

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

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

Applicants

- and -

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

Respondent

APPLICATION UNDER Rule 14.05 of the Ontario Rules of Civil Procedure, 15(1) and 24(1) of the Canadian Charter of Rights and Freedoms, and s. 3 of the Constitution Act, 1982

AMENDED NOTICE OF APPLICATION

TO THE RESPONDENTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicants. The claim made by the applicants appears on the following page.

THIS APPLICATION will come on for a hearing at a date and time to be fixed by the Registrar, at 393 University Avenue, Toronto, Ontario, M5G 1E6

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

AMENDED THIS 21/01/15
 MODIFIE
 PAR LA REGLE 26.02 (A) 1-14-09
 THE ORDER OF L'ORDONNANCE DU
 DATED / FAIT LE
 REGISTRAR
 GREFFIER
 SUPERIOR COURT OF JUSTICE
 COUR SUPERIEURE DE JUSTICE

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date October 9, 2014

Issued by "M. Sagaria"
Local registrar

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 Toronto, Ontario M5G 1E6

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APPLICATION

I. THE APPLICANTS MAKE APPLICATION FOR:

1. A declaration that *An Act to amend the Canada Elections Act and other Acts and to make consequential amendments to certain Acts* (“the Act”), which amends the *Canada Elections Act*, S.C. 2000, c. 9 and the *Director of Public Prosecutions Act*, S.C. 2006, c. 9, s. 121, and in particular ss. 7, 46(1), ~~(2), (3), (4), and (6)~~, 50(1.1), (2), (4), and (5); 54(1.1), (1.2), (3) and (4); 108; 113(1); 114; and 152 of the Act (collectively referred to herein as the “impugned provisions”), infringe on and deny the right to vote guaranteed by s. 3 of the *Canadian Charter of Rights and Freedoms* (the “*Charter*”), and that such infringement cannot be justified as a demonstrable limit, pursuant to s. 1 of the *Charter*.
2. A declaration that ss. 7, 46(1), ~~(2), (3), (4) and (6)~~, 50(1.1), (2), (4) and (5); and 54(1.1), (1.2), (3), and (4) of the Act also infringe on and deny equality rights guaranteed by s. 15(1) of the *Charter*, and that such infringement cannot be justified as a demonstrable limit, pursuant to s. 1 of the *Charter*.
3. A declaration that, insofar as the impugned provisions and any consequential amendments in the Act arising therefrom, infringe and deny the rights and freedoms guaranteed by s. 3 and/or s. 15 of the *Charter* and cannot be justified under s. 1 of the *Charter*, those provisions are invalid and of no force and effect, to the extent of the inconsistency;

4. If required, interim declaratory and injunctive relief to enjoin the implementation of the impugned measures before the 42nd Federal general election, pending the final determination of this application on the merits.
5. Costs of this application to be fixed by the judge hearing the application; and
6. Such further and other relief as the circumstances of the case may require, and this Honourable Court may deem to be just and appropriate.

II. THE GROUNDS FOR THE APPLICATION ARE:

A. The Applicants

1. The Council of Canadians is an independent, non-partisan citizens' interest group with a demonstrated history of defending democracy and the integrity of Canada's electoral system.
2. The Canadian Federation of Students ("the Federation")— is a national federation of student organizations representing more than half a million students from more than 80 university and college students' unions in every province. The Federation advocates on behalf of students at both the national and provincial levels to ensure students' rights and concerns are fully represented. The Federation has been active for much of its history in facilitating student voting at the municipal, provincial and federal level.
3. Jessica McCormick is the National Chairperson of the Canadian Federation of Students. In that role, she has been involved in partnerships with Elections Canada and public education and outreach campaigns designed to increase youth voter turnout and educate

students about their right to vote, how to exercise it, and the various political choices available to them.

