S.C.C. File No. 36645

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

GILLIAN FRANK AND JAMIE DUONG

Appellants

AND:

THE ATTORNEY GENERAL OF CANADA

Respondent

AND:

THE ATTORNEY GENERAL OF NOVA SCOTIA, THE ATTORNEY GENERAL OF QUEBEC, CANADIAN AMERICAN BAR ASSOCIATION, CANADIAN EXPAT ASSOCIATION, DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS, UNIVERSITY OF TORONTO FACULTY OF LAW, CANADIAN CIVIL LIBERTIES ASSOCIATION, METRO TORONTO CHINESE AND SOUTHEAST ASIAN LEGAL CLINIC and BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Intervenors

FACTUM OF THE INTERVENER, CANADIAN EXPAT ASSOCIATION

OSLER, HOSKIN & HARCOURT LLP
Suite 2500, TransCanada Tower
450 – 1st Street SW
Calgary, AB T2P 5H1

Colin Feasby / Brynne Harding / Sean Sutherland
Tel: (403) 260-7000
Fax: (403) 260-7024
Email : cfeasby@osler.com
bharding@osler.com
ssutherland@osler.com

Counsel for the Intervener, Canadian Expat Association

OSLER, HOSKIN & HARCOURT LLP
Suite 1900, 340 Albert Street
Ottawa, ON K1R 7Y6

Patricia J. Wilson / Geoffrey Langen
Tel: (613) 787-1009/787-1015
Fax: (613) 235-2867
Email: pwilson@osler.com
glangen@osler.com

Ottawa Agent for Counsel for the Intervener, Canadian Expat Association

ORIGINAL TO: **THE REGISTRAR OF THE SUPREME COURT OF CANADA**

AND TO:

CAVALLUZZO SHILTON McINTYRE CORNISH LLP
Barristers & Solicitors
474 Bathurst Street, Suite 300
Toronto, ON M5T 2S6

Shaun O'Brien
Amanda Darrach
Tel: (416) 964-1115
Fax: (416) 964-5895

Counsel for the Appellants

SUPREME ADVOCACY LLP
340 Gilmour Street, Suite 100
Ottawa, ON K2P 0R3

Marie-France Major
Tel: (613) 695-8855
Fax: (613) 695-8580
Email : mfmajor@supremeadvocacy.ca

Ottawa Agents for Counsel for the Appellants

ATTORNEY GENERAL OF CANADA
Department of Justice
The Exchange Tower
130 King Street West
Suite 3400, Box 36
Toronto, ON M5X 1K6

Peter Southey
Gail Sinclair
Peter Hajecek
Tel: (416) 973-2240
(416) 954-8109
(416) 973-9035
Fax: (416) 973-0809
Email: peter.southey@justice.gc.ca
gail.sinclair@justice.gc.ca
peter.hajecek@justice.gc.ca

Counsel for the Respondent

ATTORNEY GENERAL OF CANADA
50 O'Connor Street, Suite 500, Room 557
Ottawa, ON K1A 0H8

Christopher Rupar
Tel: (613) 670-6290
Fax: (613) 954-1920
Email: christopher.rupar@justice.gc.ca

Agent for the Respondent

ATTORNEY GENERAL OF NOVA SCOTIA
1690 Hollis Street, 10th Floor
Halifax, NS B3J 3J0

Edward A. Gores, Q.C.
Tel: (902) 424-4024
Fax: (9020 424-1730
Email: goresea@gov.ns.ca

GOWLING WLG (CANADA) INC.
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Counsel for the Attorney General of Nova Scotia

PROCUREUR GÉNÉRAL QUÉBEC
1200, route de l'Église, 2e étage
Québec, QC G1V 4M1

Dominique A. Jobin
Tel: (418) 643-1477 ext: 20788
Fax: (418) 644-7030
Email: djobin@justice.gouv.qc.ca

