

Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

GILLIAN FRANK AND JAMIE DUONG

Applicants

- and -

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

Respondent

**APPLICATION UNDER Rule 14.05(3) of the *Rules of Civil Procedure* and the
Canadian Charter of Rights and Freedoms, ss. 1, 3 and *Constitution Act*,
1982, s. 52.**

AFFIDAVIT OF JEAN-PIERRE KINGSLEY

I, **JEAN-PIERRE KINGSLEY**, of the City of Ottawa, in the Province of Ontario, in Canada, MAKE OATH AND SAY:

1. I am the former Chief Electoral Officer of Canada and have extensive expertise in managing and evaluating elections. As such, I have knowledge of the matters to which I depose in this Affidavit.

I. Qualifications

2. I obtained a Bachelor of Commerce in 1965 and a Masters of Hospital Administration in 1969, both from the University of Ottawa. I have held a number of positions in the public and greater public service, including the position of Assistant Deputy Registrar General of Canada (from 1987-1990) and, most significantly for the purpose of this Application, the position of Chief Electoral Officer of Canada. I held that position for 17 years, from 1990 to 2007, during a period when the *Canada Elections Act* underwent sweeping changes.
3. Since leaving Elections Canada, I have held a number of positions in international organizations. From May 2007 until July 2009, I held the full-time position of President and Chief Executive Officer of IFES (International Foundation for Electoral Systems), an organization which provides democratic electoral management expertise to newly emerging/re-emerging democracies.
4. I also have held positions to assist with particular elections. I was the OSCE Head of election evaluation missions in Portugal (2009) and the United Kingdom (2010). The OSCE is the Organization for Security and Co-operation in Europe. I also was the Commonwealth Head of the election evaluation mission to the 2011 elections in St. Lucia.
5. I currently hold the position of Adjunct Professor (Senior Fellow) at the University of Ottawa's Graduate School of Public and International Affairs.
6. Attached and marked as Exhibit "A" to this Affidavit is a copy of my *curriculum vitae*.

II. Overview of My Affidavit

7. My Affidavit includes three sections: the first deals with legislative history relating to the amendments allowing Canadian citizens living abroad to vote (for up to the first five years) and especially the 1993 amendments to the *Canada Elections Act*; the second section of my Affidavit addresses my 2005 recommendation to Parliament to eliminate the five-year or more restriction on voting for citizens living abroad and the government's response to that recommendation; and the third section of my Affidavit deals with the current mechanism which allows Canadians abroad to vote (for up to the first five years or if they fall within other exceptions).
8. By way of brief overview, in 1993, the House of Commons passed significant changes to the *Canada Elections Act*. These changes included the introduction for the first time of a voting mechanism for Canadians resident outside Canada (other than members of the armed forces, federal public servants, and their dependants, who were able to vote from abroad prior to this time). Until this time, Canadian citizens had no ability to vote from outside Canada. The amendments also put a limitation on the right to vote for residents abroad, allowing citizens resident outside Canada for less than five consecutive years to vote, but prohibiting the vote from outside Canada for those who were absent for five consecutive years or more.
9. As discussed further below, the changes to the *Canada Elections Act* came about largely because of Parliament's concern for the Charter rights of these voters, particularly in view of a 1992 Ontario court decision in which the judge "recommend[ed]" that Parliament legislate in this area prior to the next election. The Committee evidence and House debates also indicated concerns about

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whether Canadians abroad had a sufficient attachment to Canada. They referenced time limitations as a solution for this concern. However, from my review, the discussions and debates did not reveal (1) any evidence that Canadians living abroad are not attached to Canada; or (2) any rational explanation for why five years was chosen as a limitation, other than that the Members of Parliament thought five years seemed reasonable. As one Member of Parliament later stated in 2006: “Did this rule fall from the sky or out of a tree?”.

10. In 2005, I recommended to Parliament that the limitation on voting for citizens abroad for five years or more be removed. The Parliamentary standing committee unanimously adopted this recommendation, with Members of Parliament from the four major political parties endorsing it on the basis that the change would protect the fundamental right to vote of Canadian citizens. This recommendation has not yet been implemented by the government.
11. Although citizens living outside of Canada for five years or more currently are not permitted to vote (subject to exceptions for certain groups), there is a mechanism currently in place which enables voting for Canadians living outside of Canada who are permitted to vote. As set out in the third portion of my Affidavit, Elections Canada makes significant effort to provide voting information to Canadians living abroad. Canadians who are resident abroad are then required to take a number of steps in order to register and then vote. In the past, for mentally disabled persons, Parliament has used the steps for voting as a “self-testing” mechanism to permit voting. In other words, in that case, if the elector was able to complete the steps required to vote, s/he was entitled to vote.

