CITATION: Fair Voting BC v. AG Canada, 2023 ONSC 6516
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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
FAIR VOTING BC and SPRINGTIDE COLLECTIVE FOR DEMOCRACY SOCIETY Applicants	*Nicolas Rouleau*, for the Applicants
– and –	
ATTORNEY GENERAL OF CANADA Respondent	*Sean Gaudet, Andrew Law, Emily Atkinson, and Renuka Koipillai*, for the Respondent
– and –	
ELECTORAL REFORM SOCIETY (UK), THE APATHY IS BORING PROJECT, FAIR VOTE CANADA, and CANADIAN CONSTITUTION FOUNDATION Interveners	*Scott Fairley and Joan Kasozi*, for the Intervener, Electoral Reform Society (UK) *Ted Brook and Sara McCalla*, for the Intervener, The Apathy Is Boring Project *Jeffrey Nieuwenburg*, for the Intervener, Fair Vote Canada *Kristopher Kinsinger*, for the Intervener, Canadian Constitution Foundation

HEARD: SEPTEMBER 26-28, 2023

E.M. MORGAN J.:

I. The constitutional issue

[1] The Applicants seek to strike down sections 2(1), 24(1), and 313(1) of the *Canada Elections Act*, SC 2000, c 9 ("*CEA*"). They submit that these provisions infringe sections 3 and 15(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (the "*Charter*").

[2] The impugned sections of the *CEA* lay the foundations for Canada's single member plurality ("SMP") or, more colloquially, first past the post ("FPTP") electoral system.

[3] Canadians have long debated the merits of the SMP system as against different versions of proportional representation ("PR"). The debate has taken place in legislatures, referenda, political science journals, law reviews, classrooms, editorials, op-eds, blogs, and other media and venues, including other courts: *Daoust v. Québec (Directeur general des élections)*, 2011 QCCA 1634. This Application continues the discussion in yet another judicial forum.

[4] The Applicants, the Respondent, and a number of Interveners, have done a monumental job in amassing evidentiary material and presenting the debate. The record contains a thorough canvassing of expert analyses, statistical evidence, historical material, personal voting experiences, and, of course, constitutional case law. Those who study the field, including expert witnesses on both sides of this case, all describe the issue as a complicated one, in which competing values mirror competing goals of electoral fairness. These include critical factors such as popular representation, representation of minorities and women, and government stability and accountability.

[5] Applicants' expert, Professor John Carey of Dartmouth College, expounds on this diversity of views in his affidavit, stating that "there is a longstanding debate over the degree to which electoral system designers should prioritize the correspondence between partisan vote shares and seat shares when doing so may entail trading-off against other desiderata." Taking this diversity into account, it must be said that the advocacy in this case for and against PR and SMP as each party's preferred way of conducting elections has been deeply researched, thorough, thoughtful, and forceful.

[6] I say this not to unduly flatter counsel (although they all deserve praise and my gratitude for putting together such an interesting case). Rather, my purpose is to indicate at the outset that the contest of values presented by the two competing forms of elections is a serious and, to some extent, intractable one.

[7] Professor Carey goes on in his affidavit to explain, although several large and important democracies – the U.S., U.K., and Canada – use a strictly SMP system, many more democracies use a PR system or a hybrid of the two. A few have in recent decades moved from SMP to PR, although there does not appear to be any jurisdiction that has moved in the opposite direction.

Professor Carey observes that "[a] well-documented trend in electoral systems is the adoption or introduction of PR and the move away from single-winner systems, particularly FPTP."

[8] Canadians are generally familiar with SMP, having had it as the prevailing electoral methodology since the country's inception. PR is therefore presented here as an alternative to the existing system. In their extensive record of theories and comparative electoral systems, the Applicants have demonstrated that PR is a fair, and, with certain admitted limitations, egalitarian system for democratic elections.

[9] But that is not the question.

[10] The issue for the Court is not how or why a switch from SMP to PR would improve Canadian democracy. It clearly adds, or emphasizes, important values. As Justice LeBel explained in *Figueroa v. Canada (Attorney General)*, [2003] 1 SCR 912, at para. 154 (dissenting on other grounds), an SMP system "creates a bias in favour of mainstream parties that represent an aggregated view of a broad section of society" giving rise to stability and majority governments. By contrast, a PR system favours "smaller parties which provide a vehicle for dissent, advocate particular issues, or may be the precursors of mainstream political movements in the future."

