Superior Court File No. CV-12-453976
Court of Appeal File No. C58876

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

GILLIAN FRANK AND JAMIE DUONG

Applicants
(Respondents in appeal)

- and -

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA

Respondent
(Appellant in appeal)

- and -

THE CANADIAN CIVIL LIBERTIES ASSOCIATION

Intervener

FACTUM OF THE INTERVENER, CANADIAN CIVIL LIBERTIES ASSOCIATION

(Pursuant to Rule 13.02 of the *Rules of Civil Procedure*, RRO 1994, Reg 194)

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PART I - OVERVIEW

1. The court in this appeal is asked to review the decision of Justice Penny, who found that subsections 11(d), 222(1)(b) and (c), 223(1)(f), 226(f), and the word "temporarily" in subsections 220, 222(1), and 223(1)(e) of the *Canada Elections Act*, SC 2000, c 9 (collectively the "**Impugned Provisions**"), were unconstitutional and of no force and effect because they imposed an unreasonable and unjustifiable limit on the right to vote enshrined in section 3 of the *Canadian Charter of Rights and Freedoms* (the "***Charter***"). The Impugned Provisions prevented Canadian citizens residing abroad for more than five consecutive years (or those abroad for less than five years who did not intend to return to Canada) from voting in federal elections.

2. There is little doubt that the Impugned Provisions constitute a *prima facie* violation of section 3 of the *Charter*; the appellant concedes as much in its factum. The *Charter* provides an unqualified right to vote to all Canadian citizens, while the Impugned Provisions purported to deprive an entire class of citizens of that right. The central issue in this appeal is therefore whether the limitation on the right to vote is reasonable and demonstrably justified, and saved by s. 1 of the *Charter*.

3. The Canadian Civil Liberties Association ("**CCLA**") intervenes in this appeal to make submissions on the nature of the final stage of the *Oakes* analysis, which balances the salutary effects of the government's objective in violating a *Charter* right against the deleterious impact on those persons whose right is being limited. Specifically, the CCLA wishes to address the extent to which, in considering the deleterious effects of the Impugned Provisions, this court should have regard to the impact that legislation has on other *Charter* values.

PART II - THE CCLA'S POSITION ON THE ISSUE

4. The analysis of whether a limit on a fundamental *Charter* right is demonstrably justified under s. 1, and in particular whether the presumed benefit of that limit is proportional to the deleterious effect, must be informed by other *Charter* values underlying the right. The extent to which other *Charter* values are protected or eroded by legislation that violates the *Charter* should be weighed along with any other salutary and deleterious effects. Where the impugned legislation undermines other *Charter* values, that fact should weigh heavily against a finding that the effect of the legislation is proportional.

5. Underlying the right to vote, and inextricably linked to it, is the value of equality. An analysis of whether a limit on s. 3 is demonstrably justified, and in particular whether the salutary effects outweigh the deleterious ones, must therefore consider the impact of the limit on equality principles. Absent an extraordinary circumstance, where a limitation on the right to vote undermines equality principles, the deleterious effects will outweigh the salutary.

6. The Impugned Provisions in this case create a regime under which an entire class of approximately 1.4 million Canadians is treated differently and unfairly based on a personal characteristic – place of residence – that does not have a bearing on the right to vote in federal elections. This distinction, by depriving non-resident Canadians of personal autonomy and self-determination, undermines the *Charter* value of equality. In these circumstances, it cannot be said that any hypothetical benefit of the Impugned Provisions outweighs the deleterious and menacing effect on the integrity of the *Charter* right to vote.

PART III - LAW AND ARGUMENT

A. The *Oakes* Test

7. The two-step test to determine whether a limit on an individual's *Charter* rights is reasonable and demonstrably justified under s. 1 of the *Charter* is well-established:

(a) First, the objective to which the limit is directed must be sufficiently important to warrant overriding the constitutionally protected right. The objective must relate to concerns that are "pressing and substantial" in order to meet this test;

(b) Second, it must be shown that the means employed to limit that pressing and substantial objective are proportional. Specifically, the court must consider whether:

(i) the effect of the legislation is rationally connected to the pressing and substantial objective;

(ii) the legislation impairs the *Charter* right as minimally as is reasonably possible; and

