

**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 -

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

Interveners

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**FACTUM OF THE INTERVENER,  
THE CANADIAN CIVIL LIBERTIES ASSOCIATION**  
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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## PART I - OVERVIEW

### A. Overview

1. Section 3 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") provides, in sweeping and unqualified terms, the right to vote to all Canadian citizens. At issue in this appeal is whether the government has the power to deprive Canadian citizens of the right to vote when it deems Canadian citizens to be "non-residents".

2. Specifically, this court is asked to review the constitutionality of 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") and, in particular, whether the Impugned Provisions impose an unreasonable and unjustifiable limit on the right to vote enshrined in section 3 of the *Charter*. The Impugned Provisions prevent Canadian citizens residing abroad for more than five consecutive years (or those abroad for less than five years who do not intend to return to Canada) from voting in federal elections.

3. There is no doubt that the Impugned Provisions constitute a *prima facie* violation of the *Charter*. The respondent concedes as much. The *Charter* provides an unqualified right to vote to all Canadian citizens while the Impugned Provisions purport 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*.

4. The Canadian Civil Liberties Association ("CCLA") adopts the appellants' legal analysis of the Impugned Provisions and the s 3 right to vote. 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 such as equality.

### B. The Facts

5. CCLA takes no position on the facts of this case.

## PART II - CCLA'S POSITION ON THE ISSUE

6. 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 *Charter* values are protected or eroded by legislation that violates the *Charter* should be

weighed along with any salutary and deleterious effects. Where the impugned legislation undermines *Charter* values, that fact should weigh heavily against a finding that the effect of the legislation is proportional.

7. Underlying the right to vote, and inextricably linked to it, is the principle of equality. The analysis of whether a limit on s 3 is demonstrably justified, and in particular whether the salutary effects outweigh the deleterious, 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 impacts will outweigh the salutary.

8. 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 cannot justify depriving individuals of the right to vote in federal elections. This distinction, by depriving non-resident Canadians of personal autonomy and self-determination, creates a second class of citizens, undermines the *Charter* value of equality, and has a deleterious and menacing effect on the integrity of the *Charter* right to vote.

### PART III - ARGUMENT

#### A. The Decision of the Court of Appeal for Ontario

9. CCLA intervened in this case at the Court of Appeal. CCLA argued, relying on jurisprudence of this court, that at the final balancing stage of the proportionality analysis, the court is required to consider the impact of a *prima facie Charter* infringement on other *Charter* values. The majority held that the *Charter* value of equality was not engaged in the present case as the Impugned Provisions did not constitute discriminatory treatment:

The intervener CCLA argued that in this final balancing process the court should consider *Charter* values, and in particular the value of equality. Its submission was not that the court should embark on a full-blown s. 15 *Charter* analysis, but that the court should be mindful of equality principles and not create a class of “second class” citizens, namely long-term non-resident voters. I am not persuaded that the proposed analysis is called for in every case... While in some cases the “harm of the infringement” might include an aspect of discrimination, that is not so in the case before us. Non-resident voters are not treated differently because they are less worthy of the vote.<sup>1</sup>

10. In contrast, Laskin JA, in dissent, adopted CCLA’s submission and considered the impact of the Impugned Provisions on the *Charter* value of equality in the final balancing:

[T]he harmful effects of depriving the respondents of their right to vote are significant. Voting, participating in the selection of a country’s representatives, is a cornerstone of a free and democratic state. Depriving a person of this most fundamental benefit of

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<sup>1</sup> *Frank v Canada*, 2015 ONCA 536 at paras 158-159, Appellants’ Record, Volume I, Tab 6, pp 115-116 [*Frank CA*].

citizenship, constitutionally guaranteed in Canada, must inevitably have a serious adverse impact. This deprivation turns the respondents into second class citizens and so undermines the values of equality and inclusiveness stressed in *Sauvé* and underlying our *Charter* rights.<sup>2</sup>

11. The majority and dissenting reasons at the Court of Appeal diverge on when the impact of a *Charter* infringement on *Charter* values ought to be considered at the final balancing stage of the proportionality analysis, and whether the Impugned Provisions merit such an analysis. The majority did not consider the impact of the Impugned Provisions on *Charter* values at all.

