

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

BETWEEN:

CITY OF TORONTO

Appellant  
(Appellant)

– and –

ATTORNEY GENERAL OF ONTARIO

Respondent  
(Respondent)

– and –

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EXPRESSION AT RYERSON UNIVERSITY, CANADIAN CIVIL LIBERTIES  
ASSOCIATION, ART EGGLETON, BARBARA HALL, DAVID MILLER and JOHN  
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TORONTO, MÉTIS NATION OF ONTARIO, MÉTIS NATION OF ALBERTA  
and FAIR VOTING BRITISH COLUMBIA

Interveners

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(Pursuant to Rule 37 of the *Rules of the Supreme Court of Canada*)

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## **PART I: OVERVIEW**

1. This case gives the Court the opportunity to determine whether our *Charter* prevents the government from changing the rules of elections midstream. The question of electoral system integrity is always timely in a democracy – just because our electoral system has worked well over the last century does not mean it will prove resilient in the next election.

2. Particularly, this case gives the Court the opportunity to determine if and when the s. 2(b) right to freedom of expression and participation of electoral voters and candidates is violated by midstream rule changes in a municipal election.

3. In its decision on this case, this Court should recognize **a right to fair and legitimate elections**, protected under ss. 2(b) and 3 of the *Charter*. The recognition of this right is consistent with the rights and values that this Court has already repeatedly recognized and protected in its ss. 2(b) and 3 electoral law jurisprudence. The right would guarantee that the substance of election laws and the process through which they are devised is fair and legitimate. It would prevent future governments from interfering with electoral laws through partisan self-dealing and would shield candidates and voters from government interference while elections are ongoing.

## **PART II: STATEMENT OF ARGUMENT**

### **1. Recognizing a right to fair and legitimate elections**

(i) *The right to vote encompasses multiple democratic rights protected under ss. 2(b), 2(d), and 3 of the Charter*

4. By explicitly recognizing that voters and candidates have the right to fair and legitimate elections, this Court would give further interpretive content to s. 2(b) of the *Charter*. In its electoral rights jurisprudence, the Court has already recognized the existence of multiple democratic rights, each of which is concerned with a particular facet of democratic governance, participation, and expression. In that sense, the ‘hard’ right to vote is an umbrella concept that consists of several ‘soft’ democratic rights, some of which extend beyond the textual language of s. 3 of the *Charter* and into ss. 2(b), 2(d), and 15 of the *Charter*. The underlying purpose of these democratic rights is not only to protect the right to vote but also more broadly to regulate the structure and conduct of elections.

5. This Court’s electoral law jurisprudence confirms that not only does the *Charter* protect the right to cast a ballot, the *Charter* also protects the right to effective representation and the right to meaningful participation (under s. 3 of the *Charter*),<sup>1</sup> the expressive content inherent in the vote and the right of citizens to democratically participate and express themselves in the electoral process as voters and candidates (under ss. 2(b) and (d) of the *Charter*)<sup>2</sup> and the right to equality in section 15 of the *Charter*.<sup>3</sup> In the context of its s. 2(b) cases, this Court has specifically noted that the s. 2(b) right implies a right to equal participation in democratic government and a right to a free and informed vote.<sup>4</sup> In recognizing these rights, in *Libman*, this Court recognized that “freedom of expression is of crucial importance in a democratic society” and that the “connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(b) guarantee, and [that] the nature of this connection is largely derived from the Canadian commitment to democracy.”<sup>5</sup> In *Figuroa*, the majority added: “As this Court frequently has acknowledged, the free flow of diverse opinions and ideas is of fundamental importance in a free and democratic society... It thus follows that participation in the electoral process has an intrinsic value independent of its impact upon the actual outcome of elections. To be certain, the electoral process is the means by which elected representatives are selected and governments formed, but it is also the primary means by which the average citizen participates in the open debate that animates the determination of social policy.”<sup>6</sup>

6. Yasmin Dawood convincingly argues that the multiple democratic rights protected under ss. 2(b) and 3 are best understood as structural rights: i.e., rights influenced in significant part by

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<sup>1</sup> *Reference re Prov Electoral Boundaries (Sask)*, [1991] 2 SCR 158 at [183](#); *Figuroa v Canada (Attorney General)*, 2003 SCC 37 at ¶[27](#), [50](#).

