COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Henry v. Canada (Attorney General),* 2014 BCCA 30

Date: 20140128
Docket: CA038128

Between:

Rose Henry, Clyde Wright and Helen Eddlestone

Appellants
(Plaintiffs)

And

The Attorney General of Canada and The Chief Electoral Officer of Canada

Respondents
(Defendants)

And

British Columbia Civil Liberties Association

Intervenor

Before: The Honourable Madam Justice Ryan
The Honourable Madam Justice D. Smith
The Honourable Mr. Justice Hinkson

On Appeal from an Order of the Supreme Court of British Columbia, dated May 3, 2010 (*Henry v. Canada (Attorney General)*, 2010 BCSC 610, Vancouver Registry, Docket Number S080662).

Counsel for the Appellants:	B.B. Olthuis M.S. Oulton S.L. McHugh
Counsel for The Attorney General of Canada:	H.J. Wruck, Q.C. A.J. Semple
Counsel for The Chief Electoral Officer:	M. Chenier J. Parisien
Counsel for The British Columbia Civil Liberties Association:	M.P. Good D.W. Burnett G.J. White

Place and Date of Hearing:	Vancouver, British Columbia February 4 & 5, 2013
Place and Date of Judgment:	Vancouver, British Columbia January 28, 2014

Written Reasons by:
The Honourable Madam Justice Ryan

Concurred in by:
The Honourable Madam Justice D. Smith
The Honourable Mr. Justice Hinkson

Summary:

This appeal concerns the voter identification requirements in the Canada Elections Act pertaining to personal identification and residence. The appellants appeal the order of the trial judge dismissing their action for a declaration under s. 52 of the Charter that these sections are of no force and effect. The trial judge found that the voter identification requirements did violate s. 3 of the Charter but were demonstrably justified under s. 1. The appellants argue the trial judge erred in law or in principle in her conclusions with respect to both s. 1 and s. 3.

Held: appeal dismissed. The voter identification provisions are a facial breach of s. 3; the appellants did not establish that the trial judge erred in her understanding or application of s. 3. The trial judge did not err in her conclusion that there were no alternative, less drastic means of achieving the legislative goals nor in her conclusion that the salutary effects of the provisions outweighed the deleterious effects.

Reasons for Judgment of the Honourable Madam Justice Ryan:

Introduction

[1] Section 3 of the *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*, (the "*Charter*") provides:

> 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 and to be qualified for membership therein.

[2] The appellants, Rose Henry, Clyde Wright, and Helen Eddlestone, allege that amendments made in 2007 to the *Canada Elections Act*, S.C. 2000, c. 9 (the "*Canada Elections Act"* or the "*Act*") pertaining to voter identification requirements with respect to personal identity and residence infringe their rights under s. 3 of the *Charter*. They appeal the May 3, 2010 order of Madam Justice L. Smith dismissing their action for a declaration under s. 52 of the *Charter* that certain sections of the *Act* are, as a consequence, of no force and effect.

[3] Justice Smith found that the voter identification requirements did violate s. 3 of the *Charter*, but were demonstrably justified under s. 1. The trial decision is indexed as *Henry v. Canada (Attorney General)* and may be found at 2010 BCSC 610.

[4] For the reasons that follow, I agree with the conclusion of Justice Smith. As a result, this appeal must be dismissed.

The Impugned Sections

[5] The challenged sections of the *Canada Elections Act* collectively put into place voter identification requirements relating to voting on election day ("polling day"), registering to vote on polling day and voting in advanced polls. The key provision at issue is s. 148.1(1) which refuses the vote to those unable to prove their identity and residence in accordance with the new provisions of the *Act*. It provides:

> 148.1(1) An elector who fails to prove his or her identity and residence in accordance with subsection 143(2) or (3) or to take an oath otherwise required by this *Act* shall not receive a ballot or be allowed to vote.

[6] I will set out subsections (2) and (3) of s. 143, in full, later in these reasons. Briefly, they require that an elector show one piece of government-issued identification with a photograph, name and address, or, two pieces of identification, each of which establishes the elector's name and at least one of establishes his or her address. An elector may also establish identity and address by taking an oath and being vouched for by another qualified elector. Prior to the amendments an elector was not required to show identification to vote. He or she needed only to state his or her name and address to the poll clerk who would confirm the information on the list of electors and issue a ballot. If there was doubt about the elector's identity, the elector could be required to swear an oath.

[7] The appellants do not take issue with Parliament's prerogative to require voters to prove identity and residence. They object to the way in which the legislation requires that proof. The appellants' position is that the legislation unconstitutionally disenfranchises persons who would otherwise be entitled to vote. All of the sections of the *Act* challenged by the appellants may be found in Appendix A of these reasons.

The Canadian Electoral System

[8] As set out above, s. 3 of the *Charter* gives each citizen the right to vote "in an election of members of the House of Commons or of a legislative assembly". This right reflects Canada's constitutional character as a Parliamentary democracy. The issues raised by this appeal can only be understood in that context.

[9] Canada's electoral system is known as "first-past-the-post" or "the single member plurality system". In this system, which has been essentially unchanged since Confederation, one Member of Parliament is elected in each defined electoral district to represent the residents in that riding in Parliament. As a result, Canadians do not have the right to vote at large but rather the right to vote in a specific electoral

district, choosing among various candidates who stand for election as the Member of Parliament for that riding.

[10] The single-member plurality system, by necessary implication, places the notion of "residence" at the centre of our electoral system. The definition of "residence" in the present *Act* is broad. It has not always been so. As Dan McDougal, Assistant Secretary to the Cabinet, described in his affidavit of 18 March 2009:

> 16. Previous residency rules were stricter. For instance, the *Dominion Elections Act, 1920* required voters to have been resident in Canada for 12 months and resident in the electoral district for at least two months before the issue of the writ (s. 29(1)(c)) to be qualified to vote. While this rule met policy objectives such as indicating a connection between the elector and the district, it also disqualified electors who may have recently moved. This residency requirement was repealed in 1960 at the federal level (S.C. 1960, c. 39 s. 115. …
>
> 17. There have developed significant legislative and operational efforts to assist in determining the residence of electors without permanent addresses. The Act has been amended to allow temporary residences, shelters, hostels, and similar institutions that provide services to those who have no other residence to be deemed as a residence for the purpose of a federal election …

[11] Section 6 now provides:

> 6. Subject to this *Act*, every person who is qualified as an elector [earlier defined in s. 3 as a Canadian citizen, 18 years of age or older on polling day] is entitled to have his or her name included in the list of electors for the polling division in which he or she is <u>ordinarily resident</u> and to vote at the polling station for that polling division. [Emphasis added.]

[12] Section 8 of the *Act* sets out comprehensive rules to establish an elector's residence. It ensures that every person eligible to vote has a place of ordinary residence, can be registered to vote at that address and can vote at the polling station established for the polling division where the address is located. It provides:

> (1) The place of ordinary residence of a person is the place that has always been, or that has been adopted as, his or her dwelling place, and to which the person intends to return when away from it.
>
> (2) A person can have only one place of ordinary residence and it cannot be lost until another is gained.

> (3) Temporary absence from a place of ordinary residence does not cause a loss or change of place of ordinary residence.
>
> (4) If a person usually sleeps in one place and has their meals or is employed in another place, their place of ordinary residence is where they sleep.
>
> (5) Temporary residential quarters are considered to be a person's place of ordinary residence only if the person has no other place that they consider to be their residence.
>
> (6) A shelter, hostel or similar institution that provides food, lodging or other social services to a person who has no dwelling place is that person's place of ordinary residence.

[13] Further, if the rules in s. 8 of the *Act* are not sufficient to determine a place of ordinary residence for the elector, s. 9 allows an election officer to determine ordinary residence by reference to "all the facts of the case."

[14] While all Canadians are qualified to vote, they are not entitled to do so unless their name is included on the list of electors for the polling division in which the elector is ordinarily resident (s. 149 of the *Act*). The Chief Electoral Officer (the "CEO") and staff prepare the list of electors.[1]

[15] As part of his legislative mandate, the CEO maintains the Register of Electors which is updated from time to time and during an election period (ss. 44 – 55 of the *Act*). It is from the Register of Electors and by other methods, such as door-to-door canvassing, that the CEO, aided by other electoral officers, prepares a "preliminary list of electors", a revised "preliminary list of electors" and finally the "list of electors" used at the polling stations on polling day (ss. 93 – 107 of the *Act*).

[16] This appeal is concerned with new voter identification requirements to vote or register to vote on polling day or at an advanced poll. It is not concerned with the way the list of electors is drawn up prior to the date of the election.

---

[1] The Office of the Chief Electoral Officer of Canada is an independent, non-partisan body set up to support the Chief Electoral Officer of Canada (the "CEO") who is appointed under s. 16 of the *Canada Elections Act* by resolution of the House of Commons to hold office during good behaviour.

Background to the Voter Identification Amendments

[17] Section 535 of the *Canada Elections Act* requires that the CEO submit a report to the House of Commons setting out any amendments that are considered desirable for the better administration of the *Act*. The CEO filed a report in September of 2005 after the 2004 election but, because of an intervening general election in 2006, the House of Commons Standing Committee on Procedure and House Affairs did not consider it until the early fall of 2006. It was during the course of the hearings of the Committee that members raised the issue of voter fraud. In its tabled report, entitled " Improving the Integrity of the Electoral Process: Recommendations for a Legislative Change" the Committee expressed its view that electoral fraud, and the means for reducing the potential for such fraud, were issues that had to be addressed to preserve the integrity of the electoral process. As noted by the trial judge, the Committee wrote at pp. 25 – 27 of its report:

> Many Canadians have expressed concern about the potential for fraud and misrepresentation in voting. Members of the Committee share this concern. While we have no means of knowing how widespread this problem is, the fact that it exists undermines the integrity of the electoral process. ...
>
> At present, there is no requirement that voters show any identification before being able to vote, so long as their names are on the list. In our society, most important activities require that an individual be able to furnish some form of proper identification, often with a photograph. In the case of voting, we do not believe that it would be unreasonable to impose a similar requirement. Moreover, it would bring home to voters the seriousness and public importance of what they are about to do: exercise a valued and fundamental democratic right.
>
> ...
>
> Traditionally, Canada has tried to make voting as easy as possible, but if confidence in the system is undermined, it becomes necessary to make changes. Obviously, it is not our intention to impose any measures that would discourage voting, nor do we want to make voting more difficult than necessary. The credibility and legitimacy of the system, however, require that procedures be adopted to ensure that only those persons who are entitled to vote do so, and that they are who they say they are. This is essential to preserve the integrity in the electoral system.
>
> The Committee's concerns about adequate proof of identification and residency, and proof of a person's eligibility to vote were shared by the witnesses who appeared before the Committee and who made written submissions. All of the parties currently represented in the House of Commons support a more effective method of ensuring voter identification,

> including photo identification, with alternatives available for persons who are unable to furnish the required identification. The Committee wishes to make it clear that voter information cards should not entitle a person to cast a ballot. This was never the intent of these cards, although, in practice, they appear to often be used for this purpose. Given the problems with how they are delivered or disposed of, this must be clarified. Members of the Committee are also disturbed that voters seem to be able to use magazine subscription labels and utility bills to establish their identity. Although such documents may be useful in establishing one's address, they are no substitute for adequate identification.

