Court File No. CV-14-513961

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

THE COUNCIL OF CANADIANS,
THE CANADIAN FEDERATION OF STUDENTS,
JESSICA McCORMICK, PEGGY WALSH CRAIG, and SANDRA McEWING

Applicants

- and -

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

Respondent

- and -

CHIEF ELECTORAL OFFICER OF CANADA
THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Intervenors

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INDEX

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PART I - OVERVIEW

1. The intervenor, the British Columbia Civil Liberties Association (the "BCCLA"), submits that the legal principles governing interlocutory relief and the protection of voting rights support the applicants' motion for an interlocutory injunction to stay the implementation and operation of s. 46(3) of *An Act to amend the Canada Elections Act and other Acts and to make consequential amendments to certain Acts*, S.C. 2014, c. 12 (the "impugned provision").[1] The impugned provision eliminates the ability of voters to use Voter Information Cards to prove their identity. As a result, tens of thousands of Canadian citizens will be effectively disenfranchised.

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[1] A copy of the order governing the BCCLA's intervention on this motion is attached at Schedule "C".

2. This case easily meets the first two stages of the test for an interlocutory injunction under the test set out in *RJR-MacDonald Inc v Canada (Attorney General)* ("*RJR*").[2] There is no doubt that the impugned provision infringes the voting rights protected under s. 3 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). This infringement is unlikely to survive s. 1 scrutiny given the stringent justification standard that must be met in voting rights cases and the paucity of evidence supporting justification in this case. Furthermore, the harm that flows from an interference with voting rights is irreparable, not only to disenfranchised voters themselves, but also potentially to the public at large.

3. At the final stage of the *RJR* test, the public interest must be considered in deciding where the balance of inconvenience lies and, ultimately, whether an injunction should be granted. The BCCLA's submissions focus on why the public interest supports granting an injunction in this case.

4. First, the presumption that validly enacted legislation is in the public interest does not apply to the impugned provision. The 'public interest presumption' must be limited to laws that promote a clear and recognizable public interest. Laws like the impugned provision, which interfere with voting rights and effectively disenfranchise voters, are not in the nature of promoting the public interest and do not attract this presumption. This conclusion flows from the Supreme Court's decision in *Sauvé v Canada (Chief Electoral Officer)* ("*Sauvé*")[3], which held that voting rights are of fundamental importance in a participatory democracy and need to be vigilantly protected under the *Charter*. In the context of an interlocutory injunction, this means that laws interfering with voting rights must be proven, not presumed, to be in the public interest, before the balance of convenience is held to fall against the voting citizen.

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[2] [1994] 1 SCR 311, Applicants' Book of Authorities ("Applicants' BOA"), Tab 8

[3] [2002] 3 SCR 519, Applicants' BOA, Tab 1

5. Further, as legislation that effectively disenfranchises voters, the BCCLA submits that the impugned provision should, in fact, be presumed to be *against* the public interest. Such an approach properly reflects the significant interest of the Canadian public in protecting voting rights by according them a measure of interim security until such time as the constitutionality of the impugned provision has been adjudicated and determined.

6. Finally, even if this Court concludes that the public interest presumption applies with respect to the impugned provision that presumption is firmly rebutted and outweighed by the countervailing public interest in favour of an injunction in this case. Relevant factors supporting this conclusion include: the unique and fundamental nature of the rights at issue; the fact that denying the injunction sought will result in far greater irreparable harm than if it were granted; the disproportionate impact of the impugned provision on specific sectors of the voting population; and the fact that the impugned provision was passed on a date that made a full constitutional review on the merits highly unlikely.

PART II - THE FACTS

7. The BCCLA accepts and relies upon the facts as stated in the factum of the applicants.[4]

PART III - ISSUES AND THE LAW

8. The sole issue on this motion is whether an interlocutory injunction should issue with respect to the impugned provision. The test for an interlocutory injunction asks whether:

(a) there is a serious question to be tried with respect to the impugned provision;

(b) the applicants would suffer irreparable harm if the injunction were not granted; and

(c) the balance of inconvenience favours granting an injunction.

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[4] Applicants' factum at paras 12-54

9. In this case, the BCCLA submits that all these questions should be answered in the affirmative, and so an injunction should be ordered.

