File Number: 36645

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

B E T W E E N :

GILLIAN FRANK AND JAMIE DUONG

Applicants

- and –

THE ATTORNEY GENERAL OF CANADA

Respondent

REPLY OF THE APPLICANTS

CAVALLUZZO SHILTON McINTYRE CORNISH LLP
Barristers & Solicitors
474 Bathurst Street, Suite 300
Toronto, ON M5T 2S6

Shaun O'Brien – LSUC#43547F
Amanda Darrach – LSUC#51257O
Tel: 416-964-1115
Fax: 416-964-5895

Counsel for the Applicants

ORIGINAL TO: **THE REGISTRAR**

COPY TO: **ATTORNEY GENERAL OF CANADA**
Department of Justice
The Exchange Tower
130 King Street West
Suite 3400, Box 36
Toronto, ON M5X 1K6

Peter Southey/ Gail Sinclair / Peter Hajecek
Tel: (416) 973-2240
/954-8109/973-9035
Fax: (416) 973-0809
Email: peter.southey@justice.gc.ca / gail.sinclair@justice.gc.ca / peter.hajecek@justice.gc.ca

Counsel for the Respondent

William F. Pentney, Q.C.
Deputy Attorney General of Canada
East Memorial Building
284 Wellington Street
Ottawa, ON K1A 0H8

Christopher Rupar
Tel: (613) 941-2351
Fax: (613) 954-1920
Email: christopher.rupar@justice.gc.ca

Agent for the Respondent

COPY TO: **LERNERS LLP**
130 Adelaide Street West, Suite 2400
Toronto, ON M5H 3P5

Mark Freiman / Jameel Madhany
Tel: (416) 601-2370 / (416) 601-2640
Fax: (416) 867-2453 / (416)601-2745
Email: mfreiman@lerners.ca / jmadhany@lerners.ca

Lawyers for the Intervener, Canadian Civil Liberties Association

COPY TO: **BORDEN LADNER GERVAIS LLP**
Barristers and Solicitors
Scotia Plaza, 40 King Street West
Toronto, ON M5H 3Y4

Alessandra V. Nosko
Tel: (416) 367-6644
Fax: (416) 361-73343
Email: anosko@blg.com

Lawyers for the Intervener, the Chief Electoral Officer

COPY TO: **STOCKWOOD LLP Barristers**
TD North Tower
77 King Street West, Suite 4130
Toronto, ON M5K 1H1

Brandan van Niejenhuis / Justin Safayeni
Tel: (416) 593-7200
Fax: (416) 593-9345
Email: brendanvn@stockwoods.ca / justins@stockwoods.ca

Lawyers for the Intervener, BC Civil Liberties Association

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PART I: Overview

1. In its Memorandum of Argument responding to the Applicants' Application for Leave to Appeal, the Respondent has relied on provincial and territorial decisions, as well as the international context, including decisions of the European Court of Human Rights (the "ECHR"), to argue that this Court need not intervene in this matter. Neither the provincial and territorial jurisprudence nor the international context detract in any way from the public and national importance of the issues in this case. Moreover, the provincial and territorial cases are readily distinguishable. They deal with an individual's connection to a particular province or territory in the context of a system of federalism in which such a connection may not otherwise exist. The same cannot be said of citizens of Canada, who by their citizenship have a fundamental connection to this country.

2. With respect to the international context, Canada has been a leader in voting rights. This Court has taken a strong, uncompromising stance in protecting the voting rights of Canadian citizens, distinct from the more deferential stance adopted by the ECHR. Neither the provincial nor international context should provide any comfort that would prevent this Court from intervening in this matter.

PART II: Legal Argument

A. Provincial Cases Do Not Assist

3. The cases relied on by the Respondent addressing provincial and territorial electoral laws have little bearing on the current case.[1] They address only the issue of establishing residence in a

1 *Storey v. Zazelenchuk*, [1984] SJ No. 800 (C.A.); *Anawak v. Nunavut (Chief Electoral Officer)*, 2008 NUCJ 26; *Re Yukon Election Residency Requirements*, [1986] YJ No. 14 (C.A.) ("*Yukon Election*").

province or territory prior to being entitled to vote in the province or territory, not the right to vote after having lived in it. More importantly, as recognized by the Application Judge, and by Laskin J.A. in dissent, who found provincial and territorial legislation "quite distinguishable,"[2] the cases are distinguishable precisely because they address the provincial or territorial context, and not the federal context. Citizenship connects Canadian citizens to Canada as a whole and delineates the entitlement to vote. There is no similar pre-existing connection to a province or territory. Indeed, in the *Yukon Election* case, relied on by the Respondent, the Yukon Territory Court of Appeal acknowledged the need to show a connection to the province or territory arose because "[m]anifestly, in a federal system," individuals may "move from one province to another." The individual may need to show some connection to the new province before deciding on its local matters.[3]

4. By contrast, as the Application Judge found in the current case:

> The very fact of being a citizen creates and is the attachment to Canada which forms the foundation of the s. 3 *Charter* right. Unlike the province or territory, therefore, there is no need to create an additional test for attachment – attachment is established by virtue of citizenship.[4]

5. In *Sauvé No. 2*,[5] the provincial context did not assist the federal government's justification of its denial of voting rights to some prisoners. Although the dissenting judgment of this Court relied on the fact that many provinces or territories prohibited some or all prisoners from voting, this provincial context did not temper the majority's blistering judgment, which rejected all limitations on prisoners' voting rights. Here, the provincial cases, in which

2 Decision of the Court of Appeal, at para 254, Application for Leave to Appeal ("ALA") Tab 3(e), p.190

3 *Yukon Territory, supra*, at p. 3.