### **B. Proportionality and the Final Balancing**

12. 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 the objectives that are advanced by the limitation on the *Charter* right and whether the limit is proportional.<sup>3</sup> 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.<sup>4</sup>

13. 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”.<sup>5</sup> As noted by the Chief Justice in *Hutterian Brethren*, this final proportionality assessment is critical in cases involving fundamental rights. The right to vote is clearly such a right.<sup>6</sup> Whether a limitation on the right to vote is demonstrably justified often will turn on whether the deleterious impact of the limitation is proportional to the benefits achieved by the legislation.<sup>7</sup>

### **C. The Role of *Charter* Values in the Proportionality Analysis**

14. 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 constitutional challenge to legislation does not meet the requirements of s 15 because, for instance, the distinction drawn in the legislation is not

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<sup>2</sup> *Ibid* at para 251, Appellants' Record, Volume I, Tab 6, p 150.

<sup>3</sup> *Sauvé v Canada (Chief Electoral Officer)*, [2002] 3 SCR 519 at para 14, Appellants' Book of Authorities, Volume 1, Tab 29 [*Sauvé* No. 2].

<sup>4</sup> *Sauvé v Canada (Attorney General)*, [1992] OJ No 565 at 7 (CA), Appellants' Book of Authorities, Volume 1, Tab 27, *aff'd* [1993] 2 SCR 438, Appellants' Book of Authorities, Volume 1, Tab 28.

<sup>5</sup> *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 77, Book of Authorities of the Intervener, Canadian Civil Liberties Association (“CCLA's Authorities”), Tab 1 [*Hutterian Brethren*].

<sup>6</sup> *Ibid* at para 78, CCLA's Authorities, Tab 1.

<sup>7</sup> *Ibid*, CCLA's Authorities, Tab 1.



based on an enumerated or analogous ground.<sup>8</sup> 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 the *Charter* as a whole.

15. Similarly, this court has held in multiple cases that *Charter* values inform the application of the *Oakes* test. Specifically, at the final balancing stage of the proportionality test, where the benefits of the Impugned Provisions are to be weighed against the deleterious effects, this court has assessed the extent to which impugned legislation undermines *Charter* values.

16. For example, in *Thomson Newspapers v Canada (Attorney General)*, this court 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:

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*.<sup>9</sup>

17. In *Thomson*, this court weighed the salutary effects of the impugned legislation on the right to vote against the deleterious impact on free expression.<sup>10</sup>

18. Similarly, in weighing the benefits of a *prima facie* infringement of expressive freedom against its costs, a majority of this court in *Canada (Human Rights Commission) v Taylor* held that, under *Oakes*, a meaningful consideration of the principles central to a free and democratic society should "give full recognition to other provisions of the *Charter*"<sup>11</sup> - 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".<sup>12</sup>

19. As set out more fully below, CCLA respectfully submits that the Impugned Provisions 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. This weighs heavily against a finding that the Impugned Provisions constitute a reasonable and demonstrably justified limit.

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<sup>8</sup> Peter W Hogg, "Equality as a Charter Value in Constitutional Interpretation" (2003) 20 SCLR (2d) 113 at 130-131, CCLA's Authorities, Tab 10 [Hogg].

<sup>9</sup> *Thomson Newspapers v Canada (Attorney General)*, [1998] 1 SCR 877 at para 125, Appellants' Book of Authorities, Volume 1, Tab 33 [Thomson].

<sup>10</sup> *Ibid* at paras 127-30, Appellants' Book of Authorities, Volume 1, Tab 33. See also: *Hutterian Brethren*, *supra* note 5 at para 77, CCLA's Authorities, Tab 1.