A. The constitutionality of the impugned provision raises a serious question to be tried

10. This case easily meets the first requirement in the *RJR* test, which requires only that an application not be frivolous or vexatious.[5] In fact, there is little room to doubt the impugned provision infringes s. 3 of the *Charter*. In *Henry v Canada (Attorney General)* ("*Henry*"), less onerous voter identification requirements were held to be an infringement on voter rights, with the British Columbia Court of Appeal explaining that "any interference with the right to put a ballot in the box must be justified under s. 1 of the *Charter*."[6] The same applies *a fortiori* here.

11. It is also highly unlikely that the impugned provision could be justified under s. 1. As discussed further below, a stringent standard for justification applies when voting rights are infringed, with little deference afforded to the state.[7]

B. There will be irreparable harm if an injunction is not granted

12. By interfering with the right to vote and effectively disenfranchising voters, the impugned provision will clearly cause irreparable harm to those voters.[8] As many courts have recognized, one cannot simply put a price tag on the right to vote.[9] Moreover, the impact of the irreparable harm does not stop at the disenfranchised voters. If it is later determined that the

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[5] ***RJR***, Applicants' BOA, Tab 8 at paras 49-50

[6] 2014 BCCA 30, leave to appeal dismissed 2014 CanLII 38981 (SCC), Applicants' BOA, Tab 3 at para 56 (see also paras 71-72). Note that the BCCLA does not endorse the Court of Appeal's section 1 analysis in *Henry*, which errs in according the state a significant degree of deference, rather than applying the stringent justification standard required by the Supreme Court in *Sauvé*.

[7] ***Sauvé***, Applicants' BOA, Tab 1 at paras 14, 15-16, 18

[8] The Supreme Court has defined irreparable harm as harm that "either cannot be quantified in money terms or which cannot be cured": ***RJR***, Applicants' BOA, Tab 8 at para 58

[9] ***Sauvé v Canada (Chief Electoral Officer)***, [1997] 3 FC 628 ["*Sauvé* (FC)"], Applicants' BOA, Tab 28 at para 23 ("the respondents cannot be compensated for the denial of their right to vote in the upcoming federal election."); ***Frank v Canada (Attorney General)***, 2014 ONCA 485 ["*Frank*"], Applicants' BOA, Tab 6 at para 22 ("Once the election has passed, the constitutional right to vote in that election will be lost forever.")

participation of the disenfranchised voters would or could have changed the result of the election, the harm that flowed would be irredeemable not only to them, but to the public at large and its confidence in the legitimacy of the government.[10]

C. Balance of inconvenience: public interest presumption does not apply in this case

13. The balance of inconvenience stage of the *RJR* test favours granting an injunction in this case.

14. In *Charter* litigation, it is at this final stage that the public interest must be considered[11] and that is where the BCCLA focuses its three submissions. First, the public interest presumption in favour of maintaining validly enacted legislation does not apply where the law in question interferes with voting rights, as it does in this case. Second, such laws should in fact be presumptively considered *against* the public interest. Finally, even if the public interest presumption applies in favour of the respondent, it is rebutted in the circumstances of this case, firmly weighting the balance of inconvenience in favour of an injunction.

i. Public interest presumption does not apply in all cases

15. In the context of an interlocutory injunction, the maintenance of validly enacted legislation has traditionally been presumed to be in the public interest.[12] This traditional presumption has evolved, reflecting the conclusions of leading commentators, who have called this approach "problematic" and "unfortunate".[13] Indeed, the BCCLA submits that the public interest presumption is inconsistent with the Supreme Court's acknowledgment that:

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[10] ***Frank***, Applicants' BOA, Tab 6 at para 22

[11] ***RJR***, Applicants' BOA, Tab 8 at para 64

[12] *Ibid.* at paras 71-72, 80

[13] K. Roach, *Constitutional Remedies* (loose-leaf), Tab A of these submissions at 7.480 and 7.490, citing, in part, J. Cassels, "An Inconvenient Balance: The Injunction as a Charter Remedy" in Remedies*: Issues and Perspectives*, Jeffrey Berryman, ed. (Toronto: Carswell, 1991) at 303

(a) the public interest is not a monolithic concept[14];

(b) the Attorney General has no monopoly on the public interest[15];

(c) the public interest includes "both the concerns of society generally and the particular interests of identifiable groups"[16]; and

(d) there is no presumption that the challenged legislation is constitutional in the context of motions for interlocutory relief.[17]

Accordingly, there is no principled reason to give the state the benefit of a presumption at this stage of the analysis, and automatically put it in a more advantageous position than non-state parties seeking to advance their own understanding of what serves the public interest.

