CITATION: Frank et al. v. AG Canada, 2014 ONSC 907
COURT FILE NO.: CV-12-453976
DATE: 20140502

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
GILLIAN FRANK AND JAMIE DUONG	)	*Shaun O'Brien and Emily Dixon*, for the Applicants
	)	
Applicants	)	
	)	
– and –	)	
	)	
HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA	)	*Gail Sinclair and Peter Hajecek*, for the Respondent
	)	
	)	
Respondents	)	
	)	
	)	**HEARD: February 3, 4 and 5, 2014**

PENNY J.

Overview

[1] Section 3 of the *Canadian Charter of Rights and Freedoms* provides as follows:

> 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.

[2] The *Canada Elections Act*, S.C. 2000, c. 9 (the "*Act*") entitles Canadian citizens over the age of 18 to have their names included in the list of electors for the polling division in which they are ordinarily resident and to vote at the polling station for that polling division. This is commonly referred to as the "residence requirement."

[3] The *Act* creates various exceptions to the residence requirement including an exception for electors not ordinarily resident in Canada at the time of an election. This includes members of the Canadian Forces, public servants posted outside Canada, Canadian citizens employed by certain international organizations posted outside Canada, and Canadian citizens who have been absent from Canada for less than five consecutive years and intend to return to Canada as residents.

[4] The net effect of these provisions of the *Act* is that a Canadian citizen (who is not a member of the Canadian Forces or the public service or employed by a qualifying international organization) who has been a non-resident for five years or more is not entitled to vote in a federal election unless and until he or she re-establishes residence in Canada.

[5] This is an application by two Canadian citizens who have been non-resident for more than five years. They seek a declaration that the provisions of the *Act* which have extinguished their right to vote are inconsistent with s. 3 of the *Charter*, are not justified under s. 1, and are therefore unconstitutional and of no force and effect.

[6] Specifically, the Applicants attack the following sections of the *Act*:

> subsection 11(d)
>
> paragraphs 222(1)(b) and (c) and 223(1)(f)
>
> subsection 226(f)
>
> the word "temporarily" in section 220, subsection 222(1) and paragraph 223(1)(e).

The Issues

[7] This Application raises three basic issues:

(1) Do the impugned provisions of the *Canada Elections Act* violate s. 3 of the *Charter*?

(2) If yes, are the limitations imposed by those provisions prescribed by law and demonstrably justified in a free and democratic society under s. 1 of the *Charter*?

(3) If no, what is the appropriate remedy under ss. 24 and 52 of the *Charter*?

Background

The Applicants

[8] The Applicant, Gillian Frank, is a 34 year-old academic completing post-doctoral studies in Long Island, New York. He is a Canadian citizen, having been born in Toronto and lived there until he was 21 years old.

[9] Dr. Frank became aware that he was unable to vote in Canada prior to the May 2011 federal election. He attempted to apply online through the Elections Canada website to have a special ballot sent to him in Brooklyn. He felt strongly about voting in this election because he

had been following Canadian politics and was concerned about a number of issues. Dr. Frank learned from the Elections Canada website that he was not entitled to receive a ballot since he had been resident outside of Canada for five years or more.

[10] 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.

[11] 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.

[12] 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.

[13] 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.

[14] Dr. Frank travels on a Canadian passport and is not entitled to vote in the United States. Since discovering that he is not entitled to vote from abroad in Canadian elections, Dr. Frank has taken a number of steps in an attempt to change the situation. Apart from commencing this Application, he also contacted a Member of Parliament and, with her assistance, created and circulated a petition addressed to the government of Canada requesting that the right to vote be restored for all Canadian citizens living abroad, regardless of the duration of their absence from Canada.

[15] 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.

However, he was unable to return to Canada for the 2011 federal election. He therefore tried to apply for a ballot via the Elections Canada website in order to vote from abroad. He learned from the website that he was not permitted to vote since he had been outside of Canada for too long.

[16] 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.

[17] 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.

[18] At Cornell University, Mr. Duong joined the "Canadians at Cornell" club, a group for Canadian students to connect and socialize (including for NHL hockey games and to watch results from Canadian elections).

The Broader Non-resident Citizen Picture

[19] A large number of Canadians live abroad and have done so for five years or more. In 2009, approximately 2.8 million Canadian citizens had been living abroad for one year or more. This amounted to approximately 8% of Canada's population at the time. On the calculations of the Applicants' expert, Dr. Don De Voretz, a professor of economics who specializes in immigration and citizenship, approximately 1.4 million Canadians have lived abroad for more than five years. Some of these citizens fall within exclusions set out in the *Act* and are permitted to vote from abroad.

[20] Nonetheless, taking those deductions into account, it is clear that well over a million Canadians are caught by the legislative provisions which deny the vote to persons who have been living outside Canada for five years or more. It is not controversial that not all of these citizens would take up the opportunity to vote but for some it is of great importance. The Applicants have connected with an on-line group of expatriates who are devoted to seeking re-enfranchisement. They have presented a petition to Parliament on this issue.

[21] Many Canadians living abroad have strong connections to Canada and care deeply about the country. Research conducted by the Asia Pacific Foundation, an independent, not-for-profit think tank, surveyed connections of Canadians residing abroad in the United States and Asia. The majority of the 2.8 million Canadians abroad live in the United States, China, the United Kingdom, and Australia. The largest concentration of these people (36%) live in the United States. The survey found that most respondents were Canadian born and only citizens of Canada. Specifically, 60% were solely Canadian citizens. By contrast, 36% were dual citizens. Some 65% of Canadians gained citizenship by birth while 29% gained it through immigration and naturalization. Respondents to the survey indicated strong familial connections and a sense of belonging to Canada, including the following:

> 94% of respondents had visited Canada since they established principal residence abroad
>
> 54% made at least one trip to Canada per year
>
> 69% indicated they had plans to return to Canada in the near future
>
> 64% of respondents indicated that they considered Canada their home, where they had strong family ties and emotional links
>
> 66% of respondents identified more closely with Canada than with their country of residence in connection with their family and personal lives.

[22] Respondents to the survey also showed employment-related connections to Canada. Approximately two out of three had left Canada for work-related reasons. Nearly one-third of respondents reported working abroad for Canadian entities, including government, businesses, NGOs, or self-employment.

[23] According to the survey, 64% of respondents obtained Canadian news and information from friends and family "frequently" or "very frequently." The second leading source of Canadian news was domestic Canadian media (including print, web, and broadcast sources). The survey reported that 57% of respondents obtained Canadian news from these sources "frequently" or "very frequently."

[24] The Respondent's expert, Dr. Donald Munroe Eagles, is a Canadian citizen living in New York State. He is originally from the Maritimes and completed his undergraduate and master's degrees in Canada. He lives and works in Buffalo, New York, which is a two-hour drive from Toronto. He is the founder and director of the Canadian Studies Program at the State University of New York in Buffalo. Dr. Eagles has written a number of books and articles about Canada and he works frequently with Canadian political scientists. He has family in Toronto and travels to Toronto often.

[25] Dr. Eagles follows Canadian politics very closely and is very knowledgeable about it. He is currently working on a study of "exit interviews" with Canadian Members of Parliament. Dr.

Eagles voted in the Canadian federal election in 1993, while a resident in Buffalo, New York, and has said that it is a "subject of regret" for him that he is now not eligible to vote. He has "an abiding interest in Canada" and, if he were eligible, he would have voted again after 1993 and, "in all likelihood ... at every opportunity since then."

[26] In addition to socio-cultural ties, non-resident Canadian citizens can maintain strong economic ties to Canada, both in contributions to social insurance programs or tax payments, and in receipt of benefits.

[27] Canadians living abroad (some but not all of whom are Canadian citizens) contribute to or accrue service under or receive benefits from both the Canada Pension Plan ("CPP") and the Old Age Security Program. Under certain circumstances, Canadians living abroad can contribute directly to CPP or to the equivalent social security program of their host country, which may be recognized in Canada, pursuant to the terms of the applicable social security agreement.

[28] Many Canadians living abroad additionally have tax obligations in Canada. They will be required to report, and in certain circumstances pay taxes on, income from employment or business carried on in Canada, capital gains from dispositions of taxable Canadian property, and Canadian scholarships, bursaries, and research grants. There are also source withholdings on Canadian source investment income, pension, annuities, and other payments, as well as rental income from real properties. As the proportion of Canadian citizens living abroad increases, so does the proportion of non-resident income taxes paid to Canada, despite the fact that non-resident Canadians receive few monetized benefits, such as health care or education.

[29] Individual Canadian non-residents (of which the majority is likely citizens) pay tax disproportionate to the benefits received. This disproportionate low level of use continues even when these Canadians return to Canada.

[30] Citizenship, while not determinative for tax or social services, can be a highly relevant feature when determining eligibility for certain programs. For example, while Canadian citizens, like non-citizens, can be deemed resident or non-resident for tax purposes, citizenship is a factor used in determining residence. Citizenship is also a factor in some provinces when determining whether non-resident fees will be charged, and the extent of those fees.