4. Peggy Walsh Craig is an eligible voter residing in the electoral district of Nipissing-Timiskaming and is one of eight individuals who brought six applications pursuant to section 524(1)(b) of the *Canada Elections Act* to contest the results of Canada's 41st General Election. Ms. Craig relied upon public statements of Mr. Marc Mayrand, the Chief Electoral Officer of Canada, reported in the media to inform herself in part of issues and events relevant to that application.
5. Sandra McEwing is an eligible voter residing in the electoral district of Winnipeg South Centre and is another of the eight individuals who brought six applications pursuant to section 524(1)(b) of the *Canada Elections Act* to contest the results of Canada's 41st General Election. Ms. McEwing relied upon public statements of Mr. Marc Mayrand, the Chief Electoral Officer of Canada, reported in the media to inform herself in part of issues and events relevant to that application.

B. Coming into force

6. The Act received Royal Assent on June 19, 2014. Not all of its provisions came into effect immediately. Sections 7, 46(1)(2), (3), (4) and (6), 50(1.1), (2), (4) and (5), 54(1.1), (1.2), (3) and (4) and 113(1) of the Act will come into force no later than six months after the day the Act received Royal Assent. Sections 108, 114, and 152 of the Act came into force on October 1, 2014.

7. Pursuant to Section 56.1 of the Act, the next general election is to be held on October 19, 2015, unless the Governor General exercises his power to dissolve Parliament at an earlier date.
8. This application raises a serious issue to be tried. If the impugned provisions are in effect upon the issuance of a proclamation by the Governor in Council for a general election to be held, they will cause irreparable harm to the applicants and to the Canadian electorate generally. Both the balance of convenience and the public interest weigh in favour of granting interlocutory relief.

C. The impugned provisions of the Act violate s. 3 and s. 15 of the *Charter*

9. Section 3 of the *Charter* guarantees the right of every citizen of Canada the right to vote in an election of members of the House of Commons.
10. The right granted under s. 3 of the *Charter* includes the right of each citizen to participate and play a meaningful role in the electoral process. Section 3 is infringed where the purpose or effect of legislation or government action is to interfere with the ability of citizens to exercise their right to vote.
11. The constitutional right to participate in the electoral process is of fundamental importance in a free and democratic society and should not be construed narrowly, but rather should be interpreted in a manner that seeks to enfranchise all entitled persons and to encourage them to come forward to vote on election day.

12. The Applicants maintain that the impugned provisions of the Act, both in purpose and effect, interfere with the right of electors to participate in the electoral process and with their right to vote, in violation of s. 3 of the *Charter* because they:

- i. place unreasonable restrictions on the documentation that qualified electors can rely on to establish their identity and residence in order to obtain a ballot to vote under the *Canada Elections Act*, and result in a loss by tens of thousands of Canadians of their right to vote;
- ii. restrict the authority of the Chief Electoral Officer to implement public education and information programs or to use any appropriate means to provide Canadians with necessary information to allow them to participate in the electoral process and to exercise their right to vote, and result in tens of thousands of qualified electors not having the information they require to exercise their right to vote; and
- iii. eliminate the authority of the Chief Electoral Officer to appoint, direct, oversee, be informed of, or report to Parliament upon enforcement and compliance activities and measures taken under the Act by the Commissioner of Canada Elections, thereby undermining public confidence in the electoral process, depriving electors of information concerning fraudulent or corrupt practices that may have affected the result of an election, and undermining the essential requirements of electoral democracy and the right to vote.

13. Section 15(1) of the *Charter* protects every person's equal right to be free from discrimination. This includes the right to equal access to voting and equal participation in the democratic process.