Agent for the Attorney General of Nova Scotia

NOËL & ASSOCIÉS
111, rue Champlain
Gatineau, QC J8X 3R1

Pierre Landry
Tel: (819) 771-7393
Fax: (819) 771-5397
Email: p.landry@noelassocies.com

Counsel for the Attorney General of Quebec

BLAKE, CASSELS & GRAYDON LLP
199 Bay Street, P.O. Box 25
Commerce Court West, Suite 4000
Toronto, Ontario M5L 1A9

Bradley E. Berg
Max Shapiro
Peter W. Hogg
Tel: (416) 863-4316
Fax: (416) 863-2653
E-mail: brad.berg@blakes.com

Agent for the Attorney General of Quebec

BLAKE, CASSELS & GRAYDON LLP
1750 - 340 Albert Street
Constitution Square, Tower 3
Ottawa, Ontario K1R 7Y6

Nancy K. Brooks
Tel: (613) 788-2218
Fax: (613) 788-2247
E-mail: nancy.brooks@blakes.com

Counsel for the Canadian American Bar Association

DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS, UNIVERSITY OF TORONTO FACULTY OF LAW
University of Toronto
78 Queen's Park
Toronto, Ontario M5S 2C5

Audrey Macklin
Tel: (416) 978-0092
Fax: (416) 978-8894
E-mail: audrey.macklin@utoronto.ca

Agent for the Canadian American Bar Association

GOLDBLATT PARTNERS LLP
500-30 Metcalfe St.
Ottawa, Ontario K1P 5L4

Colleen Bauman
Tel: (613) 482-2463
Fax: (613) 235-3041
E-mail: cbauman@goldblattpartners.com

Counsel for David Asper Centre for Constitutional Rights, University of Toronto Faculty of Law

Agent for David Asper Centre for Constitutional Rights, University of Toronto Faculty of Law

LERNERS LLP 130 Adelaide Street West Suite 2400 Toronto, Ontario M5H 3P5 **Mark J. Freiman** **Jameel Madhany** Tel: (416) 601-2370 Fax: (416) 867-2453 E-mail: mfreiman@lerners.ca **Counsel for Canadian Civil Liberties Association**	**GOWLING WLG (CANADA) LLP** 2600 - 160 Elgin Street P.O. Box 466, Stn. A Ottawa, Ontario K1P 1C3 **Matthew Estabrooks** Tel: (613) 786-0211 Fax: (613) 788-3573 E-mail: matthew.estabrooks@gowlingwlg.com **Agent for Canadian Civil Liberties Association**
METRO TORONTO CHINESE & SOUTHEAST ASIAN LEGAL CLINIC 180 Dundas Street West, Suite 1701 Toronto, Ontario M5G 1Z8 **Avvy Yao Yao Go** Tel: (416) 971-9674 Fax: (416) 971-6780 E-mail: goa@lao.on.ca **Counsel for Metro Toronto Chinese & Southeast Asian**	
STOCKWOODS LLP 77 King Street West, Suite 4130 P.O. Box 140 Toronto, Ontario M5K 1H1 **Brendan Van Niejenhuis** **Stephen Aylward** **Tel: (416) 593-7200** **Fax: (416) 593-9345** **E-mail: brendanvn@stockwoods.ca** **Counsel for British Columbia Civil Liberties Association**	Michael J. Sobkin 331 Somerset Street West Ottawa, Ontario K2P 0J8 Tel: (613) 282-1712 Fax: (613) 288-2896 E-mail: msobkin@sympatico.ca **Agent for British Columbia Civil Liberties Association**

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PART I. OVERVIEW

1. The right to vote, guaranteed by section 3 of the *Canadian Charter of Rights and Freedoms*, lies at the heart of Canadian democracy and is a defining characteristic of Canadian citizenship. This appeal considers whether Parliament can deprive Canadian citizens abroad for more than five years ("Expats") of this core democratic right in federal elections. A majority of the Court of Appeal for Ontario found the disenfranchisement of Expats was a reasonable limit justified in a free and democratic society; Justice Laskin and the Application Judge found it was not.