[18] In addition to the concerns raised about the way in which voters had been permitted to identify themselves and their place of residence, the Committee also expressed unease about the high number of election day registrations that had taken place in the past election and noted that the CEO had agreed to conduct an audit in the riding of Trinity-Spadina in Toronto where approximately 10,000 voters had registered on polling day.

[19] The Government tabled its response to the report in October of 2006: Government of Canada, *Government Response to the Thirteenth Report of the Standing Committee on Procedure and House Affairs: "Improving the Integrity of the Electoral Process*," 1st Session, 39th Parliament, 20 October 2006. It indicated that it would be introducing a bill which would implement most of the Committee's recommendations. It referred to some of the issues surrounding potential voter fraud in this way:

> **Measures to reduce the potential for fraud or error that could result in voting by individuals not entitled to vote**
>
> The bill will implement a number of Committee recommendations that will assist in reducing the potential for fraud or error that could impair the integrity of the voting system by allowing voting by individuals who are not entitled to vote. The Committee heard evidence from political parties and Committee members of instances in which non-citizens have voted. Concerns were also raised about voter information cards that are sent by Elections Canada being left in bundles in apartment buildings, leaving open the opportunity for individuals seeking to defraud the system to use these cards as evidence of their entitlement to vote.
>
> The nature of our voting system makes it difficult to conclusively determine how widespread voter fraud may be. However, each instance that comes to light affects public confidence in the integrity of our electoral process and even a small degree of fraud can affect the results of a close election. In addition, some individuals may vote out of a mistaken belief that they are

> eligible to do so rather than due to any malicious intent. The proposed legislative reforms will go a significant way in preventing these opportunities from arising[.]

[20] Bill C-31, containing the voter identification provisions, was passed and received Royal Assent on June 22, 2007. A further bill was enacted to remedy an overlooked issue with respect to rural and northern areas that have areas in which there are no assigned residential addresses or mail delivery. That bill, Bill C-18, received Royal Assent on December 14, 2007.

Voter Identification Requirements Relevant to this Appeal

[21] As noted earlier, prior to the 2007 amendments, an elector did not have to show personal identification to vote; he or she needed only to state his or her name and address to the poll clerk at his or her polling station, who would confirm this information on the list of electors and issue a ballot. If poll staff had any doubts as to the elector's identity, they could require the elector to swear an oath.

[22] The amended *Act* now requires an elector to prove his or her identity and residence by prescribed means before he or she can cast a ballot in a federal election.

[23] Section 143 now provides:

> 143.(1) Each elector, on arriving at the polling station, shall give his or her name and address to the deputy returning officer and the poll clerk, and, on request, to a candidate or his or her representative.
>
> (2) If the poll clerk determines that the elector's name and address appear on the list of electors or that the elector is allowed to vote under section 146, 147, 148 or 149, then, subject to subsection (3), the elector shall provide to the deputy returning officer and the poll clerk the following proof of his or her identity and residence:
>
> > (*a*) <u>one piece of identification issued by a Canadian government, whether federal, provincial or local, or an agency of that government, that contains a photograph of the elector and his or her name and address; or</u>
> >
> > (*b*) <u>two pieces of identification authorized by the Chief Electoral Officer each of which establish the elector's name and at least one of which establishes the elector's address.</u>

> (2.1) For greater certainty, the Chief Electoral Officer may authorize as a piece of identification for the purposes of paragraph (2)(*b*) any document, regardless of who issued it.
>
> (2.2) For the purposes of paragraph (2)(*b*), a document issued by the Government of Canada that certifies that a person is registered as an Indian under the *Indian Act* constitutes an authorized piece of identification.
>
> (3) An elector may instead prove his or her identity and residence by taking the prescribed oath if he or she is accompanied by an elector whose name appears on the list of electors for the same polling division and who
>
> > (*a*) provides to the deputy returning officer and the poll clerk the piece or pieces of identification referred to in paragraph (2)(*a*) or (*b*), respectively; and
> >
> > (*b*) vouches for him or her on oath in the prescribed form.
>
> (3.1) If the address contained in the piece or pieces of identification provided under subsection (2) or paragraph (3)(a) does not prove the elector's residence but is consistent with information related to the elector that appears on the list of electors, the elector's residence is deemed to have been proven.[2]
>
> (3.2) Despite subsection (3.1), a deputy returning officer, poll clerk, candidate or candidate's representative who has reasonable doubts concerning the residence of an elector referred to in that subsection may request that the elector take the prescribed oath, in which case his or her residence is deemed to have been proven only if he or she takes that oath.
>
> (4) If the deputy returning officer is satisfied that an elector's identity and residence have been proven in accordance with subsection (2) or (3), the elector's name shall be crossed off the list and, subject to section 144, the elector shall be immediately allowed to vote.
>
> (5) No elector shall vouch for more than one elector at an election.
>
> (6) An elector who has been vouched for at an election may not vouch for another elector at that election.
>
> (7) The Chief Electoral Officer shall publish each year, and within three days after the issue of a writ, in a manner that he or she considers appropriate, a notice setting out the types of identification that are authorized for the purpose of paragraph (2)(*b*). The first annual notice shall be published no later than six months after the coming into force of this subsection.

[24] Accordingly, s. 143(2) of the *Act* requires that to vote at the polls in an election, an elector must show one piece of government-issued identification with a photo, name, and address (e.g., a driver's licence) or two pieces of identification, each of which establishes the elector's name and at least one of which establishes his or her address. If the address on the document proving identity does not contain

[2] This information includes an elector's Postal Code.

a residential address, the elector will have proved residence if the address is "consistent" with the information contained on the list of electors. Alternatively, under s. 143(3), an elector may prove his or her identity by both taking the prescribed oath and having another elector who lives in the same polling division vouch for him or her. An elector may vouch for only one elector; an elector who has been vouched for may not vouch for another elector. The same procedures apply both to an elector who is already on the list of electors and to an elector who seeks to register on polling day.

[25] Section 143(2)(b) of the *Act* requires the CEO to issue and amend a list of approved identification which the CEO must publish annually and within three days of an election writ being issued. The version in effect in April 2009 provided:

> **Identity Cards**
>
> Health Card
> Social Insurance Number Card
> Birth Certificate
> Driver's Licence
> Canadian Passport
> Certificate of Indian Status
> Certificate of Canadian Citizenship or Citizenship Card
> Credit/Debit Card with elector name
> Canadian Forces Identity Card
> Veterans Affairs Canada Health Card
> Employee Card issued by employer
> Old Age Security Identification Card
> Public Transportation Card
> Student Identification Card
> Library Card
> Liquor Identification Card
> Canadian Blood Services/Héma-Québec Card
> Hospital Card
> Fishing Licence
> Wildlife Identification Card

Hunting Licence

Firearm Acquisition Card/Firearm Possession Card

Outdoors Card and Licences

Provincial/Territorial Identification Card

Local Community Service Centre Card (CLSC)

Original Documents (containing name and address)

Credit Card Statement

Bank Statement

Utility Bill (residential telephone, cable television, public utilities commission, hydro, gas or water)

Attestation of Residence issued by the responsible authority of an Indian Band or reserve

Local Property Tax Assessment

School, College or University Report Card or Transcript

Residential Lease, Residential Mortgage Statement or Agreement

Canada Child Tax Benefit Statement

Income Tax Assessment Notice

Insurance Policy

Government Cheque or Government Cheque Stub with elector name

Statement of Employment Insurance Benefits Paid (T4E)

Canada Pension Plan Statement of Contributions/Québec Pension Plan Statement of Participation

Statement of Old Age Security (T4A) or Statement of Canada Pension Plan Benefits (T4AP)

Statement of Benefits from provincial workplace safety or insurance board

Statement of Direct Deposit for provincial works or provincial disability support program

Vehicle Ownership

Vehicle Insurance

<u>Attestation of Residence issued by the responsible authorities (shelters, soup kitchens, student/senior residences, long-term care facilities</u>)

Letter from public curator.

[Emphasis added.]

[26] As it stands, the CEO's approved list of identification permits homeless and other vulnerable persons who possess no government-issued identification or other

paper linking them to a place of residence, to prove their identity and place of ordinary residence through the use of attestations. An official from a shelter, for example, can issue a letter of attestation stating that an individual uses the facility as a residence. Poll staff then check the signature on this letter of attestation against a list of approved signatures.

[27] In practice, the CEO publishes the list in a permanent fashion on-line, and makes changes to that list as needed from time to time.

The Appellants' Experience in the 2008 General Election

[28] Rose Henry voted in the 2008 general election. She is a member of the Snuneymuxw First Nation and is an anti-poverty activist who has at times been homeless. In early 2007, she lived at a residential address in Victoria. She was homeless for much of 2007 and 2008. In late 2008, she returned to the residential address. When she attended her polling station to vote she presented her driver's licence and was able to vote. She deposed it was "pure luck" she could vote in 2008 because she had happened to return to the residential address before the election. In discovery, she testified that she also had other sufficient documents with her to vote, and that had it been required, other electors with her could have vouched for her.

