Jewish Holidays, Federal Elections, and Court Decisions! Oh My!

Chani Aryeh-Bain, Conservative Party candidate in the upcoming federal election in the Toronto riding of Eglinton-Lawrence, and Ira Walfish, political activist, both adhere to an Orthodox Jewish faith and strictly follow religious holidays.[1] The date of the upcoming federal election, October 21, happens to coincide with the Jewish holiday of Shemini Atzeret. Aryeh-Bain and Walfish requested of Canada's Chief Electoral Officer (CEO) that the date of the election change. They believed the date infringes their religious, democratic, and equality rights under the *Charter*.[2] The challenge resulted in an initial denial by the CEO, a Court decision which required re-determination, and the CEO's ultimate decision to keep the election date on October 21 – or Shemini Atzeret – despite the *Charter* implications for Aryeh-Bain and Walfish.

A Jewish Holiday and a Federal Election

Shemini Atzeret is at the end of the Jewish holiday period of Sukkot. The holiday "has no distinctive ritual," so it is often associated as a day of rest at the end of the Sukkot period, which was historically a time of pilgrimage.[3] Work is not permitted on the day of rest.[4] In 2019, Sukkot will fall on a date of election advance polling (October 14, 2019) and Shemini Atzeret falls on election day itself (October 21, 2019).[5]

Shemini Atzeret is not practiced by all who hold the Jewish faith – in fact, it is one holiday that has "baffled" some Jewish people because it is not understood or faithfully followed by all.[6] Orthodox Jews are the religious group who most often adhere to the strict rituals of Shemini Atzeret – it is estimated that the there are 75,000 people in Canada that practice an Orthodox Jewish faith.[7]

Thus, in exercising their faith Orthodox Jews do not work on Shemini Atzeret. This has important consequences as observant Jewish people are prohibited from "writing, driving… using any electronic devices such as televisions, computers and phones… [or] voting, volunteering or otherwise participating in election campaigns."[8]

When Ms. Aryeh-Bain won the Eglinton-Lawrence Conservative Party nomination on April 14, 2019, she "was immediately concerned about the impact of the election date with Shemini Atzeret, and the effect it would have on her campaign."[9] She wrote to Elections Canada Chief Electoral Officer ("CEO") Stéphane Perrault on April 18, requesting that the election date move to October 28 because, in her words, "having Jewish candidates and voters disadvantaged runs contrary to their rights to equality under the *Charter of Rights and Freedoms*."[10] In addition, there were more than 140 letters from the Canadian public to Elections Canada asking the CEO to consider moving the date so observant Jews could fully participate in the election process.[11]

While federal election dates are pre-set (subject to Parliament dissolving early) on the third Monday of October in the fourth calendar year,[12] the CEO of Elections Canada has discretion to recommend changing the election date to the next day (October 22) or the following Monday (October 28).[13] There is precedent for moving an election because of conflict with Shemini Atzeret. In 2007, Ontario moved their provincial election from October 4 to October 10 because the original date fell on Shemini Atzeret and was deemed to negatively effect observant Jews.[14]

CEO Perrault denied Ms. Aryeh-Bain's request to change the election date. In a letter dated May 7, 2019, Perrault says that it is "unfortunate" that the election date falls on Shemini Atzeret and that it "may have an impact" on her candidacy, but he reiterated that "Elections Canada does not choose election dates."[15] However, CEO Perrault vowed to find ways to "ensure that the next general election will be as accessible as possible to electors who may not vote on election day in observance of Jewish holidays."[16]

Ms. Aryeh-Bain and Mr. Walfish then sought judicial review of Elections Canada's decision, asking the Federal Court to re-evaluate the administrative agency's determination.

The Federal Court: Give us Reasons

In *Aryeh-Bain v Canada (Attorney General),*[17] McDonald J of the Federal Court required CEO Perrault to reconsider his decision. As CEO of Elections Canada, Perrault is the administrative decision maker – as such, his decision would often be given deference. However, when an administrative decision engages *Charter* rights – in this case democratic rights, religious freedoms, and equality rights – there must be a proportionality analysis weighing the *Charter* protections with the objectives of the Act that is being administered.[18] This means that a standard of review of reasonableness – the administrative decision maker's decision will stand if it falls within a range of reasonable outcomes – will be applied if consideration is given to the *Charter* values at issue.

Justice McDonald's judgment focuses primarily on section 3 of the *Charter* – democratic rights. According to the Supreme Court of Canada ("SCC"), the "central purpose of s 3 is to ensure the right of each citizen to participate meaningfully in the electoral process."[19] In 2003, the SCC said that a meaningful role in the electoral process enables each citizen of Canada to have a "certain level of participation in the electoral process."[20]

Ms. Aryeh-Bain argued that her right to meaningful participation in the electoral system was infringed because she could not vote, campaign, or advise others to campaign on her behalf on Shemini Atzeret. Mr. Walfish argued that his rights to campaign and vote were also infringed by his inability to campaign or vote on Shemini Atzeret or the other Jewish holidays during advanced polling. They both argued that their religious freedoms and equality rights guaranteed by the *Charter* were not being adequately considered, and the infringement of these rights should warrant moving the election date.

