

COURT OF APPEAL FOR ONTARIO

BETWEEN:

GILLIAN FRANK and JAMIE DUONG

Applicants
(Respondents in appeal)

and

THE ATTORNEY GENERAL OF CANADA

Respondent
(Appellant in appeal)

and

**THE CANADIAN CIVIL LIBERTIES ASSOCIATION, CHIEF ELECTORAL
OFFICER, and BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION**

Intervenors

FACTUM OF THE INTERVENOR, THE CHIEF ELECTORAL OFFICER

October 24, 2014

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Part I – Overview

1. The Chief Electoral Officer (the “CEO”) intervenes in this appeal in order to provide information and evidence to this Honourable Court regarding the potential impact of the appeal decision on the operations of Elections Canada.
2. The CEO takes no position on the merits of the case, and does not seek any relief from this Honourable Court.¹

Part II – Facts

A. The CEO and Election Readiness

3. The CEO is appointed by resolution of the House of Commons to hold office until age 65 during good behaviour. The current CEO, Marc Mayrand, was appointed on February 21, 2007. The CEO is non-partisan and reports directly to Parliament.

Affidavit of Paul Legault affirmed September 4, 2014 (“Legault Affidavit”), para. 4; Affidavit of Paul Legault Filed by the Chief Electoral Officer Pursuant to the Order of Justice Strathy dated September 22, 2014 (“CEO Evidence”), Tab 1, p. 2.

4. The CEO’s responsibilities include exercising general direction and supervision over the conduct of elections and exercising the powers and performing the duties and functions that are necessary for the administration of the *Canada Elections Act*, S.C. 2000, c. 9 (the “Act”).

Legault Affidavit, para. 5; CEO Evidence, Tab 1, pp. 2-3.

¹ However, if necessary, the CEO does seek leave to admit the evidence of Paul Legault, which has been filed in accordance with the Order of Justice Strathy dated September 22, 2014.

5. The CEO and the Office of the CEO, otherwise known as Elections Canada, must be ready to deliver electoral events whenever they may be called. A proclamation directing the CEO to issue writs for a general election may be made at any time and without warning to the CEO. Because by-elections are only held when a seat in the House of Commons becomes vacant, the CEO and Elections Canada have some notice that a by-election will be held. However, an order directing the CEO to issue a writ for a by-election may be issued at any time and without warning to the CEO, within a prescribed period.

Legault Affidavit, para. 6; CEO Evidence, Tab 1, p. 3.

6. While the date for the next general election is October 19, 2015, pursuant to section 56.1(2) of the *Act*, it is possible that the next general election could be called before that date. In light of this possibility, the CEO and Elections Canada must conduct their operations in a manner that will permit them to deliver an election whenever the writ is dropped, including before October 19, 2015.

Legault Affidavit, paras. 6-8; CEO Evidence, Tab 1, p. 3.

B. The Register

7. Elections Canada maintains a register of electors who are resident outside Canada (the “Register”), pursuant to sections 220 to 226 of the *Act*.

Legault Affidavit, paras. 3, 11; CEO Evidence, Tab 1, pp. 2, 4.

8. Prior to May 2, 2014, the *Act* only permitted certain non-resident electors to vote. In particular, non-resident electors were required to have been absent from Canada for less than five years and have an intention to return to Canada to reside. If a non-

resident elector had been resident outside Canada for five years or more, the elector was required to prove that one of the exceptions in section 222(2) of the *Act* was applicable in order to vote. This information was provided by non-resident electors to Elections Canada in Applications for Registration and Special Ballot (the “Applications”).

Legault Affidavit, para. 12, Exhibit “B”; CEO Evidence, Tab 1, pp. 4-5, Tab 1B.

9. Pursuant to section 226(f) of the *Act*, Elections Canada regularly deleted from the Register the names of electors who had resided outside Canada five or more years and who had not proven the applicability of an exception set out in section 222(2).

