COURT OF APPEAL FOR ONTARIO

CITATION: Frank v. Canada (Attorney General), 2015 ONCA 536
DATE: 20150720
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Strathy C.J.O., Laskin and Brown JJ.A.

BETWEEN

Gillian Frank and Jamie Duong

Applicants (Respondents)

and

The Attorney General of Canada

Respondent (Appellant)

Peter M. Southey, Gail Sinclair and Peter Hajecek, for the appellant

Shaun O'Brien and Amanda Darrach, for the respondents

Alessandra Nosko, for the intervener Chief Electoral Officer

Mark J. Freiman and Jameel Madhany, for the intervener Canadian Civil Liberties Association

Brendan van Niejenhuis and Justin Safayeni, for the intervener British Columbia Civil Liberties Association

Heard: January 6, 2015

On appeal from the judgment of Justice Michael A. Penny of the Superior Court of Justice, dated May 2, and amended May 15, 2014, with reasons reported at 2014 ONSC 907.

Strathy C.J.O.:

A. INTRODUCTION

[1] Section 3 of the *Canadian Charter of Rights and Freedoms* states that every Canadian citizen has the right to vote – a right the Supreme Court has described as lying at the heart of Canadian democracy.[1] This appeal asks whether that right can be taken away from Canadian citizens who have lived outside Canada for more than five years.

[2] Gillian Frank and Jamie Duong, the respondents, are Canadian citizens. They have lived and worked in New York State for most of their adult lives, but plan to return if they can find suitable work. They were not able to vote in the last federal election because they had lived outside Canada for more than five years. They brought an application in the Superior Court of Justice to declare unconstitutional the provisions of the *Canada Elections Act*, S.C. 2000, c. 9 ("*CEA*") denying the vote to most citizens[2] who have resided outside Canada for more than five years.

[3] The application judge held that Parliament cannot take away the voting rights of non-resident Canadian citizens – even long-term non-residents. He struck down the impugned provisions of the *CEA*, because in his view they

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[1] *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519, at para. 1.
[2] Other than certain exempt classes, discussed below, such as military and public service personnel posted abroad.

violated s. 3 of the *Charter*, were not saved by s. 1, and were therefore of no force and effect.

[4] I would allow the appeal of the Attorney General of Canada. My reasons can be summarized as follows.

[5] Canada's political system is based on geographically defined electoral districts. The citizens living in each riding elect a Member of Parliament to represent them. Their representative serves the interests of the community, speaks for the community and participates in making laws that affect the daily activities of all residents of the community. The electorate submits to the laws because it has had a voice in making them. This is the social contract that gives the laws their legitimacy.

[6] Permitting all non-resident citizens to vote would allow them to participate in making laws that affect Canadian residents on a daily basis, but have little to no practical consequence for their own daily lives. This would erode the social contract and undermine the legitimacy of the laws. The legislation is aimed at strengthening Canada's system of government and is demonstrably justified in a free and democratic society. While the impugned legislation violates s. 3 of the *Charter*, it is saved by s. 1. Denying the right to vote to non-resident citizens whose absence exceeds five years is a reasonable limit on the *Charter* right.

[7] I will begin by explaining the factual and legislative background underlying

this appeal. I will then summarize the reasons of the application judge and the positions taken by the parties in this court. Finally, I will analyze the issues. The appellant acknowledges the impugned legislation breaches s. 3 of the *Charter*, so the real battleground of the appeal is the s. 1 analysis.

B. BACKGROUND

(1) The affected population

[8] In 2009, some 2.8 million Canadians, or 8% of the country's population, had lived abroad for more than a year. Of those, about 1.4 million citizens of voting age had been non-resident for more than five years. While some of those were public servants, military personnel or diplomats who had special voting rights, it is conceded that over one million Canadian citizens who have lived outside Canada for more than five years have no voting rights as a result of the impugned legislation.

[9] The evidence establishes that a very small percentage of non-resident citizens affected by the impugned legislation take advantage of the right to vote. In the last federal election, in 2011, only 6,000 non-resident votes were recorded.[3]

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[3] This number does not include military and diplomatic personnel or employees of international organizations.

(2) Brief history of residence as a voting requirement

[10] Residence has historically played a prominent role in defining eligibility to vote in Canadian federal elections. At one time, actual physical presence in the electoral district on polling day was required in order to vote. This strict requirement was gradually relaxed for some members of the electorate. A desire to accommodate soldiers posted abroad was a driving force behind many of the reforms.

[11] Beginning in the early 1900s, soldiers and war correspondents engaged in active duty were exempted from the residency requirement. In 1915, "postal voting" was implemented to allow soldiers to cast their ballots if they were absent on election day. In 1917, the residency exemption was widened by *The Military Voters Act, 1917*, S.C. 1917, c. 34, to permit voting by all members of the military who were British subjects, regardless of their age, gender or length of absence.

[12] Advance voting was introduced in 1920 for commercial travellers, railwaymen and sailors. It was extended to members of the Royal Canadian Mounted Police and the armed forces in 1934 and to military reservists in 1951. In 1945, proxy voting was introduced for Canadians held as prisoners of war.

[13] Similar rights were gradually extended to public service employees and members of military families stationed abroad. In 1960, advance voting rights became available to all resident electors, if they swore they would be absent from

the polling division on election day. The oath requirement for advance voting was removed in 1977.

[14] In 1970, diplomats and other public servants posted outside Canada and their dependants gained access to a form of remote voting through the special voting rules in the *CEA*. Civilian employees of the military, such as teachers and administrative support staff, became eligible in 1977. This enabled these non-resident groups to vote by mail using a "special ballot".

[15] The right of Canadian citizens to vote was enshrined in the *Charter* in 1982. It was not until 1993, however, that legislative changes were made to facilitate voting by citizens who were temporarily residing outside of Canada, regardless of their reason for non-residence.

[16] In 1993, after deliberations by several parliamentary committees, a Royal Commission on Electoral Reform and Party Financing and the recommendations of a House of Commons Special Committee on Electoral Reform, Parliament introduced sweeping changes to the *CEA*. Part of this reform included extending the special voting rules to temporary non-residents, who had been living outside Canada for less than five years and who intended to return to Canada. This regime is described in greater detail in the next section.

(3) The current legislative scheme

[17] Part 1 of the *CEA*, entitled "Electoral Rights", provides the basic rules for

voting in Canada. Canadian citizens 18 years of age or older are qualified electors (s. 3). They are entitled to vote for a Member of Parliament for the electoral district in which they ordinarily reside (s. 6).

[18] Section 127 recognizes three methods of voting in federal elections:

> (a) in person at a polling station on polling day;
>
> (b) in person at an advance polling station during the period provided for the advance poll; or
>
> (c) *by means of a special ballot issued in accordance with Part 11*. [Emphasis added.]

[19] This appeal concerns the third method – the special ballot voting procedure referred to in s. 127(c). This allows eligible citizens to submit their special ballot outside the polling district in which it will be counted. Eligibility for this method of voting is defined in s. 11 of the *CEA*:

> Any of the following persons may vote in accordance with Part 11:
>
> (a) a Canadian Forces elector;
>
> (b) an elector who is an employee in the federal public administration or the public service of a province and who is posted outside Canada;
>
> (c) a Canadian citizen who is employed by an international organization of which Canada is a member and to which Canada contributes and who is posted outside Canada;
>
> (d) *a person who has been absent from Canada for less than five consecutive years and who intends to return to Canada as a resident;*

> (e) an incarcerated elector within the meaning of that Part; and
>
> (f) any other elector in Canada who wishes to vote in accordance with that Part. [Emphasis added.]

[20] Section 11(d) establishes the temporal limit on non-resident voting rights that is the focal point in this appeal. Citizens who have been living outside Canada for five years or more are not eligible to vote, unless they fall within one of the other exceptions.[4]

[21] Non-resident citizens who are eligible to vote under s. 11 must apply and meet the additional criteria prescribed in Part 11 of the *CEA*. Division 3 of Part 11, spanning ss. 220-230, deals specifically with the "electors temporarily resident outside Canada" referred to in s. 11(d). These provisions require the Chief Electoral Officer ("CEO") to maintain a register of electors who may access the special ballot procedure. In order to qualify for inclusion on the register, non-resident Canadians must file an application and meet the three criteria set out in s. 222(1). The citizen must be a person who:

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

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[4] It should be noted that the appellant asserts these citizens who have been non-residents for five or more years also have no right to vote in person at a polling station under ss. 127(a) or (b). The CEO intervener denies this and has adopted an administrative policy of permitting non-residents to attend a polling station in person and cast a vote. It is not necessary to decide in this appeal which view is legally correct. Instead, it may be assumed that the appellant is correct, as that only makes its justification of the s. 3 infringement more challenging.

> (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.

[22] Section 222(2) creates an exception to the five-year limit for various non-resident citizens who are entitled to vote provided they previously resided in Canada and intend to return to resume residence in the future. This exception applies to any individual 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
>
> (d) a person who lives with a member of the Canadian Forces or with a person referred to in paragraph 191(d) [which describes: "a person who is employed outside Canada by the Canadian Forces as a teacher in, or as a member of the administrative support staff for, a Canadian Forces school."]

[23] To summarize, in order to vote, a non-resident citizen who does not fit within the exceptions in s. 222(2) must: (a) have previously resided in Canada; (b) have resided outside Canada for less than five years; and (c) have indicated an intention to resume residence in Canada in the future.

[24] The non-resident citizen is entitled to select a place of residence for the

purpose of counting his or her vote. That place can be any one of: the person's last place of ordinary residence in Canada; the place of ordinary residence of his or her spouse, common law partner, other relative, or relative of the spouse or common law partner; the place of ordinary residence of a person in respect of whom the elector is a dependant; or the place of ordinary residence of a person with whom the elector would live, but for his or her residing temporarily outside Canada (s. 223(1)(e)).

[25] Sections 227-229 describe the method of remote voting. The CEO mails a special ballot to the non-resident's foreign address. The non-resident must return the ballot by mail or other designated means and it will be counted as long as it arrives by 6:00 p.m., local time, on polling day.

[26] A non-resident's name is deleted from the register once he or she has resided outside Canada for five consecutive years or more: s. 226(f).

(4) The respondents

[27] The respondents are Canadian citizens who live and work in New York State. They attended university in the U.S. and remained there to pursue careers in their chosen professions.

[28] Gillian Frank was born in Toronto. He attended high school and completed undergraduate studies in Canada and served in the Canadian Forces. At the time of this *Charter* application, he was 34 years old, had been living in the U.S. for 13

years and was completing post-doctoral studies. He has family in Toronto and he travels to Canada approximately four times each year. He has not sought immigration status in the United States, other than on a temporary basis, and is not entitled to vote in American elections. He has paid U.S. taxes since 2001.

[29] Jamie Duong was born in Montreal and lived in Canada until grade 10 before attending school in Vermont. After high school, he attended Cornell University, where he now works. He has spent most of his adult life in the U.S. and has been resident there since 2006. He is a U.S. citizen, pays U.S. taxes and votes in U.S. elections. He does not file a Canadian tax return. He has family in Montreal and he returns to Canada several times each year during the summer and holidays.

[30] The respondents have expressed interest in returning to Canada if they can secure employment in their fields. In the meantime, they wish to vote in Canadian elections. They brought this constitutional challenge after discovering they were disqualified from voting in the 2011 federal election, based on the five-year limit in s. 222(1)(b).

C. THE DECISION OF THE APPLICATION JUDGE

[31] After noting the respondents' strong ties to Canada and their absence because of employment, the application judge observed that "many Canadians living abroad have strong connections to Canada and care deeply about the

country". He described the connections as both socio-cultural and economic. He then summarized the legislative scheme and the history of non-resident voting in Canada.

(1) Breach of s. 3

[32] The application judge found the legislative restrictions on the voting rights of non-residents breached s. 3 of the *Charter*. He held that s. 3 clearly contains "no limits on the right to vote other than citizenship" and "[a]ny limitation on the scope of the right ... constitutes a breach of s. 3 which must then be justified under s. 1." He referred to *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519 ("*Sauvé #2*"), where McLachlin C.J. stated at para. 11:

> I conclude that s. 3 must be construed as it reads, and its ambit should not be limited by countervailing collective concerns, as the government appears to argue. These concerns are for the government to raise under s. 1 in justifying the limits it has imposed on the right.

[33] He observed that in spite of the long history of residence as an element of the Canadian electoral process, the *Charter* makes citizenship the only requirement to vote. The framers of the *Charter* could easily have included residence if it was meant to be an additional requirement, but did not. The *CEA* does not identify residence as a qualification to vote and instead uses residence as a "mechanism for regulating the voting process", akin to the means of "regulating a modality of the universal franchise" referred to by McLachlin C.J. at

para. 37 of *Sauvé #2*. He rejected the Attorney General's submission that the right could have internal limitations on the basis of fairness to resident citizens.