16. For present purposes, this Court need not revisit the merits of the public interest presumption recognized by the Supreme Court in *RJR* and *Harper v Canada (Attorney General)* ("*Harper*")[18], but rather must assess whether the presumption applies in this particular case.

17. It does not. *RJR* and *Harper* limit the presumption to laws where "the nature and declared purpose of legislation is to promote the public interest" (emphasis added).[19] In other words, *RJR* and *Harper* properly recognize that certain laws will, by their very nature, not be entitled to the presumption.[20] The impugned provision falls squarely within this category.

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[14] ***RJR***, Applicants' BOA, Tab 8 at para 65

[15] *Ibid.*

[16] *Ibid.* at para 66

[17] ***Manitoba (Attorney General) v Metropolitan Stores (MTS) Ltd,*** [1987] 1 SCR 110 ["*Metropolitan*"], Applicants' BOA, Tab 7 at paras 11-16

[18] [2000] 2 SCR 764, Applicants' BOA, Tab 11

[19] ***RJR***, Applicants' BOA, Tab 8 at para 80; ***Harper,*** Applicants' BOA, Tab 11 at para 9.

[20] ***RJR***, Applicants' BOA, Tab 8 at para 71: "The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action." [Emphasis added].

ii. Laws interfering with voting rights do not promote the public interest

18. Legislation interfering with voting rights – whether by way of explicit exclusions (as in *Sauvé*) or by way of barriers to participation that effectively disenfranchise voters (as in *Henry* and in this case) – is not entitled to the public interest presumption. By restricting democratic participation, threatening a fundamental right and undermining the legitimacy of Canada's constitutional democracy, these laws fall outside the category of laws recognized in *RJR* and *Harper* as attracting the presumption.

19. To put it in the words of *RJR* and *Harper*, the "nature" of legislation that disenfranchises voters is not to "promote the public interest".

20. This conclusion flows from the unique and fundamental importance of voting rights, which call for special protections rather than blind deference. In *Sauvé* (decided two years after *Harper*), the Supreme Court repeatedly emphasized that the right to vote is "fundamental to our democracy and the rule of law"; has "special importance"; is "one of the most fundamental rights guaranteed by the *Charter*"; is "the cornerstone of democracy"; and represents "the foundations of the participatory democracy guaranteed by the *Charter*".[21]

21. The Court explained that a deferential approach to justifying *Charter* infringements is "not appropriate" when dealing with the voting rights. Instead, "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." Applying a "stringent justification standard", the Court declared legislative provisions prohibiting prisoners from voting to be unconstitutional.[22]

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[21] ***Sauvé***, Applicants' BOA, Tab 1 at paras 9, 10, 13, 14, 15

[22] *Ibid.* at paras 13-16, 18

22. In the context of the present motion for interlocutory injunctive relief, the principles set out in *Sauvé* demand that this Court strictly scrutinize the respondent's arguments for keeping the impugned provision in place. Deference under the *RJR* analysis – whether by way of the public interest presumption or otherwise – is not appropriate when the legislation at issue effectively disenfranchises voters and interferes with voting rights. In order to resist interlocutory relief, such laws must be proven, not presumed, to be in the public interest.

23. Indeed, the very foundations for the public interest presumption crumble when the legislation at issue interferes with voting rights. The presumption is tied to concerns about maintaining the rule of law, and depends on the law in dispute having democratic legitimacy.[23] As the Supreme Court explained in *Sauvé*, however, the legitimacy of legislation is directly linked to voting rights, and this connection is "enshrined in the *Charter*":

> In a democracy such as ours, the power of lawmakers flows from the voting citizens, and lawmakers act as the citizens' proxies. **This delegation from voters to legislators gives the law its legitimacy or force.** Correlatively, the obligation to obey the law flows from the fact that the law is made by and on behalf of the citizens. **In sum, the legitimacy of the law and the obligation to obey the law flow directly from the right of every citizen to vote.** As a practical matter, we require all within our country's boundaries to obey its laws, whether or not they vote. But this does not negate **the vital symbolic, theoretical and practical connection between having a voice in making the law and being obliged to obey it. This connection, inherited from social contract theory and enshrined in the *Charter*, stands at the heart of our system of constitutional democracy.** [Emphasis added].[24]