(iii) the deleterious effects of the legislation on the persons whose *Charter* rights are limited are proportional to the salutary effects served by the limitation.[1]

8. Where the government seeks to deny a fundamental right, such as the right to vote, it will be held to the standard of "stringent justification" in the analysis of whether the second stage

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[1] *R v Oakes*, [1986] 1 SCR 103 at paras 69-70, Brief of Authorities of the Intervener, Canadian Civil Liberties Association ("**CCLA's Authorities**"), Tab 1.

of the *Oakes* test is satisfied.[2] In the case of the right to vote, a stringent justification is required because the right is central to the functioning of our participative democracy and, in turn, our identities as Canadian citizens. As stated by this court in *Sauvé No. 1*:

> ***...the most pressing and substantial state objectives would need to be identified in justification of a limitation on the right to vote. Although there is no hierarchy of constitutional rights, and therefore no scale for permissible infringement, some rights will attract fewer acceptable limitations under s. 1***. In *Belczowski* (F.C.A.), supra, although Hugessen J.A. did not expressly advocate the use of a stricter test, he said:
>
> > I turn now to the application of the *Oakes* test itself. The first step is to ascertain if the objectives of the impugned legislation are of "sufficient importance to warrant overriding a constitutionally protected right or freedom". It is significant in this connection to note the rather special status of the constitutionally protected right which is here in issue. ***The framers of the* Charter *recognized that the right to vote, going as it does to the very foundations and legitimacy of a free and democratic society, is, if anything, even more in need of constitutional protection than most of the other guaranteed rights and freedoms, no matter how important the latter may be***.[3]

9. The final stage of the *Oakes* analysis, which weighs the deleterious effects of the impugned legislation against the salutary, provides for "a broader assessment of whether the benefits of the impugned law are worth the cost of the rights limitation".[4] As noted by Chief Justice McLachlin in *Alberta v Hutterian Brethren of Wilson Colony*, this final proportionality assessment is critical in cases involving fundamental rights – the right to vote is clearly such a right.[5] Whether a limitation on the right to vote is demonstrably justified often will turn on

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[2] *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68 at para 14, CCLA's Authorities, Tab 2 [*Sauvé No. 2*]; Amended Reasons for Judgment at para 115, Appeal Book and Compendium ("**ABC**"), Tab 5.
[3] *Sauvé v Canada (Attorney General)* (1992), 7 OR (3d) 481 (CA), aff'd [1993] 2 SCR 438, CCLA's Authorities, Tab 3 [***emphasis added***].
[4] *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 77, CCLA's Authorities, Tab 4 [*Hutterian Brethren*].
[5] *Ibid* at para 78, CCLA's Authorities, Tab 4.

whether the deleterious effect of the limitation is proportional to the benefits achieved by the legislation.[6]

B. *Charter* Values in the Context of the Proportionality Analysis

10. A *Charter* "value" is not the same as a *Charter* "right". *Charter* values are not constrained in their application by the strict tests articulated for each *Charter* right. Professor Hogg argues that the very purpose of the *Charter* value of equality, for example, is to provide the courts with an analytical tool in circumstances where a challenge to legislation does not meet the requirements of s. 15 because, for instance, the distinction drawn in the legislation is not based on an enumerated or analogous ground.[7] The frequent recourse to *Charter* values by the courts in constitutional litigation is recognition that *Charter* rights must be interpreted harmoniously with the principles enshrined in other parts of the *Charter*.

11. Similarly, *Charter* values must inform the application of the *Oakes* test. In particular, the final stage of the proportionality test, where the benefits of the Impugned Provisions are to be weighed against the deleterious effects, must assess the extent to which the Impugned Provisions may undermine other *Charter* values.

12. For instance, in *Thomson Newspapers Co. (c.o.b. Globe and Mail) v Canada (Attorney General)*, the Supreme Court of Canada held that a ban on publishing polls three days prior to the election was an unreasonable and unjustified limit on free expression. Justice Bastarache for the majority described the interaction of *Charter* values with the proportionality test as follows:

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[6] *Ibid*, CCLA's Authorities, Tab 4.
[7] Peter W Hogg, "Equality as a *Charter* Value in Constitutional Interpretation" (2003) 20 SCLR (2d) 113 at 130-131, CCLA's Authorities, Tab 5.