2. The intervener the Canadian Expat Association, Canada's largest organization dedicated to Canadians living abroad, has two brief submissions.

3. ***First***, the majority erred in finding the alleged "social contract" to be a "pressing and substantial objective" that justifies disenfranchisement of Expats. The social contract is a fiction and a tautology. The majority failed to properly consider: (i) the *Charter*'s express definition of the political community as one based on citizenship, not residency; (ii) the legal context in which section 3 of the *Charter* was drafted; and (iii) the relationship between Parliament, Canadian law and non-resident citizens.

4. ***Second***, the majority erred by failing to consider as part of the overall balancing of salutary and deleterious effects—the very heart of proportionality—the expressive harms of stripping Expats' right to vote. "Expressive" harms are those that arise from the ideas or attitude expressed by government action. By depriving Expats of their right to vote, Parliament has devalued their Canadian citizenship and signalled that Expats are second-class citizens and less worthy of respect under Canadian law. For Expats whose identity is deeply Canadian, this expressive harm to their dignity and personhood is demeaning and harmful. When combined with the direct harms of the impugned law (the loss of the ability to cast a vote and express a preference), these harms outweigh all justifications offered by the government.

PART II. ARGUMENT

A. The Social Contract Theory is a Fiction and a Tautology

5. The Attorney General of Canada's social contract theory, and the majority's adoption of that theory, is circular and based on a flawed premise.

6. The Attorney General summarizes the social contract as one that links "a voice in making the law" to the obligation to obey the law, and describes it as "the vital, symbolic, theoretical and practical connection that stands at the heart of our system of constitutional democracy."[1] The majority similarly reasoned that "preserving the connection between citizens' obligation to obey the law and their right to elect lawmakers – strengthening the social contract – is a pressing and substantial objective".[2]

7. Social contract theory, though controversial, has a long pedigree in western philosophy. Proponents and adversaries of the theory alike recognize the essential fact that the social contract is an imaginary device. It is an argument, no more and no less, to justify the power of the state, economic inequality, and the obligation to obey the law. It is not a legal contract in any sense.

8. A central objection to social contract theory is the absence of meaningful consent. The social contract purports to "bind all of the people all of the time".[3] Theorists dispute whether parties to the "contract" enjoy a real choice prior to entry, and whether they have a mechanism to signal dissent.[4] These questions are especially important with respect to the people who are disadvantaged by the terms of the purported contract.[5]

9. The social contract envisioned by the majority obliges individuals to obey the law and, in exchange, entitles them to vote. This fictitious contract does not reflect the real Canada. Canadian society is made up of resident adult citizens entitled to vote, minor citizens who are not permitted to vote, permanent residents who are not permitted to vote, and others legally entitled to reside in

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[1] Respondent's Factum, ¶64.
[2] *Frank v. Canada (Attorney General)*, 2015 ONCA 536 [**Court of Appeal Decision**], Canadian Expat Association Book of Authorities [**CEBA**], Tab 2, ¶93.
[3] Tamar L. Smith, "The Obligation to Obey Law: A New Theory and an Old Problem," (1990) 28 Osgoode Hall L.J. 859, CEBA, Tab 21, at 865, 867;
aw," (1992) 92 Colum. L. Rev. 651, CEBA, Tab 14, at 678.
[4] *Id.*
[5] For a related critique see Martha C. Nussbaum, "Beyond the Social Contract: Capabilities and Global Justice," *Oxford Development Studies*, Vol. 32, No. 1, March 2004, CEBA, Tab 17, at 3-4.

Canada who are not permitted to vote (*e.g.*, refugee claimants awaiting hearings). All of these people are obliged to obey the law. The right of resident adult citizens to vote does not provide a satisfactory account of why members of Canadian society who are not permitted to vote must obey the law.

10. A second controversy in social contract theory concerns who is included in the contract. Classical social contract theory envisioned as legitimate a constitutional monarchy that was in effect a class state: a state wherein a small class of amply propertied males exercised political rights to vote, hold office, exercise political and social influence, and enjoy other important benefits and responsibilities, to the exclusion of everyone else.[6] This theory posited a social contract only between those members of society whose interests are served by the contract.