Later, the Court added that the denial of voting rights "undermines the legitimacy of government, the effectiveness of government, and the rule of law."[25]

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[23] ***Metropolitan***, Applicants' BOA, Tab 7 at para 55

[24] ***Sauvé***, Applicants' BOA, Tab 1 at para 31

[25] *Ibid.* at para 58

24. Since the impugned provision disenfranchises the very citizens whose voting power grounds its legitimacy, it should not be granted the benefit of a presumption that presupposes and depends on such legitimacy. The notion that legislation passed by Parliament always reflects the public interest does not extend so far. Laws infringing voting rights may ultimately be in the public interest, but presuming that they are is wholly inconsistent with the principles articulated in *Sauvé*, the fundamental importance of voting rights in a constitutional democracy and the need for courts to be vigilant – not deferential – in protecting those rights.

iii. Public interest presumption has never been applied in voting rights cases

25. These two related aspects of voting rights – their fundamental importance in Canada's constitutional democracy, and their direct connection to the legitimacy of legislation – is why the public interest presumption should not be, and has not been, applied in the voting rights cases. It is what distinguishes this case from other motions for interlocutory relief where there is an alleged breach of *Charter* rights. (*Harper* and *RJR* were s. 2(b) cases, not s. 3 cases.)

26. In the context of motions for a stay pending appeal in s. 3 cases, for example, courts have consistently applied a more stringent evidentiary standard before suspending voting rights, rather than deferring to the state through the public interest presumption.[26]

27. One such case is the Federal Court's decision on a motion for interlocutory relief in *Sauvé*, where the Attorney General sought a stay of a decision declaring the legislation unconstitutional, pending appeal of that decision to the Federal Court of Appeal. The Federal

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[26] Although these cases are decided after a *Charter* breach has already been established, they remain instructive since motions for stay pending appeals involve the same principles as motions for an interlocutory injunction: see ***RJR***, Applicants' BOA, Tab 8 at para 41. However, where the government is an applicant for interlocutory relief, "the issue of the public interest, as an aspect of irreparable harm to the interests of the government, will be considered at the second stage. It will again be considered in the third stage when harm the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter": see para 81.

Court dismissed the motion, rejected the Attorney General's position that it should benefit from a presumption of irreparable harm to the public interest, and instead required evidence that striking down the law would harm the public interest. The Court was clearly influenced by the fact that the motion was occurring "in the context of the denial of a democratic right", asking "What could be more fundamental than the right to vote in a free and democratic society?" Since the Crown failed to file evidence on the issue of irreparable harm/public interest, the motion for a stay pending appeal failed.[27]

28. A similar approach can be seen in the Ontario Court of Appeal's recent decision in *Frank v Canada (Attorney General)* ("*Frank*"). That case involved provisions of the *Canada Elections Act* restricting the voting rights of non-resident Canadians, which this Court struck down as unconstitutional. The Attorney General appealed and sought a stay pending the outcome of the appeal. Sharpe J.A. rejected the notion that the Attorney General "has something approaching an automatic right to a stay due to a presumption of irreparable harm and that the balance of convenience favours maintaining the 'status quo'." Emphasizing that the government does not have a monopoly on the public interest, Sharpe J.A. instead held that "it is necessary to carefully review the particular facts and circumstances of this case in order to determine whether or not a stay is warranted." In the result, he dismissed the motion.[28]

29. The BCCLA is aware of no case applying the public interest presumption in favour of a law engaging the voting rights protected under s. 3 of the *Charter*.[29]

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[27] ***Sauvé* (FC)**, Applicants' BOA, Tab 28 at para 15-17

[28] ***Frank***, Applicants' BOA, Tab 6 at paras 14, 18

[29] It is anticipated that the respondent may rely on *Gould v Attorney General*, [1984] 2 SCR 124 to support its resistance to this motion. *Gould* is a voting rights case, but its reasoning is stale, limited and of no assistance to the respondent in this case. In *Gould,* the Court dismissed an inmate's application to allow him to vote in an upcoming election pending an ultimate determination on the merits. However, the Court did not reach this conclusion on the

D. Balance of inconvenience: impugned provision is presumptively *against* the public interest

30. Since the impugned provision effectively disenfranchises voters, it not only falls outside the scope of the public interest presumption, but should also presumptively be considered as against the public interest. The respondent has failed to rebut that presumption in this case.

