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The Case for a Constitutional Right to Barrier-Free Voting for Electors with Disabilities

Les arguments en faveur d'un droit constitutionnel au vote sans obstacles pour les électeurs handicapés

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Abstract

Through a constitutional challenge at the Federal Court of Canada, formal limits on the right to vote for peoples with disabilities were abolished in 1988. Despite this expansion of formal voting rights, peoples with disabilities continue to face barriers in Canadian electoral processes with lower rates of voting and continued reports of barriers in casting a ballot. In this article, I explore voting barriers for electors with disabilities from a constitutional perspective. Instead of focusing on potential legislative and administrative responses to voting barriers, I seek to make the broader case for the constitutional right to a barrier-free voting for electors with disabilities. Specifically, I argue that the right to vote under section 3 of the *Canadian Charter of Rights and Freedoms* imposes a positive obligation on federal, provincial, and territorial governments to offer barrier-free voting options for electors with disabilities. The recognition of a section 3 right to vote without disability barriers creates a minimum constitutional threshold for any future legislative or executive action (or lack thereof) that impacts electors with disabilities. My proposed right to barrier-free voting for electors with disabilities has three components: (1) the right to a private vote, (2) the right to actively cast a vote, and (3) the right to verify a vote.

Résumé

Grâce à une contestation constitutionnelle devant la Cour fédérale du Canada, les limites formelles du droit de vote des personnes handicapées ont été abolies en 1988. Malgré cette expansion du droit de vote formel, les personnes handicapées continuent de faire face à des obstacles lorsqu'elles votent au Canada. Dans cet article, j'explore les obstacles au vote pour les électeurs handicapés d'un point de vue constitutionnel. Au lieu de me concentrer sur les réponses législatives et administratives potentielles aux obstacles au vote, je cherche à défendre le droit constitutionnel à un vote sans obstacle pour les électeurs handicapés. Plus précisément, je soutiens que le droit de vote en vertu de l'article 3 de la *Charte Canadienne des Droits et Libertés* impose aux gouvernements fédéral, provinciaux et territoriaux une obligation positive d'offrir des options de vote sans obstacle aux électeurs handicapés. La reconnaissance d'un droit de vote sans obstacles liés au handicap crée un seuil constitutionnel minimum pour toute action législative ou exécutive future ayant un impact sur les électeurs handicapés. Le droit que je propose à un vote sans obstacle pour les électeurs handicapés comporte trois éléments : (1) le droit à un vote privé, (2) le droit de voter activement et (3) le droit de vérifier un vote.

Keywords

Canadian Charter of Rights and Freedoms; Right to Vote; Section 3; Elections; Electors with Disabilities; Constitutional Law

Mots-clés

Charte canadienne des droits et libertés; droit de vote; article 3; élections; électorat handicapé; droit constitutionnel

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Introduction

Canada's path towards full enfranchisement¹ for all citizens has not been linear. Between confederation in 1867 to the patriation of Canada's Constitution in 1982, the right to vote was expanded in a piecemeal and patchwork approach. In this period, women,² First Nations, Inuit, and Métis Peoples,³ and citizens of Chinese and Japanese origins all gained the right to vote.⁴ Following patriation and the adoption of an entrenched set of individual rights, the right to vote was constitutionalized under section 3 of the *Canadian Charter of Rights and Freedoms* (*Charter*).⁵ Subsequently, disenfranchised groups, such as judges⁶ and incarcerated citizens,⁷ successfully achieved the right to vote through constitutional litigation.

¹ In this context I use the term enfranchisement to refer to individuals gaining the right to vote. However, I note that in Canada the term enfranchisement has a unique added meaning to refer to a specific Canadian government policy, whereby Indigenous men (and women after 1918) were offered full citizenship (with voting privileges) only if they surrendered their legal identity as an Indigenous person. The enfranchisement provisions of the *Indian Act* were not removed and reversed until 1985. See Chief Electoral Officer of Canada, "A History of the Vote in Canada", 3rd ed, (2021) online: *Elections Canada*

<www.elections.ca/res/his/WEB_EC%2091135%20History%20of%20the%20Vote_Third%20edition_EN.pdf> [perma.cc/4DYY-NZXJ] at 66 [Chief Electoral Officer Report]; *An Act to amend the Indian Act*, SC 1985, c 31.

² Ian Greene, *The Charter of Rights and Freedoms: 30+ Years of Decisions that Shape Canadian Life*, (Toronto: James Lorimer & Company Ltd., 2014) at 175; *An Act to Confer Electoral Franchise upon Women*, SC 1918, c 20.

³ *An Act respecting the Franchise of Electors at Elections of Members of the House of Commons*, SC 1934, c 51, s 4. See also Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada 1900-1950*, (Toronto: University of Toronto Press, 1999) at 27; Greene, *supra* note 2 at 175.

⁴ *Provincial Elections Act*, RSBC 1897, c 67, s 8; *Cunningham v Homma*, [1903] 9 AC 151; Greene, *supra* note 2 at 175.

⁵ *Canadian Charter of Rights and Freedoms*, s 3, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982 (UK)*, c 11 [*Charter of Rights and Freedoms*].

⁶ *Muldoon v Canada*, [1988] 3 FC 628, 21 FTR 154 [*Muldoon*].

⁷ *Sauvé v Canada (Attorney General)*, [1993] 2 SCR 438, 64 OAC 124 [*Sauvé I*]; *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68 [*Sauvé II*].

One of the most recent groups to gain the right to vote are peoples with disabilities.⁸ In 1988, the Canadian Disability Rights Council successfully challenged section 14(4)(f) of the *Canada Elections Act*. This provision disenfranchised citizens who because of a mental disease had their liberty of movement restrained or were deprived of the management of their property.⁹ In *Canadian Disability Rights Council*, Justice Reed of the Federal Court of Canada held that the provision infringed section 3 and was not reasonably justified under section 1 because it arbitrarily “assume[s] that psychiatric patients are necessarily incapable of voting.”¹⁰ As a remedy, the Federal Court struck the provision and all future federal, provincial, and territorial elections proceeded without any formal restriction voting by peoples with disabilities.

Despite this expansion of voting rights to peoples with disabilities, they continue to face barriers in Canadian electoral processes. Although it is difficult to determine the total number of citizens with disabilities who experience accessibility barriers when voting, there is empirical and qualitative evidence demonstrating the wide scope of the issue. Empirically, Elections Canada has found that electors with disabilities are less likely to report having voted compared to voters without disabilities.¹¹ Further, in recent federal and provincial elections, voters with visual impairments and those who use wheelchairs have reported experiences where voting aids designed to meet their needs were non-existent or non-functioning.¹² Even when voting aids

⁸ In this article, I use the person-first terminology “person with a disability” interchangeably with the term “disabled.” However, I acknowledge and respect each individual person’s autonomy in choosing to refer to themselves and their relationship with disability.

⁹ *Canadian Disability Rights Council v Canada*, [1988] 3 FC 622, 38 CRR 53 at 624 [*Canadian Disability Rights Council*].

¹⁰ *Ibid* at 625.

¹¹ Canada, Elections Canada, *National Electors Study on the 43rd Canadian Federal General Election: Report on Voter Experience Final Report*, (June 2020), online: <www.elections.ca/res/rec/eval/pes2019/nes/nesve/nesve2020_e.pdf> [perma.cc/W5M5-LZMX].

¹² Michelle McQuigge, “Some voters report issues with accessible voting machines in Ontario”, *CBC News Toronto* (6 June 2018), online: <www.cbc.ca/news/canada/toronto/some-voters-report-issues-with-accessible-voting-machines-in-ontario-1.4694706> [perma.cc/43JT-DWM4]. See also Tyler Bloomfield, “How accessible is voting for people with disabilities?”, *CBC News* (15 September 2021), online: <www.cbc.ca/news/politics/ask-accessible-voting-election-disabilities-1.6175148> [perma.cc/AP5N-GUZP].

were available, some voters raised concerns that these aids are often premised on expectations that electors with disabilities forego the ability to vote in private or independently verify their vote. For example, electors with visual impairments have reported that they are expected to rely on election officer staff or related third parties to cast a ballot on their behalf that they are unable to independently verify.¹³

In this article, I explore voting barriers for electors with disabilities from a constitutional perspective. Instead of focusing on potential legislative and administrative responses to voting barriers, I seek to make the broader case for the constitutional right to a barrier-free voting for electors with disabilities. Specifically, I build on existing literature and jurisprudence to argue that the right to vote under section 3 of the *Charter* imposes a positive obligation on federal, provincial, and territorial governments to offer barrier-free voting options for electors with disabilities. The recognition of a section 3 right to vote without disability barriers creates a minimum constitutional threshold for any future legislative or executive action (or lack thereof) that impacts electors with disabilities.