The Existing Legislative Scheme for Non-resident Voters

[31] The *Act* includes provisions that establish a mechanism for voting from outside the country.

[32] Section 11 of the *Act* provides that a number of groups may vote in accordance with the "Special Voting Rules" found in Part 11. The Special Voting Rules provide a mechanism for citizens to apply for and receive a "special ballot" which can be submitted outside of the polling district in which it will be counted. For Canadian citizens living outside of Canada, this is the only mechanism to vote from abroad.

[33] Division 3 of Part 11 of the *Act* specifically sets out the Special Voting Rules for electors temporarily resident outside Canada (other than the Canadian Forces, which is dealt with separately in Division 2, ss. 190 - 219). Division 3 provides for the maintenance of a register of non-resident electors. In order to be included on this register, however, the citizen needs (1) to have been residing outside of Canada for less than five consecutive years and (2) to intend to resume residence in the future, and to identify a date of return. Once such an elector either returns to Canada to reside or has resided outside of Canada for five consecutive years or more, his or her name is deleted from the register. There is no other mechanism in the *Act* for these electors to vote from outside the country.

[34] The Special Voting Rules in the *Act* maintain a connection between the voter and a Canadian residence, and yet compromise the principle of residence. The rules do this by using a broad definition of Canadian residence and by not requiring the voter to actually reside in the place of residence. These compromises apply to a number of groups. The *Act* permits Canadians to vote from outside the country for the first five years abroad, but it also exempts the following groups from the five-year limitation:

(1) members of the Canadian Forces posted outside Canada, which includes individuals employed as teachers or support staff in Canadian Forces schools

(2) an elector who is an employee in the public service and who is posted outside Canada

(3) 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

(4) individuals who live outside Canada with any of the above electors.

[35] In addition, some electors living in Canada are entitled to have their votes counted in polling divisions in which they do not reside. These include Canadian Forces electors who are posted within Canada, as well as incarcerated electors.

[36] All of the groups identified above who are entitled to have their votes counted in polling divisions in which they do not reside are entitled to identify, in their statement of ordinary residence for the purpose of voting, places where they have never lived. These include the places of ordinary residence of a spouse, common-law partner, relative or dependant, relative or dependant of his or her spouse, or a person with whom the elector would live but for being in the Canadian Forces/incarcerated/resident outside the country. Thus, an elector may identify a residence for voting purposes in which he or she has never resided and of a person he or she has never met.

[37] Elections Canada also has attempted to facilitate voting in person for the very group of citizens who form the subject of this Application. That is, Elections Canada has administratively

permitted citizens who reside outside Canada for five years or more to vote *in person* at an advance poll or on voting day. If the elector had no place of residence in Canada, he or she was permitted to vote at the polling place associated with his or her last place of ordinary residence in Canada or the polling place associated with the address that was provided to the International Register of Electors if he or she was previously approved for voting from abroad. It is to be noted, however, that the Attorney General views this administrative approach as contrary to the *Act* and therefore unlawful. The Attorney General submits that, once a Canadian citizen has been non-resident for five years or more, he or she is prohibited from voting until he or she resumes Canadian residence.

Pre-Charter Legislative History of Non-resident Voting

[38] As early as 1915, Parliamentarians were concerned about effectuating the right to vote for Canadians living outside Canada. By passing Bill 111, the Soldiers' Voting Bill, Parliament ensured that members of the Canadian Armed Services overseas retained the right to vote. In order for members of the Armed Services to vote under this Bill, they needed to have 30 days of residence in Canada. There was no need to be born in Canada.

[39] Two years later, under Bill 127, the Military Voters' Act, members of the Canadian military became entitled to vote so long as they were British subjects, even if they had never been resident in Canada.

[40] Although the legislation was enacted, Parliamentary debates from this period disclose concerns about the sufficiency of soldiers' understanding of the issues at home and a concern about fairness to resident constituency electors whose votes might no longer have deciding influence in an election. Following the conclusion of the First World War, these voting exceptions were repealed.

[41] In 1920, Bill 12, the Franchise Act, for the first time enshrined residence as one of the three requirements necessary to be entitled to vote: (1) British citizenship; (2) residence in Canada for one year and in a constituency for two months; and (3) the attainment of the age of 21 years. However, Parliament made exceptions to extend voting rights to Canadians away from their residence at the time of the polls. In this case, Parliament was concerned with the voting rights of those abroad because of economic need. The exceptions to the residence requirement were aimed at railway employees and sailors whose employment required them to travel outside the country.

[42] In 1944, Parliamentarians took further steps to effectuate the right to vote for service personnel in the war. A Special Committee made recommendations which were subsequently formulated into Bill 135. The Special Committee set about its task "for the sole purpose of securing that no one would be deprived of his or her vote if it was humanly possible to enable him to register it." Unlike during the First World War, however, soldiers voting abroad in 1944 could only cast a ballot in the constituency where they ordinarily resided before enlistment.

[43] In 1955, Bill 415, An Act to Amend the Canadian Elections Act, was passed. Again, this legislation extended voting rights to those outside the country by allowing a wife of a Canadian Forces elector to vote from outside the country. The wife did not need to be from Canada or ever to have lived in Canada, so long as she was a British subject. While, in order to vote, she needed to stipulate a place of residence in Canada, it did not need to be somewhere she had ever lived. There were concerns about the wives' level of knowledge about Canada or the constituency of their imputed residence. Nevertheless, Members of Parliament opined that it was better to allow wives of servicemen to vote in a constituency in which they had never lived than to deprive them of the right to vote altogether.

[44] In 1970, the legislation was amended to extend voting rights to non-resident public servants and their dependents, as well as dependents of Canadian Forces electors.

[45] In 1981, the Standing Committee on Privileges and Elections considered Bill C-237, An Act to Amend the Canada Elections Act. This was a private member's bill which proposed that voting rights should be extended to Canadians (beyond those in the public service or Canadian Forces) living outside the country for a period of up to five years. The bill ultimately did not reach third reading.

Post-Charter Legislative History of Non-resident Voting

[46] In 1983, the Chief Electoral Officer, Jean-Marc Hamel, prepared a statutory report addressing in part the impact of the *Charter* on the *Act*. Mr. Hamel was concerned that certain restrictions in the *Act* contravened the newly adopted *Charter*. He considered Canadian citizens living and working abroad for extended periods to be "administratively disfranchised."

[47] In 1984, the House of Commons Standing Committee on Privileges and Elections was convened to respond to the Chief Electoral Officer's 1983 report. The Standing Committee concluded that the franchise should be extended to Canadians abroad for up to five years. Most of the Committee's discussion as it related to Canadians abroad centered on the mechanism to implement voting for this group – such as how they would be identified and where their "fictitious residence" would be established. Parliamentarians however cautioned that the vote of non-residents or incarcerated persons should not "interfere with the local constituency."

[48] While this Committee considered and adopted the view from the 1981 Standing Committee that the franchise be extended for a period of no more than five years, the Committee did not provide any further explanation for the choice of five years as the limitation on voting.

[49] The government continued to have concerns about the voting rights of Canadians abroad. In 1987, the House of Commons considered Bill C-79, which arose out of recommendations in the White Paper on Election Law Reform (the "White Paper"). The White Paper recommended comprehensive reforms to the *Act*, including extending the franchise to voters living abroad. The White Paper explicitly rejected the five year limitation on voting as proposed by the 1981 and 1984 Committees. Bill C-79 would have required the Chief Electoral Officer to maintain a

registry of electors residing outside of Canada with no limitation on voting based on the length of time abroad.

[50] Some Parliamentarians were concerned that there were a large number of Canadians abroad, and that some had been away for long periods and had limited connection to Canada. One Member of Parliament raised a concern about candidates being unable to contact these voters. Some Parliamentarians thought it went too far in permitting non-residents to vote who had been away "not five or 10 or even 15 years but 30 or 40 years - most of his or her life." Bill C-79 was not passed before the 1988 dissolution of Parliament.

[51] After Bill C-79 died on the order paper, the government initiated a further comprehensive review of the *Act*, which resulted in the 1993 amendments. In 1989, the federal government appointed the Federal Commission on Electoral Reform and Party Financing (the "Lortie Commission"). This was a multi-party commission, supported by extensive research, with the aim, among other things, of modernizing the *Act* in view of the *Charter*.

[52] The Lortie Commission Report recommended that eligible voters not resident in Canada be qualified to vote in federal elections. The Report specifically addressed the concern raised in the Parliamentary debates regarding Bill C-79 – that is, that some Canadians living abroad may not have sufficient connection to Canada:

> 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.

[53] The multi-party Lortie Commission took the position that "we should trust these Canadians." Its Report stated that "we should assume these Canadians continue to have a stake in Canada and that they keep themselves sufficiently informed as citizens." Even in 1991, the consensus was that Canadian citizens abroad had the ability, through modern telecommunications, to stay informed about public affairs at home. The Commission recommended treating these Canadians no differently than any other Canadian 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."

