Court File No. C58876

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

GILLIAN FRANK AND JAMIE DUONG

Applicants
(Respondents in appeal)

- and -

THE ATTORNEY GENERAL OF CANADA

Respondent
(Appellant in appeal)

- and -

THE CANADIAN CIVIL LIBERTIES ASSOCIATION, CHIEF ELECTORAL OFFICER, AND BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Intervenors

FACTUM OF THE INTERVENOR, THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

STOCKWOODS LLP
Barristers
Toronto-Dominion Centre
TD North Tower
77 King Street West
Suite 4130, P.O. Box 140
Toronto ON M5K 1H1

Brendan van Niejenhuis (46752J)
Justin Safayeni (58427U)
Stephen Aylward (66556E)

Tel: 416-593-7200
Fax: 416-593-9345

Lawyers for the Intervenor,
The British Columbia Civil Liberties Association

TO: **DEPARTMENT OF JUSTICE**
Ontario Regional Office
The Exchange Tower
130 King Street West
Suite 3400
Toronto, ON M5X 1K6

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

Lawyers for the Appellant,
The Attorney General of Canada

AND TO: **CAVALLUZZO SHILTON McINTYRE & CORNISH LLP**
Barristers and 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
adarrach@cavalluzzo.com

Lawyers for the Respondents in appeal,
Gillian Frank and Jamie Duong

AND TO: **BORDEN LADNER GERVAIS LLP**
Barristers and Solicitors
Scotia Plaza
40 King Street West
Toronto, ON M5H 3Y4

Alessandra V. Nosko
Tel: 416-367-6644
Fax: 416-361-7343
Email: anosko@blg.com

Lawyers for the Intervenor,
the Chief Electoral Officer

AND TO: **LERNERS LLP**
Barristers and Solicitors
130 Adelaide Street West
Suite 2400
Toronto, ON M5H 3P5

Mark Freiman / Jameel Madhany
Tel: 416-601-2370 / 601-2640
Fax: 416-867-2453 / 601-2745
Email: mfreiman@lerners.ca / jmadhany@lerners.ca

Lawyers for the Intervenor,
the Canadian Civil Liberties Association

INDEX

Court File No. C58876

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

GILLIAN FRANK AND JAMIE DUONG

Applicants
(Respondents in appeal)

- and -

THE ATTORNEY GENERAL OF CANADA

Respondent
(Appellant in appeal)

FACTUM OF THE INTERVENOR, THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

PART I - OVERVIEW

1. The respondents successfully challenged the constitutionality of the restrictions placed on non-resident voters by the "Special Voting Rules" as set out in section 11 of the *Canada Elections Act*, SC 2000, c 9. The application judge, Penny J., struck down the restrictions and denounced the "vague generalizations" put forward by the government in defence of a *Charter*-infringing law.[1] The British Columbia Civil Liberties Association ("BCCLA") intervenes in support of a stringent evidentiary standard for showing justification for breaches of *Charter* rights under s. 1. In particular, the BCCLA submits that the application judge's reasons form part of a broader return to the principles laid out in *R v Oakes*, [2] under which the government is required to prove by cogent evidence and not mere assertion that rights violations are

---

[1] *Frank et al. v Canada*, 2014 ONSC 907 at paras 110-113 ["Reasons of Penny J."], Appeal Book and Compendium, Tab 2.

[2] *R. v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200 [*Oakes*], Respondents' Book of Authorities.

demonstrably justified in a free and democratic society. While strict scientific proof may not be feasible in every case, the government must provide a reasoned demonstration of the basis for limiting *Charter* rights that is capable of being adjudicated.

2. The BCCLA limits its submissions to three points. The first is a submission on the appropriate evidentiary standard to be applied in s. 3 cases. In effect, it is an argument against vague and generalized claims by the government in the context of the s. 1 justification analysis. While the cases do not speak with one voice, the balance of authority strongly supports the need for some form of evidence in most cases of *Charter* litigation and particularly in the context of s. 3. The BCCLA will then outline that this evidence-based approach should be applied to the first and second branches of the *Oakes* test in this case. The government should not be permitted to rely on abstract objectives that insulate *Charter*-infringing measures from judicial scrutiny. Nor should common sense reasoning suffice in establishing a rational connection between the impugned measure and the legislative objective where more reliable and testable evidence is available.

PART II - THE FACTS

3. The BCCLA accepts the application judge's factual findings.

PART III - ISSUES AND THE LAW

4. The BCCLA's submissions address the following issues:

(a) what evidentiary standard should apply to the s. 1 analysis where there is an infringement of s. 3 rights;

(b) whether the objectives identified by the appellant are pressing and substantial; and

(c) whether the impugned measures are rationally connected to those objectives.