III. Legislative History: Voting Rights and Limitations for Canadians Abroad

A. *House of Commons Standing Committee on Privileges and Elections (1981-1984)*

12. The issue of voting for Canadians living abroad arose several times prior to the 1993 amendments to the *Canada Elections Act*. These preliminary considerations of the issue provide helpful context for the discussions and debates leading up to the 1993 amendments. The issue arose initially at the House of Commons Standing Committee on Privileges and Elections (1981 and 1984) and subsequently in the government's White Paper on Election Law Reform, which formed the basis for Bill C-79 (which ultimately was not passed). The White Paper and Standing Committee discussions are early illustrations of the government and Parliament's desire to extend the franchise to Canadians living abroad and to protect the Charter rights of that group. While the Standing Committee also proposed time limitations (of five years) attached to these voting rights, the government in the White Paper rejected that time limitation.
13. In 1981, the Standing Committee on Privileges and Elections (the "1981 Committee") was tasked with considering Bill C-237, *An Act to Amend the Canada Elections Act*. In its report to the House of Commons, the 1981 Committee recommended extending voting to those who were otherwise not able to vote on election day. Among other recommendations, this Committee proposed amendments to the Special Voting Rules in the *Canada Elections Act* "so that all Canadians who [were] working outside of Canada for a period of less than five years and their dependants may be able to vote." The 1981 Committee's report did not provide any explanation for why the Committee chose five years or more as the time limitation on voting. Attached as Exhibit "B" to this

Affidavit is a copy of the 1981 Committee's Report to the House dated June 30, 1981.

14. In 1984, the House of Commons Standing Committee on Privileges and Elections (the "1984 Committee") again considered the issue of voting for Canadians abroad. This discussion arose in response to a report of the Chief Electoral Officer, which addressed potential conflicts between the *Canada Elections Act* and the Charter. Most of this Committee's discussion, as it related to Canadians abroad, centred on a mechanism to implement voting for this group. The 1984 Committee considered and adopted the view from the 1981 Committee that the franchise be extended for a period of less than five years. The evidence of the 1984 Committee did not provide any further explanation for the choice of five years or more as the limitation on voting. Attached as Exhibit "C" to this Affidavit is a copy of the Minutes of Proceeding and Evidence of the Standing Committee on Privileges and Elections dated April 10, 1984.

B. White Paper and Bill C-79 (1987)

15. In 1986, the government prepared a White Paper on Election Law Reform. The White Paper recommended comprehensive reforms to the *Canada Elections Act*, including a number of recommendations to extend the franchise to groups and individuals who were, at the time, unable to exercise their right to vote.
16. The White Paper directly responded to the recommendations of the 1981 and 1984 Committees. While the White Paper recommended extending the franchise to voters living abroad, it also directly rejected the five year limitation, stating: "The Government recommends that the right to vote should not be limited to Canadians who have been abroad for less than five years, as was proposed by the Standing Committee on Privileges and Elections in 1981 and 1984"

(emphasis added). Attached as Exhibit "D" is a copy of relevant portions of the White Paper, dated June 1986.

17. The White Paper formed the basis of Bill C-79, which, though it ultimately was not passed, provides further important context leading up to the 1993 amendments to the *Canada Elections Act*.
18. According to debates in the House of Commons, a "clear priority" in Bill C-79 was the desire to extend the right of Canadians to vote. With respect to Canadians abroad, the House of Commons debates recognized the Charter rights of these citizens:

Hon. Doug Lewis:...I point particularly to the question addressed in the Bill of the right of Canadians abroad to vote. We appreciate that because of the Canadian Charter of Rights and Freedoms, this issue must be addressed. ...

Attached as Exhibit "E" to this Affidavit are copies of the relevant portions of debates from the House of Commons on November 30, 1987 and March 16, 1988, p. 13815.

19. The Bill therefore included a provision requiring the Chief Electoral Officer to maintain a registry of electors who resided outside of Canada. The only restrictions on the entitlement to vote for those outside Canada were that they be 18 years of age, that they have previously resided in Canada, that they intend to return to Canada, and that they not be entitled to vote by proxy. Attached as Exhibit "F" to this Affidavit is a copy of the relevant portions of Bill C-79.
20. Ultimately, the Bill was not passed. One of the primary concerns expressed in the House of Commons was that Bill C-79's proposal for Canadians abroad was too "wide-ranging". According to the debates, the concern was that there were a large number of Canadians abroad and that some of them may have been away for long periods and have limited connection to Canada. There is no indication in

the debates of any specific evidence that was relied upon for this concern about a limited connection to Canada.