[54] Following the government's receipt of the Lortie Commission Report, the House of Commons appointed a Special Committee on Electoral Reform to conduct a comprehensive review of the Report. The Special Committee's work resulted in Bill C-114, which was passed in 1993 and brought about sweeping amendments to the *Act*, including the current provisions governing the voting of Canadians resident outside Canada. This Committee and the subsequent House of Commons debates reveal that Parliamentarians were concerned about securing the *Charter* rights of Canadians living abroad. They realized that Canada had fallen behind other developed democracies in terms of allowing non-residents to vote. They reflect a view that the amendments to the *Act* would produce more voters than any time in Canadian history and that this would improve Canadian democracy as a whole.

[55] Special Committee Members were also concerned about allowing the right to vote for Canadians abroad. Their concerns echoed those expressed at the time of Bill C-79, which was considered too "wide-ranging." Committee Members did not know how many voters were abroad ("I have asked and begged: how many of these possible foreigners are here? From 200,000 to millions"). They also questioned whether Canadians abroad may have lost their "affinity" or "connection" to the country. However, the Committee did not hear any evidence about whether Canadians abroad had lost their connection to the country.

[56] In order to address these concerns, the Special Committee proposed a five-year limitation. Canadians resident abroad would have a mechanism to vote in the new legislation, but the mechanism would be available only to those who had been resident outside Canada for no more than five consecutive years and who intended to return to Canada as a resident.

[57] However, Special Committee Members provided no clear articulation as to why five years was chosen to address the feared loss of affinity or connection to the country. During the Committee proceedings, there was reference to five years, ten years, twelve years, and those abroad on a "two- or three-year contract." In the House of Commons, it was clear that the five-year limitation did not have a particular justification specific to that time frame, other than that it was a "middle-of-the-road" compromise.

[58] In 2006, with non-resident voting having been in place for some 13 years, both Elections Canada and a Parliamentary committee revisited the need to maintain the five-year limit.

[59] Jean-Pierre Kingsley, then Chief Electoral Officer of Canada, in his statutory report to Parliament following the 38th General Election (which took place on June 28, 2004), recommended removing the limitation on voting for those Canadians resident outside of Canada for five years or more and who intended to return to Canada as residents. He raised questions about the justification for the five-year time frame. Mr. Kingsley also questioned the assumed connection between a Canadian's absence from the country and his or her knowledge of public affairs. His recommendation noted that there was no significant operational impediment to

extending the Special Voting Rules to Canadians living abroad for more than five years. His recommendation states as follows:

> 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 less than five consecutive years and who intend to return to Canada as residents is a reasonable limit on the right that can be 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. While it may be true in some cases that after a number of years of absence from Canada one's awareness of Canadian current affairs may diminish, the correlation between absence from the country and the level of knowledge of public affairs occurring in the country may not be sufficiently clear to constitute reasonable grounds to deprive someone of their right to vote. Finally, there is no significant operational impediment in extending the application of the Special Voting Rules currently available to Canadians living outside the country to those Canadians who have been absent from the country for more than five consecutive years.

[60] Mr. Kingsley did not recommend eliminating the requirement that a non-resident voter intend to return to Canada. However, the Parliamentary Committee that considered his recommendation was content to discard this requirement as well.

[61] The House of Commons Standing Committee on Procedure and House Affairs considered Mr. Kingsley's recommendation in June 2006. That Committee, which included members from all of the major political parties, endorsed the view that the five-year limitation should be removed from the legislation. The Committee Members recognized the fundamental connection between citizenship and voting. For example, MP Marcel Proux stated,

> I think I understood the last comment to mean the same thing that I wish, in the sense that as long as they're Canadian citizens, regardless of whether they live in Canada or outside of Canada, they should have the right to vote.

[62] In its response to Mr. Kingsley's Report and the Committee's endorsement, the government did not reject the recommendation but simply said that it would "best be considered" in the context of a comprehensive review of the Special Voting Rules. The government has, I was advised, never conducted a comprehensive review of the Special Voting Rules.

Do the Impugned Provisions of the *Act* Breach s. 3 of the *Charter*?

The Parties' Positions

[63] The Applicants argue that the right of every citizen to vote lies at the heart of Canadian democracy. Each citizen must have the opportunity to participate in the selection of elected representatives. Section 3 of the *Charter* is critical in this context; it promotes and protects each citizen's right to play a meaningful role in the political life of Canada.

[64] The central importance of s. 3 to the *Charter* and to Canadian democracy is underscored by the fact that it is not subject to s. 33 of the *Charter*, the override provision. Section 3 rights must be guarded assiduously and violations cannot be tolerated. Section 3 has "seminal importance" among *Charter* rights.

[65] Considering the central and fundamental role of s. 3 in the *Charter*, it is particularly important to apply a broad and purposive interpretation to the right. The wisdom of this approach is underscored by the "broad, untrammeled language" of s. 3.

[66] The wording of s. 3 does not incorporate any qualified language or collective concerns to suggest a balancing of interests. Where the impugned legislation is inconsistent with the express language of s. 3, the breach is plain and obvious. In this case, the legislation plainly and clearly violates the Applicants' right to vote in elections of members of the House of Commons. While the *Act* creates a mechanism and process for citizens outside the country to vote, through the Special Voting Rules found in Division 3 of Part 11 of the *Act*, those who are outside the country for five years or more are expressly prohibited from access to that mechanism (unless they fall within certain exceptions).

[67] In s. 11, the *Act* first excludes those who have been absent from Canada for five years or more from access to the Part 11 Special Voting Rules. In other words, unless a Canadian citizen living outside of Canada has been absent for less than five consecutive years and intends to return to Canada as a resident, or, unless he or she otherwise falls within one of the exceptions found in subsections (a) to (c), he or she has no access to the mechanisms which would allow voting from outside the country.

[68] Correspondingly, s. 226 of the *Act* prevents citizens who have been absent from the country for more than five years and/or who do not have an intention to return to reside in the country from participating in the Division 3 Special Voting Rules. Section 222, which details the requirements for a register of electors outside Canada, only includes Canadians resident outside Canada for less than five consecutive years and who intend to return to reside in Canada. Subsection (2) then goes on to exclude certain electors from the limitations set out in subsection (1). That is, electors who are employed outside Canada in federal or provincial public service or by specified international organizations, or who live with someone in either of these groups, are permitted on the register of electors.

[69] Finally, s. 226 of the *Act* ensures that any person who has been absent for five years or more (other than those who are in the Canadian Forces or fall within the exceptions already identified) is prohibited from voting, by ensuring their names are removed from the register of electors once they have been absent for five years or more.

[70] The *Act* therefore specifically ensures that the only voting mechanism in place for citizens to vote from outside the country is not available to those who have been absent for five years or more. These citizens are excluded from any mechanism that would allow them to vote.

[71] Canadian courts, including the Supreme Court of Canada, have found repeatedly that legislation that prevents particular groups of citizens from voting violates s. 3. *Charter* challenges on behalf of affected groups have been consistently successful. Canadian citizens abroad for five years or more is one of the few if not the only group (other than citizens under age 18) that continues to be prohibited by the *Act* from voting.

[72] In successive *Charter* challenges, the courts have struck down limitations on voting for citizens with mental disabilities and for judges. The Supreme Court of Canada struck down the limitation on voting for prisoners and, after Parliament amended the legislation to permit voting only for prisoners serving sentences of less than two years, the limitation for the remainder of prisoners was struck down again. As it stands under the current legislation, mass murderers such as Clifford Olsen are entitled to vote, but Dr. Frank, Mr. Duong, and others who care deeply about Canada are not.

[73] The Attorney General argues that s. 3 contains internal limitations, namely that not every citizen has the right to vote but only those who meet other basic criteria of the franchise, one of which is residence. An early articulation of this view appears in *Badger v. A.-G. Manitoba* (1986), 30 D.L.R. (4th) 108 (Man. Q.B.), at p. 112, Scollin J.:

> The right to vote presupposes certain attributes of the voter which are inherent but not expressed in s. 3. These are qualities of the right, not limitations on it and they may quite properly be the subject of re-evaluation by lawmakers without resort s. 1. Thus, just as the basic conditions of citizenship are outside the Charter, so the law governing elections must spell out residence and age requirements. It is pedantic to classify these as limits. They are simply the rational dimensions of the right.

[74] Residence serves a number of essential purposes in our electoral system and parliamentary representation system:

- It demonstrates a level of commitment to Canada and its future, and ensures knowledge of local issues
- It informs where the boundaries of electoral districts are drawn

- It describes who will be most directly engaged in the political debate of the electoral district leading up to an election
- It defines the population that candidates must address and campaign to during an election period
- It defines the population that MPs represent during their incumbency
- It describes who will be most directly affected by the laws that will be enacted by the Members elected to the House of Commons.

