

Divisional Court File No. 369/15
Superior Court File No. CV-14-513961

**ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

B E T W E E N :

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

Moving Parties (Applicants)

- and -

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

Respondent

- and -

CHIEF ELECTORAL OFFICER OF CANADA
and THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Intervenors

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TABLE OF CONTENTS

	Page
PART I - Nature of the Motion.....	1
PART II - Overview.....	1
PART III - Summary of Facts	2
PART IV - Statement of Law and Argument	6
A. Test for Granting Leave	6
B. The Impugned Decision Conflicts with Settled Appellate Jurisprudence	7
(a) The decision of the Motion Judge conflicts with <i>Harper</i>	8
(b) The decision of the Motion Judge conflicts with <i>Frank</i>	10
(c) The decision of the Motion Judge conflicts with the very line of election cases he relied on.....	12
(d) The decision of the Motion Judge conflicts with <i>Sauvé #2</i>	16
(e) The decision of the Motion Judge conflicts with general principles governing interlocutory injunctions in constitutional cases	18
C. There is Good Reason to Doubt the Correctness of the Motion Judge's Decision	22
(a) The Motion Judge failed to undertake an evidence-based balancing exercise	22
(b) The Motion Judge misapprehended the evidence of the targeted revision process	25
(c) The Motion Judge ignored the CEO's evidence and the discretionary nature of the relief.....	25
(d) The Motion Judge erred by refusing to consider related statutory provisions.....	27
D. The Proposed Appeal Involves Matters of Public Importance	30
PART V - Order Requested.....	30

PART I - NATURE OF THE MOTION

1. The Moving Parties/Applicants (the “Applicants”) seek leave to appeal from the July 17, 2015 decision of the Honourable Justice David Stinson (the “Motion Judge”) of the Ontario Superior Court of Justice, which denied the Applicants’ request for interlocutory relief to suspend the operation of s. 46(3) of the *Fair Elections Act*, S.C. 2014, c. 12 (“*FEA*”). The order would have restored the discretion of the Chief Electoral Officer for Canada (“CEO”) to authorize the Voter Information Card (“VIC”) as a document to assist assist an elector, who is on the list of electors, to prove her or his identity and address in order to obtain a ballot to vote in the upcoming federal general election, scheduled by law to be held no later than October 19, 2015.

PART II - OVERVIEW

2. The proposed appeal concerns whether courts are bound by a preemptive “rule against granting interlocutory relief in constitutional challenges to electoral statutes.”¹ The Motion Judge erroneously found that he was bound by such a rule.

3. As a result, having found that the matter before him raised a serious issue to be tried and that irreparable harm would result if the motion were refused and the underlying application were successful, he failed to consider the evidence of benefits and harms before him in deciding whether the balance of convenience favoured granting the relief requested, as he was required to do by *RJR-MacDonald* and subsequent caselaw. Had he done so, it would have been clear and obvious on the evidence before him that the balance of convenience favoured granting an

¹ Motion Judgment, para. 98, Applicant’s Motion Record (“AR”), Tab 3, p. 66 (see also paras. 84, 87 and 92).

injunction to restore a crucial element of the discretion of the CEO to facilitate the right to vote of Canadians, pending a determination of the Application on the merits.

4. The decision of the Motion Judge conflicts with leading appellate authority on the test for granting interlocutory injunctions in constitutional cases, as well as jurisprudence on the right to vote, a right which the Supreme Court of Canada has described as the cornerstone of democracy and one that cannot be lightly set aside. Further, there is good reason to doubt the correctness of the decision, and the matter is of such public importance that leave to appeal should be granted.

PART III -SUMMARY OF FACTS

5. Following the introduction of voter identification requirements in 2007, the CEO undertook various initiatives to ensure that the requirements did not serve as a barrier to the exercise of the right to vote. While most registered electors can easily satisfy the requirements by producing a valid driver's license, nearly four million Canadians do not have a driver's license and many face difficulties meeting the identification requirements under the *CEA*.²

6. Responding to particular difficulties faced by seniors, Aboriginals and students in meeting the identification requirements, the CEO undertook pilot projects at by-elections in 2010 in which the VIC was authorized as an acceptable piece of identification for individuals from those target groups. At the 2011 general election, the pilot project was expanded to include 900,000 such electors. Of those 900,000 permitted to rely on the VIC, 400,000 did so.³

² Motion Judgment, para. 8, AR, Tab 3, p. 46. The Motion Judge describes the process for registration and the requirements for voting on election day at paras. 15-27.

³ Motion Judgment, paras. 30-31, AR, Tab 3, p. 50.

Following the success of these pilot projects, the CEO announced his intention to authorize the VIC as a piece of identification for all electors.⁴

7. Thereafter, Parliament introduced into law s. 46(3) of the *FEA*, which, by amending s. 143(2.1) of the *CEA*, prohibits the CEO from authorizing the VIC as a piece of identification:

143. (2.1) The Chief Electoral Officer may authorize types of identification for the purposes of paragraph (2)(b). For greater certainty, any document — other than a notice of confirmation of registration sent under section 95 or 102 — regardless of who issued the document, may be authorized. [emphasis added]

8. On October 9, 2014, the Applicants commenced an application in the Superior Court of Justice seeking a declaration that s. 46(3) and several other provisions in the *FEA* are unconstitutional in that they infringe ss. 3 and 15(1) of the *Charter* and that such infringements cannot be demonstrably justified under s. 1 of the *Charter*. The application record was served on January 26, 2015. Because the application was unlikely to be heard and determined prior to the general election, which is scheduled by law to be held no later than October 19, 2015,⁵ the Applicants sought interlocutory relief.⁶

9. The evidence of the CEO is that “he would authorize the use of the VIC as a piece of identification in all cases if the injunction is granted, provided that there is sufficient time to make the necessary arrangements to reprint or revise the stock VICs already printed.”⁷ On cross-examination, the Deputy CEO, Michel Roussel, agreed that the VIC is an “enfranchising

⁴ Motion Judgment at para. 32, AR, Tab 3, p. 50.

⁵ *Canada Elections Act*, s. 56.1; Affidavit of Michel Roussel, paras. 11-12, AR, Tab 12, p. 191.

⁶ While the interlocutory motion was initially brought in respect of both the curtailment of the CEO’s discretion to authorize the VIC and the elimination of identity vouching, the Applicants subsequently deferred to the CEO’s evidence in respect of the administrative difficulty of re-establishing identity vouching before the October election.

⁷ Roussel Affidavit, para. 91, AR, Tab 12, p. 216.

instrument”⁸ and confirmed that the decision to authorize the VIC as a piece of identification for all electors was made pursuant to the following three criteria in the Elections Canada Voter Identification Policy:

- a. Accessibility for electors who may face barriers in providing documentary proof of their ordinary place of residence;
- b. The integrity of the vote, including public confidence in the electoral system;
- c. The efficient administration of electoral events, whereby the process is seamless and the requirements are applied consistently.⁹

10. The CEO communicated that a decision on an appeal, if leave is granted, would be required by September 1, 2015 to provide sufficient time for its implementation should he exercise his discretion to do so.

11. Expert evidence adduced by the Applicants estimates that the curtailment of the CEO’s discretion to authorize the VIC will effectively disenfranchise tens of thousands of eligible electors. Evidence introduced by the Applicants on the likely impact of the amendment includes:

- a. the expert evidence of Harry Neufeld, former CEO of British Columbia, who was retained by Elections Canada in 2011 and authored *Compliance Review: A Review of Compliance with Election Day Registration and Voting Process Rules* (interim and final reports);¹⁰
- b. the expert evidence of Prof. François Gélinau¹¹ and the evidence of Jessica McCormick, National Chairperson of the Canadian Federation of Students and also an Applicant,¹² on the impact of the *FEA* on youth and student electors;
- c. the expert evidence of Cathy Crowe¹³ and Prof. Abram Oudshoorn¹⁴ on the impact of the *FEA* on homeless electors; and

⁸ Roussel Cross-examination, p. 80, AR, Tab 18, p. 239.

⁹ Elections Canada, “Policy on Voter Identification”, AR, Tab 16, p. 232.

¹⁰ Affidavits of Harry Neufeld, AR, Tab 6, p. 127-142.

¹¹ Affidavit of François Gélinau, AR, Tab 7, pp. 144-152.

¹² Affidavits of Jessica McCormick, sworn November 26, 2014, AR, Tab 5, pp. 96-125.

- d. the evidence of Prof. Yasmin Dawood¹⁵ on public and parliamentary debate about the *FEA*.

12. The Attorney General filed one expert affidavit providing a methodological critique of the evidence of Mr. Neufeld and Prof. G lineau, which was entirely refuted by reply evidence¹⁶ and during cross examination. It also introduced several short affidavits describing the procedure for obtaining certain pieces of identification, as well as an affidavit of Natasha Kim, Director of Democratic Reform in the Privy Council Office, setting out the legislative history of the *FEA* and background on voter identification requirements.¹⁷

13. The Motion Judge concluded that the first two steps of the test for interlocutory relief had been met, holding that “based on the evidence to date, there is a risk that some individuals who would otherwise rely on the Voter Information Card to enable them to vote will be unable to do so due to s. 46(3), which would result in irreparable harm due to their inability to exercise their right to vote in that fashion.”¹⁸

14. However, in respect of the third test – balance of convenience – the Motion Judge believed that he was “bound by... a rule against granting interlocutory relief in election cases.” As a result, he did not determine the balance of convenience having regard to the evidence of the Applicants and the CEO concerning the benefits and harms of granting relief. Rather, he articulated the preemptive rule, and explained why in his view it should apply.¹⁹

¹³ Affidavit of Catherine Crowe, AR, Tab 10, p. 167-177.

¹⁴ Affidavit of Abraham Oudshoorn, AR, Tab 9, p. 159-165.

¹⁵ Affidavit of Yasmin Dawood, AR, Tab 8, pp. 154-157.

¹⁶ Reply Affidavit of Fran ois G lineau, AR, Tab 11, pp. 179-186.

¹⁷ See Respondent’s Superior Court Motion Record and Supplementary Motion Record.

¹⁸ Motion Judgment, para. 101(b), AR, Tab 3, p. 66.

¹⁹ Motion Judgment, paras. 82-100, AR, Tab 3, pp. 61-66.

PART IV - STATEMENT OF LAW AND ARGUMENT

A. Test for Granting Leave

15. An appeal lies to the Divisional Court, with leave, from an interlocutory order. The Court will grant leave where there are conflicting decisions on the matter involved in the appeal and it is determined that it is desirable to grant leave *or* where there appears to be good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that leave to appeal should be granted.²⁰ This motion meets both of these tests.

16. The “conflicting decision” requirement will be satisfied where a Court makes a discretionary ruling if there is “a difference in the principle chosen as a guide to the exercise of such discretion.”²¹

17. In order to demonstrate that there is reason to doubt the correctness of a decision, a party need not convince the court that the decision is wrong or even “probably wrong” but must only show that the question is open to serious debate.²²

18. A matter will be of such importance that leave to appeal should be granted where it transcends the interests of the immediate litigants, and where it deals with issues of general or public importance, including matters relevant to the development of the law and the administration of justice.²³

²⁰ Rule 62.02(4). Leave to appeal may be granted on the basis of either test: *McDonald v. Freedman*, 2013 ONSC 812 (“*McDonald*”) at para. 16.

²¹ *Brownhall v. Canada (Ministry of National Defence)*, [2006] O.J. No 672 (“*Brownhall*”) at para. 27; *McDonald*, *supra* at para. 16.

²² *McDonald*, *supra* at para. 17, citing *Ash v. Lloyd’s Corporation reflex*, (1992), 8 O.R. (3d) 282 (“*Ash*”) at 284. See also *Brownhall*, *supra* at para. 30.

