Court File No.: 36645

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

GILLIAN FRANK AND JAMIE DUONG

Appellants

- and -

THE ATTORNEY GENERAL OF CANADA

Respondent

- and -

THE ATTORNEY GENERAL OF QUEBEC, THE ATTORNEY GENERAL OF NOVA SCOTIA, CANADIAN AMERICAN BAR ASSOCIATION, CANADIAN EXPAT ASSOCIATION, DAVID ASPER CENTRE for CONSTITUTIONAL RIGHTS, UNIVERSITY OF TORONTO FACULTY OF LAW, CANADIAN CIVIL LIBERTIES ASSOCIATION, METRO TORONTO CHINESE AND SOUTHEAST ASIAN LEGAL CLINIC and BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Interveners

FACTUM OF THE INTERVENER, THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

(pursuant to Rule 44 of the *Rules of the Supreme Court of Canada*)

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FACTUM OF THE INTERVENER,
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION ("BCCLA")

PART I - OVERVIEW

1. The British Columbia Civil Liberties Association ("BCCLA") intervenes in support of a stringent evidentiary standard to justify breaches of *Charter* rights. As in this Court's decision in *R v Oakes*,[1] the government must prove by cogent evidence, not mere assertion, that rights violations are demonstrably justified in a free and democratic society. While strict scientific proof may not be feasible in every case, the government must provide a reasoned demonstration of the basis for limiting *Charter* rights that is capable of being adjudicated.

2. Consistent with this Court's jurisprudence, the BCCLA proposes a four part framework to assess whether a pressing and substantial objective exists that can justify the limitation of the right to vote. The proposed objective of strengthening the "social contract" by limiting the right to vote to those most directly affected by the law, fails each step of the proposed framework. This objective is repugnant to democratic values, is insufficiently weighty to displace constitutional rights, is overly vague, and is unsupported by evidence.

3. Finally, the BCCLA submits that there is no rational connection between the limits on the use of the special ballot by non-resident Canadians contained in the *Canada Elections Act* and the objective of strengthening the social contract.

PART II - QUESTIONS AT ISSUE

4. The BCCLA's submissions are limited to three points:

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[1] *R. v. Oakes*, [1986] 1 S.C.R. 103, Appellants' Book of Authorities, vol 1, tab 19.

(a) A stringent evidentiary standard for the justification of a violation of the right to vote is required under s. 1 of the *Charter*;

(b) The promotion of the social contract is not a pressing and substantial objective that can be used to limit the right to vote; and

(c) The limits on non-resident voting are not rationally connected to the aim of strengthening the social contract.

PART III - STATEMENT OF ARGUMENT

A. Strict evidentiary standard applies when justifying an infringement of s. 3

5. The starting point in determining the proper evidentiary standard to be applied under s. 1 is *Oakes*, where this Court held that cogent and persuasive evidence would generally be necessary for the government to meet the burden of justification under s. 1.[2] It is only where the application of the s. 1 analysis is "obvious or self-evident" that the requirement for evidence may be relaxed.[3]

6. This Court's later jurisprudence adopted a "contextual approach" to s. 1, which adjusts the requisite standard of proof for justification based on a number of different factors. These factors are used to determine the extent to which evidence may consist of "approximations and extrapolations" as opposed to more traditional forms of social science proof, and therefore to what extent arguments based on logic and reason will be accepted as a foundational part of the s. 1 case.[4] These factors include: (i) the nature of the purported harm and the (in)ability to measure it; (ii) the vulnerability of the group purportedly protected; (iii) whether there are subjective fears and apprehension of harm; and (iv) the nature of the

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[2] *Ibid*. at p. 138 (emphasis added; citations omitted), Appellants' Book of Authorities, vol 1, tab 19.
[3] *Ibid*.
[4] *R. v. Bryan*, [2007] 1 S.C.R. 527 at para 29, BCCLA's Book of Authorities, tab 8.

infringed activity.[5] In this case, the key factors are the fundamental importance of the infringed activity (the right to vote) and the speculative nature of the harm (undermining the imagined "social contract").