[75] Supreme Court jurisprudence emphasizes that *Charter* rights were not enacted in a vacuum and must be interpreted in their proper linguistic, philosophic, and historical context. With respect to s. 3 in particular, while the interpretation of the right to vote must be broad and purposive, the right must also be interpreted having regard to the philosophical principles that have guided the historic development of the right to vote in our constitutional tradition. For example, based on the philosophic and historical context of Canada, the Supreme Court and other courts have concluded, in the context of electoral boundaries, that the s. 3 right to vote does not guarantee "absolute equality of voting power."

[76] The right to vote has always been a right to vote for representatives based on residence in a polling district in Canada. The proper historical context shows residence to be foundational to Canada's electoral system and parliamentary representation system. These two related systems are built on representation at the local level, by members of the House of Commons elected to serve the local electoral district in which electors reside. It follows that the scope of the s. 3 right should be interpreted as necessarily being conditional on residence. It is an essential and implicit condition to the right granted by s. 3 of the *Charter*.

[77] In this regard, the Respondent relies on the Supreme Court's decision *Opitz v. Wrzesnewskyj*, 2012 SCC 55, [2012] 3 S.C.R. 76, at para. 30 where the majority wrote, "The Charter right to vote is for the Member of Parliament for the electoral district in which the voter resides."

[78] In addition to the Supreme Court's jurisprudence, residence has been recognized as a condition of voting by two territorial superior courts. The Yukon Court of Appeal and the Nunavut Court of Justice each considered *Charter* challenges to minimum residence requirements to the exercise of the right to vote in their respective territorial electoral statutes. Both courts concluded that the requirement of residence alone does not breach s. 3 of the *Charter* because residence is implicit in the right. The courts went on to consider the constitutionality of the specific minimum periods of residence required in the Yukon or Nunavut - 12 months - and concluded that these durational residence requirements constituted reasonable limits under s. 1 of the *Charter*.

Analysis

[79] I agree with Lefsrud J. when he said that s. 3 clearly contains no limits on the right to vote other than citizenship: *Fitzgerald (Next Friend of) v. Alberta*, 2002 ABQB 1086, 331 A.R. 111, at para. 14, aff'd 2004 ABCA 184, 348 A.R. 113 leave to appeal to S.C.C. refused, [2004] S.C.C.A. No. 349. While the content of the right to vote might be subject to interpretation (see e.g. *Dixon v. British Columbia (A.G.)* (1989), 59 D.L.R. (4th) 247 (B.C.S.C.) or *Reference Re Provincial Electoral Boundaries*, [1991] 2 S.C.R. 158), the words "every citizen" are clear. Any limitation on the scope of the right conferred by those words constitutes a breach of s. 3 which must then be justified under s. 1.

[80] The approach adopted in *Badger* and by the Respondent in this case has been repeatedly rejected by provincial Superior Courts, the Federal Court, and the Supreme Court of Canada: see *Belczowski v. Canada*, [1991] 3 F.C. 151 (T.D.), aff'd [1992] 2 F.C. 440 (C.A.); *Sauvé v. Canada (A.G.); Belczowski v. Canada*, [1993] 2 S.C.R. 438 (*Sauvé #1*); *Harvey v. New Brunswick (A.G.)*, [1996] 2 S.C.R. 876; *Reid v. Canada* (1994), 73 F.T.R. 290 (T.D.); *Figueroa v. Canada (A.G.)*, 2003 SCC 37, [2003] 1 S.C.R. 912; and *Hoogbruin v. British Columbia (A.G.)* (1985), 24 D.L.R. (4th) 718 (B.C.C.A.).

[81] The analysis of the majority judgment written by Iacobucci J. in *Figueroa*, at paras. 33 and 37, is particularly apposite on this issue:

> With respect, I do not agree with LeBel J. that the proper analytical approach varies with the nature of the alleged breach. The only difference, in my view, is one of proof. As discussed throughout, the purpose of s. 3 is to protect the right of each citizen to play a meaningful role in the electoral process. Where the impugned legislation is inconsistent with the express language of s. 3, it is unnecessary to consider the broader social or political context in order to determine whether the legislation interferes with the right of each citizen to play a meaningful role in the electoral process. It is plain and obvious that the legislation has this effect. But where the legislation affects the conditions in which citizens exercise those rights it may not be so obvious whether the legislation has this effect. Consequently, it may be necessary to consider a broad range of factors, such as social or physical geography, in order to determine whether the legislation infringes the right of each citizen to play a meaningful role in the electoral process. In neither instance, however, is the right of each citizen to play a meaningful role in the electoral process subject to countervailing collective interests. These interests fall to be considered under s. 1.
>
> ...

> Finally, although certain aspects of our current electoral system encourage the aggregation of political preferences, I do not believe that this aspect of the current electoral system is to be elevated to constitutional status. In his reasons, LeBel J. argues that first-past-the-post elections favor mainstream parties that have aggregated political preferences on a national basis. This might, indeed, be true. But the fact that our current electoral system reflects certain political values does not mean that those values are embedded in the *Charter*, or that it is appropriate to balance those values against the right of each citizen to play a meaningful role in the electoral process. After all, the *Charter* is entirely neutral as to the type of electoral system in which the right to vote or to run for office is to be exercised. This suggests that the purpose of s. 3 is not to protect the values or objectives that might be embedded in our current electoral system, but, rather, to protect the right of each citizen to play a meaningful role in the electoral process, whatever that process might be.

[82] Any doubt whatever about this approach has been resolved by the majority decision in *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519 (*Sauvé #2*) where McLachlin C.J. wrote the following at paras. 11, 33-35:

> At the first stage, which involves defining the right, we must follow this Court's consistent view that rights shall be defined broadly and liberally: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 56; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 53. A broad and purposive interpretation of the right is particularly critical in the case of the right to vote. The framers of the *Charter* signaled the special importance of this right not only by its broad, untrammeled language, but by exempting it from legislative override under s. 33's notwithstanding clause. 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.
>
> ...
>
> Under s. 3 of the *Charter*, the final vestiges of the old policy of selective voting have fallen, including the exclusion of persons with a "mental disease" and federally appointed judges: see *Canadian Disability Rights Council v. Canada*, [1988] 3 F.C. 622

> (T.D.) and *Muldoon v. Canada*, [1988] 3 F.C. 628 (T.D.). The disenfranchisement of inmates takes us backwards in time and retrenches our democratic entitlements.
>
> The right of all citizens to vote, regardless of virtue or mental ability or other distinguishing features, underpins the legitimacy of Canadian democracy and Parliament's claim to power. 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.
>
> More broadly, denying citizens the right to vote runs counter to our constitutional commitment to the inherent worth and dignity of every individual. As the South African Constitutional Court said in *August v. Electoral Commission*, 1999 (3) SALR 1, at para. 17, "[t]he vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts." The fact that the disenfranchisement law at issue applies to a discrete group of persons should make us more, not less, wary of its potential to violate the principles of equal rights and equal membership embodied in and protected by the *Charter*.

[83] Section 11 of the *Act* excludes those who have been absent from Canada for five years or more from access to the Part 11 Special Voting Rules. Section 222 of the *Act* prevents citizens who have been absent from the country for more than five years from participating in the Division 3 registration process. Section 226 of the *Act* requires that any citizen who has been absent for five years or more be removed from the register of electors. These exclusions ensure that the non-resident citizen is prohibited from voting unless and until he or she becomes a resident again.

[84] The framers of the *Charter*, and those who adopted it, stipulated *citizenship* as a requirement to vote but did not include residence, in spite of the long history of residence as an element of the Canadian electoral process. Indeed, the framers of the *Charter* could easily have included residence under s. 3 if they had intended it to be a precondition to the right to vote. This point was not lost on Parliamentarians in the course of their post-*Charter* deliberations about elections. For example, Member of Parliament Crosby from Halifax West, a member of the Standing Committee on Privileges and Elections, when considering the 1983 statutory report of the Chief Electoral Officer said the following:

> Now, it would have been awfully easy in the Charter to say that every citizen has a right to vote in an election of Member of the House of Commons for the constituency in which he or she

> resides. We, the framers of the Charter of Rights, knew federal elections were conducted constituency by constituency; we knew you did not vote at large for the Prime Minister; we knew all about elections. Yet we gave every citizen the right to vote without restriction. So we must have intended to give citizens the right to vote if they were out of the country.

[85] The argument that residence is an essential and implicit precondition to a citizen's right to vote is also belied by the *Act* itself. Section 3 of the *Act*, which provides the *qualifications* required to vote (citizenship and age 18), makes no reference to residence. Section 6 of the *Act* sets out *where* a qualified person may vote. Section 11 and Division 3 specifically create, for certain non-resident citizens, a system or mechanism for voting while living abroad, notwithstanding the fact that these citizens do not reside in any electoral district. The *Act* therefore uses residence as a *mechanism for regulating the voting process*. Residence is clearly not treated as a fundamental precondition to the right to vote, otherwise no non-resident citizens would be permitted to vote at all. To use the words of McLachlin C.J. in *Sauvé #2*, at para. 37, residence is not part of the right to vote; it is merely a means of "regulating a modality of the universal franchise."