²³ *McDonald*, *supra*, at para. 18.

B. The Impugned Decision Conflicts with Settled Appellate Jurisprudence

19. As noted, the Motion Judge decided the motion on the balance of convenience, holding that he was “bound by *stare decisis* to follow... a rule against granting interlocutory relief in election cases” (hereafter the ‘rule in election cases’ or the ‘rule’).²⁴ He articulated the ‘rule’ in the following ways:

- a. “it is inappropriate to grant interlocutory relief in elections cases on the grounds of a constitutional challenge to electoral legislation” (para. 84);
- b. “the rule against granting final relief in interlocutory proceedings involving constitutional challenges in elections cases” (para. 87);
- c. “the rule against granting final relief at the interlocutory stage in elections cases” (para. 92);
- d. “the rule against granting interlocutory relief in constitutional challenges to electoral statutes” (para. 98).

20. There is no such ‘rule in election cases’. Indeed, if such a rule existed, courts would not be required to go beyond the first of the three prongs set out in *RJR*. Such a ‘rule’ would clearly contravene the directions of the Supreme Court of Canada in *RJR* that, “[f]or courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances be to condone the most blatant violation of *Charter* rights,” which would “undermine the spirit and purpose of the *Charter* and might encourage a government to prolong unduly final resolution of the dispute.”²⁵

21. The application by the Motion Judge of a ‘rule’ against granting injunctive relief in election cases conflicts with the following jurisprudence, which will be examined in turn: (i) the

²⁴ Motion Judgment, para. 67, AR. Tab 3, p. 67.

²⁵ *RJR – MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (“*RJR*”) at para. 39.

Supreme Court of Canada's decision in *Harper*, which the Motion Judge misinterpreted; (ii) the Ontario Court of Appeal's decision in *Frank*, which the Motion Judge failed to consider at the balancing stage; (iii) the line of election cases relied on by the Motion Judge, each of which involved a balancing exercise by the court on the evidence before it; (iv) the Supreme Court of Canada's statements on the right to vote in *Sauvé #2*; and (v) the general principles governing interlocutory injunctions in constitutional cases as set out in *RJR* and *Harper*.

(a) The decision of the Motion Judge conflicts with *Harper*

22. The Motion Judge relied on *Harper*²⁶ for the proposition that an application for interlocutory relief in an election case must fail. At paragraph 7 of *Harper*, the passage relied on by the Motion Judge, the majority states:

We cannot, with respect, agree. This application is governed by the principles set forth in previous cases. On appeal the applicant Harper may seek alteration of these principles, but for the moment they govern. Applying these principles, the balance of convenience in this case favours granting the stay of the injunction. One of these principles is the rule against granting the equivalent of final relief in interlocutory challenges to electoral statutes, even in the course of elections governed by those statutes ... In this case, allowing the injunction to stay in place will in effect give Mr. Harper the ultimate relief he seeks in his action, at least with respect to the current election. The trial judge, however, did not address this factor, nor the case law which addresses it.²⁷
[emphasis added]

23. On a plain reading of *Harper*, it is clear that the election rule is not a categorical or preemptive rule but, rather, a “principle” or “factor” to be applied alongside other factors at the

²⁶ *Harper v. Canada (Attorney General)*, [2000] 2 S.C.R. 764 (“*Harper*”).

²⁷ *Harper*, *supra* at para. 7.

balance of convenience stage. While the Court used the word “rule”, it is trite law that each phrase in a judgment, let alone each word, “should not be treated as if enacted in a statute.”²⁸

24. Furthermore, the notion of a preemptive “rule against granting interlocutory relief in constitutional challenges to electoral statutes” conflicts with the actual analysis undertaken in *Harper*. For one, the Court found that the applicant’s constitutional claim – infringement of the freedom of expression of third-party advertisers – raised a serious issue to be tried, and that refusing an injunction risked irreparable harm. As in this case, such findings would have been completely unnecessary if there was a ‘rule’ that foreclosed granting relief.

25. More importantly, at the balance of convenience stage, the Court undertook a balancing of the relative risks of harm caused by granting or refusing an injunction. The Court simply found that the “partial limitation on freedom of expression” asserted by the applicant failed to outweigh the presumed public purpose served by legislated spending limits on third parties.²⁹ It did not hold that there was a ‘rule’ against granting injunctive relief in election cases.

26. Believing himself to be bound by a ‘rule in election cases’, the Motion Judge failed to undertake a balancing exercise taking into account the evidence of harm before him (the effect of that failure is considered below at paras. 60-66). Further, he did not consider any of the facts and circumstances of *Harper*, or whether its conclusions properly applied to facts and circumstances of this case. The risk of harm asserted by the Applicants in this case is a complete deprivation of the franchise of disadvantaged electors for the duration of a federal election cycle. This is contrast to the “partial limitation on freedom of expression” for advertisers asserted in *Harper*.

²⁸ *R. v. Henry*, [2005] 3 S.C.R. 607 at para. 57.

²⁹ *Harper*, *supra* at para. 11.

Further, the remedy sought is simply to restore the discretion of the CEO, in contrast to the attempt in *Harper* to dismantle an entire regulatory scheme in the lead-up to an election.

27. Finally, even on the Motion Judge's strict reading of *Harper*, the 'rule in election cases' is expressly limited to cases in which an injunction would grant "the equivalent of final relief". That was the case in *Harper*, where the applicant sought to dismantle, on an interlocutory basis, the entire scheme for third-party spending limits – the very relief he sought on the main application. In contrast, the interlocutory relief sought by the Applicants in this case is limited to a single aspect of a larger constitutional challenge, and seeks only to restore a discretionary authority conferred to the Chief Electoral Officer of Canada.

(b) The decision of the Motion Judge conflicts with *Frank*

28. The leading authority of the Ontario Court of Appeal on the issues arising in this case is *Frank*, in which Sharpe J.A. refused the government's motion to stay, pending an appeal, a decision extending the right to vote to certain expatriate Canadians.³⁰ At the irreparable harm stage of the test, the Motion Judge correctly found that he was bound by Sharpe J.A.'s clear finding that disenfranchisement constitutes irreparable harm: "Once the election has passed, the constitutional right to vote in that election will be lost forever."³¹

29. However, at the decisive balance of convenience stage, the Motion Judge failed to apply the central holding in *Frank* 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."³² Sharpe

³⁰ *Frank v. Canada (Attorney General)*, 2014 ONCA 485 ("*Frank*"). As recognized by the Motion Judge (para. 74), a stay motion "requires the court to consider the same three-part test as a motion for an interlocutory injunction."

³¹ *Frank*, *supra* at para. 22, cited in the Motion Judgment at para. 76, AR, Tab 3, p. 60.

³² *Frank*, *supra* at para. 19.

J.A. specifically rejected the Attorney General's argument that it 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'." This rejection of an automatic rule in the context of a stay motion applies equally to interlocutory injunctions.

30. On the evidence before him, Sharpe J.A. refused the Attorney General's motion for a stay. He noted, among other things, that the trial judge's order permitting non-resident citizens to vote would not involve the dismantling of a complex statutory scheme or administrative apparatus, nor would it create a legislative void in an area of activity that needs to be regulated in the public interest.³³ These same considerations apply with greater force in this case, as the order sought is simply to restore an element of the CEO's discretion. Further, this case is unlike *Frank*, where the court granted a right to vote where none previously existed. In this case, only electors *already on the voter's list* will be enabled to rely on their VIC, together with another piece of identification, to prove their identity and residence so they can obtain a ballot to vote.

31. Notably, the Motion Judge's reasons in his balance of convenience analysis also fail to consider, and conflict with, the Federal Court's refusal of a stay pending appeal in *Sauvé #1*, where the Court held that "the public interest must also include the protection of democratic rights enshrined in the *Charter*" and asked, "[w]hat could be more fundamental than the right to vote in a free and democratic society?"³⁴

³³ *Frank*, *supra* at paras. 27-29.

³⁴ *Sauvé v. Canada (Chief Electoral Officer)*, [1997] 3 F.C.R. 628 (FC) ("*Sauvé #1*") at para. 22.

(c) The decision of the Motion Judge conflicts with the very line of election cases he relied on

32. The Motion Judge held that he was bound by “a long line of cases in which courts have stated that it is inappropriate to grant what would amount to final relief in relation to a pending election on an interlocutory basis.”³⁵ The Motion Judge cited five election cases in support of the ‘rule’. In fact, none of the cases he relied on applied the preemptive rule he asserts.³⁶ To the contrary, in each of these cases, the court balanced the harms asserted by the parties and made a determination based on the particular facts and circumstances before it.

33. Moreover, the Motion Judge’s failure to refer to any of the facts and circumstances of the five election cases he relied on casts further doubt on the correctness of his application of the ‘rule’. The Applicants will now address each of the five cases, in turn.

34. First, in *Gould*, the applicant, a prisoner, sought an “interlocutory mandatory injunction” requiring Canada to “make arrangements to permit” him to vote in “next Tuesday’s general election.”³⁷ After the Federal Court granted the injunction, the Federal Court of Appeal reversed it, in brief reasons endorsed orally by the Supreme Court. Mahoney J.A. found that an individualized remedy was inappropriate where the real issue was much broader:

To treat the action as affecting only the rights of the respondent is to ignore reality... I think the learned Trial Judge erred in dealing with it as though the application before her was a conventional application for an interlocutory injunction to be disposed of taking

³⁵ Motion Judgment, paras. 84 and 86, AR, Tab 3, pp. 61-63.

³⁶ Moreover, *Frank* and *Sauvé #1* are examples of election cases in which courts indeed vindicated constitutional rights prior to a final determination (albeit on appeal).

³⁷ *Gould v. Attorney General of Canada*, [1984] 2 S.C.R. 124 (“*Gould SCC*”), affirming [1984] 1 F.C. 1133 (“*Gould FCA*”).

account of the balance of convenience as between only the respondent and appellants.”³⁸

35. Mahoney J.A. then proceeded to make several broad statements about the purpose of interlocutory injunctions, which are now clearly bad law, including that “[t]he proper purpose of an interlocutory injunction is to preserve or restore the *status quo*, not to give the plaintiff his remedy, until trial.”³⁹ As discussed in subsection (v) below, the *status quo* presumption was resoundingly rejected in *RJR*.⁴⁰ *Gould* is not, therefore, authority for a preemptive ‘rule’ that all election injunction cases must fail. Its outcome turned on the last-minute and individualized nature of the relief sought.

36. The second case, *Figueroa*,⁴¹ raised the same concern about last-minute *individualized* relief, and was decided on that basis. The applicant, a member of a small political party, sought to have his party’s name printed on the ballot despite a prohibition against listing parties that field less than 50 candidates. An injunction was initially granted, then overturned by the Divisional Court, which found, as in *Gould*, that the applicant had sought an individualized remedy despite the broader ramifications of the right asserted.

37. The Motion Judge in this case relied on a sentence in *Figueroa* which stated: “The public interest in the uniform, fair and orderly conduct of election procedures requires that cases like

³⁸ *Gould FCA, supra* at pp. 1139-40. The Supreme Court of Canada endorsed the decision of Mahoney J.A. orally, finding only that “[w]e generally share the views expressed by Mr. Justice Mahoney.”

³⁹ *Gould FCA, supra* at pp. 1140.

⁴⁰ *RJR, supra* at para. 75: “his approach would seem to be of limited value in private law cases, and, although there may be exceptions, as a general rule it has no merit as such in the face of the alleged violation of fundamental rights. One of the functions of the *Charter* is to provide individuals with a tool to challenge the existing order of things or *status quo*.”