The structure of this article is four-fold. First, I review the state of disability-related voting accessibility in Canada. Second, I present the literature and jurisprudence on the right to vote under section 3. Third, applying established *Charter* interpretation methods, I argue that section 3 encompasses a right to barrier-free voting for electors with disabilities that has three components: (1) the right to a private vote, (2) the right to actively cast a vote, and (3) the right to verify a vote.

¹³ Maan Alhmidi, “Blind lawyer says lack of accessible, private voting options is a violation of the Charter”, *The Globe and Mail* (13 September 2021) online: <www.theglobeandmail.com/politics/article-blind-lawyer-says-lack-of-accessible-private-voting-options-is-a/> [perma.cc/3UL7-9L32].

The State of Voting Accessibility in Canada

Approximately 22% of the Canadian population (~6.2 million people) report living with a disability.¹⁴ Drawing on the expansive approach to disability in the *Convention on the Rights of Persons with Disabilities*, the *Accessible Canada Act* defines disability as “impairment, including a physical, mental, intellectual, cognitive, learning, communication or sensory impairment — or a functional limitation — whether permanent, temporary or episodic in nature, or evident or not, that, in interaction with a barrier, hinders a person’s full and equal participation in society.”¹⁵

Disability is inextricably linked to accommodations. Although a central tenant of disability right is to design spaces and services from a universal design¹⁶ perspective that does not require adaptation for individualized disability needs, both international and domestic Canadian law recognize the duty to accommodate peoples with disabilities.¹⁷ The Supreme Court of Canada (SCC) has recognized that without accommodations, the acceptance of peoples with disabilities in society is conditional on their “emulation of able-bodied norms”¹⁸ where they are forced “to sink or swim within the mainstream environment.”¹⁹ In the electoral context, accommodations for peoples with disabilities could include polling locations with ramp and elevator access, adapted ballots or voting technology, and the ability to vote by mail through special ballots or by phone for individuals unable to travel to polling locations.

¹⁴ Canada, Statistics Canada, *A demographic, employment and income profile of Canadians with disabilities aged 15 years and over, 2017*, by Stuart Morris et al., (28 November 2018), online: <www150.statcan.gc.ca/n1/pub/89-654-x/89-654-x2018002-eng.htm> [perma.cc/QYC7-DX6L] at 6 [Statistics Canada Disability Report].

¹⁵ *Accessible Canada Act*, SC 2019, c 10, s 2; *Convention on the Rights of Persons Living with Disabilities*, 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008, ratified by Canada 11 March 2010 with effect April 12 2019) [CRPD].

¹⁶ CRPD, *supra* note 15, art 2; Deborah Stienstra, *About Canada: Disability Rights* (Winnipeg: Fernwood Publishing, 2012) at 79–84; North Carolina State University Centre for Universal Design, “The Principles of Universal Design” (1997), online: <<https://design.ncsu.edu/wp-content/uploads/2022/11/principles-of-universal-design.pdf>> [perma.cc/V3EV-8S4D].

¹⁷ *Accessible Canada Act*, *supra* note 15, s 121.1; CRPD, *supra* note 15, art 2.

¹⁸ *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, 151 DLR (4th) 577 at para 56 [Eldridge].

¹⁹ *Eaton v Brant County Board of Education*, [1997] 1 SCR 241, 142 DLR (4th) 385 at para 67.

The SCC has also recognized that peoples with disabilities are a group “suffering [...] political [...] disadvantage in our society.”²⁰ Since the striking down of formal voting exclusions in *Canadian Disability Rights Council*, disability rights advocates have achieved several legislative reforms to reduce voting barriers for electors with disabilities.

Federally, in 1992, Parliament enacted a series of legislative reforms to increase electoral accessibility.²¹ Among the many reforms, the 1992 legislation permitted polling stations at institutions for seniors and peoples with disabilities, required level access at all polling places, introduced transfer certificates to allow peoples with disabilities to vote at a different polling places that better met their accessibility needs, required the availability of specialized voting templates, and allowed election workers to assist electors with disabilities by marking their ballot. In 2014, following a Canadian Human Rights Tribunal finding that Elections Canada failed to provide barrier-free access to a voter with a disability, Elections Canada launched an Advisory Group for Disability Issues that exists to this day.²²

In 2018, further accessibility-related electoral reforms were enacted, through the *Elections Modernization Act*. This act expanded accommodation requirements beyond persons with physical impairments to all persons with disabilities and mandated the Chief Electoral Officer to develop, obtain or adapt voting technology for peoples with disabilities.²³ Any election-related information²⁴ communicated to electors must be accessible. Polling stations must

²⁰ *Eldridge*, *supra* note 18 at para 54 quoting *R v Turpin*, [1989] 1 SCR 1296, 34 OAC 115 at 1333.

²¹ *An Act to Amend Certain Acts with Respect to Persons with Disabilities*, RSC 1992, c A-1. See also Chief Electoral Officer of Canada, *supra* note 1 at 139.

²² *Hughes v Elections Canada*, 2010 CHRT 4; Chief Electoral Officer Report, *supra* note 1 at 140; Elections Canada, “Advisory Group for Disability Issues” (31 October 2023), online: www.elections.ca/content.aspx?section=abo&dir=adv/agdi&document=index&lang=e [perma.cc/PJ5A-BCUJ].

²³ *Elections Modernization Act*, SC 2018, c 31.

²⁴ Election-related information is defined under s 18(2) of the *Elections Modernization Act*. It includes: information on (1) how to become a candidate; (2) how an elector may have their name added to a list of electors and may have corrections made to information respecting add an elector to a list, (3) how an elector may vote, (4) identification requirements of electors, and (5) accommodation measures for electors with disabilities. See *Ibid*, ss 18(2), 18(2.1).

be accessible to electors with disabilities and can only be exempted from this requirement with special permission from the Chief Electoral Officer.²⁵ Finally, the *Elections Modernization Act* also makes amendments aimed at increasing accessibility for electoral candidates with disabilities.²⁶ For example, the act alters the campaign expense rules to permit disability-related expenses to be filed as personal expenses and permits additional campaign spending for accessibility expenses. These changes to the campaign spending rules remove barriers for disabled candidates who may have additional disability-related expenses that (without these provisions) would require political parties to spend less on other aspects of the political campaign.

Most recently, in 2023, Elections Canada released its first-ever Accessibility Plan. In this plan, Elections Canada committed to removing barriers that inhibit the “full and equal participation of people with disabilities in all aspects of the electoral process” by 2040.²⁷

Beyond federal election requirements, every province and territory has enacted special legislative provisions aimed at ensuring accessibility for voters with disabilities.²⁸ These provincial and territorial legislative measures are primarily aimed at requiring physically accessible polling locations and alternative voting processes for electors with disabilities.

²⁵ *Ibid*, ss 121(1), 121(2).

²⁶ *Ibid*, ss 243, 244(1), 245(3.1) 248.

²⁷ Canada, Elections Canada, *Elections Canada’s Accessibility Plan* (Ottawa, 2023), online: <www.elections.ca/abo/a11y/a11pln/a11y_plan_e.pdf> [perma.cc/4QSN-BHVG] [Elections Canada’s Accessibility Plan].

²⁸ *Election Act*, RSBC 1996, c 106, ss 81, 109, 109.01, 110; *Election Act*, RSA 2000, c E-1, ss 96(1.1), 116(1)–116(4), 118(1)–118(7); *Election Act*, SS 1996, E-6.01, ss 77(4), 89.1(1)–89.1(3); *The Elections Act*, CCSM 2006, c E30, 64(5.1), 103(3), 119(1), 121(1), 125(6), 137(1.1), 151(1); *Election Act*, RSO 1990, c E.6, ss 55–55.1; *Election Act*, CQLR 1989, c E-3.3, ss 132, 180, 300, 303, 348; *Elections Act*, RSNB 1973, c E-3, ss 5.1(1), 87.53(1)–87.53(9), 87.54(1); *Elections Act*, SNS 2011, c 5, ss 21(4), 27(1), 92(2)–92(3), 110, 115(1), 132, 356(12), 357(1); *Election Act*, RSPEI 1988, c E-1.1, s 67(1); *Elections Act*, SNL 1992, c E-3.1, s 81; *Elections Act*, RSY 2022, c 63, ss 166, 240.01, 254; *Elections and Plebiscites Act*, SNWT 2006, c 15, ss 106(2), 117(4), 138(1)–138(2), 189(1); *Nunavut Elections Act*, CSNu 2002, c N-60, ss 50(3), 115.

