

June 11, 2019

## Taking Youth Seriously: Reconsidering the Constitutionality of the Voting Age

**By:** Colin Feasby

**Case Commented On:** *Frank v Canada (Attorney General)*, [2019 SCC 1](#)

[N]o one is born a good citizen; no nation is born a democracy. Rather, both are processes that continue to evolve over a lifetime. Young people must be included from birth. A society that cuts itself off from its youth severs its lifeline... ([Kofi Annan, 1998](#))

### Introduction

Earlier this year the Supreme Court of Canada issued its most important voting rights case in many years, *Frank v Canada (Attorney General)*, [2019 SCC 1](#). *Frank* secured the right to vote for expatriate Canadians – a meaningful achievement – but the case is more significant for its reasoning and implications for the future of voting rights than it is for its result. The majority in *Frank* made it clear that the right to vote is qualified only by citizenship and that any limits on the right to vote must be justified under [s 1 of the Charter](#). *Frank* has laid the foundation for a challenge to the last significant restriction on the right to vote, age. A challenge to the voting age – even just to lower it to 16 – promises to have a profound and beneficial impact on Canadian politics and political discourse.

Sixteen-year-olds can legally [get a job](#) (and pay income tax), [drive a car](#), and [have sex](#). But they cannot vote. This is not only unfair to 16-year-olds, it distorts Canadian democracy in favour of older citizens. The exclusion of a class of citizens – 16- and 17-year-olds – from the vote reinforces their subordinate and disadvantaged position in society and sends a message that their views are not as worthy of respect as those of older citizens. Extending the vote to 16-year-olds would invigorate political discourse by creating an additional incentive for candidates and political parties to take issues important to youths and affecting youths more seriously. Broadening the franchise sends a message that young people and their opinions are valued and that they have a corresponding stake in society.

### Age Discrimination and Voting

[Voting](#) at the time of Confederation was restricted to men (mostly white) with property who were at least 21-years-old. Since then various religious and racial restrictions on the right to vote have come and gone, property qualifications have been dropped, and the electoral franchise has been extended to women. Prompted by youth involvement in protests and social activism in the 1960s, many countries lowered the voting age to 18. Pierre Trudeau's government announced in the 1969 [Throne Speech](#) that young "citizens in our ... country believe that they are entitled to

assume greater responsibility for the destiny of our society. Such demands ... are the expression of a truly democratic ideal.”

The *Canada Elections Act*, [SC 2000, c 9](#), provides that citizens must be 18-years-old to vote in a federal election. Elections statutes in the various provinces provide the same with respect to provincial elections and local elections (in Alberta see the *Election Act*, [RSA 2000, c E-1](#) and *Local Authorities Election Act*, [RSA 2000, c L-21](#)). There is no corresponding age qualification in [s 3 of the Charter](#) which provides that “[e]very citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly....” The absence of an age qualification in s 3 of the *Charter* stands in contrast to the [Twenty-sixth Amendment](#) to the U.S. Constitution, adopted in 1971, which expressly provides that, “[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.”

Early in the life of the *Charter*, some imagined that there were internal or implied restrictions in the right to vote. For example, in *Badger v Manitoba (Attorney General)* (1986), [30 DLR \(4<sup>th</sup>\) 108 \(Man QB\)](#), it was speculated that “[t]he right to vote presupposes certain attributes of the voter which are inherent but not expressed in s. 3. These are qualities of the right, not limitations on it, and they may quite properly be the subject of re-evaluation by lawmakers without resort to s. 1” (at para 8). The view in *Badger* was rejected in *Sauvé v Canada (Chief Electoral Officer)*, [2002 SCC 68](#), a case dealing with the voting rights of federal prisoners, and again in *Frank*. *Frank* involved a residence qualification on the right to vote. The majority in *Frank* held that “a broad and purposive interpretation of s. 3 does not allow for residence to operate as an internal limit on the right to vote” (at para 31). The majority explained that, “[i]n clear language, the *Charter* tethers voting rights to citizenship, and citizenship alone” (at para 30). The same thing may be said for age. Accordingly, any age limit on the right to vote in federal or provincial elections must be justified under s 1 of the *Charter*.