31. As discussed above, *Sauvé* recognizes that the fundamental importance of the right to vote in our constitutional democracy requires courts to exercise vigilance and impose a stringent standard of justification under s. 1 of the *Charter*. In other words, *Sauvé* reflects the significant public interest in ensuring voting rights are given full and robust protection. Deference to the state is not appropriate when voting rights are at issue. The stakes are too high.

32. Translating those principles into the context of interlocutory relief means that whenever there is a serious issue to be tried as to whether a law unjustifiably infringes voting rights, the public interest presumptively favours protecting those rights, unless and until such time it is determined that they are not infringed or that any infringement is justified. Of course, it is always open to the Attorney General to adduce evidence to overcome the presumption by showing why the law does serve the public interest – but that has to be done on proper evidence, not deference. At the very least, such evidence should establish that a specific threat to the public interest exists, and demonstrate how the law in question will assist in reducing that threat. Speculative harms and vague assurances of necessity in the public interest will not suffice.

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basis of the public interest presumption – or indeed on any public interest considerations at all. In a brief, one page decision, the Court adopted the majority reasons of the Federal Court of Appeal. The Court of Appeal's reasons, which were only slightly longer than those of the Supreme Court, hinged on the rationale that "the proper purpose of an interlocutory injunction is to preserve or restore the status quo" – a proposition has since been explicitly rejected by the Supreme Court in *RJR* (at para 75). Accordingly, *Gould* is offers little, if any, insight as to how motions for interlocutory relief should be determined in the post-*RJR* and post-*Sauvé* era. Certainly, it does not support (or even advert to) the proposition that the public interest presumption should apply in voting rights cases.

33. The presumption that legislation disenfranchising voters is contrary to the public interest is critical, since it may be on a motion for interlocutory relief where voting rights are most in need of protection. To see this, one need go no further than the present case. Because of the date when the impugned provision came into effect, it was highly unlikely that their constitutionality would be determined before the upcoming, heavily contested federal election. Yet it is precisely during that election when the need to protect voting rights is most pressing, and the consequences of failing to protect those rights most severe. The presumption accords voting rights a measure of interim protection, and helps to guard against potentially egregious infringements occurring simply due to the time it would take for an adjudication on the merits.

34. Such an approach to the presumptive public interest in voting rights cases is what the unique nature and importance of the right to vote demands. It is not only in the interest of those who stand to be disenfranchised, but also is in the interest of the public at large, all of whom have a stake in maintaining the legitimacy of Canada's constitutional democracy.

35. The presumption applies in this case, and it has not been rebutted. The applicants have established that the impugned provision will have a direct, disenfranchising effect on voters. In so doing, they have easily satisfy the 'serious question to be tried' requirement when it comes to an unjustified voting rights violation, and that is enough to attract the presumption. The respondent has failed to defeat the presumption, since he has not adduced any compelling evidence explaining why the public harms requires the impugned provision – either in terms of existing harms that need to be addressed, or how the impugned provision will, in fact, serve to address those harms.

E. Balance of inconvenience: even with the public interest presumption, the balance favours granting an injunction

36. Even assuming that the public interest presumption applies (a proposition the BCCLA does not accept), that presumption is rebutted in this case and outweighed by the countervailing public interest in support of an injunction. In support of this argument, the BCCLA highlights the following four factors.

37. **First,** the public interest presumption is rebutted for the simple reason that the impugned provision threatens voting rights. As discussed above, these rights are of fundamental importance; they underlie the legitimacy of Canada's constitutional democracy and they demand vigilance, not deference. That must weigh heavily in the public interest analysis, whether by recognizing that disenfranchising legislation falls outside the ambit of the public interest presumption from *RJR* (as argued in Part III.C, *supra*), by recognizing a presumption that laws disenfranchising voters are against the public interest (as argued in Part III.D, *supra*), or as an important factor that supports rebutting the public interest presumption in *RJR*.