[11] No one of these values comprise the whole of what constitutional analysis is all about. It is important that any electoral system cover, to one extent or another, all of the values that the Constitution enshrines. Justice LeBel therefore continues his analysis, at *Figueroa*, para. 161, with the observation that,

> The Constitution of Canada does not require a particular kind of democratic electoral system, whether it is one that emphasizes proportionality and the individual aspects of participation or one that places more emphasis on centrism and aggregation…

[12] All that is to say that the issue before the court is not whether a PR system is or could be designed to be a fair and effective electoral methodology. If that were the issue, I would be tempted to answer it in the affirmative. The Applicants have done an admirable job demonstrating that.

[13] The real question here is whether the SMP system currently in place is unconstitutional.

[14] For the reasons that follow, I find that it is not.

II. The Legal Framework

[15] As stated at the outset, the impugned provisions of the *CEA* establish a legal regime in which the candidate who receives the most votes in a given riding, or electoral district, is elected as a Member of Parliament. The *CEA* creates the electoral districts, which are defined in section 2(1) as "a place or territorial area that is represented by a member in the House of Commons." In tandem with this, section 24(1) establishes the appointment of a returning officer for each electoral district.

[16] Section 313(1) of the *CEA* provides the basic building block of the voting system. It requires that, once the votes in a given district are counted, the returning officer "shall declare elected the candidate who obtained the largest number of votes…" Since multiple parties can run candidates in any district, the candidate with the plurality of votes will become the single Member of Parliament for that district. As the winner of a plurality, that candidate will have been the "first past the post". The candidates who trail behind in any district do not get seats in Parliament, regardless of how many votes they may have received.

[17] As Respondent's counsel make clear in their factum, the challenged provisions represent component parts of broad and complex electoral scheme composed of statutory, constitutional, and regulatory measures. The *CEA* covers not only how ballots are counted and candidates are elected, but how voters, electoral officials, candidates and others conduct themselves while voting and otherwise engaging in the electoral process. Complementing the structure set out in the *CEA*, the *Electoral Boundaries Readjustment Act*, RSC 1985, c E-3 ("*EBRA*") establishes a non-partisan process for determining the contours of electoral districts.

[18] The electoral system is supported on a foundation of several specific constitutional pillars. Sections 37 through 52 of the *Constitution Act, 1867* contain provisions governing the structure of the House of Commons, elections thereto, and the allocation of seats therein: *British North America Act* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No. 5. Section 3 of the *Charter* guarantees every citizen of Canada the right to vote, while section 15(1) guarantees equality.

III. SMP vs. PR: representation and accountability

[19] An SMP election, as its name suggests, has a single winner in any given electoral district. Regardless of how many candidates, on behalf of how many political parties, run in the election, the one with the most votes in any given district – the first past the post, as they say – will be the sole member of Parliament for that district. There will be the same number of MPs as there are electoral districts.

[20] Assuming a contested election, a single member system will result in some portion of the electorate being represented by a member of Parliament for whom they did not vote. That number may potentially be sizeable in multi-candidate elections, since the winner need only have a plurality rather than a majority of the votes.

[21] One of the expert witnesses, Professor Nadia Urbinati of Columbia University explains that this gives rise to reduced voter voice, with the electorate in large part relying on a local MP from a party they oppose. Professor Larry LeDuc of the University of Toronto opines that as an upshot of this, strategic voting where voters cast ballot for a candidate other than the one they truly support is prevalent. He also observes that in SMP jurisdictions voter turnout is relatively small, and overall voter satisfaction with the system is correspondingly low.

[22] By contrast, a PR election, as its name suggests, will have multiple winners in proportion to the votes each attains in any given electoral district. All candidates who pass a pre-determined minimum number or percentage of votes, regardless of how may parties field a candidate in the district, will be seated in Parliament as representative of that district. There will ultimately be more MPs than districts, since PR requires a division of the district's seats among multiple candidates.

[23] Again, assuming a contested election, a PR system will result in substantially all members of the electorate having a representative in their district for whom they voted. The number of representatives in any district may potentially be sizeable since PR requires a multi-party presence reflecting a proportionate division of the multiple political alignments in the electorate.