> The focus of the first and second steps of the proportionality analysis is not the relationship between the measures and the Charter right in question, but rather the relationship between the ends of the legislation and the means employed... ***The third stage of the proportionality analysis provides an opportunity to assess, in light of the practical and contextual details which are elucidated in the first and second stages, whether the benefits which accrue from the limitation are proportional to its deleterious effects as measured by the values underlying the Charter.***[8]

13. In *Thomson*, the Supreme Court of Canada weighed the salutary effects of the ban on the right to vote against the deleterious effects on free expression.[9]

14. Similarly, in weighing the benefits of a *prima facie* infringement of expressive freedom against its costs, a majority of the Supreme Court of Canada in *Canada (Human Rights Commission) v Taylor* held that, under the *Oakes* test, a meaningful consideration of the principles central to a free and democratic society should "give full recognition to other provisions of the *Charter*"[10] – notably, in that case, to the values in ss. 15 and 27 – and went on to state that "the guiding principles in undertaking the s. 1 inquiry include respect and concern for the dignity and equality of the individual".[11]

15. The Supreme Court of Canada therefore has clearly articulated its view that the proportionality analysis should include an inquiry into the effect of *prima facie* unconstitutional legislation on other *Charter* values. If consistency with the *Charter* value of respect for the dignity and equality of the individual can help establish the proportionality of a *prima facie* infringement of a *Charter* right – as stated by the majority in *Taylor* – then *a fortiori*, the fact that a provision *prima facie* inconsistent with a *Charter* right is also inconsistent with these *Charter* values will weigh heavily as a demonstration of the disproportionality of any salutary effects of

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[8] *Thomson Newspapers Co. (c.o.b. Globe and Mail) v Canada (Attorney General)*, [1998] 1 SCR 877 at para 125, CCLA's Authorities, Tab 6 [***emphasis added***].
[9] *Ibid* at paras 127-130, CCLA's Authorities, Tab 6; see also: *Hutterian Brethren*, *supra* note 4 at para 77, CCLA's Authorities, Tab 4.
[10] *Canada (Human Rights Commission) v Taylor*, [1990] 3 SCR 892 at para 36, CCLA's Authorities, Tab 7.
[11] *Ibid* at para 45, CCLA's Authorities, Tab 7.

an impugned provision with the damage it inflicts to the principles of a free and democratic society.

16. As set out more fully below, the limitations in the Impugned Provisions on the s. 3 right to vote do not advance *Charter* values. To the contrary, they impair not only the s. 3 right directly implicated, but also the *Charter* value of equality, which influences those rights and is essential to their purpose.

C. The *Charter* Value of Equality

17. The *Charter*, by enshrining a right to equality, protects what the Supreme Court of Canada has called one of the highest "ideals and aspirations" of Canadian society.[12] Section 15 concerns substantive equality in the application of the law. In other words, the law should impact individuals without discrimination or prejudice. As stated by the Supreme Court of Canada, the purpose underlying s. 15 is to prevent

> ...the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.[13]

18. As also stated by the Supreme Court of Canada, the equality guarantee is informed by the ideals of personal autonomy, self-determination, and fairness:

> ***...s. 15(1) is concerned with the realization of personal autonomy and self-determination***. Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. ***Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits***. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the

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[12] *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 2, CCLA's Authorities, Tab 8.
[13] *Ibid* at para 51, CCLA's Authorities, Tab 8.

> context underlying their differences. ***Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued***, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society *per se*, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. ***Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law***?[14]

19. The principles of human dignity, freedom from arbitrary disadvantage or prejudice, and the realization of individual autonomy and self-determination therefore guide the *Charter* value of equality.

D. Interaction Between the Right to Vote and Equality

20. The Supreme Court of Canada has expressed on multiple occasions that *Charter* rights must be interpreted in relation to each other, rather than in isolation.[15] The *Charter* "must be construed as a system where '[e]very component contributes to the meaning as a whole, and the whole gives meaning to its parts'".[16] Interpretations of *Charter* rights that result in denying other *Charter* rights or values should be avoided.