14. The impugned provisions, specifically ss. 7 and 46(1), (2), (3), (4) and (6) of the Act, by denying a substantively equal opportunity to vote to young adults, elderly people, people with disabilities, homeless people and Aboriginal people, violate s. 15(1) of the *Charter* by creating a distinction based on an enumerated or analogous ground that results in a disadvantage.

i) Unreasonable restrictions on establishing identity

15. ~~Subsections 46 (1),(2), (3), (4) and (6) Section 46 of the Act (which amend ss. 143(2), (2)(b), (2.1),(3),(5) and (6) which amends Section 143 of the *Canada Elections Act*)~~ restricts the right of an elector to receive a ballot or be allowed to vote under s. 148.1 of the *Canada Elections Act* by:

- Eliminating the authority of the Chief Electoral Officer to authorize an elector to use “the notice of confirmation of registration”, commonly known as the Voter Information Card or “VIC”, to prove the elector’s identity and residence, ~~and;~~
- ~~E~~eliminating an elector’s ~~ability~~ former right to prove his or her identity pursuant to the vouching provisions of the *Canada Elections Act*; ~~and by~~
- eliminating an elector’s former right to provide proof of his or her residence pursuant to the vouching provisions of the *Canada Elections Act*, and replacing that right with procedures that are intimidating, more difficult to satisfy, administratively onerous, and unnecessary.

16. The right of electors to register in person at an advance polling station or on polling day has been similarly and unreasonably restricted in the same way by ss. 50(1.1), (2), (4), and

(5) and 54(1.1.) and (4) of the Act (which amend ~~ss. Sections 161 and 169 (1)(a) and (b), 161(6) and (7), 169(2)(a) and (b) and 169(5) and (6)~~ of the *Canada Elections Act*).

Elimination of the use of the VIC to prove an elector's residence or identity

17. To assist those having difficulty meeting the identification requirements of the *Canada Elections Act*, the Chief Electoral Officer established pilot programs during by-elections held in November 2010, and in the 41st General Election, which allowed certain electors to use the VIC, together with another piece of identification, as proof of address and identity which, enabled the elector to vote. Of approximately 900,000 registered voters in the pilot study group permitted to use the VIC, 400,000 did so in the 2011 General Election.
18. A subsequent survey conducted for Elections Canada found broad support for the "VIC initiative", and that a majority of administrators in senior residences, long term care facilities, First Nations band offices and student residences indicated that the use of the VIC made voting much easier (38%) or easier (26%) for residents. The evidence also indicates that receipt of the VIC is positively associated with voting. As a result, the Chief Electoral Officer announced in the both the *2013-2014* and *2014-2015 Report on Plans and Priorities* that Elections Canada intended to revise its voter identification policy for the 2015 general election to permit the ~~continued~~ use of the VIC by all qualified electors, in conjunction with another piece of identification, to prove the address and identity of the elector so that he or she could obtain a ballot, ~~or~~ and be allowed to vote.
19. Notwithstanding the absence of evidence indicating problems arising from the use of the VIC to prove one's address or identity, the Act prohibits the use of a VIC to prove either

the identity or residence of an elector for the purposes of registering at an advance poll or on polling day, or to obtain a ballot so that he or she may vote.

20. Students living away from home will be particularly and adversely affected by removing the authority of the Chief Electoral Officer to authorize the use of the VIC because these students will often have no authorized document that proves their address in the poll in which they reside for several reasons:

- Many students move frequently and for that reason do not have documentation indicating their current residence;
- This problem is exacerbated for students who move on the eve of an election, as would have been the case in respect of the 41st General Election which took place on May 2, 2011, soon after the close of the school year for many post-secondary students;
- Because of the mobility and transience of student populations, the ~~two~~ most common documents used by electors for the purpose of obtaining a ballot - a driver's licence ~~or health card~~ - will often not establish the student's address in the poll they reside. It is also estimated that 19% or 636,000 of 18 to 24 year olds do not have a driver's license;
- Many students living in campus residences would have no pieces of authorized documentation indicating their on campus address; and

- Students living off campus may similarly have no authorized document proving their address, particularly where they share accommodations with other students and are not identified on shared leases or utility bills.

