

ONTARIO
SUPERIOR COURT OF JUSTICE

Court File No.

CV-12-45397k

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.

NOTICE OF APPLICATION

TO THE RESPONDENT

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicants. The claim made by the applicants appears on the following page.

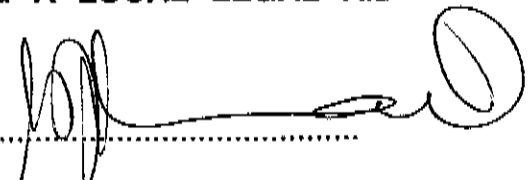
THIS APPLICATION will come on for a hearing at Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the *Rules of Civil Procedure*, serve it on the applicants' lawyer or, where the applicants do not have a lawyer, serve it on the applicants, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicants' lawyer or, where the applicants do not have a lawyer, serve it on the applicants, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but not later than 2 p.m. on the day before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: May 18 2012

Issued by 
Registrar

Address of court office **S. Chandradet
Registrar**
393 University Avenue
Toronto, ON M5G 1E6

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

Tel: (416) 973-9241
Fax: (416) 973-0531

APPLICATION

1. THE APPLICANTS MAKE APPLICATION FOR:

- (a) A declaration that provisions of the *Canada Elections Act* and, in particular, subsection 11(d), paragraphs 222(1)(b) and (c) and 223(1)(f), subsection 226(f), and the word “temporarily” as found in sections 220, subsection 222(1) and paragraph 223(1)(e) violate the right to vote protected under s. 3 of the *Canadian Charter of Rights and Freedoms* (“*Charter*”) and that this violation is not saved by s. 1 of the *Charter*;
- (b) A declaration that subsection 11(d), paragraphs 222(1)(b) and (c) and 223(1)(f) and subsection 226(f) are severed and of no force and effect;
- (c) An order striking out the word “temporarily” in section 220, subsection 222(1) and paragraph 223(1)(e);
- (d) An order substituting the words “a Canadian citizen who resides outside Canada” in place of the current wording of subsection 11(d);
- (e) Their costs of this application; and
- (f) Such further and other relief as counsel may advise and this Honourable Court permit.

2. THE GROUNDS FOR THE APPLICATION ARE:

Applicants

1. The Applicant, Gillian Frank is a Canadian citizen living and working in New York State, U.S.A. Mr. Frank was denied the ability to vote in the Canadian election of members of the House of Commons which took place on May 2, 2011 (the “federal election”).
2. Mr. Frank was born in and lived most of his life in Canada. In 2001, Mr. Frank moved to the United States to pursue graduate work. He has been unable to find

employment as an academic in Canada and currently is completing post-doctoral studies at the University of New York at Stony Brook in Long Island, New York.

3. Mr. Frank maintains a number of personal and family connections to Canada. He follows and is well-informed about Canadian politics and current affairs. He continues to apply for academic positions in Canada. The reasons why Mr. Frank resides outside Canada are beyond his control in that if he could pursue his profession in Canada he would. He will return to Canada when an appropriate professional opportunity arises.
4. Mr. Frank considers the right to vote as fundamental to his Canadian citizenship and the deprivation of the right as an affront to his dignity. He should not be required to forego the opportunity for self-realization by fully pursuing a professional career in order to maintain his fundamental right to vote.
5. The Applicant, Jamie Duong is a Canadian citizen living and working in Ithaca, New York. Mr. Duong also was denied the ability to vote in the Canadian election of members of the House of Commons which took place on May 2, 2011.
6. Mr. Duong was born in Canada and his immediate family members all continue to live in Montréal, Québec. Mr. Duong lives and works at Cornell University, in Ithaca, New York, where he completed his undergraduate degree.
7. Mr. Duong is only in the United States because of his employment. He has ongoing connections to Canada and continues to visit Canada regularly. He will return to Canada if a professional opportunity arises. Mr. Duong keeps apprised of Canadian news and current events.
8. Voting is extremely important to Mr. Duong and he considers it to be a fundamental aspect to his Canadian citizenship. It is an affront to his dignity that he is required to forego exercising his fundamental right to vote in order to continue his employment in the United States.

9. In the spring of 2011, Mr. Frank and Mr. Duong each attempted to apply online, via the Elections Canada website, for a special ballot in order to vote in the federal election. Each of them was informed by the Elections Canada website that he did not qualify to vote. Accordingly, both Mr. Frank and Mr. Duong were unable to receive a ballot and to vote in the federal election.