[86] The Respondent essentially argues 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. This is the basis upon which the Respondent seeks to distinguish *Sauvé #2*. Prisoners are entitled to vote because they live with the consequences of Canada's laws, whereas non-residents do not.

[87] I do not find this argument persuasive for a number of reasons. First, it is precisely the sort of "countervailing collective concern" which cannot be used to limit the ambit of a clearly articulated constitutional right.

[88] Second, non-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.

[89] Third, non-residents may well be subject to Canadian law. Many of Canada's laws have extraterritorial application. Non-residents, leaving aside extradition, may not be subject to enforcement by Canadian authorities if they do not live here but that does not mean they are "not subject to Canadian law."

[90] Most importantly perhaps, the logic of the Respondent'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.

[91] The Respondent relies on a quotation from John A. MacDonald in 1870 when he said, "The great question to be asked in deciding whether or not a man shall exercise the franchise, was whether or not he has a sufficient interest at stake in the country to be entrusted with a share of its government." It is indeed a "great question." But much has changed in Canada since 1870. For example, in 1870, in order to have a sufficient "stake" to warrant access to the franchise, an individual had to be a male property owner, a requirement not completely abandoned in all Canadian provinces until 1936. More importantly, 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.

[92] The Respondent argues that Division 3 of Part 11 of the *Act* was not required or mandated by s. 3 of the *Charter*. Rather, Parliament conferred these non-resident voting entitlements acting under its sovereign jurisdiction. I am unable to agree with this submission. The purpose of s. 3 of the *Charter* is to grant to every Canadian citizen the right to play a meaningful role in the selection of elected representatives. The democratic rights guaranteed in the *Charter* are positive ones. Federal and provincial governments have a mandate to hold regular elections and to allow citizens to select their representatives: see *Haig v. Canada (Chief Electoral Officer),* [1993] 2 S.C.R. 995, at pp. 1031-1032.

[93] I do not find the recent decision of the Supreme Court of Canada in *Opitz* of much assistance in the present context. *Opitz* did not involve a *Charter* challenge to any legislation and had nothing to do with non-resident voters or the Special Voting Rules. *Opitz* involved alleged administrative errors in the conduct of polling in Etobicoke Centre during the 2011 federal election. The question was whether there were "irregularities ... that affected the result of the election." *Opitz* is clearly instructive in terms of the importance of the voting franchise. For example, the majority wrote the following at para. 1:

> The *Canadian Charter of Rights and Freedoms* and the *Canada Elections Act,* S.C. 2000, c. 9 ("Act"), have the clear and historic purposes of enfranchising Canadian citizens, such that they may express their democratic preference, and of protecting the integrity of our electoral process.

[94] I do not think, however, that the particular characterization used by the court in para. 30 to describe the right to vote ("The *Charter* right to vote is for the Member of Parliament for the electoral district in which the voter resides") can be taken to be a comprehensive or definitive statement of the rights conferred by s. 3 of the *Charter* in the context of non-resident citizens and the Special Voting Rules under Division 3 of Part 11 of the *Act*. *Opitz* was dealing with the garden variety case of electors showing up at a polling station in an electoral district in Canada. Accordingly, *Opitz* does not stand for the proposition that residence is an essential and implicit condition of the right to vote granted by s. 3.

[95] Similarly, the British Columbia Court of Appeal's decision in *Henry v. Canada (A.G.)*, 2014 BCCA 30, [2014] B.C.J. No. 122 concerns voter identification requirements when attending a polling station in Canada and, therefore, is of limited assistance in the analysis of the problem of non-resident voting.

[96] I also agree with the Applicants that the cases involving residence requirements prior to voting in Canadian provinces or territories are distinguishable from the case at bar. These cases all deal with the requirement for residency in a province or territory for a limited period prior to voting in a provincial election. A Canadian citizen who has lived his whole life, for example, in Alberta but finds himself in Quebec on voting day may have no attachment whatever to Quebec. In respect of a national election, however, a Canadian citizen, by definition, has a particular attachment to Canada. The very fact of being a citizen creates and is the attachment to Canada which forms the foundation of the s. 3 *Charter* right. Unlike the province or territory, therefore, there is no need to create an additional test for attachment – attachment is established by virtue of citizenship.

[97] The case for non-resident citizens can be paraphrased in McLachlin C.J.'s words in *Sauvé #2* at paras. 37 and 38. In the impugned sections of the *Act*, the government is making a decision that some people, whatever their abilities, are not worthy to vote – that they do not "deserve" to be considered members of the community and hence may be deprived of the most basic of their constitutional rights. But this is not the lawmakers' decision to make. The *Charter* makes this decision for us by guaranteeing every citizen's right to vote and by expressly placing all citizens under the protective umbrella of the *Charter* through constitutional limits on the power of the government to limit a citizen's right to vote. To deny non-resident Canadians the right to vote would be to deny an important means of maintaining the connection of the non-resident to his or her native land.

[98] For these reasons, I find that the following provisions of the *Act* infringe s. 3 of the *Charter*:

> subsection 11(d)
>
> paragraphs 222(1)(b) and (c)
>
> paragraph 223(1)(f)
>
> subsection 226(f), and
>
> the word "temporarily" in section 220, subsection 222(1) and paragraph 223(1)(e).

Has the Limitation Been Demonstrably Justified?

[99] If a *Charter* breach is established, the onus falls on the Respondent to show that a limit prescribed by law is reasonable and demonstrably justified in a free and democratic society.

Two criteria must be satisfied. First, the objective to which the limit is directed must be of sufficient importance to warrant overriding the constitutionally protected right. It is necessary that an objective relate to concerns which are "pressing and substantial" before it can be characterized as sufficiently important.

[100] Second, once a sufficiently significant objective is identified, it must be shown that the means chosen are also reasonable and demonstrably justified. This involves balancing and, therefore, a test of proportionality. There are three components to the proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must be rationally connected to the objective. Second, the means must impair the protected right as minimally as reasonably possible. Third, the effects of the measures adopted on the person or persons whose rights are limited must be proportional to the benefits of the pressing and substantial objective served by the limitation: *R. v. Oakes*, [1986] 1 S.C.R. 103, at pp. 138-139.

Is There a Pressing and Substantial Objective for the Limitation?

The Parties' Positions

[101] Is there a pressing and substantial objective which warrants depriving Canadian citizens who have been non-resident in Canada for five years or more of the right to vote? The Attorney General relies on the Supreme Court of Canada decision in *Harper v. Canada (A.G.),* 2004 SCC 33, [2004] 1 S.C.R. 827, at para. 25 for the proposition that it is sufficient for the government to *assert* a pressing and substantial objective:

> [T]he proper question at this stage of the analysis is whether the Attorney General has asserted a pressing and substantial objective. Whether the objective is furthered falls to be considered at the proportionality analysis which inquires into rational connection, minimal impairment and whether the benefit conferred (if any) outweighs the significance of the infringement.

[102] 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.

[103] 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.

[104] 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.

[105] In *Harper*, the court held that common sense dictates that promoting electoral fairness is a pressing and substantial objective in our liberal democracy, even in the absence of evidence that past elections have been unfair. In *R. v. Bryan*, 2007 SCC 12, [2007] 1 S.C.R. 527, at p. 541, the court found that the objective of maintaining public confidence in the fairness of the electoral process warranted restriction on the release of information on election day. In *Harvey*, the court found that the objective of maintaining and enhancing the integrity of the electoral process warranted restricting a candidate's ability to run due to a conviction for an electoral offence.

[106] The Applicants argue that these objectives advanced by the Respondent are not pressing and substantial because there is simply no evidence of a problem. Rather, the government's objectives are rhetorical, vague, and generic. As such, they must be treated with suspicion.

[107] When Parliament introduced the limitation on voting rights in 1993, Parliamentarians had a vague notion that permitting all citizens outside the country to vote was, in some way, going too far. They did not know how many citizens lived outside the country and had generic concerns, unsubstantiated by any evidence, that citizens outside the country for extended periods had lost their affinity to Canada.

[108] However, voting from outside the country has now been in place for over twenty years. There is evidence not only of how many citizens reside outside the country, but also of how many are likely to vote. Moreover, studies indicate that many citizens outside the country

maintain strong connections to Canada, including through family, on-line and other media, visits to Canada, contributing taxes and collecting social payments, and, importantly, an intention to return to Canada to live.

[109] For the past twenty years, citizens residing outside the country for less than five years have been permitted to vote. In addition, citizens residing outside of Canada for five years or more and who work for the public service or certain international organizations, or who work for the Canadian Forces, or who live with any of these individuals, have been permitted to vote. Since voting for citizens outside the country was implemented, government experts have not been able to identify a single complaint or concern about it raised with Elections Canada in any study or by a Member of Parliament. The evidence from Elections Canada is that it has no record of any complaint regarding voting from outside the country.