<sup>2</sup> *Siemens v Manitoba (Attorney General)*, 2003 SCC 3 at ¶[41](#); *Baier v Alberta*, 2007 SCC 31 at ¶[33](#), [57](#); *Haig v Canada*; *Haig v Canada (Chief Electoral Officer)*, [1993] 2 SCR 995 at [1040](#); *Libman v Quebec (Attorney General)*, [1997] 3 SCR 569 at ¶[47](#); *BC Freedom of Information and Privacy Association v British Columbia (Attorney General)*, 2017 SCC 6 at ¶[15-16](#).

<sup>3</sup> *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at ¶[16-17](#), [103](#).

<sup>4</sup> *Libman v Quebec (Attorney General)*, [1997] 3 SCR 569 at ¶[47](#); *Harper v Canada (Attorney General)*, 2004 SCC 33 at ¶[71](#).

<sup>5</sup> *Libman v Quebec (Attorney General)*, [1997] 3 SCR 569 at ¶[47](#), citing *R v Keegstra*, [1990] 3 SCR 697 at [763-764](#).

<sup>6</sup> *Figuroa v Canada (Attorney General)*, 2003 SCC 37 at ¶[28-29](#).

the social, political, and institutional structures in which they operate.<sup>7</sup> The structural rights approach holds that courts can use individual rights to remedy structural deficiencies in the democratic system. Put differently, courts could and should find that the individual rights of individuals are breached where the institutional framework does not fairly allow them to exercise these rights. This is in fact largely how this Court has approached its electoral law jurisprudence. Rather than focusing narrowly on protecting individual rights under ss. 2(b) and 3 of the *Charter*, this Court has used the multiple democratic rights it has identified to address system-wide aspects of the democratic process, such as the structure of representation, electoral redistricting, the role of money in elections, and the regulation of political parties.<sup>8</sup>

7. Viewing democratic rights as structural rights implies that the court’s role in adjudicating these types of cases is akin to that of a regulator of the democratic process: i.e., the court’s role is to ensure that the democratic process functions so that the sovereign will of the electorate may be expressed without distortion.<sup>9</sup>

**(ii) This Court’s ss. 2(b) and 3 jurisprudence already recognizes the values that underpin a right to fair and legitimate elections**

8. The recognition that voters and candidates have the right to fair and legitimate elections would be consistent with the rights and values that this Court has already repeatedly recognized and protected in its ss. 2(b) and 3 electoral law jurisprudence.<sup>10</sup> As the application judge noted in the present case, citing *de Jong v Ontario (Attorney General)*,<sup>11</sup> the rights enshrined in s. 3 “have a close relationship to freedom of expression and to the communication of ideas... there is an affinity between ss. 3 and 2(b) (freedom of expression) of the Charter.”<sup>12</sup>

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<sup>7</sup> Yasmin Dawood, “Democracy and the Right to Vote: Rethinking Democratic Rights under the Charter” (2013) 51.1 *Osgoode Hall LJ* 251.

<sup>8</sup> Yasmin Dawood, “Democracy and the Right to Vote: Rethinking Democratic Rights under the Charter” (2013) 51.1 *Osgoode Hall LJ* 251 at 269-290. See, e.g., *Reference re Prov Electoral Boundaries (Sask)*, [1991] 2 SCR 158 at 183-184; *Harper v Canada (Attorney General)*, 2004 SCC 33 at ¶61-62, 72.

<sup>9</sup> Colin Feasby, “City of Toronto v Ontario and Fixing the Problem with Section 3 of the Charter”, *The University of Calgary Faculty of Law Blog*, 1 September 28, 2018 at 2.

<sup>10</sup> Yasmin Dawood, “Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review” (2012) 62 *University of Toronto LJ* 499 at 527-530.

<sup>11</sup> *de Jong v Ontario (Attorney General)*, 2007 CanLII 44348 (ON SC) at ¶25.