[34] The application judge rejected the appellant's submission that "allowing non-residents to vote is unfair to resident Canadians because resident Canadians live here and are, on a day-to-day basis, subject to Canada's laws and live with the consequences of Parliament's decisions" (paras. 86-90).

[35] He gave four reasons for rejecting this argument:

> (a) it was "precisely the sort of 'countervailing collective concern' which cannot be used to limit the ambit of a clearly articulated constitutional right";
>
> (b) non-residents live with the consequences of the law because they frequently visit, have family here and the laws may affect them in the future;
>
> (c) non-residents may be subject to Canadian laws, even though the laws may not be capable of extra-territorial enforcement against them; and
>
> (d) "the logic of the [appellant's] argument would dictate that all non-resident Canadians should be prohibited from voting, without exception. Non-resident voters are equally 'not subject to Canada's laws' and could equally affect election outcomes in close ridings whether they have been non-resident for four or six years."

[36] He concluded that the *Charter* guarantee of the right to vote creates a protective umbrella to limit the power of the government to take away the right to vote.

[37] The application judge distinguished residency requirements for provincial

and territorial elections, finding that non-residents of a province would not have a sufficient attachment, whereas citizenship establishes the necessary connection to Canada. He concluded that the impugned provisions designate non-residents as unworthy of the franchise in a manner that violates s. 3.

(2) Justification under section 1

[38] After finding the impugned provisions infringe s. 3, the application judge proceeded with an *Oakes* analysis to determine whether the infringement is justified under s. 1: *R. v. Oakes*, [1986] 1 S.C.R. 103.

(a) Pressing and substantial objective

[39] He identified the two pressing and substantial objectives put forward by the Attorney General of Canada as "fairness to resident voters" a ıd "concerns over electoral fraud." At the outset, he observed that "the rhetorical nature of the government objectives ... render[ed] them suspect" and "broad, symbolic objectives" were "inherently problematic".

[40] He was troubled that substantive fairness was "almost always in the eye of the beholder". He noted the low turnout from non-resident voters in prior elections, which was "entirely dwarfed by the non-resident Canadian Forces and incarcerated electors." He compared the fairness objective to an argument that resident citizens would consider it unfair for incarcerated electors to influence an election outcome, but held such stereotypes and vague generalizations have

been rejected by Canadian courts.

[41] The application judge found the second objective – "concerns over electoral fraud" – to be speculative and without any evidentiary foundation. There were no documented problems associated with non-resident voting on which to base this objective.

[42] Although not inclined to view the objectives as pressing and substantial, he nevertheless proceeded to the proportionality stage of the analysis to determine whether they were in fact capable of justifying the infringement.

(b) Proportionality

(i) Rational connection

[43] At the rational connection stage, the application judge characterized the Attorney General's argument as treating non-residents as "unworthy" because having been away for more than five years they had lost their connection to Canada. He considered that the government was attempting to protect the voting rights of residents from being "de-valu[ed]" by the unworthy non-residents. This, he said, was the same argument rejected in *Sauvé #2* and it was inconsistent with s. 3 and with the respect for personal dignity that lies at the heart of Canadian democracy.

[44] He observed that the evidence showed that non-resident Canadians

maintained connections to Canada in a number of ways. Although non-residents would lose their affinity to Canada over time, there was no rational connection between this general trend and the five-year limitation imposed by the legislation. More broadly, the Attorney General had not established a rational connection between any temporal limit on non-resident voting rights and the objectives of fairness and preventing electoral abuse.

(ii) Minimal impairment

[45] The application judge observed that the impugned provisions prevented informed and connected citizens like the respondents from voting, while enfranchising resident electors who may be uninformed and disinterested. As a result, it was overbroad. Even if the provisions advanced the government objectives, they were not minimally impairing because they created a blanket prohibition that failed to account for exceptionally informed and connected non-residents like the respondents. Further, the appellant had not established that a five-year cut-off was a reasonable basis to separate the informed and connected from the uninformed and unconnected.

[46] The application judge dismissed international comparisons, noting that Canada, as a world leader in voter enfranchisement, had already taken a more liberal approach to the voting rights of people with mental disabilities and prisoners.

[47] Moreover, he found less impairing means were available to achieve the government objective of ensuring a sufficient connection to Canada. Specifically, the act of voting itself is a "self-testing mechanism" to ensure non-residents are sufficiently interested in and connected to Canada, given the procedural steps and knowledge required by the process. Therefore, he concluded the means failed the minimal impairment test.

(iii) Final balancing

[48] The application judge found that it was at this final stage that "the lack of substantive evidence of any actual problem resulting from non-resident voting comes home to roost." The vague assertions of unfairness and speculative concerns over electoral abuse could not outweigh the substantial interference with the rights of Canadian citizens to vote. The impact on Canadian elections would be, at most, "slight". At the same time, the provisions deprived citizens who cared deeply about Canada and lived abroad for legitimate reasons from having a voice in Canadian political life. He concluded that the importance of this fundamental right could not be ousted by the alleged salutary benefits put forward by the Attorney General. Therefore, the impugned provisions could not be saved by s. 1.

(3) Remedy

[49] As a result, the application judge declared ss. 11(d), 222(1)(b) and (c),

223(1)(f), 226(f) and the word "temporarily" in ss. 220, 222(1) and 223(1)(e) to be of no force or effect; and read into s. 11(d) the words "an elector who resides outside Canada".

[50] On June 23, 2014, Sharpe J.A. dismissed the appellant's motion for a stay pending the outcome of this appeal: *Frank v. Canada (Attorney General)*, 2014 ONCA 485.

D. THE POSITIONS OF THE PARTIES

(1) Appellant

[51] The appellant's primary position, and the one I will focus on, is that the residency requirement fulfills the pressing and substantial objective of preserving the social contract at the heart of Canada's system of constitutional democracy. It ensures citizens are both subjectively connected to Canada through their knowledge and affiliation and objectively connected through holding citizenship responsibilities and duties to obey domestic laws. The connection between having a voice in making the laws and being obliged to obey them is what gives the laws legitimacy.

[52] Limiting the voting rights of non-residents is rationally connected to the diminished connection non-residents have to Canada, both subjectively and objectively. Absence from Canada attenuates a citizen's participation in the social contract, as few Canadian laws apply extra-territorially.

[53] Parliament has extended the right to vote by mail to non-residents who intend to return to Canada after a temporary absence of up to five years to resume their obligations as citizens. It has also created exceptions for other individuals who are reasonably presumed to be returning to Canada. These exceptions do not undermine the rational connection, but instead demonstrate the means chosen are minimally impairing. Many non-residents who fall within the exceptions demonstrate their participation in Canada's social contract through committed public service. International comparators verify that five years is a reasonable temporal limit on non-resident voting rights.

[54] Moreover, the impugned measures do not permanently strip non-residents of the right to vote. They only limit the right as long as those non-residents *choose* to live outside Canada. Residence, like age, is a way of regulating the modality of voting and does not speak to "worthiness". The five-year rule is therefore entitled to deference. Five years corresponds to the maximum life of Parliament and is a reasonable and minimally impairing temporal line for regulating the right to vote.

[55] The deleterious impact is mitigated by the likelihood that non-residents can participate in the foreign polity. Further, the limitation is not permanent and non-resident citizens may choose to return to Canada and regain the right to vote.

(2) Respondents

[56] The respondents defend the reasons of the application judge. They say the right to vote is a fundamental right of citizenship, which is protected by the *Charter* and does not depend on residence. Residence is not a primary component of the electoral system. It is simply an organizational framework for the allocation of votes in that system. The impugned legislation strips away the voting rights of the respondents, committed and engaged citizens with strong connections to Canada.

[57] The respondents submit the vague and symbolic objectives advanced by the government should be rejected. They argue that the government has failed to identify any demonstrated problem with non-resident voting that could justify the infringement. Moreover, the purported objective is undermined by its unprincipled exceptions for other groups of non-residents.

[58] At the proportionality stage, they submit five years is an arbitrary limit with no rational connection to the objective advanced by the appellant. They re-assert the application judge's conclusion that the measures are overbroad by capturing non-residents such as the claimants who maintain a strong connection to Canada. Moreover, the measures are overly drastic, as the completion of the procedural requirements for non-resident voting in itself evidences a sufficient connection.

[59] In the final balancing, the impact on the voting rights of non-residents outweighs the symbolic benefits advanced by the appellant. The measures leave non-resident citizens with no voice in the direction of the country. In turn, this has a serious deleterious impact on their dignity and belonging.

(3) BCCLA

[60] The British Columbia Civil Liberties Association ("BCCLA") was granted leave to intervene in this appeal as a friend of the court and limits its submissions to the issues of pressing and substantial objective and rational connection. It argues for a stringent justification standard requiring the government objective to be directed at a concrete harm and supported by cogent evidence. Abstract and rhetorical objectives cannot be used to insulate *Charter* breaches from judicial scrutiny and evidence, not "common sense" or logical reasoning, must establish a rational connection between the impugned legislation and its objective. It says the appellant failed to demonstrate that the impugned legislation is directed at any specific harm.

[61] The primary objective of "fairness to resident voters" is framed in vague and abstract terms. Resident voters are not a vulnerable group in need of protection. There is nothing inherently unfair about non-residents voting and there is no evidence that resident voters share the appellant's view of any unfairness in non-resident votes being counted. Further, the historical evidence

suggests that non-resident voter participation will be limited.

[62] At the rational connection stage, the BCCLA submits the application judge's findings are entitled to deference. The application judge found non-residents maintain connections to Canada and it is easy for them to stay informed about Canadian politics.

[63] Non-residents do not withdraw from the fictitious social contract any more than prisoners. Further, the appellant's proposition that non-residents are not subject to Canadian laws is flawed. Parliament has complete jurisdiction to legislate extra-territorially. Parliament has exercised this authority conservatively to date, but this could change and the provisions prevent non-residents from having a voice in that change. Therefore, there is no rational basis on which to impose a temporal limit on the voting rights of non-resident voters.

(4) CCLA

[64] The Canadian Civil Liberties Association ("CCLA") was also granted leave to intervene in this appeal and limits its submissions to the role of equality values in the final balancing of proportionality under *Oakes*.

[65] The CCLA asserts that *Charter* rights must be read harmoniously with broader *Charter* values and the language of s. 3 – extending the right to vote to "*every* citizen" – places equality at its core. It argues the legislation creates a distinction that undermines the dignity, self-autonomy and worth of non-resident

Canadians based on an extraneous personal characteristic. Denying non-residents the right to vote does not protect a modality of the right to vote, it sends the message that non-residents do not deserve to vote. It creates a class of approximately 1.4 million Canadian citizens who are treated differently based on non-resident status.

[66] Citizenship and age are the only legitimate qualifications on the right to vote. The harm to the s. 3 *Charter* rights of non-residents, combined with the harm to equality values, outweighs any salutary benefits put forward by the government.

(5) Chief Electoral Officer

[67] The CEO was also granted leave to intervene as a friend of the court, but makes no submissions on the merits of the appeal. Rather, he seeks to ensure the court is properly informed about voting procedures and the potential impact of the court's decision on the operations of Elections Canada.

[68] The CEO has informed the court that the next federal election must take place by October 19, 2015. If the court were to allow the appeal, the CEO will be required to contact certain non-resident electors to determine their eligibility to vote in accordance with the decision of this court.

E. ANALYSIS

(1) Introduction

[69] The meaning and significance of citizenship is central to this appeal. I will put the issues in context by explaining how one obtains Canadian citizenship and the rights and responsibilities attaching to citizenship.

(a) Obtaining citizenship

[70] A person can obtain Canadian citizenship through birth, descent or naturalization. The following are entitled to citizenship, under s. 3 of the *Citizenship Act*, R.S.C. 1985, c. C-29:

- a person born in Canada;
- a person born outside Canada who has at the time of birth at least one Canadian parent who was either born in Canada or naturalized in Canada;[5] or
- a person who receives a grant of Canadian citizenship.

[71] In order to obtain a grant of citizenship through naturalization under s. 5 of the *Citizenship Act*,[6] an applicant over 18 years of age must:

- have permanent resident status in Canada;
- have lived in Canada and complied with income tax requirements for at least four of the previous six years since becoming a permanent resident;

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[5] Prior to April 17, 2009, there was no requirement for the Canadian parent to be born or naturalized in Canada.
[6] Including amendments that came into force on June 11, 2015.

- intend to continue to reside in Canada, work outside Canada in the military or public service, or reside outside Canada with a spouse, common-law partner or parent who is a Canadian citizen in the military or public service;

- if under 65 years of age, have an adequate knowledge of one of the two official languages;

- if under 65 years of age, demonstrate an adequate knowledge of the responsibilities and privileges of citizenship, such as voting in elections and obeying the law, and an understanding of Canadian history, values, institutions and symbols; and

- not, among other things, be under a removal order, in prison, under a probation order, on parole, charged with or awaiting trial on an indictable offence, or convicted of an indictable offence in the previous three years.