[29] Clyde Wright voted in the 2008 general election. He is a member of the Gitanmaax Band of the Gitxsan First Nation. He lives in the Downtown Eastside of Vancouver and has frequently been homeless. It is hard for him to obtain identification; when he does obtain it, it is often stolen. He proved his identity in the 2008 election by a letter of attestation from the Pivot Legal Society and a community services centre card. However, he fears he will not be able to vote in future elections because he lacks a "residential address".

[30] Helen Eddlestone did not vote in the 2008 general election. She was 86 years old and visually impaired, but she was mobile with assistance of a cane and lived on her own with some help from her daughter. In the early morning of the 2008

general election, she brought her voter information card with her to the polling station, where staff informed her she needed to show identification. The identification she had with her did not comply with the *Act*. She suggested the polling staff ask if anyone present could vouch for her, as she could not see who was in the polling station. The staff did not do this. One staff member offered to make telephone enquiries. Ms. Eddlestone waited but the staff member did not return. She left the polling station after an hour without having voted. She did in fact have sufficient identification in her home to vote, but she was unable to see these documents. She also did not call her daughter for help or return to vote later in the day because her cat had a veterinary appointment and Ms. Eddlestone was too tired to walk back to the polling station.

[31] The appellants filed other affidavit evidence that many homeless people in Vancouver are unsheltered and that theft of identification amongst the homeless is common. Canada filed material regarding the existence of various organizations that help homeless, vulnerable and low income individuals obtain identification.

[32] At trial the Attorney General of Canada ("Canada," or "the AGC") conceded the appellants had standing to challenge the legislation in question. The AGC took the position, at trial and in this court, that the appellants had not proved causation in this case, that is, that the voter identification requirements caused, or would cause, a failure to vote. Given that I would dismiss the appeal on the grounds put forward by the appellants, I have found it unnecessary to address the causation issue in these reasons.

Reasons for Judgment

The Section 3 Charter Breach

[33] The trial judge found that s. 148.1(1), which denies a ballot to those electors who are unable to prove their identities on election day, creates a new condition precedent to voting that did not exist previously. Justice Smith found that this constituted a facial breach of s. 3 of the *Charter*. Referring to the decision of this

Court in *Hoogbruin v. British Columbia (Attorney General)* (1985), 24 D.L.R. (4th) 718, 70 B.C.L.R. 1 (B.C.C.A.) she said:

> [190] Section 148.1(1) denies a ballot to a registered elector who is unable, on election day, to prove his or her identity and residence to the satisfaction of Elections Canada officials, pursuant to the *Act*. On its face, it limits access to the right to vote to those who are able to satisfy the identification requirements, and its evident purpose is to create that limit. The question is whether this provision is inconsistent with the guarantee of electoral rights under s. 3 of the *Charter*.
>
> [191] Prior to the enactment of s. 148.1(1) of the *Act*, any citizen on the Register of Electors who appeared at the appropriate polling station and identified herself or himself was able to vote. Since the enactment of s. 148.1(1), only those registered electors who provide the required documentary identification or a person to vouch for them are able to vote; other registered electors are disenfranchised. The purpose of the legislation is to create a new condition precedent to voting. In *Hoogbruin*, the condition precedent of personal attendance at the polling station was held to be a limitation on the right to vote that contravened s. 3 of the *Charter*. Similarly, in this case, the condition precedent that registered electors must provide identification is inconsistent with the s. 3 *Charter* guarantee.

[34] The trial judge went on to articulate her conclusions in the language of the most recent expression by the Supreme Court of Canada as to the purpose of s. 3 found in *Figueroa v. Canada (Attorney General)*, 2003 SCC 37, [2003] 1 S.C.R. 912 [*Figueroa*]. She said:

> [192] Paraphrasing the words of Iacobucci J. in *Figueroa* at para. 36, if the legislation interferes with the capacity of each citizen to play a meaningful role in the electoral process, it is inconsistent with s. 3, and any benefits of the legislation (in furtherance of countervailing collective interests) must be considered under s. 1. Section 148.1(1) does interfere with the entitlement to cast a vote for those citizens who are unable to produce the required identification and thus interferes with their capacity to play a meaningful role in the electoral process.

[35] The trial judge went on to find that the impugned provisions also offend s. 3 in their effects. She found that the plaintiffs established there is more than a remote or theoretical possibility that the provisions in issue could have the effect of impeding their electoral rights. Ms. Henry and Mr. Wright's evidence shows a reasonably-founded belief they may not be able to vote in the future; Ms. Eddlestone's ability to vote was impeded by the new requirements, even if they were not the sole cause of

her failure to vote. Justice Smith referred to the evidence of Ms. Graves, a City of Vancouver employee who works with homeless people, that many homeless people are unsheltered and have no documentation. In summary, the existence of economically or physically disadvantaged people and voters in rural areas is not theoretical. The provisions will increase cost and inconvenience to some of society's most vulnerable citizens. A possible consequence is that some people will be unable to cast ballots. In the words of the trial judge:

> [209] I find that the evidence shows that the identification requirements imposed by the *Act* will have the effect of increasing the burden on citizens – particularly economically disadvantaged and homeless citizens, citizens who live in rural or remote communities, and citizens who are disabled – in exercising their right to vote in elections for Members of Parliament. I find that a possible consequence is that some eligible citizens (though likely few in number, given the extensive measures Elections Canada has taken to facilitate voting) may be unable to cast a vote in future elections.
>
> [210] In my view, the plaintiffs have established that the impugned provisions, in their effect, interfere with the right of each citizen to play a meaningful role in the electoral process.

[36] Justice Smith then turned to the question whether the impugned provisions were justified under s. 1 of the *Charter*, applying the test from *R. v. Oakes*, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200 [*Oakes*].

Reasonable Limits under Section 1

Context and Deference

[37] Before applying the *Oakes* test, Justice Smith discussed the contextual analysis that determines the level of deference owed to Parliament.

[38] The trial judge examined the case law where different levels of deference were paid to the legislature. She concluded that while areas such as electoral finance and access to debates may attract more deference to Parliament's expertise, an individual's right to place a ballot in a box is not such an area. That said, because the impugned provisions form part of a broader scheme that allows for numerous ways of establishing identity, she found that in this case "there must be a level of deference" (para. 255). She reasoned that although the nature of the right

weighs heavily on the side of stringent scrutiny of the legislation, some deference is owed because of the inability to measure voter fraud accurately and Parliament's construction of mechanisms that maximize opportunity for qualified electors to cast a ballot.

Pressing and Substantial Objective and Rational Connection

[39] The respondent, the Attorney General of Canada (in these reasons also referred to as "Canada" or "the AGC"), asserted two discrete but related objectives of the impugned legislation: a) protecting the integrity of the vote, and b) maintaining public confidence in the integrity of the electoral system. The AGC further particularized the objectives as:

1. To address the harm of fraud;

2. To address the potential for fraud;

3. To address the public perception of fraud and the potential for fraud;

4. To address mistakes and inaccuracies in the electoral system and the conduct of elections thereby ensuring that the electoral system and the conduct of elections is, and is perceived to be, fair, secure and effective; and,

5. To ensure that only eligible voters cast their votes.

[40] Justice Smith found the objectives of preventing voter fraud and maintaining confidence in the electoral system to be pressing and substantial. Citing the low standard for rational connection, she found the provisions were rationally connected. No party takes issue with these specific aspects of her *Oakes* analysis on appeal. In fact, the appellants conceded that the objectives of the impugned legislation were pressing and substantial, and almost all the provisions rationally connected to it. However, they did not agree that "requiring proof of residence" was connected, nor the vouching process. The trial judge dealt with these complaints in her minimal impairment analysis.

Minimal Impairment

[41] The appellants argued the legislation is not minimally impairing for three reasons: it requires electors to have an address; does not permit multiple or serial vouching; and only permits vouching for someone in the same polling district.

[42] The trial judge rejected the appellants' first argument. She accepted the AGC's position that the *Act* does not require a voter to have an address to vote. Through the vouching procedure, a voter without a civic or mailing address can be placed on the list of electors for the polling district in which they ordinarily reside. As noted earlier, the CEO's approved list of identification allows homeless people without a civic address to use a shelter, for example, as their ordinary residence for the purpose of voting.

[43] Carrying on with her analysis, the trial judge observed that laws of general application are by necessity not tailored to individuals; the courts must analyze the provisions in a societal context. She concluded that the question is not whether a more advantageous arrangement for a particular claimant could be devised. Justice Smith found that Parliament's objectives would not be met by looser vouching procedures or the ability to swear a statutory declaration without a voucher. In both cases, the possibility of personation is higher. If someone could swear an oath without any other evidence of their identity or residence, then he or she would leave behind "a piece of paper with a signature [that] would be meaningless" (para. 366). A serial voucher, for example, could vouch for many other people without any sort of paper trail.

[44] The trial judge concluded that there were no alternative, less drastic measures to achieve Canada's objectives and the scheme fell within a range of reasonable alternatives. In the result, the trial judge found the impugned provisions passed the minimal impairment hurdle.

Proportionate Effects

[45] Justice Smith found the deleterious effects did not outweigh the salutary effects of the legislation. While she found the evidence showed no systemic electoral fraud in federal elections, she observed that the secret nature of voting makes it impossible to know the full extent of fraud. In addition, there have been actual cases of fraud prosecuted by Elections Canada. The *Act* makes erroneous or fraudulent voting significantly less likely; it also provides reassurance to "those who are concerned about electoral fraud, and thereby would tend to enhance confidence [in the system]" (para. 400).

[46] The trial judge did not confine her analysis of deleterious effects to the specific appellants, noting the court can take a societal perspective. She reviewed at length surveys conducted by Elections Canada about the new voting laws following certain by-elections. The surveys identified potential identification problems in a rural Saskatchewan riding with a high proportion of Aboriginal voters and problems with polling stations in seniors' residences. However, the surveys were such that it was not possible to determine conclusively that any individual voter did not vote solely because of the new identification requirements. In the end, Justice Smith found at para. 473 it would be:

> … a fair inference that, among millions of Canadians who were eligible to vote, for a small number, the voter identification requirements played some role in deterring them from voting − as they did for Ms. Eddlestone. These deterrent effects would likely be greater on the Canadians who are economically disadvantaged, are seniors, live in rural or remote areas, or have disabilities. It is also a fair inference that the requirements ... in very rare cases ... might altogether prevent some electors from voting.