21. The Members of Parliament who raised concerns about Canadians being away for extended periods also raised time limitations as a potential solution. However, they did not provide any explanation for a specific time limitation under consideration (for example, to differentiate four years, five years, or ten years abroad). The debates include, for example, the following comments:

Mr. Murphy:...[T]he proposal in Bill C-79 is to let anyone who has Canadian citizenship and who indicates that he or she may eventually return to Canada to vote in an election. He or she could have been away not only five, 10 or 15 years but 30 or 40 years, most of his or her life. He or she would still be permitted to vote in a Canadian election, simply by saying that he or she will probably return to Canada at some point.

...

We proposed that we limit the categories of people who would be eligible for voting. We also suggested that those who had been away for five or ten years without ever returning to Canada should not be allowed to vote, but those who had been back or who had only been away for four or five years should automatically be allowed to vote.

Attached as Exhibit "G" to this Affidavit are copies of the relevant portions of debates from the House of Commons on March 16, 1988, pp. 13823-13824.

C. *Lortie Commission* (1989-1991)

22. After Bill C-79 failed to pass in the House of Commons, the government initiated a further, comprehensive review of the *Canada Elections Act*, which resulted in the 1993 amendments. In 1989, the federal government appointed the Royal Commission on Electoral Reform and Party Financing. This Commission is also known as the Lortie Commission (as it was chaired by Pierre Lortie).

23. The Lortie Commission was a multi-party commission which arrived at unanimous recommendations. The Commission's Report aimed, among other goals, to modernize the *Canada Elections Act* in view of the Charter. It specifically recommended voting rights for Canadians living abroad and it addressed the concerns about attachment to Canada which had been raised in the House of Commons at the time of Bill C-79.
24. Mr. Lortie, speaking on behalf of the Commission, described the *Canada Elections Act*, prior to the changes as recommended by his report, as a "pre-Charter statute" and a "statute frozen in time". Shortly prior to the Commission's report, there had been a number of successful challenges to exclusions of voting rights in the Act. These included a challenge to a provision disqualifying judges from voting (*Muldoon v. Canada*, [1988] 3 F.C. 628 (T.D.)) and a challenge to the provision disqualifying some mentally disabled persons from voting (*Canadian Disability Rights Council v. Canada*, [1988] 3 F.C. 622 (T.D.)). Accordingly, Mr. Lortie understood his task as being to secure the democratic rights of voters and to recommend amendments which would make the Act consistent with the Charter. Attached and marked as Exhibit "H" to this Affidavit is testimony to this effect by Mr. Lortie at the House of Commons Committee proceedings on March 18, 1991, pp. 1:17 and 1:18.
25. The Lortie Report included a recommendation which would allow Canadians living abroad to vote. The reasoning as set out in the report specifically addressed the concern raised in the Parliamentary debates regarding Bill C-79 – that is, that some Canadians living abroad may not have sufficient connection to Canada:
- Canadians live abroad for many reasons, including their occupation or that of their spouse or parent; in many cases their presence abroad contributes directly to the benefit of Canada or Canadian interests and ideals.... Nor is it the case

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that all Canadians living abroad have severed their ties to Canada.

We conclude that the administrative difficulties of serving voters living abroad do not constitute an acceptable justification for disenfranchising these citizens. The United States, France, Germany, Australia and Great Britain make provisions for voters living abroad to register and to vote, as do Quebec and Alberta. In all of these cases, it has been recognized that with modern telecommunications and the international press, the argument that citizens living abroad cannot be informed about public affairs at home no longer applies. Moreover, with increasing globalization of the world economy, the number of Canadians travelling and living abroad will likely increase in the coming years.

26. Contrary to the view in the House of Commons, then, which expressed hesitation toward Canadians living abroad for long periods, the Lortie Report took the position that "we should trust these Canadians". It stated that we should assume these Canadians continue to have a stake in Canada and that they keep themselves sufficiently informed as citizens. It was of the view that this would mean treating them no differently than any other Canadian citizens: "In other words, we should not attempt to impose on citizens living outside Canada conditions that are not imposed on those residing in Canada".
27. The only limitation the Lortie Report recommended with respect to the right to vote for Canadians living abroad is that they certify they have not voted in another foreign national election since becoming a non-resident. However, this proposed limitation has never been picked up by any Parliamentary Committee, nor appeared in any legislation or proposed legislation. The Report did not recommend any limitation on voting related to the citizen's length of time abroad. Attached and marked as Exhibit "I" to this Affidavit is the relevant portion of the Lortie Report, which was presented to the Cabinet of Canada in 1991.