<sup>11</sup> *Canada (Human Rights Commission) v Taylor*, [1990] 3 SCR 892 at 916-917, CCLA's Authorities, Tab 2.

<sup>12</sup> *Ibid* at 920, CCLA's Authorities, Tab 2.

#### D. The *Charter* Value of Equality

20. The *Charter*, by enshrining a right to equality, protects what this court has called one of the highest "ideals and aspirations" of Canadian society.<sup>13</sup> 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 this court, 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.<sup>14</sup>

21. In addition to the protection of essential human dignity and freedom, the *Charter* value of equality is guided by the principles of freedom from arbitrary disadvantage or prejudice and the realization of individual autonomy and self-determination.<sup>15</sup>

#### E. Interaction Between the Right to Vote and Equality

22. This court has expressed on multiple occasions that *Charter* rights must be interpreted in relation to each other, rather than in isolation.<sup>16</sup> 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".<sup>17</sup> Interpretations of *Charter* rights that result in the deprivation of other *Charter* rights or values should be avoided.

23. 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*.<sup>18</sup>

24. This court has held that the right to vote is a fundamental right.<sup>19</sup> The text of s 3 plainly confers an unqualified right to vote on every Canadian citizen. That the democratic right is given to all citizens equally is at the heart of the guarantee. Indeed, Professor Hogg, analyzing this

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<sup>13</sup> *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 2, CCLA's Authorities, Tab 6.

<sup>14</sup> *Ibid* at para 51, CCLA's Authorities, Tab 6.

<sup>15</sup> *Ibid* at para 53, CCLA's Authorities, Tab 6.

<sup>16</sup> *R v Dubois*, [1985] 2 SCR 350 at 365, CCLA's Authorities, Tab 8 [*Dubois*]; *R v Tran*, [1994] 2 SCR 951 at 976, CCLA's Authorities, Tab 9.

<sup>17</sup> *Ibid* at 365, CCLA's authorities, Tab 8.

<sup>18</sup> *Sauvé No. 2*, *supra* note 3 at para 11, Appellants' Book of Authorities, Volume 1, Tab 29.

<sup>19</sup> *Ibid* at para 9, Appellants' Book of Authorities, Volume 1, Tab 29.

court's decision in *Reference Re Provincial Electoral Boundaries (Saskatchewan)* concluded that the decision established that s 3 includes within it an equality requirement.<sup>20</sup>

25. 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 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.<sup>21</sup>

26. This relationship between equality and the right to vote is intuitive when situated within the democratic principle that s 3 protects. As noted by this court in *Sauvé No. 2*, democracy in Canada is built on the principles of "inclusiveness, equality, and citizen participation".<sup>22</sup> The right to vote protected by s 3, in turn, is defined as the "cornerstone" of our democracy.<sup>23</sup>

27. It is therefore respectfully submitted that, contrary to the holding of the majority in the court below, equality as a *Charter* value is central to and inherent in the right to vote. Where legislation seeks to limit the right to vote, the *Charter* value of equality is engaged, and the court should consider the extent to which the impugned legislation undermines principles of personal

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<sup>20</sup> *Reference Re Provincial Electoral Boundaries (Saskatchewan)*, [1991] 2 SCR 158 at 183-84, CCLA's Authorities, Tab 7; Hogg, *supra* note 8 at 122-123, CCLA's Authorities, Tab 10. As stated by Prof Hogg at 122:

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.

<sup>21</sup> *Henry v Canada (Attorney General)*, 2010 BCSC 610 at para 143, CCLA's Authorities, Tab 4. *aff'd* without reference to this point 2014 BCCA 30, Appellants' Book of Authorities, Volume 1, Tab 9, leave to appeal to SCC refused, 35806 (July 17, 2014), CCLA's Authorities, Tab 5.

<sup>22</sup> *Sauvé No. 2*, *supra* note 3 at para 41, Appellants' Book of Authorities, Volume 1, Tab 29.