Despite these legislative measures, voters with disabilities continue to report electoral accessibility challenges.²⁹ In a survey of eligible voters who did not vote in the 2021 federal election, 11% reported that they did not vote for reasons of “illness or disability.”³⁰ Further, Elections Canada through consultations with voters with disabilities identified continued challenges with inaccessible voting technology and databases, physically inaccessible polling locations, and barriers in the voting process itself.³¹

Instead of focusing on other statutory reforms and executive actions to address these continued accessibility barriers, I examine whether there is a constitutional dimension to this issue. Specifically, I focus on whether section 3 encompasses a right to barrier-free voting for electors with disabilities. In the following section I provide an overview of the section 3 jurisprudence to set the stage for my argument that the right’s scope should be expanded.

The Right to Vote Under Section 3 of the *Charter*

Section 3 of the *Charter* guarantees 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.”³² This right falls within the *Charter*’s heading of “democratic rights.” This heading also includes the section 4 limit on Parliament and provincial legislatures from (barring exceptional circumstances) sitting for more than five years without holding a general election and the section 5 requirement that these bodies hold a sitting at least once every twelve months.³³ Section 3 is expressly limited to Canadian citizens and applies to federal,

²⁹ McQuigge, *supra* note 12; Bloomfield, *supra* note 12.

³⁰ Canada, Statistics Canada, Reasons for not voting in the federal election, September 20, 2021 (Ottawa: 16 February 2022), online: <www150.statcan.gc.ca/n1/daily-quotidien/220216/dq220216d-eng.htm> [perma.cc/4C7V-798E] at 6.

³¹ Elections Canada’s Accessibility Plan, *supra* note 27 at 7–8.

³² *Charter of Rights and Freedoms*, *supra* note 5, s 3.

³³ *Ibid*, ss 3, 4(1), 4(2), 5.

provincial, and territorial elections.³⁴ The SCC has determined that section 3 does not extend to voting in other contexts, such as municipalities, school boards, and referendums.³⁵

While section 3 is a constitutive part of what is commonly referred to as the “law of democracy”,³⁶ it is not its sole component. The term the law of democracy generally refers to court jurisprudence on democratic rights, election law, and electoral processes.³⁷ It comprises not only cases on section 3 of the *Charter*, but also fundamental freedoms under sections 2(b) (expression) and 2(d) (association) and equality rights under section 15.³⁸

If each case is examined individually, the SCC’s approach to the law of democracy may appear siloed without clear coherence. However, Yasmin Dawood theorizes that the SCC has adopted a multi-faceted approach to the law of democracy, whereby it encompasses a “bundle of rights.” This approach conceptualizes the right to vote as a plural right that acts as an “umbrella concept [consisting] of several democratic rights.”³⁹ Dawood identifies four democratic rights within this umbrella: (1) the right to effective representation, (2) the right to meaningful participation, (3) the right to equal participation, (4) and the right to a free and informed vote.⁴⁰ She posits that the first two sets of rights have been recognized by the SCC as forming the

³⁴ *Ibid*, ss 3, 30.

³⁵ *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 at para 82 [*Toronto (City) SCC*]; *Haig v Canada (Chief Electoral Officer)*, [1993] 2 SCR 995, 105 DLR (4th) 577 [*Haig*].

³⁶ Yasmin Dawood, “Democracy and the Right to Vote: Re-thinking Democratic Rights under the Charter” (2013) 51:1 Osgoode Hall LJ 251 at 253 [Dawood, “Democracy and the Right to Vote”] citing Samuel Issacharoff, Pamela Karlan & Richard Pildes, *The Law of Democracy: Legal Structure of the Political Process*, 3d ed (Westbury, NY: Foundation Press, 2007) at 1–3. See also Yasmin Dawood, “Democratic Rights” in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) 718 at 719 [Dawood, “Democratic Rights”]. See also the writing of Colin Feasby who theorizes that an egalitarian approach underscores most of the SCC’s jurisprudence on the right to vote under section 3: Colin Feasby, “Libman v. Quebec (A.G.) and the Administration of the Process of Democracy under the Charter: The Emerging Egalitarian Model” (1999) 44 McGill LJ 5; Colin Feasby, “Constitutional Questions about Canada’s New Political Finance Regime” (2007) 45 Osgoode Hall LJ 514, 540 [Feasby Constitutional Questions].

³⁷ Dawood, “Democracy and the Right to Vote”, *supra* note 36 at 253–254.

³⁸ *Ibid* at 254, 259; Dawood, “Democratic Rights”, *supra* note 36 at 719. See also Feasby Constitutional Questions, *supra* note 35 at 539.

³⁹ Dawood, “Democracy and the Right to Vote”, *supra* note 36 at 254–255.

⁴⁰ *Ibid* at 261; Dawood, “Democratic Rights”, *supra* note 36 at 724.

purposes of the right to vote under section 3. The latter two sets of rights are described as deriving from the right to meaningful participation and an “overarching constitutional commitment to the principle of democracy.”⁴¹

Dawood presents a persuasive account of the SCC’s jurisprudence on the law of democracy. Her bundle of rights theory adds coherence to the jurisprudence, which at times is complex and encompasses a wide-range of electoral and electoral-adjacent issues. Her theory on the law of democracy also informs my approach to the right to vote, whereby I argue that the right to a barrier-free vote under section 3 falls within this democratic rights umbrella as one of the strands that make up the bundle of rights.

Turning to a more detailed analysis of section 3, the SCC has expanded and clarified the contours of its scope. For the purposes of this article, I will focus on three areas of the court’s interpretation of this right: (1) express denials of the right to vote, (2) the right to effective representation, and (3) the right to meaningful participation.

To begin, Canadian courts have consistently struck express legislative denials of the right to vote as section 3 infringements. Since the passing of the *Charter*, either the SCC or lower courts have held that section 3 is infringed by voting restrictions on judges, peoples with mental disabilities, provincial and federally incarcerated peoples, citizens who reside outside of Canada for more than five years, and youth under the age of eighteen years old.⁴² In some of these cases, the government conceded that the right to section 3 was infringed⁴³ and in all of the categories but the last one (age limitations), the courts found that the restrictions on the right to vote could not be justified under section 1.

⁴¹ *Ibid.* See also Dawood, “Democracy and the Right to Vote”, *supra* note 30 at 261.

⁴² *Muldoon*, *supra* note 6; *Sauvé I*, *supra* note 7; *Sauvé II*, *supra* note 7; *Canadian Disability Rights Council*, *supra* note 9; *Frank v Canada (Attorney General)*, 2019 SCC 1; *Fitzgerald v Alberta*, 2004 ABCA 184; *Fitzgerald v Alberta*, 2002 ABQB 1086.

⁴³ *Sauvé I*, *supra* note 7; *Sauvé II*, *supra* note 7 at para 6.

However, the right to vote has also been interpreted as extending beyond the ability to cast a ballot. In one of her final and often quoted decisions as Chief Justice of the British Columbia Supreme Court, future Chief Justice of the SCC McLachlin rejected a narrow technical view of section 3 and held that “[m]ore is intended [in the right to vote] than the bare right to place a ballot in a box.”⁴⁴ Since then, the SCC has gone on to recognize that the purposes of section 3 also include the right to effective representation and meaningful participation.

