

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

BETWEEN:

**GILLIAN FRANK AND JAMIE DUONG**

Appellants

- and -

**ATTORNEY GENERAL OF CANADA**

Respondent

- and -

**ATTORNEY GENERAL OF QUEBEC, ATTORNEY GENERAL OF NOVA SCOTIA,  
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**

Interveners

---

**FACTUM OF THE INTERVENER**  
**CANADIAN AMERICAN BAR ASSOCIATION**

---

**BLAKE, CASSELS & GRAYDON LLP**

Barristers and Solicitors  
Suite 4000, Commerce Court West  
199 Bay Street  
Toronto, ON M5L 1A9

**Bradley E. Berg** LSUC #38755M

**Max Shapiro** LSUC #60602U

**Peter W. Hogg** LSUC #13249G

Tel: 416-863-2400

Fax: 416-863-2653

Email: [brad.berg@blakes.com](mailto:brad.berg@blakes.com)

[max.shapiro@blakes.com](mailto:max.shapiro@blakes.com)

[peter.hogg@blakes.com](mailto:peter.hogg@blakes.com)

Lawyers for the Intervener,  
Canadian American Bar Association

**BLAKE, CASSELS & GRAYDON LLP**

Barristers and Solicitors  
Suite 2000, World Exchange Plaza  
45 O'Connor Street  
Ottawa, ON K1P 1A4

**Nancy Brooks** LSUC #37690H

Tel: 613-788-2218

Fax: 613-788-2247

Email: [nancy.brooks@blakes.com](mailto:nancy.brooks@blakes.com)

Agent for the Intervener,  
Canadian American Bar Association

**Ivo Entchev** (Member of the New York Bar)

**Valérie Scott** (Member of the New York Bar)

Of Counsel for the Intervener,  
Canadian American Bar Association

**ORIGINAL TO:     ROGER BILODEAU, Q.C.**  
**Registrar of the Supreme Court of Canada**  
Supreme Court of Canada  
301 Wellington Street  
Ottawa, ON K1A 0J1

**COPIES TO:**

**CAVALUZZO 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  
Email: [sobrien@cavalluzzo.com](mailto:sobrien@cavalluzzo.com)

Counsel for the Appellants,  
Gillian Frank and Jamie Duong

**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  
Fax: 416-973-0809  
Email: [peter.southey@justice.gc.ca](mailto:peter.southey@justice.gc.ca)  
[gail.sinclair@justice.gc.ca](mailto:gail.sinclair@justice.gc.ca)  
[peter.hajecek@justice.gc.ca](mailto:peter.hajecek@justice.gc.ca)

Counsel for the Respondent,  
Attorney General of Canada

**SUPREME ADVOCACY LLP**  
340 Gilmour Street  
Ottawa, ON K1P 5L4

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

Ottawa Agents for the Appellants,  
Gillian Frank and Jamie Duong

**William F. Pentney, Q.C.**  
**Deputy Attorney General of Canada**  
50 O'Connor Street, Suite 500, Room 557  
Ottawa, ON K1A 0H8

**Christopher M. Rupar**  
Tel: 613- 941-2351  
Fax: 613-954-1920  
Email: [christopher.rupar@justice.gc.ca](mailto:christopher.rupar@justice.gc.ca)

Agent for the Respondent,  
Attorney General of Canada

**ATTORNEY GENERAL OF NOVA SCOTIA**

1690 Hollis Street, 10th Floor  
Halifax, NS B3J 3J9

**Edward A. Gores, Q.C.**

Tel: 902-424-4024  
Fax: 902-424-1730  
E-mail: [goresea@gov.ns.ca](mailto:goresea@gov.ns.ca)

Counsel for the Intervener,  
Attorney General of Nova Scotia

**PROCUREUR GÉNÉRAL DU 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  
E-mail: [djobin@justice.gouv.qc.ca](mailto:djobin@justice.gouv.qc.ca)

Counsel for the Intervener,  
Attorney General of Québec

**OSLER, HOSKIN & HARCOURT LLP**

Suite 2500 – TransCanada Tower  
450 – 1st Street S.W.  
Calgary, AB T2P 5H1

**Colin C.J. Feasby**

**Sean Sutherland**

**Geoffrey Langen**

Tel: 450-260-7067  
Fax: 450-260-7024  
Email: [cfeasby@osler.com](mailto:cfeasby@osler.com)

Counsel for the Intervener,  
Canadian Expat Association

**GOWLING WLG (CANADA) INC.**

160 Elgin Street, Suite 2600  
Ottawa, ON K1P 1C3

**D. Lynne Watt**

Tel: 613-786-8695  
Fax: 613-788-3509  
E-mail: [lynne.watt@gowlingwlg.com](mailto:lynne.watt@gowlingwlg.com)

Agent for the Intervener,  
Attorney General of Nova Scotia

**NOËL & ASSOCIÉS**

111, rue Champlain  
Gatineau, QC J8X 3R1

**Pierre Landry**

Tel: 819-771-7393  
Fax: 819-771-5397  
E-mail: [p.landry@noelassocies.com](mailto:p.landry@noelassocies.com)