[72] It is significant to this appeal that applicants for Canadian citizenship through naturalization must establish an objective connection to Canada through a minimum period of residence and, if under 65 years of age, must demonstrate a subjective awareness of the rights and responsibilities of citizenship.

(b) Citizenship rights and responsibilities

[73] Once acquired, Canadian citizenship provides exclusive access to several fundamental political rights. Citizens have the right to vote and run for office, the right to receive a passport, and an unqualified right to enter and remain in Canada. The *Charter* entrenches the nexus between citizenship and rights by guaranteeing only to citizens the right to vote (s. 3), the mobility rights in s. 6(1) and minority language education rights (s. 23).

[74] Adding a layer to citizenship, residence and physical presence can have an important influence on the rights and obligations of Canadians. For instance, residence is a requirement for entitlement to full health coverage and social assistance in Ontario. Similarly, only resident citizens can be compelled to serve on a jury. Residents, whether citizens or not, pay the full array of taxes that support government programs. Most important, only residents are regularly required to obey domestic Canadian laws. With limited exceptions, the laws enacted by Parliament do not reach outside Canadian borders.

[75] What this means, on a practical level, is that while resident citizens may enjoy greater privileges than non-resident citizens, they also bear greater responsibilities and burdens.

(2) Breach of s. 3 of the *Charter*

[76] Although the breach of s. 3 of the *Charter* was conceded by the appellant, I will briefly address it to lay the foundation for the s. 1 analysis. Section 3 provides:

> Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

[77] As I noted at the beginning of these reasons, in *Sauvé* #2, McLachlin C.J. described the right of Canadian citizens to vote as lying at the heart of Canadian democracy. It is a right that must be interpreted liberally and can only be taken

away for good reason.

[78] In *Figueroa v. Canada (Attorney General)*, 2003 SCC 37, [2003] 1 S.C.R. 912, Iacobucci J. speaking for the majority said, at para. 30, that the purpose of s. 3 is "to promote and protect the right of each citizen to play a meaningful role in the political life of the country. Absent such a right, ours would not be a true democracy".

[79] These principles find expression in s. 6 of the *CEA*, which provides that a Canadian citizen 18 years of age or older is entitled to have his or her name included in the list of electors for the polling division in which he or she is ordinarily resident and to vote at the polling station for that polling division.

[80] Some Canadian courts have suggested that the right to vote nevertheless contains internal limits. For instance, the Yukon Court of Appeal concluded that residence requirements for the right to vote in a territorial election did not violate s. 3: *Re Yukon Election Residency Requirements* (1986), 1 Y.R. 23 (C.A.). This view appears to have been superseded by the holding of McLachlin C.J. in *Sauvé #2*, at para. 11, that "s. 3 must be construed as it reads, and its ambit should not be limited by countervailing collective concerns".

[81] As a result, the breach of s. 3 is straightforward. The legislation prevents a particular group of Canadian citizens from voting in federal elections, thereby violating their s. 3 rights. Countervailing interests and any justifiable limitations

are to be considered under s. 1: see *Sauvé #2*; *Figueroa*.

(3) Section 1 of the *Charter*

[82] Section 1 guarantees the rights and freedoms set out in the *Charter*, "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

[83] Having found a breach of s. 3, the question is whether the limit on voting rights of non-resident citizens is reasonable and can be demonstrably justified in a free and democratic society.

[84] The analysis requires that: (a) the objective of the legislation be pressing and substantial; and (b) the means used to further that objective are proportionate, namely, (i) rationally connected to the objective of the law, (ii) minimally impairing of the *Charter* right, and (iii) proportionate in effect. See: *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, at para. 139; *R. v. Oakes*; *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, at paras. 137-39.

[85] The onus lies on the party seeking to justify the limitation of the *Charter* right to prove these requirements on a balance of probabilities: *RJR-MacDonald v. Canada*, [1995] 3 S.C.R. 199, at paras. 137-38.

(a) Pressing and substantial objective

(i) *Introduction*

[86] The first step in the *Oakes* analysis asks whether the objective of the infringing measure is sufficiently important to be capable in principle of justifying a limitation on *Charter* rights and freedoms: *RJR-MacDonald*, at paras. 142-44; *Mounted Police Association of Ontario*, at para. 142. The objective must correspond to Parliament's intent at the time the law was enacted: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 335. The objective must also be directly connected to justifying the aspect of the legislation that infringes the right: *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at paras. 113-116. It must be consistent with the values of a free and democratic society and should be directed at the realization of collective goals of fundamental importance: *Oakes*, at p. 136.

[87] In *Oakes*, Chief Justice Dickson pointed out that the s. 1 justification standard requires the court to have regard to the purpose for which the *Charter* was entrenched in the Constitution – to ensure that Canadian society is free and democratic. He added, at p. 136:

> The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, *and faith in social and political institutions which enhance the participation of individuals and groups in*

> *society*. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified. [Emphasis added.]

[88] I will return to the words in italics in the next section.

(ii) *Objectives of the legislation*

[89] The objectives of the legislation can be determined through reasoning and common sense, by reference to "the values and principles essential to a free and democratic society": *R. v. Bryan*, 2007 SCC 12, [2007] 1 S.C.R. 527, at para. 22.

[90] The appellant says two main objectives of the law are pressing and substantial. First, it submits that the regime promotes the fairness of the electoral process by protecting the social contract lying at the heart of Canada's constitutional democracy. Second, it maintains the primacy of residence in Canada's system of parliamentary representation, rooted as it is in geographically determined, electoral district-based representation within Canada.

[91] In oral argument, the appellant focused primarily on the social contract objective. The appellant described the social contract between citizens and the government as having both subjective and objective dimensions. Subjectively, the right to vote is premised on the electors' knowledge and affiliation with their country and electoral district. Objectively, it is rooted in citizens' obligations to obey the laws enacted by the Parliament they participate in electing.

[92] In fairness to the application judge, it appears that the appellant did not expressly invoke the social contract in its submissions before him. Instead, it framed its submission as "fairness to resident voters", who live with the consequences of the laws for which they vote.

[93] For the reasons that follow, however, I am satisfied that preserving the connection between citizens' obligation to obey the law and their right to elect the lawmakers – strengthening the social contract – is a pressing and substantial objective that justifies the s. 3 *Charter* infringement. As a result, I will consider the other proposed objectives only insofar as they relate to the social contract objective.

[94] At a general level, the social contract is about reciprocity between civic rights and responsibilities. In the context of this case, it is founded on a mutuality between the franchise and the citizen's obligation to obey the law – between political rights and political obligations. This notion finds strong support in both political theory and Supreme Court jurisprudence.

[95] In *Sauvé* #2, both the majority and the minority recognized the significance of the connection between the right to vote – having a say in the making of the law – and the obligation to obey the law. This social contract was endorsed by the majority at para. 31:

> In a democracy such as ours, the power of lawmakers flows from the voting citizens, and lawmakers act as the citizens' proxies. This delegation from voters to legislators gives the law its legitimacy or force. Correlatively, the obligation to obey the law flows from the fact that the law is made by and on behalf of the citizens. In sum, the legitimacy of the law and the obligation to obey the law flow directly from the right of every citizen to vote. As a practical matter, we require all within our country's boundaries to obey its law, whether or not they vote. But this does not negate the vital symbolic, theoretical and practical connection between having a voice in making the law and being obliged to obey it. This connection, inherited from social contract theory and enshrined in the *Charter*, stands at the heart of our system of constitutional democracy.

[96] The Chief Justice synthesized this, at para. 44, with the observation that "laws command obedience because they are made by those whose conduct they govern". The connection between electing the lawmakers and being subject to the laws gives the laws their legitimacy.

[97] The minority judgment in *Sauvé* #2 disagreed with the majority about the nature and implications of prisoners' participation in the social contract. Nevertheless, it too endorsed a similar concept of the social contract, at para. 115:

> The social contract is the theoretical basis upon which the exercise of rights and participation in the democratic process rests. In my view, the social contract necessarily relies upon the acceptance of the rule of law and civic responsibility and on society's need to promote the same.

[98] Indeed, the minority took the social contract a step farther, recognizing its

potential to justify residency as a qualification for voting, at para. 118:

> It is for this same reason, the importance of the nexus between voters and their community, that many jurisdictions qualify the right to vote with residency requirements. This Court, in *Haig v. Canada*, [1993] 2 S.C.R. 995, upheld residency requirements as a reasonable qualification to the eligibility to vote in a referendum. While it is clear that there was no breach of s. 3 of the *Charter* in that case since s. 3 does not apply to referenda, *Haig*, *supra*, generally seems to imply that residency requirements may be capable of being reasonable qualifications upon the right to vote. *This reasonableness arises not only from practical concerns, but also from the nexus between a particular individual's eligibility to vote in an election, their relationship to the community, and the fact that it is that community which will be subjected to the results of the election.* [Emphasis added.]

[99] Given the Supreme Court's recognition of the importance of the social contract, and the majority's recognition that it "stands at the heart of our system of constitutional democracy", I am satisfied that strengthening the social contract qualifies as a pressing and substantial objective. Returning to the words of Dickson C.J. in *Oakes*, it promotes faith in political institutions that enhance the participation of individuals and groups in our society.

(iii) *Parliament's intent*

[100] It remains necessary to ask whether Parliament's intention was to protect the social contract when Bill C-114 was passed in 1993. The overall intention of the special ballot provisions was to e*xtend* the franchise to certain non-resident citizens who were previously unable to vote. It did so by providing a method of

remote voting to qualified non-resident citizens. The question is whether Parliament's intention in not extending the franchise to all non-resident citizens was to protect the social contract.

[101] Although not expressly stated in those terms, the underlying Hansard evidence reveals a concern that the vote should be limited to non-residents having a sufficient connection to Canada. For instance, during the Senate Standing Committee, Ms. Margaret Bloodworth remarked:

> The feeling of the special committee, and it was a feeling that the government agreed with, was that it is not unreasonable for a democratic society to ensure that those voting in the election have some degree of connection with the country.
>
> Is five years sure to succeed in a court challenge? I cannot give you that kind of guarantee. I can say there is a reason behind the five years, in the sense that it ensures that there is some degree of connection with the country. Five years is also the maximum period of a parliament, so it is not a number picked completely out of the air. It is a matter of judgment in the end.
>
> I personally do not think it is unreasonable that people have some personal connection with the country. There have been some exceptions put in for people who have an obvious connection; public servants, either federal or provincial, who happen to be out more than five years and also Canadians who are working for international organizations that Canada is a part of because normally, Canada has a direct interest in making sure Canadians work for those organizations. We have tried to build in obvious exceptions where people do have a direct ongoing connection with the country, but it will not give the vote to people who have lived outside the

> country for 20 or 25 years. Those kinds of people will not be able to vote.

[102] In the Special Committee on Electoral Reform, M.P. Jim Hawkes expressed a similar view:

> 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.

[103] Admittedly, these concerns were primarily directed at the subjective connections of non-residents based on their knowledge and ties to Canada. However, the objective component is an equally important part of this connection and was implicit in the rationale underlying the law. The focus on this objective component in this appeal could be fairly described as a "permissible shift in emphasis": *R. v. Butler*, [1992] 1 S.C.R. 452, at p. 496.

(iv) *The application judge's characterization of the objective*

[104] The social contract objective of protecting a correspondence between the right to elect lawmakers and being required to obey the law is well supported by jurisprudence. The application judge acknowledged this argument, which he described as the argument that "resident Canadians live here and are, on a day-to-day basis, subject to Canada's laws and live with the consequences of

Parliament's decisions." He did not, however, in my respectful view, give sufficient consideration to the nature of Canadian parliamentary democracy, the social contract and the role played by residence in both. This caused him to reduce residence to an organizing concept and to overlook the legitimizing effect of the social contract.

[105] Couched as it was in terms of "unfairness to resident voters", it is understandable that the application judge discounted the argument. He focused on fairness to resident voters and the risks of electoral fraud. Instead, he might have recognized that non-residents are generally not subject to Canadian laws and do not share the same citizenship obligations.

[106] The application judge felt that non-residents live with the consequences of the law because they visit Canada, have family here and may in the future be affected by the laws. He also said that non-residents may be subject to Canada's laws even though they may not be enforced against them. In my view, these connections are tenuous. As a practical matter, Canada does not purport to legislate extra-territorially in most cases. Nor does it attempt to enforce its laws outside the country. While the respondents will be subject to Canadian laws when they come to Canada, the same is true of any visitor. On a day-to-day basis, the respondents are subject to an array of U.S. municipal, state and federal laws that affect every aspect of their lives. Their tax dollars are directed to the support of U.S. policies, programs and institutions, not Canadian ones. They

may well have an interest in Canadian politics, but their taxes go to Washington, not Ottawa.

[107] The application judge suggested that the logic of the appellant's argument would dictate that all non-residents should be prohibited from voting. This overlooks the subjective element of the legislation. A short-term non-resident who demonstrates an intent to return to Canada and to thereby voluntarily subject him/herself to the laws is entitled to vote.

