Court File No.:

COURT OF APPEAL FOR ONTARIO

BETWEEN:

GILLIAN FRANK AND JAMIE DUONG

Applicants
(Respondents in appeal)

and

THE ATTORNEY GENERAL OF CANADA

Respondent
(Appellant)

APPLICATION UNDER Rule 14.05(3) of the *Rules of Civil Procedure*

NOTICE OF APPEAL

THE APPELLANT, THE ATTORNEY GENERAL OF CANADA, APPEALS to the Court of Appeal from the judgment of the Honourable Justice Penny of the Superior Court of Justice, dated May 2, and amended May 15, 2014, made at Toronto, Ontario.

THE APPELLANT ASKS that the judgment be set aside and judgment be granted as follows: the appeal is allowed and the application is dismissed, with costs to the Attorney General of Canada in this Court and in the court below.

THE GROUNDS OF APPEAL are as follows:

SECTION 3

1. The judge erred in law in concluding that subsection 11(d), paragraphs 222(1)(b) & (c), paragraph 223(1)(f), subsection 226(f), the word "temporarily" in section 220, subsection 222(1) and paragraph 223(1)(e) of the *Canada Elections Act*, breached the rights of the Applicants under s. 3 of the *Canadian Charter of Rights and Freedoms* ("*Charter*").

2. The judge erred in law in determining that s. 3 of the *Charter* requires Parliament to facilitate unlimited voting rights for expatriates who wish to vote from abroad and that these non-resident citizens are entitled to do so indefinitely, regardless of the length of period of absence from Canada, even if they never intend to return to Canada to resume residence.

3. The judge erred in law in construing s. 3 of the *Charter* as not containing any internal limits to the right to vote, save citizenship.

SECTION 1

4. The judge erred in law in determining that the breach by the statutory provisions identified by him (set out in paragraph 1 herein) was not saved under s. 1 of the *Charter* as a reasonable limit prescribed by law and demonstrably justified in a free and democratic society.

5. The judge erred in law by failing to conduct an independent s. 1 inquiry. The judge made an error of mixed fact and law in concluding that the Supreme Court's decision in *Sauvé v. Canada*, 2002 SCC 68 "can be transcribed almost directly to the circumstances of this case", and was therefore dispositive of the s. 1 issues in the present challenge.

6. The judge erred in law in his application of the s. 1 test to the limit of less than 5 consecutive years of non-residence, and in his failure to apply the test to the second limit in issue – the ongoing requirement of an intention to return to Canada to resume residence.

i) Pressing and substantial objectives

7. The judge erred in law in concluding that the objectives of the impugned legislation were not pressing and substantial objectives.

8. The judge made an error of mixed fact and law in concluding that the objectives were "symbolic" and "rhetorical".

9. The judge made an error of mixed fact and law in failing to take into account in his assessment of those objectives the central role of geographically-defined electoral districts in the structure of Canada's electoral system and system of parliamentary representation, and the consequent importance of residence in those districts.

II) Rational connection

10. The judge made an error of mixed fact and law in concluding that there is no rational connection between the objectives of the impugned legislation and the requirements of a citizen having less than five consecutive years of absence from Canada and an intention to return to Canada.

11. The judge made an error of mixed fact and law in concluding that the Attorney General's argument was based on the assumption that someone who has not lived in Canada for five years or more is unworthy of the franchise. No such argument was made by the Attorney General.

iii) Minimal impairment

12. The judge erred in law in his application of the minimal impairment requirements of the s. 1 analysis. The judge erred in failing to consider the limits on non-resident voting enacted by other, comparable, democracies.

13. The judge made a mixed error of fact and law by disregarding expert testimony that voting trends under a system with limited non-resident voting cannot be used to predict possible effects and harms from a voting system with unlimited non-resident voting.

14. The judge made a mixed error of fact and law in concluding that citizenship alone suffices to demonstrate an ongoing connection to Canada and that therefore the act of voting by a non-resident citizen meets Parliament's concern about a non-resident continuing to have a sufficient attachment to Canada to continue being able to vote.

iv) Overall proportionality

15. The judge made an error of mixed fact and law in finding that the deleterious impact of the limits outweighs their salutary effects.

16. The judge made an error of mixed fact and law in concluding that unlimited non-resident voting would have only a slight impact on Canadian elections, despite the unchallenged expert evidence that many electoral district contests are very close and that non-resident votes could be determinative of the outcome of the election.

REMEDY

17. The judge erred in law in declaring subsection 11(d), paragraphs 222(1)(b) & (c), paragraph 223(1)(f), subsection 226(f), the word "temporarily" in section 220, subsection 222(1) and paragraph 223(1)(e) of the *Canada Elections Act* of no force or effect as of the date of his Judgment.

18. The judge made a mixed error of fact and law in failing suspend his declaration of constitutional invalidity as requested by the Attorney General. The judge erred in law failing to correctly apply the Supreme Court's ruling in *Schachter v. Canada*, [1992] 2 S.C.R. 679.

19. The judge made a mixed error of fact and law in concluding that Parliament would have extended limited non-resident voting to unlimited non-resident voting, and by 'reading out' statutory provisions and 'reading in' other provisions.

20. The judge made a mixed error of fact and law in concluding that an immediate invalidity declaration would not create a danger to the rule of law.

21. The judge made a mixed error of fact and law in holding there was no evidence that an election is anticipated within 12 months, notwithstanding Canada's parliamentary system where by-elections are held as a matter course, necessitated by the death or resignation of a Member of Parliament – matters susceptible to judicial notice.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS: s. 6(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43, which provides for an appeal as of right when a Judgment being appealed is a final order of a judge of the Superior Court of Justice. The order of Justice Penny is final. Hence, it is not necessary to seek leave to appeal.

June 2, 2014

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FORM 61A – NOTICE OF APPEAL TO AN APPELLATE COURT, Rules of Civil Procedure, (Rule 61.04)

(Court file no.)

THE ATTORNEY GENERAL OF CANADA AND **GILLIAN FRANK AND JAMIE DUONG**

Appellant Respondents

ONTARIO
COURT OF APPEAL FOR ONTARIO

Proceeding Commenced at Toronto

NOTICE OF APPEAL

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