21. Elections Canada's National Youth Survey Report dated September 20, 2011 found that ~~16%~~ 16.9% of those surveyed (between the ages of 18 and 34) reported difficulty in proving their address as a factor in the decision not to vote, and that percentage is much higher for 18 and 19 year olds.
22. Eliminating the authority of the Chief Electoral Officer to authorize the use of the VIC for individuals who are qualified electors, but unable to provide the documents required to prove their address or identity, or find an elector qualified to attest to their residence ~~vouch for them~~ under s. 143, 161, or 169 ~~143(3)~~ of the *Canada Elections Act* as it was, ~~or~~ has been amended, will deny tens of thousands of such electors their democratic right to vote. ~~In such cases, without being able to use the VIC to prove their residence or identity, individuals, especially students, will be denied their right to vote in contravention of s. 3 of the Charter.~~
23. The prohibition on the use of the VIC to prove residence or identity also disproportionately and adversely impacts on certain disadvantaged groups, including the young, the elderly, the disabled, the homeless and Aboriginal people, who are less likely to possess the identification otherwise required by the *Canada Elections Act* ~~Act~~, thereby violating s. 15(1) of the ~~Charter~~ Charter by creating a distinction based on an enumerated or analogous ground that results in a disadvantage.

Elimination of vouching to prove an elector's identity

24. Prior the enactment of the Act, a qualified elector who did not have the identification required under the Canada Elections Act ~~Act~~ to prove their identity and residence, could have another elector (who is able to satisfy various conditions for doing so) vouch for their identity or residence under oath. The Act eliminates the ability of an elector to prove their identity through vouching, either for the purpose of registering to vote at advance poll or on polling day, or to obtain an ballot. As is the case with the use of the VIC, the elimination of vouching to prove identity will prevent many qualified electors, and in particular young adults, elderly people, people with disabilities, homeless people and Aboriginal people, from exercising their right to vote.
25. During the 41st General Election approximately 120, 000 qualified voters relied upon the vouching provisions of the ~~Canada Elections Act~~ Canada Elections Act in order to exercise their right to vote.
26. Preventing electors from using vouching to establish their identity infringes on and denies the right to vote of those electors who have no other way of proving their identity and breaches their rights under s. 3 of the *Charter*.
27. Similarly, preventing electors from using vouching to establish identity also disproportionately and adversely impacts on certain disadvantaged groups, including young adults, elderly people, people with disabilities, homeless people and Aboriginal people, who are less likely to possess the identification required by the Canada Elections Act ~~Act~~ to establish identity, thereby violating s. 15(1) of the ~~Charter~~ Charter by creating a distinction based on an enumerated or analogous ground that results in a disadvantage.

Elimination of vouching to prove an elector's residence

28. The former right of an elector to have his or her residence vouched for under ss. 143(3), 161(1), and 169(2) of the *Canada Elections Act* has similarly been eliminated by the Act.
29. Instead, an elector may have her or his residence attested to under ss. 143, 161, and 169 of the *Canada Elections Act* as amended, which is a procedure that is intimidating, more difficult to satisfy, administratively onerous and unnecessary. In consequence, electors will find it far more difficult to prove their residence, and many will be unable to do so.
30. In addition, by establishing administratively cumbersome, onerous, and unnecessary attestation of residence procedures, the Act will exacerbate problems that vexed the vouching procedures they replace, and in consequence, undermine public confidence in the electoral process.

ii) Eliminating public education and information programs

31. Section 7 of the Act amends ss. 18(1) and (2) of the *Canada Elections Act* in manner that interferes with the right to vote by denying electors information about the electoral process that is necessary in order for them to exercise their right to vote .
32. Section 7 of the Act ~~almost entirely~~ expressly eliminates the authority of the Chief Electoral Officer to 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 right to vote. Groups identified as experiencing such problems include youth, aboriginal Canadians, new immigrants, the homeless, and the elderly living in care facilities.