Analysis

[110] The majority in *Sauvé #2* found that the philosophically based or symbolic nature of the government's objectives did not command deference. Broad, symbolic objectives are, in fact, inherently problematic; Parliament cannot use lofty objectives to shield legislation from *Charter* scrutiny. To be sure, legislative justification does not require empirical proof in a scientific sense. It is enough that the justification be convincing, in the sense that it is sufficient to satisfy the reasonable person looking at all the evidence and relevant considerations that the state is justified in infringing the right at stake to the degree it has. However, one must be wary of stereotypes cloaked as common sense, and of substituting deference for the reasoned demonstration required by s. 1.

[111] The court found that the legislation denying penitentiary inmates the right to vote was not directed at a specific problem or concern. Parliamentary debates, McLachlin C.J. observed, offered more "fulmination than illumination." She wrote the following at para. 22:

> Vague and symbolic objectives such as these almost guarantee a positive answer to this question. Who can argue that respect for the law is not pressing? ... However, precisely because they leave so little room for argument, vague and symbolic objectives make the justification analysis more difficult. ... The broader and more abstract the objective, the more susceptible it is two different meanings in different contexts, and hence to distortion and manipulation.

[112] The majority's concerns in *Sauvé #2* can be transcribed almost directly to the circumstances of this case. The rhetorical nature of the government objectives advanced here renders them suspect. The first objective, fairness to resident voters, could be asserted in support of not only a complete prohibition against all non-resident voting (including, by the way, the non-resident voting of prisoners incarcerated in other locations in Canada), but also in support of a "means" test which would require proof of a sufficient "affinity" to Canada, and an

understanding of not only national but local issues and sufficient legal "capacity" to vote meaningfully. In the complete absence of any concrete evidence of a problem with non-resident voting somehow thwarting the will of the resident majority, it is difficult, if not impossible, to weigh whether the infringement of the right is justified or proportionate.

[113] I am equally troubled by the notion of what is or is not "fair" to the resident majority of voters. Substantive "fairness" is almost always in the eye of the beholder. To put the issue in context, since the Special Voting Rules were implemented in 1993, a vastly smaller number of non-resident Canadian citizens have exercised their right to vote than expected. Elections Canada estimated at the time that approximately 2,000,000 Canadians were living abroad and planned for 200,000 registrations. In the election that followed, a little over 15,000 special ballots were requested and issued. Over the next several general elections, the number of external ballots issued ranged from a low of 10,733 (in 2011) to a high of 19,230 (in 2000). In the most recent election, in the ten Canadian ridings with the highest number of special ballots, as a percentage of total registered electors in the constituency, the non-resident votes ranged from a low of 0.05% to a high of 0.2%. Also in that election, Elections Canada reported that barely 6,000 votes were recorded from international electors, compared to approximately 26,000 votes from Canadian Forces electors and almost 15,700 votes from incarcerated electors. Where the number of non-resident voters under the five-year rule is entirely dwarfed by the non-resident Canadian Forces and incarcerated electors by a factor of seven, it is hard to see what unfairness is being visited on the resident majority by the voting of other non-resident citizens. It is not difficult to imagine that resident voters in an electoral district might well consider it "unfair" that the outcome of the election in their riding could be influenced by the votes of incarcerated electors (or those with mental disabilities for that matter). Yet, this approach, based as it is on stereotypes and vague generalizations, has been consistently rejected by Canadian courts.

[114] The second objective, concerns over electoral fraud, while less vague than the first, is subject to the same frailties. In this case, the government has failed to identify any particular problem with non-resident voter fraud or of non-resident voting causing an undue drain on Parliamentary resources. Indeed, the only evidence of these concerns at all comes from the speculation of a political science professor teaching at the University of Buffalo – State University of New York, who opines that an increase in non-resident voting "could," "may" or "might" give rise to concerns in the future. The available evidence from Elections Canada is that there are no documented problems associated with non-resident voting.

[115] For these reasons, I would have been inclined to the view that the objectives cited by the Respondent do not qualify as pressing and substantial within the meaning of the *Oakes* test. Nevertheless, despite the abstract nature of the government's objectives and the rather thin basis upon which they rest, as suggested in *Sauvé #2*, prudence requires that I proceed to the proportionality analysis rather than dismissing the government's objectives outright. The proportionality inquiry will determine whether the government's asserted objectives are in fact capable of justifying its denial of the right to vote to Canadian citizens who are non-resident for five years or more.

Is the Limitation Proportional?

[116] The Respondent argues that, in assessing whether the s. 3 right has been impaired only to the extent necessary to achieve the objectives, Parliament should be accorded a measure of flexibility and deference in its determination as to where best to draw the line. A task such as designing Canada's electoral system is uniquely Parliament's responsibility. This is because it involves subjective perceptions of harms and fairness, harms not easily measurable, and for which cogent and persuasive evidence may not even exist. In cases such as this one, arguments based on logic and reason may be accepted as a foundational part of the s. 1 justification analysis.

[117] The Applicants argue that, where the *Act* limits the right to vote for a particular group, it is not appropriate for the courts to defer to Parliament. Rather, according to the Supreme Court of Canada in *Sauvé #2* at para. 14, the courts must employ a stringent justification standard:

> *Charter* rights are not a matter of privilege or merit, but a function of membership in the Canadian polity that cannot lightly be cast aside. This is manifestly true of the right to vote, the cornerstone of democracy, exempt from the incursion permitted on other rights through s. 33 override.

[118] Thus, when the court is considering a denial of voting rights, a stringent justification standard should be applied. While deference may be appropriate on a decision involving competing social and political policies, it is not appropriate on a decision to limit fundamental rights. McLachlin C.J. stated in *Sauvé #2* at para. 13, "The core democratic rights of Canadians do not fall within a 'range of acceptable alternatives' among which Parliament may pick and choose at its discretion."

(a) Is There a Rational Connection?

The Parties' Positions

[119] The Respondent argues that the five-year limit and the condition of an intention to return to Canada logically advance Parliament's objectives of resident voter fairness and electoral integrity.

[120] It argues that the rational connection between a body politic choosing to set limits on those allowed to cast votes in its election and the objective of enhancing the fairness and integrity of its electoral process was captured by Prof. Laurence Tribe in his text *American Constitutional Law*, 3d ed. (New York: Foundation Press, 2000)

> Although free and open participation in the electoral process lies at the core of democratic institutions, the need to confer the franchise on all who aspire to it is tempered by the recognition that completely unlimited voting could subvert the ideal of popular rule

> which democracy so ardently embraces. Moreover in deciding who may and who may not vote in its elections, a community takes a crucial step in defining its identity. If nothing else, even though anyone in the world might have some interest at any given election's outcome, a community should be empowered to exclude from its elections persons with no real nexus to the community as such.

[121] The rational connection between a residence requirement for voting and the preservation of fairness and the proper functioning of Canada's democratic system is a said to have been recognized in the provincial cases that justified related residence limits and in European Court of Human Rights decisions that accept state-imposed residence limits on the right to vote to enhance the fairness and democratic legitimacy of domestic electoral processes.

[122] The Applicants argue that there is no rational connection between five years, or of having a fixed intention to return, and the objective of maintaining the voter's connection to Canada or maintaining the integrity of the electoral process. They say that the choice of five years was without supporting evidence and that it was an arbitrary limitation.

Analysis

[123] The government's argument proceeds on the basis of an assumption that someone who has not lived in Canada for five years or more is unworthy of the franchise and that allowing such people to vote demeans the votes of resident citizens and the electoral system generally. Put another way, the government argues that the non-resident is insufficiently connected to Canada and that the voting rights of resident Canadians can only be protected against de-valuation by taking away the vote from those who are unworthy – those who have lost their connection to Canada by being non-resident for five years or more.

[124] Arguments of a very similar nature, however, were rejected as any basis for proving a rational connection in *Sauvé #2* at paras. 28 to 53. Denial of the right to vote on the basis of attributed unworthiness is inconsistent with the respect for the dignity of every person that lies at the heart of Canadian democracy and the *Charter*. It also runs counter to the plain words of s. 3 and its exclusion from the s. 33 override: see *Sauvé #2*, at para. 44.

[125] While, in 1993, Parliamentarians may have had some vague concerns over the ability of Canadians abroad to stay sufficiently well-informed about Canadian politics, the Lortie Commission Report, following careful study, came to a very different conclusion. It emphasized that with modern telecommunications and the international press, the argument that citizens abroad cannot be informed about public affairs at home no longer applies. In 2013, it is not only possible but easy for interested Canadians to keep abreast of Canadian politics and current events. The evidence on this application shows that, on balance, Canadians living abroad do maintain connections to Canada in a number of ways.

[126] It is not controversial that some Canadians living abroad will lose their affinity to Canada and any interest in Canadian events or politics. But, there is no necessary or rational connection between this diminished connection and five years or a fixed intention to return. In my opinion, the five-year rule punishes all non-resident Canadians in the same way, regardless of their knowledge of Canada or its election issues and regardless of the connection they have to Canada.