4 Amended Reasons for Judgment at para 96, ALA Tab 3(b), p.68.

5 *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68.

individuals have no fundamental attachment to a province or territory, similarly do not provide a sound basis to prevent this Court's intervention.

B. International Context Does Not Assist

6. It is equally clear that the international context should not dissuade this Court from recognizing the public, national importance of the issues in this case. First, decisions of the ECHR, which interpret a convention between individual sovereign states (members of the Council of Europe), are not in line with the decisions of this Court. They should not provide any comfort that the issues in this case have been settled.

7. The ECHR's decisions on prisoners' voting rights, for example, take a sharply different approach than has this Court. In *Scoppola v. Italy (No. 3)*,[6] the ECHR upheld limitations on voting rights of prisoners, stating that the rights enshrined in Article 3 of Protocol No. 1 (including the right to vote) are not absolute. Contracting states must be afforded a wide margin of appreciation in this sphere.[7] Each state was free to adopt legislation in accordance with its own "democratic vision."[8]

8. This Court has taken a drastically different approach. Far from affording the state a wide margin of appreciation, this Court has said that "courts considering denials of voting rights have applied a stringent justification standard."[9] In the result, this Court has not been prepared to

6 *Scoppola v. Italy (No. 3),* Application No. 126/05, 22 May 2012

7 *Ibid*, at para 83.

8 *Ibid*, at para 102.

9 *Sauvé No. 2*, at para 14.

accept the disenfranchisement of any prisoners, while the ECHR has allowed some Italian prisoners to be disenfranchised permanently.

9. Given its sharply differing approach to voting rights, the ECHR's decisions with respect to the voting rights of non-resident citizens relied on by the Respondent have little relevance to this Court. Again in those cases, the ECHR affirmed that it needs to show a wide margin of appreciation to the legislating state.[10] In *Shindler*, therefore, because the United Kingdom did not ban all residents from voting, its line-drawing was permitted. Canada is a leader when it comes to voting rights and our courts have not shown this kind of deference to the disenfranchisement of Canadian citizens.

10. In the appellate decision in this matter, the majority judgment recognized that the decisions of the ECHR "are indeed distinguishable," but stated that they "nevertheless affirm the interest of the polity in limiting enfranchisement to its residents."[11] The Applicants respectfully submit that the desire of some other states to limit enfranchisement to their residents says little about the fundamental rights enshrined in the Canadian *Charter*. The Applicants adopt the conclusion on this issue of Laskin J.A. (in dissent) that "international jurisprudence is of limited or no assistance, both because of the deferential stance taken by international tribunals and because Canada has been a leader in expanding voting rights for its citizens."[12]

10 *Hilbe v. Liechtenstein Decision*, Application no. 31981/96, EHCR 1999-VI at p. 3.; *Shindler v. The United Kingdom Judgment*, Application no. 19840/09, EHCR 2013-II, at paras 115, 118 ("*Shindler*").

11 Decision of the Court of Appeal, para 128, ALA Tab 3(e) p.143-144.

12 Decision of the Court of Appeal, para 255, ALA Tab 3(e) p.190.

11. Finally, a comparison to legislation in other countries does not assist the Respondent. It is common for strong democracies to allow non-residents to vote indefinitely.[13] The Application Judge found that two countries, which the Respondent relies on as close comparators, Australia and New Zealand, have non-resident voting rules, which are "much less stringent" than the impugned legislative provisions.[14] In addition, Canada's approach as a leader in voting rights means that it will not be influenced by other countries with more draconian limitations. In *Sauvé No. 2*, the dissenting judgment canvassed the many other countries that disenfranchised prisoners, as well as cases of the ECHR that permitted prisoner disenfranchisement. The majority of this Court refused to allow those limitations on voting in Canada. The Applicants submit that, similarly, in this case, the international context should have little bearing on the importance of the Court's intervention.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 18th DAY OF NOVEMBER, 2015.

Shaun O'Brien

Amanda Darrach

13 Amended Reasons for Judgment, at para 140, ALA Tab 3(b) p.77, Exhibit 5 to Cross-Examination of Donald Munroe Eagles, Reply of the Applicants, Tab 2 p.11.

14 Amended Reasons for Judgment, at para 140, ALA Tab 3(b) p.77.

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PART III: Table of Authorities

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