A. Strict evidentiary standard applies when justifying an infringement of s. 3

5. Where the right to vote under s. 3 of the *Charter* has been infringed, the government is held to a stricter evidentiary standard throughout the s. 1 justification analysis.

6. It is worth noting that, from its inception, the evidentiary standard for justifying the infringement of *Charter* rights was designed to be a strict one. In *Oakes,* Chief Justice Dickson cited two important "contextual factors" that influenced the Supreme Court's view on this issue. The first factor was that the law in question "violates constitutional rights and freedoms -- rights and freedoms which are part of the supreme law of Canada." The second factor was the requirement, based on the language of s. 1, that "the underlying values and principles of a free and democratic society" set the "ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified." Those values include "faith in social and political institutions which enhance the participation of individuals and groups in society." Based on these two considerations, the Court described the evidentiary standard for justification under s. 1 as follows:

> Having regard to the fact that s. 1 is being invoked for the purpose of justifying a violation of the constitutional rights and freedoms the Charter was designed to protect, a very high degree of probability will be, in the words of Lord Denning, "commensurate with the occasion". **Where evidence is required in order to prove the constituent elements of a s. 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit.** A court will also need to know what alternative measures for implementing the objective were available to the legislators when they made their decisions. I should add, however, that there may be cases where certain elements of the s. 1 analysis are obvious or self-evident.[3]

---

[3] *Ibid* at 138 (emphasis added; citations omitted), Respondents' Book of Authorities.

7. Since *Oakes*, much judicial ink has been spilled in attempting to determine when a case falls into the category where the evidentiary standard may be relaxed, or perhaps even altogether dispensed with, on the basis that elements of the s. 1 test are "obvious or self-evident." This can be seen in the Court's development of a "contextual approach" to s. 1, which adjusts the requisite standard of proof for justification based on a number of different factors.[4]

8. The application of the contextual approach by courts across the country has been uneven. In certain cases, the BCCLA submits that it has resulted in an unacceptable infringement of *Charter* rights based on little or even no evidence, a highly deferential posture towards the government, and generous doses of "common sense" reasoning. These cases have strayed some distance from the view in *Oakes* that "cogent and persuasive" evidence will "generally" be required on all elements of the justification test.

9. However, when it comes to the right to vote under s. 3 of the *Charter*, the Supreme Court has clearly signalled its commitment to a stricter, more evidence-based version of the *Oakes* test. In *Sauvé v Canada (Attorney General)* ["*Sauvé #2*"], Chief Justice McLachlin, writing for the majority, explained that a stringent standard was necessary in order to safeguard a right of such fundamental importance:

> **13** The core democratic rights of Canadians do not fall within a "range of acceptable alternatives" among which Parliament may pick and choose at its discretion. **Deference may be appropriate on a decision involving competing social and political policies. It is not appropriate, however, on a decision to limit fundamental rights.** This case is not merely a competition between competing social philosophies. **It represents a conflict between the right of citizens to vote -- one of the most fundamental rights guaranteed by the *Charter* -- and Parliament's denial of that right. Public debate on an issue**

[4] *Harper v Canada (Attorney General)*, [2004] 1 SCR 827, 2004 SCC 33 at paras 77ff, *per* Bastarache J. [*Harper*], Appellant's Book of Authorities; *R v Bryan*, [2007] 1 SCR 527, 2007 SCC 12 at paras 22ff, *per* Bastarache J [*Bryan*], Appellant's Book of Authorities.

> **does not transform it into a matter of "social philosophy", shielding it from full judicial scrutiny. It is for the Courts, unaffected by the shifting winds of public opinion and electoral interests, to safeguard the right to vote guaranteed by s. 3 of the *Charter*.**
>
> **14** *Charter* rights are not a matter of privilege or merit, but a function of membership in the Canadian polity that cannot lightly be cast aside. This is manifestly true of the right to vote, the cornerstone of democracy, exempt from the incursion permitted on other rights through s. 33 override. **Thus, courts considering denials of voting rights have applied a *stringent* justification standard**: *Sauvé v. Canada (Attorney General)* (1992), 7 O.R. (3d) 481 (C.A.) ("*Sauvé No. 1*"), and *Belczowski v. Canada*, [1992] 2 F.C. 440 (C.A.).
>
> **15** The *Charter* charges courts with upholding and maintaining an inclusive, participatory democratic framework within which citizens can explore and pursue different conceptions of the good. **While a posture of judicial deference to legislative decisions about social policy may be appropriate in some cases, the legislation at issue does not fall into this category. To the contrary, it is precisely when legislative choices threaten to undermine the foundations of the participatory democracy guaranteed by the *Charter* that courts must be vigilant in fulfilling their constitutional duty to protect the integrity of this system.**[5]