[47] Ultimately, she found the deleterious effects did not outweigh the benefits. The salutary effects were "modest" but the new *Act* will lower the risk of fraud and increase confidence. The deleterious effects are "very modest, amounting to the most part to minor inconvenience for a minority of electors" (para. 480). Further, Parliament cannot be held to the standard of perfection.

[48] In summary, she found the provisions infringed s. 3 but were justified under s. 1.

The Grounds of Appeal

[49] The appellants set out four grounds of appeal. They submit that:

a) The learned trial judge erred in law or in principle by failing to find the s. 3 violation extended beyond interference with the right to play a meaningful role in the electoral process;

b) The learned trial judge erred in law or in principle by according excessive deference to Parliament;

c) The learned trial judge erred in law or in principle by misapplying the proportionality aspect of the *Oakes* test by finding that the impugned provisions are minimally impairing of the right to vote; and

d) The learned trial judge erred in law or in principle by finding that the salutary effects of the impugned provisions outweigh their deleterious effects.

The First Ground of Appeal

Positions of the Appellants and Respondent

[50] The appellants and the respondent both disagree with the way in which the trial judge characterized the breach. Thus the meaning and purpose of s. 3 of the *Charter* became a central issue for both parties on this appeal.

[51] The appellants took the position that the trial judge fell into error by reducing the content of s. 3 of the *Charter* to "the right to play a meaningful role in the electoral process." They accept that this is the *purpose* of the guarantee, but, echoing McLachlin C.J.B.C. (as she then was) in *Dixon v. British Columbia (AG)* (1989), 59 D.L.R. (4th) 247 at 256, 35 B.C.L.R. (2d) 273 (B.C.S.C.) they argue that s. 3 must contain both procedural and substantive rights if it is to achieve its purpose. They argue that procedural rights are granted by the express words of s. 3, i.e., the right of a citizen "to vote in an election of members of the House of Commons or of a legislative assembly" and "to be qualified for membership therein." A purposive analysis of these express words, they say, reveals that the purpose of the section is to grant to citizens the right to play a meaningful role in the electoral

process. Implicit rights follow from that purpose and so ancillary or corollary rights must be read into the section to fulfill its role beyond the simple act of voting and being qualified for membership in the House of Commons or legislative assembly. The ancillary rights include such things as the right to have one's vote count for the same as other valid votes.

[52] The appellants say that their case is centered on the procedural aspect of s. 3. They argue that any limitation on the right to physically place a ballot in the box constitutes a breach of s. 3 which must be justified under s. 1 of the *Charter*. They disagree with the importance the trial judge placed on the fact that Ms. Eddlestone did not vote in the election because of a number of reasons, one of which was the voter identification rule. They say that it was enough for Ms. Eddlestone to show that the identification rule was one of the causes. They say that Ms. Eddlestone was prevented from voting on account of the voter identification provisions, and that the breach of the right was therefore a denial (rather than a mere interference) with the franchise. The appellants say that requiring electors to produce acceptable identification before they vote is no doubt "an impediment to their right to play a meaningful role in the electoral process", but it is more than that. They argue that the gravamen of the breach in this case is the disenfranchisement of any qualified elector who cannot produce accepted identification. The appellants say that the trial judge's s. 1 analysis was premised on an incomplete understanding of the extent of the breach. Had the trial judge fully comprehended its breadth, she would not have found that the legislation was demonstrably justified under s. 1 of the *Charter*.

[53] The respondent defends the order dismissing the application on two bases. First, the AGC presses the argument that the trial judge ought to have dismissed the application on the footing that the appellants had not established a s. 3 breach. The AGC cites *R. v. Perka*, [1984] 2 S.C.R. 232 at 240, 13 D.L.R. (4th) 1, for the well-known proposition that a respondent is entitled to advance all arguments that sustain a trial judgment, even those that did not find favour in the trial court. Second, the respondent says that if the impugned legislation does breach s. 3, the trial judge was correct in finding that it is justified under s. 1 of the *Charter*.

[54] On the first point the AGC submits that the trial judge erred in this case by failing to critically examine what the right to vote entails. Once the nature and purpose of the right to vote are understood in the context of the Canadian electoral system, "it becomes clear", the AGC says, "that the identification requirements [of the impugned legislation] do not limit, or interfere with or deny the right. Rather, the identification requirements protect and enhance the right to vote." It is the position of the AGC that a review of the case law[3] reveals the complexity of s. 3. He argues that the right contains a number of core elements:

1. The right to have one's voted counted;

2. The right and expectation of citizens to have a fair electoral process so that the s. 3 right does not become a hollow and empty one;

3. The right to have one's vote count for the same as other valid votes cast in their electoral district – relative parity of voting power;

4. The right to be represented by a candidate with at least a plurality of votes in a district; and

5. Representation by population.

[55] The AGC submits that all of the core elements must be examined in determining whether s. 3 has been breached. He argues that the right to cast a ballot is only one aspect of the right to vote. The AGC asks rhetorically – what good is the right to put a ballot in the box if, for example, that ballot is not counted, or not counted equally with every other ballot in the box? The essential point made by the AGC is that the identification requirements of the impugned legislation are designed to enhance the right to vote by seeking to ensure that only qualified electors vote, that they only vote once, and that they vote only in the proper electoral district. Had

[3] *Dixon v. British Columbia*, [1989] B.C.J. No. 583 at p. 6-7; *Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995 at p. 45-46; *Reference Re: Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158 at paras. 50 and 55; and *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876 at para. 37.

the trial judge undertaken a proper analysis, the AGC submits, she would have concluded that the impugned sections do not breach the appellants' *Charter* rights.

Analysis

[56] In my view, the appellants have correctly identified how the jurisprudence from the Supreme Court of Canada has come to define the contents and operation of s. 3. I agree with the appellants that any interference with the right to put a ballot in the box must be justified under s. 1 of the *Charter*.

[57] To repeat, s. 3 of the *Charter* provides:

> 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 and to be qualified for membership therein.

On the face of it, the rights given under s. 3 of the *Charter* are restricted only by citizenship and connection to an electoral district. This follows from the wording of s. 3 of the *Charter* which provides that citizens have the right to vote "in an election of members of the House of Commons or of a legislative assembly".

[58] Early *Charter* jurisprudence explored the idea that s. 3 "presupposes certain attributes of the voter which are inherent but not expressed in s. 3." In *R. v. Badger* (1986), 51 C.R. (3d) 163 at p. 171, 30 D.L.R. (4th) 108, (Man. Q.B.), Justice Scollin opined that it is pedantic to classify such things as age and residence as "limits" to the right. In his view they are simply its "rational dimensions." This analysis is similar to the one made in the case at bar by the AGC. However, the analysis was not adopted in subsequent cases. This is made clear in *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876, 137 D.L.R. (4th) 142 [*Harvey*], where the scope of the specific words of s. 3 was at issue.

[59] In *Harvey* the Supreme Court of Canada examined legislation (s. 119(c) of the *Elections Act*, R.S.N.B. 1973, c. E-3) which provided that a member of the New Brunswick legislature would, upon conviction for an illegal or corrupt practice, be disqualified from running as a candidate for five years. The question was whether

the legislation violated s. 3 of the *Charter*. The positions of the parties were set out by La Forest J. at paras. 21 and 22:

> [21] … The appellant's position is straightforward. Section 3 of the *Charter*, he maintained, provides an unqualified right for every citizen of Canada to vote and to seek public office. In support of this position the appellant relied on the fact that the rights protected by s. 3 are "preferred" rights in that they are not subject to the notwithstanding clause found in s. 33 of the *Charter*. In short, he insists that any restriction on the rights contained in s. 3 must be justified under s. 1 of the *Charter*.
>
> [22] The competing viewpoint, urged on the Court both by the respondents and by the Attorney General of Canada, is that the rights guaranteed by s. 3 are not absolute but contain inherent limitations that need not be justified under s. 1 of the *Charter*. More specifically, they argue, when a contextual approach is applied to s. 3, and the specific language used in the section is taken into account, the validity and consistency of s. 119(c) become clear.

[60] La Forest, J. then turned to analyze the two positions:

> [27] This then becomes a central question: what is meant by the expression found in s. 3 of the *Charter* that "[e]very citizen of Canada has the right to vote in an election of members of … a legislative assembly and to be qualified for membership therein", and what is the purpose behind the right? The respondents argue that the right to effective representation is at the heart of the right to be qualified for membership in a legislative assembly. Since the disqualification provisions of s. 119 of the *Elections Act* exist to preserve the integrity of the electoral process, and thereby help to ensure effective representation, they are in accord with s. 3 of the *Charter*. Similarly, the Attorney General of Canada focuses first on the language of s. 3, arguing that the use of the word "qualified" indicates that inherent in the right to be a candidate are limitations that are necessary to ensure effective representation. He goes on to argue that regard must be had to the appropriate historical context underlying the right. In particular, he notes that there has been a continual evolution of candidate eligibility requirements and disqualifications throughout Canadian history; that disqualifications such as those found in s. 119 have their origin in the widespread election corruption that was prevalent in the early years of confederation; and that disqualifications for corrupt or illegal election practices are to be found in many foreign jurisdictions.

[61] La Forest J. stated his conclusions in this way:

> [28] While these arguments may initially appear persuasive, I agree with the appellant that the provisions of s. 119(c) are *prima facie* unconstitutional as violating his rights under s. 3 of the *Charter*. My reasons are twofold. First, there is the language of s. 3. Admittedly in the English version the words "right to be qualified" are somewhat ambiguous. The use of the word "qualified" suggests that certain criteria must be met before a citizen can run

for office. However, since there exists a right to be qualified, it would appear that qualification is automatic regardless of any criteria set out by statute. If it was Parliament's intent to confer on every citizen the right to be a candidate, clearer language should have been used. But we are not left in doubt. A more precise statement of the right appears in the equally authoritative French text, which uses the phrase "*Tout citoyen canadien … est éligible aux élections …*". The word "*éligible*"translates as "eligible" in English and is defined in *Le Nouveau Petit Robert* (1994), at p. 733, as one who has met the relevant conditions so that they can be chosen. This suggests that the English version of s. 3 should be read as "[e]very citizen … is qualified for membership therein". In short, while the English version is somewhat lacking in clarity, the French version is straightforward and indicates that the right to be a candidate and to sit as a member of Parliament or a legislative assembly should be read in a broad manner.

