

Court finds that first-past-the-post electoral system is constitutional (Fair Voting BC v. Canada (Attorney General))

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Canada's federal elections, and the elections in most provinces and municipalities, are contested under a first-past-the-post or single member plurality ("SMP") electoral system. Under this electoral system, the candidate who gets the most votes in a defined electoral district is declared the winner. The candidate does not need more than 50 percent of the vote in order to win. The SMP system has been criticized by electoral reform advocates who have, among other things, contended that this electoral system is unconstitutional and breaches the *Charter of Rights and Freedoms* (the "Charter").

In *Fair Voting BC v. Canada (Attorney General)*, 2023 ONSC 6516 (CanLII), the court concluded that the FPTP electoral system used to govern Canada's federal elections is constitutional.

The Applicants in this case contended that the FPTP system breached the right to vote and equality rights under the Charter and that proportional representation was a fairer and more effective electoral system. Essentially, the Applicants advanced the notion that within each federal electoral district, multiple candidates or representatives should be elected in proportion to the ballots cast by voters for the various candidates or parties contesting an election.

With respect to the right to vote enshrined in section 3 of the Charter, the Applicants submitted that the provisions under the *Canada Elections Act* which underpinned the SMP system and governed Canada's federal elections violated the right to fair elections because this system led to unfair and arbitrary outcomes and was capable of producing a disproportional translation of votes to seats in the Canadian federal Parliament. The Applicants argued that the SMP system violated the principle that all votes should count equally.

In contrast, the Respondent contended that the current electoral system was a reasonable means of organizing a representative democracy. While acknowledging that "there [was] no perfect or even best electoral system", the Respondent submitted that the SMP system served the following democratic goals that were otherwise neglected:

- Protection of regional interests;
- Political moderation; and
- The promotion of stable, responsive, and accountable government.

The application judge found that even though the SMP system might have its flaws and that it could produce anomalous results, this did not translate into a finding that the system made the representation of the electorate ineffective so as to breach section 3 of the Charter. Effective representation was the key to section 3. As determined by the Supreme Court of Canada in *Libman v. Quebec (Attorney General)*, 1997 CanLII 326 (S.C.C.), section 3 was to be interpreted pragmatically with respect to effective representation and required a nuanced balancing act.

Furthermore, the Supreme Court of Canada has stated that section 3 is permitted to reflect the fact that "parity of voting power, though of prime importance, is not the only factor to be taken into account..." and that parity might be undesirable because it can detract from effective representation.

Moreover, the application judge explained that the right to vote was focused on electoral process rather than outcome, which formed the basis of the evidence and the Applicants' argument.

The application judge cited the following passage from the Quebec Court of Appeal decision in *Daoust v. Québec (Directeur général des élections)* to sum up the constitutional answer to the Applicants' section 3 challenge:

Once there is effective representation of citizens, which implies the possibility that each elector can exercise his right to vote periodically, freely, and secretly, be a candidate for office, vote for the party of his choice, and express himself in public, the right to vote enshrined in s. 3 of the *Canadian Charter*...is respected.

Similarly, the Applicants' argument with respect to section 15 of the *Charter*, which is concerned with equality rights, failed.

As determined by the Supreme Court of Canada in *R. v. Sharma*, 2022 SCC 39, a successful challenge under section 15 requires a claimant to prove that the impugned law or state action:

- a. Creates a distinction based on enumerated or analogous grounds, on its face or in its impact; and
- b. Imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.

A key requirement is that the claimant prove "a sufficient causal connection between the state-caused [effect] and the prejudice suffered by the [claimant]": see *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 (CanLII).

The Applicants contended that the SMP system disadvantaged certain voters because only those voters who cast a ballot for the winning candidate obtained representation by the Member of Parliament of their choice, while those who voted for losing candidates had to simply accept who their representative would be. They had no choice.

However, the application judge explained that there was no evidence before the court from anyone to suggest that the SMP system had caused any form of discrimination to an individual. The application judge stated that under section 15 of the *Charter*, Canadians did not have a right to an egalitarian society at large. Instead, they only had a right to not be discriminated against.

While the Applicants submitted that the current electoral system discriminated against women and racial minorities, the application judge found that some of the arguments made by the Applicants, particularly with respect to the representation of women, seemed "more like partisan spin" than it did "legal argument".

Overall, the application judge found that the issues before the Court were not about which system was the best and speculative evidence was insufficient to establish causation for the purposes of section 15. The Applicants simply did not meet the required threshold of causation and therefore they were unable to establish that the SMP system violated any equality rights under the *Charter*.

The application judge also dismissed the application on the grounds that the *Charter* could not be used to invalidate other provision of Canada's Constitution. Implementing a proportional representative electoral system would require Canada to amend its Constitution, which enshrined the number of representatives from specific provinces and territories. For example, the Constitution guarantees four seats in the House of Commons to Prince Edward Island. Accordingly, given the small size of this province, hundreds of additional seats would need to be added in other regions of the country to maintain proportionality under a proportional representation system. This would require an amendment to section 37 of the *Constitution Act, 1867*.

The application judge also found that the Constitution effectively barred the territories from introducing proportional representation because, by its own logic, proportional representation required each electoral district to elect two or more representatives. However, Canada's three territories are only entitled to constitutionally elect one representative each.

Even though proportional representation might be a fairer system, the application judge concluded that proportional representation was not required by the Constitution and that the existing SMP electoral system was compliant with the Constitution and did not have to change.

The key take-away from this decision is that while the political debate between different forms of electoral systems is fascinating, the first-past-the-post system is likely here to stay. Proportional representation would require significant constitutional amendment and would require a significant increase to the number of representatives who would be elected to the House of Commons. In this author's view, the likelihood of any constitutional amendment to accommodate proportional representation would be minimal and Canadians, in any event, would likely reject the need for more and more politicians. The SMP electoral system has served Canada well, despite any anomalous results, and does not require a wholesale change.



It remains to be seen whether the application judge's decision is appealed to the Court of Appeal for Ontario. A PDF version is available to download [here](#).

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