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Election date ruling a good day for democracy | David Elmaleh

By David Elmaleh



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(July 30, 2019, 8:50 AM EDT) -- Canada's upcoming nationwide election is scheduled on a day of religious significance to the country's Jewish community — Shemini Atzeret.

On July 23, 2019, in a stunning (and correct) decision, the Federal Court breathed fresh life into Canadian democracy when it ordered the Chief Electoral Officer (CEO) to reconsider his decision not to recommend moving the election date from the Oct. 21 holiday (*Chani Aryeh-Bain et al. v. Chief Electoral Officer of Canada* 2019 FC 964).

Uncontroverted evidence confirmed that Orthodox Jewish observance calls for refraining from participating or directing election activity, including voting, campaigning, calling and transporting.

There is no doubt that if the election proceeds on Oct. 21, Aryeh-Bain (an Orthodox Jewish Eglinton-Lawrence candidate) will be denied meaningful participation in the election. Her campaign will "go dark" on the most important day of the campaign — e-day.

Similarly, voters observing Shemini Atzeret will be disenfranchised — unable to meaningfully participate in a democracy's highest public exercise.

In a recent *The Lawyer's Daily* article, Heather MacIvor argues that the court's call for reconsideration is unsatisfactory for two principal reasons: (1) orthodox Jewish voters are not disenfranchised because they may vote at advance polls; and (2) the CEO should not be required to balance "Charter values" because there is simply "nothing to balance."

With respect, MacIvor minimizes the significance of election day itself, focusing instead on the lead-up, which is important but not nearly as critical.

The sweeping election rollercoaster reaches its highest peak on election day. Campaigns reach their 11th hour and roll up their sleeves, honing their "get out the vote" strategies and communications procedures and sending scrutineers, legal teams and volunteers to homes and polling booths throughout the day.

I know this because I have volunteered on every provincial and federal election day since I reached 18. Never am I prouder to be Canadian than when I participate with a dedicated team in shaping the future of our country — an opportunity my elders did not share.

Furthermore, Parliament expressly contemplated a similar scenario in s. 56.2(1) of the *Canada Elections Act*, granting the CEO discretion to switch an election date if it conflicts with "a day of cultural or religious significance".

In my view, it is crystal clear that Parliament contemplated a situation where an election day would fall on a day of religious significance and that serious consideration ought to be given to move the date. The availability of advance polling prior to an election date was obviously insufficient in the eyes of Parliament — who correctly recognized that participating in a democratic process on *election*

day itself is of paramount significance to a vibrant democracy.

The Federal Court had the opportunity to change the date. It chose not to, and simply referred the matter back to the CEO to do his job — that is, to “assess the impact of the election date being in conflict with a day of ‘religious significance’ and to consider the discretion he has been granted by Parliament pursuant to subsection 56.2(1) of the *Canada Elections Act*.”

The court’s ruling is a flashpoint, testing the limits of a society touting acceptance and multiculturalism but unnerved by the emergence of minority religious and cultural concerns affecting public consensus. Reaction to the ruling has also fanned the flames of antisemitism.

As Canadians, we must resist division and fear of minority concerns. Whether or not the CEO exercises his discretion to recommend moving the election date, as a country that prides itself on its interwoven fabric of multiculturalism and religious tolerance, we must celebrate the day that our Federal Court proclaimed that minorities matter. That process matters. That Charter rights — particularly of minority groups — matter.

I applaud the courage of the applicants and the intervener (B’nai Brith Canada) for bringing this issue forward — too many times throughout history have religious minorities buckled to pressure from the state and remained complacent, instead shrugging their shoulders and telling themselves “nothing can be done.”

I also applaud the insight and detailed reasoning of the Federal Court to insist that the CEO’s decision be justifiable, transparent and intelligible and must consider the Charter values of the applicants and others.

Yesterday, the CEO reconsidered his decision in accordance with the Federal Court’s direction, and declined to recommend moving the date. For many, the result is disappointing and was avoidable. However, regardless of the CEO’s ultimate recommendation, July 23, was a good day for Canadian democracy and should be recognized and celebrated as such.

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