The principles for the judicial regulation of elections developed in the context of s 3 have been held not to apply to [local elections](#). [Section 15\(1\) of the Charter](#), however, does apply to local elections statutes and provides that “[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law ... without discrimination based on ... age...” The Supreme Court in *Quebec (Attorney General) v A*, [2013 SCC 5](#) explained that a key question in the s 15(1) analysis is whether “the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it....” (at para 332). Young people are subordinated or disadvantaged in society in many respects. Recent Alberta examples are the establishment of a lower [minimum wage](#) for individuals under the age of 18 and the exclusion of those under 18 from protection against most forms of [age discrimination](#) through the definition of “age” in the *Alberta Human Rights Act*, [RSA 2000, c A-25.5](#). Excluding young people from the right to vote certainly does nothing to ameliorate their disadvantaged condition.

The question of dignity is relevant to both s 3 and s 15(1) analysis. Former Chief Justice Beverley McLachlin in *obiter dicta* in *Sauvé* tried to dismiss the impact of the denial of the right to vote on the dignity and self-worth of youth by asserting it was different because “[Parliament] is not saying that the excluded class is unworthy to vote, but regulating a modality of the

universal franchise” (at para 37). McLachlin C.J. was correct to recognize that the law is expressive and conveys a message, but missed that the issue is not what Parliament intends to say, but rather it is how the law’s message is heard. The Supreme Court of Canada in *Frank* observed in the context of citizens living abroad that “[d]enying citizens the right to vote not only strikes at the heart of their fundamental rights, but also comes at the expense of their dignity and sense of self-worth” (at para 82). Regardless of Parliament’s intention, the exclusion of a class of citizens from a right that is central to citizenship sends a message that the excluded class is of lesser value or worth than those who enjoy the right. The fact that with the passage of time young citizens will acquire the right to vote does not diminish that the law conveys the message that so long as they are under 18 they are lesser members of society.

### **Why Limit Voting to Adults?**

Opponents of lowering the voting age typically argue that 16-year-olds lack the political knowledge and experience or intellectual maturity to responsibly exercise the right to vote. When the voting age in Alberta provincial and local elections was challenged in *Fitzgerald v Alberta*, [2002 ABQB 1086](#), the Court held: “...it is clear that the legislature’s objective was to ensure, as much as possible, that those eligible to vote are mature enough to make rational and informed decisions about who should represent them in government” (at para 56). This conclusion was upheld by the Court of Appeal, [2004 ABCA 184](#). Former Chief Justice McLachlin in *obiter dicta* in *Sauvé* put it slightly differently as she tried to distinguish the limits on youth voting from limits on prisoner voting by pointing out that in the case of youth voting “Parliament is making a decision based on the experiential situation of all citizens when they are young” (at para 37). Justices Russell Brown and Suzanne Côté, dissenting in *Frank*, also addressed the question of youth voting in *obiter dicta*, speculating that Parliament’s objective in restricting the vote to those 18 and older was to “ensur[e] an informed electorate that is capable of exercising rational and independent choice...” (at para 145).

Despite the view of the Alberta courts and supporting *obiter dicta* from the Supreme Court of Canada, we must ask whether it is ever a valid objective for Parliament to restrict the right to vote to those citizens who it determines to have the political knowledge and experience or the intellectual maturity necessary to vote. For example, can Parliament impose a test of civics knowledge or cognitive capacity as a precondition to the right to vote? [Literacy tests](#) and other tests of intellectual competency have been mainly deployed as devices to exclude disadvantaged groups – principally African-Americans in the southern U.S. – from voting. Quite apart from the troubling history of competency tests, Canada is a free society and adult citizens are entitled to spoil their ballots, vote for satirical political parties like the [Rhinoceros Party](#), and vote based on entirely [irrational reasons](#) such as the colour of a political party’s lawn signs. This is a corollary of a secret ballot.

The origins of voting restrictions on women, Indigenous Canadians living on reserves, and minors can all be attributed, at least in part, to a legal inability to exercise property rights when voting was an incident of property ownership. This was also the rationale for denying the vote to citizens with mental disabilities or “mental disease” who had been deprived of their liberty and right to manage their property. These restrictions were struck down by the Federal Court in *Canadian Disability Rights Council v Canada*, [1988] 3 FC 622 (TD). As with voting age, the

ostensible purpose of the limitation was to ensure that the right to vote was exercised “in a rational manner” (at para 6). The restrictions were found to be over-inclusive and not rationally connected to the purpose because the conclusion that a person who has a mental disability and has been deprived of their liberty or right to manage property “is incapacitated for all purposes, including voting, is simply a false assumption” (at para 7). In the over 30 years since, [Parliament has not enacted](#) more narrowly tailored restrictions, which suggests that concerns about adult citizens incapable of casting a vote in a rational manner are not pressing and substantial.