⁴¹ *Figueroa v. Canada (Attorney General)* (1997), 34 O.R. (3d) 59 (Div. Ct.) (“*Figueroa*”).

this be decided after a trial, not before a trial.” However, the Motion Judge failed to cite the rest of that paragraph, which provides its clear context, namely:

Similarly situated candidates should have similar rights across the country rather than giving individual candidates a different set of rules by way of *ad hoc* judicial fiat in individual cases.⁴²

38. By omitting the second sentence in *Figueroa*, the Motion Judge ignored the clear context for the phrase “uniform, fair and orderly conduct of election procedures”.⁴³ That concern is directed at unfairness caused by individualized relief. By quoting *Figueroa* out of context, and failing to consider the facts and circumstances in *Figueroa* and *Gould*, the Motion Judge erroneously concluded that they stand for a preemptive rule in all election cases, even where an injunction would *not* create asymmetrical rights and attendant unfairness. They do not.

39. In the third case, *Tan*, the applicant brought a motion for an injunction to “stop the provincial election in the Point Grey riding” on the basis that he had been refused the opportunity to run as a candidate because he did not pay the \$100 fee required by statute.⁴⁴ The Motion Judge relied on this case without any consideration of the extraordinary remedy sought for a highly individualized claim. The court in *Tan* nevertheless undertook a detailed balancing of the evidence of harms, which in that case included the fact that “the Leader of the Liberal Party [was] running in that riding, and should his party be elected...would not have a seat in the House pending a hearing...of this application.”⁴⁵ *Tan* is not authority for the proposition that interlocutory relief is precluded in all election cases.

⁴² *Figueroa*, *supra* at p. 61; Motion Judgment, para. 88, AR, Tab 3, p. .

⁴³ *Figueroa*, *supra* at p. 61.

⁴⁴ *Tan v. British Columbia (Chief Electoral Officer)*, 2001 BCSC 704 (“*Tan*”) at paras. 1-2.

⁴⁵ *Tan*, *supra* at para. 13.

40. The remaining two cases relied on by the Motion Judge in support of the ‘rule’ are *Harper*, discussed above, and *BC Teachers*,⁴⁶ which involved similar issues (spending limits and advertising restrictions, respectively). Even though *BC Teachers* was decided several years after *Harper*, and concerned very similar issues, the court *still* undertook a factual analysis of the relative risks of granting or refusing an injunction, based on the evidence.⁴⁷ The court refused an injunction not by applying any ‘rule’ from *Harper*, but by finding, on the evidence, that the balance of convenience favoured upholding third-party advertising restrictions.

41. As in *Gould and Figueroa*, the court was concerned about specific unfairness that would be caused by granting relief. Noting that the legislation regulated various participants in the electoral process, the court held that suspending advertising limits for third parties, namely public sector unions, would “upset that balance to the detriment of the other participants in the electoral process” for whom spending limits would still apply, namely candidates and political parties.⁴⁸ *BC Teachers* is not authority for the proposition that interlocutory relief is precluded in all election cases.

42. In short, the “long line of cases” relied on by the Motion Judge, discussed in full above, does not establish a ‘rule’ against interlocutory relief in election cases such as to obviate the requirement to actually balance the risks of harms on the evidence before the court.

⁴⁶ *British Columbia Teachers’ Federation v. British Columbia (Attorney General)*, 2008 BCSC 1769 (“*BC Teachers*”).

⁴⁷ *BC Teachers*, *supra* at para. 14, 16.

⁴⁸ *BC Teachers*, *supra* at para. 14.

(d) The decision of the Motion Judge conflicts with *Sauvé #2*

43. With the exception of *Gould*, which was decided in 1984, none of the cases relied on by the Motion Judge in support of a preemptive ‘rule’ concerned the right to vote. In 2002, the Supreme Court of Canada decided *Sauvé #2*, which described the foundational importance of the right to vote and its “special importance” in our constitution. At minimum, *Sauvé #2* requires a fact-specific analysis taking into account the nature of the rights at issue. It is therefore entirely inconsistent with a preemptive ‘rule’ against interlocutory relief where the right to vote is at stake.

44. In *Sauvé #2*, McLachlin C.J. noted that the right to vote is “fundamental to our democracy and the rule of law”, the “special importance” of which is demonstrated by the “broad, untrammelled language” of s. 3 of the *Charter*, as well as its “exempt[ion] from legislative override under s. 33’s notwithstanding clause.”⁴⁹ Indeed, “the legitimacy of the law and the obligation to obey the law flow directly from the right of every citizen to vote.”⁵⁰ The right to vote is “the cornerstone of democracy.”⁵¹ Accordingly, limits on the right to vote “require not deference, but careful examination.”⁵²

45. The issue in *Sauvé #2* was government justification under s. 1 of the *Charter*. However, the Supreme Court’s forceful language about the right to vote applies to any case where that right is jeopardized. In *Frank*, which the Motion Judge ignored at the balance of convenience stage, the Ontario Court of Appeal properly applied the rigorous analytic approach required by *Sauvé #2* to the test for granting a stay.

⁴⁹ *Sauvé v. Canada*, [2002] 3 S.C.R. 519 (“*Sauvé #2*”) at paras. 9, 11.

⁵⁰ *Sauvé #2*, *supra* at para. 31.

⁵¹ *Sauvé #2*, *supra* at para. 14.

⁵² *Sauvé #2*, *supra* at para. 9.

46. Finally, even assuming that a preemptive ‘rule in election cases’ emerged from the jurisprudence he referred to (which, for reasons noted, it does not), *Sauvé #2* would require that such a ‘rule’ be revisited. In articulating the doctrine of *stare decisis*,⁵³ the Motion Judge failed therefore to have regard to the more recent and clear direction of the Supreme Court of Canada in *Carter*, notably, that *stare decisis* is subordinate to the constitution, that it is “not a straightjacket that condemns the law to stasis”, and that trial judges may reconsider the rulings of higher courts where “(1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that ‘fundamentally shifts the parameters of the debate’.”⁵⁴

47. A ‘rule’ against granting injunctions in election cases would effectively preclude interlocutory relief to safeguard the right to vote (because the right to vote is only ever exercised during elections), notwithstanding that the right to vote is the very foundation of democracy and the rule of law. This would fly in the face of the Supreme Court of Canada’s recognition – including in *Harper* – that insisting rigidly on the enforcement of laws until the moment they are struck down “might in some instances condone the most blatant violation of *Charter* rights.”⁵⁵

48. *Sauvé #2* fundamentally shifted the parameters of the debate, making a preemptive ‘rule’ against interlocutory relief in election cases completely untenable. Further, the legal and factual issues raised in this case – concerning legislative interference with the right to vote in the lead-up to an election – are entirely novel, requiring a revisiting of any binding precedent concerning the

⁵³ Motion Judgment, para. 91, AR, Tab 3, p. 64.

⁵⁴ *Carter v. Canada (Attorney General)*, 2015 SCC 5 at para. 44, citing *Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1101 at para. 42.

⁵⁵ *RJR*, *supra* at para. 39; *Harper*, *supra* at para. 5.

right to vote. The Motion Judge did not consider *Sauvé #2* in his discussion of the ‘rule’, or anywhere in his reasons except for two passing references in his introduction and overview.⁵⁶

(e) The decision of the Motion Judge conflicts with general principles governing interlocutory injunctions in constitutional cases

49. In defending the “logic behind the rule”, the Motion Judge purported to quote *Harper*:

As McLachlin C.J.C. commented in *Harper*, interference by the court may be appropriate in the “clearest of cases.” However, given the issues raised, this is not such a case.⁵⁷

50. In fact, the Chief Justice does not refer to the “clearest of cases”, but to “clear cases”.

Through this mistake, the Motion Judge elevated the standard to be met. The full passage in *Harper* is:

It follows that in assessing the balance of convenience, the motions judge must proceed on the assumption that the law -- in this case the spending limits imposed by s. 350 of the Act -- is directed to the public good and serves a valid public purpose. This applies to violations of the s. 2(b) right of freedom of expression; indeed, the violation at issue in *RJR-MacDonald* was of s. 2(b). 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.⁵⁸

51. The Motion Judge then compounded this error in his discussion of what, in his view, “clearest of cases” meant. He reproduced the following passage from *Metropolitan Stores*:

⁵⁶ Motion Judgment, p. 2 and para. 5, AR, Tab 3, p. 44-45.

⁵⁷ Motion Judgment, para. 94, AR, Tab 3, p. 64-65.

⁵⁸ *Harper, supra* at para. 9.

There may be rare cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a motion judge. A theoretical example which comes to mind is one where Parliament or a legislature would purport to pass a law imposing the beliefs of a state religion. Such a law would violate s. 2(a) of the *Canadian Charter of Rights and Freedoms*, could not possibly be saved under s. 1 of the *Charter* and might perhaps be struck down right away ... It is trite to say that these cases are exceptional.⁵⁹

52. The Motion Judge incorrectly relied on the above passage to suggest that injunctions against legislation should only be granted in cases involving *pure questions of law*. That is not the law. Indeed, in *RJR* the Supreme Court of Canada relied on the *very same* passage from *Metropolitan Stores* and explained its proper context: it is a consideration relevant to the serious issue stage of the three-part test. That is, where a case presents itself as a pure question of law, courts may depart from the normal prohibition against an extensive review on the merits:

A judge faced with an application which falls within the extremely narrow confines of this second exception need not consider the second or third tests since the existence of irreparable harm or the location of the balance of convenience are irrelevant inasmuch as the constitutional issue is finally determined and a stay is unnecessary.⁶⁰

53. By relying only on *Metropolitan Stores*, and ignoring the explanation in *RJR*, the Motion Judge effectively concluded that an injunction against validly enacted legislation is available only in cases involving a pure question of law. That is incorrect and conflicts with a long line of jurisprudence going back to *RJR*.

54. Further, there are several cases in which courts enjoined the operation of a valid law or regulation pending full constitutional review, but these were dismissed by the Motion Judge

⁵⁹ *Manitoba (A.G.) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110 at para. 49, cited in Motion Judgment at fn. 46, AR, Tab 3, p. 65.

⁶⁰ *RJR*, *supra* at para. 55. Emphasis added.

because they “did not relate to elections”.⁶¹ However, these cases make it clear that courts will discharge their duty to safeguard constitutional rights pending a full hearing by granting interlocutory relief when irreparable harm to the public interest is found to outweigh the presumed public interest in immediately enforcing the law:

- a. *Federation of Law Societies of Canada* (injunction granted pending a challenge to the *Proceeds of Crime (Money-Laundering) Act, 2000*, S.C. 2000, c. 17, to “restore elements of [the solicitor-client] relationship, that have been considered in the past to be fundamental, until the merits of the application have been decided”);⁶²
- b. *A.U.P.E. v. Alberta* (injunction granted against the operation of legislation that would have permitted the government to impose a new collective agreement on public sector unions);⁶³
- c. *Tłı̨chǫ Government v. Canada* (injunction granted preventing the merging of water management boards pursuant to the *Northwest Territories Devolution Act*, S.C. 2014, c. 2, pending a challenge brought by the Tłı̨chǫ Government: “there is a very real public interest benefit that derives from protecting the *status quo* where it has been demonstrated that there is a serious constitutional issue to be tried and that irreparable harm could result from the breach of a constitutionally protected right”);⁶⁴
- d. *Allard v. Canada* (injunction granted staying the implementation of federal regulations that would increase the cost of medical marijuana, pending a s. 7 *Charter* challenge, notwithstanding that the new regulations were “presumed to, among other things, increase the health, safety and security of the public”);⁶⁵
- e. *Canada v. Simon* (injunction granted against the implementation of a rule that would have changed the standards of income assistance imposed on First Nations reserves, in order to “maintain the long-standing *status quo* and to thus allow the income support program to continue... in exactly the same way as in past years”);⁶⁶

⁶¹ Motion Judge para. 84, AR, Tab 3, p. 61.