Agent for the Intervener,  
Attorney General of Québec

**OSLER, HOSKIN & HARCOURT LLP**

340 Albert Street  
Suite 1900  
Ottawa, ON K1R 7Y6

**Patricia J. Wilson**

Tel: 613-787-1009  
Fax: 613-235-2867  
E-mail: [pwilson@osler.com](mailto:pwilson@osler.com)

Agent for the Intervener,  
Canadian Expat Association

**DAVID ASPER CENTRE FOR  
CONSTITUTIONAL RIGHTS,  
UNIVERSITY OF TORONTO  
FACULTY OF LAW**

University of Toronto  
78 Queen's Park  
Toronto, ON M5S 2C5

**Audrey Macklin**

Tel: 416-978-0092  
Fax: 416-978-8894  
E-mail: [audrey.macklin@utoronto.ca](mailto:audrey.macklin@utoronto.ca)

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

**LERNERS LLP**

130 Adelaide Street West  
Suite 2400  
Toronto, ON M5H 3P5

**Mark J. Freiman**

**Jameel Madhany**

Tel: 416-601-2370  
Fax: 416-867-2453  
E-mail: [mfreiman@lernalers.ca](mailto:mfreiman@lernalers.ca)

Counsel for the Intervener,  
Canadian Civil Liberties Association

**METRO TORONTO CHINESE AND  
SOUTHEAST ASIAN LEGAL CLINIC**

180 Dundas Street West  
Suite 1701  
Toronto, ON M5G 1Z8

**Avvy Yao Yao Go**

Tel: 416-971-9674  
Fax: 416-971-6780  
E-mail: [goa@lao.on.ca](mailto:goa@lao.on.ca)

Counsel for the Intervener,  
Metro Toronto Chinese and Southeast Asian  
Legal Clinic

**GOLDBLATT PARTNERS LLP**

500-30 Metcalfe St.  
Ottawa, ON K1P 5L4

**Colleen Bauman**

Tel: 613-482-2463  
Fax: 613-235-3041  
E-mail: [cbauman@goldblattpartners.com](mailto:cbauman@goldblattpartners.com)

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

**GOWLING WLG (CANADA) LLP**

2600 - 160 Elgin Street  
P.O. Box 466, Stn. A  
Ottawa, ON K1P 1C3

**Matthew Estabrooks**

Tel: 613-786-0211  
Fax: 613-788-3573  
Email: [matthew.estabrooks@gowlingwlg.com](mailto:matthew.estabrooks@gowlingwlg.com)

Agent for the Intervener,  
Canadian Civil Liberties Association

**STOCKWOODS LLP**  
77 King Street West, Suite 4130  
P.O. Box 140  
Toronto, ON M5K 1H1

**Brendan Van Niejenhuis**  
**Stephen Aylward**

Tel: 416-593-7200  
Fax: 416-593-9345  
E-mail: [brendanvn@stockwoods.ca](mailto:brendanvn@stockwoods.ca)

Counsel for the Intervener,  
British Columbia Civil Liberties Association

331 Somerset Street West  
Ottawa, ON K2P 0J8

**Michael J. Sobkin**

Tel: 613-282-1712  
Fax: 613-288-2896  
E-mail: [msobkin@sympatico.ca](mailto:msobkin@sympatico.ca)

Agent for the Intervener,  
British Columbia Civil Liberties Association

**TABLE OF CONTENTS**

**PART I – OVERVIEW AND STATEMENT OF FACTS** ..... 1

**PART II – POSITION ON THE APPELLANTS’ ISSUES** ..... 2

**PART III – STATEMENT OF ARGUMENT**..... 2

**A. The Nature of the Voting Right Demands Attention and Strict Scrutiny**..... 2

**B. The Government’s Impoverished Section 1 Objective Should be Rejected** ..... 3

**(i) A burdens-based objective that creates a hierarchy of *Charter* rights-holders is inappropriate**..... 3

**(ii) A territory-based objective is outdated and wrong**..... 7

**(iii) The purported objective obscures vital aspects of the right to vote** ..... 8

**PART IV – SUBMISSIONS ON COSTS**..... 10

**PART V – REQUEST TO MAKE ORAL SUBMISSIONS** ..... 10

**PART VI – TABLE OF AUTHORITIES**..... 11

**PART VII – LEGISLATION AT ISSUE**..... 12

## **PART I – OVERVIEW AND STATEMENT OF FACTS**

1. Section 3 of the *Canadian Charter of Rights and Freedoms* (“**Charter**”)<sup>1</sup> provides that “every citizen of Canada has the right to vote”. The right does not expire or wither away with time. The provisions of the *Canada Elections Act*, S.C. 2000, c. 9 (“**Act**”), at issue in this appeal expressly deny that right to a diaspora of roughly 1.4 million Canadian citizens who have resided outside of Canada for more than five years. The question is whether this removal of a bedrock democratic right can withstand constitutional scrutiny under section 1 of the *Charter*.