38. **Second,** the harm flowing from not granting the injunction in this case far outweighs the harm flowing from granting the injunction. The consequences of not granting injunctive relief are severe: tens of thousands of Canadians will effectively be disenfranchised during the upcoming federal election. These citizens will be unable to exercise one of the most important rights they have in a constitutional democracy, at exactly the moment where it counts the most. Without an injunction, that opportunity will be gone forever, even if it is later determined that the impugned provision constitutes flagrant and unjustifiable breaches of Canadians' voting rights. As set out in *Frank,* where the disenfranchised voters could have changed the result of the election, this would constitute irreparable harm not only to them, but also to the public at large.[30]

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[30] ***Frank,*** Applicants' BOA, Tab 6 at para 22

39. By contrast, the Attorney General has failed to demonstrate any serious risk of harm if the injunction were granted. Speculation about voter fraud committed by individual electors seeking to impersonate other electors is not borne out of the evidence, which establishes that such occurrences are virtually non-existent. Even assuming that the injunction results in isolated instances of voter fraud or other irregularities, that harm is not irreparable. The results of an election in a particular riding can always be investigated, challenged and, if necessary, amended following the vote. In this important respect, this case is unlike *Harper*, where the nature of the alleged harm – the electoral unfairness that would occur without third party spending limits – truly was irreparable, assuming it would have occurred.

40. **Third**, the drastic and disproportionate impact of the impugned provision on certain sectors of the voting population weighs heavily against the presumption that they are in the public interest. Although the impugned measures impose facially neutral requirements, their substantive effect is to disproportionately disenfranchise specific groups of voters. Among these are some of the most vulnerable members of Canadian society (the homeless, the elderly and Aboriginal peoples), as well as members of society who, due to their life circumstances, are already facing significant obstacles to exercising their right to vote (students). The targeted effect of the impugned provision on these vulnerable groups supports granting an injunction.

41. **Finally**, the fact that the impugned provision did not receive Royal Assent until June 19, 2014, and did not come into effect until October 4, 2014[31], should weigh in favour of an

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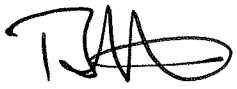
[31] Section 158(3) of *An Act to amend the Canada Elections Act and other Acts and to make consequential amendments to certain Acts*, S.C. 2014, c. 12 (the "Act") sets out that s. 46(3) (together with other provisions at issue in this application) "come into force six months after the day on which this Act receives royal assent unless, before then, the Chief Electoral Officer publishes notice in the *Canada Gazette* that the necessary preparations for the bringing into operation of those provisions have been made and that they may come into force accordingly, in which case they come into force on the day on which the notice is published." The Chief Electoral Officer published such notice in the *Canada Gazette*, Vol 148, No 40 on October 4, 2014 (at p 2585): see http://gazette.gc.ca/rp-pr/p1/2014/2014-10-04/pdf/g1-14840.pdf

injunction being granted. By having the impugned provision come into force so recently, the government must have known that it was very unlikely to be subject to a full review on the merits before the next election, regardless of how timely a constitutional challenge was brought or how expedited the timeline for a hearing. Rejecting a request for interlocutory relief in these circumstances creates an obvious and perverse incentive: governments could introduce laws violating voting rights only months before an election, safe in the knowledge that – at least for the purposes of that election – those laws will stand because a court will not be able to fully review them. Granting an injunction sends a different message, however. Rather than passing such legislation late in the day, governments would be incentivized to pass any laws implicating voting rights well in advance of an election, so as to allow sufficient time for an adjudication on the merits. Such an outcome is undeniably in the public interest.[32]

PART IV - RELIEF REQUESTED

42. The BCCLA submits that this motion for an interlocutory injunction should be granted on the terms requested by the applicants.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of June 2015.



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The British Columbia Civil Liberties Association

[32] In that regard, it should be considered that public confidence in the legitimacy of judicial decision-making on such questions is likely to be enhanced where it occurs prior to, and not after, the result of a particular election. One need only recall the perceived loss of confidence in the legitimacy of the United States Supreme Court observed by Justice Stevens in *Bush v. Gore*, 531 U.S. 98 (2000), when controversial matters of election law and constitutional law were determined in the context of a closely contested presidential election to see the disadvantage to the administration of justice in creating these perverse incentives.

SCHEDULE "A"
LIST OF AUTHORITIES

TAB	CASE
A	K. Roach, *Constitutional Remedies* (loose-leaf) (excerpts)

CONSTITUTIONAL REMEDIES
IN CANADA

SECOND EDITION

KENT ROACH
B.A., LL.B., LL.M. (Yale), F.R.S.C.