<sup>12</sup> *City of Toronto et al v Ontario (Attorney General)*, 2018 ONSC 5151 at ¶46.

9. This Court has recognized that both ss. 2(b) and 3 of the *Charter* must be interpreted consistently with the right to **electoral fairness**. In *Libman*, a s. 2(b) *Charter* case on the regulation of electoral expenses in a referendum, this Court recognized the “primacy of the principle of fairness in democratic elections”.<sup>13</sup> According to the Court this principle “flows directly from a principle entrenched in the Constitution: that of the political equality of citizens.” It protects both the right to the equal participation of citizens in democratic government and the right of voters to be adequately informed during an election. The Court observed that “[e]lections are fair and equitable only if all citizens are reasonably informed of all the possible choices and if parties and candidates are given a reasonable opportunity to present their positions.”

10. In *Figueroa*, Iacobucci J, writing for the majority, related the principle of electoral fairness to the s. 3 right to vote, observing that s. 3 “imposes on Parliament an obligation not to interfere with the right of each citizen to participate in a fair election. As the Court observed in *Libman*... electoral fairness is a fundamental value of democracy.”<sup>14</sup> In a concurrent opinion, LeBel J agreed that the concept of effective representation includes the “primary value of individual participation in fair elections on a basis of relative equality.”<sup>15</sup>

11. Similarly, writing for this Court’s majority in *Harper*, Bastarache J asserted that the “overarching objective of the regime is to promote electoral fairness by creating equality in the political discourse.”<sup>16</sup> Bastarache J also observed that the “advancement of equality and fairness in elections ultimately encourages public confidence in the electoral system.”

12. Likewise, this Court’s electoral law jurisprudence has extensively recognized the essential value of **electoral legitimacy**, and its link to democratic participation and expression. The legitimacy of our democracy’s institutions requires that citizens can participate in, and express themselves through, elections and other aspects of public life.<sup>17</sup> In *Sauvé*, McLachlin CJ concluded that denying the right to vote undermines the legitimacy of government and the rule of

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<sup>13</sup> *Libman v Quebec (Attorney General)*, [1997] 3 SCR 569 at ¶47. In supporting its position, the Court extensively referred to the findings of the Lortie Commission.

<sup>14</sup> *Figueroa v Canada (Attorney General)*, 2003 SCC 37 at ¶51.

<sup>15</sup> *Figueroa v Canada (Attorney General)*, 2003 SCC 37 at ¶161.

<sup>16</sup> *Harper v Canada (Attorney General)*, 2004 SCC 33 at ¶63.

<sup>17</sup> *Reference re Secession of Quebec*, [1998] 2 SCR 217 at ¶67.

law, and curtails the rights of citizens to political expression and participation in our country's political life.<sup>18</sup>

13. An election's legitimacy also depends on its integrity – that is, when the electoral system performs as intended without manipulation or impairment. As noted by Iacobucci J in *Figueroa*, “[t]he systems and regulations that govern the process by which governments are formed should not be easily compromised.”<sup>19</sup> In *Sauvé*, McLachlin CJ confirmed that courts must be “vigilant in fulfilling their constitutional duty to protect the integrity of this system” when “legislative choices threaten to undermine the foundations of the participatory democracy.”<sup>20</sup> In *Harvey*, La Forest J stated that the objective of “maintain[ing] and enhanc[ing] the integrity of the electoral process” is “always of pressing and substantial concern in any society that purports to operate in accordance with the tenets of a free and democratic society.”<sup>21</sup> More generally, in both *Figueroa* and *Harvey*, this Court accepted that preserving the integrity of the electoral process is a pressing and substantial concern in a free and democratic state.<sup>22</sup>

14. Crucially, an election's legitimacy depends on the understanding that the rules of the game are fair, non-partisan, and set in advance. These rules include financial spending limits, electoral riding boundaries, voting methods, and the voting system. The values of stability and predictability in a democratic context are recognized through the unwritten constitutional principle of the rule of law. In the *Reference re Secession of Quebec*, this Court confirmed that the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs.<sup>23</sup> It provides a shield for individuals from arbitrary state action. As Joseph Raz observes, the rule of law demands predictability, so that individuals can properly plan their decisions.<sup>24</sup> Laws that change too frequently or radically will

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<sup>18</sup> *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68 at ¶32, 58.