2. The Canadian American Bar Association (“**CABA**”) submits the answer is no. The CABA is a non-profit association of Canadian and American lawyers with strong cross-border ties through citizenship, education and professional designation. Its mission is to provide an associational forum and voice to Canadians in the United States and Canadians at home in relation to cross-border legal issues. The CABA brings the institutional perspective and distinct legal interest of a bar association that engages with the effects of Canadian law beyond Canada’s borders. Many of its members are directly impacted by the legislation under review, having been deemed unworthy to vote despite deep and continuing connections to Canada, and despite being subject to the benefits and burdens of Canada’s laws regardless of where they live.

3. Section 3 of the *Charter* contains a single and unqualified requirement to vote: citizenship. That right is being violated. The objective relied upon to justify this deprivation, rooted in “social contract” theory, is to address unfairness that supposedly results from allowing certain citizens who no longer maintain a subjective connectedness to Canada or who are less burdened by Canadian laws to vote. This objective is neither pressing nor substantial. The *Charter* does not impose this or other unstated prerequisites to vote, nor does it create a hierarchy of rights-holders with “more” or “less” of a stake in electoral outcomes. The justification under section 1 runs counter to the lifeblood of the *Charter* and should fail, just as it did in the court of first instance.<sup>2</sup>

4. The CABA adopts the facts section of the Appellants’ factum.

---

<sup>1</sup> *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

<sup>2</sup> *Frank et al. v. Canada (A.G.)*, 2014 ONSC 907 [*Frank – Application Decision*], Appellants’ Book of Authorities (“**Appellants’ BA**”).

## **PART II – POSITION ON THE APPELLANTS’ ISSUES**

5. There are two issues on this appeal.<sup>3</sup> The first is whether sections 11(d), 222(1)(b) and (c), 223(1)(f), 226(f), and the word “temporarily” in sections 220, 221(1) and 223(1)(e), of the Act violate section 3 of the *Charter*. There is no dispute that that they do.<sup>4</sup> The second issue is whether the section 3 infringement is a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under section 1 of the *Charter*.

6. The CABA’s submissions briefly frame the nature of the voting right and then focus on whether preserving an unwritten “social contract” or “fairness” of the electoral system on the basis of connection to Canada is a pressing and substantial objective under section 1.

## **PART III – STATEMENT OF ARGUMENT**

### **A. The Nature of the Voting Right Demands Attention and Strict Scrutiny**

7. Before embarking on a section 1 justification analysis, it is necessary to consider the right at issue. Given the unusual concession of a section 3 breach, the Respondent and majority of the court below failed to afford the right to vote its proper and heavy weight.

8. The framers of the *Charter* accorded the right to vote special protection “in the constellation of rights.”<sup>5</sup> Section 3 is the first democratic right listed in the *Charter*, contains “broad, untrammelled language”,<sup>6</sup> and is not subject to override pursuant to the section 33 notwithstanding clause.<sup>7</sup> As Chief Justice McLachlin stated in *Sauvé v. Canada (Chief Electoral Officer)* (“*Sauvé #2*”):

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

---

<sup>3</sup> Order Stating Constitutional Questions dated June 2, 2016; Appellants’ Factum at para. 40.

<sup>4</sup> Respondent’s Factum at para. 46.

<sup>5</sup> *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68 at para. 36 (per McLachlin C.J.) [*Sauvé #2*], Appellants’ BA.

<sup>6</sup> *Sauvé #2, ibid.*, at para. 11 (per McLachlin C.J.), Appellants’ BA.

<sup>7</sup> *Charter, supra* note 1, s. 33(1). See also *Sauvé #2, supra* note 5, at para. 9 (per McLachlin C.J.), Appellants’ BA; *Figueroa v. Canada (A.G.)*, 2003 SCC 37 at para. 60 (per Iacobucci J.) [*Figueroa*], Appellants’ BA.



permitted on other rights through s. 33 override. Thus, courts considering denials of voting rights have applied a stringent justification standard.<sup>8</sup>

9. The majority below described the section 3 breach as “straightforward”, and assessed the right to vote through a social contract-based analysis that appears more focused on finding a justification for the infringement than on understanding the nature of the underlying right.<sup>9</sup> The Respondent takes a similar justification-oriented, as opposed to rights-oriented, approach on this appeal, albeit with a shift in emphasis away from the social contract toward the purported objective of preserving the fairness of the electoral system.

10. Heightened scrutiny is warranted given that section 3 does not contemplate a second-tier of Canadian citizenship and its plain terms contain no limits on the right to vote other than citizenship.<sup>10</sup> A stringent justification analysis is further required where Parliament has infringed “a crucial right such as the right to vote” on the basis of “symbolic and abstract reasons”.<sup>11</sup>

## **B. The Government’s Impoverished Section 1 Objective Should be Rejected**

### **(i) A burdens-based objective that creates a hierarchy of *Charter* rights-holders is inappropriate**

11. The section 1 objective being advanced, whether it is a social contract or *quid pro quo* involving reciprocal obligations between citizen and state designed to promote electoral fairness, should be rejected. Such an analysis improperly imports conditionality to the right to vote that is not found in the *Charter*. A person’s constitutional entitlements do not depend on contractual negotiation or performance against the state, or the government policy of the day.