(v) *Consistent with the goals of a free and democratic society*

[108] By strengthening public confidence in the laws enacted by Parliament, the legislation is consistent with the principles and values of a free and democratic society.

[109] The respondents say that the impugned legislation is a regressive step in light of Canada's history of leadership in the extension of the franchise, beginning with the enfranchisement of women, and continuing with the reduction of the voting age from 21 to 18, and the removal of limitations on the voting rights of judges, prisoners and people with mental disabilities. They say the government has identified no "problem" addressed by the legislation.

[110] Given the history of extension of the franchise in Canada, and the entrenchment of the right of citizens to vote in the *Charter*, any restriction of that right must be carefully scrutinized. Canada has evolved away from unjust limits

on the right to vote based on wealth, gender, or race. It is, however, consistent with the values of a "free and democratic society" to require long-term residency as a pre-condition to enjoying the full political rights flowing from citizenship. As one professor of political science noted (Claudio López-Guerra, "Should Expatriates Vote?" (2005) 13:2 Journal of Political Philosophy 216, at p. 220):

> [W]hether self-determination is understood simply as the election of representatives or as a more radical notion of active and direct participation in the citizenry, the implications are the same for the purpose of defining who ought to have political rights in a democratic government – *the governed*. [Emphasis added.]

(vi) *Conclusion on the pressing and substantial objective*

[111] The impugned provisions have a sufficiently significant objective to meet the "pressing and substantial" standard. I now turn to the proportionality analysis mandated by *Oakes*.

(b) Proportionality

[112] This second stage of the *Oakes* test, the proportionality analysis, involves three considerations: (i) whether there is a rational connection between the impugned legislation and a constitutionally valid objective; (ii) if so, whether the right is minimally impaired; and (iii) at the final balancing stage, whether the law's salutary benefits outweigh its deleterious effects.

[113] In my view, the proportionality analysis turns on whether Parliament was

entitled to impose a maximum period of non-residency as a condition of entitlement to vote. Less important is the particular period of time it chose. Whether five years is an acceptable period of absence at which to draw the line falls to be considered at the minimal impairment stage and not the rational connection stage of the analysis.

(i) Rational connection

[114] In *Mounted Police Association*, the majority (per McLachlin C.J. and LeBel J.) observed at para. 143:

> The government must demonstrate that the infringing measure is rationally connected to its objective. This test is "not particularly onerous" (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120, at para. 228; *Health Services*, at para. 148). It is not necessary to establish that the measure will *inevitably* achieve the government's objective. A reasonable inference that the means adopted by the government will help bring about the objective suffices (*Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610, at para. 40; *Health Services*, at para. 149). The assessment is a matter of causal relationship.

[115] The rational connection must be established by evidence or by reason and logic: *RJR-MacDonald*, at paras. 153-154. As I will explain below, I find that Canadian citizens who have been non-resident for five years or more are largely not governed by the Canadian legal system; therefore, excluding them from the franchise helps to strengthen the social contract and enhance the legitimacy of the laws.

[116] The appellant supports the rational connection between the legislative objective and the legislation by four arguments:

- the social contract theory discussed in *Sauvé* #2;
- provincial and territorial electoral legislation;
- the electoral laws of other Westminster democracies; and
- international jurisprudence.

[117] I will examine each of these.

Sauvé #2 and the social contract

[118] As I have noted above, in *Sauvé* #2, the Chief Justice affirmed "the vital symbolic, theoretical and practical connection between having a voice in making the law and being obliged to obey it".

[119] The foundation of the government's objective is neither new nor revolutionary. In *Sauvé* #2 the Supreme Court of Canada referred to the writings of John Stuart Mill as one of the sources of democratic theory. So too were the works of Jean-Jacques Rousseau. In "The Social Contract", Rousseau observed:

> The People, subject to the enactments of law, must be its authors, for it belongs only to those who have combined together to order the conditions of their society.[7]

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[7] Jean-Jacques Rousseau, "The Social Contract" (1762), in Sir Ernest Barker (ed.), *Social Contract: Essays by Locke, Hume, and Rousseau, with an Introduction by Ernest Barker* (Westport, Connecticut: Greenwood Press, 1980) 167, at pp. 203-204.

[120] Contemporary scholars on the subject of citizenship, residence and the right to vote have expressed similar views. For example, Professor Patti Tamara Lenard, in an article entitled "Residence and the Right to Vote" (2015) 16:1 Journal of International Migration and Integration 119, makes the following observation at pp. 120 and 125:

> According to ideal accounts of democratic theory, democratic states are justified by their commitment to the equality of all those who are subject to their rule. This equality finds its central expression in citizens' protected, equal access to its collective decision-making procedures.
>
> ...
>
> [A]bsent a compelling explanation—those who are obligated to abide by state laws, and those whose daily lives are shaped by them, have the right to participate in selecting those who create them.

[121] The rational connection between the objective and the legitimacy of the laws is eloquently captured in the words of former Chief Justice of the Ontario High Court of Justice James C. McRuer, found in the Foreword to J. Patrick Boyer, *Political Rights: The Legal Framework of Elections in Canada*, (Toronto: Butterworths, 1981):

> Since primitive tribal times there has been a slow but persistent struggle to define and regulate the exercise of power necessary for the protection and welfare of those who in their own interest must live in some form of association. *The recognition that the source of the power exercised must rest in those affected by its exercise has been an idea of comparatively recent development in human history*. It is a democratic idea.

> The growth of democratic ideas has been slow and spasmodic and even now after eons of history only in a comparatively small segment of the world's population do they prevail in the control of the internal affairs of nations.
>
> *It is fundamental to the democratic idea that there be a social acknowledgement that not only must the source of the power to govern lie with those subject to the power, but they must have a right to define and limit its exercise.* [Emphasis added.]

See also López-Guerra, at 234: "Participation in a democratic process should be restricted to those who will be subject to the rulings of that government."

[122] In *Sauvé*, a majority of the Supreme Court found that denying penitentiary prisoners the right to vote was not rationally connected to the stated objectives of enhancing respect for the law and imposing legitimate punishment. The court held, at paras. 42-53, that the former was a variant on the "unworthiness rationale" and the latter was not achieved by removing the vote. Inmates remain subject to the law even if they choose not to obey it. Non-resident citizens, on the other hand, are generally no longer subject to Canadian law. They have opted out of the social contract in a way that inmates have not. It is the obligation to obey the law, not obedience to the law, which animates the social contract.

Provincial and territorial legislation

[123] Residence is a determinant of voter eligibility in all provinces and territories, with most requiring a minimum period of residence. The Saskatchewan Court of Appeal, the Yukon Territory Court of Appeal and the

Nunavut Court of Justice have found a rational connection between these residence requirements and the fairness and integrity of the electoral process: *Storey v. Zazelenchuk* (1984), 36 Sask.R. 103 (C.A.); *Anawak v. Nunavut (Chief Electoral Officer)*, 2008 NUCJ 26, 172 A.C.W.S. (3d) 391; *Re Yukon Election Residency Requirements* (1986), 1 Y.R. 23 (C.A.).

Westminster Democracies

[124] Residence is a requirement of the electoral laws of the other Westminster democracies. The U.K., Australia and New Zealand limit the voting rights of non-resident citizens to those temporarily resident abroad, albeit with different time limits – 15 years in the U.K., six years in Australia and three years in New Zealand: see *Representation of the People Act 1985*, (U.K.) 1985, c. 50, s. 1, as amended by s. 141(a) of *Political Parties, Elections and Referendums Act 2000*, (U.K) 2000, c.41; *Commonwealth Electoral Act 1918* (Aus) No. 27, 1918, as amended, s. 94; *Electoral Act 1993*, (N.Z.) 1993 No. 87, s. 80. The New Zealand time limit is re-set if the non-resident returns to the country between absences.

International jurisprudence

[125] The appellant also refers to international jurisprudence, including the decisions of the European Court of Human Rights in *Shindler v. the United Kingdom*, No. 19840/09, 7 May 2013, at p. 27; and *Hilbe v. Liechtenstein* (dec.), No. 31981/96, [1999] VI E.C.H.R. 453, at p. 459, both of which affirmed the

importance of limiting the right to vote to those who would be most directly affected by the law.

[126] In *Hilbe*, the court said at p. 459:

> In the present case the court considers that the residence requirement which prompted the application is justified on account of the following factors: firstly, the assumption that a non-resident citizen is less directly or less continually concerned with his country's day-to-day problems and has less knowledge of them; secondly, the fact that it is impracticable for the parliamentary candidates to present the different electoral issues to citizens abroad and that non-resident citizens have no influence on the selection of candidates or on the formulation of their electoral programmes; *thirdly, the close connection between the right to vote in parliamentary elections and the fact of being directly affected by the acts of the political bodies so elected; and, fourthly, the legitimate concern the legislature may have to limit the influence of citizens living abroad in elections on issues which, while admittedly fundamental, primarily affect persons living in the country*. [Emphasis added.]

[127] In *Shindler* the court said, at para. 107, that it was satisfied that the legislation "pursues the legitimate aim of confining the parliamentary franchise to those citizens with a close connection with the United Kingdom and who would therefore be most directly affected by its laws".

[128] The respondents distinguish the provincial voting cases and the decisions of the European Court of Human Rights. These decisions are indeed distinguishable, but they nevertheless affirm the interest of the polity in limiting

enfranchisement to its residents.

[129] The authorities, provincial and international, provide strong support for the logical connection between limits on non-resident voting and the legitimacy and fairness of the electoral system.

Application to the case at hand

[130] In my view, the focus of the application judge's analysis was misdirected by the government's assertion that long-term non-residents do not have the same connection to Canada as residents. This caused the debate to be cast as whether non-resident citizens were worthy of the vote, comparing it to the treatment of criminals discussed in *Sauvé #2*. As a result, he overlooked Canada's democratic tradition and the importance of the social contract between Canada's electorate and Parliament. This, in turn, tainted the proportionality analysis. As the Supreme Court noted in *Toronto Sun Newspapers Ltd. v. Canada*, 2010 SCC 21, [2010] 1 S.C.R. 721, at para. 20, "[A]ll steps of the *Oakes* test are premised on a proper identification of the objective of the impugned measure." As I will explain, the mischaracterization of the objective of the measure skewed the rational connection analysis because the application judge treated the legislation as declaring long-term non-residents to be unworthy.

[131] The appellant's main argument is not that longer-term non-residents lack a sense of commitment to Canada. Rather, the legislative objective is to maintain

the connection between the voters, the lawmakers and the laws. Non-residents are not directly "governed" by Canadian laws. Once a citizen's non-residence becomes long-term rather than temporary, it is reasonable for the government to place limits on that citizen's entitlement to vote. That limit is important, but not because the longer-term non-resident is unworthy due to a lack of engagement in Canadian affairs. It is because the longer-term non-resident has voluntarily withdrawn from the social contract and has submitted him/herself to another political and legal order.

[132] Two of the interveners, the BCCLA and CCLA, argued that Parliament has jurisdiction to pass more extra-territorial laws than it does, and can potentially have a greater impact on non-residents. They argued that the reduced obligations of non-resident citizens are as much a choice of Parliament as the choice of non-residents.

[133] While Parliament has the power to make laws having extra-territorial application, there is a presumption against extra-territorial application of the law.[8] Moreover, Canada exercises restraint by not purporting to legislate extra-territorially out of respect for the sovereignty of foreign states and because such laws would be largely unenforceable.

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[8] The *Statute of Westminster*, 1931, 22 Geo. V., c. 4, s. 3 (U.K.), reprinted in R.S.C. 1985, App. II, No. 27, granted jurisdiction to British Dominions to make laws having extra-territorial application. The presumption against the extra-territorial application of the criminal law is codified in s. 6(2) of the *Criminal Code*, R.S.C. 1985, c. C-46; see also *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292; *Libman v. The Queen*, [1985] 2 S.C.R. 178.

[134] In *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, La Forest J. recognized this legislative restraint, at p. 1095:

> [It is] one of the basic tenets of international law, that sovereign states have exclusive jurisdiction in their own territory. As a concomitant to this, states are hesitant to exercise jurisdiction over matters that may take place in the territory of other states. Jurisdiction being territorial, it follows that a state's law has no binding effect outside its jurisdiction.

[135] Similarly, in *R. v. Hape*, LeBel J. noted the state's limited authority over its foreign nationals, at para. 60:

> Under international law, a state may regulate and adjudicate regarding actions committed by its nationals in other countries, provided enforcement of the rules takes place when those nationals are within the state's own borders. *When a state's nationals are physically located in the territory of another state, its authority over them is strictly limited.* [Emphasis added.]

[136] He then observed, at para. 69:

> Simply put, Canadian law, whether statutory or constitutional, cannot be enforced in another state's territory without the other state's consent.