11. A similar strategy of exclusion is deployed by the Attorney General in this case. The Attorney General's theory ***presumes*** that the social contract is amongst a national political community defined by residency. Based on that presumption, the Attorney General and the majority reach the inevitable conclusion that a political community of residents is strengthened by excluding non-residents from voting. This reasoning is circular.

12. Furthermore, the presumption that the social contract is amongst a national political community defined by residency is flawed for three reasons.

13. ***First***, the *Charter* expressly defines the national political community as one based on citizenship, not residency. All residents of Canada and even those temporarily within Canada's borders enjoy most *Charter* rights; only certain rights are reserved to citizens. Amongst those *Charter* rights reserved to citizens, political rights are unique in that they are not (to any extent) qualified by residency. All of the other citizens' rights, like mobility rights in section 6 and minority language education rights in section 23, refer to residency. [7]

14. ***Second***, the majority's presumption ignores the legal context in which section 3 of the *Charter* was drafted. At common law and under the *Canadian Bill of Rights* there was no right to vote. Rather, each legislative body had the power to enact its own voting qualifications, including

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[6] John Rawls, *Lectures on the History of Political Philosophy*, Samuel Freeman, ed. (Cambridge: Harvard University Press, 2007), CEBA, Tab 20, at 103-105, 138–139.

[7] *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 [***Charter***], ss. 6, 23.

the power to exclude certain classes of citizens.[8] For example, the Judicial Committee of the Privy Council ruled in 1903 in *Cunningham v. Tomey Homma* that citizens of Japanese origin could lawfully be excluded from voting in British Columbia.[9]

15. Rather than following the common law, the *Charter* granted a constitutional right to vote to citizens without reference to residency. The *Charter* determined that the national political community would be defined by citizenship, not residence. As Laskin J.A. wrote in dissent:

> For my colleagues and the Attorney General, residence in Canada appears to be a proxy for participation in the social contract, and thus is the philosophical foundation of the right to vote. And in the years leading up to enactment of the *Charter*, Canadian residence, with few exceptions, was the defining criterion of the right to vote. But in 1982 the framers of the *Charter* discarded Canadian residence for another defining criterion: Canadian citizenship, and nothing more.[10]

16. ***Third***, Parliament is responsible for more than mere passage of domestic laws imposed on and enforceable against residents. The actions of Parliament affect the standing of Canada in the world, including Canadian expatriates living abroad, and what it means to be Canadian.[11] As Laskin J.A. recognized, non-residents have the same obligation to obey the laws that affect them as do residents.[12] For example, non-residents pay Canadian income tax on their Canadian income, and property tax on any real property that they own in Canada. By defining the social contract in terms of residency the majority disregarded the impact of Canadian law and policy choices on Expats and, instead, endorsed a narrow view of Parliament's impact on citizens.

17. Accordingly, based on its circularity, flawed premise and other valid objections to social contract theory raised by the Appellants, the Attorney General's social contract theory does not represent a pressing and substantial objective.

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[8] Peter W. Hogg, *Constitutional Law of Canada* (loose-leaf), 5th ed. supplemented, Vol. 2, [**Hogg**], CEBA, Tab 15, at 45-1.
[9] *Cunningham v. Tomey Homma*, [1903] A.C. 151, CEBA, Tab 5.
[10] Court of Appeal Decision, above, note 2, CEBA, Tab 2, ¶170. See also ¶¶221, 236.
[11] See also the Appellants' Factum, ¶¶78-80.
[12] Court of Appeal Decision, above, note 2, CEBA, Tab 2, ¶ 224.