33. In the last federal election, only 58% of qualified electors cast a ballot, and less than 40% of those aged 18 to 24 did so. Moreover the voting participation rate of young Canadians has been declining for many years. A poor understanding of the electoral process and of the identification requirements that must be met in order to vote, are important contributing factors to these dismal and declining voter participation rates.

34. To address these problems the Chief Electoral Officer has implemented public education and information programs designed to make voting more accessible to target groups by removing barriers to registration and voting and to improve knowledge and understanding of the election and electoral processes. As a result of the Act's amendment to s. 18 of the *Canada Elections Act*, many of these programs will no longer be permitted, or will have to be curtailed.

35. Among the casualties resulting from the Act will be many of the activities carried out under the auspices of the Community Relations Officer (CRO) program, which was a centrepiece of the public education and information initiatives undertaken by Elections Canada. The CRO program, which was launched in 2000, focused on five target groups: youth, Aboriginal electors, seniors living in residences and long-term care facilities, ethnocultural communities and homeless electors. Members of these groups will often experience difficulties in exercising their democratic rights.

36. ~~Under the CRO Program:~~

~~(a) it was the role of CROs to increase election awareness by providing information on how, when and where to register and vote and~~

~~explaining the importance of registering and voting in order to help make voting as accessible as possible for the particular target group.~~

~~(b) CROs used a variety of outreach techniques to educate and inform electors, including setting up information kiosks, making presentations, hosting discussion groups, and distributing communications materials.~~

~~(c) CROs worked with administrators in seniors' residences and long-term care facilities to help administrators and electors understand the requirements for registration and voting particularly with respect to the initiative of accepting the VIC as proof of address.~~

~~(d) Aboriginal Elders and youth were hired to assist voters on polling day by explaining the voting process, answering general questions and providing translation services.~~

~~(e) Two hundred and forty CROs were hired to engage with young and student electors by: working with post-secondary school student associations; setting up information kiosks on college and university campuses; and making class presentations. In addition, CROs or returning officers contacted the administrators of post-secondary institutions to inform them of the planned outreach activities on campus and to review student voting options.~~

36. In addition to the CRO program, Elections Canada engaged in a wide variety of public education and outreach programs which, in addition to advertising, involved:

- (a) hosting websites, such as “Inspire Democracy” where organizations and citizens can find research and share information about ~~on~~ how to encourage youth civic engagement in Canada. The website provides lists of upcoming outreach events, links to surveys and studies, and links to tools and resources to help engage youth;
- (b) convening and attending roundtables, dialogue sessions, conferences and other consultative exercises and events with various stakeholders including youth and student serving organizations;
- (c) meeting with student associations to discuss how to facilitate voting by students living on and off campuses;
- (d) partnering with governmental and non-governmental organizations such as Samara, Apathy is Boring, Rush the Vote, Dominion Institute, Public Policy Forum, Student Vote, Library of Parliament, CIVIX and others for the purpose of increasing democratic engagement and civic education and participation;
- (e) sending letters to new electors aged 18-24 reminding them of their right to vote and informing them of what steps to take to register to vote; and
- (f) hosting “Democracy Week” an initiative to engage young Canadians in meaningful discussions about politics and the workings of our democracy. Events were held across the country including on various university campuses.

37. These and other public education and outreach programs implemented by the Chief Electoral Officer have been crucial to facilitating the exercise by electors of their democratic right to vote. Particularly important have been efforts to make electors aware, through such programs, of the identification requirements of the *Canada Elections Act* so they can make appropriate arrangements to have necessary identification with them (if possible) when they go to the polls.

38. Eliminating or curtailing the authority of the Chief Electoral Officer to implement such public education and information programs, other than for primary and secondary school students, infringes s. 3 of the *Charter* by depriving electors, and in particular those who are most likely to experience difficulties in exercising their democratic rights, of information necessary to the meaningful exercise of those rights.