[137] A statement to a similar effect is found in John H. Currie, *Public International Law*, 2nd ed. (Toronto: Irwin Law, 2008) at p. 335:

> States being in essence territorially-defined entities, the starting point for their enforcement jurisdiction is naturally territorial. In other words, it is a starting presumption in international law that, within its borders, a state is sovereign and free to exercise plenary enforcement jurisdiction with respect to persons and property situated within those borders. The necessary

> corollary of this presumption, which is based on territorial sovereignty, is that the enforcement jurisdiction of a state is in fact *limited* to its territory absent some special rule of international law or other basis permitting the exercise of such jurisdiction abroad. Otherwise, a state exercising enforcement jurisdiction in the territory of another state would necessarily be violating the exclusive jurisdiction of that state over all enforcement measures within its territory." [Italics in original; underlined emphasis added.]

[138] The truth is that most of Canada's laws have little practical impact on non-resident citizens. While there are unquestionably some Canadian laws that are expressly intended to apply extra-territorially, these are, equally unquestionably, the exceptions.[9]

[139] The same is true of the application judge's suggestion that non-resident

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9 See the examples discussed in Hugh M. Kindred & Phillip M. Saunders, eds., *International Law, Chiefly as Interpreted and Applied in Canada*, 7th ed. (Toronto: Edmond Montgomery Publications, 2006) at pp. 567-68. See, also, for example, offences committed by Canadian military personnel and other persons subject to the Code of Service Discipline – *National Defence Act*, R.S.C. 1985, c. N-5, as amended, ss. 67, 130 and 132; any indictable offence committed by a Canadian federal public servant – *Criminal Code*, s. 7(4); any indictable offence committed on or in respect of Canadian aircraft – *Criminal Code*, s. 7(1)(a); any indictable offence committed on an aircraft in flight where the aircraft lands in Canada – *Criminal Code*, s. 7(1)(b); various offences pertaining to Canada's exclusive economic zone or continental shelf – *Criminal Code*, s. 477.1(a) and (b); *Canadian Environmental Protection Act*, S.C. 1999, c. 33, s. 271.1; *Migratory Birds Convention Act, 1994*, S.C. 1994, c. 22, s. 18.3; offences committed in the course of "hot pursuit" from Canada – *Criminal Code*, s. 477.1(d); any offence committed by a Canadian citizen which is outside the territory of any state – *Criminal Code*, s. 477.1(e); immigration offences – *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 135; citizens who commit high treason or treason outside of Canada – *Criminal Code*, s. 46(3); piracy – *Criminal Code*, ss. 74 and 75; forgery or fraud in relation to Canadian passports – *Criminal Code*, s. 57; fraudulent use of Canadian citizenship certificate – *Criminal Code*, s. 58; various offences involving cultural property – *Cultural Property Export and Import Act*, R.S.C. 1985, c. C-51, s. 36.1(3); bigamy – *Criminal Code*, s. 290; hijacking or endangering the safety of an aircraft or airport – *Criminal Code*, s. 7(2); seizing control, or endangering the safety of, a ship or fixed platform at sea – *Criminal Code*, s. 7(2.1) and (2.2); hostage taking – *Criminal Code*, s. 7(3.1); terrorism – *Criminal Code*, s. 7(3.73), (3.74) and (3.75); various offences involving explosive or other lethal devices – *Criminal Code*, s. 7(3.72); various offences involving chemical weapons – *Chemical Weapons Convention Implementation Act*, S.C. 1995, c. 25, s. 22; torture – *Criminal Code*, s. 7(3.7); genocide, crimes against humanity and war crimes – *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24, ss. 6 and 8; breach of command responsibility in relation to genocide, a crime against humanity or a war crime – *Crimes Against Humanity and War Crimes Act*, ss. 7 and 8.

citizens are "subject" to Canadian laws. While the interests of non-resident citizens may be affected by certain Canadian laws, most Canadian laws have no impact on them unless and until they come into the country. They are not *governed* by Canada's legal regime in the same way as residents. López-Guerra makes this point at pp. 232-33:

> While expatriates could comply with taxation and conscription laws to some extent, they cannot be subject to the entire legal system in the same terms as those residing within the country.
>
> ...
>
> Individuals are governed by the entire legal system only when they live under the jurisdiction of the state, and only then should they have the right to elect representatives entitled to discuss and vote on every issue.

[140] In my view, the application judge understated the significance of residence in our electoral system. Residence is not merely a "mechanism for regulating the voting process", as he stated at para. 85 of his reasons. Nor is it simply an "organizing principle" as the respondents contend. Residence of the elector, either in Canada, or temporarily resident outside Canada with an intention to return, provides the subjective and objective connection between the electorate and lawmakers.

[141] There is, therefore, a rational connection between the maintenance of the social contract in a constituency-based system of representation and a limit on the rights of long-term non-resident Canadians to vote. The duration of a citizen's

current absence is a reasonable means by which to differentiate between temporary non-residents and longer-term non-residents who have voluntarily removed themselves from the social contract.

[142] The respondents' argument that "[t]here is no rational connection between five years and the alleged social contract" conflates the first two stages of the proportionality test. Whether five years is a reasonable duration of absence from Canada at which to draw the line is properly considered under the minimal impairment portion of the analysis.

[143] I do not regard the exemption of military personnel, public servants posted abroad and employees of international organizations as inconsistent with this rational connection. Nor do I accept the suggestion that, as a matter of logic, these citizens should also be subject to a five-year limit. Unlike the respondents, these citizens have not voluntarily severed their connections with Canada in the pursuit of their own livelihoods – they have done so in the service of their country. This service to the country is its own unique form of connection to Canada, notwithstanding their physical absence. It is also significant that military personnel may be tried for criminal offences committed outside Canada by virtue of s. 67 of the *National Defence Act*, R.S.C. 1985, c. N-5, and similarly, an offence committed by federal public service employees posted abroad may be deemed to have been committed in Canada by virtue of s. 7(4) of the *Criminal Code*.

(ii) Minimal impairment

[144] I now consider whether the means used impair the protected right as minimally as reasonably possible. I do not find it necessary to consider the respondents' argument that the impairment of the right is "overly drastic". That argument was premised on the idea that the administrative inconvenience of voting abroad was barrier enough to prove that that those who voted from abroad had a strong connection to Canada. However, this appeal is not being decided on the basis of the degree of engagement with Canada, and therefore worthiness to vote, of non-resident citizens. The issue is not whether there is a less intrusive degree of impairment of an individual's right to vote. Citizens are either allowed to vote or not; there are no degrees of voting. Therefore, whether the means used minimally impair the right turns on whether five years is a reasonable cut-off.

[145] The application judge held that the means used did not minimally impair voting rights of non-resident citizens, because the five-year limitation and the requirement that the voter intended to return to Canada were overly broad. He reasoned that the law excluded well-informed non-resident citizens like the applicants, but allowed resident electors, who might be uninformed and disinterested, to vote.

[146] He asked whether the five-year limit was a reasonable means of

separating the informed from the uninformed, and concluded that it was not. As in the rational connection analysis, he focused on whether the individual voter was worthy of being enfranchised, concluding that the *Sauvé* principles against unfair disenfranchisement applied.

[147] I agree that whether someone has been away from Canada for more than five years does not have a direct correlation with his or her political knowledge; however, the five-year limit is not a filter for political knowledge. Rather, the duration of absence is a means by which to determine whether the citizen is temporarily away from Canada or not.

[148] There was evidence before the application judge that Canada is one of a minority of Commonwealth countries that provide *any* mechanism to permit non-residents to vote. Many do not allow it at all. All the "Westminster democracies" restrict non-resident voting.

[149] Any particular time limit for a citizen's absence from the country is bound to involve an exercise of judgment. If the section allowed for voting after a longer period of absence from Canada, it might accommodate more people, but it would not necessarily impair the rights of non-resident citizens any less. The same competing rights and principles would remain in play. Any "cut-off" point will produce some arbitrariness at its boundaries, but if it is a principled rule it is capable of constituting a reasonable limit.

[150] Parliament could have chosen a period longer than five years, and the record was thin as to the rationale for enacting a five-year, as opposed to some other, time limit. The corresponding limit in the United Kingdom was an absence of 15 years, for example. However, the government did provide rationales for using a period of less than five years as a measure of temporary residence.

[151] Five years is the maximum life of a Parliament. Thus, the regime permits a citizen to be away for a full electoral cycle and still maintain the right to vote. A citizen who returns to reside in Canada within the electoral cycle will become subject to the laws of the government he or she participated in electing. The duration of a term of an elected official has been pointed to as a reasonable standard by which to choose an appropriate time limit: López-Guerra, at p. 226.

[152] Five years is generally enough time to complete a university degree, a common reason for Canadian citizens to spend time abroad.

[153] In considering whether the chosen limit is minimally impairing, it is of some assistance to consider the record with respect to the practices in other countries. The fact that Canada chose to draw the line for external voting at a length of time within the range of that drawn in two similar jurisdictions (six years in Australia and three years in New Zealand) is some evidence that five years is within the realm of reasonable policy choices that were available to Parliament to make.

[154] The Supreme Court in *Sauvé #2* (at paras. 13-14) held that a "stringent

justification standard" must be applied to a limitation on a core democratic right. While this might narrow the range of reasonable options from which Parliament may choose, it cannot mean that the courts are entitled to craft their own policy ideals to replace those chosen by Parliament. It also cannot mean that courts may consider alternatives at the minimal impairment stage that do not achieve the government's objective: *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 54. If the government had drawn the line for non-resident voting at ten or 15 years so as to infringe the s. 3 rights of fewer citizens, its ability to strengthen the connection between those who make the laws and those who are governed by the laws would diminish. Because five years falls within the reasonable range of policy choices as the point at which to differentiate between temporary non-residents and longer-term non-residents who have voluntarily removed themselves from the social contract, the means chosen were minimally impairing.

(iii) Final balancing

[155] Even if the first two requirements of the proportionality test are met, the effects of the measures adopted on the persons whose rights are limited must be proportional to the benefits of the pressing and substantial objective served by the limitation. By definition in a s. 1 analysis, the effect of the impugned law will be to limit *Charter* rights. The courts must look beyond this to assess the severity of the deleterious effects of the law. The more severe the effects, the more

important the legislative objective must be: *Oakes*, at p. 140.

[156] In this case, the salutary effects of the legislation are the solidification of the bond between the electorate and the elected. The representative nature of our government is a core democratic principle. The legitimacy of elected representatives is strengthened by the fact that they are elected by, and are answerable to, those who live in the jurisdiction.

[157] The deleterious effects are measured. There is no outright ban on non-resident voting. In fact, the impugned sections enacted the first provisions that made voting generally available to non-resident civilians. The right to vote is only denied to those who withdraw from the social contract by leaving Canada on a long-term basis. In so doing, they cease to be subject to most Canadian law and thereby relinquish their right to a voice in that law. The voters' rights are not "stripped"; nor are they permanently denied. Their choice is reversible and, as Canadian citizens, they are free to return to Canada at any time and remain without restriction. They are entitled to vote as soon as they return to reside in Canada.

[158] The intervener CCLA argued that in this final balancing process the court should consider *Charter* values, and in particular the value of equality. Its submission was not that the court should embark on a full-blown s. 15 *Charter* analysis, but that the court should be mindful of equality principles and not create

a class of "second class" citizens, namely long-term non-resident voters. I am not persuaded that the proposed analysis is called for in every case.

[159] In its proportionality analysis, the court must compare "the harm which may be prevented with the harm of the infringement itself": *Thomson Newspapers Co. (c.o.b. Globe and Mail) v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, at para. 125. While in some cases the "harm of the infringement" might include an aspect of discrimination, that is not so in the case before us. Non-resident voters are not treated differently because they are less worthy of the vote. The legitimate reasons for their differential treatment are set out above. I am of the view that the salutary effects outweigh the legislation's deleterious effects.

F. CONCLUSION

[160] The impugned provisions violate s. 3 of the *Charter*, but I find that they are saved by s. 1. I would allow the appeal and set aside the order of the application judge.

G.R. Strathy C.J.O.

I agree. J.M. Simmons J.A.

Laskin J.A. (Dissenting):

A. Overview

[161] Section 3 of the *Canadian Charter of Rights of Freedoms* guarantees every Canadian citizen the right to vote in a federal or provincial election. The framers of the *Charter* considered this right so important that they did not allow Parliament or a provincial legislature to override it. Since the enactment of the *Charter*, our courts have invalidated federal legislation which, despite s. 3, had deprived groups of Canadian citizens of the right to vote – persons with mental disabilities, prisoners, even judges. The present case raises the constitutionality of the last significant piece of federal legislation denying the right to vote to a group of Canadian citizens. That group comprises some, but not all, Canadian citizens who have lived outside Canada for more than five years.

[162] The application judge, Penny J., struck down this legislation. He found that it breached s. 3 of the *Charter* and that the government had not justified the breach under s. 1. My colleagues accept that this legislation, which precludes the two respondents and over one million other Canadian citizens from voting in a federal election, breaches s. 3. But they have concluded that the breach is demonstrably justified under s. 1 of the *Charter*.