[24] Another of the expert witnesses, Professor Benjamin Ferland of the University of Ottawa, opines that as an upshot of this, parties whose MPs are elected by in proportion to their votes rarely can form a government without entering into coalition agreements with other parties. As a result, while multiple parties may be part of a governing coalition, their policies and electoral platforms are typically compromised, traded off, or abandoned in forming agreements with their coalition partners.

[25] Further, Dr. Peter John Loewen of the University of Toronto explains that while PR produces ideological diversity among parties, SMP emphasizes geographically concentrated loyalties. The SMP system therefore reflects Canada's diversity in the regional sense typical of a physically large nation. Professor Karen Bird of McMaster University shows in her affidavit that, for example, the Bloc Quebecois has benefitted from its regional concentration. The SMP system has given the Bloc's Quebec-oriented voice a stature in Parliament that it might not otherwise gain through the less regionalized concentration fostered by PR.

[26] In short, SMP requires that a single member be elected per district, while PR requires that at least two (or, typically, more) members be elected per district. This gives rise to differing numbers of MPs, from various districts and parties, bargaining of ways to consolidate political power and form a government. That bargaining ultimately impacts, sometimes dramatically, on the relationship between campaign platforms and post-election policies.

[27] Each of the systems has its elements of flexibility and rigidity. The expert evidence in the record shows that PR is generally flexible in parties aligning with each other, but that it often produces rigid coalition agreements in which parties can hamstring each other in policy commitments. It also shows that SMP generally leaves little room for parties to bargain and maneuver with each other in forming a government, but that it often produces majority governments in which the governing party is free to implement its policies flexibly in accordance with prevailing social and economic needs.

[28] Professors Bird and Carey both provide comparative evidence indicating that those countries with PR systems tend to elect a somewhat higher percentage of women than those with SMP systems. These surveys show that Canada's Parliament, with women comprising 30% of the

current MPs, trails a number of PR jurisdictions in respect of gender parity, including: New Zealand (48%), Sweden (47%), Finland (46%), Norway (44%), Spain (44%), Belgium (42%), Switzerland (42%), Portugal (40%), Austria (40%), Denmark (40%), Iceland (40%), Italy (36%), Netherlands (33%), Luxembourg (32%), and Germany (31%). On the other hand, Canada is squarely in the middle of the major SMP jurisdictions, trailing the U.K. (34%) but passing the U.S. (23%) in terms of female representation in the national legislature.

[29] The experts all concede that a combination of cultural and sociological factors are at play in respect of elections and women representatives. They concede, as they must, that the given society's overall attitude toward women plays a significant role in how many get elected to public office. But they also contend that the form of election plays a role in that parties are often reluctant to support female candidates in a winner-take-all election such as those under the SMP system. The comparative evidence demonstrates that parties seem to become more amenable to female candidates where they will attain seats in direct proportion to their votes.

[30] In oral argument, Applicants' counsel did concede that the number of women elected to Parliament will also vary from time to time with party leadership and the importance which that leadership places on gender representation. In fact, depending on how one measures women's success or prominence in the political arena, it is self-evident that while electoral systems may be tangentially implicated, the particular type of system – whether SMP or PR – is not the cause of women's comparative advantages or disadvantages across societies.

[31] None of the experts explain, for example, why, despite their similar PR systems, France has never had a female president (although it currently has a woman in the subordinate role of prime minister) but Germany has had a female chancellor (although it has never had a woman in the more ceremonial role of president). Even more, none of the experts explain how the U.K., with its SMP system, not only elected a woman prime minister as early as 1979, but she became the country's longest serving prime minister.

[32] I do not blame the many impressive experts in this case for not having these explanations. The point of raising the questions is that they illustrate how any number of crucial issues of gender representation is not in their field. As election and democratic systems scholars, the expert witnesses have addressed the configuration of election results, but in doing so they have examined only the edges of the larger gender issue. Election experts do not have the tools to analyze the deep sociological and cultural questions underlying the status of women position in different societies.

[33] The effect of electoral system design on representation by minority legislators is all the more complicated. Professor Bird argues that under PR rules, minorities in Canada would likely be more broadly represented as political parties would have incentives to engage in "ticket balancing". She deposes that this approach, in turn, "could lead to wider distribution of seats across diverse visible minority groups." Applicants' counsel submits that these balanced slates would then include minorities that are not geographically concentrated such as Indigenous peoples and francophones outside Quebec.

