

EVIDENCE TO THE EQUALITIES AND HUMAN RIGHTS COMMITTEE: PRISONER VOTING

As the Committee proceeds with its scoping exercise on prisoner voting, the evidence below is intended to present Committee members with an overview of the history of prisoner voting in Canada, where all prisoners can exercise their constitutional right to vote.

Canadian Charter of Rights and Freedoms: The Right to Vote

One of the most significant influences on electoral law in Canada was the adoption of the Canadian Charter of Rights and Freedoms (the Charter), which came into force in 1982.¹ Sections 2 to 5 set out fundamental freedoms and democratic rights. Under section 3:

Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly [of a province or territory] and to be qualified for membership therein.

One of the principal beneficiaries of Charter challenges to electoral law, as far as the right to vote is concerned, has been prisoners, who have relied on the Charter to establish through the courts that they should be able to vote.

First Challenge to the Voting Ban: *Sauvé v. Canada* (1993)

Richard Sauvé, who was serving a life sentence, challenged the blanket ban on prisoners' right to vote. In particular, he challenged the *Canada Elections Act* provision that precluded 'every person undergoing punishment as an inmate in any penal institution for the commission of any offence' from voting. The specific reference to 'any penal institution' is important. In Canada, the correctional system is divided in two ways. First, where a sentence of imprisonment is imposed, a dividing line is set at two years. If a person is sentenced to two years or more, the person is sent to a penitentiary. If a person is sentenced to two years less a day, the person is confined to a prison. As per the British North America Act (1867), penitentiaries fall under federal authority and prisons fall to the management of the provinces and territories.

In *Sauvé v. Canada* (1993), the Supreme Court of Canada, the highest court in Canada, ruled that the prohibition on prisoner voting in the *Canada Elections Act* was too broad. The Court found that the ban failed to meet the requirement that penal sanctions must result in minimal impairment of Charter rights, and that the negative effects of impairing the right must be proportionate to the benefits. In response to the ruling, the Government removed the voting ban, but only for prisoners serving a sentence of two years less a day. In other words, the Government maintained the voting ban for prisoners serving sentences over two years.

¹The Canadian Charter of Rights and Freedoms is one part of the Canadian Constitution.

Challenging the Revised Voting Ban: *Sauvé v. Canada (2002)*

Mr. Sauvé and other prisoners challenged the new attempt to deny them the right to vote. Between 1993 and 2002, the case progressed through Canadian courts until finally reaching the Supreme Court of Canada.

The Government argued before the Supreme Court that denying this category of prisoners (i.e., those serving sentence over two years) the right to vote was justifiable under the Charter as it served several purposes best determined by Parliament, namely:

1. The goal of promoting civic responsibility and respect for the rule of law; and
2. Denial of the vote was a reasonable punishment above the one specified by the court.

The Supreme Court of Canada rejected these arguments.

First, the Court noted that voting was a fundamental right in a democracy and any attempt to restrict this right had to be made on the basis of a compelling reason that met specific legal tests. In particular, the restriction had to be justified on the basis of necessity, could not be arbitrary, and the objectives of the ban could not be met through other measures. In dismissing the arguments put forward by the Government, the Supreme Court rejected the argument that denying the vote would help reach the objective of “promoting civic responsibility and respect for the law.” The Supreme Court found that:

Denying penitentiary inmates the right to vote is more likely to send messages that undermine respect for the law and democracy than messages that enhance those values. The government's novel political theory that would permit elected representatives to disenfranchise a segment of the population finds no place in a democracy built upon principles of inclusiveness, equality, and citizen participation.

Second, the Supreme Court found that denying a fundamental right is arbitrary because it is applied to all prisoners regardless of the circumstances relating to the prisoner or his/her offence. By definition, blanket punitive measures are arbitrary. The Supreme Court further found that the denial of the right to vote on the basis of attributed “moral unworthiness” was inconsistent with the respect for the dignity of every person that lies at the heart of Canadian democracy and the Charter.

Finally, the court said that the negative aspects outweigh the positive benefits that may come from denying this right. According to the court:

Denying inmates the right to vote imposes negative costs on inmates and on the penal system. It removes a route to social development and undermines correctional law and policy directed towards rehabilitation and integration.

Canada's highest court found that the Government did not have sufficient reason to deny prisoners the right to vote. Since 2002, all prisoners in Canada can exercise their right to vote.

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About the author

Emma Trottier is a former public servant of the Government of Canada. She spent nearly a decade with the Correctional Service of Canada and the Department of Public Safety. In 2017, Emma completed her Master's degree at the University of Cambridge, where she conducted research on the practice of remand and courts' response to the time served by the presumptively innocent in pre-trial custody. Emma sits on one of the sub-committees of the International Corrections and Prisons Association, where she and others are examining best practices on the training and development of staff who work with women prisoners.