In *Reference Re Prov. Electoral Boundaries (Sask.)*, the SCC recognized that section 3 encompasses the right to effective representation. In this decision, the SCC held that electoral boundaries that reflect relative voter parity as opposed to absolute voter parity do not infringe section 3 of the *Charter*.⁴⁵ To arrive at this interpretation, Justice McLachlin (as she was then) on behalf of the SCC majority determined that section 3 safeguards the right to effective representation. A citizen’s right to “be represented in government” was interpreted to consist of “the idea of having a voice in the deliberations of government as well as the idea of the right to bring one’s grievances and concerns to the attention of one’s government representative.”⁴⁶

Less than two years later in 1993, the SCC also recognized that section 3 encompasses a right to meaningful participation. In *Haig v Canada*, the SCC considered a challenge to Quebec’s residency requirements for a provincially run referendum on the proposed Charlottetown Accord constitutional amendments.⁴⁷ In addition to ruling that section 3 does not apply to referenda, Justice l’Heureux-Dubé for the majority also expanded the scope of section 3 by finding that one

⁴⁴ *Dixon v British Columbia (Attorney General)*, [1989] 4 WWR 393, 59 DLR (4th) 247 at 403 quoted in *Figuroa v Canada (Attorney General)*, 2003 SCC 37 at para 106 [*Figuroa*].

⁴⁵ *Reference re Prov. Electoral Boundaries (Sask.)*, [1991] 2 SCR 158, 81 DLR (4th) 16.

⁴⁶ *Ibid* at 183.

⁴⁷ *Haig*, *supra* note 35.

of its purposes is “to grant every citizen of this country the right to play a meaningful role in the selection of elected representatives.”⁴⁸

The SCC elaborated on the content of this “right to meaningful participation” ten years later in *Figueroa v Canada*.⁴⁹ In *Figueroa*, the SCC ruled that *Canada Elections Act* provisions requiring political parties to nominate candidates in at least fifty electoral districts to gain access to benefits accorded to registered political parties was an unjustified infringement of section 3. Building on *Haig*, the SCC found that this restriction was “inconsistent with the right of each citizen to play a meaningful role in the electoral process.”⁵⁰ Justice Iacobucci for the majority found that the “rights of s. 3 are participatory in nature” and they guarantee a “certain level of participation in the electoral process.”⁵¹ He noted that participation in electoral processes has “intrinsic value” in itself and that citizens must have “a genuine opportunity to take part in the [country’s] governance” through the election of representatives.⁵²

As a final point, the SCC has also determined that the government should be accorded little deference under section 1 when the right to vote is infringed. In *Sauvé v Canada (2002)*, Chief Justice McLachlin writing for the majority held that “the right to vote is fundamental to our democracy and [...] cannot be lightly set aside.”⁵³ This stringent approach to reasonable limitations is informed by section 3’s “special importance” signaled by its exclusion from the notwithstanding clause under section 33 of the *Charter*.⁵⁴ As such, the SCC held that any limits on section 3 require “careful examination.”⁵⁵

⁴⁸ *Ibid* at 1031.

⁴⁹ *Figueroa*, *supra* note 44.

⁵⁰ *Ibid* at para 90.

⁵¹ *Ibid* at para 26.

⁵² *Ibid* at paras 26, 30.

⁵³ *Sauvé II*, *supra* note 7 at para 9.

⁵⁴ *Ibid* at paras 11, 14, 44.

⁵⁵ *Ibid* at para 9.

Thus, section 3 of the *Charter* encompasses, using Dawood’s terminology, a “bundle of rights” that non-exhaustively includes the right to not be expressly denied the vote, the right to effective representation, and the right to play a meaningful role in electoral processes. Any infringement of section 3 will undergo careful scrutiny at the section 1 stage.

The Case for a Section 3 Right to a Barrier-Free Vote

In this section I present my argument that the right to a barrier-free vote for electors with disabilities falls within the ambit of section 3. In other words, and through Dawood’s lens of the right to vote as a plural right, I propose that the right to a barrier-free vote could constitute a strand within the bundle of democratic rights already recognized within the jurisprudence. I will make my argument in two-parts. First, existing literature and jurisprudence recognizes that section 3 imposes positive obligations on federal, provincial, and territorial governments. Second, section 3 encompasses a right to a barrier-free vote that comprises of three elements: (1) the right to a private vote, (2) the right to actively cast a ballot, and (3) the right to vote verification.

Positive Obligations Under Section 3

My argument begins by building on existing literature and jurisprudence asserting that section 3 imposes positive obligations on federal, provincial, and territorial governments. I draw on this literature and jurisprudence to argue that the right to a barrier-free vote constitutes one of the positive obligations embedded within the right to vote.

In Canada, the interpretation of *Charter* rights has been influenced by perceived dichotomies between positive and negative rights. Positive rights “impose positive obligations on

governments to act.”⁵⁶ For example, the SCC has recognized that minority language rights under section 23 have some positive obligations requiring government funding for their realization.⁵⁷ In contrast, negative rights “requir[e] [the state] to refrain from interfering with individuals’ exercise of [their] rights.”⁵⁸ Often negative rights are realized by a government doing nothing, such as section 12 of the *Charter* that protects the right to “not be subjected to any cruel and unusual treatment or punishment.”⁵⁹

Thus far, *Charter* jurisprudence has overwhelmingly recognized and accorded constitutional protections for negative elements of *Charter* rights while being more averse to positive ones. A central concern throughout the Canadian jurisprudence has been a worry that imposing positive obligations on governments could undermine the separation of powers. More specifically, there is a concern that positive rights recognition could result in courts making findings that require government spending, which some argue delves into the policy-making domain that is best left to the legislative branch.⁶⁰

In contrast to the move away from dichotomous positive and negative rights approaches that has occurred in other constitutional courts globally and international treaty bodies, Canada has largely maintained a distinction between these categories of rights.⁶¹ Through this

⁵⁶ Martha Jackman, “Charter Remedies for Socio-economic Rights Violations: Sleeping Under a Box?” (Paper delivered at CIAJ 2009 Annual Conference: Taking Rights Seriously, 2009) at 284. See also Michael Da Silva, “Positive Charter Rights: When Can We Open the ‘Door?’” (2021) 58:3 *Osgoode Hall LJ* 669.

⁵⁷ See e.g. *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 [*Doucet-Boudreau*]; *Mahe v Alberta*, [1990] 1 SCR 342, 68 DLR (4th) 69 [*Mahe*]; *Conseil scolaire francophone de la Colombie-Britannique v British Columbia*, 2020 SCC 13 [CSF]; *Commission scolaire francophone des Territoires du Nord-Ouest v Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31.

⁵⁸ Jackman, *supra* note 56 at 284. See also “Positive and Negative Rights” (4 July 2019), online: *Centre for Constitutional Studies* <www.constitutionalstudies.ca/2019/07/positive-and-negative-rights/> [perma.cc/W9MQ-6YHM].

⁵⁹ *Charter*, *supra* note 5, s 12.

⁶⁰ Jackman, *supra* note 56 at 284.

⁶¹ International Commission of Jurists, *Courts and the Legal Enforcement of Economic and Cultural Rights: Comparative Experiences of Justiciability* (Geneva: International Commission of Jurists, 2008) cited in Jackman, *supra* note 56 at 281–282.

dichotomous approach the SCC has recognized that many *Charter* rights have or could have both positive and negative elements, including sections 2,⁶² 3,⁶³ 7,⁶⁴ 15,⁶⁵ and 23,⁶⁶ among others.

For example, the SCC in *Gosselin v Québec* left open the possibility that “one day [the right to life, liberty, and security of the person under] s.7 may be interpreted to include positive obligations.”⁶⁷ However, three years later in *Chaoulli v Quebec* the SCC declined to take up this option left open in *Gosselin* by finding that section 7 “does not confer a freestanding constitutional right to healthcare.”⁶⁸

Alternatively, the right to equality under section 15(1) of the *Charter* has a more complicated relationship with positive obligations. Until recently, the SCC recognized narrow positive obligations under section 15(1) and left open the possibility for the right’s further expansion. In *Eldridge v Canada*⁶⁹ and *Vriend v Alberta*,⁷⁰ the SCC explicitly recognized that in certain circumstances section 15(1) encompasses some “positive action.”⁷¹ Specifically, the SCC affirmed that “this Court has repeatedly held that once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner.”⁷² In both decisions the SCC did not “decide the matter” of whether section 15(1) imposes free-standing positive obligations on the

⁶² For freedom of association under section 2(d), see e.g. *Dunmore v Ontario (Attorney General)*, 2001 SCC 94 at para 17; *Ontario (Attorney General) v Fraser*, 2011 SCC 20 at para 73. For freedom of expression under section 2(b), see *Haig v Canada (Chief Electoral Officer)*, *supra* note 35 at 1037–1041; *Baier v Alberta*, 2007 SCC 31 at para 30 [*Baier*]; *Toronto (City) v Ontario (Attorney General)*, *supra* note 35 at paras 16–21 [*Toronto (City)*].