Of the Bar of Ontario
Professor of Law
University of Toronto

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November 2014

effects of granting an interim remedy on the public interest in the constitutional context. Beetz J. noted that courts "have found it necessary to rise above the interests of private litigants up to the level of the public interest, and, in cases involving interlocutory injunctions directed at statutory authorities, they have correctly held it is erroneous to deal with these authorities as if they have any interest distinct from that of the public".[130] He added:

> Whether or not they are ultimately held to be constitutional, the laws which litigants seek to suspend or from which they seek to be exempted by way of interlocutory injunctive relief have been enacted by democratically elected legislatures and are generally passed for the common good.[131]

Metropolitan Stores not only requires that the public interest be considered before interlocutory relief is granted, but makes the more problematic assumption that statutory authorities and existing legislation always represent the public interest.[132] The idea that existing legislation was presumed to be in the public interest was re-affirmed by the Supreme Court in *Canada (Attorney General) v. Harper*.[133] In that case, the court held that a trial judge erred in holding that the public interest was not advanced by legislation restricting third party spending during elections because the government had not called evidence on the issue. The court stated: **7.480**

> The assumption of the public interest in enforcing the law weighs heavily in the balance. Courts will not lightly order that laws that Parliament or a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter. It follows that only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed.[134]

This suggests not only that existing legislation will be presumed to be in the public interest, but that this presumption will heavily weight the balance of convenience. In the result, interlocutory remedies creating exemptions or suspensions from legislation will only be granted in clear cases.

The assumption that the public interest is always represented by existing legislation is unfortunate. It creates the possibility that the public interest will **7.490**

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130 *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110, 38 D.L.R. (4th) 321 at p. 339.

131 *Supra*, at p. 338.

132 Jamie Cassels has argued that:

> The Attorney General is not the exclusive representative of a monolithic "public" in Charter disputes, nor does the applicant always represent only an individualized claim. Most often, the applicant can also claim to represent one vision of the "public interest". Similarly, the public interest may not always gravitate in favour of enforcement of existing legislation. Just as the Attorney General will argue that the public interest is served by legislation, so will the applicant argue that the legislation is detrimental to the public interest.

Jamie Cassels, "An Inconvenient Balance: The Injunction as a Charter Remedy" in *Remedies: Issues and Perspectives*, Jeffrey Berryman, ed. (Toronto: Carswell, 1991), at p. 303.

133 *Canada (Attorney General) v. Harper*, [2000] 2 S.C.R. 764, 193 D.L.R. (4th) 38.

134 *Supra*, at para. 9.

be conceived in crudely majoritarian terms which are in tension to the court's role in protecting the constitutional rights of minorities. For example, Beetz J. stated in *Metropolitan Stores* that the interlocutory injunction to stop the James Bay development until the aboriginal rights of the Cree were litigated "is a striking illustration of interlocutory relief which could have compromised the common good of the public as a whole".[135] It can be argued that the plaintiffs in that case also represented the public interest, in particular the public interest that is served by the Crown respecting its obligations to First Nations.[136] The Federal Court of Appeal has recognized that "[t]here is a public interest in enabling the court to protect Charter rights which will, perhaps, be irreparably destroyed"[137] if an interlocutory remedy is not granted.

7.500 Fortunately, the Supreme Court of Canada made clear in *R.J.R.-Macdonald* that the presumption that existing legislation is supported by the public interest is rebuttable. It may be displaced by the applicant showing that the interlocutory remedy requested will serve the public interest.[138] Cory and Sopinka JJ. stated:

> It is, we think, appropriate that it be open to both parties in an interlocutory Charter proceeding to rely upon considerations of the public interest. Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups.[139]

7.510 Private applicants "are normally presumed to be pursuing their own interests rather than those of the public at large",[140] while public authorities acting within their jurisdiction are assumed "in most cases"[141] to be acting in the public interest. In the case, the applicant tobacco company did not

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135 *Metropolitan Stores*, *supra*, footnote 130, at p. 339 (citing with approval *Kanatewat v. James Bay Development Corp.*, [1975] C.A. 166 at pp. 182, 177, 8 C.N.L.R. 373 (Que. CA.), *per* Crete J.A., *per* Turgeon J.A.).

136 See, *infra*, Chapter 15.

137 *YRI-York Ltd. v. Canada (Attorney General)* (1988), 21 C.P.R. (3d) 161 at p. 182, [1988] 3 F.C. 186 (C.A.), quoted in Cassels, *supra*, footnote 132, at p. 304. Professor Cassels argues at p. 305 that: "The assumption that only one party speaks for the public interest, or that the public interest unambiguously points in any one direction, is simply an artificial attempt to squeeze Charter litigation back into the bipolar model".