12. The objective also creates a hierarchy of rights-holders within section 3 that effectively fragments the right to vote, setting an expiration date on that right for a discrete class of citizens who reside abroad for five years or more. This runs counter to this Court’s long-standing guidance in *Dagenais v. Canadian Broadcasting Corp.* that a hierarchical approach to rights

---

<sup>8</sup> *Sauvé #2*, *supra* note 5, at para. 14 (per McLachlin C.J.), Appellants’ BA.

<sup>9</sup> *Frank v. Canada (A.G.)*, 2015 ONCA 536 at para. 81 (per Strathy C.J.) [*Frank – CA Decision*], Appellants’ BA.

<sup>10</sup> *Frank – Application Decision*, *supra* note 2, at para. 79, citing *Fitzgerald (Next Friend of) v. Alberta*, 2002 ABQB 1086 at para. 14, *aff’d* 2004 ABCA 184, leave to appeal refused, [2004] S.C.C.A. No. 349, Appellants’ BA.

<sup>11</sup> *Sauvé #2*, *supra* note 5, at para. 23 (per McLachlin C.J.). See also paras. 13-14, 16, Appellants’ BA.

“must be avoided”,<sup>12</sup> and to Chief Justice Dickson’s direction in *R. v. Big M Drug Mart Ltd.* that *Charter* rights must be interpreted in a generous manner “aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*’s protection.”<sup>13</sup>

13. More specifically, there is no basis in Canadian constitutional law for creating a hierarchy of rights-holders based on who may be more “burdened” by the laws of Canada. Echoing the majority below, the Respondent asserts that it is a pressing and substantial objective to uphold the restrictions in the Act because it is unfair to allow long-term non-residents to vote since they have a “lesser stake” in elections by virtue of their “lesser legal responsibilities under Canadian law.”<sup>14</sup> This analysis is flawed, for at least three reasons.

14. First, being subject to laws is an arbitrary and limited metric of connection to Canada. It is not, and should not be, correlated with the entitlement to vote. Anyone who is physically present in Canada is subject to the laws of Canada, including permanent residents and business travelers. On the Respondent’s territory-based logic, mere tourists in Canada have a stronger connection to the country than the Appellants or members of the CABA.

15. Second, the ability to exercise a *Charter* right should not depend on how extensively a citizen is regulated or subject to particular Canadian laws. Heavily-regulated citizens are not more deserving of the right to vote than others. No authority is cited for the Respondent’s proposition.

16. Third, the objective is based on a false premise that long-term expatriates have broken a social contract or shed their legal connection with Canada. The majority below made the point more starkly, finding that long-term non-resident Canadians have “severed their connections with Canada in the pursuit of their own livelihoods”.<sup>15</sup> In the CABA’s respectful view, this notion is wrong and offensive. The Respondent and the majority below fail to take into account

---

<sup>12</sup> *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. at para. 75, CABA Book of Authorities (“**CABA BA**”), Tab 2.

<sup>13</sup> *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at para. 117, Appellants’ BA.

<sup>14</sup> Respondent’s Factum at paras. 1, 62.

<sup>15</sup> *Frank – CA Decision*, *supra* note 9, at para. 143 (per Strathy C.J.), Appellants’ BA.

the fact that many Canadian laws apply with extra-territorial effect, conferring burdens and benefits upon citizens living abroad regardless of affinity or connection to Canada.<sup>16</sup>

17. The following is an illustrative, non-exhaustive, list of federal laws that may impose extra-territorial burdens:

- (a) Tax laws. The *Income Tax Act* (“*ITA*”) applies extra-territorially in several ways.<sup>17</sup> For example, any person that is a “resident” of Canada is taxable in Canada on their world-wide income, including income earned from activities taking place entirely outside of Canada. In this context, the concept of residency in the *ITA* is very broad and can include people that have no physical presence in Canada during a particular year.<sup>18</sup> The *ITA* also imposes on every employer paying salary or remuneration to a person resident in Canada the obligation (subject to penalties) to make source withholdings on account of Canadian income taxes. This obligation extends to employers that are not located in Canada paying employees who, while Canadian residents, performed all of their services outside of Canada.<sup>19</sup>
- (b) Criminal laws. Although the *Criminal Code*<sup>20</sup> contains a presumption against extra-territoriality in section 6(2), numerous federal criminal laws expressly apply to Canadian nationals outside of Canada, regardless of residency. These include sexual offences against children pursuant to section 7(4.1), the offence of treason in section 46, the offence of piracy in section 74, certain terrorism offences in Part II.<sup>21</sup> and the offence of torture in section 269.1.

---

<sup>16</sup> *Frank – Application Decision*, *supra* note 2, at para. 89, Appellants’ BA; Appellants’ Factum at para. 63.

<sup>17</sup> In addition to the tax obligations described in this Factum, the Application Judge found that many Canadians living abroad have tax obligations back in Canada relating to income generated in Canada: *Frank – Application Decision*, *ibid.*, at para. 28, Appellants’ BA. This finding was undisturbed on appeal.

<sup>18</sup> *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), ss. 3(a)-(b), 250(3) [*ITA*], CABA BA Tab 10.