B. The Weighing of Tenuous Objectives Against Direct and Expressive Harms to Expats

(a) The Final Balancing is "the very heart of proportionality"

18. The fourth element of the *Oakes* test is "the very heart of proportionality."[13] It invites courts to "stand back to determine on a normative basis whether a rights infringement is justified in a free and democratic society".[14] This Court has recognized the right to vote as central to Canadian democracy.[15] Government justificatory goals must be weighed against the direct and expressive harms of the law, both to Expats and to Canadian democracy.

(b) Removing Expats' Right to Vote Causes Direct Harm

19. The impugned law's direct harm to Expats is the loss of the ability to cast a vote and express a preference. The right to vote is "one of the touchstones of a free and democratic state".[16] It is among the most fundamental rights and responsibilities of Canadian citizenship.[17] The deleterious effects of its deprivation are "substantial."[18] As this Court recognized in *Sauvé #2*, the denial of basic political rights on its own constitutes harm to the affected citizens.[19]

(c) Depriving Expats' Right to Vote Causes Expressive Harm

(i) The Meaning of "Expressive Harm"

20. An expressive harm "results from the ideas or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about." Expressive harms recognize that "[p]ublic policies can violate the Constitution not only because they bring about concrete costs, but because ***the very meaning they convey demonstrates***

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[13] Aharon Barak, "Proportional Effect: the Israeli Experience" (2007), 57 U.T.L.J. 369, [**The Israeli Experience**], CEBA, Tab 10, at 380, cited in *R. v. K.R.J.*, 2016 SCC 31, [***K.R.J.***], CEBA, Tab 7, ¶78.

[14] *K.R.J.*, *Id.*, ¶79.

[15] *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519 [***Sauvé #2***], Appellants' Book of Authorities [**ABA**], Tab 29, ¶27.

[16] *Figueroa v. Canada (Attorney General)*, 2003 SCC 37, [2003] 1 S.C.R. 912, ABA, Tab 7, ¶70; *Sauvé #2*, *Id.*, ABA, Tab 29, ¶1 ("***The right of every citizen to vote … lies at the heart of Canadian democracy***").

[17] Government of Canada, "Discover Canada: The Rights and Responsibilities of Citizenship", online: <http://www.cic.gc.ca/English/resources/publications/discover/section-04.asp> ("The right to vote comes with a responsibility to vote in federal, provincial or territorial and local elections"), CEBA, Tab 13; Chief Electoral Officer of Canada, "A History of the Vote in Canada" (2007), online: <http://www.elections.ca/res/his/History-Eng_Text.pdf> ("Canadians see voting not only as a treasured right but also as a civic obligation – a way of acting on our commitment to democratic principles and protecting our stake in Canada's political life.") [**A History of the Vote in Canada**], CEBA, Tab 11, at xi.

[18] *Id*.

[19] *Sauvé #2*, above, note 15, ABA Tab 29, ¶59.

inappropriate respect for relevant public values."[20] The existence of expressive harm is recognized in Canadian law, international law, and academic commentary.

21. This Court recognized the existence of expressive harm in *Vriend v. Alberta* (1998). A majority of this Court reasoned that omitting sexual exclusion from prohibited grounds of discrimination in human rights legislation "***sends a message*** to all Albertans that it is permissible, and perhaps even acceptable, to discriminate against individuals on the basis of their sexual orientation … the implicit message conveyed by the exclusion [is] that gays and lesbians, unlike other individuals, are not worthy of protection."[21]

22. The Supreme Court of the United States accepted the important role of expressive harms in the context of voting and election jurisprudence. In *Shaw v. Reno* (1993), O'Connor J. (writing for the majority) reasoned that drawing electoral districts using race as a primary criterion communicated "the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls." O'Connor J. went on to conclude that the meaning expressed by the law, quite apart from concrete effects, caused harm.[22]

(ii) The Law's Expressive Harm to Expats

23. The impugned law's expressive harm to Expats is Parliamentary devaluation of their Canadian citizenship, their membership in the national community, and their worth and dignity as proud Canadians. Enfranchisement signals membership in the political community, while exclusion communicates second-class citizenship.