⁶² *Federation of Law Societies of Canada v. Canada (Attorney General)*, (2002) 57 O.R. (3d) 383 at para. 51.

⁶³ *Alberta Union of Provincial Employees v Alberta*, 2014 ABQB 97, at paras. 104-107.

⁶⁴ *Tłı̨chǫ Government v. Canada (Attorney General)*, 2015 NWTSC 9 at para. 100.

⁶⁵ *Allard v. Canada*, 2014 FC 280 at para. 119.

⁶⁶ *Canada (Attorney General) v. Simon*, 2012 FCA 312, at paras. 41-44.

- f. *NTI v. Canada (Attorney General)* (injunction granted against the implementation of the *Firearms Act*, R.S.C. 1995, c. 39 in Nunavut, to safeguard Inuit rights guaranteed in the Nunavut Land Claims Agreement, despite that there was “clearly a significant public interest attached to enforcement of public safety legislation of this kind”);⁶⁷
- g. *Québec v. Canada* (injunction granted against the operation of legislation providing for the destruction as soon as feasible of all records in the Canadian Firearms Registry related to the registration of long-gun firearms, pending a constitutional challenge brought by the Quebec government”).⁶⁸

55. In each of these cases, the court, having regard to the evidence before it, carried out a rigorous balancing of the harm to the public interest asserted by the applicants, against the harm to the public interest should the impugned legislation be suspended. In light of the Supreme Court of Canada’s powerful reasons in *Sauvé #2*, this rigorous and evidence-based approach should be applied with particular care in cases involving the right to vote. Instead, the Motion Judge found the opposite. He found that in election cases, including those involving the right to vote, there is a ‘rule’ against interlocutory relief.

56. In effect, the Motion Judge turned the Supreme Court of Canada’s repudiation of *status quo* reasoning on its head. As noted above, the presumption in favour of the *status quo* was overturned in *RJR*, which held that it had “no merit” in constitutional cases and noted that “[o]ne of the functions of the *Charter* is to provide individuals with a tool to challenge the existing order of things or *status quo*.”⁶⁹ By finding that there is something akin to a ‘rule’ against granting interlocutory relief in election cases, the Motion Judge went even further, by effectively applying a *status quo* ‘rule’ in election cases, including those involving the right to vote.

⁶⁷ *NTI v. Canada (Attorney General)*, 2003 NUCJ 1.

⁶⁸ *Québec (Procureur général) c. Canada (Procureur général)*, 2012 QCCS 1614 at para. 67.

⁶⁹ *RJR*, *supra* at para. 75.

57. In short, the far-reaching ‘rule’ articulated by the Motion Judge, which would have implications well behind this case, conflicts with all of the authorities it relied on as well as several that were ignored. Each of the five conflicts outlined above would, in the Applicants’ view, be sufficient to warrant leave to appeal on the basis of Rule 62.02(4)(a).

58. Because the Motion Judge decided the case on the basis of the ‘rule in election cases’, the errors described above also establish that there is good reason to doubt the correctness of the Motion Judge’s decision, under Rule 62.02(4)(b). The relevant standard under that subrule is not that his decision was wrong or even probably wrong, but that it is open to serious debate.⁷⁰ The Applicants now turn to other errors made by the Motion Judge that provide additional reason to doubt the correctness of his decision.

C. There is Good Reason to Doubt the Correctness of the Motion Judge’s Decision

59. In addition to the foregoing errors, the Motion Judge committed the following additional errors at the balance of convenience stage, which provide further reason to doubt the correctness of his decision: (a) he failed to undertake an evidence-based balancing exercise; (b) he misapprehended the evidence of the targeted revision process; (c) he ignored the evidence of the CEO and the discretionary nature of the relief sought; and (d) he erred by refusing to consider related statutory provisions.

(a) The Motion Judge failed to undertake an evidence-based balancing exercise

60. The Motion Judge's entire reasoning on the balance of convenience test can be divided into: (1) a discussion of jurisprudence in respect of the ‘rule in election cases’ (paras. 84-91), and

⁷⁰ *McDonald*, *supra* at para. 17, citing *Ash*, *supra* at 284. See also *Brownhall*, *supra* at para. 30.

(2) a discussion of why he believed the ‘rule’ is correct (paras. 92-100). At para. 92, the Motion Judge said that the “logic behind the rule... is exemplified by the facts of the present case, for the following reasons.” But in the ensuing paragraphs, he did not consider *any* of the voluminous and largely uncontested evidence of harm asserted by the Applicants, as well as by the CEO.

61. The only suggestion that the Motion Judge had any regard whatsoever to the Applicants’ evidence of harm is at para. 99, where the Motion Judge wrote:

The applicants have stressed the importance of ensuring the integrity of the electoral process and guarding against disenfranchisement, which would undermine public confidence in the process. However, as stated at the beginning of this decision, preserving public trust in the electoral process involves a balancing between enabling electors to vote and ensuring the integrity of the system.

62. In the following paragraph, the Motion Judge concluded, “[i]n light of all of the foregoing considerations, I find that the balance of convenience does not favour granting injunctive relief.”

63. With respect, this reference to the Applicants’ position, occurring as it does at the very end of the decision, is a conclusion, not an analysis.

64. Examples of extremely credible and largely uncontested expert evidence of harm that the Motion Judge ignored entirely include the evidence of Harry Neufeld, who was the very expert retained by Elections Canada to review irregularities following the 2011 federal general election:

- a. Mr. Neufeld's *Compliance Review*, which the government purported to rely on when enacting the *FEA*, specifically recommended "[w]idening use of the Voter Information Card as a valid piece of address identification for all voters."⁷¹
- b. This recommendation was made in order to "reduce the number of voters who must have their identity and address of residence vouched for on Election Day."⁷² The *FEA* also eliminated vouching (for identity).
- c. The Deputy CEO confirmed this rationale on cross-examination: "It was our belief that there would be less electors having to go through the vouching process if the [VIC] was prescribed as an otherwise [sic] proof of address."⁷³
- d. The opinion of Mr. Neufeld was that, among other things, modifications in the *FEA* will "result in the disenfranchisement of many tens of thousands of voters who are otherwise fully eligible electors."⁷⁴
- e. Mr. Neufeld provided further evidence that, based on his "33 years of election administration involvement in both provincial and federal jurisdictions within Canada," incidents of individual voter fraud are "extremely rare", and that "[a]lmost all multiple voters are found to be suffering some form of mental dementia."⁷⁵

65. The Motion Judge also ignored the expert evidence of Cathy Crowe and Abram Oudshoorn on the impact of the amendments on the ability of homeless electors to vote, and the expert evidence of Prof. François Gélinau and the evidence of Jessica McCormick on the impact of the amendments on the ability of student electors to vote.

66. In short, the Motion Judge's complete failure to consider the Applicants' evidentiary record raises serious doubts as to the correctness of his decision.

⁷¹ *Compliance Review*, p. 38, AR, Tab 15, p. 229.

⁷² *Ibid.*

⁷³ Cross-examination of Michel Roussel, p. 77, AR, Tab 18, p. 238.

⁷⁴ Neufeld Affidavit, para. 17, AR, Tab 6, pp. 135-136.

⁷⁵ Neufeld Affidavit, para. 15, AR, Tab 6, pp. 134-135.

(b) The Motion Judge misapprehended the evidence of the targeted revision process

67. The only *specific* risk of harm⁷⁶ cited by the Motion Judge in his reasons (besides the general risks to public trust discussed above), was that a registered elector who is visited at his or her home by a Revising Officer during the revision period may, *upon the taking of an oath*, register other occupants of the premises without providing any proof of their identity: s. 106(1)(d) of the *CEA*.⁷⁷

68. The Motion Judge acknowledged that this risk “was raised by me during the course of argument.”⁷⁸ It was not argued by the Attorney General. Nowhere in its 50-page factum before the Motion Judge was there any reference to s. 106 or to the targeted revision process. The Motion Judge erred in relying on this argument as it was not properly before him.

69. Moreover, this so-called “potential ‘soft spot’” lacks any evidentiary foundation. Even assuming that there is a risk that an elector may improperly obtain a VIC through this process (despite the requirement of an oath), any elector who improperly obtains a VIC would still need a second piece of identification in order to rely on the VIC to vote.

(c) The Motion Judge ignored the CEO’s evidence and the discretionary nature of the relief

70. By analyzing the balance of convenience without any regard to the role of the CEO’s discretion in implementing a court order, the Motion Judge ignored a key aspect of this case that, on its own, raises serious doubts as to the correctness of the decision. The discretionary nature of

⁷⁶ The Motion Judge found, on a *general* level, as rationale for applying the ‘election rule’, that last-minute changes to election rules “might harm public confidence and could lead to further errors in the election process”: para. 95. This was not grounded in evidence in respect of the impugned provision.

⁷⁷ Motion Judgment at para. 97, AR, Tab 3, p. 65.

⁷⁸ *Ibid.*

the relief sought in this case distinguishes it from all previous election injunction cases cited by the Motion Judge, all of which involved mandatory orders *against* the government or the CEO.

71. More specifically, the Motion Judge's finding that "it is problematic to change the rules for elections at the last minute through the blunt instrument of judicial intervention," because doing so "might harm public confidence and could lead to further errors,"⁷⁹ is a general statement drawn from cases where the court was considering whether to issue mandatory orders to compel the CEO to take certain actions, not restore the CEO's discretion. The nature of the relief in this case, to restore the CEO's discretion, softens the so-called "blunt instrument of judicial intervention."

72. Granting an injunction would not undermine public confidence, but would instead restore the CEO's mandate to protect it. In this respect, the Motion Judge did not consider, at any point in his decision, the criteria the CEO relies on in the exercise of its discretion. As stated earlier, the three "key considerations" of the CEO in exercising his discretion, which as noted are:

- a. Accessibility for electors who may face barriers in providing documentary proof of their ordinary place of residence;
- b. The integrity of the vote, including public confidence in the electoral system;
- c. The efficient administration of electoral events, whereby the process is seamless and the requirements are applied consistently.⁸⁰

73. Based on those criteria, the CEO indicated its intention, if an injunction is granted *and if it is feasible to do so*, to authorize use of the VIC for all electors. By refusing an injunction on the basis that it would undermine public trust and may lead to errors, the Motion Judge implied

⁷⁹ Motion Judgment, para. 95, AR, Tab 3, p. 65.

⁸⁰ Elections Canada, "Policy on Voter Identification", AR, Tab 16, p. 232.

that the CEO would exercise its discretion to authorize the VIC in contravention of its own policy. Yet he did not address the evidence of the CEO in any meaningful way.

74. Clearly, where public confidence is concerned, the balance of convenience favoured granting an injunction. Although finding that “there is a risk that some individuals who would otherwise rely on the Voter Information Card to enable them to vote will be unable to do so due to s. 46(3),”⁸¹ the Motion Judge ignored the possibility, recognized by the Ontario Court of Appeal in *Frank*, that “[i]f the election is decided by one or a very few votes” and the constitutional challenge is ultimately successful, refusal of an injunction “will have improperly disenfranchised voters whose vote could have changed the election.”⁸²

(d) The Motion Judge erred by refusing to consider related statutory provisions

75. In describing the rationale for the preemptive ‘rule’ in this case, the Motion Judge described the evidentiary record as “limited” and found that he was precluded from considering the broader statutory scheme, as doing so would create the “risk of unfairly isolating or highlighting concerns arising out of one specific provision without considering the impact and context provided by the rest, and the potential justification that may be found to exist in light of the whole.”⁸³

76. The evidentiary record was not “limited”. While the proceeding was interlocutory, the record on the motion had 19 volumes and included extensive affidavit evidence and transcripts of cross-examinations from both sides. Notably, much of the Attorney General’s evidence focused on the legislative history of s. 46(3) and various justifications for its enactment. In addition to

⁸¹ Motion Judgment, para. 101(b), AR, Tab 3, p. 66; see also paras. 79-80.