D. Special Committee on Electoral Reform (1992-1993)

28. Following the government's receipt of the Lortie Report, the House of Commons issued an Order of Reference (dated February 14, 1992) authorizing a Special Committee on Electoral Reform (the "Special Committee") to conduct a comprehensive review of the Lortie Report. Bill C-114, which brought about sweeping amendments to the Act, resulted from the work of this Committee.
29. One of the recommendations of the Special Committee was to introduce a voting mechanism for Canadians living abroad. This would occur by what was termed "special ballot" (a term which continues to be used in the legislation). Special ballots were to be available for voters who could not attend to vote, such as prison inmates, patients in acute treatment in hospitals, members of the Armed Forces, and other Canadians living abroad. Until this time, although the Act did not contain any prohibition preventing Canadians living abroad from voting, there also was no mechanism allowing them to vote from abroad.
30. This Committee, again, was concerned to secure the Charter rights of Canadians living abroad. The Committee also questioned the attachments to Canada of some Canadians living abroad and ultimately relied on a five-year or more time limitation in an attempt to address this concern. Again, I am not aware of any evidence they considered regarding attachments of Canadians abroad to Canada, nor of any specific reason for a five year or more limitation period.

(i) Charter Compliance

31. I attended to present evidence to the Special Committee with respect to proposed changes to the electoral system. On the issue of Canadians living abroad, one of the important factors I raised with the Committee, and which I

believe was influential in their decision regarding these citizens, was a recent Charter challenge in court by a Canadian living in Bangladesh who had no ability to vote (*Clifford v. Attorney General Canada et al.*). I had been named as a Respondent in that case, in my capacity as Chief Electoral Officer. Attached and marked as Exhibit "J" is a copy of the *Clifford* decision.

32. I advised the Special Committee that the judge who heard the *Clifford* case decided that the Applicant's right to vote had not been abrogated, but that the judge also effectively served notice on Parliament to legislate in this area. Specifically, the judge recommended that Parliament should enact legislation with respect to voters living abroad "before the next election or referendum". Attached and marked as Exhibit "K" and "L" are the evidence of the Special Committee on November 24, 1992, pp. 5:24 and November 25, 1992, pp. 6:11-6:12.
33. The Special Committee was concerned about the *Clifford* case, including the prospect that a Charter challenge could arise if they were not to provide a mechanism for Canadians living outside Canada to vote, and that such a challenge could arise in the middle of an election. I expressly raised this concern with the Committee:

Judges have the right to vote, the mentally-ill have the right to vote, prisoners have the right to vote, and soon, people outside Canada will have the right to vote – without exception. When the court ruled that prisoners had the right to vote, the court did not say: only this or that category of prisoners can vote. It said that all prisoners have the right to vote.

And that is exactly what we can expect with respect to the international situation. If a court rules that people living outside Canada have the right to vote, I am going to be forced to let them vote. I can tell you that that could make

for a two or perhaps even three-month delay in the voting process. (See Exhibit "K", p. 5:46-5:47).

34. Members of Parliament on the Special Committee also were concerned about a Charter challenge:

Mr. Boyer: It's interesting because given the publicity about this, given what the royal commission says about it, and given the number of people from other countries who have this right now, it would be hard to imagine that we're going to get to and through the next Canadian general election without this kind of court challenge arising.

Attached as Exhibit "M" is the Evidence of the Special Committee dated March 5, 1992, p. 3:28.

35. In the House of Commons debates on Bill C-114, members of the Special Committee presented the amendments to the Act as changes which would improve the Act's compliance with the Charter and improve Canadian democracy as a whole:

Jim Hawkes: ...Our predictions would be that the next federal election would produce more voters than at any previous time in Canadian history and that the difference would be substantial. Our democracy will work a bit better because of that.

...

Peter Milliken:...[W]e decided that the best policy was to seek to amend the existing Elections Act in order to make changes that would adopt those parts of the royal commission report that we could proceed with and make other necessary changes in order to make the act one that complied, at least for the most part, with the Canadian Charter of Rights and Freedoms as far as we reasonably could.

Attached as Exhibit "N" are relevant portions of the House of Commons debates on March 8, 1993, pp. 16660, 16662-16663.

(ii) Attachments to Canada and Five-Year Limitation

36. Members of the Special Committee also had concerns about allowing the right to vote for Canadians abroad. One of their concerns was that they did not have sufficient information about the number of voters abroad. As stated by one Special Committee member (Mr. Prud'homme): "I have asked and begged: how many of these possible foreigners are here? From 200,000 to millions". (See Exhibit "M", p. 3:29)
37. Another concern echoed the debates of Bill C-79 – that is, that Canadians abroad may have lost their "affinity" or "connection" to the country. Again, I am not aware of any evidence which the Committee heard relating to the presence or absence of connections to the country held by Canadians living abroad. Attached as Exhibit "O" is the evidence of the Special Committee on March 19, 1992 at p. 2:41 and March 25, 1992 (see Exhibit "M", pp. 3:25, 3:29, 3:30).
38. In order to address their concerns, the Committee ultimately proposed a time limitation of five years. Canadians resident outside of Canada would have a mechanism to vote in the new legislation, but the mechanism would be available only to those who had been resident outside Canada for less than five consecutive years and who intended to return to Canada as a resident.
39. As with the debates of Bill C-79, in these discussions about the time limitation, there was no clear articulation of why five years or more, as opposed to some other number of years, was chosen.
40. The first discussion of the time requirement arose with reference to Bill C-79 (in which some of the Members of the Special Committee had had involvement):

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Mr. Boyer: I think previously we had a time requirement on it, did we not? We spoke about some time of perhaps 12 years or something during which this right inhaled in people and after that they lost the right to vote abroad.