## **The Myth of Political Immaturity**

Parliament selected 18 as the voting age in 1970 because it coincided with the age for compulsory [military service](#) in times of war – this was an especially salient rationale for changing the voting age in the U.S. which was in the midst of the [Vietnam War](#) when it made the change – and because it accorded with a popular view that 18 was roughly the age at which adolescents became adults. Parliament did not consider any psychological or political science evidence regarding the capability of 18-year-olds to vote let alone evidence regarding the capability of adults younger than 18 to vote. Just over twenty years later, the [Royal Commission on Electoral Reform and Party Financing](#) (the “Lortie Commission”) looked at the question of voting age. The Lortie Commission observed that: (a) “by the age of 15 or 16, most young people have acquired a view of the social and political world that is not significantly different from the perceptions and understanding of adults” (at p 48); and (b) “in terms of political competence, 16 could be just as defensible an age as 18” (at p 49). Despite these conclusions on the evidence, the Lortie Commission recommended that the voting age remain at 18 because that corresponded to a societal view as to when individuals achieve maturity as citizens (at p 49). The Lortie Commission’s reliance on what is essentially popular opinion is misplaced given that the s 3 right to vote is not subject to democratic override pursuant to the [notwithstanding clause](#).

Developmental psychologists have shown that maturity is a multi-dimensional concept. For the purposes of this discussion, [psychological maturity](#) may be broken into two aspects: (1) cognitive maturity; and (2) psychosocial maturity. Cognitive maturity is the ability to think and process information logically. Cognitive maturity is typically achieved by age 16 and changes little thereafter. Psychosocial maturity involves emotional and social components and concerns, among other things, the ability to control impulses and sensation-seeking and the ability to accurately assess risks. Psychosocial maturity is typically achieved in the mid-20s. The [differences in ages](#) at which cognitive maturity and psychosocial maturity are achieved suggests that the law should treat 16-year-olds as adults for some things (e.g. [voting](#)) and not others (e.g. [criminality](#)).

Sixteen-year-olds not only have the cognitive maturity to responsibly exercise the right to vote but also have sufficient knowledge to do so. A [U.S. study](#) using data from the National Household Educational Survey concluded that “[o]n measures of civic knowledge, political skills, political efficacy, and tolerance, the 16-year-olds on average, are obtaining scores similar to those of adults” (at 212). As a result, the authors of the study concluded that “[T]here is little empirical reason to award the vote to 18-year-olds but to deny it to 16-year-olds” (at 213). There is every reason to believe that Canadian 16-year-olds also have acquired the political knowledge

to exercise the right to vote through, among other things, school curricula designed for that purpose. For example, the Alberta [social studies curriculum](#) is designed to:

develop the attitudes, skills and knowledge that will enable [students] to become engaged, active, informed and responsible citizens. Recognition and respect for individual and collective identity is essential in a pluralistic and democratic society. Social studies helps students develop their sense of self and community, encouraging them to affirm their place as citizens in an inclusive, democratic society.

Scotland and Austria both recently lowered the voting age to 16. The actual lived experience in these countries shows that 16-year-olds are responsible voters. Austrian studies on elections after the voting age was lowered show that: (a) interest in politics increased among 16- and 17-year-olds; (b) there was no significant difference in political interest and knowledge between 16- and 17-year-olds and older first-time voters aged 18-21; (c) turnout among 16- and 17-year-olds was higher than first-time voters aged 18-21; and (d) the votes of 16- and 17-year-olds reflected their policy preferences as well as first-time voters aged 18-21. A [study](#) on the Scottish experience with 16- and 17-year-olds voting reached a similar conclusion regarding turnout noting that 16- and 17-year-olds voted at a higher rate than 18-24-year-olds. The Austrian and Scottish results support the view of Canada's [Chief Electoral Officer](#) that voting is a habit and that a lower voting age may lead to higher lifetime participation rates. Analysis of the Scottish experience also showed that 16- and 17-year-olds make independent voting decisions with over 40% reporting a different voting intention than their parents.