39. The restrictions on the authority of the Chief Electoral Officer to implement these public education and information programs also disproportionately and adversely impacts on certain disadvantaged groups, including young adults, elderly people, people with disabilities, homeless people and Aboriginal people, who require these outreach and education initiatives in order to fully participate in the electoral process and exercise their right to vote, thereby violating s. 15(1) of the ~~Charter~~ *Charter* by creating a distinction based on an enumerated or analogous ground that results in a disadvantage.

Restricting the Chief Electoral Officer's ability to communicate with electors

40. Section 7 of the Act removes the discretionary authority of the Chief Electoral Officer to use media or other means in addition to transmitting advertising messages to 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.

41. The "Survey of Electors" and other studies carried out by or on behalf of Elections Canada show that many electors are uninformed about the electoral process including: how to be added to the list of electors, what identification is necessary to obtain a ballot, and how they may swear an oath and be vouched for to obtain a ballot. The Chief Electoral Officer has implemented public education and information programs to address these problems which have included communication strategies that go well beyond the use of conventional advertising.

42. By limiting the means of communication to transmitting advertising, the Act denies the the Chief Electoral Officer access to other effective means for communicating with electors, including through social media and person to person outreach initiatives. The means for communicating with electors has been evolving rapidly with the advent of technology and social media platforms such as Facebook, You Tube, and Twitter. These new communications platforms are particularly important for reaching young voters who have enthusiastically adopted them, often as their principal means of gathering information about the world around them and for communciating with others. While advertising has found a place in some of these media environments, it is limited in form, content and presence on many of the new platforms and is no substitute for a much broader, more diverse and evolving array of communciation options.

43. By restricting the ways in which Chief Electoral Officer may communicate with electors, the Act fundamentally handicaps the Chief Electoral Officer's ability to provide electors

with information necessary to enable them to participate fully in the electoral process, and violates s. 3 of the *Charter* by depriving electors of essential information they require to exercise their democratic right to vote or, as described in the next section, to challenge election results where irregularities, fraud or corrupt or illegal practices have affected the result of the election.

44. These restrictions on the Chief Electoral Officer's ability to communicate with electors also disproportionately and adversely impacts on certain disadvantaged groups, including the young adults, elderly people, people with disabilities, homeless people and Aboriginal people, who require these communication initiatives in order to fully participate in the electoral process and exercise their right to vote, thereby violating s. 15(1) of the *Charter* by creating a distinction based on an enumerated or analogous ground that results in a disadvantage.

iii) Reducing the independence and accountability of the Commissioner of Canada Elections

45. Sections 108, 113 and 114 of the Act amend the *Canada Elections Act* in manner that interferes with the right of electors to fully participate in the electoral process; undermines public confidence in the integrity of the electoral process; and is likely to deny electors timely information about fraud or corrupt practices that may have affected the result of an election, by:

- removing the authority of the Chief Electoral Officer to appoint, or to be consulted with respect to the appointment of the Commissioner of Canada Elections whose duty it is to ensure that the *Canada Elections Act* is complied with and

enforced, and granting that authority of appointment to the Director of Public Prosecutions;

- removing the obligation of the Chief Electoral Officer to direct the Commissioner of Canada Elections to make an inquiry where there are reasonable grounds to believe that an election officer or any person may have committed an offence under certain provisions of the *Canada Elections Act*;
- adding s. 510.1 to the *Canada Elections Act* which prohibits the Commissioner of Canada Elections from disclosing information relating to an investigation without, *inter alia*, the consent of the person being investigated;
- removing the obligation and authority of the Chief Electoral Officer to report to Parliament on, *inter alia*, measures taken in respect of the enforcement of the *Canada Elections Act*, including matters referred by Commissioner of Canada Elections to the Director Public Prosecution for prosecution, including whether a prosecution was initiated;
- repealing s. 535.1 of the *Canada Elections Act* to eliminate the authority of the Chief Electoral Officer to consult with the Director of Public Prosecutions with respect to enforcement measures taken under the *Canada Elections Act*, for the purposes of reporting to Parliament.