[163] I disagree. Instead, I agree with Penny J.'s judgment, which I consider to be a thorough and well-reasoned analysis of the issues under ss. 3 and 1 of the

Charter. Therefore, in this dissent, I will focus only on the new arguments put forward by Strathy C.J.O. to justify taking away the respondents' right to vote.

[164] Strathy C.J.O. concludes that the breach of s. 3 of the *Charter* can be justified by "the pressing and substantial objective of preserving the social contract at the heart of Canada's system of constitutional democracy." In my colleague's opinion, this social contract is founded on a connection between a citizen's right to elect our lawmakers and our citizens' obligation to obey the law. He acknowledges that the Attorney General "did not expressly invoke the social contract" before the application judge. Nonetheless he says that the application judge "overlooked" or did not give "sufficient consideration" to this pressing objective – an objective the Attorney General now claims motivated the five-year non-residency limitation in the *Canada Elections Act*, S.C. 2000, c. 9.

[165] I do not agree with the majority's judgment for any one of three reasons, which I will elaborate on in this dissent. First, neither on the application before Penny J., nor even on the later stay motion before Sharpe J.A., did the Attorney General propose that this objective of preserving the social contract justified breaching the respondents' s. 3 *Charter* rights. Indeed, in all of the material filed by the Attorney General on the application, I cannot find a single reference to this so-called social contract. Only in this court, for the first time, did the Attorney General rely on this objective to try to meet its burden under s. 1. I am dubious whether the Attorney General can fairly raise this new argument on appeal,

without any evidence before the court about the nature of the social contract and how it animated the challenged legislation.

[166] Second, to meet its burden under s. 1, the Attorney General must rely on an objective that reflects Parliament's intent at the time the challenged provisions were enacted – in this case, 1993, when the *Canada Elections Act* was amended to extend the vote to non-resident citizens who had been absent from Canada for less than five years. But the objective the Attorney General and my colleagues now rely on does not do so. The record before this court contains no evidence to show that when Parliament enacted the five-year non-residency limitation in 1993, its intent was to preserve or strengthen the social contract. To now rely on this objective runs afoul of the well-recognized shifting purpose doctrine of Canadian constitutional interpretation.

[167] Finally, even if the Attorney General could overcome these first two hurdles, in my opinion, the preservation of the social contract does not satisfy the government's stringent justification burden under s. 1. It is not a pressing and substantial objective of the legislation and it does not meet the proportionality requirements of the s. 1 *Oakes* test.

[168] To support their position that the government's pressing and substantial objective is preservation of the social contract, the Attorney General and my colleagues point to the Supreme Court of Canada's judgment in *Sauvé v.*

Canada (Chief Electoral Officer), 2002 SCC 68, [2002] 3 S.C.R. 519. They also assert that residence in Canada provides the "subjective and objective connection between the electorate and law makers", which they say is the basis of democratic legitimacy. In my view neither *Sauvé* nor the role of residence in our electoral system supports the majority's position.

[169] What the Attorney General has done is to fasten onto a single paragraph – paragraph 31 – in the majority reasons of McLachlin C.J.C. in *Sauvé*, decided nine years after the legislation in question on this appeal was passed. That paragraph, however, was written in a different context and for a different purpose. It was written in the context of striking down legislation that took away the voting rights of a group of Canadian citizens – those incarcerated in our country's prisons. It was not written for the purpose the Attorney General and my colleagues seek to use it: to uphold legislation that takes away voting rights from another group of Canadian citizens. On the contrary, as I will try to show, the majority judgement in *Sauvé* supports the respondents' position.

[170] For my colleagues and the Attorney General, residence in Canada appears to be a proxy for participation in the social contract, and thus is the philosophical foundation of the right to vote. And in the years leading up to enactment of the *Charter*, Canadian residence, with few exceptions, was the defining criterion of the right to vote. But in 1982 the framers of the *Charter* discarded Canadian residence for another defining criterion: Canadian

citizenship, and nothing more.

B. Background

[171] Strathy C.J.O. has summarized much of the relevant background, as well as the provisions of the *Canada Elections Act* challenged in this litigation. Here, I add only the following brief additional summary.

(1) The challenged legislation

[172] The *Canada Elections Act* prescribes who can vote in a federal election, and by doing so, determines who cannot vote. Section 3 sets out the qualifications for voting. There are but two: being 18 years of age, which McLachlin C.J.C. said in *Sauvé*, at para. 37, merely regulates "a modality of the universal franchise"; and being a Canadian citizen. Notably, even under the statute, Canadian residence is not a qualification for voting.

[173] But then, in combination, ss. 11 and 222 set out who can vote, and by implication who cannot. Section 11(d) is the main provision challenged on this appeal:

> 11. Any of the following persons may vote in accordance with Part 11:
>
> ...
>
> (d) a person who has been absent from Canada for less than five consecutive years and who intends to return to Canada as a resident.

[174] Part 11 of the *Canada Elections Act* outlines the Special Voting Rules, which provide the only mechanism under which Canadian citizens living outside of Canada may vote. Section 11 determines eligibility for voting under Part 11. The combined result of ss. 11(d) and 222 (which falls under Part 11) is that any Canadian citizen who has been absent from Canada for more than five years, even though intending to return to Canada, is prohibited from voting.

[175] Both Gillian Frank and Jamie Duong have been absent from Canada for more than five years. Both intend to return to Canada and reside here when they can find a job in Canada. Yet both are prohibited from voting in a federal election.

[176] There are exceptions to the five-year non-residency limitation in s. 11(d). Sections 11 and 222 together exempt several groups of non-resident Canadian citizens from disenfranchisement under s. 11(d). These include:

- Members of the Canadian Forces;
- Employees in either the federal or provincial public service, who have been posted outside Canada;
- Employees of an international organization to which Canada belongs, who have been posted outside Canada; and
- Any person who lives with a Canadian citizen in any one of these exempted groups

[177] All of these exempted Canadian citizens may vote in a federal election,

even though they may live outside Canada for decades and have no intention of returning to this country.

(2) The respondents Gillian Frank and Jamie Duong

[178] Each respondent is a Canadian citizen. Each has family ties in Canada and cares deeply about this country. Each has been living in the United States for more than five years: Frank is finishing post-doctoral studies; Duong works at the university where he graduated. But each respondent has applied for work in Canada and each intends to return to Canada when offered employment here.

[179] The application judge set out the details of each respondent's background. I reproduce verbatim that portion of his reasons.

(a) Gillian Frank

> Dr. Frank has strong ties to Canada and cares deeply about this country. He completed undergraduate studies at York University. During his final year of high school and through part of his university career, Dr. Frank was a member of the Canadian Forces and served in a communications regiment, mostly on a part-time basis. He served full-time for one semester of high school and during the 1998 ice storm in Eastern Ontario.
>
> Following his graduation from York University, Dr. Frank was accepted on full scholarship for seven years for graduate studies to Brown University in Providence, Rhode Island. While Dr. Frank now is completing post-doctoral studies in the United States, he has applied (unsuccessfully to date) for every academic job in Canada that is appropriate to his expertise and would advance his career.

Dr. Frank's wife is a Canadian citizen who was born and grew up in Toronto. Dr. Frank's parents and immediate family, as well as his wife's family, all live in Toronto. Dr. Frank and his wife now have one child. If Dr. Frank is successful in obtaining an academic position in Canada, he will move back to Canada without hesitation. Dr. Frank and his wife would prefer to raise their child in Canada. They identify themselves as Canadian and hold values that they associate with their Canadian heritages. Dr. Frank travels to Canada approximately four times per year.

At Brown University, he founded a Canadian club (with events sponsored by Tim Horton's and Labatt). Since living in New York, he has joined the Canadian Association of New York. He has participated on multiple occasions in the Terry Fox run in Central Park. He is well-informed about Canadian politics. Dr. Frank does not intend to permanently reside in the United States. He wants to move to Canada and is making every effort to obtain an academic position here. He is only in the United States because he has not been able to obtain a job in Canada in his chosen profession. He has not sought immigration status in the United States other than on a temporary basis.

(b) Jamie Duong

The Applicant, Jamie Duong, was born in Montreal, Quebec and currently lives in Ithaca, New York. He is a citizen of both Canada and the United States. He has voted in person in a number of Canadian federal and provincial elections since being based in the United States...

Mr. Duong also resides in the United States because of his employment. He obtained his Bachelor of Science Degree from Cornell University and, upon graduation, he converted part-time employment on campus into full-time employment. He now holds a systems administrator information technology position on campus.

> Mr. Duong has applied for positions in Canada related to his expertise, without success. If he finds an appropriate professional position in Canada, he will return to live here. Mr. Duong has strong ongoing connections to Canada. His immediate family — his parents and sister — all live in Montreal. He attended school in Montreal until grade ten and then transferred to a school in Vermont. While he was attending high school and at Cornell University, he spent his summer and almost every other holiday in Canada, both at a family property in Nova Scotia and assisting his father at his computer store in Montreal. Mr. Duong's family continues to own property in Canada. He expects that partial ownership of two of the properties will be transferred to him over the next several years. Mr. Duong also continues to return to Canada regularly. He typically returns to Canada every Christmas, for a stretch during the summer, and for other holidays through the year.

(3) Section 3 of the *Charter*

[180] Section 3 states:

> Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

[181] Before the application judge, the Attorney General argued that s. 11(d) of the *Canada Elections Act* (and the accompanying registration requirements in ss. 222, 223, and 226) did not breach s. 3 of the *Charter*. The application judge rejected this argument. He found a breach.

[182] On appeal, the Attorney General abandoned this argument. He now concedes that the legislation challenged in this litigation contravenes s. 3 of the

Charter. Thus this appeal turns on s. 1 of the *Charter*: has the government met its burden to show that the breach of the respondents' s. 3 rights is demonstrably justified – a justification McLachlin C.J.C. emphasized in *Sauvé* must be "convincing"?

C. Discussion

[183] As stated in the overview, I dissent for three reasons:

[184] The pressing and substantial objective the Attorney General puts forward and on which my colleagues rely – preservation of the social contract – is a new argument, raised for the first time in this court. I do not think it fair to either the respondents or the application judge, nor is it appropriate, to rely on this new argument when the record contains no evidence to support it.

[185] Parliament did not have this objective in mind when it enacted the five-year non-residency limitation in 1993.

[186] The objective itself is not pressing and substantial and does not meet the proportionality requirements of the *Oakes* test.

(1) New argument on appeal

[187] The Attorney General and my colleagues argue that the objective of preserving the social contract justifies breaching the respondents' s. 3 rights. This is a new argument made for the first time in this court. That it is a new

argument is evident from the reasons of the application judge and those of Sharpe J.A. on the stay motion.

[188] The application judge set out in detail the objectives proffered before him by the Attorney General. They were two: unfairness to resident voters and maintaining the integrity of our electoral system.

> The Attorney General argues that Parliament's pressing and substantial objectives in restricting non-resident voting were twofold:
>
> > (1) to extend the right to vote to non-resident citizens but not to the point of giving rise to unfairness for Canada's resident voters and
> >
> > (2) to maintain the proper functioning and integrity of Canada's electoral system and system of parliamentary representation.

[189] The application judge then set out the Attorney General's reasons for each objective:

> Regarding the first objective, non-resident voting is said to be unfair for the following reasons:
>
> > (a) Non-residents no longer have the same substantial connection to Canada in terms of their citizenship obligations. Resident voters remain subject to all laws enacted by those elected while non-residents may only be affected by some laws.
> >
> > (b) Despite the internet and access to news on national campaigns, non-residents will not be versed in local issues to the same extent as residents, with local issues being

> an important influence on the result of elections.
>
> (c) A single vote can decide the outcome in Canada's electoral system (first past the post), magnifying the unfair influence of non-resident votes particularly when their votes will be most prevalent in a limited number of highly urbanized electoral districts.
>
> Regarding the second objective, non-resident voting is said to raise concerns over the integrity of the electoral and parliamentary representation systems for the following reasons:
>
> (a) There are risks of electoral fraud and ineffectiveness of any extraterritorial reach of the Act in terms of its electoral finance regime.
>
> (b) Non-resident voting could increase constituency demands of non-resident voters making it more difficult for MPs to deliver effective representation to the residents in their ridings.

[190] Nowhere in this detailed recitation of the Attorney General's position do we find any mention of preserving the social contract. The reasons of the application judge are so thorough, so comprehensive, and his description of the parties' positions so detailed, I find it hard to believe he would not have addressed the social contract objective had it been argued before him.

[191] Nor was the social contract raised at the stay motion. I have read the factum of the Attorney General filed on his stay motion, which was heard in June 2014. It does not mention a social contract. By contrast, his factum filed on appeal mentions the social contract 27 times. And Sharpe J.A., in summarizing

the Attorney General's position, reiterated that it was based on unfairness to resident voters. He noted, "In oral argument, counsel insisted that Parliament's central concern was election fairness."