<sup>19</sup> *ITA*, *ibid.*, s. 153(1)(a), CABA BA Tab 10; *Income Tax Regulations*, C.R.C., c. 945, ss. 102, 104(2), CABA BA Tab 11. See also Appellants’ Factum at para. 15 for additional and non-duplicative submissions on tax matters.

<sup>20</sup> *Criminal Code*, R.S.C. 1985, c. C-46.

<sup>21</sup> “Terrorist activity” is defined in s. 83.01(1)(b) as including acts or omissions “in or outside Canada”, CABA BA Tab 8.

- (c) Foreign anti-corruption laws. Offences under the *Corruption of Foreign Public Officials Act* committed outside of Canada are deemed to have been committed in Canada on the basis of nationality jurisdiction, regardless of residency.<sup>22</sup>
  - (d) Special economic measures. Canada may make orders or regulations prohibiting the dealings of Canadians “outside Canada” with foreign sanctioned states, regardless of residency.<sup>23</sup>
  - (e) Corporate social responsibility. Certain companies that operate in the extractive sector “in Canada or elsewhere” are, if they meet certain statutory criteria, subject to special reporting and disclosure obligations.<sup>24</sup>
18. The following benefits that may apply to Canadians residing abroad are also notable:
- (a) Right of entry to Canada from foreign soil. Section 6 of the *Charter* guarantees every citizen “the right to enter, remain in and leave Canada”. The right to enter must necessarily be exercised from outside Canadian territory and is not conditional upon the citizen being a resident.<sup>25</sup>
  - (b) Government benefits. Non-residents may continue to receive benefits from the Canada Pension Plan<sup>26</sup> and Old Age Security Program.<sup>27</sup>
  - (c) Citizenship laws. Canadians may pass on their citizenship to their biological or adopted children,<sup>28</sup> or may apply to renounce their citizenship.<sup>29</sup>

---

<sup>22</sup> *Corruption of Foreign Public Officials Act*, S.C. 1998, c. 34, s. 5(1), CABA BA Tab 7.

<sup>23</sup> *Special Economic Measures Act*, S.C. 1992, C. 17, ss. 4(1)-4(2), CABA BA Tab 13.

<sup>24</sup> *Extractive Sector Transparency Measures Act*, S.C. 2014, c. 39, s. 376, ss. 2, 9(1), 9(2), 9(5), CABA BA Tab 9.

<sup>25</sup> An example of the application of the s. 6 *Charter* right of entry is found in *Abdelrazik v. Canada (Minister of Foreign Affairs & International Trade)*, 2009 FC 580 at paras. 7, 169, CABA BA Tab 1.

<sup>26</sup> *Canada Pension Plan*, R.S.C., 1985, c. C-8, ss. 107(1) and 107(4), CABA BA Tab 3.

<sup>27</sup> *Old Age Security Act*, R.S.C., 1985, C. O-9, s. 40(1), CABA BA Tab 12.

<sup>28</sup> *Citizenship Act*, R.S.C. 1985, c. C-29, ss. 3(1)(b), 5.1(1) [*Citizenship Act*], CABA BA Tab 4; *Citizenship Regulations*, SOR/93-246, ss. 5.1(c)-(d), 5.2(c)-(d), 5.3(b), CABA BA Tab 5.

<sup>29</sup> *Citizenship Act*, *ibid.*, s. 9(1), CABA BA Tab 4.

(ii) **A territory-based objective is outdated and wrong**

19. The touchstone of the objective relied on to justify the section 3 breach is the notion of “connection” to Canada, which includes subjective and objective components. The Respondent asserts that it is a pressing and substantial objective to maintain the social contract, and hence the fairness of the electoral system, by ensuring that electors have a subjective connection to electoral districts (perhaps something “more than the elector having a sentimental attachment, or even an ongoing knowledge and interest in Canada”, though the threshold is unclear).<sup>30</sup>

20. It is not a pressing and substantial objective to preserve a presumed bargain between citizen and state on the basis of an outdated, territory-based notion of citizenship rooted in the distant past of 18th century political philosophers. In today’s globalized world, Canada’s best and brightest citizens are encouraged or required to go abroad – including to attend top universities or to work for leading international companies. Even if residency-based notions of citizenship were ever appropriate to underpin the right to vote, that is not the case today.<sup>31</sup>

21. If this Court accepts that there is a social contract between citizen and state, participation in associations such as the CABA demonstrates how Canadians, long admired for our internationalism, can and do perform that contract and live out their Canadian identity from abroad. This is achieved in a myriad of ways, including through easy travel and communication technologies, the growth of cross-border business and trade, participation in international educational, cultural and sporting events, financial support of political parties in Canada and contributions to academic and legal developments.

22. In any event, even if this Court accepts that long-term non-resident citizens have opted out of the social contract or lost their connection to Canada, that is not sufficient to save the legislation. Chief Justice McLachlin made clear in *Sauvé #2* that “whether a right is justifiably

---

<sup>30</sup> Respondent’s Factum at para. 59. See also paras. 61-64.