24. Professor Ronald Dworkin has observed that the consequences of enfranchisement are: (i) ***symbolic***, confirming membership in the decision-making class for free and equal citizens and identifying excluded individuals as "not fully respected or not fully a member"; and (ii) ***communal***, nourishing participants' sense of sharing fully in the pride or shame of the collective

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[20] Richard H. Pildes & Richard G. Niemi, "Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances after *Shaw v. Reno*", 92 Mich. L. Rev. 483, CEBA, Tab 19, at 506-507 [emphasis added].

[21] *Vriend v. Alberta*, [1998] 1 S.C.R. 493, CEBA, Tab 9, ¶¶101-102 [emphasis added].

[22] *Shaw v. Reno*, 509 U.S. 630 (1993), CEBA, Tab 8, at 647 (see also 648: "The message that such districting sends to elected representatives is equally pernicious. When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole.").

decision.[23] The right to vote is an affirmation of belonging "that signals the jurisdiction's acceptance of the voter as a full citizen within the polity. Denial of the vote is tantamount to exclusion from the community or relegation to second-class citizenship, ***with the message of exclusion being the primary harm produced***."[24]

25. Through legislative amendment or through the court process, Canada has eliminated all limits on the rights of adult citizens to vote including: gender, race, class, employment, and mental disability.[25] For each of these categories of citizen, exclusion from the right to vote was perceived as a badge of second-class citizenship as it is today for Expats.

26. A majority of this Court held in *Sauvé #2* that the denial of the right to vote to penitentiary inmates "curtails the personal rights of the citizen to political expression and participation in the political life of his or her country. ***It countermands the message that everyone is equally worthy and entitled to respect under the law — that everybody counts***".[26] The majority in *Sauvé #2* reasoned further that "denying citizens the right to vote runs counter to our constitutional commitment to the ***inherent worth and dignity of every individual*** … 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*."[27]

27. Regarding the right to vote, the South African Constitutional Court has held, in words quoted with approval by this Court: "[t]he vote of each and every citizen is a ***badge of dignity and of personhood***. Quite literally, it says that ***everybody counts***."[28] Denying Expats the right to vote causes serious harm to their dignity and personhood as proud Canadians.

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[23] Ronald Dworkin, "What is Equality? Part 4: Political Equality" (1987-1988) 22 U.S.F. L. Rev. 1, CEBA, Tab 12, at 4.

[24] Ellen D. Katz, "Race and the Right to Vote After *Rice v Cayetano*", (2000) 99 Mich. L. Rev. 491, CEBA, Tab 16, at 512-513 [emphasis added]. See also Spencer Overton, "A Place at the Table: *Bush v. Gore* through the Lens of Race", (2001-2002) 29 Fla. St. U. L. Rev. 469, CEBA, Tab 18, at 485 ("***Exclusion from the political process conveys a form of second-class citizenship on those who are excluded***." [emphasis added]).

[25] *Sauvé #2,* above, note 15, ABA, Tab 29, ¶33; Hogg, above, note 8, CEBA, Tab 15.

[26] *Sauvé #2,* ABA, Tab 29, ¶58 [emphasis added].

[27] *Sauvé #2, Id.*, ¶35 [emphasis added].

[28] *August v. Electoral Commission*, 1999 (3) SALR 1, CEBA, Tab 4, ¶17, cited in *Sauvé #2, Id*., ¶35 [emphasis added].

(iii) The Law's Expressive Harm to Canadian Democracy

28. The Attorney General and the majority assert that disenfranchising Expats strengthens the social contract. This argument is premised on the expressive dimension of the impugned law. The government believes that disenfranchising Expats will send a message that causes resident citizens to value their democratic rights more.