21. The right to vote enshrined in s. 3 is as central to the *Charter* as it is to the democratic system it supports. The "broad, untrammelled" language in which it is drafted suggests its fundamental importance and its foundational nature, as does the fact that it is not subject to the notwithstanding clause in s. 33 of the *Charter.*[17]

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[14] *Ibid* at para 53, CCLA's Authorities, Tab 8 [***emphasis added***].
[15] *R v Dubois*, [1985] 2 SCR 350 at para 40, CCLA's Authorities, Tab 9 [*Dubois*]; *R v Tran*, [1994] 2 SCR 951 at para 36, CCLA's Authorities, Tab 10.
[16] *Dubois*, *supra* note 15 at para 40, CCLA's Authorities, Tab 9.
[17] *Sauvé No. 2*, *supra* note 2 at para 11, CCLA's Authorities, Tab 2.

22. In the context of s. 3 specifically, the Supreme Court of Canada has held that the right to vote is a fundamental right.[18] The text of s. 3 plainly confers an unqualified right to vote on ***every*** Canadian citizen, thereby fundamentally placing the ***equal*** right of ***all citizens*** to this democratic right at the heart of the guarantee.

23. Indeed, Professor Hogg, analyzing the Supreme Court of Canada's decision in *Reference Re Provincial Electoral Boundaries (Saskatchewan)*, concluded that the decision established that s. 3 includes within it an equality requirement.[19]

24. Similarly, the British Columbia Supreme Court, in *Henry v Canada (Attorney General)*, recently considered the effect of s. 15 of the *Charter* on s. 3. At issue in *Henry* was the constitutional validity of voter identification rules in federal elections under amendments to the *Canada Elections Act*, which were alleged to infringe the right to vote guaranteed by s. 3 of the *Charter*. The Court stated that:

> The *Charter* value of equality... comes into play in ensuring that s. 3 of the *Charter* is understood and interpreted in a way that maintains the *Charter's* underlying values and internal coherence. No group or category of voters should be disproportionately burdened by the requirements imposed for voting, even if the requirements are, on their face, neutral. The government would not be meeting its obligations to conduct fair elections if it failed to take steps to ensure

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[18] *Ibid* at para 9, CCLA's Authorities, Tab 2.
[19] *Reference Re Provincial Electoral Boundaries (Saskatchewan)*, [1991] 2 SCR 158 at paras 62-63, CCLA's Authorities, Tab 11; Hogg, *supra* note 7 at 122-123, CCLA's Authorities, Tab 5. As stated by Prof Hogg at 122-123:

> What the Supreme Court of Canada decided in the *Saskatchewan Electoral Boundaries Reference* was that section 3 contained its own requirement of equality. The Court held that section 3 guaranteed a right of "effective representation". While a number of factors (including geography and settlement patterns) could properly be taken into account in designing electoral boundaries "parity of voting power" was the factor of "prime importance": the "citizen whose vote is diluted" suffers from "uneven and unfair representation." The Court divided on whether Saskatchewan's liberal allowances for population disparities between urban and rural constituencies violated the rule of effective representation. Justice Cory for the dissenting minority would have held that each vote was not of sufficiently equal value and that section 3 was therefore offended. But McLachlin J. for the majority held that the factors of geography and settlement patterns provided a sufficient explanation for the inequalities in voting power to satisfy section 3; the challenge was accordingly rejected. None of the judges made reference to section 15, and all agreed on the presence of an equality value in section 3.

> equal access to polling stations and to accommodate Canadian citizens, in all of their diversity, in becoming registered electors and exercising their right to vote.[20]

25. This relationship between equality and the right to vote is intuitive when situated in the context of the democratic principle that s. 3 protects. As noted by the Supreme Court of Canada in *Sauvé No. 2,* democracy in Canada is built on the principles of "inclusiveness, equality, and citizen participation".[21] The right to vote protected by s. 3, in turn, is defined as the "cornerstone" of our democracy.[22]

26. Equality is therefore a *Charter* value central to and inherent in the right to vote. Where legislation seeks to limit the right to vote, the court should consider the extent to which the impugned legislation undermines principles of personal autonomy, self-determination, fair treatment of all Canadians, and freedom from arbitrary disadvantage or prejudice.