Legault Affidavit, para. 13; CEO Evidence, Tab 1, p. 5.

10. On May 2, 2014, the Honourable Justice Penny ordered that certain provisions of the *Act* are of no force and effect, including the five-year period within which non-resident electors were permitted to vote by special ballot (the “Order”).

Legault Affidavit, para. 10, Exhibit “A”; CEO Evidence, Tab 1, p. 4, Tab 1A, para. 162, p. 34.

11. Accordingly, as of the date of the Order, Elections Canada stopped deleting electors from the Register pursuant to section 226(f), and stopped sending letters pertaining to the five-year limitation to electors. Elections Canada also revised the prescribed Application forms, as the CEO no longer has the authority to request information regarding an elector’s intention to return to Canada to resume residence, or the date of such intended return.

Legault Affidavit, paras. 13, 18-21, Exhibits “C”, “D”; CEO Evidence, Tab 1, pp. 5-7, Tabs 1C, 1D.

12. As a result of the Order, the Register now contains the names of some non-resident electors whose names could not have been added thereto prior to the Order. As well, the names of certain non-resident electors whose names would have been deleted from the Register prior to the date of the Order pursuant to section 226(f) of the *Act* remain on the Register.

Legault Affidavit, para. 22; CEO Evidence, Tab 1, p. 7.

C. The Potential Impact of the Appeal on Elections Canada's Operations

13. There is no mechanism available that would permit the CEO to quickly implement the reinstatement of the requirements set out in sections 222(1)(b) and (c) of the *Act* if the appeal of the Order is granted.

Legault Affidavit, para. 23; CEO Evidence, Tab 1, p. 7.

14. If the appeal is granted, Elections Canada and the CEO will be required to contact certain non-resident electors and request information from them, including their intention to return to Canada to resume residence, the intended date of such return, and proof that an exception in section 222(2) of the *Act* applies. The standard period given by Elections Canada for electors to respond to such information requests is 90 days.

Legault Affidavit, paras. 24-27; CEO Evidence, Tab 1, pp. 8-9.

15. Depending on when the next general election is called, there may only be a short time between the issuing of an order granting the appeal and the calling of an election. In those circumstances, while Elections Canada will make best efforts to collect the information required to update the Register, it might not be able to delete the names of

electors from the Register in accordance with section 226(f) of the *Act* due to the overlap between the period to respond to the CEO's request for information and the election period.

Legault Affidavit, para. 30; CEO Evidence, Tab 1, p. 9.

16. In any event, prior to the date of the Order, Elections Canada implemented a policy whereby, once a writ was dropped, no electors were deleted from the Register, even if their five-year period would end during the election period. The reason for this policy is that, pursuant to section 227(1) of the *Act*, the CEO is required to send a special ballot to every elector listed on the Register after the issue of the writs, regardless of whether their five-year period would end before polling day. If an elector's name were deleted from the Register during the election period, an absurd situation would arise whereby the CEO would send the elector a special ballot, knowing that the ballot would not be counted, because the elector's name would be deleted from the Register prior to polling day.

Legault Affidavit, para. 14; CEO Evidence, Tab 1, p. 5.

17. The policy was also implemented due to the operational challenges inherent in tracking and keeping separate certain ballots, and the lack of authority to set aside outer envelopes unopened or to not count certain ballots received from non-resident electors, which Elections Canada would be required to do, in the absence of this policy, for non-resident electors whose five-year period ended during the election period.

Legault Affidavit, paras. 15-17; CEO Evidence, Tab 1, pp. 5-6.

18. Even if the appeal is granted, the rationale underlying the policy of not deleting electors from the Register during the election period, as described above, will continue to be valid.

Legault Affidavit, para. 30; CEO Evidence, Tab 1, p. 9.

Part III – Issues and the Law

19. The issue in this appeal, as stated by the Appellant, is whether “the 1993 limits to Parliament’s extension of mail voting to temporary non-resident voters [are] demonstrably justified in a free and democratic society”.