10. The Court in *Sauvé #2* held that while scientific proof was not necessary in every case, the justification for infringing the right to vote had to be convincing, "in the sense that it is sufficient to satisfy the reasonable person looking at all the evidence and relevant considerations, that the state is justified in infringing the right at stake to the degree it has." Common sense and inferential reasoning may "supplement the evidence," but the majority warned that "one must be wary of stereotypes cloaked as common sense, and of substituting deference for the reasoned demonstration required by s. 1."[6]

11. A stringent evidentiary standard in voting rights cases is also justified under the contextual approach to s. 1. That approach requires considering factors such as: (i) the nature of

---

[5] *Sauvé v Canada (Chief Electoral Officer)*, [2002] 3 SCR 519, 2002 SCC 68 [*Sauvé #2*] (emphasis added; italics in original), Appellant's Book of Authorities.

[6] *Ibid* at para 18.

the purported harm and the (in)ability to measure it; (ii) the vulnerability of the group purportedly protected; (iii) whether there are subjective fears and apprehension of harm; and (iv) the nature of the infringed activity. Justice Bastarache explained the role of these factors in *Bryan*:

> The contextual factors are essentially directed at determining to what extent the case before the Court is a case where the evidence will rightly consist of "approximations and extrapolations" as opposed to more traditional forms of social science proof, and therefore to what extent arguments based on logic and reason will be accepted as a foundational part of the s. 1 case.[7]

12. In the context of the present appeal, the nature of the purported harm is difficult to measure, but only because it has been framed in vague and abstract terms by the appellant (as discussed further below), which cannot militate in favour of a more lenient evidentiary standard. The group purportedly protected (resident electors) is not vulnerable.[8] Although the BCCLA does not accept that subjective fears or apprehensions of harm should influence the evidentiary standard for protected constitutional rights, the evidence in this case does not establish that any such fears or apprehensions exist; indeed, unlike previous cases relied upon by the appellant, there is no polling evidence or Commission reports that suggest the existence or threat of harm.[9] Finally, the infringed activity in this case is the right to vote, the significance of which the Supreme Court has repeatedly recognized.

13. This brings us back to Chief Justice Dickson's discussion in *Oakes* about the contextual factors that guided the original formulation of the test, both of which militate in favour of a strict evidentiary standard in voting rights cases. Chief Justice Dickson stated that the "ultimate

---

[7] *Bryan*, *supra* note 4 at para 29, Appellant's Book of Authorities.

[8] *Ibid* at para 24

[9] *Ibid* at para 25

standard" for evaluating a limitation on rights must be guided by "the underlying values and principles of a free and democratic society". The right to vote is essential to democracy. Voting rights are a central tenet of democratic citizenship.

14. The explicit reasoning of the Court in *Sauvé #2*, the contextual factors used in cases like *Bryan*, and the original view of what was required to justify infringement in *Oakes* all point to the same conclusion: a breach of the right to vote under s. 3 requires a strict, evidence-based standard for justification. Appeals to common sense or logic to *supplement* that evidence must be carefully scrutinized, without deference. The BCCLA submits that is the lens through which the justification analysis in the present appeal must be viewed.

B. No pressing and substantial objectives

15. The appellant submits that the impugned provisions serve the pressing and substantial objectives of (i) ensuring "fairness" to resident electors and (ii) maintaining the "primacy of the role of residence" in Canada's electoral system.

16. The BCCLA submits that neither objective qualifies as pressing and substantial. To meet this standard, particularly in the context of a s. 3 infringement, the objective must both identify a specific, concrete harm it seeks to remedy (or potential harm it seeks to avoid), and provide some evidentiary basis on which it may be concluded that such a harm exists (or will exist in absence of the legislation). Neither requirement is met in this case.

i. Failure to identify specific, concrete harms

17. As the Supreme Court made clear in *Sauvé #2*, objectives that are framed in "vague," "abstract," "symbolic" or "rhetorical" terms must be viewed with suspicion. Such objectives frustrate the constitutional analysis because they "almost guarantee a positive answer" to the first

stage of the *Oakes* test and "make the justification analysis more difficult." Proper justification "requires that the objective clearly reveal the harm that the government hopes to remedy," otherwise it is "hard to say the denial [of the right to vote] is directed at a pressing and substantial purpose."[10]

18. Where the government does not put forward a sufficiently precise and identifiable objective, the BCCLA submits that there should be a clear finding that it has failed to meet the *Oakes* test. This applies *a fortiori* where the impugned measure infringes the right to vote under s. 3, and consequently attracts a more rigorous standard for justification. In *Sauvé* #2, the Court opted for "prudence" and continued with the justification analysis, despite the fact that the government had failed to identify any specific harm that would be remedied by the impugned provisions. So too did the application judge in this case. But a meaningful commitment to the standards in the *Oakes* test and the protection of constitutional rights requires that courts simply reject vague, abstract, symbolic or rhetorical objectives on the basis that they fail to qualify as pressing and substantial. This approach also promotes analytical clarity and incentivizes a proper framing of the government's purported objectives at first instance.