E. Effect of the Impugned Provisions on the Value of Equality

27. On proportionality of effect, the appellant argues that the salutary effects of not allowing non-resident Canadians to vote are that Canada's electoral system and parliamentary representation system will remain fair to resident voters and that it avoids the potential for electoral abuse through the expansion of non-resident voting. The appellant's submission is premised on the notion that there is a "residency requirement" in order to vote in federal elections. The appellant argues that the residency requirement ensures that voting citizens maintain some connection to Canada: it is only those citizens who reside in Canada who maintain that connection because they bear full responsibility to obey all of Canada's laws. The argument is effectively that resident Canadians remain parties to a social contract with the government, while non-residents do not. The appellant submits that, as a result, Canadian

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[20] *Henry v Canada (Attorney General)*, 2010 BCSC 610 at para 143, aff'd without reference to this point 2014 BCCA 30, CCLA's Authorities, Tab 12.
[21] *Sauvé No. 2, supra* note 2 at para 41, CCLA's Authorities, Tab 2.
[22] *Ibid* at para 14, CCLA's Authorities, Tab 2.

citizens ought to be given "due priority" and a residency requirement must be maintained in Canada's electoral system. The Impugned Provisions are said to further those salutary effects.[23]

28. The respondent in appeal argues, and Justice Penny held, that the deprivation of the ability to vote is itself a substantial deleterious effect. The respondent argues that the deleterious effect of depriving individuals of a fundamental right, such as the right to vote, weighs heavily in this balancing, particularly where the appellant has provided a theoretical and speculative justification for the limit, rather than a stringent and concrete one.[24]

29. The inquiry ought not, however, end there. The court also must weigh the salutary and deleterious effects of the Impugned Provisions on other *Charter* values, and in particular the value of equality that is embedded into the s. 3 right.

30. Up to 2.8 million citizens, or almost 8% of Canada's total population, live abroad. Approximately half of those Canadians – 1.4 million – have been abroad for more than five years and therefore are unable to vote.[25] Almost 60% of those 1.4 million people are not citizens of any other country.[26]

31. The Impugned Provisions deprive 1.4 million Canadians of the right to vote, with the only justification made available to this court being a presumption that only those Canadians who reside in Canada maintain a sufficient investment in the nation's government to deserve the right to vote.

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[23] Appellants' Factum at paras 2-4, 51-57, 71-74, 111-115 ("**AF**").
[24] Respondents' Factum at para 109 ("**RF**").
[25] Affidavit of Don De Voretz, Respondents' Compendium, Tab 12 at 176 ("**RC**"); Affidavit of Don De Voretz, RC, Tab 9; Amended Reasons for Judgment at para 19, ABC, Tab 5.
[26] Affidavit of Don De Voretz at para 42, RC, Tab 9 at 74.

32. Given that there is no explicit residency requirement in s. 3 of the *Charter*, such a requirement would represent a qualification to a fundamental right that has been described by the Supreme Court of Canada as "broad", "untrammelled", and deserving of a liberal, purposive, and enabling interpretation.[27] The only two recognized qualifications to the right to vote – that the individual must be at least 18 years of age, and a Canadian citizen – are both explicitly set out in s. 3 of the *Canada Elections Act*.[28] Nothing in s. 3 of the *Canada Elections Act*, however, further qualifies the right to vote by tying it to residency in Canada.

33. The effect of the Impugned Provisions is not, as suggested, that they merely regulate the modality of voting, similar to the age requirement.[29] Rather, the Impugned Provisions hold that non-residents do not ***deserve*** to vote, much like the case in *Sauvé No. 2.*[30] They flatly deny the fundamental right to vote to approximately 1.4 million people – 4% of Canada's entire population. Up to 60% of those citizens may not have the right to participate in the democratic process anywhere in the world because they are citizens of only Canada. This deprivation extends to an entire class of citizens and, according to the Hansard transcripts of the Parliamentary debates over enactment, is based on an arbitrary period of time (five years) selected by Parliament simply because it seemed an appropriate compromise between varying positions held by Members of Parliament.[31] This arbitrariness cannot constitute justification for violating both the right to vote and fundamental equality principles for up to 1.4 million Canadians.