⁸² *Frank*, *supra* at para. 21.

⁸³ Motion Judgment, paras. 93-94, AR, Tab 3, pp. 64-65.

this voluminous record, the Motion Judge had the benefit of two days of oral argument. His suggestion of a “potential justification that may be found to exist” is not borne out by the facts.⁸⁴ The Attorney General had every reason to put its best foot forward, and did so. It cannot now blame a lack of evidence of public benefit on the interlocutory nature of the proceeding.

77. Moreover, as set out above, the Motion Judge’s speculation that granting an injunction would somehow undermine a “cohesive scheme” is without factual basis. There is no logical, let alone evidentiary basis for the proposition that restoring an element of the discretion of the CEO to authorize the VIC would upset any balance in the identification provisions of the *CEA*.

78. To the contrary, a consideration of related identification provisions in the *CEA* emphasizes the importance of restoring the CEO’s discretion, not curtailing it. As set out above, the evidence of the Applicants and the CEO is that authorizing the VIC was intended to alleviate the burden on vouching. Having eliminated identity vouching altogether, the benefits of the VIC, and the corresponding harms of eliminating it, are dramatically increased. Despite extensive evidence on these issues, the Motion Judge found, without citing any authority, that he was precluded from considering the impact of the elimination of vouching in the balance of convenience.

79. Strong support for this view can be found in the decisions of the B.C. Supreme Court and Court of Appeal in *Henry*. In that case, both courts found that the introduction of identification requirements in 2007 violated s. 3 in purpose and effect: “any interference with the right to put a

⁸⁴ See also para. 97, where the Motion Judge stated, “the rule against granting final relief in interlocutory proceedings involving constitutional challenges to electoral laws is informed by the risk of creating difficulties in the legislative scheme without considering the potential justification arguments that might be made under s. 1 of the Charter and further without allowing Parliament the opportunity to respond.”

ballot in the box must be justified under s. 1 of the *Charter*.”⁸⁵ The government was able to justify the imposition of identification requirements under s. 1 on the basis of critical safeguards that ensured that disadvantaged voters would retain their right to vote, namely (1) the authority of the CEO, including through public outreach, to further minimize difficulties in voting and maximize access;⁸⁶ (2) the ability of electors who could not otherwise establish identity or residence to rely on vouching;⁸⁷ and (3) the authority of the CEO to continue to fine-tune and expand the range of options for establishing identity and residence. In that respect, the court clearly had in mind “the possibility of adding the voter information card as possible proof of residence.”⁸⁸

80. In *Henry*, Canada defended the above safeguards as “failsafe” measures enabling those without proper identification to cast a ballot, and thereby justifying the transition to an identity system.⁸⁹ Canada has now eliminated or curtailed the three safeguards that were critical to the constitutionality of the previous regime – identity vouching, the CEO’s discretion to authorize pieces of identification, and public outreach. Despite the obvious relevance of the removal of other safeguards for disadvantaged voters, including vouching, when assessing the harm of eliminating the VIC, the Motion Judge did not consider such evidence.

⁸⁵ *Henry v. Canada (Attorney General)*, 2014 BCCA 30 (“*Henry BCCA*”) at para. 56, 70, 72; *Henry v. Canada (Attorney General)*, 2010 BCSC 610 (“*Henry BCSC*”) at paras. 190-193 (re: purpose) and 194-212 (re: effect).

⁸⁶ *Henry BCSC* at para. 482. Smith J. reached her conclusion that the s. 3 violation was proportionate in its effects, in part, “[o]n the premise (which I find is well-founded in the evidence) that the CEO will continue with public outreach initiatives and implementation of the voter identification requirements so as to further minimize difficulties for voters and maximize access, in particular for those voters who are marginalized or impoverished, or who have been identified in the research to date as experiencing the most difficulty with the identification requirements.” See also *Henry BCCA* at paras. 102-103.

⁸⁷ *Henry BCCA* at paras. 41-44, 87-93.

⁸⁸ *Henry BCSC* at para. 369. Smith J.’s decision that the 2007 voter identification requirements were minimally impairing specifically “[took] into account the broad range of options available for proof of identity and residence, and the delegation to the CEO of the ability to continue to fine-tune and expand that range of options.”

⁸⁹ *Henry BCSC* at para. 352.

D. The Proposed Appeal Involves Matters of Public Importance

81. For the above reasons, there is further serious reason to doubt the correctness of the Motion Judge's decision such that leave to appeal is warranted. Clearly an appeal would consider matters of significant public importance.

PART V - ORDER REQUESTED

82. The Applicants seek an Order granting it leave to appeal to the Divisional Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 23 day of July, 2015.


for Steven Shrybman / Louis Century
Goldblatt Partners LLP

SCHEDULE "A" – AUTHORITIES

1.	<i>RJR –MacDonald Inc. v. Canada (Attorney General)</i> , [1994] 1 S.C.R. 311
2.	<i>McDonald v. Freedman</i> , 2013 ONSC 812
3.	<i>Brownhall v. Canada (Ministry of National Defence)</i> , [2006] O.J. No 672
4.	<i>Ash v. Lloyd’s Corporation reflex</i> , (1992), 8 O.R. (3d) 282
5.	<i>Harper v. Canada (Attorney General)</i> , [2000] 2 S.C.R. 764
6.	<i>R. v. Henry</i> , [2005] 3 S.C.R. 607 –
7.	<i>Frank v. Canada (Attorney General)</i> , 2014 ONCA 485
8.	<i>Sauvé v. Canada (Chief Electoral Officer)</i> , [1997] 3 F.C.R. 628 (FC) (“ <i>Sauvé #1</i> ”)
9.	<i>Gould v. Attorney General of Canada</i> , [1984] 2 S.C.R. 124, affirming [1984] 1 F.C. 1133
10.	<i>Figueroa v. Canada (Attorney General)</i> (1997), 34 O.R. (3d) 59 (Div. Ct.)
11.	<i>Tan v. British Columbia (Chief Electoral Officer)</i> , 2001 BCSC 704
12.	<i>British Columbia Teachers’ Federation v. British Columbia (Attorney General)</i> , 2008 BCSC 1769
13.	<i>Sauvé v. Canada</i> , [2002] 3 S.C.R. 519 (“ <i>Sauvé #2</i> ”)
14.	<i>Carter v. Canada (Attorney General)</i> , 2015 SCC 5
15.	<i>Manitoba (A.G.) v. Metropolitan Stores Ltd.</i> , [1987] 1 S.C.R. 110
16.	<i>Federation of Law Societies of Canada v. Canada (Attorney General)</i> , (2002) 57 O.R. (3d) 383
17.	<i>Alberta Union of Provincial Employees v Alberta</i> , 2014 ABQB 97
18.	<i>Tłı̨chǫ Government v. Canada (Attorney General)</i> , 2015 NWTSC 9
19.	<i>Allard v. Canada</i> , 2014 FC 280
20.	<i>Canada (Attorney General) v. Simon</i> , 2012 FCA 312
21.	<i>NTI v. Canada (Attorney General)</i> , 2003 NUCJ 1

22.	<i>Québec (Procureur général) c. Canada (Procureur général)</i> , 2012 QCCS 1614
23.	<i>Henry v. Canada (Attorney General)</i> , 2010 BCSC 610
24.	<i>Henry v. Canada (Attorney General)</i> , 2014 BCCA 30

SCHEDULE “B” – STATUTES

The following includes all provisions of the *Fair Elections Act*, S.C. 2014, c. 12 (“*FEA*”) that are impugned in the Amended Notice of Application, and for each provision, a chart setting out the amended provisions in the *Canada Elections Act*, S.C. 2000, c. 9 (“*CEA*”) or *Director of Public Prosecutions Act*, S.C. 2006, c. 9, s. 121 (“*DPPA*”).

Fair Elections Act, S.C. 2014, c. 12

7. Section 18 of the Act is replaced by the following:

Public education and information programs

17.1 The Chief Electoral Officer may implement public education and information programs to make the electoral process better known to students at the primary and secondary levels.

Advertising

18. (1) The Chief Electoral Officer may transmit or cause to be transmitted advertising messages, both inside and outside Canada, to inform electors about the exercise of their democratic rights. Such advertising messages shall only address

- (a) how to become a candidate;
- (b) how an elector may have their name added to a list of electors and may have corrections made to information respecting the elector on the list;
- (c) how an elector may vote under section 127 and the times, dates and locations for voting;
- (d) how an elector may establish their identity and residence in order to vote, including the pieces of identification that they may use to that end; and
- (e) the measures for assisting electors with a disability to access a polling station or advance polling station or to mark a ballot.

Clarification

(1.1) For greater certainty, subsection (1) does not prevent the Chief Electoral Officer from transmitting or causing to be transmitted advertising messages for any other purpose relating to his or her mandate.

Communication with electors with disabilities

(2) The Chief Electoral Officer shall ensure that any information provided under subsection (1) is accessible to electors with disabilities.

Unsolicited calls

(3) The Chief Electoral Officer shall not provide information under this section by the use of calls, as defined in section 348.01, that are unsolicited.

2001, c. 21, s. 2

CEA s. 18 (pre-FEA)	CEA ss. 17.1-18 (post-FEA)
<p>18. (1) The Chief Electoral Officer may implement public education and information programs to make the electoral process better known to the public, particularly to those persons and groups most likely to experience difficulties in exercising their democratic rights.</p> <p>(2) The Chief Electoral Officer may, using any media or other means that he or she considers appropriate, provide the public, both inside and outside Canada, with information relating to Canada's electoral process, the democratic right to vote and how to be a candidate.</p> <p>(3) The Chief Electoral Officer may establish programs to disseminate information outside Canada concerning how to vote under Part 11.</p>	<p>17.1 The Chief Electoral Officer may implement public education and information programs to make the electoral process better known to students at the primary and secondary levels.</p> <p>18. (1) The Chief Electoral Officer may transmit or cause to be transmitted advertising messages, both inside and outside Canada, to inform electors about the exercise of their democratic rights. Such advertising messages shall only address</p> <ul style="list-style-type: none"> (a) how to become a candidate; (b) how an elector may have their name added to a list of electors and may have corrections made to information respecting the elector on the list; (c) how an elector may vote under section 127 and the times, dates and locations for voting; (d) how an elector may establish their identity and residence in order to vote, including the pieces of identification that they may use to that end; and (e) the measures for assisting electors with a disability to access a polling station or advance polling station or to mark a ballot. <p>(1.1) For greater certainty, subsection (1) does not prevent the Chief Electoral Officer from transmitting or causing to be transmitted advertising messages for any other purpose relating to his or her mandate.</p> <p>(2) The Chief Electoral Officer shall ensure that any information provided under subsection (1) is accessible to electors with disabilities.</p>

	(3) The Chief Electoral Officer shall not provide information under this section by the use of calls, as defined in section 348.01, that are unsolicited.
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46. (1) The portion of subsection 143(2) of the Act before paragraph (a) is replaced by the following:

(2) If the poll clerk determines that the elector's name and address appear on the list of electors or that the elector is allowed to vote under section 146, 147, 148 or 149, then the elector shall provide the deputy returning officer and the poll clerk with the following proof of the elector's identity and, subject to subsection (3), his or her residence:

(2) Paragraph 143(2)(b) of the Act is replaced by the following:

(b) two pieces of identification of a type authorized under subsection (2.1), each of which establishes the elector's name and at least one of which establishes the elector's address.

(3) Subsection 143(2.1) of the Act is replaced by the following:

(2.1) The Chief Electoral Officer may authorize types of identification for the purposes of paragraph (2)(b). For greater certainty, any document — other than a notice of confirmation of registration sent under section 95 or 102 — regardless of who issued the document, may be authorized.

