

How Fair is the Fair Elections Act? Voter ID Rules

This article was written by a law student for the general public.

Introduction

The right to vote is essential to a democracy. That is because the people need to be in charge of selecting who will govern them. However, every democracy recognizes that some voting restrictions, such as citizenship status, are necessary for preserving the integrity of the elections process. In 2014, the Conservative government passed the *Fair Elections Act*, which places new restrictions on the types of identification that can be used to allow voters to vote in an election.[\[1\]](#)

These new voter ID rules have raised concerns because they might prevent certain voters from being able to vote in elections, including the upcoming federal election on October 19, 2015. For that reason, the new rules might violate section 3 of the *Charter of Rights and Freedoms*, which protects the right to vote.[\[2\]](#)

The Fair Elections Act

The *Fair Elections Act* gives voters three options for presenting identification to vote:

- (1) One piece of government-issued ID that includes a photo and address
- (2) Two pieces of ID, both with the voter's name, and at least one with the voter's address
- (3) The vouching system: The voter must present two pieces of ID containing his or her name, and then swear an oath to establish his or her address. Another person must vouch for the voter by swearing an oath. The voucher must have the appropriate identification to vouch for the voter.

The types of ID that are acceptable for use can be found on the Elections Canada website.[\[3\]](#) The Chief Electoral Officer also has the authority to authorize any ID that is not listed.

The *Fair Elections Act* makes some major changes to the old voter ID rules. Prior to the *Fair Elections Act*, a voter identification card was one of the acceptable forms of ID approved by the Chief Elections Officer. Now, the voter identification card is no longer acceptable. Another major change made by the *Fair Elections Act* is in the vouching system. The old rules did not require a voter to present any identification when being vouched for, and the voucher did not have to swear an oath.

The issue with these new voter ID rules is that they might prevent certain members of the population from voting. Those members include students, Aboriginals, elderly persons, and the homeless. These groups of individuals are less likely to have the required ID. According

to Stephen Shrybman, a lawyer who sought an injunction against the rule on voter ID cards and the vouching process, an estimated 250,000 Canadians will not be able to vote in the upcoming election.[4]

In July 2015, an Ontario Court decided against Mr. Shrybman, and did not allow an injunction against any of the voter ID rules.[5] Because of this decision, the rule against using voter ID cards will apply during this election. The *Fair Elections Act* is also being challenged on constitutional grounds - that it violates section 3 of the *Charter*. This decision on constitutionality will be delivered after the October 2015 election.

Are The New Voter ID Rules Constitutional?

Henry v Canada: A Past Case on the Old Voter ID Laws

In 2007, the federal government changed the voter ID laws and these laws were challenged in the British Columbia courts. The Court of Appeal decided that the voter ID laws at the time violated section 3 of the *Charter* because they interfered with the right to vote for some members of the population.[6] However, the government was able to justify this violation.

First, the government's goal was to prevent voter fraud and the harm it causes to the elections process. The Court found this to be an important objective, and the use of stricter voter ID laws was a logically valid way of meeting that objective. The Court also found that the government had no other reasonable means to prevent voter fraud without compromising its goal.[7] Finally, the positive effect of creating stricter voter ID rules outweighed the negative effect of some voters potentially not being able to vote.[8] The government won and the decision was not appealed to the Supreme Court.

The Fair Elections Act

The issue for a court that considers the new voter ID laws will be whether the new ID rules violate section 3 of the *Charter* - the right to vote - and whether the government can convince the court that they are necessary.

The Supreme Court of Canada has held that section 3 of the *Charter* ensures "each citizen is entitled to be *represented* in government" and that we have a right to play a meaningful part in the democratic process. [9] If a law interferes with the capacity of a citizen to play a meaningful role in the electoral process, it violates section 3 of the *Charter*.

The government's objective in the *Fair Elections Act* continues to be preventing voter fraud. The new rules, from the government's perspective, are a logical way of achieving this goal. In *Henry v Canada* (the B.C. case), the Court of Appeal concluded that there was no "alternative, less drastic means of achieving the [government's] legislative goals in a real and substantial manner." [10] However, the new ID laws are much stricter. The government will need to explain why the laws need to be changed - why the old rules aren't sufficient. It will also need to convince the court that there is no better way of preventing voter fraud.

The government will also have to show that the benefit of their new rules outweighs the negative impact on certain peoples' right to vote. If it can be shown that too many Canadians will be prevented from voting because of the new rules, then a court might strike the new rules down based on a violation of section 3 of the *Charter*. Making it difficult for people to vote interferes with their constitutional, *Charter*-protected right. That interference can only be justified if the government makes strong arguments about why the new rules are necessary.

Conclusion

The new voter ID rules in the *Fair Elections Act* might be unconstitutional because they violate the right to vote for a number of Canadians. A court will have to decide whether the government can justify these new rules in the face of evidence that some Canadians, many of whom are poor or disenfranchised, might not be able to vote. Unfortunately, the decision on the new act's constitutionality will not be decided before the next federal election on October 19th. The controversy surrounding the *Fair Elections Act* should motivate Canadians to exercise their fundamental democratic right in this upcoming election.

[1] *Fair Elections Act*, SC 2014, c 12.

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

[3] See:
<http://www.elections.ca/content.aspx?section=vot&dir=ids&document=index&lang=e>.

[4] John Nicol, "Fair Elections Act ID rules block voting, groups argue in court challenge", *Canadian Broadcasting Corporation* (02 July 2015) online: CBCnews <http://www.cbc.ca/news/canada/fair-elections-act-id-rules-block-voting-groups-argue-in-court-challenge-1.3136431>.

[5] Mr. Shrybman made an application to appeal the decision in July, but the appeal was denied.

[6] *Henry v Canada*, 2014 BCCA 30 at para 70.

[7] *Ibid* at para 93.

[8] *Ibid* at para 100.

[9] *Reference re Provincial Electoral Boundaries*, [1991] 2 SCR 158, [1991] SCJ No 46 at para 26, emphasis in original text; *Figueroa v Canada*, 2003 SCC 37 at para 25, [2003] 1 SCR 912.

[\[10\]](#) *Ibid* at para 93.