<sup>23</sup> *Ibid* at para 14, Appellants' Book of Authorities, Volume 1, Tab 29.

autonomy, self-determination, fair treatment of all Canadians, and freedom from arbitrary disadvantage or prejudice.

**F. Effect of the Impugned Provisions on the *Charter* Value of Equality**

28. On the final balancing, the respondent argues that the salutary effects of preventing non-resident Canadians from voting 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.<sup>24</sup> Before the Court of Appeal, the argument was characterized primarily as the need to preserve the "social contract" between the government and those who are required to obey its laws. The respondent's submission is premised on the notion that there is a "residency requirement" that can reasonably qualify the right to vote in federal elections insofar as it ensures that voting citizens maintain some connection to Canada. According to the respondent, it is only those citizens that reside in Canada who maintain that connection because they bear full responsibility to obey all of Canada's laws, while non-residents remove themselves as parties to the social contract. The Impugned Provisions are said to further those salutary effects.

29. The appellants, meanwhile, argue that the deprivation of the ability to vote is itself a substantial deleterious effect. The appellants argue that the deleterious impact 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.<sup>25</sup>

30. It is respectfully submitted that the inquiry ought not, however, end there. The court must also weigh the salutary and deleterious impacts of the Impugned Provisions on other *Charter* values, and in particular the principle of equality that is embedded in the right to vote.

31. 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.<sup>26</sup> Almost 60% of those 1.4 million people are not citizens of any other country.<sup>27</sup> The Impugned Provisions deprive those Canadians of the right to vote, with the only justification made available to this court being a presumption that only those

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<sup>24</sup> Factum of the Respondent, para 95.

<sup>25</sup> Appellants' Factum, paras 102-105.

<sup>26</sup> Affidavit of Don De Voretz sworn May 12, 2012 ("De Voretz Affidavit") at para 41, Appellants' Record, Volume II, Tab 3, p 29.

<sup>27</sup> De Voretz Affidavit at para 17, Appellants' Record, Volume II, Tab 3, pp. 22-23.

Canadians who reside in Canada maintain a sufficient investment in the nation's government to deserve the right to vote.

32. However, like the appellants, many of these Canadians, maintain a substantial connection to Canada. They pay taxes on income in Canada, many have family in Canada, and laws are enacted specifically so that they apply to non-resident Canadians.<sup>28</sup>

33. Indeed, the court need not look beyond the Impugned Provisions 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). The Impugned Provisions prevent the very Canadians affected by them from having 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 undermines the very purpose of the *Charter* by securing the rights of one group of Canadians (residents) through the denial of the same right to another (non-residents). Equality is not a zero-sum game.

34. The Impugned Provisions 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 discriminatory character of this distinction is deepened by the correlations that often exist between non-resident status and ethnicity or national origin.<sup>29</sup> Insofar as non-resident status is more common among certain ethnic groups and among individuals from certain national origins, the result is a system of tiered citizenship that is drawn, at least in part, upon lines of ethnicity and national origin.

35. 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 this court 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.<sup>30</sup>

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<sup>28</sup> De Voretz Affidavit at paras 15-40, Appellants' Record, Volume II, Tab 3, pp 22-29.

<sup>29</sup> Asia Pacific Foundation of Canada, *Canadians Abroad: Canada's Global Asset Capstone Report* by Don Devoretz & Kenny Zhang (27 June 2011) at pp 12-14, Exhibit "C" to the De Voretz Affidavit, Appellants' Record, Volume II, Tab 3C, pp 89-91.

<sup>30</sup> *Opitz v Wrzesnewskyj*, [2012] 3 SCR 76 at para 34, Appellants' Book of Authorities, Volume 1, Tab 16.