McDonald J ordered CEO Perrault to reconsider his decision not to move the election date, and to provide new reasons for his decision. She stated that there was an "absence of

evidence of the CEO's consideration of the *Charter* values at play" and instead the reasons he provided only focused on "operational or logistical concerns in changing the election date."[21] She believed that he did not truly consider the option of moving the election date, even though it is available to him in the *Elections Act* to request a change. The Judge ruled that the Court could not defer to the administrative decision maker – the CEO – because he did not "provide any explicit or implicit evidence of proportionate *Charter* balancing."[22] Thus, for procedural fairness to be given, CEO Perrault was required to reassess his decision and consider the *Charter* impacts of the election date on Ms. Aryeh-Bain, Mr. Walfish, and other observant Jews throughout Canada.

The CEO Gives His Reasons

On July 29, CEO Perrault responded with a decision – he had reconsidered the election date, decided not to advise that the date be moved, and provided reasons.

Perrault stated that he "carefully considered the impact of holding the election on October 21 on the ability of observant Jews to participate in the electoral process" and concluded that it was not in the interests of the Canadian public to advise that the date be moved.[23] Perrault says that he recognizes "that this situation engages [Aryeh-Bain and Walfish's] *Charter* rights to freedom of religion, to equality, and to vote and to be qualified for membership in the House of Commons."[24] However, long-standing preparations by Elections Canada, identification of polling locations, and a potential conflict with Nunavut municipal elections were the reasons for his decision to keep election day on October 21.[25]

Perrault noted that Elections Canada was engaging in campaigns to try and limit the impacts of the polling dates on Orthodox Jewish Canadians. Noting that significant Jewish population are only located in 36 of the 338 federal ridings, Elections Canada has devised "local solutions" in these 36 ridings. These include:

- Increasing staff at advanced polls in ridings where more than 1% of the population is Jewish;
- Require a community relations officer to work with local Jewish communities;
- Reaching out to local Jewish organizations, such as synagogues, to highlight voting options available on days that are not holidays;
- Hold meeting with candidates to provide them with information for alternate voting options;
- Increase frontline staff at Elections Canada returning offices to answer questions; and,
- Launch an information campaign designed to inform Jewish Canadians of different options to vote.[26]

CEO Perrault, however, noted that "there is no such thing as a perfect election day,

especially in a country as diverse as Canada."[27] With this, he decided that he would recommend keeping the election polling day on October 21, 2019.

Conclusion

Thus, it appears that the federal election date will go ahead as planned on October 21. The saga of the federal election, the Jewish holiday, and the court decision did create a public conversation about how to balance important civic events with deeply held religious conflicts. While it can be difficult to find a perfect time for an election in a country as diverse as Canada, it is important to try and include as many Canadians as possible. For this reason, there have been calls to amend the *Elections Act* in the future to move the fixed election date to a period with fewer religious conflicts, such as in June.[28] However, in 2019, Canada's general election period will proceed through a period of Jewish religious significance. It remains to be seen how much of an impact this will have on candidates like Ms. Aryeh-Bain and voters like Mr. Walfish.

[1] Catharine Tunney, "Elections Canada recommends keeping Oct. 21 election date" (29 July 2019), online: *Canadian Broadcasting Corporation* <cbc.ca/news/politics/chief-electoral-election-date-orthodox-jewish-1.5228581>.

[2] *Canadian Charter of Rights and Freedoms*, ss 2(a), 3, 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[3] Ari L Goldman, *Being Jewish: The Spiritual and Cultural Practice of Judaism Today* (New York: Simon & Schuster, 2000) at 135-136.

[4] *Ibid*. This belief is derived from the biblical passage: "On the eighth day you shall hold a solemn gathering; you shall not work at your occupations" (Numbers 29:35).

[5] *Aryeh-Bain v Canada (Attorney General)*, 2019 FC 964 at para 13 .

[6] Carla Naumberg, "Figuring out what Shemini Atzeret is. Finally" (28 September 2017), online: *Jewish Standard* <jewishstandard.timesofisrael.com/figuring-out-what-shemini-atzeret-is-finally/>.

[7] *Aryeh-Bain, supra* note 5 at para 8.

[8] Chief Electoral Officer of Canada, *Decision of the Chief Electoral Officer: Date of General Election* (29 July 2019), online (pdf): *Election Canada* <elections.ca/med/spe/decision2919_e.pdf> at 3 [CEO decision].

[9] *Aryeh-Bain, supra* note 5 at para 17.

[10] *Ibid.*

[11] *Ibid* at para 21.

[12] *Canada Elections Act*, SC 2000, c 9, s 56.1.

[13] *Ibid*, s 56.2.

[14] Heather MacIvor, "Chief Electoral Officer told to reconsider federal election date" (26 July 2019), online: *The Lawyer's Daily* <thelawyersdaily.ca/articles/14025/chief-electoral-officer-told-to-reconsider-federal-election-date-heather-macivor?article_related_content=1> [MacIvor].

[15] *Aryeh-Bain, supra* note 5 at para 28.

[16] *Ibid.*

[17] *Ibid.*

[18] *Ibid* at para 36; *Doré v Barreau du Québec*, 2012 SCC 12 at para 54.

[19] *Frank v Canada (Attorney General)*, 2019 SCC 1 at para 26; *Figueroa v Canada (Attorney General)*, 2003 SCC 37 at paras 25-26.

[20] *Ibid.*

[21] *Aryeh-Bain, supra* note 5 at para 61.

[22] *Ibid* at para 63.

[23] CEO decision, *supra* note 8 at 1.

[24] *Ibid* at 3.

[25] *Ibid* at 5-7.

[26] *Ibid* at 9.

[27] *Ibid* at 10.

[28] MacIvor, *supra* note 14.