<sup>19</sup> *Figueroa v Canada (Attorney General)*, 2003 SCC 37 at ¶72.

<sup>20</sup> *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68 at ¶15.

<sup>21</sup> *Harvey v New Brunswick (Attorney General)*, [1996] 2 SCR 876 at ¶38.

<sup>22</sup> *Figueroa v Canada (Attorney General)*, 2003 SCC 37 at ¶72; *Harvey v New Brunswick (Attorney General)*, [1996] 2 SCR 876 at ¶38.

<sup>23</sup> *Reference re Secession of Quebec*, [1998] 2 SCR 217 at ¶70.

<sup>24</sup> Richard Albert, “Constitutional Amendment by Stealth” (2015) 60-4 *McGill LJ* 673, 2015 [CanLIIDocs 391](#) at 715.

not generate public confidence.<sup>25</sup> When an election's rules are set in advance, candidates and voters can confidently plan their campaigns. When they need to account for the possibility of a midstream rule change, however, they cannot confidently plan their campaigns and will lose faith in the system. Furthermore, any midstream rule change raises the possibility that it is being implemented for partisan gain. The motivations for making this change will of necessity become part of the public conversation, distracting from the actual election. An election without a midstream rule change also minimizes the possibility of urgent litigation to debate the constitutionality of this change. Contested issues about electoral rules are ideally litigated in advance, where they can be more fully addressed by the court.

15. Finally, an election's legitimacy (and the possibility of an orderly transition of power) also depends on the public's *perception* of its fairness and integrity, including the perception of fairness and integrity by voters and candidates who lose the election. As Bastarache J acknowledged in *Harper*, "the legitimacy of the election regime depends upon how citizens assess the extent to which the regime advances the values of their electoral democracy."<sup>26</sup> Bastarache J added: "Electoral fairness is key. Where Canadians perceive elections to be unfair, voter apathy follows shortly thereafter." Similarly, in *Oakes*, Dickson CJ wrote in the majority opinion that faith in social and political institutions "enhance[s] the participation of individuals and groups in society."<sup>27</sup> In *Bryan*, Bastarache J reiterated that the "subjective perceptions of Canadian voters that the electoral system is fair is a vital element in the value of the system."<sup>28</sup> The dissent, penned by Abella J, likewise acknowledged the "significance of maintaining public confidence in electoral fairness and the integrity of the electoral system."<sup>29</sup> In the *Reference Re Secession of Quebec*, this Court acknowledged, particularly, that "[t]he consent of the governed is a value that is basic to our understanding of a free and democratic society."<sup>30</sup> To the extent that a government measure – such as a rule change in the midst of an election – undermines the consent

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<sup>25</sup> Jack Watson, "You Don't Know What You've Got 'Til It's Gone: The Rule of Law in Canada — Part II" (2015) 52-4 *Alberta LR* 949, 2015 *CanLIIDocs* 80 at 957.

<sup>26</sup> *Harper v Canada (Attorney General)*, 2004 SCC 33 at ¶82.

<sup>27</sup> *R v Oakes*, [1986] 1 SCR 103 at ¶64.

<sup>28</sup> *R v Bryan*, 2007 SCC 12 at ¶25.

<sup>29</sup> *R v Bryan*, 2007 SCC 12 at ¶104.

<sup>30</sup> *Reference re Secession of Quebec*, [1998] 2 SCR 217 at ¶67.

of the governed, including those who supported losing candidates, it constitutes a direct threat to the election's legitimacy.

16. Like the multiple other 'soft' democratic rights recognized by this Court, the right to a fair and legitimate election is best understood as a structural right that provides meaning and interpretive content to the 'hard' right to vote.<sup>31</sup> In addressing the electoral rights of individuals under ss. 2(b) and 3 of the *Charter*, therefore, courts should take into account the fact that these *Charter* rights can only truly be exercised in the context of a fair and legitimate election.

