

Democracy in the City: Citizenship and the Municipal Vote

Craig Martin, September, 2004

It is time for a debate in this country on whether permanent residents should be extended the right to vote in local elections. The debate is raging south of the border, yet strangely has not received any attention in Canada. It is certainly an issue that we should discuss here in Ontario, particularly in Toronto.

Consider that earlier this year Toronto went through one of the most galvanizing municipal elections in its history. Yet for a large segment of Toronto's population, it was a democratic process in which they were denied the crucial and most fundamental function – the right to vote. Under the Ontario *Municipal Elections Act, 1996*, as amended, a person is only entitled to vote if, on voting day, he or she is a Canadian citizen.

The City of Toronto has a total population of just under 2.5 million persons, of which there are approximately 400,000 non-citizens. Among them, some 356,000, or close to 15% of the entire population of the city, are permanent residents, which means they are permitted by law to live and work in Canada indefinitely. In the Greater Toronto Area there are more than half a million people who are permanent residents, according to the Statistics Canada 2001 census. Half a million permanent residents, who pay property and other local taxes, work and build businesses, send their children to local schools, and contribute in a myriad of other ways to what has recently been hailed as the most diverse city in the world. And they cannot vote in municipal elections.

Statistics Canada reported last month that in the 1990s a full 73% of immigrants to Canada settled in the three largest cities, Toronto, Montreal, and Vancouver. According to the report, 90% of the 1.8 million people who immigrated to Canada within the decade live in the ten largest municipalities in Canada. Within days of that report, the *Globe and Mail* reported that the Population Reference Bureau had announced that most of the industrialized countries of the world (with the marked exception of the U.S.), will lose population in the period up to 2050. All this suggests that immigration will continue to become increasingly important to Canada's prosperity, and increasing percentages of those immigrants will settle

in large municipalities, where they will comprise ever larger percentages of the overall community. Should they not be permitted to vote in their local elections?

The debate received prominence in the United States in August when the *New York Times* reported on a bill tabled in Washington D.C. to extend the franchise to non-citizens in elections for Washington city council and local school boards. A similar proposal is on the ballot slated for November in San Francisco. The proposals have met with surprisingly strong resistance.

The loudest argument raised in the U.S. against extending the vote to non-citizens, is that doing so would reduce the significance and meaning of citizenship. It is argued that the right to vote is one of the key features that differentiates citizenship from mere residency, and that maintaining the distinction creates an incentive for residents to become citizens. This argument is flawed, but it does raise the knotty question of what it really means to be a citizen, and what rights and obligations flow from the status of citizenship.

Justice Robert Sharpe of the Court of Appeal for Ontario, has written on the subject of the constitutional treatment of citizenship in Canada. He noted that prior to the repatriation of the *Charter of Rights and Freedoms* in 1982, citizenship was a concept that had little constitutional content. *The British North America Act, 1867*, our original Constitutional document, does not speak of citizenship at all. It does confer upon the federal government the exclusive power over “naturalization”, the act of granting citizenship to aliens. Canadian citizenship was not defined in law until the 1947 federal *Canadian Citizenship Act*. Early attempts in the courts to rely on the federal power over naturalization to create an expansive conception of citizenship with accompanying rights and privileges, however, ended in failure.

The issue was raised squarely in the 1900 case of *Tomey Homma*, in which a Japanese Canadian challenged a disgraceful B.C. provincial law that denied the vote to all persons of Japanese descent, regardless of whether they were citizens. On final appeal the Privy Council in 1903 upheld the B.C. law, denying that the federal government had exclusive powers to affect the rights of citizenship. Thus, the federal government could

confer citizenship, but it had no exclusive power to create and confer accompanying rights and privileges, and the status of citizenship withered as a source of domestic rights.

With the promulgation of the Charter, Canada received a rich and expansive conception of constitutionally enshrined rights. Those rights, however, are extended for the most part to all persons who are in Canada, rather than being tied to the status of citizenship. The right to vote and be qualified for membership in the House of Commons or Provincial Legislature is one of only three rights that are explicitly guaranteed exclusively to citizens. What is more, in the first decision of the Supreme Court on the equality rights under the Charter, *Andrews v. The Law Society of British Columbia*, the issue of discrimination on the basis of citizenship was analyzed by the Court. A permanent resident challenged the B.C. law that restricted membership in the legal profession to citizens of Canada.