[127] Comparisons with other democracies say little about the Canadian vision of democracy or what the *Charter* permits. For example, the passage quoted above from Prof. Laurence Tribe describes the right of the polity to decide who may exercise the franchise as a "crucial step in defining its identity." The framers and adopters of the *Charter*, however, took that step in 1982. The Canadian community's ability to exclude from voting in its elections those deemed to lack sufficient nexus has, therefore, been constitutionally circumscribed.

[128] With respect to the Canadian authorities involving provincial residence requirements, as noted above, I view the provincial cases as distinguishable because they involve an essentially different issue than the federal *Act* and its application to national elections.

[129] If there were evidence establishing that a time limit is a reasonable basis for constraining the vote by non-resident citizens, I would tend to agree with the Respondent that whether it is four, five, six, or even 15 years is not likely capable of rational or empirical delineation. However, in the circumstances of this case, I do not think the Respondent has met its burden of showing any rational connection between the objective – fairness and possible election abuses – and a temporal limit on the allowable period of non-residence.

[130] For these reasons, I conclude that the Respondent has not met the burden of showing that there is a rational connection between the objective and the limit sought to be justified.

(b) Is There Minimal Impairment?

The Parties' Positions

[131] The Respondent argues that, to qualify as minimally impairing, a limit need not be the least restrictive possible but need only fall within a range of reasonable alternatives. Parliament, it argues, should be accorded both a measure of flexibility and deference in determining where best to draw the line in this instance.

[132] In defining "temporary," in the context of the *Act*, Parliament was challenged to arrive at a precise definition that could be applied by those administering an election in relation to a relative term that requires the balancing of competing interests and a very particular assessment of what is "fair" in Canada's democratic process. This task, the Respondent says, is uniquely the responsibility of Parliament as it involves subjective perceptions of harm and fairness for which cogent and persuasive evidence may not even exist.

[133] While admittedly a crude tool which cannot be justified in any absolute sense, the five-year period is said to be reasonable for several reasons. First, it is the equivalent of one life of

Parliament, thus it allows a non-resident citizen to vote in at least one election. Second, the five-year period enhances the likelihood that non-resident voters were actually counted in the decennial census. Finally, the five-year period "may" reduce the possibility of extraterritorial abuse by limiting the number of non-resident citizens entitled to vote.

[134] The government also justifies the five-year period as reasonable compared to temporal limitations in other countries such as the U.K., Australia, and New Zealand.

[135] The Applicants argue that the legislation is too broad, catching many who do not fall within the government's objectives. Accordingly, the Respondent has not employed the least drastic means. Moreover, legislation cannot be saved by the mere fact that it is less restrictive than a blanket exclusion of all voters in the affected group.

Analysis

[136] In the context of this case, the five-year limitation and the requirement that the voter intend to return to Canada is overly broad. It prevents citizens like the Applicants (and the Respondent's expert, Dr. Eagles), who are highly informed and well connected to Canada, from voting while allowing all resident electors and some other non-residential electors, many of whom may be totally uninformed and disinterested, to vote.

[137] In *Sauvé #2* the Supreme Court found that the legislation did not minimally impair the *Charter* rights of inmates. In the context of this case, a similar reasoning applies. Even if it had been established that denying the right to vote to Canadian citizens non-resident for five years or more is rationally connected to enhancing fairness and preventing abuse in Canada's electoral system, it would nevertheless be too broad because it prevents many non-resident citizens whose knowledge of and connection to Canada are exceptional from voting.

[138] It is also impossible to substantiate the proposition that five years is a reasonable means of separating the informed and connected from the uninformed and unconnected. It is no answer to the overbreadth critique to say that the five-year limit only affects a limited class of people. The question is why individuals in the relevant class are singled out to have their rights taken away. The only real answer the government has provided to the question 'why five years?' which is not an *ex post facto* rationalization, is that it "felt" right to some Parliamentarians in some of the past Parliamentary debates.

[139] During the June 2006 Proceedings of the Standing Committee on Procedure and House Affairs, which ultimately recommended abolishing the five-year rule, the Committee's research assistant, Mr. Robertson, said the following:

> In the early 1990s, I believe as a result of the recommendation of the Lortie commission and the introduction of the Charter of Rights and Freedoms, the act was amended to allow citizens who are abroad for less than five years and are planning to come back to vote. I think the five years was brought in because there was a

> feeling there needed to be some connection and intention to return, and because it was an extension of a rule, that previously people had not been allowed to vote if they lived outside the country.
>
> 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 the new rule, a new provision, they built in those two requirements.

[140] I have real hesitation about the extent to which international comparisons are reliable or useful in this context. Canada is already a world leader in voter enfranchisement. For example, in a survey introduced through Dr. Eagles called "Deciding who has the right to vote: a comparative analysis of election laws" (Exhibit 10 to Dr. Eagles' Cross Examination) the authors point out that, of the 60 democracies surveyed, only four countries, Canada, Ireland, Italy, and Sweden, do not restrict in any way the right to vote for mentally challenged persons. The remaining 56 countries all have some kind of restriction. The authors also observe that "stronger democracies" are less inclined to disenfranchise citizens residing abroad. They wrote, "It must be kept in mind, however, that while there seems to be a clear norm among strong democracies that citizens residing abroad should be allowed to keep the right to vote, only a few exceptional countries have granted the same rights to mentally deficient persons." Prisoners are disenfranchised in 23 of the surveyed democracies, including Brazil, India, Portugal, the UK, and Australia. I also note that while Australia and New Zealand have non-resident rules which are superficially similar to Canada's, their rules are, in fact, much less stringent. Australia's six-year rule can be perpetually extended through annual application by the non-resident. New Zealand's three-year rule re-sets the clock every time the non-resident even visits the country. European Union cases reflect a very different approach to constitutional validity than that reflected in Canadian constitutional jurisprudence. Accordingly, I place little stock in the insights to be gleaned from international rules and authorities. They are of limited assistance in evaluating whether the impugned provisions of the *Act* in this case minimally impair the right to vote under s. 3.

[141] I agree with the Applicants that the five-year limitation and intention to return are overly drastic because there are less restrictive means to achieve the same objective. These limitations are not needed as a measure of a citizen's connection to Canada.

[142] If the very fact of being a citizen is not considered sufficient to create and sustain an individual's connection to Canada, then the act of voting itself is evidence of this connection. In order to vote, a Canadian citizen living outside the country must take a number of steps, including completing an application for special ballot, completing the special ballot, and ensuring that both documents arrive at Elections Canada on time. The voter needs to know the name of the relevant local candidate and, if he or she wishes to vote by party, must determine which candidate is connected with which party. Thus, the very act of being interested in and taking the steps to vote is evidence of the voter's connection to Canada. It is a self-testing

mechanism similar to that which was accepted for those with mental disabilities who were previously prohibited from voting under the *Act*: see *Canadian Disability Rights Counsel v. Canada, supra*.

[143] For these reasons, I do not think that the Respondent has shown that the means employed to achieve the purported objectives result in minimal impairment.

(c) Are the Effects Proportional?

The Parties' Positions

[144] The final step under the s. 1 analysis is to weigh the proportionality between the salutary and the deleterious effects of the limit in question. When weighing the benefits of legislation against its deleterious effects, the violation of s. 3 *Charter* rights will weigh heavily in the balance. As set out in *Figueroa* at para. 70,

> The right to participate in the selection of elected representatives is one of the touch stones of a free and democratic state. ... The deleterious effects associated with the violation of s. 3 are substantial.

[145] The Respondent argues that the salutary effects of not allowing non-resident citizens to vote after five years or more abroad are that Canada's electoral system and parliamentary representation system will remain fair to the resident majority of voters and it avoids the potential for electoral abuse by non-resident voting if it is expanded.

[146] The deleterious effect of the limit is that citizens who do not reside in Canada for five years or more are prohibited from voting and must resume residence in Canada before they are entitled to vote.

[147] The Respondent argues that the salutary effects outweigh the deleterious ones. Whether by their own choice or otherwise, the nature and consequences of the non-resident's vote is essentially different from that of a resident citizen because the resident remains subject to all obligations under Canadian law whereas the non-resident does not. The deleterious effect is only temporary in that it does not come into force until five years or more of non-residence and may be reversed at any time by the resumption of Canadian residence.

[148] The Applicants argue that the inability to vote leaves Canadian citizens living abroad with no voice in the direction or well-being of the country of which they are citizens and relegates them to the status of second-class citizens. Of Canadians abroad who were surveyed, 69% indicated that they had plans to return to Canada. Thus, a substantial majority of Canadians have a direct and important stake in the direction and future of Canada.