7. When it comes to the right to vote under s. 3 of the *Charter*, this Court has consistently demanded a stricter version of the *Oakes* test. In *Sauvé #2*, McLachlin C.J., writing for the majority, explained that a stringent standard was necessary in order to safeguard a right of such fundamental importance:[6]

> *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.**

8. The nature of the purported harm is difficult to measure, but only because it has been framed in vague and abstract terms by the respondent (as discussed further below), which cannot militate in favour of a more lenient evidentiary standard.

9. As a result, a breach of the right to vote under s. 3 requires a strict, evidence-based standard for justification. Appeals to common sense or logic to *supplement* that evidence must be carefully scrutinized. The BCCLA submits that strict scrutiny is the lens through which the justification analysis in the present appeal must be viewed.

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[5] *Ibid.* at para. 10, BCCLA's Book of Authorities, tab 8.
[6] *Sauvé v Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519 at para. 14 [*Sauvé #2*] (italics in original; emphasis added), BCCLA's Book of Authorities, tab 11.

B. **No pressing and substantial objectives**

10. The majority of the Court of Appeal held that the pressing and substantial objective in this case was to "strengthen the social contract and enhance the legitimacy of the laws".[7]

11. A pressing and substantial objective is one that is "sufficiently important to be capable in principle of justifying a limitation on the rights guaranteed by the constitution".[8] The BCCLA submits that, consistent with this Court's jurisprudence, a four step inquiry is necessary where a stringent evidentiary standard is in play: i) is the objective consistent with the values of a free and democratic society? ii) is the objective sufficiently important that it can in principle justify the limitation of *Charter* rights? iii) does the objective identify a specific, concrete harm it seeks to remedy; and (iv) is there some evidentiary basis on which it may be concluded that such a harm exists. None of these requirements is met in this case.

12. ***First***, a pressing and substantial objective must be consistent with the values of a free and democratic society.[9] The proposed objective here is repugnant to those values.

13. The "social contract" (as that term is used by the respondent) bears no relation to that concept as it was used by this Court in *Sauvé #2*. McLachlin C.J. referred to the notion of a social contract in support of the principle that prisoners – citizens governed by the law—must retain a role in the democratic process that legitimizes these laws.[10] This is simply an expansion of the constitutional principle "no taxation without representation", generalized to

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[7] *Frank v. Canada (Attorney General)*, 2015 ONCA 536 at para. 115, Appellant's Record, vol. I, tab 6; see also Respondent's Factum at para. 72.
[8] *Mounted Police Association of Ontario v. Canada (Attorney General)*, [2015] 1 S.C.R. 3 at para. 142 [*Mounted Police*], BCCLA's Book of Authorities, tab 5.
[9] *R. v. K.R.J.*, 2016 SCC 31 at para. 61, BCCLA's Book of Authorities, tab 9.
[10] *Sauvé #2*, *supra* at para. 31, BCCLA's Book of Authorities, tab 11.

apply to burdens other than paying taxes.[11] The respondent here effectively proposes the converse—"no representation without taxation"—an entirely different idea that finds no support in this Court's jurisprudence. The suggestion that the state can remove the right to vote from a citizen for insufficient participation in the social contract is anathema to the inclusive view of Canadian democracy endorsed by this Court in *Sauvé #2*.

14. Moreover, this state-citizen model of the "social contract" ignores international law. International law regulates many aspects of modern life, ranging from climate change to child abduction to international security. International agreements on immigration or freedom of movement have a more direct impact on non-residents than resident Canadians. By the very logic of the social contract, these Canadians should be entitled to vote for the elected officials who negotiate and ratify the agreements that underpin their ability to live and work abroad.

15. The respondent's approach also ignores the myriad ways in which non-resident Canadians are (and could be) affected by Canadian laws. For instance, the respondent relies on the fact that currently only resident Canadians are required to pay Canadian taxes.[12] But there is no reason Canada could not also assess taxes based on citizenship, as the United States does.[13] It is true that Canadian laws cannot be *directly enforced* on non-resident Canadians while they are abroad, but nothing would prevent the enforcement of such laws when they return to visit, or through extradition arrangements with foreign states.

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[11] *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, [2007] 1 S.C.R. 3 at para. 14, BCCLA's Book of Authorities, tab 4.
[12] Respondent's Factum at para. 66.
[13] See e.g., Frederic Behrens, "Using a Sledgehammer to Crack a Nut: Why FATCA will not stand" (2013) Wis. L. Rev. 205, BCCLA's Book of Authorities, tab 13.