[34] Professor Bird also opines that improving the fair representation of diverse minorities would require not just enactment of a PR system, but implementation of several other structural changes: modest district size in most ridings (3 to 7 members per district), the creation of special electoral districts with a smaller number of members in northern areas where the Indigenous population is concentrated, and a legislated role for diverse local populations in the ranking of candidates. Proportional representation in and of itself will not suffice to increase minority representation; at the very least, the numbers of minority representatives will inevitably turn on the political disposition of party leadership in populating the party list in a PR system that depends on party votes rather than individual candidate votes.

[35] The evidence with respect to minority representation in different electoral systems is even less definitive than that of women's representation. On one side, Professor Bird cites the example of New Zealand as one where the move to a form of PR has coincided with a significant increase in the representation of minorities, to the point where New Zealanders of European origin are now slightly underrepresented (63% of MPs compared to 70% in the general population), and the indigenous Maori and Pacific Islander populations are now proportionately represented. There is, however, relatively little comparative evidence with which to assess whether social/political conditions in New Zealand have made it unique, or whether it can be taken as typifying other democratic jurisdictions in this respect.

[36] On the other side, Professor Erin Tolley of Carleton University, who holds a Canada Research Chair in Gender, Race, and Inclusive Politics, explains in her affidavit that under the existing SMP system it has become evident that "electoral victory requires parties to attract Canada's growing racialized population". Her view of SMP and PR is therefore the reverse of Professor Bird's view. Professor Tolley opines that while, in SMP systems, voters are willing give their support to minority candidates, it is unclear whether PR's hierarchical, party-imposed authority will have the same effect.

[37] In fact, Professor Tolley opines that a move to PR would "likely erode the political power that racialized Canadians have managed to assemble and mobilize under SMP." She points out that although the SMP system itself cannot be identified as the sole cause of recent voting patterns, and the progress has been uneven, under this system "racialized Canadians are able to leverage their territorial concentration to select racialized candidates and, ultimately, racialized Members of Parliament."

[38] As with the evidence with respect to gender, the expert evidence on racial minorities and political representation is necessarily incomplete. The relative success of racialized communities in the political sphere is at best only tangentially related to the form that elections take.

[39] For example, nothing in the record can explain why the U.S., with its unusual state-by-state electoral college system for presidential elections, and the U.K., with its SMP elections and Westminster parliamentary system, are alone among the western democracies to have produced a

racialized person as president or prime minister at the pinnacle of government. Again, I do not castigate the expert witnesses for this omission; explaining the electoral system has little to do with this question. Issues of race relations and the status of minorities in the United States, England, France, Germany, etc. are so fraught with complexity, and so unique to the history, demography, sociology, and political culture of those societies, that one would be missing the point to expect elections experts to opine on them with any degree of certainty.

[40] Finally, survey evidence introduced by Professor Ferland shows that single-party governments typically produced by SMP electoral systems fulfil more of their electoral promises (about 80%) than parties in coalition governments typically resulting from PR electoral systems (about 55%). On the other hand, the evidence adduced by Professor LeDuc demonstrates that in PR systems, where voters perceive their vote as translating directly into the representation that they voted for, voter contentment with the system is relatively high; by comparison, in SMP systems, where large numbers of voters end up without representation from their favoured candidate or party, voter satisfaction is notoriously low.

[41] Accordingly, if political effectiveness were required in the constitutional, SMP would have the stronger case. By contrast, if citizens' happiness were a constitutional imperative, PR would have the upper hand. Both are important from a political science and sociological point of view, and one cannot discount them in any assessment of the merits of competing electoral systems. That said, neither effectiveness nor satisfaction factors directly into an analysis of constitutional rights.

V. The right to vote

[42] Section 3 of the *Charter* provides: "Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein." As a first principle in interpreting the right to vote, the Supreme Court of Canada has emphasized that, "The content of a *Charter* right is to be determined in a broad and purposive way, having regard to historical and social context": *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 SCR 158, at 181.

[43] The Supreme Court has also observed that section 3 must be interpreted, like the Constitution overall, as a "living tree" capable of adapting to the times. At the same time, it is necessary to ensure that "the tree is rooted in past and present institutions" – in this case, Canada's democratic institutions: *Ibid*.