[149] The "substantial" deleterious effect of losing the right to vote weighs heavily against the tenuous salutary impacts urged by the Respondent. Voting from outside Canada by

(i) members of the Canadian Forces

(ii) members of the public service

(iii) Canadians working in certain international organizations

(iv) individuals living with any person in the aforesaid groups, and

(v) Canadians abroad for up to five years

has been in place for more than 20 years (not to mention non-resident voting from outside the electoral districts of incarcerated prisoners). In that 20 years, no complaint or problem has ever been raised about electoral abuse or the effects of voting by any of these individuals or groups on Canada's electoral and parliamentary system.

Analysis

[150] It is here, in the final balancing aspect of the s. 1 test, where the lack of substantive evidence of any actual problem resulting from non-resident voting comes home to roost. In my view, the vague assertions of unfairness to resident voters and the speculative nature of any negative impacts cannot outweigh the substantial, deleterious impact of stripping a Canadian citizen of his or her right to vote by virtue only of crossing the five-year non-resident threshold.

[151] The slight impact on Canadian elections, assuming any, of allowing non-resident citizens to vote cannot outweigh the seriousness of the s. 3 breach in this case. Many Canadian citizens who reside outside the country for legitimate employment-related or other reasons and who maintain strong ties to and care deeply about Canada, are prevented from having a voice in Canada's political life, while many others, both inside and outside the country, who may be less connected or concerned, are allowed to vote.

[152] The importance of the s. 3 right to vote, so consistently and repeatedly lauded and elevated by the Supreme Court of Canada, cannot be ousted by the type of alleged salutary effect put forward in this case.

[153] For these reasons, I find the Respondent has not discharged its burden of showing that the salutary effects of the limits to non-resident voting by Canadian citizens outweigh its deleterious impacts.

What is the Appropriate Remedy?

[154] The Respondent argues that, if the court finds that limiting the right to vote under Division 3 of Part 11 of the *Act* is a breach of s. 3 of the *Charter* which cannot be justified under s. 1, Parliament should be accorded maximum flexibility to determine how best to address the constitutional infirmity. This is said to be because of the foundational importance of residence in

Canada's electoral system and the Supreme Court's guidance in *Schachter v. Canada,* [1992] 2 S.C.R. 679.

[155] The Respondent argues that Parliament should be accorded a period of 12 months in order to fashion an appropriate remedy to address the constitutional infirmity. A period of 12 months is required (1) to determine how to reset the delicate balance between extending the franchise and not giving rise to unfairness for resident voters or jeopardizing the integrity of the electoral process and (2) to ensure passage of any required amendments through both Houses of the Parliament of Canada.

[156] In *Schachter*, the Supreme Court recognized that where benefit is "constitutionally encouraged," an assumption can be made that the extension of the permissible portion was a choice that could have been made by Parliament. This "strengthens the assumption that the legislature would have enacted it without the impermissible portion": at p. 714.

[157] Clearly, the *Charter* encourages the protection of democratic rights, including voting rights, for all citizens. Extending constitutionally protected rights to non-resident Canadian citizens cannot be considered a choice the legislature would inevitably not have made. In other words, by granting the remedy of striking out the impugned sections of the *Act*, the court would not be making a choice the legislature would not have made; it can be assumed that Parliament would legislate in compliance with the *Charter*.

[158] This conclusion is supported by the work of Parliament itself when considering this issue on several prior occasions:

(a) Bill C-79, which arose out of recommendations in the White Paper on Election Law Reform which recommended comprehensive reforms to the *Act*, including extending the franchise to voters living abroad and explicitly rejecting the five-year limitation on non-resident voting

(b) the multi-party Lortie Commission, which recommended treating non-resident Canadian citizens wishing to vote no differently than any other Canadian citizen

(c) the 2006 statutory report to Parliament of Mr. Kingsley following the 38th General Election in June 2004, which recommended the removal of the limitation on voting for those Canadians resident outside of Canada for five years or more and who intended to return to Canada as residents

(d) the House of Commons Standing Committee on Procedure and House Affairs which considered Mr. Kingsley's recommendation and, in June 2006, endorsed the view that the five-year limitation on voting for those living abroad should be removed from the legislation.

[159] An immediate declaration of invalidity would create no danger to the public or to the rule of law. Nor is this a situation where Parliament will be unable to hold an election due to the court's decision. There is no evidence that an election is anticipated within 12 months.

[160] Further, in all of the cases regarding the voting rights of Canadian citizens to date, courts have not given Parliament the flexibility that the Respondent now submits should be granted. Indeed, prisoners have had the right to vote since *Sauvé #1* and *#2* were released (but the *Act* has still not been amended since *Sauvé #2*). The ability of prisoners to vote today depends, not upon an act of Parliament but upon the Chief Electoral Officer making an alteration to the *Act* by direction in every election.

[161] For these reasons, the Applicants are entitled to the normal remedy of a declaration that the impugned provisions of the *Act* are unconstitutional as being in violation of s. 3 of the *Charter* and not saved by s. 1.

Conclusion

[162] In the result, I dispose of the three issues as follows:

(1) **Q.:** Do the impugned provisions of the *Canada Elections Act* violate s. 3 of the *Charter*? **A.:** Yes.

(2) **Q.:** If yes, are the limitations imposed by those provisions prescribed by law and demonstrably justified in a free and democratic society under s. 1 of the *Charter*? **A.:** No.

(3) **Q.:** If no, what is the appropriate remedy under ss. 24 and 52 of the *Charter*? **A.:** A declaration that:

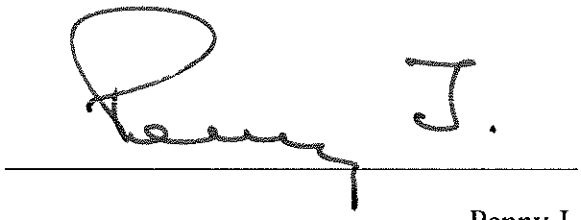
> subsection 11(d)
>
> paragraphs 222(1)(b) and (c) and 223(1)(f)
>
> subsection 226(f) and
>
> the word "temporarily" in section 220, subsection 222(1) and paragraph 223(1)(e)

are of no force or effect.

Costs

[163] I encourage the parties to seek to reach an accommodation on the issue of costs. In the absence of an agreement, any party seeking costs shall submit a brief written submission (not to exceed three typed double-spaced pages) together with a Bill of Costs and any supporting

material within two weeks of the release of these Reasons. A party wishing to respond to a request for costs shall submit a brief written submission (subject to the same page limit) within a further 10 days.



Penny J.

Date: May 2, 2014

SCHEDULE A

3. Every person who is a Canadian citizen and is 18 years of age or older on polling day is qualified as an elector.

4. The following persons are not entitled to vote at an election:

(a) the Chief Electoral Officer;

(b) the Assistant Chief Electoral Officer; and

(c) every person who is imprisoned in a correctional institution serving a sentence of two years or more. [*Although still on the statute book, 4(c) has been held by the S.C.C. to be of no force or effect.*]

6. Subject to this Act, every person who is qualified as an elector 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.

8. (1) The place of ordinary residence of a person is the place that has always been, or that has been adopted as, his or her dwelling place, and to which the person intends to return when away from it.

(2) A person can have only one place of ordinary residence and it cannot be lost until another is gained.

(3) Temporary absence from a place of ordinary residence does not cause a loss or change of place of ordinary residence.

(4) If a person usually sleeps in one place and has their meals or is employed in another place, their place of ordinary residence is where they sleep.

(5) Temporary residential quarters are considered to be a person's place of ordinary residence only if the person has no other place that they consider to be their residence.

(6) A shelter, hostel or similar institution that provides food, lodging or other social services to a person who has no dwelling place is that person's place of ordinary residence.

11. 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.

222. (1) The Chief Electoral Officer shall maintain a register of electors who are temporarily resident outside Canada in which is entered the name, date of birth, civic and mailing addresses, sex and electoral district of each elector who has filed an application for registration and special ballot and who

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

(b) has been residing outside Canada for less than five consecutive years immediately before making the application; and

(c) intends to return to Canada to resume residence in the future.

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

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

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

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

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

223. (1) An application for registration and special ballot may be made by an elector. It shall be in the prescribed form and shall include

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

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

(c) the elector's date of birth;

(d) the date the elector left Canada;

(e) the address of the elector's last place of ordinary residence in Canada before he or she left Canada or the address of the place of ordinary residence in Canada of the spouse, the common-law partner or a relative of the elector, a relative of the elector's spouse or common-law partner, a person in relation to whom the elector is a dependant or a person with whom the elector would live but for his or her residing temporarily outside Canada;

(f) the date on which the elector intends to resume residence in Canada;

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

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

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

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

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

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

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

(d) returns to Canada to reside;

(e) cannot be contacted; or

(f) except for an elector to whom any of paragraphs 222(2)(a) to (d) applies, has resided outside Canada for five consecutive years or more

CITATION: Frank et al. v. AG Canada, 2014 ONSC 907
COURT FILE NO.: CV-12-453976
DATE: 20140502

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

GILLIAN FRANK AND JAMIE DUONG

Applicants

– and –

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

Respondent

JUDGMENT

Penny J.

Date: May 2, 2014