<sup>31</sup> The Respondent appears to concede this at para. 4 of her Factum, where she states: “[a]nother Parliament may well conclude that in a shrinking world of electronic connection and international interdependence, some or no restrictions on the right to vote of non-residents are necessary.”

limited cannot be determined by observing that an offender has, by his or her actions, withdrawn from the social compact.”<sup>32</sup> This reasoning applies directly to this appeal.

**(iii) The purported objective obscures vital aspects of the right to vote**

23. The right to participate in the electoral process is not merely the capacity to cast a ballot. As signaled in *Figueroa v. Canada (A.G.)* (“*Figueroa*”),<sup>33</sup> it more broadly protects a citizen’s sense of belonging and association to Canada. The right to vote is vital to both the flourishing of the individual and the broader democratic interest of incorporating the diverse viewpoints, ideas and lived experiences of the wider electorate – including unique viewpoints and outlooks on the world developed abroad.

24. From a collective viewpoint, this Court recognized in *Figueroa* that the purpose of section 3 is “to promote and protect the right of each citizen to play a meaningful role in the political life of the country. Absent such a right, ours would not be a true democracy”.<sup>34</sup> Participation in the electoral process has an intrinsic value independent of its impact on electoral outcomes. This was emphasized in *Richter v. The Minister for Home Affairs*, a decision of the Constitutional Court of South Africa that struck down certain non-resident voting limits as being inconsistent with the South African constitution.<sup>35</sup> The Court stated:

To the extent that citizens engaged in such pursuits want to take the trouble to participate in elections while abroad, it is an expression both of their continued commitment to our country and their civic-mindedness from which our democracy will benefit.<sup>36</sup>

---

<sup>32</sup> *Sauvé #2*, *supra* note 5, at para. 47 (per McLachlin C.J.), Appellants’ BA.

<sup>33</sup> *Figueroa*, *supra* note 7, at para. 27 (per Iacobucci J.), Appellants’ BA.

<sup>34</sup> *Figueroa*, *ibid.*, at paras. 29-30 (per Iacobucci J.), Appellants’ BA.

<sup>35</sup> *Constitution of the Republic of South Africa*, n° 108 of 1996, CABA BA Tab 6. The language bestowing the right to vote is as expansive as in the *Charter*: “[e]very citizen has the right...to vote in elections for any legislative body established in terms of the Constitution” (s. 19(3)(a)). The South African Constitution has a similar structure to the *Charter*, including a limiting clause in s. 36(1) that is similar to s. 1 which expressly states that “the nature of the right” is relevant to the limitation analysis (s. 36(1)(a)).

<sup>36</sup> *Richter v. The Minister for Home Affairs*, [2009] ZACC 3 at para. 69, Appellants’ BA.

25. In this case, the electoral voices of the Appellants and members of the CABA (amongst others) are silenced by the Act. As noted in *Sauvé #2*, silenced messages cannot be retrieved.<sup>37</sup> The marketplace of ideas in Canadian political discourse is less vibrant and diverse as a result.

26. At the individual level, the residence-based distinction in the Act is an invidious voting limit that makes a subjective valuation of the qualities of specific citizens. The Respondent's position on this appeal cannot be reconciled with the direction in *Sauvé #2* that “denying citizens the right to vote runs counter to our constitutional commitment to the inherent worth and dignity of every individual,”<sup>38</sup> and that the denial of the right to vote “countermands the message that everyone is equally worthy and entitled to respect under the law – that everybody counts.”<sup>39</sup>

27. The right to vote is a personal right whose exercise has implications for an individual's standing in the community. The denial of that right necessarily carries with it a subjective valuation of that person's status as a citizen. Justice Laskin, dissenting in the court below, noted:

These Canadian citizens, abroad for a wide variety of reasons both personal and professional...often maintain strong ties and affinity to Canada. They have not renounced membership in the Canadian polity. But under the legislation, the place of their residence deems them unworthy to be entitled to vote.<sup>40</sup>

28. There is undeniable worth in the subjective connections that long-term non-residents have with their country of citizenship. This was also recognized by Justice Laskin in the court below, whose reasons reveal clear markers of connection to Canada, including the presence of family members in Canada, an intention to return to Canada upon finding of employment, service in the Canadian Forces, holding Canadian values, owning property in Canada, and possessing Canadian credit cards or bank accounts.<sup>41</sup> To this list may be added the acts of registering to vote and voting, themselves indications of civic commitment.

29. Despite these markers of connection, the impugned provisions of the Act result in the unmodulated deprivation of roughly 1.4 million Canadian citizens from being represented in

---

<sup>37</sup> *Sauvé #2*, *supra* note 5, at para. 60 (per McLachlin C.J.), Appellants' BA.

<sup>38</sup> *Sauvé #2*, *ibid.*, at para. 35 (per McLachlin C.J.), citing *August v. South Africa (Electoral Commission)*, [1999] ZAAC 3 (South Africa Constitutional Ct.) at para. 17, Appellants' BA.

<sup>39</sup> *Sauvé #2*, *ibid.*, at para. 58 (per McLachlin C.J.), Appellants' BA.

<sup>40</sup> *Frank – CA Decision*, *supra* note 9, at para. 242 (per Laskin J. dissenting) [emphasis added], Appellants' BA.