The idea that citizens under 18 can vote responsibly is not just a theoretical position – it is something that has been happening in Canadian political parties for a long time. All of the major federal political parties allow 14-year-olds to join as members and all members enjoy full participatory rights. (See, for example, the Liberal Party of Canada's [Constitution](#) and [Membership By-Law](#)). These participatory rights include voting in party leadership contests and local nomination contests. Leadership and nomination contests are important democratic processes that have a significant impact on the formation of the government. It is not an exaggeration to say that in electoral districts with a dominant political party, the nomination contest may be more important than the election. Similarly, given the control that party leaders – including the Prime Minister – typically wield over their parties, leadership contests are very important. And no one has ever taken serious issue with the question of whether 14-year-olds are sufficiently mature to vote in these important democratic processes.

### **Balancing Political Discourse and Intergenerational Equity**

Canada's electorate is not representative of its citizens never mind its population as a whole. The exclusion of citizens under the age of 18 over-weights the influence of older Canadians. This is exacerbated by the historical pattern of lower voter turnout among voters under 30. Together these factors create an incentive for political parties and candidates to develop policies to cater to the interests and needs of older Canadians. As a result, issues of interest to and affecting young Canadians get less attention and are taken less seriously and political discourse is impoverished as a result. This, in turn, affects decisions concerning the allocation of societal resources. I suspect that this is a reason for Canadian society's preferential allocation of resources to



[healthcare](#) – a universal social program disproportionately used by older Canadians – over [education](#) – a universal social program disproportionately used by younger Canadians.

Some advocates and critics of lowering the voting age focus on imagined partisan impacts of the change. Any predictions of partisan impact of a lower voting age cannot take into account how political parties may adjust or adapt their policies in light of the change. The Lortie Commission observed that when the voting age in Canadian federal elections was lowered from 21 to 18 it had no discernable partisan impact. The impact that it would clearly have is to elevate the significance of issues important to younger Canadians. These might be issues like education funding and university tuition, the appropriate level of minimum wage for young people, the age at which decisions can be made for assisted dying, or issues of intergenerational equity such as deficit financing and climate change. An editorial in [The Economist](#) advocating for a lower voting age argued that: “A lower voting age would strengthen the voice of the young and signal that their opinions matter. It is they, after all, who will bear the brunt of climate change and service the debt that paid for benefits, such as pensions and health care, of today’s elderly.”

## Conclusion

The age qualification on the right to vote is ripe to be struck down as unconstitutional as it is discriminatory and perpetuates the disadvantage of young people. Whether a case is advanced with respect to federal or provincial elections statutes under s 3 of the *Charter* or local elections statutes under s 15(1) of the *Charter*, the government will bear the burden of justifying the age qualification on the right to vote. Evidence from developmental psychology, the experience with a lower voting age in Austria and Scotland, and the longstanding Canadian practice of 14-year-olds voting in electoral district nomination and party leadership contests make it very hard for the government to justify excluding 16-year-olds from voting in elections.

If the voting age is struck down, Parliament will have to grapple with the question of whether to set a new voting age and, if so, what age should be chosen. Political scientist [David Runciman](#) contends that the generational inequity caused by the disenfranchisement of young people cannot be solved by lowering the voting age to 16. He points out that there is no similar disenfranchisement of elderly citizens, some of whom are suffering [cognitive decline](#), and that this necessarily tilts the political playing field in favour of older citizens. Instead of disenfranchising elderly citizens which he recognizes would be undemocratic, his suggestion is that the voting age be lowered to 6-years-old. Parliament in considering a new voting age should weigh all of the evidence and evaluate all of the options – even a radical suggestion like that of Runciman.

---

This post may be cited as: Colin Feasby, “Taking Youth Seriously: Reconsidering the Constitutionality of the Voting Age” (June 11, 2019), online: ABlawg, [http://ablawg.ca/wp-content/uploads/2019/06/Blog\\_CF\\_Frank.pdf](http://ablawg.ca/wp-content/uploads/2019/06/Blog_CF_Frank.pdf)

To subscribe to ABlawg by email or RSS feed, please go to <http://ablawg.ca>

Follow us on Twitter [@ABlawg](#)

THE UNIVERSITY OF CALGARY FACULTY OF LAW BLOG

ablawg.ca | 6