Mr. Gould (Assistant Chief Electoral Officer): That was not in Bill C-79, but it was the topic of discussion. There was a 5-year consideration and there was a 12-year consideration, and there were all of the offsetting problems of cross-posted diplomats and missionaries who have been out 25 years and who definitely intend to return. All of that was explored at that time. (See Exhibit "M", p. 3:27).

41. Later, the Chairman of the Committee, Jim Hawkes, re-introduced the notion of five years, or, at least, a Canadian out of the country on a "two- or three-year contract":

Personally, I'm partial to some kind of time limitation notion. People who have been non-resident in Canada for five years or less, or something of that kind, makes me more comfortable. Somebody who's not lived in this country for 40 years – I'm not sure I want them voting. And I'm not sure they have a close enough connection to satisfy me they're still Canadian. They may have a passport that says they are, but if they're out of the country on a two- or three-year contract doing something, then I think they are in a different position. It's the temporary absence from Canada that pleases me the most.

42. Further, in emphasizing that the important first step was to implement a system for voter registration, Mr. Hawkes seemed aware that the five-year limitation was not a precise requirement:

But the first thing we have to do...you can change that criterion rather quickly. You can say five years or ten years or take it off. But you have to have a system of voter registration and voting; that's the more complex piece in terms of advance. (See Exhibit "K", p. 5:61).

43. In addressing this issue in the House of Commons, it also was clear that the five-year or more limitation did not have a particular justification specific to that time frame, other than that it was a “middle-of-the-road” compromise:

Hon. Marcel Prud’homme (Saint Denis):...Some people advocated an absolute right to vote for all Canadians wherever they live. We said: “Not so fast”, but others said “Never”. We went for a middle-of-the-road solution and settled on five years. Perhaps the next Parliament will make reforms on voting rights....

Attached as Exhibit “P” to this Affidavit is the relevant portion of the House of Commons debates on March 8, 1993, p. 16679.

E. Bill C-114 (1993)

44. Bill C-114 was passed in the House of Commons on May 6, 1993 as *An Act to Amend the Canada Elections Act*. This Act amended the *Canada Elections Act* to permit the vote for “a person who has been absent from Canada for less than five consecutive years and who intends to return to Canada as a resident” (s.24 of Bill C-114).
45. Voters in this category were permitted to vote in accordance with Schedule II. Schedule II (provided for at s. 126 of Bill C-114) set out the Special Voting Rules for a number of categories of voters, including, in Part III, Canadian Citizens Temporarily Residing Outside Canada. Attached as Exhibit “Q” to this Affidavit is a copy of *An Act to Amend the Canada Elections Act*, formerly Bill C-114.
46. Although the *Canada Elections Act* has been amended a number of times since the passage of Bill C-114, the provisions regarding the rights of electors residing outside Canada remain very similar now to those in this Bill. Any changes are, for the most part, minor changes of wording.

IV. Recommendation for Change (2005-2006)

47. While the five-year or more limitation remains in the current *Canada Elections Act*, the issue of the voting rights for this group of Canadians has been before the Government on at least one other occasion since 1993. In 2005, while I was still Chief Electoral Officer of Canada, I made a recommendation to the House of Commons for the removal of the limitation on voting for those Canadians resident outside of Canada for five years or more.
48. The House of Commons Standing Committee on Procedure and House Affairs unanimously endorsed this recommendation in its report to the government (framing the recommendation even more broadly than I had done). The members of the Committee, which included Members of Parliament from the four major political parties, indicated that they viewed voting as a fundamental right of citizens. While the government did not reject the Committee's recommendations on this point, it also has not yet implemented the required changes.
49. The Chief Electoral Officer is appointed by a resolution of the House of Commons and he or she reports directly to Parliament. He or she also may be removed only "for cause" and by the Governor General on address of the Senate and House of Commons (s. 13 of the *Canada Elections Act*) Pursuant to provisions of the *Canada Elections Act* (currently, s. 535), the Chief Electoral Officer is required, as soon as possible after a general election, to make a report to the House of Commons that sets out any amendments that, in his or her opinion, are desirable for the better administration of the Act.
50. Following the 38th General Election (which took place on June 28, 2004), in my position as Chief Electoral Officer, I prepared a report to the House of Commons entitled *Completing the Cycle of Electoral Reforms – Recommendations from the*

Chief Electoral Officer of Canada on the 38th General Election. This report was tabled in the House of Commons on September 29, 2005.