[29] Secondly, and in my view this is decisive, to accept the respondents' position would be to remove the balancing of interests from s. 1 and incorporate it in s. 3 of the *Charter*. In their oral submissions counsel for both the respondents and the Attorney General of Canada argued that any given qualification or limitation should first be weighed against the interests represented by s. 3 to determine if there was a violation of that section. Such an approach runs counter to the recent practice of this Court.

[30] In interpreting the right to vote under s. 3 this Court, and Canadian courts in general, have taken the approach that the justification for limitations on the right must be grounded in s. 1 of the *Charter*. As I have earlier noted, I do not believe the wording in the second part of s. 3 justifies taking a different approach to the right to stand for election and become a Member of Parliament or a legislative assembly. This is in accord with this Court's well established approach of reading *Charter* rights broadly and putting the burden of justifying limitations upon the state. In ***B. (R.) v. Children's Aid Society of Metropolitan Toronto***, [1995] 1 S.C.R. 315, at pp. 383-84, in the context of freedom of religion under s. 2(*a*) of the *Charter*, I emphasized the importance of carrying out any required balancing of rights under s. 1:

> This Court has consistently refrained from formulating internal limits to the scope of freedom of religion in cases where the constitutionality of a legislative scheme was raised; it rather opted to balance the competing rights under s. 1 of the *Charter*; see *R. v. Jones*, *supra*, and *R. v. Edwards Books and Art Ltd.*, *supra*. A similar approach was taken in the context of s. 2(*b*) of the *Charter*, freedom of expression. In *R. v. Keegstra*, *supra*, Dickson C.J., writing for the majority, stated that s. 1 was better suited than s. 2(*b*) to facilitate the necessary balance between state and individual interests …
>
> In my view, it appears sounder to leave to the state the burden of justifying the restrictions it has chosen. Any ambiguity or hesitation should be resolved in favour of individual rights. Not only is this consistent with the broad and liberal interpretation of rights favoured by this Court, but s. 1 is a much more flexible tool with which to balance competing rights than s. 2(a).

[62] In concluding that the words of the section granted an absolute right to both vote and stand for election, La Forest J. rejected what he saw as the contextual approach set out in the earlier case, *Reference Re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158, 81 D.L.R. (4th) 16 [*Saskatchewan Reference*]. He said:

> [23] In order to choose between these two fundamentally different viewpoints, the logical place to start is with this Court's previous treatment of s. 3 of the *Charter*. While the Court has not yet examined the right to be an elected member found in the second part of s. 3, it has on several occasions had the opportunity to consider the right to vote enshrined in the first part of the section. The fullest treatment of the right to vote appears in McLachlin J.'s majority reasons in *Reference Re Prov. Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158 ["*Saskatchewan Boundaries case*"]. At issue there was whether the purpose of the right was to guarantee equality of voting power or effective representation. Beginning at p. 179, McLachlin J. first considered the manner in which the content of a *Charter* right is to be determined. She identified the general principle, emerging from *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, as being that *Charter* rights should be interpreted in a broad and purposive manner having regard to the appropriate historical and social context. From this general principle she identified three particular considerations that were relevant to the interpretation of the right to vote: (1) that the *Charter* is part of the living tree that is the Canadian constitution and that as such, "the past plays a critical but non-exclusive role" (p. 180) in determining the scope of *Charter* rights; (2) that practical considerations should be borne in mind when undertaking constitutional interpretation; and (3) that the Court must be guided by the ideal of a "free and democratic society" as enunciated by Dickson C.J. in *R. v. Oakes*, [1986] 1 S.C.R. 103.
>
> [24] Applying these considerations to the first part of s. 3, McLachlin J. concluded that the right enshrined by the right to vote was the right to effective representation. She stated, at pp. 188-89:
>
> > In summary, I am satisfied that the precepts which govern the interpretation of *Charter* rights support the conclusion that the right to vote should be defined as guaranteeing the right to effective representation. The concept of absolute voter parity does not accord with the development of the right to vote in the Canadian context and does not permit of sufficient flexibility to meet the practical difficulties inherent in representative government in a country such as Canada. In the end, it is the broader concept of effective representation which best serves the interests of a free and democratic society.
>
> Based on this interpretation, McLachlin J. went on to find that the electoral boundaries in question did not violate s. 3 of the *Charter* since they could be justified on the grounds of effective representation and did not need to be justified under s. 1.
>
> [25] In contrast to this approach is that used by this Court and others in dealing with particular statutory disqualifications of voters. In *Sauvé*

> *v. Canada (Attorney General)*, [1993] 2 S.C.R. 438, the Court found that the voting disqualification for inmates found in the *Canada Elections Act*, R.S.C., 1985, c. E-2, violated s. 3 and could only be justified under s. 1 of the *Charter*. Similarly, the federal disqualifications of mentally incompetent persons and federally appointed judges, and a provincial disqualification of absentee citizens have all been found to be *prima facie* unconstitutional; see *Canadian Disability Rights Council v. Canada*, [1988] 3 F.C. 622 (T.D.); *Muldoon v. Canada*, [1988] 3 F.C. 628 (T.D.); and *Re Hoogbruin and Attorney-General of British Columbia* (1985), 24 D.L.R. (4th) 718 (B.C.C.A.).
>
> [26] Professor Peter Hogg in *Constitutional Law of Canada* (3rd ed. 1992 (loose-leaf)) would apply the same logic to disqualifications in respect of the candidacy right in the second part of s. 3. He states in vol. 2 at s. 42.2:
>
> > The qualifications of a member of the House of Commons or a legislative assembly are prescribed by statute in each jurisdiction, and various citizens are disqualified … All disqualifications of citizens are, of course, now contrary to the Charter, unless they can be justified under s. 1.
>
> In support of this position Professor Hogg cites the Nova Scotia Supreme Court Trial Division case of *MacLean v. Nova Scotia (Attorney General)* (1987), 76 N.S.R. (2d) 296. There Glube C.J.T.D. held that a provincial statute which retroactively imposed a five-year disqualification on running in a provincial election violated s. 3 of the *Charter*. She arrived at this result on what she saw as the clear wording of s. 3 (at p. 305):
>
> > On the plain meaning of the words in s. 3 of the *Charter*, I find that an attempt to put limits on membership qualification violates Mr. MacLean's right as a citizen to be qualified for membership in the House of Assembly of Nova Scotia. [Emphasis added.]

[63] I take from this that any legislation which has the effect of encumbering the explicit words of s. 3 breaches the right and must be justified under s. 1 of the *Charter.* However the AGC disagrees and says that the subsequent decision in *Figueroa* clarified the approach to take. The AGC submits that *Figueroa* has defined the full right in s. 3 as the right "to play a meaningful role in the electoral process." If this is the case, he argues, the right is multi-faceted and all of its elements ought to be considered when determining whether legislation constitutes a breach of s. 3. I do not read *Figueroa* in that way.

[64] The issue in *Figueroa* was whether federal legislation that restricted the right of candidates of smaller parties to list the party's name on the ballot and to issue tax

receipts contravened s. 3 of the *Charter*. In determining the content of s. 3 Iacobucci J., for the majority, said this at paras. 19 and 20:

> ... On its face, the scope of s. 3 is relatively narrow: it grants to each citizen no more than the bare right to vote and to run for office in the election of representatives of the federal and provincial legislative assemblies. But *Charter* analysis requires courts to look beyond the words of the section. In the words of McLachin C.J.B.C. (as she then was), "[m]ore is intended [in the right to vote] than the bare right to place a ballot in a box". [Citation omitted.]
>
> In order to determine the scope of s. 3, the Court must first ascertain its purpose.

[65] Iacobucci J. then looked to a number of earlier cases, including *Saskatchewan Reference.*

[66] The issue in *Saskatchewan Reference* was whether proposed changes to electoral boundaries that resulted in a variance in voter populations between rural and urban ridings violated s. 3 of the *Charter*. For the majority, McLachlin J. (as she then was) defined the issue in para. 46: "The question for resolution on this appeal can be summed up in one sentence: To what extent, if at all, does the right to vote enshrined in the *Charter* permit deviation from the democratic principle of "one person-one vote" rule?" In determining the answer to that question McLachlin J. concluded that the right permitted deviation on the grounds of practical impossibility or the provision of more effective representation. First, she noted absolute parity is impossible. As she put it, voters die and voters move making it impossible to ever guarantee the same number of voters in each district. Secondly, as McLachin J. reasoned at para. 54:

> ... [S]uch relative parity as may be possible of achievement may prove undesirable because it has the effect of distracting from the primary goal of effective representation. Factors like geography, community history, community interests and minority representation may need to be taken into account to ensure that our legislative assemblies effectively represent diversity of our social mosaic. These are but examples of considerations which may justify departure from absolute voter parity in the pursuit of more effective representation: the list is not closed.

[67] In my view, McLachlin J. was here deciding whether an absolute right to voter parity was guaranteed by s. 3. She was defining the contents (as opposed to

purpose) of the right itself. She concluded that s. 3, for the reasons she gave, did not guarantee absolute voter parity.

[68] McLachlin J. was not, as some have suggested, balancing the rights of the urban voters against those of the rural voters in assessing a possible breach. In *Figueroa* the minority opinion, written by LeBel J., reached the conclusion that *Saskatchewan Reference* decided "that some diminution of one aspect of effective representation (parity) can ultimately result in the provision of more effective representation" (at para. 117). The majority opinion, expressed by Iacobucci J., specifically disagreed with that interpretation. Iacobucci J. read the case as ultimately deciding that the considerations afforded to rural voters did not breach the s. 3 rights of urban voters. He said at para. 23:

> The issue in that case was not whether the departure from absolute voter parity could be justified by virtue of the benefits that it provided to rural voters, but whether the departure from absolute voter parity was consistent with s. 3, not because the departure provided for the more effective representation of rural voters, but rather, because it did not interfere with the right of urban voters to an effective representation in the legislative assembly. [Emphasis added.]