(4) Subsection 143(3) of the Act is replaced by the following:

(3) An elector who proves his or her identity by providing two pieces of identification of a type authorized under subsection (2.1) that establish the elector's name may instead prove his or her residence by taking an oath in writing in the prescribed form — the form including the statement that he or she has received the oral advice set out in subsection 143.1(1) — if he or she is accompanied by another elector whose name appears on the list of electors for the same polling division who

(a) proves their own identity and residence to the deputy returning officer and poll clerk by providing the piece or pieces of identification referred to in paragraph (2)(a) or (b), respectively; and

(b) attests to the elector's residence on oath in writing in the prescribed form, the form including the statements that

(i) they have received the oral advice set out in subsection 143.1(2),

(ii) they know the elector personally,

(iii) they know that the elector resides in the polling division,

(iv) they have not attested to the residence of another elector at the election, and

(v) their own residence has not been attested to by another elector at the election.

(5) Section 143 of the Act is amended by adding the following after subsection (3.2):

(3.3) A candidate or their representative may examine but not handle any piece of identification presented under this section.

(6) Subsections 143(5) and (6) of the Act are replaced by the following:

(5) No elector shall attest to the residence of more than one elector at an election.

(6) No elector whose own residence has been attested to at an election shall attest to another elector's residence at that election.

<i>CEA s. 143 (pre-FEA)</i>	<i>CEA s. 143 (post-FEA)</i>
Elector to declare name, etc.	Elector to declare name, etc.
143. (1) Each elector, on arriving at the polling station, shall give his or her name and address to the deputy returning officer and the poll clerk, and, on request, to a candidate or his or her representative.	143. (1) Each elector, on arriving at the polling station, shall give his or her name and address to the deputy returning officer and the poll clerk, and, on request, to a candidate or his or her representative.
Proof of identity and residence	Proof of identity and residence
(2) If the poll clerk determines that the elector's name and address appear on the list of electors or that the elector is allowed to vote under section 146, 147, 148 or 149, then, subject to subsection (3), the elector shall provide to the deputy returning officer and the poll clerk the following proof of his or her identity and residence:	(2) If the poll clerk determines that the elector's name and address appear on the list of electors or that the elector is allowed to vote under section 146, 147, 148 or 149, then the elector shall provide the deputy returning officer and the poll clerk with the following proof of the elector's identity and, subject to subsection (3), his or her residence:
(a) one piece of identification issued by a Canadian government, whether federal, provincial or local, or an agency of that government, that contains a photograph of the elector and his or her name and address; or	(a) one piece of identification issued by a Canadian government, whether federal, provincial or local, or an agency of that government, that contains a photograph of the elector and his or her name and address; or
(b) two pieces of identification authorized by the Chief Electoral Officer each of which establish the elector's name and at least one of which establishes the elector's address.	(b) two pieces of identification of a type authorized under subsection (2.1), each of which establishes the elector's name and at least one of which establishes the elector's address.
Clarification	Authorized types of identification
(2.1) For greater certainty, the Chief Electoral Officer may authorize as a piece of identification for the purposes of paragraph	(2.1) The Chief Electoral Officer may authorize types of identification for the purposes of paragraph (2)(b). For greater

<p>(2)(b) any document, regardless of who issued it.</p> <p>Person registered as an Indian</p> <p>(2.2) For the purposes of paragraph (2)(b), a document issued by the Government of Canada that certifies that a person is registered as an Indian under the Indian Act constitutes an authorized piece of identification.</p> <p>Oath</p> <p>(3) An elector may instead prove his or her identity and residence by taking the prescribed oath if he or she is accompanied by an elector whose name appears on the list of electors for the same polling division and who</p> <p>(a) provides to the deputy returning officer and the poll clerk the piece or pieces of identification referred to in paragraph (2)(a) or (b), respectively; and</p> <p>(b) vouches for him or her on oath in the prescribed form.</p>	<p>certainty, any document — other than a notice of confirmation of registration sent under section 95 or 102 — regardless of who issued the document, may be authorized.</p> <p>Person registered as an Indian</p> <p>(2.2) For the purposes of paragraph (2)(b), a document issued by the Government of Canada that certifies that a person is registered as an Indian under the Indian Act constitutes an authorized piece of identification.</p> <p>Alternative proof of residence</p> <p>(3) An elector who proves his or her identity by providing two pieces of identification of a type authorized under subsection (2.1) that establish the elector's name may instead prove his or her residence by taking an oath in writing in the prescribed form — the form including the statement that he or she has received the oral advice set out in subsection 143.1(1) — if he or she is accompanied by another elector whose name appears on the list of electors for the same polling division who</p> <p>(a) proves their own identity and residence to the deputy returning officer and poll clerk by providing the piece or pieces of identification referred to in paragraph (2)(a) or (b), respectively; and</p> <p>(b) attests to the elector's residence on oath in writing in the prescribed form, the form including the statements that</p> <p>(i) they have received the oral advice set out in subsection 143.1(2),</p> <p>(ii) they know the elector personally,</p> <p>(iii) they know that the elector resides in the polling division,</p> <p>(iv) they have not attested to the residence of</p>
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<p>Proof of residence</p> <p>(3.1) If the address contained in the piece or pieces of identification provided under subsection (2) or paragraph (3)(a) does not prove the elector's residence but is consistent with information related to the elector that appears on the list of electors, the elector's residence is deemed to have been proven.</p> <p>Request to take an oath</p> <p>(3.2) Despite subsection (3.1), a deputy returning officer, poll clerk, candidate or candidate's representative who has reasonable doubts concerning the residence of an elector referred to in that subsection may request that the elector take the prescribed oath, in which case his or her residence is deemed to have been proven only if he or she takes that oath.</p> <p>Voting</p> <p>(4) If the deputy returning officer is satisfied that an elector's identity and residence have been proven in accordance with subsection (2) or (3), the elector's name shall be crossed off the list and, subject to section 144, the elector shall be immediately allowed to vote.</p> <p>Prohibition — vouching for more than one elector</p> <p>(5) No elector shall vouch for more than one elector at an election.</p>	<p>another elector at the election, and</p> <p>(v) their own residence has not been attested to by another elector at the election.</p> <p>Proof of residence</p> <p>(3.1) If the address contained in the piece or pieces of identification provided under subsection (2) or paragraph (3)(a) does not prove the elector's residence but is consistent with information related to the elector that appears on the list of electors, the elector's residence is deemed to have been proven.</p> <p>Request to take an oath</p> <p>(3.2) Despite subsection (3.1), a deputy returning officer, poll clerk, candidate or candidate's representative who has reasonable doubts concerning the residence of an elector referred to in that subsection may request that the elector take the prescribed oath, in which case his or her residence is deemed to have been proven only if he or she takes that oath.</p> <p>Examination of identification documents</p> <p>(3.3) A candidate or their representative may examine but not handle any piece of identification presented under this section.</p> <p>Voting</p> <p>(4) If the deputy returning officer is satisfied that an elector's identity and residence have been proven in accordance with subsection (2) or (3), the elector's name shall be crossed off the list and, subject to section 144, the elector shall be immediately allowed to vote.</p> <p>Prohibition — attesting to residence of more than one elector</p> <p>(5) No elector shall attest to the residence of more than one elector at an election.</p>
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<p>Prohibition — vouchee acting as voucher</p> <p>(6) An elector who has been vouched for at an election may not vouch for another elector at that election.</p> <p>Publication</p> <p>(7) The Chief Electoral Officer shall publish each year, and within three days after the issue of a writ, in a manner that he or she considers appropriate, a notice setting out the types of identification that are authorized for the purpose of paragraph (2)(b). The first annual notice shall be published no later than six months after the coming into force of this subsection.</p> <p>2000, c. 9, s. 143; 2007, c. 21, s. 21, c. 37, s. 1.</p>	<p>Prohibition — attesting to residence (own residence attested to)</p> <p>(6) No elector whose own residence has been attested to at an election shall attest to another elector's residence at that election.</p> <p>Publication</p> <p>(7) The Chief Electoral Officer shall publish each year, and within three days after the issue of a writ, in a manner that he or she considers appropriate, a notice setting out the types of identification that are authorized for the purpose of paragraph (2)(b). The first annual notice shall be published no later than six months after the coming into force of this subsection.</p> <p>2000, c. 9, s. 143; 2007, c. 21, s. 21, c. 37, s. 1; 2014, c. 12, s. 46.</p>
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(1.1) Paragraphs 161(1)(a) and (b) of the Act are replaced by the following:

- (a) provides as proof of his or her identity and residence the piece or pieces of identification referred to in paragraph 143(2)(a) or (b), respectively, the piece or one of those pieces containing an address that proves his or her residence; or
- (b) proves his or her identity by providing two pieces of identification of a type authorized under subsection 143(2.1) that establish the elector's name, proves his or her residence by taking an oath in writing in the prescribed form — the form including the statement that he or she has received the oral advice set out in subsection 161.1(1) — and is accompanied by another elector whose name appears on the list of electors for the same polling division who
 - (i) proves their own identity and residence by providing the piece or pieces of identification referred to in paragraph 143(2)(a) or (b), respectively, the piece or one of those pieces containing either an address that proves that other elector's residence or an address that is consistent with information related to that other elector that appears on the list of electors, and
 - (ii) attests to the elector's residence on oath in writing in the prescribed form, the form including the statements that
 - (A) they have received the oral advice set out in subsection 161.1(2),
 - (B) they know the elector personally,
 - (C) they know that the elector resides in the polling division,

- (D) they have not attested to the residence of another elector at the election, and
- (E) their own residence has not been attested to by another elector at the election.

(2) Section 161 of the Act is amended by adding the following after subsection (3):

Examination of identification documents

(3.1) The representative of a candidate may examine but not handle any piece of identification provided by the elector.

(3) Subsection 161(4) of the Act is replaced by the following:

Registration certificate

(4) If the elector satisfies the requirements of subsection (1), the registration officer or deputy returning officer, as the case may be, shall complete a registration certificate in the prescribed form authorizing the elector to vote and the elector shall sign it. The registration certificate shall include a statement by the elector that he or she is qualified as an elector under section 3.

(4) Section 161 of the Act is amended by adding the following after subsection (5):

Prohibition — registration on polling day

(5.1) It is prohibited for any person to

- (a) knowingly apply to be registered on polling day in a name that is not their own;
- (b) knowingly apply, except as authorized by this Act, to be registered on polling day to vote in a polling division in which they are not ordinarily resident;
- (c) apply to be registered on polling day to vote in an electoral district knowing that they are not qualified as an elector or entitled to vote in the electoral district; or
- (d) compel, induce or attempt to compel or induce any other person to make a false or misleading statement relating to that other person’s qualification as an elector for the purposes of the registration of that other person on polling day.

2007, c. 21, s. 26(2)

(5) Subsections 161(6) and (7) of the Act are replaced by the following:

Prohibition — attesting to residence of more than one elector

(6) No elector shall attest to the residence of more than one elector at an election.

Prohibition — attesting to residence (own residence attested to)

(7) No elector whose own residence has been attested to at an election shall attest to another elector’s residence at that election.