138 The court quoted with approval Professor Cassels' argument that determining the public interest is a "polycentric" exercise and that the Attorney General is not the exclusive representative of the public interest. See, *supra*, footnote 132. *R.J.R.-Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385 at p. 407.

139 *Supra*, at pp. 407-8.

140 *Supra*, at p. 408. However, in *Hogan v. Newfoundland (Attorney General)* (1998), 163 D.L.R. (4th) 672 at p. 692, 172 Nfld. & P.E.I.R. 185 (Nfld. C.A.), the Newfoundland Court of Appeal found that the chambers judge had erred by suggesting that an applicant's interest in enjoining the abolition of denominational schools "falls more in the private domain which must cede to the general public interest represented by the Attorney General".

SCHEDULE "B"
RELEVANT STATUTES

Canadian Charter of Rights and Freedoms

GUARANTEE OF RIGHTS AND FREEDOMS

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

DEMOCRATIC RIGHTS

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.

SCHEDULE "C"

Court File No. CV-14-513961

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE JUSTICE G DOW	)	WEDNESDAY, THE 13th DAY OF MAY, 2015

B E T W E E N :

THE COUNCIL OF CANADIANS,
THE CANADIAN FEDERATION OF STUDENTS,
JESSICA McCORMICK, PEGGY WALSH CRAIG, and SANDRA McEWING

Applicants

- and -

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

Respondent

O R D E R

(Motion under Rule 13.02 of the *Rules of Civil Procedure*)

THIS MOTION by the Proposed Intervenor, the British Columbia Civil Liberties Association (the "BCCLA"), for leave to intervene as a friend of the Court on the Applicants' motion for an interlocutory injunction (the "Motion") and on the application (the "Application"), was heard this day at the Courthouse at 393 University Ave, Toronto, Ontario.

ON READING the BCCLA's Notice of Motion, the affidavit of Laura Track affirmed April 21, 2015, the BCCLA's Factum and Book of Authorities, and on being advised of the consent to the BCCLA's intervention by the Applicants and the Respondent on certain conditions,

and on being advised that the Chief Electoral Officer takes no position on the BCCLA's intervention;

THIS COURT ORDERS THAT the BCCLA is granted leave to intervene on the Motion on the following terms:

1. The BCCLA may serve a factum not exceeding 15 pages;

2. The factum shall be served by June 16, 2015 (unless the current dates for the hearing of the Motion are delayed, in which case the deadline for service of the factum will be correspondingly adjusted);

3. The Respondent may serve a responding factum, not exceeding 15 pages, by June 26, 2015 (unless the current dates for the hearing of the Motion are delayed, in which case the deadline for service of the factum will be correspondingly adjusted);

4. The BCCLA may make oral argument not exceeding 15 minutes at the hearing of the Motion;

5. Neither the written nor oral submissions of the BCCLA will duplicate the submissions of the Applicants, raise any new issues or rely on any facts not contained in the existing record; and

6. The BCCLA will not seek or be liable for costs of the Motion;

THIS COURT FURTHER ORDERS THAT the BCCLA is granted leave to intervene on the Application on the following terms:

1. The BCCLA may serve a factum not exceeding 20 pages;

2. The factum to be served in accordance with the timetable for the Application;

3. The Respondent may serve a responding factum not exceeding 20 pages within 20 days of receipt of the BCCLA's factum;

4. The BCCLA may make oral submissions not exceeding 20 minutes at the hearing of the Application;

5. Neither the written or oral submissions will duplicate the submissions of the Applicants, raise any new issues or rely on any facts not contained in the existing record; and,

6. The BCCLA will not seek or be liable for costs of the Application.

G. DOW J.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

JUN 03 2015

AS DOCUMENT NO.:
À TITRE DE DOCUMENT NO.:
PER / PAR:

THE COUNCIL OF CANADIANS, et al Applicants/Moving Parties	and	HER MAJESTY IN RIGHT OF CANADA AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA Respondent/Responding Party	Court File No. CV-14-513961

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

FACTUM OF THE INTERVENOR, THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

(MOTION FOR AN INTERLOCUTORY INJUNCTION)

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