And later at para. 33:

> ... As discussed throughout, the purpose of s. 3 is to protect the right of each citizen to play a meaningful role in the electoral process. Where the impugned legislation is inconsistent with the express language of s. 3, it is unnecessary to consider the broader social or political context in order to determine whether the legislation has this effect. But where the legislation affects the conditions in which citizens exercise those rights it may not be so obvious whether the legislation has this effect. Consequently it may be necessary to consider a broad range of factors such as social or physical geography, in order to determine whether the legislation infringes the right of each citizen to play a meaningful role in the electoral process subject to countervailing collective interests. Those interests fall to be considered under s. 1. [Emphasis added.]

[69] Three things follow from these cases. First, s. 3 contains a bundle of rights derived from its explicit words and from its purpose of guaranteeing the rights of citizens to play a meaningful role in the electoral process. The explicit rights are procedural and spelled out in the section. The implicit rights are substantive and may require resort to a broad range of factors to determine. To paraphrase

Iacobucci J. in *Figueroa*, the implicit rights are the conditions under which the right to play a meaningful role in the electoral process are expressed. Infringement of any of the rights constitutes a breach of s. 3.

[70] It follows from all of this that the s. 3 right to cast a ballot for a candidate in a federal or provincial election is limited only by the specific wording of the section, that is, by citizenship and residence. Any other impediment to the ability of an elector to cast a vote constitutes a facial breach of the section. Where legislation, such as the legislation in question in this case, has the double effect of breaching the rights of some citizens while enhancing the rights of others, the duty of the court is to first isolate the breach and then to determine whether it is justifiable under s. 1. If the impugned legislation also has the effect of enhancing an aspect of the right, it is a factor to take into consideration in the s. 1 analysis.

Conclusion

[71] I have rejected the respondent's position as to the correct test to apply in determining a breach of s. 3 of the *Charter*. I accept the appellant's articulation of the test to apply. I agree with the appellants that the impugned legislation is a facial breach of s. 3. That said, I am of the view that the appellants have failed to demonstrate that the trial judge fell into error in her application of the test.

[72] The legislation in issue in this case refuses a vote to electors who cannot produce proof of identification that meets the standards set out in the *Act*. As such, it is a violation of the clear words of s. 3, the guarantee of the right to cast a ballot in an election for members of the House of Commons. The breach need not be characterized as anything beyond that. I agree with the appellants that it was unnecessary for the trial judge to cast the breach in terms of the purpose of the section. But in doing so the trial judge did nothing more than state the obvious. A citizen plays a meaningful role in the electoral process when he or she casts a vote and any interference with that right is a breach of s. 3. This is what the trial judge was saying when she said:

> [192] Paraphrasing the words of Iacobucci J. in *Figueroa* at para. 36, if the legislation interferes with the capacity of each citizen to play a meaningful role in the electoral process, it is inconsistent with s. 3, and any benefits of the legislation (in furtherance of countervailing collective interests) must be considered under s. 1. Section 148.1(1) does interfere with the entitlement to cast a vote for those citizens who are unable to produce the required identification and thus interferes with their capacity to play a meaningful role in the electoral process. [Emphasis added.]

[73] The appellants' first ground of appeal also includes the argument that the trial judge did not appreciate the extent of the breach, that is, that she saw it as an impediment to vote rather than a disenfranchisement. I do not agree. In my view the trial judge clearly viewed the breach as a disenfranchisement of voters who could not present the required identification when they came to vote. To repeat her words again:

> [191] Prior to the enactment of s. 148.1(1) of the *Act*, any citizen on the Register of Electors who appeared at the appropriate polling station and identified herself or himself was able to vote. Since the enactment of s. 148.1(1), only those registered electors who provide the required documentary identification or a person to vouch for them are able to vote; other registered electors are disenfranchised. The purpose of the legislation is to create a new condition precedent to voting. In *Hoogbruin*, the condition precedent of personal attendance at the polling station was held to be a limitation on the right to vote that contravened s. 3 of the *Charter*. Similarly, in this case, the condition precedent that registered electors must provide identification is inconsistent with the s. 3 *Charter* guarantee. [Emphasis added.]

[74] In my view, the appellants have not established that the trial judge erred in her understanding or application of s. 3 of the *Charter*. I would not accede to the first ground of appeal.

The Second Ground of Appeal

[75] If legislation which is found by a court to breach the *Charter* is to stand, the state must justify it pursuant to s. 1, which provides:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[76] The appellants take issue with the way in which the trial judge stated and applied the test that the government was obliged to meet in justifying the breach under s. 1. They express their second ground as this:

> b) The learned trial judge erred in law or in principle by according excessive deference to Parliament.

[77] As Chief Justice McLachlin stated in *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519 [*Sauvé No. 2*]:

> [7] To justify the infringement of a *Charter* right, the government must show that the infringement achieves a constitutionally valid purpose or objective, and that the chosen means are reasonable and demonstrably justified: *R. v. Oakes*, [1986] 1 S.C.R. 103. This two-part inquiry − the legitimacy of the objective [whether the objective is pressing and substantial] and the proportionality of the means − ensures that a reviewing court examine rigorously all aspects of justification. Throughout the justification process, the government bears the burden of proving a valid objective and showing that the rights violation is warranted − that is, that it is rationally connected, causes minimal impairment, and is proportionate to the benefit achieved [whether its salutary benefits outweigh its deleterious effects].

[78] The only serious issues before the trial court in the justification stage of the case at bar were whether the AGC had established that the legislation did not minimally impair the *Charter* right, and had established that the salutary effects of the legislation outweighed its deleterious effects. Before embarking on these two parts of the *Oakes* analysis Justice Smith discussed the question of what deference, if any, the court ought to pay to Parliament when examining legislation that interferes with the right to vote.

[79] Deference is the attitude which might be assumed by the court in assessing whether legislation that is found to constitute a breach of the *Charter* can be justified under s. 1. The role of deference when s. 3 of the *Charter* is in issue was discussed in *Sauvé No 2.* That case dealt with a section of the *Canada Elections Act* that denied the right to vote to prisoners serving a sentence in a penitentiary. The Chief Justice, speaking for the majority, held that the right to vote holds a special place in our democracy. She concluded that any attempt by the government to interfere with it must be closely scrutinized.

> [9] ...The right to vote is fundamental to our democracy and the rule of law and cannot be lightly set aside. Limits on it require not deference, but careful examination. This is not a matter of substituting the Court's philosophical preference for that of the legislature, but of ensuring that the legislature's proffered justification is supported by logic and common sense.
>
> …
>
> [13] The core democratic rights of Canadians do not fall within a "range of acceptable alternatives" among which Parliament may pick and choose at its discretion. Deference may be appropriate on a decision involving competing social and political policies. It is not appropriate, however, on a decision to limit fundamental rights. This case is not merely a competition between competing social philosophies. It represents a conflict between the right of citizens to vote − one of the most fundamental rights guaranteed by the *Charter* − and Parliament's denial of that right. Public debate on an issue does not transform it into a matter of "social philosophy", shielding it from full judicial scrutiny. It is for the courts, unaffected by the shifting winds of public opinion and electoral interests, to safeguard the right to vote guaranteed by s. 3 of the *Charter*.
>
> [14] *Charter* rights are not a matter of privilege or merit, but a function of membership in the Canadian polity that cannot lightly be cast aside. This is manifestly true of the right to vote, the cornerstone of democracy, exempt from the incursion permitted on other rights through s. 33 override. Thus, courts considering denials of voting rights have applied a stringent justification standard: *Sauvé v. Canada (Attorney General)* (1992), 7 O.R. (3d) 481 (C.A.) ("*Sauvé No. 1*"), and *Belczowski v. Canada*, [1992] 2 F.C. 440 (C.A.).
>
> [15] The *Charter* charges courts with upholding and maintaining an inclusive, participatory democratic framework within which citizens can explore and pursue different conceptions of the good. While a posture of judicial deference to legislative decisions about social policy may be appropriate in some cases, the legislation at issue does not fall into this category. To the contrary, it is precisely when legislative choices threaten to undermine the foundations of the participatory democracy guaranteed by the *Charter* that courts must be vigilant in fulfilling their constitutional duty to protect the integrity of this system. [Emphasis added.]

[80] At trial and in this Court, the AGC took the position that the reasoning in *Sauvé No. 2* did not apply to the case at bar. *Sauvé No. 2*, he said, dealt with a deliberate disenfranchisement of prisoners designed to enhance respect for the law and as a part of punishment. It is almost opposite to the situation in this case where the purpose of the legislation is not symbolic, but designed to enhance the integrity of the vote. The AGC encouraged the trial judge to apply a less stringent test. The appellants, stressing that the essence of the breach was disenfranchisement, urged

the trial judge to decline to pay deference to Parliament at all stages of the justification analysis.

[81] An examination of the reasons for judgment reveals that the trial judge carefully considered *Sauvé No. 2* and other cases which dealt with voter disenfranchisement. She also looked at cases which dealt with election laws, such as *R. v. Bryan*, 2007 SCC 12, [2007] 1 S.C.R. 527 (legislation prohibiting broadcasting election results before polling stations have closed) and *Harper v. Canada (Attorney General),* 2004 SCC 827, [2004] 1 S.C.R. 827 (legislation restricting third party election advertising), where the courts paid deference to Parliament in applying the s. 1 test. The trial judge recognized that the last two cases were decided on the basis of s. 2(b) of the *Charter*, freedom of expression, but nonetheless concluded:

> [249] I do not believe that what the Supreme Court said in *Sauvé No. 2* has been displaced by a general requirement to defer to Parliament in all challenges to electoral laws. Assessing the constitutionality of schemes for regulating electoral broadcasting, funding of political parties, access to all-party debates, and the like entails reviewing multiple competing considerations in an area where Parliament might bring to bear superior expertise and capacity to make nuanced judgments. On the other hand, the constitutionality of provisions limiting the individual exercise of the franchise – particularly qualification and disqualification from voting – is not such an area.
>
> [250] The legislation at issue in this case includes a provision explicitly limiting the exercise of the franchise (s. 148.1(1)), but mainly consists in a detailed scheme allowing for a number of different ways to establish identity and residence when voting. Thus, this challenge to the voter identification requirements bears characteristics of both the issue in *Sauvé No. 2* and the issue in *Harper*. It is comparable to *Sauvé No. 2* in that one provision in the legislation denies the ballot to persons who fail to provide the required identification. It is comparable to *Harper* in that the other impugned provisions set up a detailed voter identification scheme involving nuances and the balancing of competing logistical and administrative considerations.
>
> [251] Bearing those general considerations in mind, I turn to an assessment of the contextual factors specified in *Thomson Newspapers*: (a) the nature of the harm and the inability to measure it; (b) the vulnerability of the group protected; (c) subjective fears and apprehension of harm; and (d) the nature of the infringed activity.