[44] Furthermore, the right to vote must be interpreted with a view to considerations such as "[t]he problem of representing vast, sparsely populated territories": *Ibid*., at 188. As the Court of Appeal put it in *Working Families Working Families Coalition (Canada) Inc. v. Ontario (Attorney General)*, 2023 ONCA 139, at para. 63, quoting *Frank v. Canada (Attorney General)*, [2019] 1 SCR 3, at para. 26, "At the heart of s. 3 is the imperative 'to ensure the right of each citizen to participate meaningfully in the electoral process' and 'that each citizen have a genuine opportunity to participate in the governance of the country through the electoral process.'"

[45] It is the Applicants' view that the impugned provisions of the *CEA* violate a right to fair elections, and thus the right to vote, due to what they label the unfair and arbitrary outcomes of many SMP elections. They support this with a number of cogent examples of Canadian elections in which there appears to have been a disproportional translation of votes to seats in Parliament.

[46] The historic examples of this disproportionality are legion. Professor Carey deposes that from 1979 to 1996, in five British Columbia provincial elections, the NDP lost vote share and slipped from 46% to 39% of the electorate; at the same time, it went from a minority party in opposition to a single party majority. In federal elections, the results have been equally stark. The Conservative Party's share of the vote decreased from 43% in the 1988 election to 16% in 1993, while the party's seats decreased from 169 to 2. In the same election, the Bloc Québécois received 13.5% of the popular vote but won 54 seats in Parliament; meanwhile, the Reform Party won 18.7% of the votes, which translated into 52 seats.

[47] Professor Carey goes on to explain that since the 1950s, four elections (1957, 1979, 2019, and 2021) have produced what he calls a "wrong outcome". In those elections, the party with the most votes did not gain the most Parliamentary seats.

[48] Professor Carey concludes his review of past elections with the view that these outcomes "clearly violate the principle that all votes should count equally." Building on this demonstration of disproportionate results, Applicants' counsel submits in his factum that "this Court should confirm that all voters, regardless of their place of residence or riding, are democratically entitled to be represented by an MP aligned with their own political preferences."

[49] On a policy level, the Respondent counters that SMP does not reward mainstream or regionally strong parties arbitrarily; in fact, it does so by design. Drawing on a House of Commons' special committee study, Respondent's counsel submits that the current electoral system intentionally favours politically mainstream or regionally strong parties, and that this type of single-member plurality-based representation is a reasonable means of organizing a representative democracy.

[50] To this effect, the Respondent embraces the introductory statement of Professor Kenneth Carty of University of British Columbia, delivered at the outset of the special committee's hearings, that "there is no perfect or even best electoral system." It is Professor Carty's view that electoral systems are bespoke creations, and are necessarily tailor-made for the given society. Professor Carty therefore opines that, "Each [country] has to find a unique combination of electoral system parts…to suit their history, geography, social order, and their political life": Special Committee on Electoral Reform, Evidence, 1st session, 42nd Parliament, 26 July 2016.

[51] The parliamentary committee that conducted the Election Reform study observed that, among other things, the SMP approach serves otherwise neglected democratic goals such as the protection of regional interests, political moderation, and the promotion of stable, responsive, and accountable government: *Strengthening Democracy in Canada: Principles, Processes and Public*

Engagement for Electoral Reform, Report of the Special Committee on Electoral Reform (2016, 42nd Parliament, 1st Session), at 7-14,16. The committee was particularly cognizant of the need to represent regional diversity in the national Parliament.

[52] With this in mind, the special committee's Report cites approvingly from the testimony of James T. Arreak, CEO of Nunavut Tunngavik Inc., who admonished lawmakers to protect the "bedrock diversities of our country…and the role of Canada's three Aboriginal peoples". Mr. Arreak beseeched the committee to ensure an electoral system that worked equally for the Arctic and the south, and for the territories as well as the Provinces": *Ibid*., at 1-2. The committee also emphasized the need to preserve in the electoral system Quebecers' special voice in Canadian political discourse, noting that the system must recognize "Quebec's unique contribution to Canada's diversity and its status as a nation, within Canada": *Ibid*., at 2.

[53] In short, the Respondent's view of the policy underlying the electoral system, and the concordant right to vote in that system, is that it is a product of competing values. The Respondent does not exactly deny that a goal of proportionality between popular vote and allocation of parliamentary seats is a legitimate one; rather, it views it is one value among many. Respondent's counsel submit in their factum that the world of electoral policy has many options that reflect different, but fair, versions of democratic representation. As Thomas Axworthy, the Public Policy Chair at Massey College, University of Toronto, put it: "It is basically a political process of deciding your purposes and values and what you value most": *Ibid.*, at 2.