19. In this case, the main objective put forward by government – ensuring "fairness" to resident electors – falls squarely within the category of abstract and symbolic objectives that cannot survive the first stage of the *Oakes* test. While the Supreme Court has held that promoting electoral fairness (and/or public confidence in elections) is a pressing and substantial "overarching objective", it has only done so in cases in which the government identified a number of specific and concrete harms in order to advance that overarching objective.[11] For

---

[10] *Sauvé #2*, *supra* note 5 at paras 22-24, Appellant's Book of Authorities.

[11] *Harper*, *supra* note 4 at para 91, *per* Bastarache J., Appellant's Book of Authorities.

example, in *Thomson Newspapers,* the prohibition on publishing opinion polls during the final three days of a campaign was said to advance electoral fairness by addressing the harm of voters overestimating the scientific accuracy of polls and consequently voting based on inaccurate perceptions.[12] In *Harper*, the third party election advertising regime purported to promote fairness by preventing those with greater means from dominating electoral debate, to prevent some positions from being drowned out by others and to enhance public confidence in the democratic process.[13] And in *Bryan*, the prohibition on the early transmission of election news was said to protect informational equality, which was in turn a central element of electoral fairness.[14]

20. This case is different. Here, the high-level objective of "fairness to resident electors" is not rooted in guarding against any specific harm or potential mischief. The concept of fairness is linked only to the need to limit voting rights to those who are full participants in a "social contract" – yet another poorly defined, abstract and symbolic concept, untethered to any specific harm or potential problem. Although promoting electoral fairness may qualify as a pressing and substantial objective when it describes the *ultimate* objective of more specific measures targeting specific harms, it cannot be used to bolster or immunize from careful review an objective that, standing on its own, falls well short of the requirements in *Sauvé #2*.

21. Moreover, the BCCLA submits that there is an important difference between the objective of "electoral fairness" in cases where the impugned measures infringe s. 3 by

---

[12] *Thomson Newspapers Co. v Canada (Attorney General)*, [1998] 1 SCR 877, 38 OR (3d) 735 at para 96 [*Thomson Newspapers*], BCCLA Book of Authorities, Tab 8.

[13] *Harper*, *supra* note 4 at para 23, *per* McLachlin C.J.C. and para 92, *per* Bastarache J., Appellant's Book of Authorities.

[14] *Bryan*, *supra* note 4 at para 35, *per* Bastarache J., Appellant's Book of Authorities.

restricting *who can vote* (such as *Sauvé #2* and the present appeal), and cases where the impugned measures are designed to make elections fairer for *everyone who votes* by restricting s. 2(b) rights of third party funders or media outlets (*Thomson Newspapers, Harper, Bryan*). Where electoral fairness is invoked as an objective to justify *limiting* voting rights, rather than protecting the fair exercise of all voting rights, it ought to be regarded with suspicion and held to a more stringent standard.

22. Thus, whether the first objective is framed as simply promoting electoral fairness, or restricting voting rights to only those citizens who form part of Canada's "social contract", it cannot pass the first stage of the *Oakes* test, particularly in the context of a s. 3 infringement.

23. The second stated objective of the impugned measures is to "maintain the primacy of the role of residence in Canada's electoral system". While perhaps less vague than the main objective, the record does not establish that it is a pressing and substantial objective, as discussed further below.

ii. **No evidentiary or logical support**

24. In the face of a *Charter* infringement, it falls to the government not only to identify pressing and substantial objectives with sufficient precision, but also to provide an evidentiary basis that the concerns the impugned measures are designed to address are, in fact, pressing and substantial. It may not be realistic to demand definitive scientific or social science evidence that a pressing and substantial objective exists in every case. But nor should courts generally accept that objectives are pressing and substantial based purely on "common sense" or "logic." There should, at the very least, be *some* evidentiary basis upon which to believe that the concerns in

question are pressing and substantial.[15] The need for evidence of a pressing and substantial objective is especially important in voting rights cases, where a more rigorous standard for justifying infringement applies at all stages of the *Oakes* test.