[82] Turning to the arguments of the parties, Justice Smith said:

> [252] In support of deference, Canada's position regarding the first factor [in *Thomson Newspapers*] is that the harm in this case – voter fraud and error, actual, potential, and perceived – is by its nature, and due to the secrecy of the vote, very difficult to measure. Turning to the second factor, Mr. Wruck [counsel for the AGC] says that the group protected is legitimate voters, who are vulnerable to feeling that their democratic voice is not being respected and who must rely on government action to protect the integrity of the vote. He says with respect to the third factor that, as in *Bryan*, public confidence in the electoral process is an objective of the impugned provisions and that "the subjective perceptions of Canadian voters that the electoral system is fair is a vital element in the value of the system" (at para. 25). Finally, relating to the fourth factor, he characterizes the nature of the "infringed activity" as the ability of a voter to cast a ballot without any verification of the voter's identity and residence. He argues that Parliament requires some deference to its arbitration between the democratic values of accessibility and integrity in designing an electoral process that reinforces the effective representation of all electors by making every legitimate vote meaningful.
>
> [253] The plaintiffs emphasize the fourth factor and the fact that it is a right at the core of the s. 3 rights – the very ability to cast a ballot in an election – that is infringed.
>
> [254] I agree that the first and third factors indicate that some deference is warranted. I particularly note that it may be difficult to prove that the public's faith in the integrity of the electoral system will be enhanced by the voter identification provisions, or to prove that the voter identification requirements are a superior deterrent to fraudulent or mistaken voting. The fourth factor, the nature of the infringed activity (i.e., the exercise of the franchise), weighs heavily on the other side of the scale.
>
> [255] The foundational importance of the right to vote has already been discussed in these Reasons. The Court must exercise great care in determining whether the state has justified denying the right to vote to those who would otherwise be entitled to cast a ballot. <u>However, when assessing whether Parliament has devised mechanisms for voting that maximize the opportunity for all qualified electors to cast a ballot while maintaining the integrity of the system, there must be a level of deference</u>. [Emphasis added.]

[83] To sum up, the trial judge held that a level of deference should be accorded to Parliament in determining the apprehension and nature of the harm it sought to address through the impugned legislation. She observed that it is difficult to prove the voter identification requirements were a superior deterrent to fraudulent voting or that the measures taken would enhance the electoral system. Finally, she found that a level of deference was owed in assessing whether the mechanisms chosen by Parliament maximized the opportunity for all qualified electors to cast a ballot while

maintaining the integrity of the system. In so doing, the trial judge attempted to forge a s. 1 analysis, which might be more appropriate to the case before her, which she considered to be more nuanced than *Sauvé No. 2*.

[84] That said, I am of the view that it was not open to the trial judge to formulate a new test which permits Parliament "some level of deference." This conclusion seems unavoidable given what was said by the Supreme Court of Canada in *Figueroa*. As discussed earlier, *Figueroa* was a case, not about the core right to put a ballot in the box, but one that fell under the expanded definition of the right to vote. There, the majority clearly endorsed the stringent approach. Iacobucci J. said this at para. 60:

> Before beginning [the s. 1] analysis, I note this Court's prior conclusion that limits on s. 3 require not deference, but careful examination: *Sauvé [No.2]*, *supra* at para. 9. As the Court observed in that case, s. 3 is one of the *Charter* rights that cannot be overridden by the invocation of s. 33 of the *Charter*. This highlights the extent to which s. 3 is fundamental to our system of democracy and indicates that great care must be exercised in determining whether or not the government has justified a violation of s. 3. [Emphasis added.]

[85] Paragraph 9 of *Sauvé No. 2* is reproduced above at para. [72]. It clearly rejects deference in favour of "careful examination", and "logic and common sense".

[86] The appellants submit that the trial judge erred in determining that some deference ought to be paid to Parliament's choices and that this error along with the error in categorizing the breach "echo throughout the entirety of the trial judge's s. 1 reasoning." That said, they point only to one place in the reasons for judgment where the trial judge refers to a deferential test. It is found in the section of her reasons dealing with minimal impairment, to which I will now turn.

The Third Ground of Appeal

[87] The appellants state their third ground of appeal as this:

> c) The learned trial judge erred in law or in principle by misapplying the proportionality aspect of the *Oakes* test by finding that the impugned provisions are minimally impairing of the right to vote.

[88] The appellants submitted that the voter identification requirements were not minimally impairing in that they did not include a "failsafe" provision allowing 1) an elector without sufficient documentation to swear an oath and vote, or 2) serial or multiple vouching by electors outside the polling district.

[89] The appellants submit that the trial judge erred when she accepted that the tests to apply were set out in *RJR-MacDonald Inc. v. Canada (Attorney General),* [1995] 3 S.C.R. 199, 127 D.L.R. (4th) 1, and *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567. The appellants allege that it was an error to rely on statements of law on minimal impairment from cases in the freedom of religion (*Hutterian Brethren*) or freedom of expression contexts (*RJR-MacDonald*). They say the trial judge failed to consider s. 3 case law in her minimal impairment analysis.

[90] The trial judge set out the tests at paras. 319 and 320:

> [319] In *RJR-MacDonald*, the minimal impairment analysis was explained in these terms by McLachlin J. (as she then was), at para. 160 (and quoted in *Hutterian Brethren* at para. 54):
>
> > As the second step in the proportionality analysis, the government must show that the measures at issue impair the right of free expression as little as reasonably possible in order to achieve the legislative objective. The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. <u>If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement</u>. ... On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail. [Citations omitted; emphasis added.]
>
> [320] Chief Justice McLachlin discussed minimal impairment further in *Hutterian Brethren*. After quoting the above passage from *RJR-MacDonald*, she continued, at paras. 54-55:
>
> > ... In this manner, the legislative goal, which has been found to be pressing and substantial, grounds the minimum impairment analysis. As Aharon Barak, former President of the Supreme Court of Israel, puts it, "the rational connection test and the least harmful measure [minimum impairment] test are

> essentially determined against the background of the proper objective, and are derived from the need to realize it": "Proportional Effect: The Israeli Experience" (2007), 57*U.T.L.J.* 369, at p. 374. President Barak describes this as the "internal limitation" in the minimum impairment test, which "prevents it [standing alone] from granting protection to human rights" (p. 373). The internal limitation arises from the fact that the minimum impairment test requires only that the government choose the least drastic means *of achieving its objective*. Less drastic means which do not actually achieve the government's objective are not considered at this stage.
>
> I hasten to add that in considering whether the government's objective could be achieved by other less drastic means, the court need not be satisfied that the alternative would satisfy the objective to *exactly* the same extent or degree as the impugned measure. In other words, the court should not accept an unrealistically exacting or precise formulation of the government's objective which would effectively immunize the law from scrutiny at the minimal impairment stage. The requirement for an "equally effective" alternative measure in the passage from *RJR-MacDonald*, quoted above, should not be taken to an impractical extreme. It includes alternative measures that give sufficient protection, in all the circumstances, to the government's goal: *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350. While the government is entitled to deference in formulating its objective, that deference is not blind or absolute. The test at the minimum impairment stage is whether there is an alternative, less drastic means of achieving the objective in a real and substantial manner.

[91] Having stated the test the trial judge thoroughly examined the evidence. She then said this at paras. 367-369:

> [367] The question at this stage is whether Canada has established that there are no alternative, less drastic means of achieving both of Canada's legislative objectives in a real and substantial manner.
>
> [368] The plaintiffs submit that a "failsafe" provision of the nature they suggest (allowing an elector who arrives without the requisite documentation, and without another elector to vouch for him/her, to vote upon swearing a statutory declaration) is a less impairing but equally effective means of achieving the purposes of the legislation. I am not convinced that they are correct. The objectives of preventing fraud and enhancing confidence in the election system would not be as well met by a system with the suggested provision because such a provision would not prevent personation nearly as effectively. As well, I do not think that a scheme that permitted serial or multiple vouching, or vouching by persons from outside the polling district, would meet the objectives of preventing fraud and enhancing confidence in

> the election system as well as the more restrictive provisions for vouching that are now in effect.
>
> [369] No doubt the list of documents authorized by the CEO could be further expanded or the vouching provisions could be made more flexible without completely destroying the effectiveness of the scheme, but the question is whether the scheme falls within a range of reasonable alternatives. As was stated in *RJR-MacDonald*, while the law must be carefully tailored so that the rights are impaired no more than necessary, the tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. Looking at the scheme as a whole, taking into account the broad range of options available for proof of identity and residence, and the delegation to the CEO of the ability to continue to fine-tune and expand that range of options, I am satisfied that there are no alternative, less drastic means of achieving both of Canada's legislative objectives in a real and substantial manner. I conclude, therefore, that Canada has established that the provisions are minimally impairing. [Emphasis added.]

[92] Although the trial judge stated the test in the words of *RJR-MacDonald*, that is, whether the scheme fell within a "range of reasonable alternatives" she went on to find that no range of reasonable alternatives existed. Justice Smith looked at the "reasonable alternatives" proffered by the appellants and rejected them as unworkable. She did so because she found that in both alternatives suggested by the appellants, particularly in the case of a bare oath, there is a meaningless paper trail that cannot be used to detect or punish fraud.

[93] I agree with the conclusion of the trial judge. On the evidence, there were no alternative, less drastic means of achieving the legislative goals in a real and substantial manner. It was not necessary for her to defer to Parliament. In the result, I would not accede to this ground of appeal.

The Fourth Ground of Appeal

[94] The appellants state their final ground of appeal as this:

> d) The learned trial judge erred in law or in principle by finding that the salutary effects of the impugned provisions outweigh their deleterious effects.