34. Moreover, the idea that allowing non-resident Canadians to vote would be unfair to those resident in Canada introduces the notion of purposeful inequality, which is not borne out by the

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[27] *Sauvé No. 2*, *supra* note 2 at para 11, CCLA's Authorities, Tab 2.
[28] *Canada Elections Act*, SC 2000, c 9, s 3.
[29] AF at para 101.
[30] *Sauvé No. 2*, *supra* note 2 at para 37, CCLA's Authorities, Tab 2.
[31] Reply Affidavit of Jean-Pierre Kingsley at paras 61-63, RC, Tab 14; Amended Reasons for Judgment at para 57, ABC, Tab 5.

facts. In fact, as noted by the respondents in this appeal, the opposite is true: numerous Canadian laws have extraterritorial application. Many laws are enacted specifically so that they apply to non-resident Canadians.[32] Indeed, the court need not look beyond the Impugned Provisions themselves to understand how the deprivation of the right to vote diminishes the dignity, self-determination, and personal autonomy of non-resident Canadians based on an extraneous personal characteristic (their place of residence). If the Impugned Provisions were declared invalid but the declaration suspended while Parliament crafted an appropriate response, the very Canadians affected by those laws would have no right to have their voices heard on a law that applies only to them, in a way that wholly deprives them of a fundamental right protected by the *Charter*. It is inappropriate, and undermines the very purpose of the *Charter*, to secure the rights of one group of Canadians (residents) by denying that same right to another (non-residents). Equality is not a zero-sum game.

35. Moreover, the right to vote is closely linked with the concept of Canadian citizenship: the ability to participate in our democracy is an inherent part of being Canadian.[33] The Impugned Provisions deprive a large class of citizens of that right. They create a system of tiered citizenship whereby residents enjoy critically important rights not afforded to non-residents due to a personal characteristic that has no rational bearing on the functioning of democracy. The Impugned Provisions have a direct and negative impact on affected Canadians' personal autonomy and right to self-determination. As a result, there can be little doubt that the Impugned Provisions, in addition to violating s. 3 of the *Charter*, undermine the principle of equality for up to 1.4 million Canadians.

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[32] RF at para 21.
[33] *Figueroa v Canada (Attorney General)*, 2003 SCC 37 at para 26, CCLA's Authorities, Tab 13; *Fitzgerald (Next friend of) v Alberta*, 2002 ABQB 1086 at para 14, CCLA's Authorities, Tab 14.

36. To the extent that a purported salutary effect is inconsistent with *Charter* values – equality in particular, in the context of the right to vote – such inconsistency should weigh heavily as a deleterious effect militating in favour of a finding that the impugned legislation is not reasonable and demonstrably justified in a free and democratic society.

37. The *Charter* value of equality is concerned with achieving personal autonomy, protecting self-determination, and ensuring that Canadians are not treated unfairly based on personal traits or circumstances that have no bearing on individual needs, capacities, or merits. These principles should not be derogated from by legislation that is intended to ***enable*** the exercise of the right to vote. As stated by the Supreme Court of Canada in *Opitz v Wrzesnewskyj*:

> The procedural safeguards in the [*Canada Elections Act*] are important; however, they should not be treated as ends in themselves. Rather, they should be treated as a means of ensuring that only those who have the right to vote may do so. It is that end that must always be kept in sight.[34]

38. The *Charter* grants non-resident Canadians the right to vote. A denial of that right that also undermines the principles of equality for over one million Canadians is disproportionately deleterious. It cannot be reasonable and demonstrably justified in a free and democratic society.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of October, 2014.

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[34] *Opitz v Wrzesnewskyj*, 2012 SCC 55 at para 34, CCLA's Authorities, Tab 15.