16. ***Second,*** even if upholding this "social contract" were a worthy goal, it is not sufficiently weighty to warrant a deprivation of *Charter* rights. Administrative efficiency and fiscal prudence are both important goals, but this Court has held that they will rarely, if ever, be grounds for limiting constitutional rights.[14] The attainment of a symbolic objective such as "strengthening the social contract" cannot justify a rights infringement.

17. ***Third,*** the respondent has not identified a specific, concrete harm. In *Sauvé #2*, this Court held that "vague," "abstract," "symbolic" or "rhetorical" objectives must be viewed with suspicion.[15] Such objectives frustrate the constitutional analysis because they "almost guarantee a positive answer" to the first stage of the *Oakes* test and "make the justification analysis more difficult".[16] Proper justification "requires that the objective clearly reveal the harm that the government hopes to remedy", not simply stand as a barren tautology.[17]

18. The proposed objective of "strengthening the social contract" is fundamentally different from the promotion of electoral fairness, a concrete concern that this Court has previously accepted as a pressing and substantial objective. In every such case, the government identified a number of specific harms in order to expose that objective. For example, in *Thomson Newspapers*, the prohibition on publishing opinion polls during the final three days of a campaign was said to advance electoral fairness by addressing the harm of voters overestimating the scientific accuracy of polls and consequently voting based on

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[14] *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 S.C.R. 504 at para. 110, BCCLA's Book of Authorities, tab 7; *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381 at para. 91, BCCLA's Book of Authorities, tab 6.
[15] *Sauvé #2*, *supra* at paras. 22-24, BCCLA's Book of Authorities, tab 11.
[16] *Ibid*.
[17] *Ibid*.

inaccurate perceptions.[18] In *Harper*, the third party election advertising regime aimed to promote fairness by preventing those with greater means from dominating electoral debate, to prevent some positions from being drowned out by others and to enhance public confidence in the democratic process.[19] And in *Bryan*, the prohibition on the early transmission of election news was said to protect informational equality, which was in turn a central element of electoral fairness.[20] Although promoting electoral fairness may qualify as a pressing and substantial objective when it describes the *ultimate* objective of more specific measures targeting specific harms, it cannot be used to bolster or immunize from careful review an objective that, standing on its own, falls well short of the requirements in *Sauvé #2*.

19. ***Fourth,*** there is an insufficient evidentiary basis to support a finding that the proposed objective is, in fact, pressing and substantial. It may not be realistic to demand definitive scientific or social science evidence that a pressing and substantial objective exists in every case. But nor should courts generally accept that objectives are pressing and substantial based purely on "common sense" or "logic." There should, at the very least, be *some* evidentiary basis upon which to believe that the concerns in question are pressing and substantial.[21]

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[18] *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877 at para. 96 [*Thomson Newspapers*], BCCLA's Book of Authorities, tab 12.

[19] *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827 at para. 23, *per* McLachlin C.J. and paras. 91-92, *per* Bastarache J., BCCLA's Book of Authorities, tab 3.

[20] *Bryan*, *supra* at para 35, *per* Bastarache J., BCCLA's Book of Authorities, tab 8.

[21] *Canada (Attorney General) v Hislop*, [2007] 1 S.C.R. 429 at para. 49, BCCLA's Book of Authorities, tab 1; *Thomson Newspapers*, *supra* at paras 103-105, BCCLA's Book of Authorities, tab 12.

20. Unlike past cases involving electoral fairness, the respondent has introduced no polling data, electoral report, or government report in support of the alleged unfairness in non-resident voting.[22]

21. This is not a case like *Thomson Newspapers*, *Harper* or *Bryan*, where the Court supplemented evidence of specific harms with certain basic common sense or logical propositions. In each of those cases, the impugned measures were designed to make elections fairer for *everyone who votes* by restricting s. 2(b) rights of third party funders or media outlets. This is different from cases where the impugned measures infringe s. 3 by restricting *who can vote* (*Sauvé #2* and the present appeal). The Court should apply a stricter evidentiary standard to justify a rights infringement in the latter scenario.