[95] In this part of their argument, the appellants take issue with the trial judge's findings but they do not identify specific legal errors.

[96] The appellants submit that the trial judge overemphasized the salutary effects of the legislation and failed to characterize the deleterious effects as serious. The appellants assert three factual errors.

[97] First, the appellants take issue with the findings of the trial judge that the new provisions make it more difficult to perpetrate electoral fraud and less likely errors will occur. In their factum they say that they "do not accept" that personation was a "significant or demonstrated problem." However, that it was a *significant* problem was never in issue. The trial judge reasoned, on the basis of ample evidence that it was a *demonstrated* problem, though a rare one. On this point the trial judge took the view that while Canada has a clean voting system and that personation and error are rare, these problems do occur from time to time (para. 400). She noted too, that electoral fraud has an unknown quality to it given the secret nature of the ballot. She might also have concluded that the evidence demonstrated that if anyone was minded to commit voter fraud, it would be relatively easy to do.

[98] In the end, Justice Smith concluded that a move from the honour system to an identity system would serve to make rare events of fraud and error rarer (para. 402). The appellants submit that this conclusion is "illogical and palpably erroneous" because the pre-amendment procedures protected against fraud. This argument cannot be sustained. It fails to meet the plain logic argument that moving from an honour system to an identity system will *better* protect against fraud.

[99] Next, the appellants took issue with the trial judge's finding that the legislation would enhance voter confidence in the system for those concerned about voter fraud. They submitted that not only did the AGC fail to introduce evidence regarding public perceptions of abuse of the electoral system, but that it was erroneous and circular for the trial judge to say that the fact that Members of Parliament supported the legislation indicated that there was public concern. The appellants argued that the mere fact that Parliament passed the impugned legislation cannot stand on the "asset side of the ledger". As the appellants' put it: "The entire rationale for the

Charter is upended if we accept popular support or legislative will as evincing a salutary effect."

[100] In my view this misses the point. As I commented earlier, it is logical that a move from the honour system to an identity system would serve to make rare events of fraud and error rarer. It is self-evident that increasing the safeguards against the potential for fraud would enhance voter confidence in the electoral system. The electoral regime is a foundational aspect of Canada 's democratic process. As Rothstein and Moldaver JJ.A. noted recently in *Opitz v. Wrzesnewskyj*, 2012 SCC 55 at para. 38:

> Fair and consistent observance of the statutory safeguards [of the *Canada Elections Act*] serves to enhance the public's faith and confidence in fair elections and in the government itself, both of which are essential to an effective democracy.

[101] Finally, the appellants submit that the modest salutary effects of the legislation could not outweigh the deleterious effects of the legislation.

[102] There was some evidence before the trial judge that suggested that in rural ridings with higher Aboriginal populations, voters were more concerned about their ability to comply with the new procedures. However, the trial judge also found that it was well-founded in the evidence that Elections Canada undertakes campaigns to inform voters and actively expands the list of acceptable identification. In the end, she found the deleterious effects of the legislation to be very modest with true cases of disenfranchisement likely to be extremely rare (para. 480).

[103] Thus the analysis came down to a decrease in a rare problem versus the very small possibility that a voter, likely from a disadvantaged group, will not be able to vote. I cannot say that the trial judge was wrong in failing to find that the deleterious effects of very rare disenfranchisement outweighed the salutary effects of the legislation. The appellants have not been able to reasonably attack the final conclusion of the trial judge where she said at para. 481:

> The [appellants] submit that precluding even one voter from casting a ballot would be a significant deleterious effect. Indeed, that would be a deleterious

> effect, as would be the creation of inconvenience that discourages voters from coming to the polls. In an ideal world, no elector would ever be inconvenienced or precluded from voting by any aspect of the electoral system. However, that is not the constitutional requirement. Just as it cannot be constitutionally required for an individual polling station to be set up for each individual voter, a system of voter identification need not be such that not one person is ever inconvenienced or precluded from voting by its requirements. The state has a positive obligation to create an electoral system that is sensitive to the needs of all electors and that maximizes access in every way possible, but a standard of absolutely perfect access cannot be imposed.

[104] It follows that I would not accede to this ground of appeal.

The Arguments of the other Parties

[105] The Chief Electoral Officer of Canada is a respondent to this litigation. I have not referred to his factum as it contained only helpful background material and urged the Court to delay the effect of an order setting aside the legislation should one have been made.

[106] The British Columbia Civil Liberties Association is an intervenor in this appeal. The intervenor confined its submissions to the proportionate effects stage of the s. 1 *Oakes* test. It made arguments about the nature of the evidence that ought to have been put forward by the AGC, submitted the public support for an impugned measure could only in the rarest of cases provide a basis for showing the salutary effects of a measure, and, that where the affected rights-holder is a member of a vulnerable group he or she should be entitled to a relaxed evidentiary standard in demonstrating the deleterious effects of an impugned measure.

[107] I have not found it necessary to address these arguments in my reasons. I believe my reasons make it clear that the evidence put forward by the AGC was sufficient, that the argument about public support for an impugned measure missed the mark in this case, and that the disadvantaged group was able to prove facts without the need of a relaxed standard.

Conclusion

[108] I would dismiss the appeal.

"The Honourable Madam Justice Ryan"

I AGREE:

"The Honourable Madam Justice D. Smith"

I AGREE:

"The Honourable Mr. Justice Hinkson"

Appendix A

*143(1) Each elector, on arriving at the polling station, shall give his or her name and address to the deputy returning officer and the poll clerk, and, on request, to a candidate or his or her representative.

(2) If the poll clerk determines that the elector's name and address appear on the list of electors or that the elector is allowed to vote under section 146, 147, 148 or 149, then, subject to subsection (3), the elector shall provide to the deputy returning officer and the poll clerk the following proof of his or her identity and residence:

(a) one piece of identification issued by a Canadian government, whether federal, provincial or local, or an agency of that government, that contains a photograph of the elector and his or her name and address; or

(*b*) two pieces of identification authorized by the Chief Electoral Officer each of which establish the elector's name and at least one of which establishes the elector's address.

(2.1) For greater certainty, the Chief Electoral Officer may authorize as a piece of identification for the purposes of paragraph (2)(b) any document, regardless of who issued it.

(2.2) For the purposes of paragraph (2)(*b*), a document issued by the Government of Canada that certifies that a person is registered as an Indian under the *Indian Act* constitutes an authorized piece of identification.

(3) An elector may instead prove his or her identity and residence by taking the prescribed oath if he or she is accompanied by an elector whose name appears on the list of electors for the same polling division and who

(a) provides to the deputy returning officer and the poll clerk the piece or pieces of identification referred to in paragraph (2)(a) or (b), respectively; and

(b) vouches for him or her on oath in the prescribed form.

(3.1) If the address contained in the piece or pieces of identification provided under subsection (2) or paragraph (3)(a) does not prove the elector's residence but is consistent with information related to the elector that appears on the list of electors, the elector's residence is deemed to have been proven.

(3.2) Despite subsection (3.1), a deputy returning officer, poll clerk, candidate or candidate's representative who has reasonable doubts concerning the residence of an elector referred to in that subsection may request that the elector take the prescribed oath, in which case his or her residence is deemed to have been proven only if he or she takes that oath.

(4) If the deputy returning officer is satisfied that an elector's identity and residence have been proven in accordance with subsection (2) or (3), the

elector's name shall be crossed off the list and, subject to section 144, the elector shall be immediately allowed to vote.

(5) No elector shall vouch for more than one elector at an election.

(6) An elector who has been vouched for at an election may not vouch for another elector at that election.

(7) The Chief Electoral Officer shall publish each year, and within three days after the issue of a writ, in a manner that he or she considers appropriate, a notice setting out the types of identification that are authorized for the purpose of paragraph (2)(b). The first annual notice shall be published no later than six months after the coming into force of this subsection.

148.1(1) An elector who fails to prove his or her identity and residence in accordance with subsection 143(2) or (3) or to take an oath otherwise required by this Act shall not receive a ballot or be allowed to vote.

(2) If an elector refuses to take an oath because he or she is not required to do so under this Act, the elector may appeal to the returning officer. If, after consultation with the deputy returning officer or the poll clerk of the polling station, the returning officer decides that the elector is not required to take the oath, and if the elector is entitled to vote in the polling division, the returning officer shall direct that he or she be allowed to do so.

161.(1) An elector whose name is not on the list of electors may register in person on polling day if the elector

(*a*) provides as proof of his or her identity and residence the piece or pieces of identification referred to in paragraph 143(2)(*a*) or (*b*), respectively, which piece or one of which pieces must contain an address that proves his or her residence; or

(*b*) proves his or her identity and residence by taking the prescribed oath, and is accompanied by an elector whose name appears on the list of electors for the same polling division and who

- (i) provides the piece or pieces of identification referred to in paragraph 143(2)(*a*) or (*b*), respectively, which piece or one of which pieces must contain either an address that proves his or her residence or an address that is consistent with information related to him or her that appears on the list of electors, and
- (ii) vouches for him or her on oath in the prescribed form, which form must include a statement as to the residence of both electors.

...

(6) No elector shall vouch for more than one elector at an election.

(7) An elector who has been vouched for at an election may not vouch for another elector at that election.

*169.(1) Every elector whose name is not on the revised list of electors may register in person before the deputy returning officer in the advance polling station where the elector is entitled to vote.

(2) An elector shall not be registered unless he or she

(*a*) provides as proof of his or her identity and residence the piece or pieces of identification referred to in paragraph 143(2)(*a*) or (*b*), respectively, which piece or one of which pieces must contain an address that proves his or her residence; or

(*b*) proves his or her identity and residence by taking the prescribed oath, and is accompanied by an elector whose name appears on the list of electors for the same polling division and who

(i) provides the piece or pieces of identification referred to in paragraph 143(2)(*a*) or (*b*), respectively, which piece or one of which pieces must contain either an address that proves his or her residence or an address that is consistent with information related to him or her that appears on the list of electors, and

(ii) vouches for him or her on oath in the prescribed form, which form must include a statement as to the residence of both electors.

* The sections denoted by an asterisk are not in issue, but are included here for contextual clarity.