[192] It might seem that preservation of the social contract is merely a rhetorical gloss on unfairness. But I see them as fundamentally different, both in form and substance. The form, the label "social contract", obviously differs from unfairness. So too does the substance. The fairness argument put to the application judge is one-sided: residents are subject to more laws than non-residents, so it would be unfair to residents to permit non-residents to vote. Preservation of the social contract, however, as Strathy C.J.O. notes, is not one-sided – it rests on reciprocity and mutuality: only those obliged to obey the laws can legitimately elect their lawmakers.

[193] Furthermore, the Attorney General has put forward no evidence about the nature or basis of this social contract, which he uses to justify restricting the voting rights of more than one million Canadian citizens. The Attorney General's argument evidently presumes that the "social contract" has an objective and identifiable content, closely linked to residence. Yet as I have said, in the more than 9000 page application record, the social contract is not mentioned once. The evidence he put forward in support of his fairness argument does not address the social contract on which he now relies.

[194] What then follows? First, it is surely unfair to criticize the application judge for failing to consider an argument not made before him. Second, this court has understandably been wary about considering new arguments raised for the first time on appeal. It will only do so if it has a proper evidentiary record and if considering the new argument is not unfair to the responding parties: see, for example, *Kaiman v. Graham*, 2009 ONCA 77, 245 O.A.C. 130, at para. 18.

[195] The responding parties have dealt with the social contract argument in their factums, and have not suggested any unfairness. I am concerned, however, about the record, or more accurately the absence of anything in the record that touches on the social contract. Apart from the single paragraph in the majority reasons in *Sauvé* – which I will come to – we have almost nothing that bears on this objective. For that reason I have serious doubts about whether this court should entertain this argument. However, assuming it is entitled to do so, I turn to my other two objections.

(2) The government's objective does not reflect Parliament's intent when the challenged legislation was enacted.

[196] As Strathy C.J.O. notes at paragraph 86 of his reasons, the objective the government relies on to justify the breach of a *Charter* right must correspond to Parliament's intent at the time the law was enacted. In *R. v. Zundel*, [1992] 2 S.C.R. 731, at p. 761, McLachlin J., writing for a majority of the Court, elaborated on this proposition:

> In determining the objective of a legislative measure for the purposes of s. 1, the Court must look at the intention of Parliament when the section was enacted or amended. It cannot assign objectives, nor invent new ones according to the perceived current utility of the impugned provision. [Citations omitted.]

[197] Yet the Attorney General has done precisely what the Supreme Court of Canada said he cannot do – he has invented a new objective after the provisions in issue were enacted – in this case, well after the non-resident voting limits were enacted.

[198] The record before us about what motivated Parliament to pass the 1993 amendments is meagre. As I will discuss, four parliamentary studies on voting rights – two before and two after the 1993 amendments – all recommended removing any residency limitation on Canadian citizens' constitutional right to vote. Nonetheless, it seems that some parliamentarians were concerned, albeit without any evidentiary support, that Canadian citizens away from the country for too long may have lost their "affinity" or "connection" to the country. To address this concern, the House of Commons passed the 1993 amendments to the *Canada Elections Act*, enacting the five-year non-residency limitation. The record is unclear why Parliament chose five years as opposed to some other number. It appears to have been a "middle of the road compromise".

[199] What is clear is that not a single parliamentarian, not a single study, recommended a five-year non-residency limitation in order to preserve or

strengthen our social contract. No one expressed any concern that Canadians living abroad had withdrawn from the social contract, and thus disentitled themselves from voting. The notion of a social contract is entirely absent from the parliamentary debates.

[200] Strathy C.J.O. acknowledges as much when he writes, at paras. 101-103 of his reasons, that Parliament's concern was not expressly directed at protecting the social contract, but that it was implicit in the rationale underlying the law. It is implicit, in his view, because the social contract has both a subjective and an objective component.

[201] According to the Attorney General, whose arguments my colleagues accept, the subjective component rests on citizens' affinity to and knowledge of Canada. The objective component rests on the connection between citizens' obligation to obey the laws and their right to elect their lawmakers. My colleagues implicitly acknowledge that the application judge addressed and had sound reasons for rejecting the disenfranchisement of Canadian citizens based on the subjective component of the social contract. But they say he did not address the objective component. And though Parliament may have considered only the subjective component of protecting the social contract when it passed the 1993 legislation, they say defending the legislation on the basis of the objective component, on which the government now relies, is a "permissible shift in emphasis". So it does not, according to the Attorney General and my colleagues,

run afoul of the shifting purpose doctrine set out above in *Zundel*.

[202] In my opinion, this notion that the social contract has two components, a subjective and an objective component, is an artifice, conjured up by the Attorney General to avoid running up against the shifting purpose doctrine. No evidence was presented about the nature of the social contract, much less about its supposed objective and subjective components. And nothing in the reasons in *Sauvé* supports this notion.

[203] Paragraph 31 of *Sauvé* and even the writings of 18th century political theorists such as John Stuart Mill and Jean-Jacques Rousseau talk about the connection between citizens' obligation to obey the law and the right to vote for those who make the laws. This is the so-called objective component of the social contract. But none of these sources suggest a link between an "objective" and a "subjective" aspect of the social contract.

[204] The concerns of the parliamentarians in 1993 about non-resident citizens' affinity to Canada and connection to this country had nothing to do with the "objective" component of the social contract. Parliament did not intend to preserve, protect, or strengthen the social contract when it passed the 1993 legislation. This objective was invented by the government long after 1993; indeed, it appears to have been invented after this case was decided by the application judge. The government's objective therefore cannot justify the breach

of the respondents' s. 3 rights. On this ground alone, this appeal must fail.

[205] Nonetheless I will address the government's objective on its merits, on the assumption it reflected Parliament's intent when the legislation was enacted.

(3) The objective of preserving the social contract does not satisfy the government's burden under s. 1 of the Charter

[206] To justify a *Charter* breach under s. 1, the government must show on a balance of probabilities that the infringing measures further a constitutionally valid purpose or objective, and that the means chosen to achieve that objective are reasonable and demonstrably justified. This two-part test focuses on the legitimacy of the objective and the proportionality of the means. Because the right at stake is a core democratic right, judicial scrutiny of the government's justification should be exacting, not deferential. See *Sauvé*, at paras. 7-9; 13-14. Contrary to the opinion of my colleagues, I do not think that the government can meet either part of this two-part test.

(a) The objective of preserving the social contract is not a "pressing and substantial" objective

[207] To be a valid objective under s. 1, the government's objective in infringing the respondents' *Charter*-protected right to vote must be "pressing and substantial". Preserving the social contract does not meet this standard. It is not supported by the four parliamentary reports that examined voting rights in the period 1986 to 2006, by the place of Canadian residence in our electoral system,

or, in my opinion, by the Supreme Court of Canada's judgment in *Sauvé*.

(i) The four Parliamentary reports that examined voting rights

[208] Voting rights were considered in four parliamentary reports in the 20-year period bracketing the 1993 legislation.

[209] The first report was the 1986 White Paper on Election Law Reform, published by the Privy Council Office. This White Paper recommended comprehensive legislative reform, including a recommendation that all Canadian citizens, at home or abroad, be permitted to vote. After the White Paper, Bill C-79 was introduced. It contained no non-residency limitation on the right of Canadian citizens to vote. Bill C-79 was not passed before Parliament was dissolved in 1988.

[210] The second report was the 1991 report, *Reforming Electoral Democracy*, issued by the Royal Commission on Electoral Reform and Party Financing (the Lortie Commission). In this report, the multi-party commission addressed (among other things) the concern of parliamentarians debating Bill C-79 that some Canadians living abroad may not have a sufficient connection to Canada. The Lortie Commission concluded that this concern did not justify disenfranchising any Canadian citizens living abroad:

> 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 that all Canadians 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.

[211] The Commission said:

> [W]e should trust these Canadians. We should assume that they continue to have a stake in Canada and keep themselves sufficiently informed as 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.

[212] After the government received the Lortie Commission's report, it appointed a Special Committee to review the report. The review led to Bill C-114, which passed in 1993 and included the provisions challenged in this litigation.

[213] The third report was the 2005 report of the Chief Electoral Officer of Canada, Jean-Pierre Kingsley: Completing the Cycle of Electoral Reforms: Recommendations from the Chief Electoral Officer of Canada on the 38th General Election (Ottawa: Elections Canada, 2005). He recommended removing the limitation on voting for those Canadian citizens outside of Canada for five

years or more, but who intended to return to Canada as residents:

> 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 a long time but who intend to return as residents is a reasonable limit on the right that can be demonstrably 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.

[214] The fourth report was that of the House of Commons Standing Committee on Procedure and House Affairs in 2006, *Improving the Integrity of the Electoral Process: Recommendations for Legislative Change*. The Committee, which was directed to consider Kingsley's recommendation, included members of all major political parties. It too recommended removing the five-year limitation on the voting rights of non-resident Canadian citizens. While giving evidence before the Committee, the Committee Researcher commented:

> At this point in time there would be no problem that I see with removing either the five-year limitation or, if you wish, removing the requirement that they intend to return to Canada. It was just that in the early 1990s, because they were bringing in a new rule, a new provision, they built in those two requirements.

[215] One of the Committee members, M.P. Michel Guimond was more pointed in his comments about the five-year non-residency limitation. He asked: "Did this rule fall from the sky or out of a tree?"

[216] The government did not reject the Committee's recommendation. Instead,

it said that the recommendation should be considered in the context of a comprehensive review of the special voting rules. That review has never taken place. Nonetheless, I question how the five-year non-residency limitation can be seen as furthering a pressing and substantial government objective, when four parliamentary reports have each recommended its abolition.

(ii) The role of residence in Canada's electoral system

[217] In the Attorney General's and my colleagues' view, Canadian residence plays a crucial role in defining who should be entitled to vote in Canada. Residence, in their opinion, is a pre-requisite for full participation in the social contract. Permitting all non-residents to vote would erode the social contract and undermine the legitimacy of our laws because it would allow non-residents to participate in making laws that affect Canadian residents on a daily basis, but which have little or no practical consequences for their daily lives. Strathy C.J.O. says that the application judge erred by reducing the role of residence to a mere organizing principle, and that he failed to recognize the legitimizing effect of the social contract and the central place of residence within it. I take a different view of the role of residence.

[218] Broadly, residence is, as the application judge said it was, an organizing principle to facilitate voting. It should not be used as my colleagues use it, to undermine voting rights. To do so would reduce non-residents to second class citizens and discriminate against them solely because of where they live.

[219] More specifically, I cannot accept that residence is a marker of participation in the social contract, as my colleagues contend, or that permitting all non-residents to vote would somehow erode the social contract. I start with two obvious points, each of which shows why my colleagues' position cannot be sustained.

[220] First, the connection between residence and voting rights arose many years ago when travel was difficult, people tended to live their whole lives in one community, and only male property owners could vote. Thus historically, Canadian residence did largely dictate the right to vote in Canada, especially with the 1920 enactment of the *Dominion Elections Act*, R.S.C. 1927, c. 53.

[221] But much has changed since then. We live in a global community; travel is easy; many people do not live in one community their whole lives; and we have long since discarded the notion that only male property owners should be entitled to vote. Undoubtedly, the framers of the *Charter* recognized these changes. They could have maintained Canadian residence as the criterion defining the community of eligible voters. But, wisely, they did not. Instead they provided a new criterion much more suited to the world we now live in: the community defined by Canadian citizenship. As the application judge said, at para. 91: "the framers and adopters of the *Charter* decided in 1982 that the "sufficient interest at stake" to be able to exercise the democratic franchise under our Constitution is Canadian citizenship."

[222] Second, even under the legislation in its present form and after the 1993 amendments, Canadian residence is not a qualification for voting. The only qualifications outlined in s. 3 of the *Canada Elections* Act are age and Canadian citizenship. And Parliament had good reason for not making Canadian residence a qualification for voting, because under the statute, many non-residents can vote. The judgment of the application judge merely extended the vote to a broader class of non-residents. And for those non-residents already entitled to vote under the *Canada Elections Act*, either because they have lived abroad for less than five years or because they are in a group exempted from the five-year non-residency limitation, residence is a fiction. For voting purposes, all of these non-residents may identify a residence where they have never lived – in other words, a "fictitious residence". Removing the five-year residency rule will thus have no impact on the role of residence. It will remain an important organizing feature of our electoral system.

[223] I agree that more laws, even many more laws, affect residents than non-residents. But even among residents, legislation does not affect all citizens equally. Thus I do not agree that the number of laws a Canadian citizen is subjected to can be tied to the preservation of the social contract.

[224] Yet my colleagues seem to say that because non-residents are affected by far fewer laws, they are not part of the Canadian social contract. I cannot accept that this is so. Non-residents have the same obligation to obey the laws that

affect them as do residents. Non-residents pay Canadian income tax on their Canadian income, and property tax on any real property they may own in Canada. They must obey laws relating to their Canadian credit cards or bank accounts. As the application judge rightly wrote, at para. 88 of his reasons:

> [N]on-resident Canadians can and do live with the consequences of Parliament's decisions. The evidence is that many non-resident Canadians visit their home frequently and intend to return. That is precisely the situation with the two Applicants in this case. Parliament's decisions have lasting effect. The fact that a Canadian does not live here now does not mean he or she will not be affected by Parliament's decisions in the future. Furthermore, many non-resident Canadians also have relatives here. Canadian laws affect the resident parents, brothers, sisters, and children of non-resident and resident Canadians alike.