25. In this case, the appellant has failed to identify specific harms that the impugned measure is designed to address or guard against, at least with respect to its main objective. Still, it is clear that neither objective has been proven to be pressing and substantial. Unlike past cases involving electoral fairness, there are no government reports suggesting that striking down the impugned provisions would be unfair to resident electors (whether by reference to the social contract or otherwise) or that it would dislodge the primary role of residence in Canada's electoral system.[16] Nor are there any public opinion polls suggesting that resident electors themselves share such views.[17]

26. In support of its objectives, the appellant has adduced some evidence setting out certain potential implications of striking down the impugned provisions. However, that material is of limited assistance for three reasons.

27. First, the expert evidence is highly speculative and generalized, and thus must be regarded with suspicion. For example, the appellant relies on expert evidence supposedly

---

[15] See, for example, *Saskatchewan (Human Rights Commission) v Whatcott*, [2013] 1 SCR 467, 2013 SCC 11 at paras. 69-77, BCCLA Book of Authorities, Tab 7; *Canadian Broadcasting Corp. v Canada (Attorney General)*, [2011] 1 SCR 19, 2011 SCC 2 at paras 65-68, BCCLA Book of Authorities, Tab 2; *Cunningham v Alberta (Aboriginal Affairs and Northern Development*, 2009 ABCA 239, 457 AR 297, reversed on other grounds [2011] 2 SCR 670, 2011 SCC 37 at para 62, BCCLA Book of Authorities, Tab 4; *Canada (Attorney General) v Hislop*, [2007] 1 SCR 429, 2007 SCC 10 at para 49, BCCLA Book of Authorities, Tab 3; *Canada (Attorney General) v JTI-Macdonald Corp.*, [2007] 2 SCR 610, 2007 SCC 30 at paras 114, 126, 134, Appellant's Book of Authorities; *Thomson Newspapers*, *supra* note 12 at paras 103-105, BCCLA Book of Authorities, Tab 8.

[16] *Thomson Newspapers*, *supra* note 12 at para 104, *per* Bastarache J.; *Harper*, *supra* note 4 at paras 94-100; *Bryan*, *supra* note 4 at paras 35-36, Appellant's Book of Authorities.

[17] *Thomson Newspapers*, *supra* note 12 at para 107, *per* Bastarache J.

showing that the "needs and preferences" of resident voters are more "intimately related" to their electoral district than non-resident voters and so allowing non-resident voting would risk distracting MPs from resident concerns.[18] This point is made entirely by assertion and amounts to simple speculation. The appellant also relies on the evidence of Dr. Eagles,[19] which again amounts to a conjecture that removing the limits on the Special Voting Rules would lead to substantial numbers of non-resident voters, which could affect the way political campaigns are run. Reliance on this highly speculative threat of "over-participation" to justify infringing the right to vote is anathema to the very foundations of the *Oakes* analysis.

28. Second, the record suggests that the level of participation anticipated by the government will not even occur. The application judge found as a fact that "since the Special Voting Rules were implemented in 1993, a vastly smaller number of non-resident Canadian citizens have exercised their right to vote than expected."[20] Thus to the extent that we have any evidence, the historical evidence suggests that non-resident voter participation will be limited in scope.

29. Third, even assuming the expert evidence is accurate and reliable, it does little to assist in determining whether the potential consequences it lays out are *unfair* (and thus whether the objective of preventing them is pressing and substantial). There is nothing inherently unfair or problematic about non-resident voters exerting an impact in certain electoral districts, or voting based on a different set of considerations than resident electors.

30. This raises yet another problem with the government's main objective: even assuming that restricting voting based on the degree of participation in the social contract *could* qualify as

---

[18] Koop Affidavit at para 112, Appeal Book and Compendium, Tab 17.

[19] Eagles Affidavit, paras 102-103, Appeal Book and Compendium, Tab 63.

[20] Reasons of Penny J., *supra* note 1 at para 113, Appeal Book and Compendium, Tab 2.

a pressing and substantial objective, its view of "unfairness" rests on a series of unsubstantiated assumptions about the degree of non-resident electors' future participation in the social contract, as compared to others who are allowed to vote despite non-residence. For example, the appellant repeatedly states that it is "reasonable to assume" that the other classes of individuals who are allowed to vote under the Special Voting Rules will return to reside in Canada and "resume" their participation in the social contract, without providing any evidence on this point.

31. Similarly, with respect to its second objective, the appellant has not put forward any evidence to support the questionable underlying assumption that residence does, in fact, have a primary role to play in the electoral system. If that assumption cannot be established, then the objective built on its foundation cannot be pressing and substantial. Even if the underlying assumption could be established, the BCCLA submits that the objective of maintaining the primacy of residence could be met by more rational and less draconian solutions than denying non-resident voters their democratic rights (*e.g.*, the creation of a separate "seat" to represent non-resident voters).