C. **No rational connection**

22. The next step of the s. 1 justification framework requires the Court to determine whether the infringing measure is rationally connected to the objectives put forward by the government. The rational connection enquiry is essentially concerned with whether there is a causal link between the rights violation and the achievement of the pressing and substantial objective.[23] While strict scientific proof of causation may not be possible in every case, the government must show the connection exists. The government may demonstrate the connection by evidence, reason, and logic, not mere "theories."[24]

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[22] *Thomson Newspapers*, *supra* at paras. 104, 107, BCCLA's Book of Authorities, tab 12; *Harper*, *supra* at paras. 94-100, BCCLA's Book of Authorities, tab 3; *Bryan*, *supra* at paras. 35-36, BCCLA's Book of Authorities, tab 8.

[23] *RJR - MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at para 153, BCCLA's Book of Authorities, tab 10; Peter W. Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) at para 38.10(b), BCCLA's Book of Authorities, tab 14.

[24] See, e.g. *Sauvé #2*, *supra* at paras 28 – 29, BCCLA's Book of Authorities, tab 11.

23. In *Mounted Police*, this Court recently affirmed the need for "reasoned demonstration" of the causal link between the impugned measure and the desired objective, even in cases that do not readily admit of empirical proof.[25] The majority found no rational connection between the exclusion of the RCMP from the federal public service collective bargaining regime and the goal of promoting neutrality, stability, and reliability in the RCMP.[26]

24. Similarly, the five-year time limit on non-resident voting by special ballot has not been shown by evidence to be rationally connected to the goal of promoting the "social contract" or electoral fairness. This Court has indicated that threshold limits on rights of democratic participation must have a strong evidentiary foundation or will risk being found to be arbitrary. In *Figueroa*, the Court struck down the requirement that political parties field candidates in at least 50 ridings in order to receive certain electoral financing advantages and the right to list party affiliation next to a candidate's name on a ballot. The majority, *per* Iacobucci J., held that there was "no connection whatsoever" between the 50 candidate threshold and enhancing the electoral process.[27] On its face the infringing measure was rationally connected to its objective but the Court looked past "common sense" and held that the government had not provided sufficient evidence to support the claim that the 50 candidate rule increased the likelihood of a majority government.[28]

25. More fundamentally, the limits on voting by non-residents by special ballot do not support the goal of upholding the "social contract" because they do not in fact remove the right to vote of long term non-resident voters—they just make voting more difficult for them

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[25] *Mounted Police*, *supra* at para. 144, BCCLA's Book of Authorities, tab 5.
[26] *Ibid.* at paras. 145-147.
[27] *Figueroa v. Canada (Attorney General)*, [2003] 1 S.C.R. 912 at para. 64, BCCLA's Book of Authorities, tab 2.
[28] *Ibid*. at paras 84-85.

by removing the right to vote by mail. As the record shows, Elections Canada takes a broad interpretation of the words "ordinarily resident" under s. 6 of the *Canada Elections Act* that permits non-resident voters to vote in person at advance polls or on election day, usually at their last place of residence in Canada.[29] Elections Canada's interpretation of its home statute is entitled to deference under ordinary principles of administrative law. The *ad hoc* nature of the respondent's "social contract" argument is betrayed by the fact that the *Canada Elections Act* permits non-resident voters to vote in this way. The prohibition against special ballots for long term non-residents does not achieve the objective of upholding the "social contract" if there is a different means by which these same voters (or at least those who can afford to travel to Canada to vote) can cast a ballot.

PART IV - SUBMISSIONS ON COST

26. The BCCLA does not seek costs and requests that no costs be ordered against it.

PART V - ORDER REQUESTED

27. The BCCLA requests permission to make oral submissions of no more than 10 minutes. It asks that its submissions be taken into account in the disposition of the legal issues on this appeal.

[29] J.P. Kingsley Reply Affidavit, at paras. 32-33, AR, vol. VII, tab 5, p. 43 and Exhibit "B", Elections Canada, "Registration and Voting Process for Canadians who Live Abroad".

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of December, 2016.

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PART VI – TABLE OF AUTHORITIES

Authority	**Paragraph No. Referred to in Factum**
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PART VII – STATUTORY PROVISIONS

None.