[225] For these reasons, in my opinion, Canadian residence cannot be held out as a proxy for participation in the Canadian social contract. Nor can I agree that promoting the social contract by limiting the vote to residents and temporary non-residents qualifies as a pressing and substantial government objective, justifying a breach of the respondents' s. 3 rights.

(iii) The Supreme Court of Canada's judgment in Sauvé

[226] Strathy C.J.O. relies heavily on *Sauvé* – especially para. 31 of McLachlin C.J.C.'s reasons – in support of his argument that preserving the social contract is a pressing and substantial government objective of the five-year non-residency limitation. That paragraph, which I note parenthetically is found not in the Chief

Justice's analysis of the government's objectives, but in her analysis of proportionality, reads as follows:

> Denying penitentiary inmates the right to vote misrepresents the nature of our rights and obligations under the law and consequently undermines them. In a democracy such as ours, the power of lawmakers flows from the voting citizens, and lawmakers act as the citizens' proxies. This delegation from voters to legislators gives the law its legitimacy or force. Correlatively, the obligation to obey the law flows from the fact that the law is made by and on behalf of the citizens. In sum, the legitimacy of the law and the obligation to obey the law flow directly from the right of every citizen to vote. As a practical matter, we require all within our country's boundaries to obey its laws, whether or not they vote. But this does not negate the vital symbolic, theoretical and practical connection between having a voice in making the law and being obliged to obey it. This connection, inherited from social contract theory and enshrined in the Charter, stands at the heart of our system of constitutional democracy.

[227] It is not for me to say whether the Chief Justice intended by this passage to provide the federal government with a legitimate basis to deprive a group of Canadian citizens of the right to vote. On my reading of the case, however, the majority reasons of the Chief Justice actually support the position of the respondents on this appeal. To try to show why that is so, I make the following six points.

[228] First, para. 31 and indeed all of the majority reasons in *Sauvé* were directed at recognizing voting rights, not undermining them. The social contract referred to in para. 31 was used to enfranchise citizens, not to disenfranchise

them. This paragraph states that even prisoners are included in the Canadian social contract, and are thus entitled to vote. As I read her reasons, the Chief Justice does not suggest that the social contract is a basis for limiting voting rights.

[229] Second, I read the majority reasons in *Sauvé* as an uncompromising defence of the right of every Canadian citizen to vote, even those convicted of the most heinous crimes. The Chief Justice said at para. 35, quoting the South African Constitutional Court with approval: "The voting of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts." These poignant words, respectfully, do not appear to lend any support to the Attorney General's position on this appeal. Quite the opposite.

[230] Other passages in the Chief Justice's reasons similarly show that depriving non-resident citizens of their right to vote cannot be justified. For example, para. 32:

> Denying a citizen the right to vote denies the basis of democratic legitimacy. It says that delegates elected by the citizens can then bar those very citizens, or a portion of them, from participating in future elections. But if we accept that governmental power in a democracy flows from the citizens, it is difficult to see how that power can legitimately be used to disenfranchise the very citizens from whom the government's power flows.

[231] And then, at para. 34:

> A government that restricts the franchise to a select portion of citizens is a government that weakens its ability to function as the legitimate representative of the excluded citizens, jeopardizes its claim to representative democracy, and erodes the basis of its right to convict and punish law-breakers.

[232] And then finally, at para. 41:

> The government's novel political theory that would permit elected representatives to disenfranchise a segment of the population finds no place in a democracy built upon principles of inclusiveness, equality, and citizen participation. That not all self-proclaimed democracies adhere to this conclusion says little about what the Canadian vision of democracy embodied in the *Charter* permits.

[233] Third, a social contract is a symbolic representation of the relationship between citizens and the state, based on one theory drawn from political philosophy. Yet in her majority reasons the Chief Justice said that to qualify as a pressing and substantial objective, a symbolic and philosophically-based objective must be tethered to a specific harm, a specific problem, or at the very least a potential harm if the legislation is struck down. And the government must produce some evidence of this harm. Yet the Attorney General has put forward no evidence of harm, real or potential, that would flow from invalidating the five-year non-residency limitation – no studies, no complaints from Elections Canada, no concern from any other reputable source.

[234] Fourth, in *Sauvé* itself the Attorney General argued that prisoners were not entitled to vote because they have opted out of membership in the community.

The majority rejected that argument. Similarly here, the Attorney General argues that some longer-term non-resident Canadian citizens should not be entitled to vote because they have opted out of the social contract. In substance I see little difference between the two arguments. Thus I would reject the Attorney General's argument in this case.

[235] Fifth, social contract theory was developed in the 18th century by political theorists such as John Stuart Mill and Jean-Jacques Rousseau, when the right to vote was the exclusive right of male property owners. Since then, governments have gradually stripped away prohibitions on voting rights. As the Chief Justice noted in *Sauvé*, at para. 33: "The history of democracy is the history of progressive enfranchisement." And: "Canada's steady march to universal suffrage culminated in 1982 with our adoption of the constitutional guarantee of the right of all citizens to vote in s. 3 of the *Charter*." The modern emphasis in voting rights is on equality and inclusiveness. To maintain the five-year residency rule is a retrograde step signalling a return to a measure of exclusiveness.

[236] And finally, in my opinion, the Attorney General and my colleagues have substituted a philosophical justification for voting rights for the constitutional guarantee in s. 3 of the *Charter*. Although the relationship between citizens and legislators reflected in the social contract may have justified the right to vote before 1982, the *Charter* redefined this relationship. It defined the right to vote as inhering in citizenship, not in a notion of reciprocity between those who make the

laws and those who must obey them.

[237] For these reasons, I am not persuaded that preserving the social contract is a pressing and substantial objective, which justifies depriving Gillian Frank and Jamie Duong, and one million other Canadian citizens, of their right to vote.

[238] As in *Sauvé* however, I will discuss and attempt to show that the government has not met the proportionality requirements of the *Oakes* test.

(b) The means chosen to achieve the government's objective are not reasonable and demonstrably justified

[239] Proportionality – the second part of the *Oakes* test – has three branches. The government must show:

[240] The denial of the respondents' right to vote is rationally connected to the government's asserted objective, in that it will achieve or further that objective;

[241] The respondents' rights are minimally impaired – that is, the denial of their right to vote does not go further than reasonably necessary to achieve the government's objective; and

[242] The overall benefits of the challenged legislation outweigh its harmful effects on the respondents.

(i) No rational connection

[243] In my opinion, the denial of the respondents' right to vote is not rationally

connected to the government's asserted objective of preserving the social contract or of its asserted concern to maintain the primacy of Canadian residence in our electoral system. And the choice of a five-year non-residency limitation bears no rational connection to these objectives. It was simply a "middle of the road compromise". Canadians citizens abroad for just under five years, or those in groups exempted from the non-residency limitation for many more years, are entitled to vote, although they, like the respondents, are not bound to obey the majority of domestic laws. Moreover, since even non-resident citizens absent from Canada for more than five years remain subject to and affected by the laws that do apply to them, excluding them from voting is not rationally connected to the objective of preserving the social contract.

[244] Strathy C.J.O. says that the five-year non-residency limitation has nothing to do with worthiness. I think it has everything to do worthiness. The current scheme for non-resident voting impliedly assumes that public servants posted abroad or employees working in an international organizations, and even those living with them, are worthy of voting, though they may be away from Canada for many years and have no intention of ever returning. But Canadian citizens pursuing postsecondary and post-doctoral studies abroad for seven, eight or ten years so they can return to Canada as productive members of our society, and who care as deeply about Canada as the public servant posted abroad, can no longer vote. Nor can the Canadian citizen working for a Canadian corporation or

a Canadian bank who was sent to work in one of the corporation's or bank's overseas offices.

[245] These Canadian citizens, abroad for a wide variety of reasons both personal and professional, have not, as Strathy C.J.O. contends, "severed their connections with Canada in the pursuit of their own livelihoods." They often maintain strong ties and affinity to Canada. They have not renounced membership in the Canadian polity. But under the legislation, the place of their residence deems them unworthy to be entitled to vote.

[246] The words of McLachlin C.J.C. in *Sauvé*, at paras. 34-35, ring true in the present case: "A government that restricts the franchise to a select portion of its citizens is a government that ... jeopardizes its claim to representative democracy". Denying a group of citizens the right to vote has the potential "to violate the principles of equality rights and equal membership embodied in and protected by the *Charter*."

(ii) <u>No Minimal impairment</u>

[247] The five-year non-residency limitation is an arbitrary line, which has no bearing on a citizen's connection to Canada or on a citizen's obligation to obey the laws that affect that citizen. Indeed, no marker of this connection is needed beyond citizenship itself, or if citizenship itself is not enough, then as the application judge said, citizenship together with the act of voting.

[248] The Attorney General contends that the groups of non-resident citizens entitled to vote because they are exempt from the five-year limit, such as public servants posted abroad, members of the Canadian Forces, or Canadian employees of international organizations, are carefully tailored to electors who have or will soon assume responsibilities as residents to obey our domestic laws. He also asserts that the work of these citizens abroad "demonstrates a different (and often more poignant) participation in Canada's social contract." The Attorney General filed no evidence to support these contentions. These groups may live outside Canada for decades and have no intention of ever returning, but may still be entitled to vote. The government's attempt to meet the minimal impairment branch of the proportionality test must therefore fail.

(iii) Harmful effects outweigh benefits

[249] Strathy C.J.O. asserts that the benefit of the five-year non-residency limitation is that it solidifies the bond between the electorate and the elected; and that the harmful effects are measured because the legislation does not impose an outright ban on non-resident voting. I disagree with my colleagues' assertions.

[250] The benefits of the five-year non-residency limitation are thin, especially because already several groups of Canadian citizens who may live outside Canada for many years are entitled to vote. These groups of citizens have no more obligation to obey our laws than do Gillian Frank and Jamie Duong, yet

unlike Frank and Duong, they can participate in the election of our lawmakers. To the extent the social contract is eroded when individuals not subject to the majority of Canada's laws participate in electing our lawmakers, surely it has already been eroded by the rules extending the vote to those individuals.

[251] By contrast, the harmful effects of depriving the respondents of their right to vote are significant. Voting, participating in the selection of a country's representatives, is a cornerstone of a free and democratic state. Depriving a person of this most fundamental benefit of citizenship, constitutionally guaranteed in Canada, must inevitably have a serious adverse impact. This deprivation turns the respondents into second class citizens and so undermines the values of equality and inclusiveness stressed in *Sauvé* and underlying our *Charter* rights.

[252] Moreover, laws made today affect how our country will be governed, not just in the immediate future, but for years to come. Yet Canadian citizens abroad for more than five years, such as the respondents, will have no voice in the future direction of their country even though they have family here, intend to return here, and thus will be affected by laws enacted while they are abroad.

[253] In this final balancing, these harmful effects on the respondents far outweigh any benefits achieved by the challenged legislation.

(4) Provincial and territorial legislation, international case law and the writings of political theorists

[254] Strathy C.J.O. also relies on these sources to support his position. At para. 96 of his reasons, the application judge dealt with the residency requirements in provincial and territorial legislation. I agree with him that those requirements are quite distinguishable from the legislation in question on this appeal.

[255] Likewise, I agree with the application judge that international jurisprudence is of limited or no assistance, both because of the deferential stance taken by international tribunals and because Canada has been a leader in expanding voting rights for its citizens.

[256] Undoubtedly, some modern political theorists support my colleagues' position, and in his reasons Strathy C.J.O. has excerpted passages from their writings. But other theorists do not: see, for example, Rainer Bauböck, "Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting" (2006-07) 75 Fordham L. Rev. 2393; Ruth Rubio-Marin, "Transnational Politics and the Democratic Nation-State: Normative Challenges of Expatriate Voting and Nationality Retention of Emigrants" (2006) 81 N.Y.U. L. Rev. 117; David Owen, "Resident Aliens, Non-resident Citizens and Voting Rights: Towards a Pluralist Theory of Transnational Political Equality and Modes of Political Belonging," in Gideon Calder, Phillip Cole & Jonathan Seglow, eds., *Citizenship Acquisition and National Belonging: Migration, Membership and*

the Liberal Democratic State (London: Palgrave Macmillan, 2009). These authors, among others, reject the notion that extending voting rights to non-residents undermines democratic legitimacy. However, no theoretical or philosophical writings on either side of this debate were explored in the argument before us. I think little is to be gained by reference to one or more of these scholarly writings.

D. Conclusion

[257] For the reasons of the application judge and these additional reasons, I would dismiss this appeal.

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