

Court File No.: CV-12-453976

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

GILLIAN FRANK AND JAMIE DUONG

Applicants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

**SUR-REPLY FACTUM OF THE RESPONDENT, THE ATTORNEY
GENERAL OF CANADA**

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**SUR-REPLY FACTUM OF THE RESPONDENT, THE ATTORNEY
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1. The Attorney General of Canada (“Canada”) hereby responds to four points raised by the Applicants in their Reply factum.

1) Residence as a condition of voting in s. 3 of the Charter

a) *Importance of not overshooting the actual purpose of a right*

2. The Applicants deny that residence in Canada is ordinarily a condition of voting. This ignores, however, Chief Justice Dickson’s caution that it is important “not to overshoot the actual purpose of the right” in question, “but to recall that the *Charter* was not enacted in a vacuum, and must therefore” be interpreted “in its proper linguistic, philosophic and historical contexts”.¹

¹ *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at p. 344, para. 117. With respect to s. 3 in particular, see also *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158, and *Dixon v. British Columbia (Attorney General)* (1989), 59 D.L.R. (4th) 247 (B.C.S.C.).

b) Historical Context

3. The Applicants assert that the framers of the *Charter* could have included residence as an explicit condition of the right to vote if they had so intended. The historical context shows, however, that the framers anticipated that there would be necessary limitations on the right to vote. Indeed, the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada considered voting by non-resident citizens in 1982 while studying the proposals that became the *Charter*. Responding to a question on point, the Honourable Robert Kaplan, Acting Minister of Justice, suggested that residence may well be a reasonable limit to s. 3 and citizens who do not live in Canada could be excluded from voting since “after all they are not affected” and that “people who are Canadian citizens and do not live in our country for one reason or another may be justifiably deprived of the right to participate in an election”.²

2) Concerns expressed by Parliamentarians about fraud

4. The Applicants claim that concerns expressed by Parliamentarians about fraud and electoral abuse are unfounded because there is no evidence of such problems to date. Dr. Munroe Eagles (one of Canada’s experts) notes, however, that these concerns need to be considered within the context of a substantial increase in the possible number of non-resident voters who could vote if no limits were in place – an additional 1.4 million – creating much greater

² *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada*, Thursday, January 22, 1981, Issue No. 43 at p. 43:85

incentives for candidates and parties to reach out to them.³ It is in this context that Parliamentarians' concern about the integrity and enforceability of the CEA's electoral regime overseas ought to be considered.

5. The Applicants also claim that any risk of fraud could be mitigated by legislation regulating the conduct of Canadians living overseas, citing the *Corruption of Foreign Public Officials Act* as an example of such extraterritorial legislation.⁴ The Applicants fail to acknowledge, however, that this legislation is modelled on an OECD Convention specifically premised on State parties allowing each other to conduct investigations within each other's territory to avoid comity issues.⁵ In contrast, here, no such international agreement exists, and therefore any efforts by Canada to investigate breaches of the *CEA* overseas would be wholly dependent on the consent and cooperation of a foreign sovereign state.

3) Weight of European Court of Human Rights (ECHR) decisions

6. The Applicants seek to discount ECHR decisions *that Canada relies on by invoking ECHR decisions*⁶ on distinct electoral matters, including one that reaches a different conclusion than the Supreme Court of Canada on the same question. These decisions, however, should not distract from the ECHR

³ Sur-reply Affidavit of Dr. Eagles, paras. 14-20, **JAR, Vol. 5, Tab 13, pp. 1335-8**

⁴ Applicants' Reply Factum at para 9

⁵ This Convention is cited in the full title of the statute: *An Act respecting the corruption of foreign public official and the implementation of the Convention on Combating Bribery of Foreign Public Officials International Business Transactions, and to make related amendments to other Acts*, S.C. 1998, c. 34

⁶ Applicants' Reply Factum, paras. 20-21

reflecting the shared concerns of mature democracies on the same question at issue here – achieving fairness between the voting rights of resident and non-resident citizens.

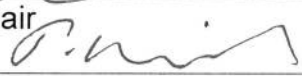
4) Remedial precision is lacking

7. The *Applicants* claim that Parliament should not be afforded remedial flexibility if the provisions are struck. Such a claim, however, does not respect the Supreme Court's guidance in *Schachter*.⁷ *Schachter* is clear that no court should decide what remedy is warranted unless it is clear what Parliament would have done if aware of the infirmity.⁸ Otherwise, a court risks intruding into the legislative sphere.⁹ The legislative record here is clear. Parliament determined limits of some duration were warranted. This is reinforced by the fact that no counterpart Westminster system of parliamentary representation allows its non-resident citizens to vote without limit.¹⁰ Parliament should therefore be allowed to decide how best to address any infirmity, and afforded the time to do so.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this 28th day of January, 2014.


Gail Sinclair


Peter Hajecek
Counsel for the Respondent, the
Attorney General of Canada

⁷ *Schachter v. Canada*, [1992] 2 S.C.R.679 at pp. 705-6

⁸ *Schachter v. Canada*, [1992] 2 S.C.R.679 at p. 707

⁹ *Schachter v. Canada*, [1992] 2 S.C.R.679 at p. 723-4 and at p. 718

¹⁰ Canada's Factum, paras. 78-80 and 151 (Australia, New Zealand and the United Kingdom)

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