2007, c. 21, s. 27

CEA s. 161 (pre-FEA)	CEA s. 161 (post-FEA)
Registration in person	Registration in person

<p>161. (1) An elector whose name is not on the list of electors may register in person on polling day if the elector</p> <p>(a) provides as proof of his or her identity and residence the piece or pieces of identification referred to in paragraph 143(2)(a) or (b), respectively, which piece or one of which pieces must contain an address that proves his or her residence; or</p> <p>(b) proves his or her identity and residence by taking the prescribed oath, and is accompanied by an elector whose name appears on the list of electors for the same polling division and who</p> <p>(i) provides the piece or pieces of identification referred to in paragraph 143(2)(a) or (b), respectively, which piece or one of which pieces must contain either an address that proves his or her residence or an address that is consistent with information related to him or her that appears on the list of electors, and</p> <p>(ii) vouches for him or her on oath in the prescribed form, which form must include a statement as to the residence of both electors.</p>	<p>161. (1) An elector whose name is not on the list of electors may register in person on polling day if the elector</p> <p>(a) provides as proof of his or her identity and residence the piece or pieces of identification referred to in paragraph 143(2)(a) or (b), respectively, the piece or one of those pieces containing an address that proves his or her residence; or</p> <p>(b) proves his or her identity by providing two pieces of identification of a type authorized under subsection 143(2.1) that establish the elector's name, proves his or her residence by taking an oath in writing in the prescribed form — the form including the statement that he or she has received the oral advice set out in subsection 161.1(1) — and is accompanied by another elector whose name appears on the list of electors for the same polling division who</p> <p>(i) proves their own identity and residence by providing the piece or pieces of identification referred to in paragraph 143(2)(a) or (b), respectively, the piece or one of those pieces containing either an address that proves that other elector's residence or an address that is consistent with information related to that other elector that appears on the list of electors, and</p> <p>(ii) attests to the elector's residence on oath in writing in the prescribed form, the form including the statements that</p> <p>(A) they have received the oral advice set out in subsection 161.1(2),</p> <p>(B) they know the elector personally,</p> <p>(C) they know that the elector resides in the polling division,</p> <p>(D) they have not attested to the residence of another elector at the election, and</p> <p>(E) their own residence has not been attested to by another elector at the election.</p>
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<p>Place of registration</p> <p>(2) Where subsection (1) applies, the registration may take place before</p> <p>(a) a registration officer at a registration desk established under subsection 39(1); or</p> <p>(b) a deputy returning officer at a polling station with respect to which the Chief Electoral Officer determines that the officer be authorized to receive registrations.</p> <p>Representative of each candidate</p> <p>(3) In the case of a registration under paragraph (2)(a), the registration officer shall permit one representative of each candidate in the electoral district to be present.</p> <p>Registration certificate</p> <p>(4) If the elector satisfies the requirements of subsection (1), the registration officer or deputy returning officer, as the case may be, shall complete a registration certificate in the prescribed form authorizing the elector to vote and the elector shall sign it. The registration certificate shall include a statement by the elector that he or she is qualified as an elector under section 3.</p> <p>List deemed to be modified</p> <p>(5) When a registration certificate is given under subsection (4), the list of electors is deemed, for the purposes of this Act, to have been modified in accordance with the certificate.</p>	<p>Place of registration</p> <p>(2) Where subsection (1) applies, the registration may take place before</p> <p>(a) a registration officer at a registration desk established under subsection 39(1); or</p> <p>(b) a deputy returning officer at a polling station with respect to which the Chief Electoral Officer determines that the officer be authorized to receive registrations.</p> <p>Representative of each candidate</p> <p>(3) In the case of a registration under paragraph (2)(a), the registration officer shall permit one representative of each candidate in the electoral district to be present.</p> <p>Examination of identification documents</p> <p>(3.1) The representative of a candidate may examine but not handle any piece of identification provided by the elector.</p> <p>Registration certificate</p> <p>(4) If the elector satisfies the requirements of subsection (1), the registration officer or deputy returning officer, as the case may be, shall complete a registration certificate in the prescribed form authorizing the elector to vote and the elector shall sign it. The registration certificate shall include a statement by the elector that he or she is qualified as an elector under section 3.</p> <p>List deemed to be modified</p> <p>(5) When a registration certificate is given under subsection (4), the list of electors is deemed, for the purposes of this Act, to have been modified in accordance with the certificate.</p>
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<p>Prohibition — registration on polling day</p> <p>(5.1) It is prohibited for any person to</p> <p>(a) knowingly apply to be registered on polling day in a name that is not their own;</p> <p>(b) knowingly apply, except as authorized by this Act, to be registered on polling day to vote in a polling division in which they are not ordinarily resident;</p> <p>(c) apply to be registered on polling day to vote in an electoral district knowing that they are not qualified as an elector or entitled to vote in the electoral district; or</p> <p>(d) compel, induce or attempt to compel or induce any other person to make a false or misleading statement relating to that other person's qualification as an elector for the purposes of the registration of that other person on polling day.</p> <p>Prohibition — vouching for more than one elector</p> <p>(6) No elector shall vouch for more than one elector at an election.</p> <p>Prohibition — vouchee acting as voucher</p> <p>(7) An elector who has been vouched for at an election may not vouch for another elector at that election.</p> <p>2000, c. 9, s. 161; 2007, c. 21, s. 26, c. 37, s. 2; 2014, c. 12, s. 50.</p>	<p>Prohibition — registration on polling day</p> <p>(5.1) It is prohibited for any person to</p> <p>(a) knowingly apply to be registered on polling day in a name that is not their own;</p> <p>(b) knowingly apply, except as authorized by this Act, to be registered on polling day to vote in a polling division in which they are not ordinarily resident;</p> <p>(c) apply to be registered on polling day to vote in an electoral district knowing that they are not qualified as an elector or entitled to vote in the electoral district; or</p> <p>(d) compel, induce or attempt to compel or induce any other person to make a false or misleading statement relating to that other person's qualification as an elector for the purposes of the registration of that other person on polling day.</p> <p>Prohibition — attesting to residence of more than one elector</p> <p>(6) No elector shall attest to the residence of more than one elector at an election.</p> <p>Prohibition — attesting to residence (own residence attested to)</p> <p>(7) No elector whose own residence has been attested to at an election shall attest to another elector's residence at that election.</p> <p>2000, c. 9, s. 161; 2007, c. 21, s. 26, c. 37, s. 2; 2014, c. 12, s. 50.</p>
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(1.1) Paragraphs 169(2)(a) and (b) of the Act are replaced by the following:

- (a) provides as proof of his or her identity and residence the piece or pieces of identification referred to in paragraph 143(2)(a) or (b), respectively, the piece or one of those pieces containing an address that proves his or her residence; or
- (b) proves his or her identity by providing two pieces of identification of a type authorized under subsection 143(2.1) that establish the elector's name, proves his or her residence by taking an oath in writing in the prescribed form — the form including the statement that he or she has received the oral advice set out in subsection 169.1(1) — and is accompanied by another elector whose name appears on the list of electors for the same polling division who
 - (i) proves their own identity and residence by providing the piece or pieces of identification referred to in paragraph 143(2)(a) or (b), respectively, the piece or one of those pieces containing either an address that proves that other elector's residence or an address that is consistent with information related to that other elector that appears on the list of electors, and
 - (ii) attests to the elector's residence on oath in writing in the prescribed form, the form including the statements that
 - (A) they have received the oral advice set out in subsection 169.1(2),
 - (B) they know the elector personally,
 - (C) they know that the elector resides in the polling division,
 - (D) they have not attested to the residence of another elector at the election, and
 - (E) their own residence has not been attested to by another elector at the election.

(1.2) Section 169 of the Act is amended by adding the following after subsection (2):

Examination of identification documents

(2.1) The representative of a candidate may examine but not handle any piece of identification provided by the elector.

(2) Subsection 169(3) of the Act is replaced by the following:

Registration certificate

(3) If the elector satisfies the requirements of subsection (2), the deputy returning officer shall complete a registration certificate in the prescribed form authorizing the elector to vote and the elector shall sign it. The registration certificate shall include a statement by the elector that he or she is qualified as an elector under section 3.

(3) Section 169 of the Act is amended by adding the following after subsection (4):

Prohibition — registration at advance polling station

(4.1) It is prohibited for any person to

- (a) knowingly apply to be registered at an advance polling station in a name that is not their own;

(b) knowingly apply, except as authorized by this Act, to be registered at an advance polling station to vote in an advance polling district in which they are not ordinarily resident;

(c) apply to be registered at an advance polling station to vote in an electoral district knowing that they are not qualified as an elector or entitled to vote in the electoral district; or

(d) compel, induce or attempt to compel or induce any other person to make a false or misleading statement relating to that other person's qualification as an elector for the purposes of the registration of that other person at an advance polling station.

2007, c. 21, s. 30(2)

(4) Subsections 169(5) and (6) of the Act are replaced by the following:

Prohibition — attesting to residence of more than one elector

(5) No elector shall attest to the residence of more than one elector at an election.

Prohibition — attesting to residence (own residence attested to)

(6) No elector whose residence has been attested to at an election shall attest to another elector's residence at that election.

2007, c. 21, s. 31

CEA s. 169 (pre-FEA)	CEA s. 169 (post-FEA)
<p>Registration at advance polling station</p> <p>169. (1) Every elector whose name is not on the revised list of electors may register in person before the deputy returning officer in the advance polling station where the elector is entitled to vote.</p> <p>Conditions</p> <p>(2) An elector shall not be registered unless he or she</p> <p>(a) provides as proof of his or her identity and residence the piece or pieces of identification referred to in paragraph 143(2)(a) or (b), respectively, which piece or one of which pieces must contain an address that proves his or her residence; or</p> <p>(b) proves his or her identity and residence by taking the prescribed oath, and is accompanied by an elector whose name appears on the list of electors for the same polling division and who</p>	<p>Registration at advance polling station</p> <p>169. (1) Every elector whose name is not on the revised list of electors may register in person before the deputy returning officer in the advance polling station where the elector is entitled to vote.</p> <p>Conditions</p> <p>(2) An elector shall not be registered unless he or she</p> <p>(a) provides as proof of his or her identity and residence the piece or pieces of identification referred to in paragraph 143(2)(a) or (b), respectively, the piece or one of those pieces containing an address that proves his or her residence; or</p> <p>(b) proves his or her identity by providing two pieces of identification of a type authorized under subsection 143(2.1) that establish the elector's name, proves his or her residence by</p>

<p>(i) provides the piece or pieces of identification referred to in paragraph 143(2)(a) or (b), respectively, which piece or one of which pieces must contain either an address that proves his or her residence or an address that is consistent with information related to him or her that appears on the list of electors, and</p> <p>(ii) vouches for him or her on oath in the prescribed form, which form must include a statement as to the residence of both electors.</p>	<p>taking an oath in writing in the prescribed form — the form including the statement that he or she has received the oral advice set out in subsection 169.1(1) — and is accompanied by another elector whose name appears on the list of electors for the same polling division who</p> <p>(i) proves their own identity and residence by providing the piece or pieces of identification referred to in paragraph 143(2)(a) or (b), respectively, the piece or one of those pieces containing either an address that proves that other elector's residence or an address that is consistent with information related to that other elector that appears on the list of electors, and</p> <p>(ii) attests to the elector's residence on oath in writing in the prescribed form, the form including the statements that</p> <p>(A) they have received the oral advice set out in subsection 169.1(2),</p> <p>(B) they know the elector personally,</p> <p>(C) they know that the elector resides in the polling division,</p> <p>(D) they have not attested to the residence of another elector at the election, and</p> <p>(E) their own residence has not been attested to by another elector at the election.</p> <p>Examination of identification documents</p> <p>(2.1) The representative of a candidate may examine but not handle any piece of identification provided by the elector.</p>
<p>Registration certificate</p> <p>(3) If the elector satisfies the requirements of subsection (2), the deputy returning officer shall complete a registration certificate in the prescribed form authorizing the elector to vote and the elector shall sign it. The registration certificate shall include a statement by the elector that he or she is qualified as an elector</p>	<p>Registration certificate</p> <p>(3) If the elector satisfies the requirements of subsection (2), the deputy returning officer shall complete a registration certificate in the prescribed form authorizing the elector to vote and the elector shall sign it. The registration certificate shall include a statement by the elector that he or she is qualified as an elector</p>