## **2. The relationship between the right to fair and legitimate elections and s. 2(b) of the *Charter***

17. The protection of freedom of expression is premised upon fundamental principles and values that promote the search for and attainment of truth, participation in social and political decision-making, and the opportunity for individual self-fulfillment through expression.<sup>32</sup> As noted above, the connection between freedom of expression and the political process is "perhaps the linchpin" of section 2(b) protection.<sup>33</sup> Free expression is valued above all as being instrumental to democratic governance.

18. This Court should find that the right of voters and candidates to a fair and legitimate election is protected under both s. 2(b) and 3 of the *Charter* (though it should obviously refrain from commenting on the scope of this right under s. 3 until such a case comes along). There is nothing unusual in the idea that a right is protected under multiple sections of the *Charter*. The right to an open court, for example, is protected under ss. 2(b), 7, and 11(d) of the *Charter*.<sup>34</sup> The right to a sentence that is not grossly disproportionate is protected under ss. 7 and 12.<sup>35</sup> The right to be free from compelled association is protected under ss. 2(b), 2(d), and 7.<sup>36</sup> Even the right to

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<sup>31</sup> Also see Yasmin Dawood, "Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review" (2012) 62 *University of Toronto LJ* 499.

<sup>32</sup> *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 976; *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712 at ¶56.

<sup>33</sup> *R v Keegstra*, [1990] 3 SCR 697 at 763-764.

<sup>34</sup> *Ruby v Canada (Solicitor General)*, 2002 SCC 75 at ¶53; *Canadian Newspapers Co v Canada (Attorney General)*, [1988] 2 SCR 12 at ¶23-25.

<sup>35</sup> *R v Safarzadeh-Markhali*, 2016 SCC 14 at ¶72.

<sup>36</sup> *Lavigne v Ontario Public Service Employees Union*, [1991] 2 SCR 211 at 319-320.

cast a vote is protected under ss. 2(b), 3, and 15.<sup>37</sup> As this Court observed in *Baier*, “Charter rights overlap and cannot be pigeonholed.”<sup>38</sup> In *Lavigne*, La Forest J added that “a person is not deprived of protection under a provision of the *Charter* merely because protection may also be derived under another.”<sup>39</sup>

19. Where both ss. 2(b) and 3 of the *Charter* are implicated, “each right must be given effect.”<sup>40</sup> Determining whether a government measure during an election breaches a person’s right to a free and legitimate election under s. 2(b) of the *Charter* is easily assessed through the *Irwin Toy* test. It requires this Court to answer two issues: (i) whether the activity in question has expressive content; and (ii) whether the state’s action infringes that protection, either in purpose or effect.<sup>41</sup>

20. Interrupting an election midstream to change the rules of the game, including the number and boundaries of electoral districts upon which candidates have crafted their campaigns and voters will have their preferences channelled, directly affects the rights of candidates and voters to a fair and legitimate election under s. 2(b) of the *Charter*. Under the first part of the s. 2(b) test, the participation of voters and candidates during the election campaign has expressive content. Obviously, the speeches, election signs, flyers and television, radio and newspaper ads delivered by municipal candidates during an election are expressive activities that fall within the scope of the s. 2(b) guarantee.<sup>42</sup>

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<sup>37</sup> *Siemens v Manitoba (Attorney General)*, 2003 SCC 3 at ¶41; *Haig v Canada; Haig v Canada (Chief Electoral Officer)*, [1993] 2 SCR 995 at 1040; *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at ¶16-17, 103.

<sup>38</sup> *Baier v Alberta*, 2007 SCC 31 at ¶57

<sup>39</sup> *Lavigne v Ontario Public Service Employees Union*, [1991] 2 SCR 211 at 319-320.

<sup>40</sup> *Baier v Alberta*, 2007 SCC 31 at ¶59; *Thomson Newspapers Co v Canada (Attorney General)*, [1998] 1 SCR 877 at ¶80.