32. To properly assess whether the appellant's objectives are pressing and substantial, these underlying assumptions and presumptions must be carefully scrutinized and evaluated. In *Thomson Newspapers*, for example, the majority concluded that the objective of having a "rest period" between when polls are last published and the date of an election was not pressing and substantial because it rested on faulty and unsubstantiated assumptions about voter maturity and behaviour.[21] Given that the present appeal involves an infringement of the right to vote, the questionable assumptions underlying the government's objectives ought to be regarded with

---

[21] *Thomson Newspapers*, *supra* note 12 at paras 101-102, *per* Bastarache J., BCCLA Book of Authorities, Tab 8.

even greater suspicion, particularly in the absence of any supporting evidence, and in circumstances where such evidence would presumably be available (*e.g.*, statistics about how many individuals in the other Special Voting Rules categories resume residence in Canada).

33. Finally, this is not a case like *Thomson Newspapers*, *Harper* or *Bryan*, where the Court supplemented evidence of specific harms with certain basic common sense or logical propositions, and found objectives designed to improve electoral fairness for all who vote to be pressing and substantial. To accept the appellant's objectives as pressing and substantial in the present appeal is to accept that vague and symbolic objectives that do not target any specifically identified harms, are without any evidentiary support, and are built upon a foundation of unsubstantiated assumptions, can restrict a fundamental right at the core of our free and democratic society. Such a result is irreconcilable with the Court's jurisprudence, from *Oakes* to *Sauvé #2*, and would deal a significant blow to the stringent standard for justification required to protect voting rights.

C. No rational connection

34. The next step of the s. 1 justification framework requires the Court to determine whether the infringing measure is rationally connected to the pressing and substantial objectives put forward by the government. The rational connection enquiry is essentially concerned with whether there is a causal link between the rights violation and the pressing and substantial objective.[22] While strict scientific proof of causation may not be possible in every case, the

---

[22] *RJR -- MacDonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199, 127 DLR (4th) 1 at para 153, BCCLA Book of Authorities, Tab 6; Peter W. Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) at para 38.10(b), BCCLA Book of Authorities, Tab 9.

government must show the connection exists. The government may demonstrate the connection by evidence, reason, and logic, but not by mere "theories."[23]

35. In *Canada (Attorney General) v. Bedford*,[24] the Supreme Court has recently examined and affirmed the importance of evidence in *Charter* litigation. Referring to the concept of arbitrariness under s. 7, which is conceptually related to the rational connection test,[25] the Court held that:

> Regardless of how the judge describes this lack of connection, the ultimate question remains whether the evidence establishes that the law violates basic norms because there is *no connection* between its effect and its purpose. This is a matter to be determined on a case-by-case basis, in light of the evidence.[26]

36. In this case, the application judge correctly weighed the evidence before him and found that Canada had not met its burden of demonstrating a rational connection between the deprivation of the fundamental democratic rights of non-resident voters and the government's objectives. In arriving at his conclusion on this point, Penny J. made numerous findings of social and legislative fact. As the Supreme Court held in *Bedford*, such findings are entitled to deference and are reviewable on a standard of overriding and palpable error.[27] The Supreme Court recognized the need for deference to the application judge, who is better placed to weigh and process the evidence relating to social and legislative facts. The BCCLA submits that this recognition is part of a broader return to the priority placed on evidence in *Charter* litigation originally emphasized in *Oakes*.

---

[23] *Sauvé #2*, *supra* note 5 at paras 28 – 29, Appellant's Book of Authorities.
[24] [2013] 3 SCR 1101, 2013 SCC 72, BCCLA Book of Authorities, Tab 1.
[25] *Ibid* at para 111.
[26] *Ibid* at para 119 (emphasis in original).
[27] *Ibid* at para 56.

37. The application judge in this case found that on balance, Canadians living abroad maintain connections to Canada and that it is easy for these citizens to stay informed of developments in Canadian politics and current events.[28] The trial judge also found that there was no evidence of any rational basis for the imposition of time limits on the rights of non-resident voters.[29]

38. By contrast to the deference due to these findings, limits on s. 3 attract not deference, but "careful examination."[30] Careful examination of the evidence tendered by Canada to support the Special Voting Rules shows it to be lacking in substance. Apart from a generic appeal to "reason and logic" the appellant's case for a causal link between the Special Voting Rules and the objectives (fairness to resident voters and preservation of Canada's residence-based form of representational democracy) consists of a comparison to residence requirements in other provinces and foreign jurisprudence upholding analogous residence requirements.