36. Where a purported salutary effect is inconsistent with *Charter* values, 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. Given that there is no explicit residency requirement in s 3 of the *Charter*, preventing the right to vote for Canadian citizens who have been non-resident in Canada for more than five years represents a qualification to a fundamental right that has been described by this court as "broad", "untrammelled", and deserving of a liberal, purposive, and enabling interpretation.<sup>31</sup>

38. In *Doré v Barreau du Québec*,<sup>32</sup> this court went so far as to find that the decision of an administrative tribunal that serves to advance *Charter* values may be constitutionally justified despite the fact that it limits a *Charter* right.<sup>33</sup> *A fortiori*, a statute that, in addition to infringing a *Charter* right is also inconsistent with *Charter* values, cannot be so justified.

39. Given the above, an analysis of *Charter* values at the balancing stage invalidates the "social contract" benefit the respondent claims for a denial of s 3 rights to long term non-residents. This court's decisions regarding attempts to limit s 3 *Charter* rights, including the discussion in *Sauvé No. 2*<sup>34</sup> of the relationship between voting and the "social contract", are based on the principle that s 3 protects a right, not a privilege, and that it applies to all citizens capable of exercising it, even those who have violated society's most fundamental norms.

40. The "social contract" theory articulated by the respondent is not new. It has been used to limit the right to vote for entire classes of citizens: non-landowners, women, mentally disabled people, and criminals. Each time, the limit has ultimately been found to be unjustifiable. Viewed from this perspective, denying the franchise to an entire class of citizens based on stereotyped views of their unworthiness or lack of capacity to participate in democratic elections is inconsistent with the democratic right itself and with the *Charter* value of equality that informs it.

41. All Canadian citizens, including long term non-residents, can be equally bound to obey laws that Parliament determines will apply to them. For that reason, all Canadians must equally have a right to participate in the election of the Members of Parliament who will determine the

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<sup>31</sup> *Sauvé No. 2*, *supra* note 3 at para 11, Appellants' Book of Authorities, Volume 1, Tab 29. To the extent the respondent cites limits on non-resident voting in other jurisdictions, it should be noted that the United Kingdom recently published a policy statement in which it committed to introduce legislation scrapping the rule that prevents British citizens who have lived overseas from voting if they have been non-resident for more than 15 years. The UK government stated in that policy statement that it plans to abolish the time limit entirely: United Kingdom, Cabinet Office, *A democracy that works for everyone: British citizens overseas*, (7 October 2016) at 4-7, CCLA's Authorities, Tab 11.

<sup>32</sup> *Doré v Barreau du Québec*, [2012] 1 SCR 395 CCLA's Authorities, Tab 3 [*Doré*].

<sup>33</sup> *Ibid* at paras 35-38, 55-71, CCLA's Authorities, Tab 3.

<sup>34</sup> *Sauvé No. 2*, *supra* note 3 at paras 37-41, Appellants' Book of Authorities, Volume 1, Tab 29.

laws they must obey. A true "social contract" analysis undermines rather than supports the notion of a salutary effect from the creation of a second class of disenfranchised Canadian citizens.

42. 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. As a result, the purported benefit to democracy arising from the delegation of some citizens to second class status is entirely overwhelmed by the harm done by such legislation to the very notion of democracy and the principle of equality it presupposes. It cannot be reasonable and demonstrably justified in a free and democratic society.

#### **G. Conclusion**

43. CCLA respectfully submits that the impact of the Impugned Provisions on *Charter* values, such as equality, should be considered by this court at the final balancing stage of the *Oakes* test. The significant deleterious impact of the Impugned Provisions on the value of equality, in addition to the *prima facie* infringement of the right to vote, leads to the unavoidable conclusion that the deleterious impacts of the Impugned Provisions far outweigh any purported salutary effect.

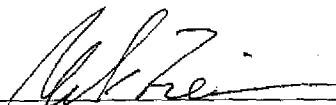
#### **PART IV - SUBMISSIONS REGARDING COSTS**

44. The CCLA does not seek costs and asks that no costs be awarded against it.

#### **PART V - ORDER REQUESTED**

45. The CCLA requests the court's permission to make oral submissions of no more than 10 minutes in length at the hearing of this appeal.