51. As set out in the introduction to that report, the report could be seen as a conclusion to a cycle of reform initiated through the Lortie Commission. In the 13 years since the Lortie Commission had issued its report, reforms had been introduced with respect to the bulk of its recommendations. That cycle of reforms could be seen as coming to an end. I also set out in the introduction that I was influenced in my recommendations regarding voting rights by the Supreme Court of Canada's decision in *Sauvé v. Canada (Chief Electoral Officer)* (which found that the prohibition on voting for prisoners serving sentences of two years or more breached the prisoners' Charter rights).
52. In my report, I recommended the removal of the limitation contained in the *Canada Elections Act* and which prohibited voting by persons who had been absent from Canada for five consecutive years or more, and who intended to return to Canada as residents. In my reasoning for this recommendation, I raised questions about the justification for the specific time frame of five years. I also questioned the connection between a Canadian's absence from the country and his or her knowledge of public affairs. Finally, my recommendation noted that there was no significant operational impediment in extending the current Special Voting Rules to Canadians abroad five years or longer. My recommendation stated as follows:

In light of the Supreme Court of Canada's decision in *Sauvé*, it is questionable whether a Court would find that denying the right to vote to individuals who have been absent from Canada for less than five consecutive years and who intend to return to Canada as residents is a reasonable limit on the right than can be justified in a free and democratic society. It is indeed difficult to explain what pressing objective is served

by distinguishing between those who have been absent from the country for five years as opposed to six, ten or twenty years. While it may be true in some cases that after a number of years of absence from Canada one's awareness of Canadian current affairs may diminish, the correlation between absence from the country and the level of knowledge of public affairs occurring in the country may not be sufficiently clear to constitute reasonable grounds to deprive someone of their right to vote. It should also be noted that awareness of current public affairs is not required from Canadian citizens living in Canada for them to have the right to vote. Finally, there is no significant operational impediment in extending the application of the Special Voting Rules currently available to Canadians living outside the country to those Canadians who have been absent from the country for more than five consecutive years.

53. The only limitation I recommended with respect to Canadians abroad was that they intend to resume residence in Canada. At the time, my view was that it was more important to address the five-year limitation than the intention to resume residence and that the removal of the five-year limitation should be undertaken as a first step. I thought that this recommendation was more likely to be embraced by Parliament if I approached it from a progressive perspective; that is, it was best not to try to change everything at once. As set out below, it turned out that I was overly cautious in this assessment, at least as it concerned the Parliamentary Committee. Attached as Exhibit "R" to this Affidavit is a copy of relevant portions of my report.
54. Following the tabling of my report, the House of Commons Standing Committee on Procedure and House Affairs ("Standing Committee") was tasked with assessing the *Canada Elections Act* and possible amendments, per the recommendations in my report.

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55. I presented evidence at that Committee, though not on the question of my recommendation with respect to Canadians living abroad. However, the Standing Committee did consider and ultimately agree with that recommendation (though broadening it even beyond what I had recommended) and I have reviewed the transcripts from those discussions. The Standing Committee unanimously and seemingly with little difficulty endorsed the view that the five year or more limitation on voting for those living abroad should be removed from the legislation.
56. The Standing Committee's discussions indicate that its members (from all the major political parties) felt strongly about the fundamental connection between citizenship and the right to vote, regardless of living abroad. The Committee members also did not see any basis for five years abroad as a limitation on the right to vote; rather, they saw this limitation as "arbitrary".
57. According to the transcripts of public Committee meetings, the issue of voting for Canadians abroad was first raised at this Committee by a representative of the Conservative Party of Canada. The Committee had invited representatives of each of the four major parties to appear before the Committee as witnesses. In his five-minute opportunity to present to the Committee, Mr. Michael D. Donison, then Executive Director of the Conservative Party of Canada, stated as follows:

I think the idea of the removal of the five-year limitation for out-of-country voters is very fundamental. If you're a Canadian citizen and you're living abroad for more than five years, you should also be able to cast your ballot. Mr. Kingsley has recommended that, and I would commend that to the committee as well.

Attached and marked as Exhibit "S" are the relevant portions of the Transcripts from the Standing Committee on Procedure and House Affairs from June 1, 2006, p. 2.

58. Although other party representatives did not directly address this issue, the representative of the Liberal Party of Canada (Mr. Steven MacKinnon, then

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National Director of the Liberal Party of Canada), indicated that he “essentially agree[d]...with everything they’ve [ie Mr. Donison] just said”. (See Exhibit “S”, p. 2).