<sup>41</sup> *Frank – CA Decision*, *ibid.*, at paras. 178-179, 224 (per Laskin J. dissenting), Appellants' BA.

their own government. This is removal, not merely dilution, of the right to vote. This Court has stated that it is doubtful such a deprivation is ever capable of justification under section 1 as “this is tantamount to saying that the affected class is outside the full protection of the *Charter*.”<sup>42</sup>

30. Significantly, the Act could result in the elimination of a non-resident citizen’s representation in any government: if Canadian citizens living abroad for more than five years are not also citizens of the country in which they reside (or dual citizens with another country that allows them to vote), they may have no vote anywhere. Such complete disenfranchisement was firmly rejected in *Sauvé #2*.

31. The uniform exclusion of all long-term non-resident Canadians from voting, without regard to any individual circumstances, insulates Canadian elections from the views of “foreign” Canadians and stigmatizes those persons as unworthy outsiders and second-class citizens. This is harmful to those citizens as individuals, and to Canadian democracy on the whole.

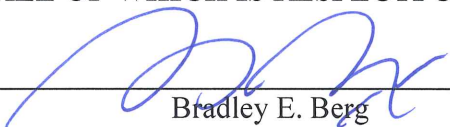
**PART IV – SUBMISSIONS ON COSTS**

32. The CABA requests no costs and asks that no costs be awarded against it.

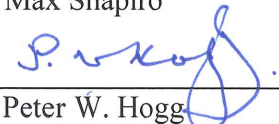
**PART V – REQUEST TO MAKE ORAL SUBMISSIONS**

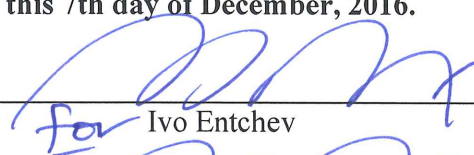
33. The CABA requests leave to present oral submissions not exceeding fifteen (15) minutes.

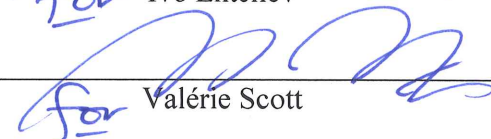
**ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of December, 2016.**

  
\_\_\_\_\_  
Bradley E. Berg

  
\_\_\_\_\_  
Max Shapiro

  
\_\_\_\_\_  
Peter W. Hogg

  
\_\_\_\_\_  
for Ivo Entchev

  
\_\_\_\_\_  
for Valérie Scott

Of Counsel for the Intervener,  
Canadian American Bar Association

**BLAKE, CASSELS & GRAYDON LLP**  
Lawyers for the Intervener,  
Canadian American Bar Association

<sup>42</sup> *Sauvé #2*, *supra* note 5, at para. 46 (per McLachlin C.J.), Appellants’ BA.



**PART VI – TABLE OF AUTHORITIES**

<b>CASES</b>	<b>Cited at paragraph(s) in Memorandum of Argument</b>
1. <i>Abdelrazik v. Canada (Minister of Foreign Affairs &amp; International Trade)</i> , 2009 FC 580	18
2. <i>Dagenais v. Canadian Broadcasting Corp.</i> , [1994] 3 S.C.R.	12
3. <i>Figueroa v. Canada (A.G.)</i> , 2003 SCC 37	8, 23, 24
4. <i>Frank et al. v. Canada (A.G.)</i> , 2014 ONSC 907	3, 10, 16, 17
5. <i>Frank v. Canada (A.G.)</i> , 2015 ONCA 536	9, 16, 27, 28
6. <i>R. v. Big M Drug Mart Ltd.</i> , [1985] 1. S.C.R. 295	12
7. <i>Richter v. The Minister for Home Affairs</i> , [2009] ZACC 3	24
8. <i>Sauvé v. Canada (Chief Electoral Officer)</i> , 2002 SCC 68	8, 10, 22, 25, 26, 29, 30