⁶³ *Haig*, *supra* note 35 at 1032; *Figueroa*, *supra* note 44 at para 133.

⁶⁴ *Gosselin v Québec (Attorney General)*, 2002 SCC 84 at paras 81–83 [*Gosselin*].

⁶⁵ *Eldridge*, *supra* note 18 at paras 72–73; *Vriend v Alberta*, [1998] 1 SCR 493, 156 DLR (4th) 385 at paras 59–63 [*Vriend*].

⁶⁶ *Doucet-Boudreau*, *supra* note 57 at para 28; *Mahe*, *supra* note 57 at 365; *CSF*, *supra* note 57 at para 147.

⁶⁷ *Gosselin*, *supra* note 64 at para 82.

⁶⁸ *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 at para 104.

⁶⁹ In *Eldridge*, the SCC unanimously ruled that the British Columbia government’s failure to fund interpretation services for deaf patients in hospitals unjustifiably infringed section 15(1). See *Eldridge*, *supra* note 18.

⁷⁰ *Vriend*, *supra* note 65 at para 61.

⁷¹ *Eldridge*, *supra* note 18 at para 73.

⁷² *Ibid* citing *Tétreault-Gadoury v Canada (Employment and Immigration Commission)*, [1991] 2 SCR 22, 81 DLR (4th) 358; *Haig*, *supra* note 35 at 1041–1042; *Native Women’s Assn. of Canada v Canada*, [1994] 3 SCR 627, 119 DLR (4th) 224 at 655; *Miron v Trudel*, [1995] 2 SCR 418, 124 DLR (4th) 693. See also *Vriend*, *supra* note 65 at para 63.

government to “provide services to ameliorate the symptoms of systemic or general inequality.”⁷³

However, more recently, the SCC has introduced jurisprudential uncertainty on whether positive obligations fall within the scope of section 15(1) of the *Charter*. In *R v Sharma* (2022), the SCC majority in a 5:4 decision explicitly stated that “s. 15(1) does not impose a general, positive obligation on the state to remedy social inequalities or enact remedial legislation.”⁷⁴

Although the SCC cited *Eldridge*, the Court did not reconcile its finding that there are no general positive obligations under section 15(1) and its previous unanimous finding in *Eldridge* leaving the door open to that possibility.⁷⁵ Further, the SCC in *Sharma* did not clarify whether its exclusion of “general positive obligation[s]” from section 15(1) also limits the application of section 15(1) to instances where governments take some initial action – as was recognized in *Eldridge* and *Vriend*.⁷⁶ Therefore, there is now immense uncertainty on the status of positive obligations under section 15(1).

Overall, as it currently stands, the Canadian jurisprudence has recognized positive obligations under many *Charter* rights, including language rights (section 23), the right to life, liberty, and security of the person (section 7), and equality rights (section 15), among others. Despite growing critiques of categorical approaches to positive and negative rights,⁷⁷ the SCC largely continues to reinforce a dichotomous approach when evaluating *Charter* rights.

⁷³ *Eldridge*, *supra* note 18 at para 73.

⁷⁴ *R v Sharma*, 2022 SCC 39 at para 63 [*Sharma*] citing *Thibaudeau v Canada*, [1995] 2 SCR 627, 124 DLR (4th) 449 at para 37; *Eldridge*, *supra* note 18 at para 73; *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, 2004 SCC 78 at para 41; *Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 at para 42.

⁷⁵ *Eldridge*, *supra* note 18 at para 73.

⁷⁶ *Sharma*, *supra* note 74 at para 63.

⁷⁷ See e.g. Cara Wilkie & Meryl Zisman Gary, “Positive and Negative Rights under the Charter: Closing the Divide to Advance Equality” (2011) 30 Windsor Rev Legal & Soc Issues 37 at 38–40; Margot Young, “Social Justice and the Charter: Comparison and Choice” (2012) 50 Osgoode Hall LJ 669 at 695; Bruce Porter & Martha Jackman,

As it relates to the right to vote under section 3, I draw on existing literature and jurisprudence asserting that section 3 has positive obligations. I build on this recognition that section 3 has positive obligations to argue that one of the right's positive obligations is a right to a barrier-free vote for disabled electors.

The recognition that the right to vote has a positive dimension has been asserted by democratic rights scholars. For example, Michael Pal notes that although the classical model of political rights conceptualizes the right to vote as a purely negative right, his identified emerging model of constitutional design of political rights is moving away from this narrow approach.⁷⁸ Referring to other proponents of recognizing positive elements within the right to vote,⁷⁹ Pal argues that this emerging political rights trend implicitly endorses an interpretation of the right to vote as having positive aspects. To him, this positive content of the right to vote includes procedures that support electoral machinery because “when an individual places a paper in a ballot box, its political meaning and effectiveness depends on an apparatus that is organized, funded, and overseen by the state.”⁸⁰

Dawood's theory of democratic rights as “structural rights” is also particularly helpful to this analysis. Dawood argues that democratic rights concerned with voting and participation are structural rights in the sense that they are “individual rights that take into account the broader institutional framework within which these rights are defined, held, and exercised.”⁸¹ She argues that the right to vote “presupposes the existence of a broader institutional framework”, which

“Introduction: Advancing Social Rights in Canada” in Martha Jackman & Bruce Porter, eds, *Advancing Social Rights in Canada* (Toronto: Irwin Law, 2014) at 13.

⁷⁸ Michael Pal, “Constitutional Design of Political Rights: The Emerging Model” in James A Gardner, ed, *Comparative Election Law* (Northampton, Massachusetts: Edward Elgar Publishing, 2022) at 161, 165.

⁷⁹ Cécile Fabré, *Social Rights Under the Constitution: Government and the Decent Life* (Oxford: Oxford University Press, 2000); Joseph Fishkin, “Voting as a Positive Right—A Reply to Flanders” (2011) 28 *Alaska L Rev* 29 (2011) cited in Pal, *supra* note 78 at 161.

⁸⁰ *Ibid* at 166.

⁸¹ Dawood, “Democracy and the Right to Vote”, *supra* note 36 at 255. See also Yasmin Dawood, “Electoral fairness and the law of democracy: A structural rights approach to judicial review”, (2012) 62:4 *UTLJ* 499 at 507.

includes governmental and societal institutions, as well as vote counting mechanisms, district drawing processes, and other forms of political actor regulation.⁸²

In other writing, Dawood has argued that constitutionalism⁸³ should be re-oriented to encompass a commitment to effective government. In a co-authored chapter, Dawood and Vicki Jackson “situate the issue of effective government squarely within a positive conception of constitutionalism.”⁸⁴ They argue in favour of a positive conception of constitutionalism that recognizes the importance of a “multi-layered” conception of effective government that “assumes a commitment to democratic self-governance [...] and human rights.”⁸⁵ In another chapter on her own, Dawood links theories on effective government to her theory of structural democratic rights by arguing that “some level of governmental effectiveness is required not only for the enforcement of rights but also for the very existence of those rights, such as the right to vote, that are structural in nature.”⁸⁶ In other words, she argues that a basic requirement within a commitment to effective government is the protection of the right to vote and its associated processes to make its uptake meaningful.

Taken together, democracy law scholars argue that the right to vote has both positive and negative dimensions. Within a democratic system, the right to vote can only be meaningful when there are positive obligations on the government to protect and promote the right to vote.

⁸² Dawood, “Democracy and the Right to Vote”, *supra* note 36 at 263.

⁸³ She defines constitutionalism as a “determination to bring . . . government under control and to place limits on the exercise of its power.” See Yasmin Dawood, “Effective Government and the Two Faces of Constitutionalism” in Vicki C. Jackson & Yasmin Dawood, eds, *Constitutionalism and a Right to Effective Government?* (Cambridge: Cambridge University Press, 2022) 47 [Dawood, “Effective Government”] quoting Katharina Pistor, “The Right to Effective Self-Government” in Vicki C. Jackson & Yasmin Dawood, eds, *Constitutionalism and a Right to Effective Government?* (Cambridge: Cambridge University Press, 2022) 60.

⁸⁴ Vicki C. Jackson & Yasmin Dawood, “Constitutionalism and Effective Government: Rights, Institutions, and Values” in Vicki C. Jackson & Yasmin Dawood, eds, *Constitutionalism and a Right to Effective Government?* (Cambridge: Cambridge University Press, 2022) 3 at 4.