59. At a subsequent meeting, the Standing Committee addressed my recommendation directly. The members of this Committee (again, from all parties) recognized the fundamental connection between citizenship and voting. A member of the Bloc Quebecois stated as follows:

Mr. Michel Guimond: My understanding is that the right to vote is directly linked to one’s citizenship. A person who has been living in the Bahamas for 15 years and who has retained his or her right to vote might very well become very disinterested in politics but, technically, if he or she has remained a Canadian citizen, he or she has the right to vote.

Attached as Exhibit “T” is the Evidence of the Standing Committee on Procedure and House Affairs from June 15, 2006, p. 2.

60. This view was endorsed by a Member of Parliament from the New Democratic Party:

Mr. Yvon Godin: A Canadian citizen is a Canadian citizen. There are Canadians who live in regions where they are able to go and vote. For example, in embassies, there is an area where you can vote. They can even send their ballot by mail.

I simply wish to underscore that a Canadian is a Canadian. (See Exhibit “T”, p. 2)

61. The Liberal Member of Parliament picked up on the same point:

Mr. Marcel Proulx: I think I understood the last comment to mean the same thing that I wish, in the sense that as long as they’re Canadian citizens, regardless of whether they live in Canada or outside of Canada, they should have the right to vote. (See Exhibit “T”, p. 2).

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62. Indeed, the Chair of the Committee, Mr. Gary Goodyear (from the Conservative Party of Canada), stated: "I think we're debating the obvious here...". (See Exhibit "T", p. 3).
63. In considering this issue, the Standing Committee rejected the five-year limitation on voting. They could not see any justification for that time limit:

Mr. Michel Guimond: There is another question that comes to mind. Where does the five year rule come from? Why five years? One of my brothers married an American and lives in Denver, Colorado. If he has been gone for four years and eight months, he would have the right to vote. But if he has been gone for five years and two months, then he no longer has the right to vote. *Did this rule fall from the sky or out of a tree?*

The Chair: It's a very good point. I'm seeing a lot of nods around the table. (emphasis added) (See Exhibit "T", p. 2).

64. The Committee also questioned the requirement that Canadians abroad be required to assert an intention to return to Canada to live in order to be permitted to vote. In addition to their view, set out above, that "a Canadian is a Canadian" and on that basis should be entitled to vote regardless of living abroad, they also discussed the difficulty of determining whether a person has an intention to return to Canada to live. In the end, the Standing Committee voted unanimously to eliminate the entire clause in the *Canada Elections Act* which limited voting for Canadian citizens living abroad. (See Exhibit "T", pp. 2-3).
65. In June of 2006, the Standing Committee formalized this view in its report: *Improving the Integrity of the Electoral Process: Recommendations for Legislative Change*. In the report, the Standing Committee endorsed my recommendation on this issue and went a step further by recommending that there be no requirement of an intention to return to Canada:

The majority of the Committee agrees that the five-year limitation period is arbitrary and should be removed. It would, however, go further and propose that all Canadian citizens who are absent from Canada should be able to vote in accordance with Part 11 of the *Canada Elections Act*. The requirement that there be an intention to return to Canada should be dropped.

Attached as Exhibit "U" to this Affidavit is a copy of the relevant portions of the Report of the Standing Committee on Procedure and House Affairs dated June, 2006, pg. 11.

66. In its response to the Standing Committee's Report, *Government Response to the Thirteenth Report of the Standing Committee on Procedure and House Affairs: Improving the Integrity of the Electoral Process*, the Government responded to the Committee's recommendation by suggesting that it be further reviewed in the context of comprehensive review of the special voting rules:

The Government suggests that the Committee's recommendation that the restrictions on voting under the special voting rules by electors absent from the country for more than five years (recommendation 1.16) would best be considered in the context of this comprehensive review of the special voting rules to be undertaken by the Committee rather than be implemented at this time.

Attached as Exhibit "V" to this Affidavit is a copy of the Government's Response to the Standing Committee's Report.

67. However, to date, the amendments to the *Canada Elections Act* since 2006 have not yet included a change with respect to Canadians living abroad.

V. Current Voting for Canadians Abroad

68. Elections Canada has an existing voting mechanism for Canadians living abroad (for up to the first five years and for Canadians falling within other exceptions). It makes substantial efforts to reach this group with voting information and the electors are then required to take a number of steps in order to vote. Parliament

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previously (in the case of mentally-disabled electors) has used the steps required to vote as a self-testing mechanism which has provided a sufficient basis to allow a particular citizen to vote.