20. The CEO takes no position on the issue to be determined in this appeal, and accordingly makes no submissions in that regard.

Part IV – Order Requested

21. The CEO does not seek any relief from this Honourable Court relating to the merits of the appeal.

22. In the event that leave is required from this Honourable Court to admit the evidence of Mr. Legault, which has been filed pursuant to the Order of the Honourable Chief Justice Strathy dated September 22, 2014, the CEO respectfully requests that such leave be granted. The evidence of Mr. Legault is necessary for the CEO to provide assistance to this Honourable Court with respect to the potential impact of the appeal decision on the operations of Elections Canada.

ORAL ARGUMENT

Counsel for the CEO estimates that 15 minutes is required for oral argument.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

October 24, 2014



BORDEN LADNER GERVAIS LLP

Alessandra Nosko
Counsel for the Intervenor,
The Chief Electoral Officer

SCHEDULE "A" – AUTHORITIES

Nil.

SCHEDULE “B” – STATUTES AND REGULATIONS

Canada Elections Act, SC 2000, c. 9²

56.1. (1) Nothing in this section affects the powers of the Governor General, including the power to dissolve Parliament at the Governor General’s discretion.

(2) Subject to subsection (1), each general election must be held on the third Monday of October in the fourth calendar year following polling day for the last general election, with the first general election after this section comes into force being held on Monday, October 19, 2009.

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.

“register” means the register referred to in subsection 222(1).

221. An elector may vote under this Division if his or her application for registration and special ballot is received in Ottawa by 6:00 p.m. on the 6th day before polling day and his or her name is entered on the register.

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

(a) at any time before making the application, resided in Canada;

(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.]

(2) Paragraph 1(b) does not apply to an elector who is

(a) employed outside Canada in the federal public administration or the public service of a province;

(b) employed outside Canada by an international organization of which Canada is a member and to which Canada contributes;

(c) a person who lives with an elector referred to in paragraph (a) or (b); or

² Provisions or words that are of no force or effect or have been rendered inapplicable pursuant to the Order are identified in square brackets.

(d) a person who lives with a member of the Canadian Forces or with a person referred to in paragraph 191(d).

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

(a) satisfactory proof of the elector's identity;

(b) [if paragraph 222(1)(b) does not apply in respect of the elector, proof of the applicability of an exception set out in subsection 222(2)];

(c) the elector's date of birth;

(d) the date the elector left Canada;

(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;]

(g) the elector's mailing address outside Canada; and

(h) any other information that the Chief Electoral Officer considers necessary to determine the elector's entitlement to vote or the electoral district in which he or she may vote.

(2) In addition to the information specified in subsection (1), the Chief Electoral Officer may request that the elector provide other information that the Chief Electoral Officer considers necessary for implementing agreements made under section 55, but the elector is not required to provide that information.

224. The address chosen as the place of ordinary residence in Canada in the application for registration and special ballot cannot be changed after the elector's name is entered in the register.

225. The Chief Electoral Officer may require an elector whose name appears in the register to provide, within the time fixed by the Chief Electoral Officer, any information that is necessary to update the register.

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

(a) does not provide the information referred to in section 225 within the time fixed by the Chief Electoral Officer;

(b) makes a signed request to the Chief Electoral Officer to have his or her name deleted from the register;

(c) has died and concerning whom a request has been received to have the elector's name deleted from the register, to which request is attached a death certificate or other documentary evidence of the death;

(d) returns to Canada to reside;

(e) cannot be contacted; or

(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.]

227. (1) After approving an application for registration and special ballot and after the issue of the writs, the Chief Electoral Officer shall send a special ballot, an inner envelope and an outer envelope to every elector whose name is entered in the register, at the address referred to in paragraph 223(1)(g).

GILLIAN FRANK and JAMIE DUONG - vs. - THE ATTORNEY GENERAL OF CANADA

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PROCEEDING COMMENCED AT TORONTO

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