46. In addition, s. 152 of the Act amends s. 16(1) of the *Director of Public Prosecutions Act* to empower the Director of Public Prosecutions to report on the activities of that office to

the Attorney General, and to include a report from the Commissioner of Canada Elections which cannot include the details of any investigations.

47. These impugned provisions reduce the independence of the Commissioner of Canada Elections, as well as Parliamentary oversight of the Commissioner's activities, in several ways:

- (a) The authority to appoint the Commissioner of Canada Elections has been removed from the Chief Electoral Officer, who is an Officer of Parliament, and accorded that to the Director of Public Prosecutions, who is not.
- (b) The Commissioner of Canada Elections no longer operates under the auspices of Elections Canada but is to be housed in the office of the Director of Public Prosecutions.
- (c) Reports on the activities of the Commissioner of Canada Elections are no longer made to Parliament by the Chief Electoral Officer, but instead are made by the Director of Public Prosecution to the Attorney General, a member of the Government. This means for example that when an investigation into possible breaches of the *Canada Elections Act* by a member of the Government causes the Commissioner of Canada Elections to believe that prosecution of that member is warranted, the matter is unlikely to be made public or reported to Parliament in a timely manner, if it is to be revealed at all, and would, in any event, not include the details of that investigation. ~~that matter~~

~~will be reported to Parliament only if and when the Attorney General chooses to do so.~~

- (d) The Chief Electoral Officer will no longer have the authority to consult with the Director of Public Prosecutions on any matters referred to the Director by the Commissioner of Canada Elections, because the Commissioner has found that reasonable grounds exist that an offense under the *Canada Elections Act* has been committed.

48. Maintaining the role of Parliament to be informed about, and provide oversight in respect of measures taken to enforce and ensure compliance with the *Canada Elections Act* is necessary to maintain public confidence in the integrity of the electoral process. Ensuring that the enforcement of the *Canada Elections Act* remains above the reach of partisan political interest is similarly an essential element of a democratic electoral system. Therefore in reducing the role of Parliament, and of its Officer, to provide oversight in respect of the Commissioner of Canada Elections, ~~and by assigning that role to a Minister of the Government,~~ the Act infringes and denies the rights of Canadians to participate fully in the electoral process and to exercise their democratic right to vote.

49. In addition, the impugned provisions constrain the authority of the Commissioner of Canada Elections to inform the public about complaints of electoral fraud received by his or her office, and about investigations undertaken in response to such complaints. Pursuant to s. 108 of the Act, the Commissioner of Canada Elections (and those acting under his or her direction) is prohibited from disclosing “any information relating to an investigation that comes to their knowledge in the exercise of their powers or the

performance of their duties and functions under this Act, including information that reveals or from which may be inferred the name of the complainant, if any, the person whose conduct is being investigated or any witness,” without the consent of those involved.

50. The public availability of such information is critical to the exercise of electors’ right under s. 524 of the *Canada Elections Act* to seek the annulment of an election where irregularities, fraud or corrupt or illegal practices affected the result of the election.
51. The right to apply for relief under s. 524 of the *Canada Election Act* is granted exclusively to an elector or candidate in a particular riding and must be exercised within 30 days of the elector learning of the events that may indicate that the election was improperly won. Given the covert nature of efforts to defraud electors, it is vital that electors be informed of evidence of electoral fraud or corruption as soon as it comes to the attention of either the Chief Electoral Officer or the Commissioner of Canada Elections.
52. In *McEwing v. Canada (Attorney General)*, 2013 FC 525 (CanLII) the Court acknowledged that the use of sophisticated telecommunications technology, such as robocalls, masked by various subterfuges, would make it very difficult for electors to detect voter fraud in a timely way, even when they are victimized by it. Applications under s.524 of the *Canada Elections Act* in that case were not filed until ten months after the election because the applicant electors only learned, at that time, through media accounts of an Information to Obtain (ITO) - filed with Court by the Commissioner of Canada Elections, and through public comments by the Chief Electoral Officer, that many

complaints of voter suppression calls had been made to Elections Canada during and the following the 41st General Election.