**PART VII – LEGISLATION AT ISSUE**

**Canada Elections Act, S.C. 2000, c. 9, ss. 11(d), 220, 222(1), 223(1)(e)-(f), 226(f)**

<p><b>11.</b> Any of the following persons may vote in accordance with Part 11:</p> <p>...</p> <p>(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;</p> <p>...</p> <p><b>Definitions</b></p> <p><b>220.</b> The definitions in this section apply in this Division.</p> <p><i>elector</i> means an elector, other than a Canadian Forces elector, who resides temporarily outside Canada.</p> <p><i>register</i> means the register referred to in subsection 222(1).</p> <p>...</p> <p><b>Register of electors</b></p> <p><b>222.</b> (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</p> <p>(a) at any time before making the application, resided in Canada;</p> <p>(b) has been residing outside Canada for less than five consecutive years immediately before making the application; and</p> <p>(c) intends to return to Canada to resume residence in the future.</p> <p>...</p> <p><b>223.</b> (1) An application for registration and special ballot may be made by an elector. It shall be</p>	<p><b>11.</b> Peuvent voter dans le cadre de la partie 11 :</p> <p>...</p> <p>d) les électeurs qui sont absents du Canada depuis moins de cinq années consécutives et qui ont l'intention de revenir résider au Canada;</p> <p>...</p> <p><b>Définitions</b></p> <p><b>220.</b> Les définitions qui suivent s'appliquent à la présente section.</p> <p><i>électeur</i> Électeur résidant à l'étranger temporairement, à l'exclusion d'un électeur des Forces canadiennes. (<i>elector</i>)</p> <p><i>registre</i> Le registre visé au paragraphe 222(1).</p> <p>...</p> <p><b>Registre</b></p> <p><b>222.</b> (1) Le directeur général des élections tient un registre des électeurs résidant temporairement à l'étranger où il inscrit les nom, date de naissance, sexe, adresses municipale et postale et circonscription des électeurs qui ont présenté une demande d'inscription et de bulletin de vote spécial et qui satisfont aux conditions suivantes :</p> <p>a) avoir résidé au Canada antérieurement à la présentation de la demande;</p> <p>b) résider à l'étranger depuis moins de cinq années consécutives au moment de la présentation de la demande;</p> <p>c) avoir l'intention de rentrer au Canada pour y résider.</p> <p>...</p> <p><b>223.</b> (1) La demande d'inscription et de bulletin de vote spécial est faite selon le formulaire prescrit et doit contenir les éléments suivants, en ce</p>
--	--

<p>in the prescribed form and shall include</p> <p>...</p> <p>(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;</p> <p>(f) the date on which the elector intends to resume residence in Canada;</p> <p>...</p> <p><b>Deletion of names from register</b></p> <p>226. The Chief Electoral Officer shall delete from the register the name of an elector who</p> <p>...</p> <p>(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.</p>	<p>qui concerne l'électeur :</p> <p>...</p> <p>e) l'adresse soit du lieu de sa résidence habituelle au Canada avant son départ pour l'étranger, soit du lieu de la résidence habituelle au Canada de son époux, de son conjoint de fait, d'un parent, d'un parent de son époux ou de son conjoint de fait, d'une personne à la charge de qui il est ou de la personne avec laquelle il demeurerait s'il ne résidait pas temporairement à l'étranger;</p> <p>f) la date à laquelle il a l'intention de rentrer au Canada pour y résider;</p> <p>...</p> <p><b>Radiation</b></p> <p>226. Le directeur général des élections radie du registre le nom de l'électeur dans les cas suivants :</p> <p>...</p> <p>f) sauf s'il est visé au paragraphe 222(2), l'électeur a résidé à l'étranger pendant cinq années consécutives ou plus.</p>
---	---

**Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, ss. 3, 6(1), 33**

<p><b>Democratic Rights of Citizens</b></p> <p>3. 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.</p> <p>...</p> <p><b>Mobility of citizens</b></p> <p>6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.</p> <p><b>Rights to move and gain livelihood</b></p> <p>(2) Every citizen of Canada and every person who has the status of a permanent resident of</p>	<p><b>Droits démocratiques des citoyens</b></p> <p>3. Tout citoyen canadien a le droit de vote et est éligible aux élections législatives fédérales ou provinciales.</p> <p>...</p> <p><b>Liberté de circulation</b></p> <p>6. (1) Tout citoyen canadien a le droit de demeurer au Canada, d'y entrer ou d'en sortir.</p> <p><b>Liberté d'établissement</b></p> <p>(2) Tout citoyen canadien et toute personne ayant le statut de résident permanent au Canada ont</p>
---	--

<p>Canada has the right</p> <p>(a) to move to and take up residence in any province; and</p> <p>(b) to pursue the gaining of a livelihood in any province.</p> <p><b>Limitation</b></p> <p>(3) The rights specified in subsection (2) are subject to</p> <p>(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</p> <p>(b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.</p> <p><b>Affirmative action programs</b></p> <p>(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.</p> <p>...</p> <p><b>Exception where express declaration</b></p> <p><b>33.</b> (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.</p>	<p>le droit :</p> <p>a) de se déplacer dans tout le pays et d'établir leur résidence dans toute province;</p> <p>b) de gagner leur vie dans toute province.</p> <p><b>Restriction</b></p> <p>(3) Les droits mentionnés au paragraphe (2) sont subordonnés :</p> <p>a) aux lois et usages d'application générale en vigueur dans une province donnée, s'ils n'établissent entre les personnes aucune distinction fondée principalement sur la province de résidence antérieure ou actuelle;</p> <p>b) aux lois prévoyant de justes conditions de résidence en vue de l'obtention des services sociaux publics.</p> <p><b>Programmes de promotion sociale</b></p> <p>(4) Les paragraphes (2) et (3) n'ont pas pour objet d'interdire les lois, programmes ou activités destinés à améliorer, dans une province, la situation d'individus défavorisés socialement ou économiquement, si le taux d'emploi dans la province est inférieur à la moyenne nationale.</p> <p>...</p> <p><b>Dérogation par déclaration expresse</b></p> <p><b>33.</b> (1) Le Parlement ou la législature d'une province peut adopter une loi où il est expressément déclaré que celle-ci ou une de ses dispositions a effet indépendamment d'une disposition donnée de l'article 2 ou des articles 7 à 15 de la présente charte.</p>
--	--