SCHEDULE "A"
LIST OF AUTHORITIES

1. *R v Oakes*, [1986] 1 SCR 103
2. *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68
3. *Sauvé v Canada (Attorney General)* (1992), 7 OR (3d) 481 (CA)
4. *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37
5. Peter W Hogg, "Equality as a Charter Value in Constitutional Interpretation" (2003) 20 SCLR (2d) 113
6. *Thomson Newspapers Co. (c.o.b. Globe and Mail) v Canada (Attorney General)*, [1998] 1 SCR 877
7. *Canada (Human Rights Commission) v Taylor*, [1990] 3 SCR 892
8. *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497
9. *R v Dubois*, [1985] 2 SCR 350
10. *R v Tran*, [1994] 2 SCR 951
11. *Reference Re Provincial Electoral Boundaries (Saskatchewan)*, [1991] 2 SCR 158
12. *Henry v Canada (Attorney General)*, 2010 BCSC 610
13. *Figueroa v Canada (Attorney General)*, 2003 SCC 37
14. *Fitzgerald (Next friend of) v Alberta*, 2002 ABQB 1086
15. *Opitz v Wrzesnewskyj*, 2012 SCC 55

SCHEDULE "B"
RELEVANT STATUTES

Canada Elections Act

SC 2000, c 9

Persons qualified as electors

3. Every person who is a Canadian citizen and is 18 years of age or older on polling day is qualified as an elector.

...

11. Any of the following persons may vote in accordance with Part 11:

(a) a Canadian Forces elector;

(b) an elector who is an employee in the federal public administration or the public service of a province and who is posted outside Canada;

(c) a Canadian citizen who is employed by an international organization of which Canada is a member and to which Canada contributes and who is posted outside Canada;

(d) a person who has been absent from Canada for less than five consecutive years and who intends to return to Canada as a resident;

(e) an incarcerated elector within the meaning of that Part; and

(f) any other elector in Canada who wishes to vote in accordance with that Part.

...

Definitions

220. The definitions in this section apply in this Division.

"elector"

« électeur »

"elector" means an elector, other than a Canadian Forces elector, who resides temporarily outside Canada.

"register"

« registre »

"register" means the register referred to in subsection 222(1).

...

Register of electors

222. (1) The Chief Electoral Officer shall maintain a register of electors who are temporarily resident outside Canada in which is entered the name, date of birth, civic and mailing addresses, sex and electoral district of each elector who has filed an application for registration and special ballot and who

(a) at any time before making the application, resided in Canada;

(b) has been residing outside Canada for less than five consecutive years immediately before making the application; and

(c) intends to return to Canada to resume residence in the future.

...

Inclusion in register

223. (1) An application for registration and special ballot may be made by an elector. It shall be in the prescribed form and shall include

(a) satisfactory proof of the elector's identity;

(b) if paragraph 222(1)(b) does not apply in respect of the elector, proof of the applicability of an exception set out in subsection 222(2);

(c) the elector's date of birth;

(d) the date the elector left Canada;

(e) the address of the elector's last place of ordinary residence in Canada before he or she left Canada or the address of the place of ordinary residence in Canada of the spouse, the common-law partner or a relative of the elector, a relative of the elector's spouse or common-law partner, a person in relation to whom the elector is a dependant or a person with whom the elector would live but for his or her residing temporarily outside Canada;

(f) the date on which the elector intends to resume residence in Canada;

(g) the elector's mailing address outside Canada; and

(h) any other information that the Chief Electoral Officer considers necessary to determine the elector's entitlement to vote or the electoral district in which he or she may vote.

...

Deletion of names from register

226. The Chief Electoral Officer shall delete from the register the name of an elector who

(a) does not provide the information referred to in section 225 within the time fixed by the Chief Electoral Officer;

(b) makes a signed request to the Chief Electoral Officer to have his or her name deleted from the register;

(c) has died and concerning whom a request has been received to have the elector's name deleted from the register, to which request is attached a death certificate or other documentary evidence of the death;

(d) returns to Canada to reside;

(e) cannot be contacted; or

(f) except for an elector to whom any of paragraphs 222(2)(a) to (d) applies, has resided outside Canada for five consecutive years or more.

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

Rights and freedoms in Canada

1. 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.

...

Democratic rights of citizens

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.

...

Equality before and under law and equal protection and benefit of law

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

...

Multicultural heritage

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

...

Exception where express declaration

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

GILLIAN FRANK AND JAMIE DUONG
Responding Party/Applicants
(Respondents in appeal)

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA
Moving Party/Respondent
(Appellant in appeal)

Court File No. CV-12-453976
Court of Appeal File No. C58776

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

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