39. The appellant submits that resident and short-term non-resident Canadians have a greater stake in the Canadian polity because they are part of or will soon resume participating in the "social contract."[31] This argument is analogous to the argument rejected in *Sauvé #2* that the prisoners were not entitled to vote because they had somehow "opted out of" of community membership.[32] The idea that Canadian citizens can inadvertently waive their s. 3 rights simply by moving abroad without a fixed intention to return home by operation of a fictitious social

---

[28] Reasons of Penny J., *supra* note 1 at para 125, Appeal Book and Compendium, Tab 2.

[29] *Ibid* at para 129.

[30] *Figueroa v Canada (Attorney General)*, [2003] 1 SCR 912, 2003 SCC 37 at para 60 [*Figueroa*], Respondents' Book of Authorities, citing *Sauvé #2*, *supra* note 5 at para 9, Appellant's Book of Authorities.

[31] Appellant Factum at para 84.

[32] *Sauvé #2*, *supra* note 5 at para 42.

contract is not in conformity with reason or logic. It is this very type speculative social philosophy that highlights the value of evidence in demonstrating a rational connection.

40. The application judge correctly rejected the analogy drawn by the appellant to provincial residence requirements. The provincial regimes are irrelevant to the federal context. Provinces have no equivalent of citizenship and so rely on the cruder measure of residence to filter out potential voters with an insufficient connection to the province.[33]

41. The application judge was also correct to downplay the relevance of foreign jurisprudence at this stage of the analysis. While the BCCLA welcomes increased reliance on human rights law from other jurisdictions to aid in the interpretation of the *Charter*, it will rarely be appropriate to consider the experience of foreign jurisdictions at the rational connection stage. Rational connection is about the causal link between the impugned measure and the government's objective. Surveying legal conclusions from other countries cannot stand in for the need for reasoned demonstration of this link, unless the foreign jurisprudence raises evidence that is applicable in the Canadian context either directly or by analogy. There is a constant risk of a "race to the bottom" based on a superficial reading of foreign jurisprudence. While comparative jurisprudence can yield important insights into the nature of rights and their limitation, it cannot stand in for cogent evidence.

42. One feature of the Special Voting Rules calls for comment, namely the five-year time limit. The Supreme Court has indicated that threshold limits on rights of democratic participation must have a strong evidentiary foundation or will risk being found to be arbitrary. In *Figueroa*, the Court struck down the requirement that political parties field candidates in at least 50 ridings

---

[33] Reasons of Penny J., *supra* note 1 at paras 96, 128, Appeal Book and Compendium, Tab 2.

in order to receive certain electoral financing advantages and the right to list party affiliation next to a candidate's name on a ballot. The majority, *per* Iacobucci J., held that there was "no connection whatsoever" between the 50 candidate threshold and enhancing the electoral process.[34] Notably, in *Figueroa* the majority accepted that on its face the infringing measure was rationally connected to its objective.[35] However, the Court looked past "common sense" and held that the government had not provided sufficient evidence to support the claim that the 50 candidate rule increased the likelihood of a majority government.

43. The thresholds at issue in this case and *Figueroa* are readily distinguishable from that in *Harvey*.[36] In that case, the majority of the Court accepted as rational a five-year disqualification from holding office for politicians convicted of electoral offences.[37] But the rational basis for the time limit was found to be its deterrent effect analogous to that of a criminal sentence. There is obviously no suggestion of a deterrent effect in the present case.

44. The arbitrary nature of the Special Voting Rules may be seen from the way in which the various provisions of s. 11 of the *Elections Act* interact. Consider a Canadian who moves abroad during an election year prior to the commencement of a posting with the UN in a foreign country. Because she lacks a fixed intention to return to Canada and is not yet employed by the international organization, she slips through the cracks of s. 11 and is deprived of the right to vote. While s. 11 appears to condone working for an international organization as preserving a

---

[34] *Figueroa* at para. 64, Respondents' Book of Authorities.

[35] *Ibid* at para 84.

[36] *Harvey v New Brunswick (Attorney General)*, [1996] 2 SCR 876, 137 DLR (4th) 142 [*Harvey*], BCCLA Book of Authorities, Tab 5.

[37] *Ibid* at para 41.

sufficient nexus to the Canadian community to warrant voting rights, a person in this situation is deprived of those rights by simple coincidence of timing.