⁸⁵ *Ibid* at 7 citing Pistor, *supra* note 83.

⁸⁶ Dawood, “Effective Government”, *supra* note 83 at 54.

This recognition of positive aspects of the right to vote in the literature, is also reflected in Canadian jurisprudence. In 1993, Justice L’Heureux Dubé on behalf of the SCC majority in *Haig* recognized that “the democratic rights guaranteed in the *Charter* are also positive ones.”⁸⁷ She noted that positive obligations under these rights, include the requirement that governments hold regular elections and “to act upon” their results.⁸⁸ This finding was reaffirmed in *Figueroa*, where Justice Iacobucci found that the right to vote does not fit within a classic model of negative rights. Instead, he recognized that section 3 “imposes a positive obligation on the government to set up an electoral system which, in turn, provides for democratic government in accordance with the choices of Canadian voters.”⁸⁹ More recently in *Frank v Canada*, Justices Côté and Brown in dissent emphasized that section 3 “is a positive right”.⁹⁰ In their analysis, they recognized that unlike many other “negative” *Charter* rights, section 3 includes positive entitlements that require filling in through legislative enactments (and arguably through judicial interpretation but the dissenting justices do not make this claim).⁹¹

Overall, both democracy law literature and the SCC’s own jurisprudence supports a non-categorical approach to section 3 that recognizes its positive content. In this article, I build on this recognition that section 3 has positive elements to argue that one of the positive obligations under section 3 relates to electoral access for peoples with disabilities. In the following section, I introduce my proposal that one of the positive obligations under section 3 of the *Charter* is the right to a barrier-free vote for electors with disabilities.

⁸⁷ *Haig*, *supra* note 35 at 1032.

⁸⁸ *Ibid.*

⁸⁹ *Figueroa*, *supra* note 44 at para 133.

⁹⁰ *Frank*, *supra* note 43 at para 113.

⁹¹ *Ibid* at paras 113, 124.

The Elements of a Barrier-Free Vote

I propose that section 3 encompasses a right to a barrier-free vote for electors with disabilities that has three components: (1) the right to a private vote, (2) the right to actively cast a vote, and (3) the right to verify a vote. While I recognize that the term “barriers” can engage a wide range of economic and social voting impediments,⁹² my proposed right to a barrier-free vote is focused on barriers experienced by electors with disabilities when they seek to cast a ballot in a federal, provincial, or territorial election.

The proposed right to a barrier-free vote was identified in reference to and in conformance with established principles of *Charter* interpretation,⁹³ including the purposive, generous, and progressive interpretation methods. First, a purposive interpretation requires that *Charter* rights are interpreted in a broad and purposive manner with regard to the historical and social context.⁹⁴ Second, generous interpretation requires that *Charter* rights are given a “generous rather than legalistic [interpretation] aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter's* protection.”⁹⁵ This large and liberal interpretive approach must ensure “not to overshoot the actual purpose of the right or freedom in question” but place it “in its proper linguistic, philosophic and historical contexts.”⁹⁶ Finally, progressive interpretation, developed from Lord Sankey’s living tree doctrine in *Edwards*, rejects

⁹² See e.g. Ilona Dougherty and Adrienne Smith, “Implementation of the Identification Requirements in the Canadian North Final Report” (7 October 2008), online: *Apathy is Boring* <www.elections.ca/res/rec/fra/id/IIRCNE_e.pdf> [perma.cc/HM8J-4BKM].

⁹³ Peter Hogg, “Canada: From Privy Council to Supreme Court” in Jeffrey Goldsworthy, ed, *Interpreting Constitutions: A Comparative Study* (Oxford: Oxford University Press, 2007) 55. See also *Hunter et al. v Southam Inc.*, [1984] 2 SCR 145, 11 DLR (4th) 641 at 155; *Law Society of Upper Canada v Skapinker*, [1984] 1 SCR 357, 9 DLR (4th) 161 at 365; *Re BC Motor Vehicle Act*, [1985] 2 SCR 486, 24 DLR (4th) 536 at para 153.

⁹⁴ *R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295, 18 DLR (4th) 321 [*Big M*] cited in *Reference re Prov. Electoral Boundaries (Sask.)*, *supra* note 45 at 179–180; *Figueroa*, *supra* note 44 at para 20.

⁹⁵ *Big M*, *supra* note 99 at para 117 cited in *Reference re Prov. Electoral Boundaries (Sask.)*, *supra* note 45 at 180; *Figueroa*, *supra* note 44 at para 20.

⁹⁶ *Big M*, *supra* note 99 at para 117.

narrow or technical approaches to *Charter* interpretation. Instead, *Charter* rights must be viewed as part of a “living tree capable of growth and expansion within its natural limits.”⁹⁷

I will now turn to the three components of my proposed section 3 right to a barrier-free vote for electors with disabilities. I argue that the right to a barrier-free vote for electors with disabilities constitutes three-parts: (1) right to a private vote, (2) the right to actively cast a vote, and (3) the right to verify one’s vote. I will examine each in turn.

Right to a Private Vote

The right to a barrier-free vote encompasses the right to a private vote. The ability to cast a vote in secret is often regarded as “so sacrosanct that few question [it].”⁹⁸ However, the act of casting a ballot has not always been done in private. In the Australia, Canada, France, the United Kingdom, and the United States, voting was considered a public affair until the late nineteenth century.⁹⁹ During this period, voting often occurred in public squares with food, drinks, and music available.¹⁰⁰ The public approach to voting was justified on the basis that democracy required honesty and transparency.¹⁰¹ Further, public voting was regarded as a method of countering voter fraud.

However, several challenges emerged with public voting. First, public votes often led to violent riots. For example, in an 1820 public vote in Montreal it has been reported that “passions

⁹⁷ *Edwards v Canada (Attorney General)*, [1930] AC 124, [1930] 1 DLR 98 at 136.

⁹⁸ Daniel Sturgis, “Is voting a private matter?” (2005) 36:1 J Soc Phil 18 at 18. Although Sturgis does in fact argue that voting in democratic systems should be a public process.

⁹⁹ Malcolm Crook and Tom Crook. “Reforming Voting Practices in a Global Age: The Making and Remaking of the Modern Secret Ballot in Britain, France and the United States” (2011) 212 Past & Present 199; Chief Electoral Officer Report, *supra* note 1 at 33.

¹⁰⁰ Crook and Crook, *supra* note 104 at 204.

¹⁰¹ *Ibid* at 215–216.

ran so high that a terrible fight broke out.”¹⁰² Second, public voters were particularly vulnerable to corruption/bribery and/or intimidation. Within Canada and abroad, there were several documented instances of voting bribery. In Canada, voter bribery often occurred by way of financial compensation or “treating” whereby votes were influenced by purchasing food or drink.¹⁰³ Public voters also experienced significant intimidation from employers and the clergy – pressuring them to vote for a particular candidate or party with the threat of consequences for non-compliance.¹⁰⁴

To combat the violence and corruption concerns associated with public voting, democracies began shifting towards voting by way of secret ballot. The modern practice of secret voting through private booths and uniform blank ballots was first adopted in Australia in 1856.¹⁰⁵ Around the same time Canadian provinces also adopted secret ballot procedures. Starting with New Brunswick in 1855, other provinces and the federal government shortly followed suit.¹⁰⁶ Similarly, the United Kingdom and the United States adopted secret ballot voting in 1872¹⁰⁷ and 1888 respectively.¹⁰⁸ Consequently, since the early 20th century all Canadian provinces and the federal government vote by way of secret ballot. Over the next century the process of secret voting became an entrenched democratic practice.

Following the adoption of the *Charter*, the practice of secret voting was subsequently recognized as a constituent aspect of the right to vote. Notably, the SCC in *Figueroa* recognized

¹⁰² “Voting in Early Canada” (9 May 2024), online: *The Canadian Encyclopedia* <<http://www.thecanadianencyclopedia.ca/en/article/voting-in-early-canada-feature>> [perma.cc/972K-62E4].

¹⁰³ Chief Electoral Officer Report, *supra* note 1 at 63.

¹⁰⁴ *Ibid* at 64–65.

¹⁰⁵ Crook and Crook, *supra* note 104 at 200.

¹⁰⁶ Chief Electoral Officer Report, *supra* note 1 at 33; *The Canadian Encyclopedia*, *supra* note 107.