A. *Information for Canadian Voters Abroad*

69. Elections Canada takes a number of steps prior to and during elections to reach Canadians living abroad. Elections Canada, with the assistance of the Department of Foreign Affairs and International Trade, has contacted institutions attended by Canadians; written to chambers of commerce, Canadian banks, airlines and other businesses; approached schools attended by Canadian students to ask for their help in distributing flyers to parents; and inserted voter information in outgoing correspondence, including passport renewals. Typically, after the writs are issued, the Chief Electoral Officer informs the media of the procedures and deadlines for voting from outside the country. Elections Canada also sends information to Canadian diplomatic missions advising them that the writs have been issued.

B. *Self-Testing Mechanism*

70. Parliament previously has used the steps required for voting as a “self-testing” mechanism which permits a particular group to vote. In 1988, after the removal of the prohibition against voting for certain mentally disabled citizens in *Canadian Disability Rights Council v. Canada*, Parliament considered the issue of allowing all mentally disabled citizens to vote. Specifically, Parliament decided not to require any test of the person’s mental capacity to vote. As I described it at the Parliamentary Special Committee in 1992:

But their position [ie the position of representatives of the mentally disabled] is effectively that there should be no test. What it becomes is a form of self-checking, as you have said, a self-testing mechanism.

{C0509573.1}

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...
The point I was trying to make is that we did not introduce any other forms of test at all. We respected the law fully and made sure the enumerators, returning officers, and deputy returning officers were fully trained. (See Exhibit "L", p. 6:15).

71. The self-testing in that case was that if the person was aware of the election (as measured by showing up at the polling station), was able to identify him or herself at the polling station and was able to vote then s/he was entitled to vote. This continues to be how the *Canada Elections Act* is applied to mentally disabled persons.

C. *Steps Required to Vote from Abroad*

72. Under the current *Canada Elections Act* (S.C. 2000, c.9), Canadian citizens who have previously lived in Canada, have resided outside of Canada for less than five consecutive years and who intend to return to Canada may vote by special ballot.
73. In order to vote, these citizens must take a number of steps:
- a. Obtain an application for registration and special ballot. The voter needs to download this form from the Elections Canada website or request the form from Elections Canada by mail, telephone or fax. The voter may also obtain it from Canadian embassies, high commissions and consular offices.
 - b. Complete the application and provide it to Elections Canada in Ottawa no later than 6:00 pm on the Tuesday before polling day. The application must be accompanied by a photocopy of proof of identity, such as a Canadian passport.

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- c. Elections Canada will then send a personalized special ballot kit to the voter.
- d. Because, unlike regular ballots, special ballots do not include the names of candidates, the voter is required to obtain the names of the candidates in his or her electoral district.
- e. The voter also cannot vote only by political party. A voter using a regular ballot has the political party associated with a given candidate indicated on the ballot. A voter using a special ballot cannot simply write the name of a party and so needs to inform him or herself of the candidate associated with that party.
- f. To vote by special ballot, the voter must first complete and sign the declaration on the outer envelope that forms part of the voting kit. The declaration states that the voter's name is as shown on the envelope and that he or she has not voted and will not attempt to vote again in the current electoral event.
- g. The voter then completes the ballot by writing on it the name of one of the candidates in his or her electoral district. The voter inserts the ballot into the series of envelopes in accordance with the instructions provided.
- h. The voter must then ensure that Elections Canada receives the special ballot no later than 6:00 pm Ottawa time on polling day in order to be counted. The ballot must be sent in the envelopes provided and can be sent by mail or other means.

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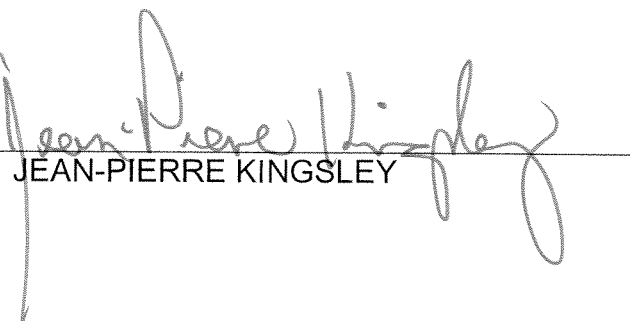
Attached as Exhibit "W" to this Affidavit is a copy of the Special Voting Rules published by Elections Canada.

74. Between approximately 6,000 and 9,000 Canadian citizens living abroad have voted in each election since the 2000 general election (excluding those voting under the exception for members of the Canadian forces).
75. I make this Affidavit in reference to the application to have relevant provisions of the *Canada Elections Act*, as described in the Notice of Application, declared unconstitutional and of no force and effect and for no other or improper purpose.

SWORN BEFORE ME at the City of
Ottawa, in the Province of Ontario, this 11th
day of May, 2012.



A Commissioner for taking Affidavits.



JEAN-PIERRE KINGSLEY