[54] That said, the Supreme Court of Canada has weighed in on the debate in a number of different contexts. Above all, the Court has been clear that section 3 is to be interpreted with a pragmatic eye to effective representation, which, in turn, requires a nuanced balancing act. On one hand, the Supreme Court has instructed that "[t]he principle of electoral fairness flows directly from a principle entrenched in the Constitution: that of the political equality of citizens": *Libman v. Quebec (Attorney General)*, [1997] 3 SCR 569, at para. 47. On the other hand, the Supreme Court has warned that representation in a diverse country of necessity "accommodates significant deviation from the ideals of equal representation": *Electoral Boundaries Reference*, *supra*, at 186.

[55] The Court has therefore opined that section 3 of the *Charter* must address the fact that "[a] system which dilutes one citizen's vote unduly as compared with another citizen's vote runs the risk of providing inadequate representation to the citizen whose vote is diluted": *Ibid*., at 183. At the same time, the Court has reasoned that section 3 is permitted to reflect the fact that "parity of voting power, though of prime importance, is not the only factor to be taken into account…"; indeed, "parity…may prove undesirable because it has the effect of detracting from the primary goal of effective representation": *Ibid.*, at 184.

[56] Accordingly, it is undeniable that "[t]he result [of voters having unequal voting power] will be uneven and unfair representation": *Ibid*., at 184. But, as a matter of section 3 interpretation, it is equally undeniable that "it is a mistake to conflate the right of each citizen to effective representation with a right to absolute voter parity": *Figueroa*, *supra*, at para. 24.

[57] One thing that is clear from the Supreme Court's section 3 jurisprudence is that voting rights focus on electoral process, not electoral outcomes. Effective representation has been interpreted by the Supreme Court to mean the right to participate in an election and to have a representative of your riding in Parliament; it does not mean that the membership of Parliament must, as a matter of voters' section 3 rights, reflect any specific outcome or the election of any specific form of government: *Ibid*., at para. 26.

[58] Under section 3, citizens do not get to play a role in government *per se*. In a representative democracy their role is not, of course, direct; modern parliaments have evolved away from Athenian-style active engagement of the citizenry: John Rothchild, "The Cambridge Companion to Ancient Greek Law (Reviewed)", [2008] *American Journal of Comparative Law* 1095. Nor is the citizen/voter's role indirect in the sense that it would be if they had a right to have their particular viewpoint expressed by an MP from their riding. Rather, they get "to play a meaningful role in the selection of elected representatives who, in turn, will be responsible for making decisions embodied in legislation for which they will be accountable to their electorate": *Haig v. Canada*, [1993] 2 SCR 995, at 1031.

[59] Obviously, PR provides each voter with a more direct link to an MP who not only represents the voter's district, but actually received that voter's vote. In this respect, a PR system necessarily reflects the idea that Parliament mirror the constituents within each district. Professor Urbinati has opined that PR's inclusion more of diverse political viewpoints grants Parliament "more legitimacy" and leads to laws that are "more reflective of the population". Dr. Ferland is of the same view, and states in his affidavit that the adoption of PR in Canada would expand the range of public debate to include more diverse perspectives.

[60] Having said that, the Supreme Court of Canada has indicated on several occasions that elected representatives are responsible to their electoral constituency as a whole, who have a right to meaningful participation in the electoral process but not to fashioning the post-election composition of Parliament in their own image: *Figueroa*, at para. 26. Thus, MPs are responsible to their entire constituency, which includes those who did not vote for them or their party as well as those who did: *Haig*, at 1031.

[61] This understanding of the right of each citizen to play a meaningful role in the electoral process has been described as a "complete statement of the purpose of s. 3 of the *Charter*": *Figueroa*, at para. 25. Accordingly, the Supreme Court has been willing to state emphatically that no votes, including those cast for an unsuccessful party or candidate, are "wasted votes". The Court has instead viewed the views of voters supporting candidates who do not end up in Parliament in a positive light: "As a public expression of individual support for certain perspectives and opinions, such votes are an integral component of a vital and dynamic democracy": *Ibid*,, at para. 45.

[62] In any case, as Dr. Loewen points out in his affidavit, the representative functions played by MPs include ombudsman, information provider, resource accessor, and local advocate for constituency members. These are not dependent on either the constituent's or the MP's political views. Indeed, citizens who did not vote for the governing party may be better situated in these

respects with a riding representative from the governing party than one from the party that they actually voted for.