¹⁰⁷ Crook and Crook, *supra* note 104 at 224.

¹⁰⁸ *Ibid* at 226.

that the section 3 right to meaningful participation in the electoral process “must implicitly include [...] the right to cast a vote in private.”¹⁰⁹

The right of a private vote is a longstanding concern for peoples with disabilities. Although electoral bodies in Canada have developed private voting methods for electors with disabilities, they are often not available. For example, special ballots with braille or in large print that could be used by blind or visually impaired voter to cast their vote independently have been reported to be unavailable at some early polling stations¹¹⁰ and mail voting ballots are not designed in method accessible to blind or visually impaired voters.¹¹¹ Further, even when special ballots are available, some disabled voters have reported being required to have an Elections Canada officer read and verify their voting choice.¹¹² As a result of these accessibility barriers, electors with disabilities, such as constitutional lawyer David Lepofsky, have raised concerns with the inability to cast a private vote arguing that this is an aspect of the right to vote that non-disabled voters “take [...] for granted.”¹¹³

In these instances where the accessibility tools are unavailable to permit an elector with a disability to vote privately, the *Canada Elections Act* permits elections officer staff or other third parties (such as friends or families), under solemn declaration, to fill out and/or verify the ballot of an elector with a disability.¹¹⁴ However, as emphasized by Lepofsky, among other electors

¹⁰⁹ *Figueroa*, *supra* note 44 at para 106 citing *Reference re Prov. Electoral Boundaries (Sask.)*, *supra* note 45 at 165.

¹¹⁰ “CCD Calls for Commitments to Remedy Discrimination against Blind Voters” (3 September 2021), online: *Council with Canadians with Disabilities* <www.ccdonline.ca/en/socialpolicy/elections/CCD-Calls-for-Commitments-to-Remedy-Discrimination-against-Blind-Voters3Sept2021> [perma.cc/MBM6-SAL7].

¹¹¹ Alhmidi, *supra* note 13.

¹¹² *Ibid.*

¹¹³ Bloomfield, *supra* note 12.

¹¹⁴ *Canada Elections Act*, SC 2000, c 9, ss 154, 155. See also Bloomfield, *supra* note 12; Maan Alhmidi, *supra* note 13.

with disabilities, assisted voting with a third-party still deprives them of their ability to cast their vote in private.¹¹⁵

Under my proposed approach, the right to a private vote, whose existence is already recognized in the jurisprudence, requires governments to ensure that electors with disabilities are offered alternative voting methods that preserve their right to do so in a private manner. This aspect of the right to a barrier-free vote requires governments to develop and make available voting methods and technology that guarantee the right to a private vote for electors with disabilities. Whether that is special ballots that can be independently verified by electors with disabilities, automated systems that allow electors to vote on the phone or at booths, or any other methods, the right to a private vote imposes a positive obligation on governments not only to host elections in five-year cycles but also host elections with voting methods and/or technology that safeguards the right to a private vote for all electors regardless of ability.

Under my proposed approach, any voting method that requires electors to have an Elections Canada Officer, friend, or other third-party verify the ballot of a voter with a disability infringes the right to a private vote and by extension the right to a barrier-free vote. Although this is long-established method of voting for electors with disabilities, it deprives them of the ability to vote privately – a right held by other electors without disabilities. As such, the section 3 right of an elector with a disability will be infringed if they are only offered the ability to vote by way of a third-party. The onus would then shift to the government to justify the violation of the section 3 right under section 1 of the *Charter*. To do so, the government could present evidence that either no voting technology exists, or it is unreasonable to expect them to provide voting technology that would permit an elector with disabilities to vote in private. Such an approach to section 3 safeguards the right to a private vote for all electors – regardless of ability.

¹¹⁵ Alhmidi, *supra* note 13.

Right to Actively Cast a Vote

The second component of the right to a barrier-free vote is the right of electors with disabilities to actively cast a vote themselves. The right to vote under section 3 and by extension its right to meaningful participation necessitates that each elector is able to cast a vote through their own actions. I interpret the term “cast” broadly recognizing that peoples with disabilities have varying abilities and the act of submitting a ballot may look different for some individuals. For example, a blind or visually impaired person may choose to cast a vote by indicating verbally to an automated voting machine or phone-in system. Alternatively, an individual with a disability that severely limits their mobility may choose to cast a ballot via a mail in system. This right to actively cast a vote would impose obligations on governments to develop and employ multiple methods of voting that are responsive to the diverse needs of electors with disabilities.

The right to actively cast a vote in a method that is adapted to an elector’s needs reflects the expressive content of the right to vote. Central to the section 3 right is not only the ability to have one’s vote counted but the ability for an individual to meaningfully participate in democratic processes by casting a ballot themselves. Such an approach upholds the inherent dignity of all electors as active participants in Canada’s democratic systems.

This second component is supported by purposive, generous, and progressive *Charter* interpretation methods. Meaningful participation in the electoral process is already recognized as one of the purposes of section 3. The ability to actively cast a vote for oneself in a manner that accords with one’s disability needs falls squarely within this purpose of meaningful participation. Without the ability to cast a vote, an elector with a disability cannot meaningfully participate in

the electoral process in a direct way. Instead, they will either not vote or must vote indirectly by having a third-party cast a ballot on their behalf through a method that denies them their agency.

The right to cast a ballot is also supported by a generous interpretive approach. The text of section 3 of the *Charter* does not expressly specify the method of voting. A large and liberal interpretation supports an interpretation of section 3 that permits governments to develop multiple methods of casting a ballot.

Finally, the right to cast a ballot aligns with a progressive interpretive approach, which requires that section 3 is “capable of growth to meet the future.”¹¹⁶ As more voting technology develops, the scope of the government’s obligations to support a diverse range of disability-related voting needs expands.

The right to actively cast a vote for oneself also has implications for special ballots. Instead of voting at an advanced or election day poll, special ballots allow individuals to write in the name of the candidate and vote by mail or in person at any Elections Canada office.¹¹⁷ Although electors in the United States are increasingly seeing restrictions placed on the ability to vote by mail,¹¹⁸ in Canada citizens continue to be able to vote by mail by way of special ballot.¹¹⁹

¹¹⁶ Reference re Prov. Electoral Boundaries (Sask.), *supra* note 45 at 180.

¹¹⁷ “Special Ballot Voting” (31 October 2023), online: *Elections Canada* <www.elections.ca/content.aspx?section=vot&dir=bkg&document=ec90540&lang=e> [perma.cc/5BSG-3NTF] [Elections Canada Special Ballot Voting].

¹¹⁸ Juliette Love, Matt Stevens and Lazaro Gamio, “Where Americans Can Vote by Mail in the 2020 Elections”, *The New York Times* (14 August 2020), online: <www.nytimes.com/interactive/2020/08/11/us/politics/vote-by-mail-us-states.html>; Julia Harte, “Explainer: Republicans push to restrict mail-in voting ahead of U.S. November midterms”, *Reuters* (9 September 2022), online: <www.reuters.com/world/us/republicans-push-restrict-mail-in-voting-ahead-us-november-midterms-2022-09-09/>.

¹¹⁹ Elections Canada Special Ballot Voting, *supra* note 122; “Voting Accessibility” (2023), online: *Elections British Columbia* <elections.bc.ca/2024-provincial-election/outreach-and-education/voting-accessibility/> [perma.cc/R8W2-TTZ7]; “How to Vote by Mail”, online: *Elections Alberta* <www.elections.ab.ca/voters/how-to-vote/voting-by-mail/> [perma.cc/H2RS-BPMP]; “Who can vote and ID options” (2023), online: *Elections Saskatchewan* <www.elections.sk.ca/voters/voter-id-requirements/> [perma.cc/W4WC-SNVX]; “Accessibility Services and Options” (2023), online: *Elections Manitoba* <electionsmanitoba.ca/en/Voting/Accessibility> [perma.cc/WS2E-JCLF]; “Voting in provincial elections” (2023), online: *Elections Ontario* <www.elections.on.ca/en/voting-in-ontario/voting-in-provincial-elections.html> [perma.cc/UXQ9-XB59]; “You are unable to move about for health reasons” (2023), online: *Élections Québec* <www.electionsquebec.qc.ca/en/vote/other-voting-options/you-are-unable-to-move-about-for-health-reasons/>

For electors with disabilities, the ability to cast a vote by mail is of particular importance. While electoral legislation permits establishing polls at institutions for seniors or peoples with disabilities, many peoples with disabilities do not live in institutions and cannot access these special polls. At the same time, many electors with disabilities living in the community, face barriers to voting at poll locations because they are confined to their home or face transportation-related barriers. In these contexts, the right to cast a vote can have the effect of constitutionalizing special ballot voting for electors with disabilities.