45. While the BCCLA takes the position that the objectives proffered by Canada are too vague to justify any deprivation of constitutionally protected rights, an alternative approach to ensuring rigorous adjudication of s. 1 justification claims in the s. 3 context is also possible. In *Sauvé #2*, Chief Justice McLachlin used the vagueness of the objectives put forward by the government to find inconsistencies between the effects of the impugned measure and the objective. The government argued that depriving certain prisoners of the right to vote enhanced civic responsibility and respect for the rule of law. The Chief Justice, for the majority, held that the disenfranchisement of prisoners had the opposite effect by undermining core democratic values.[38]

46. In this case, the vagueness of the government's objective of promoting fairness to resident voters creates a similar problem for the appellant at the rational connection stage. While in some sense it might be "unfair" that a non-resident voter might decide an election, it might equally be unfair to deny the resident public the benefit of the votes of non-resident citizens who can inform political debate with their experience and provide a different perspective on what it means to be Canadian.

---

[38] *Sauvé #2*, *supra* note 5 at paras 30-34, Appellant's Book of Authorities.

PART IV - ORDER SOUGHT

47. The BCCLA submits that the appeal should be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of October 2014

Brendan van Niejenhuis
Justin Safayeni
Stephen Aylward
Stockwoods LLP

Lawyers for the Intervenor,
The British Columbia Civil Liberties Association

CERTIFICATE OF COUNSEL

The Intervenor, The British Columbia Civil Liberties Association, certifies that:

(a) 15 minutes is required for the Intervenor's oral argument of the appeal, not including reply.

(b) An order under 61.09(2) (original record and exhibits) is not required.

DATED AT Toronto, Ontario this 27th day of October, 2014.

Justin Safayeni

SCHEDULE "A"
LIST OF AUTHORITIES

TAB	CASES
1.	*Canada (Attorney General) v Bedford*, [2013] 3 SCR 1101, 2013 SCC 72.
2.	*Canadian Broadcasting Corp. v Canada (Attorney General)*, [2011] 1 SCR 19, 2011 SCC 2.
3.	*Canada (Attorney General) v Hislop*, [2007] 1 SCR 429, 2007 SCC 10.
4.	*Canada (Attorney General) v JTI-Macdonald Corp.*, [2007] 2 SCR 610, 2007 SCC 30.
5.	*Cunningham v Alberta (Aboriginal Affairs and Northern Development*, 2009 ABCA 239, 457 AR 297, reversed on other grounds [2011] 2 SCR 670, 2011 SCC 37.
6.	*Cunningham v Alberta (Aboriginal Affairs and Northern Development*, [2011] 2 SCR 670, 2011 SCC 37.
7.	*Figueroa v Canada (Attorney General)*, [2003] 1 SCR 912, 2003 SCC 37.
8.	*Harper v Canada (Attorney General)*, [2004] 1 SCR 827, 2004 SCC 33.
9.	*Harvey v New Brunswick (Attorney General)*, [1996] 2 SCR 876, 137 DLR (4th) 142.
10.	*R v Bryan*, [2007] 1 SCR 527, 2007 SCC 12.
11.	*R. v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200.
12.	*RJR – MacDonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199, 127 DLR (4th) 1
13.	*Saskatchewan (Human Rights Commission) v Whatcott*, [2013] 1 SCR 467, 2013 SCC 11.
14.	*Sauvé v Canada (Chief Electoral Officer),* [2002] 3 SCR 519, 2002 SCC 68.
15.	*Thomson Newspapers Co. v Canada (Attorney General)*, [1998] 1 SCR 877, 38 OR (3d) 735.
	SECONDARY SOURCES
16.	Peter W. Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007).

SCHEDULE "B"
RELEVANT STATUTES

Courts of Justice Act
R.R.O. 1990, REGULATION 194

RULES OF CIVIL PROCEDURE

LEAVE TO INTERVENE AS FRIEND OF THE COURT

13.02 Any person may, with leave of a judge or at the invitation of the presiding judge or master, and without becoming a party to the proceeding, intervene as a friend of the Court for the purpose of rendering assistance to the Court by way of argument. R.R.O. 1990, Reg. 194, r. 13.02; O. Reg. 186/10, s. 1.

ATTORNEY GENERAL OF CANADA
Appellant

and

GILLIAN FRANK AND JAMIE DUONG
Respondents

Court File No. C58876

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

FACTUM OF THE INTERVENOR, THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

STOCKWOODS LLP
Barristers
Toronto-Dominion Centre
TD North Tower
77 King Street West
Suite 4130, P.O. Box 140
Toronto ON M5K 1H1

Brendan van Niejenhuis (46752J)
Justin Safayeni (58427U)
Stephen Aylward (66556E)

Tel: 416-593-7200
Fax: 416-593-9345

Lawyers for the Intervenor,
The British Columbia Civil Liberties Association