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

  
\_\_\_\_\_  
Mark J. Freiman

  
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Jameel Madhany

Lerners LLP  
Counsel for the Intervener,  
The Canadian Civil Liberties Association

**PART VI - TABLE OF AUTHORITIES**

	<b>Para(s)</b>
1. <i>Alberta v Hutterian Brethren of Wilson Colony</i> , 2009 SCC 37 .....	¶¶ 13, 17
2. <i>Canada (Human Rights Commission) v Taylor</i> , [1990] 3 SCR 892 .....	¶18
3. <i>Doré v Barreau du Québec</i> , [2012] 1 SCR 395.....	¶38
4. <i>Frank v Canada</i> , 2015 ONCA 536 .....	¶9, 10
5. <i>Henry v Canada (Attorney General)</i> , 2010 BCSC 610.....	¶25
6. <i>Henry v Canada (Attorney General)</i> , 2014 BCCA 30.....	¶25
7. <i>Henry v Canada (Attorney General)</i> , 2014 CanLII 38981 (SCC) .....	¶25
8. <i>Law v Canada (Minister of Employment and Immigration)</i> , [1999] 1 SCR 497 .....	¶20, 21
9. <i>Opitz v Wrzesnewskyj</i> , [2012] 3 SCR 76 .....	¶35
10. <i>Reference Re Provincial Electoral Boundaries (Saskatchewan)</i> , [1991] 2 SCR 158 ....	¶24
11. <i>R v Dubois</i> , [1985] 2 SCR 350.....	¶22
12. <i>R v Tran</i> , [1994] 2 SCR 951 .....	¶22
13. <i>Sauvé v Canada (Attorney General)</i> , [1992] O.J. No. 565 (ONCA).....	¶11
14. <i>Sauvé v Canada (Attorney General)</i> , [1993] 2 SCR 438.....	¶11
15. <i>Sauvé v Canada (Chief Electoral Officer)</i> , [2002] 3 SCR 519 .....	¶12, 23, 24, 26, 37, 39
16. <i>Thomson Newspapers v Canada (Attorney General)</i> , [1998] 1 SCR 877 .....	¶16, 17

**SECONDARY SOURCES**

17. Asia Pacific Foundation of Canada, <i>Canadians Abroad: Canada's Global Asset</i> , Capstone Report by Don Devoretz & Kenny Zhang (27 June 2011) .....	¶34
18. Peter W Hogg, "Equality as a Charter Value in Constitutional Interpretation" (2003) 20 SCLR (2d) 113 .....	¶14, 24
19. United Kingdom, Cabinet Office, <i>A democracy that works for everyone: British citizens overseas</i> (7 October 2016) .....	¶37



## PART VII - STATUTES AND REGULATIONS

*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.*

### Guarantee of Rights and Freedoms

#### 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

##### 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.

.....

#### Mobility Rights

##### Mobility of citizens

6 (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

##### Rights to move and gain livelihood

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

(a) to move to and take up residence in any province; and

(b) to pursue the gaining of a livelihood in any province.

#### Limitation

(3) The rights specified in subsection (2) are subject to

(a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and

(b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

#### Affirmative action programs

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

**Charte canadienne des droits et libertés, partie I de la Loi constitutionnelle de 1982, constituant l'annexe B de la Loi de 1982 sur le Canada (R-U), 1982, c 11.**

## **Garantie des droits et libertés**

### **Droits et libertés au Canada**

1 La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

.....

### **Droits démocratiques**

#### **Droits démocratiques des citoyens**

3 Tout citoyen canadien a le droit de vote et est éligible aux élections législatives fédérales ou provinciales.

.....

### **Liberté de circulation et d'établissement**

#### **Liberté de circulation**

6 (1) Tout citoyen canadien a le droit de demeurer au Canada, d'y entrer ou d'en sortir.

#### **Liberté d'établissement**

(2) Tout citoyen canadien et toute personne ayant le statut de résident permanent au Canada ont le droit :

- a) de se déplacer dans tout le pays et d'établir leur résidence dans toute province;
- b) de gagner leur vie dans toute province.