The right to actively cast a ballot and the right to a private vote for electors are inherently intertwined. Voting methods or technologies that allow electors with disabilities to vote privately necessitate the ability for the elector to actively cast their own ballot without assistance from a third-party. Similar to the first aspect of the right to a barrier-free vote, if a government does not provide mechanisms for an elector to actively cast their own ballot without assistance by others, section 3 would necessarily be infringed. The onus would then shift to the government to justify the inability to provide voting technology that upholds this aspect of the right.

Right to Verify One’s Own Vote

The third component of the right to a barrier-free vote is the right to verify one’s own vote. This right is a corollary of the two other components of the right to a barrier-free vote.

[perma.cc/26HZ-HRMT]; “Vote by Mail”, online: *Elections New Brunswick* <www.electionsnb.ca/content/enb/en/voters/vote-by-mail.html> [perma.cc/PB9B-W822]; “Nova Scotia Voters With Special Needs” (2018), online: *Elections Nova Scotia* <electionsnovascotia.ca/voters/special-needs> [perma.cc/5C76-C3N4]; “Voting in PEI” (2023), online: *Elections Prince Edward Island* <www.electionspei.ca/provincial-elections/voting-in-pej> [perma.cc/LBQ6-8HMK]; “Special Ballot Voting” (2023), online: *Elections Newfoundland and Labrador* <www.elections.gov.nl.ca/elections/voters/specialballots.html> [perma.cc/N3FU-WKKJ]; “Apply for a Mail-in Ballot” (2021), online: *Elections Yukon* <electionsyukon.ca/en/content/school-board-mail-ballots> [perma.cc/2JPX-6QME]; “Absentee and Online Ballot Application” (2023), online: *Elections Northwest Territories* <www.electionsnwt.ca/en/absentee-and-online-ballot-application> [perma.cc/6SDP-QT7U]; “Ways to Vote” (2023), online: *Elections Nunavut* <www.elections.nu.ca/en/territorial-elections/ways-vote> [perma.cc/J39H-NTL4].

Using the example of a blind or visually impaired elector again, many of these voters have expressed concerns with the inability to independently verify their vote because they often must rely on a third-party to cast it on their behalf.¹²⁰ In response to these concerns, Elections Canada in April 2023 opened a call for proposals seeking a company to develop a phone application to allow blind and visually impaired electors to “independently verify the mark on their ballot.”¹²¹ Under my proposed approach, the right to verify one’s vote would require that the private voting alternatives governments offer to electors with disabilities must also incorporate some method for them to verify their vote prior to its submission.

As a final point, I will preemptively address the concern that the recognition of the right to a barrier-free vote may open the floodgates by creating government obligations to offer innumerable (potentially high cost) voting mechanisms to respond to a range of highly varied abilities. In response to this floodgates concern, I would emphasize that section 3 is not an absolute right. As mentioned already, the government has in the past and continues to be able to justify limitations on the right to vote under section 1. However, by constitutionalizing the right to a barrier-free vote for electors with disabilities, the government cannot deny any of its three components without “careful examination”¹²² from the courts.

Interrelated Aspects of the Application of the Right to a Barrier-Free Vote

Before concluding, I will also address two interrelated aspects of any potential application of the right to a barrier-free vote: (1) its interrelation with section 15 and (2) its application in legislative, administrative, and other contexts.

¹²⁰ McQuigge, *supra* note 12; Bloomfield, *supra* note 12.

¹²¹ David Baxter, “Elections Canada plans app so blind, visually impaired voters can OK ballot”, *Global News* (18 April 2023), online: <globalnews.ca/news/9905631/elections-canada-voting-app-blind-visually-impaired/> [perma.cc/4Y6H-KS9P].

¹²² *Sauvé II*, *supra* note 7 at para 9.

Section 15 of the Charter and the Right to a Barrier-Free Vote

Section 15(1) of the *Charter* protects against discrimination on enumerated and analogous grounds.¹²³ Undoubtedly, equality rights are relevant to any *prima facie* or indirect denial of the right to vote on the basis of disability.

I argue that section 3 independently encompasses a positive obligation to offer barrier-free voting for electors with disabilities. This section 3 engagement can be independently guaranteed or recognized in addition to section 15(1) of the *Charter*. Recently, Justices Brown and Rowe on behalf of the SCC majority in *Sharma* closed the door on positive obligations falling within the ambit of section 15(1).¹²⁴ By recognizing the right a barrier-free vote under section 3 alone, my argument applies regardless of this finding on section 15(1) positive obligations in *Sharma*.

I also recognize that the jurisprudence on section 15(1) is one of “continual re-invention”,¹²⁵ with the courts adopting multiple interpretive frameworks to equality rights in the past four decades of the *Charter*.¹²⁶ As the equality jurisprudence develops, I leave open the possibility for the recognition of the right to a barrier-free vote under section 3 and section 15(1).

Finally, I emphasize that the right to a barrier-free vote should garner section 3 protections independently or in addition to section 15(1) of the *Charter*. Section 15(1) falls within the purview of the notwithstanding clause under section 33 of the *Charter*.¹²⁷ The notwithstanding clause is a constitutional tool that permits federal, provincial, and territorial

¹²³ *Charter of Rights and Freedoms*, *supra* note 5, s 15(1).

¹²⁴ *Sharma*, *supra* note 74 at paras 34, 63.

¹²⁵ Jennifer Koshan & Jonnette Watson Hamilton, “The Continual Reinvention of Section 15 of the Charter” (2013) 64 UNBLJ 19 at 19.

¹²⁶ See e.g. *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, 56 DLR (4th) 1; *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, 170 DLR (4th) 1; *R v Kapp*, 2008, SCC 41; *Fraser v Canada (Attorney General)*, 2020 SCC 28; *Sharma*, *supra* note 74.

¹²⁷ *Charter of Rights and Freedoms*, *supra* note 5, s 33.

legislatures to temporarily set aside sections 2, and 7 to 15 of the *Charter* for a renewable period of up to five years.¹²⁸ In the past, the SCC has interpreted section 3 broadly in light of the purposeful exclusion of democratic rights from the notwithstanding clause.¹²⁹ A recognition of the right to a barrier-free vote only under section 15(1) of the *Charter* risks the allowing legislatures to apply section 33 to deny the right to vote for a subset of the population.

Applications in the Legislative and Administrative Context

In terms of the potential application of my proposed right, I do not preclude the types of legal challenges that the right to a barrier-free vote could encompass. In addition to forming the basis for a challenge to a law, the right to a barrier-free vote could apply to the administrative context under the *Doré/Loyola* framework.¹³⁰ This could occur, for example, in contexts where the right is impacted by an executive decision from a Chief Electoral Officer or an election poll staffer. Further, the right to a barrier-free vote under section 3 could also inform interpretation of discrimination within the human rights regime context where disability-related voting barriers have been challenged previously.¹³¹

Conclusion

In this article I explored the scope of the right to vote under section 3 of the *Charter*. After surveying the state of voting accessibility and the jurisprudence on section 3, I argued that the right to vote encompasses the positive government obligation to guarantee a right to a barrier-free vote for electors with disabilities. Applying established methods of *Charter*

¹²⁸ Caitlin Salvino, “The Section 33 Democratic Accountability Concept: Proposing a Two-Pronged Approach for Judicial Review” (2023) 56:3 *UBC L Rev* 845 at 846.

¹²⁹ *Sauvé II*, *supra* note 7 at para 11.

¹³⁰ *Doré v Barreau du Québec*, 2012 SCC 12; *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12.

¹³¹ *Muldoon*, *supra* note 6.

interpretation, I identified three components of this section 3 right to a barrier-free vote: (1) the right to a private vote, (2) the right to actively cast a vote, and (3) the right to verify a vote.

Although governments at all levels in Canada have already taken steps to increase the accessibility of voting, if recognized, the constitutional right to barrier-free voting for electors with disabilities would inform and create a minimum threshold for federal, provincial, and territorial elections.

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