The Court held in 1989 that the law was in violation of s.15 of the Charter, and in so doing made clear that any distinctions based on nationality are inherently suspect. Justice La Forest wrote that “Discrimination on the basis of nationality has from early times been an inseparable companion of discrimination on the basis of race and national or ethnic origin...The use in legislation of citizenship as a basis for distinguishing between persons...harbours the potential for undermining the essential and underlying values of a free and democratic society that are embedded in section 15.”

As Justice Sharpe has observed, the *Andrews* decision revealed the continuing weakness of the formal status of citizenship as a source of rights, and affirmed that the Canadian values enshrined in the Charter are based on universal principles of human dignity rather than any conception of the rights of citizenship. Some may say that if the Canadian conception of citizenship is weak, and the right to vote is one of only three rights exclusive to citizens, that is all the more reason to protect that distinction. Surely, it can be said, this reinforces the arguments made in the U.S. that to reduce the “privileges” of citizenship further is to make its status meaningless.

The significance of citizenship is not, however, related only to the relationship between the citizen and the state. Citizenship has real meaning and significance in the realm of international law, and for the individual, in the rights and protections he or she enjoys

when outside of the country. Being a citizen of Canada means that the rights of Canada as a sovereign state are invoked if a citizen is mistreated abroad, and the citizen may reasonably expect that Canada will exercise its rights under international law to protect its citizens outside of its borders.

What is more, there is no basis in Canada for the argument that certain privileges and rights should be reserved to citizens lest there be no incentive for permanent residents to take the step of becoming Canadian citizens. Canada has one of the highest naturalization rates in the world. Canada is also one of the only countries in the world that extends to permanent residents a “right” to citizenship upon the satisfaction of specified conditions, including further residency requirements.

That being so, some might ask what the real concern is, since in time all permanent residents may become citizens in any event. But for many landed immigrants who emigrate from countries that do not permit dual nationality, taking Canadian citizenship necessarily means renouncing for ever their original nationality. That can be a profound step that many may be reluctant to take, notwithstanding their integration within and commitment to their community here in Canada.

It has been argued that the right to vote is a function of full and final participation in the political process of the state, and that as such it should be reserved for citizens, even at the local level. But that argument is based at least in part on the notion that there is a correlation between citizenship and both the requisite commitment to and a sufficient understanding of Canadian culture and society. Justice Wilson, writing for the majority in the *Andrews* case, rejected that argument, holding that citizenship itself does not ensure that one is committed to Canada and Canadian society, and that conversely many non-citizens may be deeply committed to and integrated in Canadian society. There are many non-citizens in this city who are more Canadian, in the Molson Canadian “I am Canadian” sense, than am I, who was born a citizen of Canada but raised abroad. And consider why it is that a Canadian citizen just off the bus from some other part of the country should be more qualified to vote in a local municipal election than a permanent resident who has lived in that community for years.

Most importantly, however, there ought to be a distinction between the right to vote in local elections and the right to participate fully in the national political process. It is certainly reflected in the laws of most countries, and recognized in all international human rights instruments, that countries may restrict the right to vote in national elections and stand for office in national assemblies to those who are citizens of the state. But at last count twenty two countries allow non-citizens to vote in local elections, thereby permitting them to participate in a more meaningful way in the community in which they have chosen to live. The Charter extends the guarantee to vote and stand for election in the House of Commons and Provincial Legislatures to citizens only, but that ought not to be taken to mean that the right to vote should therefore be restricted to citizens. We are free to extend privileges that go beyond the minimum guaranteed rights.

I am not arguing that permanent residents have a constitutional right to vote in municipal elections (though there may be grounds for such a challenge). Rather, I have reviewed the legal background to point out that on the one hand, the legal concept of citizenship in this country has no strong tradition or very meaningful content, and, on the other hand, that the constitutional value of ensuring equality in a free and democratic society is one of the fundamental values that now helps define us as a nation. We are a nation founded by immigrants, and one which will continue to depend on immigration for our prosperity and for the continued evolution of our rich and diverse culture. It only makes sense to give those members of our community who are not yet citizens the sense that they have a real stake in the community and the power to help shape it. Extending to them the franchise would, moreover, embody and further extend our own sense of justice and equality. At the very least, we ought to have a serious debate on the issue. Mr. Miller, Mr. McGinty, what say you?

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