Existing Procedure for Voting from Outside Canada

10. Section 3 of the *Canada Elections Act*, S.C. 2000, c.9 (“Act”) specifies that every person who is a Canadian citizen and is 18 years or older on polling day is qualified as an elector.
11. The Act includes a detailed scheme and procedures for electors outside of Canada.
12. Specifically, Part 11 of the Act sets out Special Voting Rules for electors who fall into a number of categories, as set out in s. 11 of the Act. Many though not all of these electors vote from outside of Canada. These electors include members of the Canadian forces, employees in the Canadian public service who are posted outside Canada, incarcerated electors and persons who have been absent from Canada for less than five consecutive years and who intend to return to Canada as a resident.
13. Division 3 of Part 11 of the Act specifically sets out a procedure which allows electors temporarily resident outside of Canada to vote. It includes a procedure for these electors to apply for registration and special ballot (s. 223). It also includes a procedure to determine the elector’s place of residence in Canada (s. 223) and a mail-in procedure for voting by special ballot (s. 227).

Restrictions on Voting Rights

14. Canadian citizens who have been resident outside of Canada for five consecutive years or more are prohibited under the Act from voting from outside of Canada.

15. Section 222 of the Act requires the Chief Electoral Officer to maintain a register of electors who are temporarily resident outside of Canada. However, pursuant to s. 222(b) and(c), this register is to be limited to electors who have been residing outside of Canada for less than five consecutive years. It also cannot include electors who do not intend to return to Canada to resume residence in the future.
16. Pursuant to s. 226(f) of the Act, the Chief Electoral Officer is required to delete from the register of electors the names of electors who have resided outside Canada for five consecutive years or more.
17. Section 11 of the Act restricts voting under Part 11 of the Act (ie the Special Voting Rules) to persons who have been absent from Canada for less than five consecutive years and who intend to return to Canada as a resident.

Charter Violations

18. The Act violates s. 3 of the *Charter* by failing to provide a mechanism to vote from outside Canada in elections of members of the House of Commons for Canadian citizens who have been resident outside of Canada for five years or more and who do not have a fixed intention to return to reside in Canada.
19. Subsections 11(d), 222(1), 223(1)(f) and 226(f) of the Act violate s. 3 of the *Charter* by expressly excluding Canadian citizens who have been resident outside of Canada for five years or more and who do not have a fixed intention to return to reside in Canada from the procedures and mechanisms set out in the Act which would enable them to vote from outside Canada in elections of members of the House of Commons.
20. These violations of s. 3 of the *Charter* do not constitute reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Statutory Provisions

21. Canadian Charter of Rights and Freedoms, including ss. 1 and 3;
 22. Constitution Act, 1982, s. 52;
 23. The Canada Elections Act, s.c. 2000, c. 9, including ss. 3,11 and the provisions in Part 11 of the Act and particularly ss. 222, 223 and 226;
 24. Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 14; and
 25. Such further and other grounds as counsel may advise and this Honourable Court permit.
3. **THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the application:**
- (a) The affidavit of Gillian Frank and the exhibits attached thereto;
 - (b) The affidavit of Jamie Duong and the exhibits attached thereto;
 - (c) affidavit of Jean-Pierre Kingsley and the exhibits attached thereto;
 - (d) The affidavit of Don De Voretz and the exhibits attached thereto; and
 - (e) Such further and other evidence as counsel may advise and this Honourable Court may accept.

May 18, 2012

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

Shaun O'Brien, LSUC #43547F
Sharon Naipaul, LSUC #59894H

Tel: 416-964-1115
Fax: 416-964-5895
Lawyers for the Applicants

GILLIAN FRANK AND JAMIE DUONG

and

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

Applicants

Court File No.:

CN-12-
45597# Respondents

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceedings commenced at Toronto

NOTICE OF APPLICATION

CAVALLUZZO HAYES SHILTON McINTYRE &

CORNISH LLP

Barristers & Solicitors

474 Bathurst Street, Suite 300

Toronto, ON M5T 2S6

Shaun O'Brien, LSUC #43547F

Sharon Naipaul, LSUC #59894H

Tel: 416-964-1115

Fax: 416-964-5895

Lawyers for the Applicants