29. The government's assertion is unsupported by evidence because the social contract theory, like all thought experiments, is inherently incapable of proof. Furthermore, it is a principle of Canadian electoral law that a restricted franchise undermines the legitimacy of government. As stated by McLachlin C.J.C. in *Sauvé #2*:

> A government that restricts the franchise to a select portion of citizens is a government that ***weakens its ability to function as the legitimate representation*** of the excluded citizens, jeopardizes its claim to representative democracy, and erodes the basis of its right to convict and punish law-breakers.[29]

30. Laskin J.A., dissenting, recognized the expressive harms of the impugned law to Canadian democratic values. The right to vote, in his rendering, is the "most fundamental benefit of citizenship, constitutionally guaranteed in Canada."[30] Its deprivation must inevitably have a serious adverse impact. He acknowledged that disenfranchisement turns Expats into second-class citizens, ***"and so undermines the values of equality and inclusiveness stressed in Sauvé and underlying our Charter rights"***.[31]

(d) The Majority Erred in Ignoring the Expressive Harms to Expats

31. Although the final balancing is recognized at law as "the very heart of proportionality",[32] the majority provided only brief reasoning in concluding that the alleged benefit of strengthening the social contract outweighed the harmful effects of disenfranchising Expats.[33] The majority did not consider the expressive harms of the impugned law.

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[29] *Sauvé #2, Id.*, ¶34 [emphasis added].
[30] Court of Appeal Decision, above, note 2, CEBA, Tab 2, ¶248.
[31] *Id.*, ¶248 [emphasis added]. See also *Frank et al. v. Canada (Attorney General)*, 2014 ONSC 907, CEBA, Tab 2, ¶124.
[32] The Israeli Experience, above, note 13, CEBA, Tab 10, at 380, cited in *K.R.J.*, above, note 13, CEBA, Tab 7, ¶78.
[33] Court of Appeal Decision, above, note 2, CEBA, Tab 2, ¶¶155-159.

32. Instead, the majority refused to entertain the idea that Expats who could not vote were treated as "second class" citizens.[34] Rather than recognize the expressive harms to Expats, the majority reasons themselves affirmed the government's message that "Expats don't count".

33. This Court has long held that deleterious effects of an impugned law are measured by "the values underlying the *Charter*".[35] The protection of human dignity has been recognized by this Court as the "lodestar" to the protection of all *Charter* rights.[36] As Dickson C.J.C. explained in formulating the *Oakes* test: "the Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, ***respect for the inherent dignity of the human person***".[37]

34. To properly weigh the deleterious effects of depriving Expats of the right to vote, this Court must consider the expressive harms to Expats. The impugned law's harm to the dignity and personhood of Expats weighs heavily against its justification.

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[34] *Id.*, ¶¶158-159.
[35] *Thomson Newspapers v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, ABA, Tab 33, ¶125.
[36] *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, CEBA, Tab 6, ¶21.
[37] *R. v. Oakes*, [1986] 1 S.C.R. 103, ABA Tab 19, at 136 [emphasis added]. See also *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, CEBA, Tab 3, ¶88.

PART III. ORDER SOUGHT

35. The Canadian Expat Association supports the Appellants' request that this Court overturn the Court of Appeal decision and substitute the decision of the Ontario Superior Court of Justice declaring the impugned law unconstitutional as being in violation of section 3 of the *Charter* and not saved by section 1 of the *Charter*. The Canadian Expat Association does not seek costs and asks that no costs be ordered against it. The Canadian Expat Association seeks leave to present 10 minutes of oral argument.

DATED at Calgary this 9th day of December, 2016.

Colin Feasby

Brynne Harding

Sean Sutherland

OSLER, HOSKIN & HARCOURT LLP
Counsel for the Canadian Expat Association

PART IV. TABLE OF AUTHORITIES

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PART V. STATUTORY PROVISIONS

3. Democratic Rights

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.

6. Mobility Rights

(1) Every citizen of Canada has the right to enter, remain in and leave Canada.

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

(a) to move to and take up residence in any province; and

(b) to pursue the gaining of a livelihood in any province.

(3) The rights specified in subsection (2) are subject to

(a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and

(b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

23. Minority Language Education Rights

(1) Citizens of Canada

(a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

(b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,

have the right to have their children receive primary and secondary school instruction in that language in that province.

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

(a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

(b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.