[63] In terms of the law-making and administrative functions of government, the idea of democratic representation is more nuanced than simply identifying the party of any given riding's representative. Legislative and executive acts are a culmination of a complex of actions impacted by the composition of Cabinet and by Members of Parliament other than the particular constituent's own MP.

[64] It is self-evident that majority governments, and even minority governments who do not depend on any agreement with another party to remain in power, will be more able to put into action their own party platform. The 'winner take all' premise of SMP thus may lead to uses of power by a plurality of voters that is far from a majority, leaving what Professor LeDuc describes as a "gap in democratic satisfaction between winners and losers of elections."

[65] By contrast, Professor LeDuc describes PR electoral systems as building "consensus-based democracies", which, he opines, has diminished the tendency in a number of advanced industrialized societies to experience an "acute crisis of democratic faith". Whether the post-election maneuvering among the multiple parties in most PR systems creates consensus or partners of convenience obviously varies with the political context. But it is important to keep in mind Dr. Ferland's observation, discussed above, that with their more complex coalition governments and the policy compromises, PR-generated coalition governments are not predictably more effective than majoritarian systems at enacting any particular party's voters' policy preferences into law.

[66] At bottom, the Applicants' view is that effective representation demands "mirror representation" – i.e. symmetry between the demographic and political alignment of a voting constituency and its elected representatives. This symmetrical logic provides the philosophical grounding for PR. Compelling as it may be in theory, and as constitutionally acceptable as it would likely be if adopted as the overall approach to elections, it is only one of several viable ways to structure democratic elections. It not demanded by the Supreme Court's prevailing interpretations of section 3.

[67] Respondent's counsel argue that in *R. v. Kokopenace*, [2015] 2 SCR 398, the Supreme Court rejected a similar mirroring argument in relation to the concept of a "representative jury", finding, at para. 39, that, "There is no right to a jury roll of a particular composition, nor to one that proportionately represents all the diverse groups in Canadian society." As with compiling a jury roll, the Supreme Court has characterized the imperative of fair elections as being an issue of process; it does not turn on demographic or ideological sameness in the ultimate composition of Parliament.

[68] As indicated above, the evidence demonstrates that the SMP elections have their flaws and are capable of producing anomalous results; but it does not establish that the existing electoral system makes the representation of citizens ineffective. On the contrary, the expert evidence in the record before me, like the evidence that was before the Québec court in the parallel case in that Province,

demonstrates that every system has shortcomings: *Daoust*, *supra*, at para. 57. The Québec Court of Appeal summarized as concisely and accurately as possible the constitutional answer to the same right-to-vote challenge as that presented by the Applicants. I cannot do better than to repeat it here:

> Once there is effective representation of citizens, which implies the possibility that each elector can exercise his right to vote periodically, freely, and secretly, be a candidate for office, vote for the party of his choice, and express himself in public, the right to vote enshrined in s. 3 of the *Canadian Charter* and s. 22 of the *Québec Charter* is respected.
>
> *Daoust*, at para. 56 [citations omitted].

VI. Equality rights

[69] As set out by the Supreme Court of Canada in *R. v. Sharma*, 2022 SCC 39, at para. 28, an equality rights challenge brought under section 15 of the *Charter* requires the claimant to demonstrate that the impugned law or state action:

> (a) creates a distinction based on enumerated or analogous grounds, on its face or in its impact; and
>
> (b) imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.

[70] It is important to begin the analysis with the understanding that to succeed in a *Charter* challenge, a claimant must prove "a sufficient causal connection between the state-caused [effect] and the prejudice suffered by the [claimant]": *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 SCR 307, at para. 60. This requirement can be satisfied either directly or by reasonable inference, measured on a balance of probabilities: *Canada (Prime Minister) v. Khadr*, [2010] 1 SCR 44, at para. 21. Critically, this standard "insists on a real, as opposed to a speculative, link": *Canada (Attorney General) v. Bedford*, [2013] 3 SCR 1101, at para. 76.