53. Information about such complaints and investigations may also provide crucial evidence for the Courts' deliberations on such an application. In *McEwing v. Canada (Attorney General)*, for example, the court relied on documents filed by the Commissioner of Canada Elections to conclude that "The ITO evidence confirms that there was a deliberate attempt at voter suppression during the 2011 election." The Court also found that the voter suppression was "targetted towards voters who had previously expressed a preference for an opposition party."
54. Had the amendments to the *Canada Elections Act* contained in the Act been in place during or following the 41st General Election, it is extremely unlikely that the complaints about, and the investigation into, voter suppression during the election would have ever come to light.
55. The need to ensure that elections are fairly won is integral to the exercise of the constitutional right to vote and to maintaining public confidence in the electoral process. Reducing the independence and accountability of the Commissioner of Canada Elections, and the ability of Chief Electoral Officer to know of, or inform the public and Parliament about incidents of election fraud such as those established in *McEwing*, fundamentally undermines the essential requirements of electoral democracy and infringes the right of electors to participate fully in the electoral process including, when necessary, by seeking the annulment of an election fraudulently won.

D. Section 1 of the *Charter*

56. The violations of s. 3 and 15(1) of the *Charter* set out above do not constitute a reasonable limit demonstrably justified in a free and democratic society pursuant to s. 1 of the *Charter*. The impugned provisions do not advance a sufficiently important government objective and, in any event, fail to meet the proportionality requirements of s. 1 of the *Charter*.

E. Constitutional and statutory provisions engaged

57. Sections 1, 3, 15(1) and 24(1) of the *Canadian Charter of Rights and Freedoms*;

58. Section 52 of the *Constitution Act, 1982*;

59. Rule 14 of the Rules of Civil Procedure; and

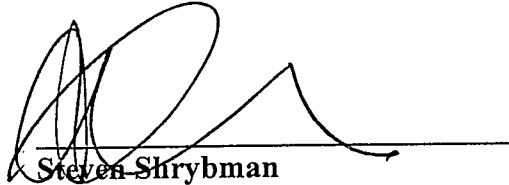
60. Such further and other grounds as counsel may advise and this Honourable Court may permit.

III. THE FOLLOWING DOCUMENTARY EVIDENCE WILL BE USED AT THE HEARING OF THE APPLICATION:

1. The affidavit of Jessica McCormick, ~~to be sworn~~ sworn November 26, 2014;
2. The affidavit of Sandra McEwing, ~~to be sworn~~ sworn January 7, 2015;
3. The affidavit of Peggy Walsh Craig, ~~to be sworn~~ sworn October 29, 2014;
4. The affidavit of Harry Neufeld, sworn December 30, 2014;
5. The affidavit of François Gélinau, sworn January 7, 2014;

6. The affidavit of Henry Milner, to be sworn;
7. The affidavit of David Elder, to be sworn;
8. The affidavit of Mark Coffin, to be sworn;
9. The affidavit of Ilona Dougherty, to be sworn; and
10. The affidavit of Lucy Draper-Chislett, to be sworn.
11. Such further and other affidavits and materials as counsel may advise and this Honourable Court may permit.

October 9, 2014



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Solicitors for the Applicants

THE COUNCIL OF CANADIANS et al
Applicants

- and -

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

Court File No. CV-14-513961

ONTARIO

SUPERIOR COURT OF JUSTICE

Proceeding commenced at TORONTO

AMENDED NOTICE OF APPLICATION

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