<sup>41</sup> The *Baier* positive rights framework should not apply in this case since, unlike *Baier*, this isn’t a case about under-inclusive access to a government platform. Rather, similarly to *Libman*, this is a claim that government legislation has interfered with the use of ongoing expressive activity on an existing platform (i.e., during an election), which is reviewed under the traditional *Irwin Toy* analysis: *Libman v Quebec (Attorney General)*, [1997] 3 SCR 569 at ¶30-36.

<sup>42</sup> See *Toronto (City) v Ontario (Attorney General)*, 2019 ONCA 732 at ¶51, 111.



21. Under the second part of the test, changing the number and boundaries of the wards mid-election has a non-trivial impact on the political expression and participation of voters and candidates, in a manner that directly undermines their right to a fair and legitimate election:

- A significant portion of the participative efforts of candidates (including volunteers) and voters, who invested time to understand their local candidates and their positions, may become null and void. Furthermore, the efforts of candidates and voters to plan their campaigns and efforts in accordance with the pre-established rules may be defeated. Candidates may be required to run in other wards; voters may become unable to vote for the candidates they supported.
- Some candidates and voters will be discouraged from participating after the mid-election rule changes. Some candidates and volunteers may drop out. Others may not have the resources to resume and run effective campaigns. Voters who are invested at the start of the election may not be willing to invest additional time and efforts to once the rules change and the campaign effectively starts over.
- Voters and candidates may remain unclear on the applicable rules until the latter part of the election, effectively trivializing their decisions in the earlier part of the election, leading some of them to deploy their resources sub-optimally, and ultimately randomizing their chance of success.<sup>43</sup>
- The efforts of candidates to discuss relevant political issues with voters and the broader public may be frustrated and disrupted.<sup>44</sup>

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<sup>43</sup> For example, in the present case, an urgent constitutional application was filed and argued in the middle of the election. This application in turn led to a court decision overturning the legislation, and a subsequent injunction staying the order.

<sup>44</sup> For example, in the present case, the application judge found that “the candidates spent more time on doorsteps addressing the confusing state of affairs with potential voters than discussing relevant political issues. The candidates’ efforts to convey their political message about the issues in their particular ward were severely frustrated and disrupted. Some candidates... dropped out of the race entirely”: *City of Toronto et al v Ontario (Attorney General)*, 2018 ONSC 5151 at ¶31.

- Candidates, volunteers, and voters who fail to win the election may feel unjustly treated, thereby undermining the principle of loser's consent.<sup>45</sup>
- The need to urgently litigate the legitimacy of midstream electoral rule changes *during the election* and the possibility that future governments will similarly make electoral rule changes midstream diminishes the legitimacy of the institution, leads to a loss of confidence in the electoral process, and will likely minimize the participation of future voters and candidates because of the apathy or distrust the changes engendered.

22. Where a mid-election rule change affects the participation and expression of voters and candidates as discussed above, it calls into question the integrity and legitimacy of the election, as well as the public's perception of it. As such, it violates the right of voters and candidates to a fair and legitimate election.

23. One final note: s. 3 of the *Charter* was not argued in this case. As noted above, however, this Court should acknowledge that s. 3 also protects the right of voters and candidates to a fair and legitimate election – at least in the context of a provincial or federal election. Furthermore, this Court should ensure it leaves open the possibility that a future litigant may seek to argue that s. 3 also protects this right in a municipal election.

### **PARTS III AND IV: COSTS AND ORDERS SOUGHT**

24. Fair Voting BC takes no position on the disposition of the appeal.

25. Fair Voting BC seeks no order as to costs, and asks that no award of costs be made against it.

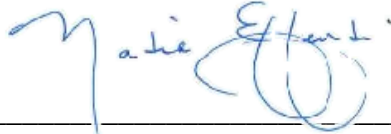
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<sup>45</sup> In the present case, there is no doubt that several of the losing candidates, volunteers, and voters in the present election were dissatisfied and/or did not participate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED February 1, 2021.

Per:



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**Nicolas M. Rouleau**  
Counsel for the intervener, Fair Voting BC

**PART V: TABLE OF AUTHORITIES****Jurisprudence**

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## Legislation

<b>Legislation</b>	<b>Paragraph Reference</b>
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