<p>under section 3.</p> <p>Entry</p> <p>(4) The poll clerk shall indicate on the prescribed form the names of the electors who are permitted to vote under this section.</p> <p>Prohibition — registration at advance polling station</p> <p>(4.1) It is prohibited for any person to</p> <p>(a) knowingly apply to be registered at an advance polling station in a name that is not their own;</p> <p>(b) knowingly apply, except as authorized by this Act, to be registered at an advance polling station to vote in an advance polling district in which they are not ordinarily resident;</p> <p>(c) apply to be registered at an advance polling station to vote in an electoral district knowing that they are not qualified as an elector or entitled to vote in the electoral district; or</p> <p>(d) compel, induce or attempt to compel or induce any other person to make a false or misleading statement relating to that other person's qualification as an elector for the purposes of the registration of that other person at an advance polling station.</p> <p>Prohibition — vouching for more than one elector</p> <p>(5) No elector shall vouch for more than one elector at an election.</p> <p>Prohibition — vouchee acting as voucher</p> <p>(6) An elector who has been vouched for at an election may not vouch for another elector at that election.</p>	<p>under section 3.</p> <p>Entry</p> <p>(4) The poll clerk shall indicate on the prescribed form the names of the electors who are permitted to vote under this section.</p> <p>Prohibition — registration at advance polling station</p> <p>(4.1) It is prohibited for any person to</p> <p>(a) knowingly apply to be registered at an advance polling station in a name that is not their own;</p> <p>(b) knowingly apply, except as authorized by this Act, to be registered at an advance polling station to vote in an advance polling district in which they are not ordinarily resident;</p> <p>(c) apply to be registered at an advance polling station to vote in an electoral district knowing that they are not qualified as an elector or entitled to vote in the electoral district; or</p> <p>(d) compel, induce or attempt to compel or induce any other person to make a false or misleading statement relating to that other person's qualification as an elector for the purposes of the registration of that other person at an advance polling station.</p> <p>Prohibition — attesting to residence of more than one elector</p> <p>(5) No elector shall attest to the residence of more than one elector at an election.</p> <p>Prohibition — attesting to residence (own residence attested to)</p> <p>(6) No elector whose residence has been attested to at an election shall attest to another elector's residence at that election.</p>
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2000, c. 9, s. 169; 2007, c. 21, s. 30, c. 37, s. 3; 2014, c. 12, s. 54.	2000, c. 9, s. 169; 2007, c. 21, s. 30, c. 37, s. 3; 2014, c. 12, s. 54.
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108. Sections 509 and 510 of the Act are replaced by the following:

Commissioner of Canada Elections

509. (1) The Commissioner of Canada Elections shall be appointed by the Director of Public Prosecutions to hold office during good behaviour for a term of seven years and may be removed by the Director of Public Prosecutions for cause.

No consultation

(2) The Director of Public Prosecutions shall not consult the Chief Electoral Officer with respect to the appointment of the Commissioner.

Ineligibility

(3) A person is not eligible to be appointed as Commissioner if the person is or has been

(a) a candidate;

(b) an employee of a registered party or a person whose services have been engaged by the registered party to support its electoral or political financing activities;

(c) a member of the staff referred to in any of paragraphs 4(2)(a) to (f) of the *Parliamentary Employment and Staff Relations Act* or a person referred to in paragraph 4(2)(g) of that Act;

(d) the Chief Electoral Officer, a member of his or her staff or a person whose services have been engaged under subsection 20(1); or

(e) an election officer referred to in paragraph 22(1)(a) or (b).

No re-appointment

(4) A person who has served as Commissioner is not eligible for re-appointment to that office.

CEA ss. 509-510 (pre-FEA)	CEA s. 509 (post-FEA)
Commissioner of Canada Elections	Commissioner of Canada Elections
509. The Chief Electoral Officer shall appoint a Commissioner of Canada Elections, whose duty is to ensure that this Act is complied with and enforced.	509. (1) The Commissioner of Canada Elections shall be appointed by the Director of Public Prosecutions to hold office during good behaviour for a term of seven years and may be removed by the Director of Public Prosecutions for cause.
Chief Electoral Officer to direct inquiry	
510. If the Chief Electoral Officer believes on reasonable grounds that an election officer may have committed an offence against this Act or	No consultation (2) The Director of Public Prosecutions shall

<p>that any person may have committed an offence under any of paragraphs 486(3)(a) and (d), section 488, paragraph 489(3)(g), section 493 and subsection 499(1), the Chief Electoral Officer shall direct the Commissioner to make any inquiry that appears to be called for in the circumstances and the Commissioner shall proceed with the inquiry.</p>	<p>not consult the Chief Electoral Officer with respect to the appointment of the Commissioner.</p> <p>Ineligibility</p> <p>(3) A person is not eligible to be appointed as Commissioner if the person is or has been</p> <p>(a) a candidate;</p> <p>(b) an employee of a registered party or a person whose services have been engaged by the registered party to support its electoral or political financing activities;</p> <p>(c) a member of the staff referred to in any of paragraphs 4(2)(a) to (f) of the Parliamentary Employment and Staff Relations Act or a person referred to in paragraph 4(2)(g) of that Act;</p> <p>(d) the Chief Electoral Officer, a member of his or her staff or a person whose services have been engaged under subsection 20(1); or</p> <p>(e) an election officer referred to in any of paragraphs 22(1)(a) to (b).</p> <p>No re-appointment</p> <p>(4) A person who has served as Commissioner is not eligible for re-appointment to that office.</p> <p>2000, c. 9, s. 509; 2014, c. 12, ss. 108, 154.</p>
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113. (1) Subsection 534(1) of the Act is amended by striking out “and” at the end of paragraph (a) and by replacing paragraph (b) with the following:

- (b) any measures to adapt any provision of this Act that have been taken under section 17 or 179 since the issue of the writs that he or she considers should be brought to the attention of the House of Commons; and
- (c) any measures that he or she has taken to improve the accuracy of the lists of electors since the last report and any such measures that he or she proposes to take.

(2) Subsection 534(2) of the Act is amended by striking out “and” at the end of paragraph (a) and by replacing paragraph (b) with the following:

(b) any measures to adapt any provision of this Act that have been taken under section 17 or 179 in relation to each of the by-elections and that he or she considers should be brought to the attention of the House of Commons; and

(c) any measures that he or she has taken to improve the accuracy of the lists of electors in relation to each of the by-elections and any such measures that he or she proposes to take.

2006, c. 9, s. 135

<i>CEA s. 534 (pre-FEA)</i>	<i>CEA s. 534 (post-FEA)</i>
<p>Report to Speaker on general election</p> <p>534. (1) In the case of a general election, the Chief Electoral Officer shall, within 90 days after the date provided for in paragraph 57(2)(c), make a report to the Speaker of the House of Commons that sets out</p> <p>(a) any matter or event that has arisen or occurred in connection with the administration of the Chief Electoral Officer’s office since the last report and that he or she considers should be brought to the attention of the House of Commons; and</p> <p>(b) any measures that have been taken under subsection 17(1) or (3) or sections 509 to 513 since the issue of the writs that he or she considers should be brought to the attention of the House of Commons.</p> <p>Report to Speaker on by-elections</p> <p>(2) If there are one or more by-elections in a year, the Chief Electoral Officer shall, within 90 days after the end of the year, make a report to the Speaker of the House of Commons that sets out</p>	<p>Report to Speaker on general election</p> <p>534. (1) In the case of a general election, the Chief Electoral Officer shall, within 90 days after the date provided for in paragraph 57(2)(c), make a report to the Speaker of the House of Commons that sets out</p> <p>(a) any matter or event that has arisen or occurred in connection with the administration of the Chief Electoral Officer’s office since the last report and that he or she considers should be brought to the attention of the House of Commons;</p> <p>(b) any measures to adapt any provision of this Act that have been taken under section 17 or 179 since the issue of the writs that he or she considers should be brought to the attention of the House of Commons; and</p> <p>(c) any measures that he or she has taken to improve the accuracy of the lists of electors since the last report and any such measures that he or she proposes to take.</p> <p>Report to Speaker on by-elections</p> <p>(2) If there are one or more by-elections in a year, the Chief Electoral Officer shall, within 90 days after the end of the year, make a report to the Speaker of the House of Commons that sets out</p>

<p>(a) any matter or event that has arisen or occurred in connection with the administration of the Chief Electoral Officer's office since the last report under this section and that he or she considers should be brought to the attention of the House of Commons; and</p> <p>(b) any measures that have been taken under subsection 17(1) or (3), subsection 178(2) or sections 509 to 513 in relation to each of the by-elections and that he or she considers should be brought to the attention of the House of Commons.</p>	<p>(a) any matter or event that has arisen or occurred in connection with the administration of the Chief Electoral Officer's office since the last report under this section and that he or she considers should be brought to the attention of the House of Commons;</p> <p>(b) any measures to adapt any provision of this Act that have been taken under section 17 or 179 in relation to each of the by-elections and that he or she considers should be brought to the attention of the House of Commons; and</p> <p>(c) any measures that he or she has taken to improve the accuracy of the lists of electors in relation to each of the by-elections and any such measures that he or she proposes to take.</p> <p>2000, c. 9, s. 534; 2014, c. 12, s. 113.</p>
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114. Section 535.1 of the Act is repealed.

<p><i>CEA s. 535.1 (pre-FEA)</i></p> <p>Consultation</p> <p>535.1 The Chief Electoral Officer may, before making a report under section 534 or 535, consult the Director of Public Prosecutions on any question relating to measures taken under section 511 or 512.</p> <p>2006, c. 9, s. 135.</p>	
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152. Subsection 16(1) of the [*Director of Public Prosecutions Act, S.C. 2006, c. 9, s. 121*] is replaced by the following:

Annual report

16. (1) The Director shall, not later than June 30 of each year, provide a report to the Attorney General on the activities of the office of the Director in the immediately preceding fiscal year.

Commissioner of Canada Elections

(1.1) In addition, the report shall include a section, provided by the Commissioner of Canada Elections, on his or her activities under the *Canada Elections Act* in that fiscal year. The Commissioner shall not include the details of any investigation

DPPA s. 16 (pre-FEA)	DPPA s. 16 (post-FEA)
<p>Annual report</p> <p>16. (1) The Director shall, not later than June 30 of each year, report to the Attorney General in respect of the activities of the office of the Director — except in relation to matters referred to in subsection 3(8) — in the immediately preceding fiscal year.</p>	<p>Annual report</p> <p>16. (1) The Director shall, not later than June 30 of each year, provide a report to the Attorney General on the activities of the office of the Director in the immediately preceding fiscal year.</p> <p>Commissioner of Canada Elections</p> <p>(1.1) In addition, the report shall include a section, provided by the Commissioner of Canada Elections, on his or her activities under the <i>Canada Elections Act</i> in that fiscal year. The Commissioner shall not include the details of any investigation.</p>
<p>Tabling in Parliament</p> <p>(2) The Attorney General shall cause a copy of the Director's report to be laid before each House of Parliament on any of the first 15 days on which that House is sitting after he or she receives the report.</p>	<p>Tabling in Parliament</p> <p>(2) The Attorney General shall cause a copy of the Director's report to be laid before each House of Parliament on any of the first 15 days on which that House is sitting after he or she receives the report.</p> <p>2006, c. 9, s. 121 "16"; 2014, c. 12, s. 152.</p>

THE COUNCIL OF CANADIANS et al
Applicants

- and -

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

Divisional Court File No.
Superior Court File No. CV-14-513961

ONTARIO
SUPERIOR COURT OF JUSTICE
(Divisional Court)

Proceeding commenced at TORONTO

MOVING PARTIES' FACTUM
(LEAVE TO APPEAL)

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