#### **Restriction**

(3) Les droits mentionnés au paragraphe (2) sont subordonnés:

- a) aux lois et usages d'application générale en vigueur dans une province donnée, s'ils n'établissent entre les personnes aucune distinction fondée principalement sur la province de résidence antérieure ou actuelle;

- b) aux lois prévoyant de justes conditions de résidence en vue de l'obtention des services sociaux publics.

### **Programmes de promotion sociale**

(4) Les paragraphes (2) et (3) n'ont pas pour objet d'interdire les lois, programmes ou activités destinés à améliorer, dans une province, la situation d'individus défavorisés socialement ou économiquement, si le taux d'emploi dans la province est inférieur à la moyenne nationale.

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### **Rules of the Supreme Court of Canada, SOR/2002-156**

57 [...]

(2) A motion for intervention shall

[...]

- (b) set out the submissions to be advanced by the person interested in the proceeding, their relevance to the proceeding and the reasons for believing that the submissions will be useful to the Court and different from those of the other parties.

SOR/2013-175, s. 38.

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### **Règles de la Cour suprême du Canada, DORS/2002-156**

57 [...]

(2) La requête expose ce qui suit :

[...]

- b) ses arguments, leur pertinence par rapport à la procédure et les raisons qu'elle a de croire qu'ils seront utiles à la Cour et différents de ceux des autres parties.

DORS/2013-175, art. 38.

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### **Canada Elections Act, SC 2000, c 9**

#### **Part 11**

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

[...]

- (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;

[...]

### **Definitions**

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

**elector** means an elector, other than a Canadian Forces elector, who resides temporarily outside Canada. (*électeur*)

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

[...]

### **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

[...]

(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

[...]

(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;

[...]

### **Deletion of names from register**

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

[...]

(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.

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## **Loi électorale du Canada, LC 2000, ch 9**

### **Partie 11**

**11** Peuvent voter dans le cadre de la partie 11 :

[...]

**d)** les électeurs qui sont absents du Canada depuis moins de cinq années consécutives et qui ont l'intention de revenir résider au Canada;

[...]

### **Définitions**

**220** Les définitions qui suivent s'appliquent à la présente section.

**électeur** Électeur résidant à l'étranger temporairement, à l'exclusion d'un électeur des Forces canadiennes. (*elector*)

**registre** Le registre visé au paragraphe 222(1). (*register*)

### **Registre**

**222 (1)** Le directeur général des élections tient un registre des électeurs résidant temporairement à l'étranger où il inscrit les nom, date de naissance, sexe, adresses municipale et postale et circonscription des électeurs qui ont présenté une demande d'inscription et de bulletin de vote spécial et qui satisfont aux conditions suivantes :

[...]

**b)** résider à l'étranger depuis moins de cinq années consécutives au moment de la présentation de la demande;

**c)** avoir l'intention de rentrer au Canada pour y résider.

[...]

### **Demande d'inscription**

**223 (1)** La demande d'inscription et de bulletin de vote spécial est faite selon le formulaire prescrit et doit contenir les éléments suivants, en ce qui concerne l'électeur :

[...]

**e)** l'adresse soit du lieu de sa résidence habituelle au Canada avant son départ pour l'étranger, soit du lieu de la résidence habituelle au Canada de son époux, de son conjoint de fait, d'un parent, d'un parent de son époux ou de son conjoint de fait, d'une

personne à la charge de qui il est ou de la personne avec laquelle il demeurerait s'il ne résidait pas temporairement à l'étranger;

f) la date à laquelle il a l'intention de rentrer au Canada pour y résider;

[...]

**226** Le directeur général des élections radie du registre le nom de l'électeur dans les cas suivants :

[...]

f) sauf s'il est visé au paragraphe 222(2), l'électeur a résidé à l'étranger pendant cinq années consécutives ou plus.