[71] In the Applicants' submission, the challenged provisions of the *CEA* create adverse impact discrimination in two respects. Flowing directly from the evidence with respect to the workings of the SMP system, they contend that the statutorily created SMP system causes the underrepresentation in Parliament of small national parties, and therefore represents unequal treatment of the people who vote for those parties. They also submit, based on the evidence of election results across jurisdictions, that SMP causes, either in whole or in part, the underrepresentation in Parliament of women and racial minority MPs. Applicants' counsel submits that these effects run counter to the section 15 goal of "advance[ing] the value that all persons be subject to the equal demands and burdens of the law and not suffer any greater disability in the substance and application of the law than others": *R. v. Turpin*, [1989] 1 SCR 1296, at 1329.

[72] As reviewed above, it is the Applicants' view that certain voters are disadvantaged in parliamentary representation by the SMP electoral system. Those voters who cast their ballot for a candidate or party that did not get elected are disadvantaged by a system that allows for only one representative per electoral district, since some have representation by the MP of their choice and others do not. The Applicants contend, therefore, that the disappointed voters suffer unequal treatment under the law — more specifically that "they failed to receive a benefit that the law provided…[to] someone else": *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 SCR 657, at para. 27.

[73] Section 15, as is well known, requires a claimant to show that "the prejudicial distinction is attributable to or on the basis of an enumerated or analogous ground": *Miron v. Trudel*, [1995] 2 SCR 418, at para. 23. While I take the Applicants' arguments seriously on their own terms, I am struck by the fact that the Application is brought by public interest organizations claiming, *inter alia*, gender and racial discrimination, but it puts forward no person who claims to have been discriminated against on an enumerated ground. I say this not so much as a matter of standing – that was not argued by the Respondent and, in any case, this Application might well pass the now very lenient standing requirement for *Charter* challenges.

[74] In *Minister of Justice of Canada v. Borowski*, [1981] 2 SCR 575, at 598, the Supreme Court declared that "a person need only to show that he is affected by [the impugned law] directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court." The final part of that test – "no other reasonable and effective manner" – has in recent times been further modified to grant standing anywhere that the challenger raises a serious issue, has a genuine policy interest in the case, and presents "a reasonable and effective means to bring the challenge to court": *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, [2012] 2 SCR 524, at para. 44.

[75] More important here is the nature of the equality right claimed by the Applicants. Under section 15 of the *Charter*, Canadians do not have a right to an egalitarian society at large; rather, they have a right not to be discriminated against by a law or other state action. Accordingly, "[a] complainant under s. 15(1) must establish that he or she is a member of a discreet or insular minority group": *Haig, supra*, at 1043.

[76] Other than the many expert witnesses, the Applicants have produced a number of affiants – the directors of each of the public interest group Applicants and five individuals active in the electoral reform cause – none of whom has identified themselves as having been personally discriminated against on any of the section 15 grounds. They are all credible individuals and articulate voting rights activists, but from their affidavits alone one does not know (except by guessing from their names) if they are women, or racialized individuals, or members of a religious minority, or of a historically discriminated against sexual orientation, etc. They do not depose to personal discrimination on those grounds.

[77] I mean no disrespect by this. I certainly do not consider the directors of the Applicants, or any of the other affiants, to be "busybody litigants", as the Supreme Court has put it, since they have a genuine policy and intellectual interest in the issues at hand: *Downtown Eastside*, at para. 1. But the lack of any Applicant with personal evidence of belonging to a section 15 group suffering discrimination gives me pause.

[78] One way in which that concern is attempted to be addressed by Applicants' counsel is to assert in their factum that, "Political affiliation is an analogous ground under s. 15 of the *Charter*." To make this argument, the Applicants would have to establish that support for a political party has "often serve[d] as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity": *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, at para. 19. The problem is that it is not.

[79] Applicants' counsel specifically rely on three cases which they reference as establishing their position on analogous grounds. As I read them, however, none of the three are particularly helpful.

[80] The first of these, *Quebec (Attorney General) v. A*, [2013] 1 SCR 61, at para. 334, makes the point that marital status, not political party support (about which it says nothing), is a personal characteristic that qualifies as an analogous ground. With respect, that seems to miss the mark. While marital status, like political party allegiance, is a matter of choice not nature or genetics, it is not, like voting for a political party, something that politicians would campaign to make one change. In that respect, marital status is more akin to religious affiliation. To proselytize a change would itself be a violation; that is, it would be so socially unacceptable, and potentially coercive, as to be offensive.

[81] The second case, *Longley v Canada (Attorney General)*, 2007 ONCA 852, at para. 102, comes closer to the issue here. It says, at para 102: "I need not consider the yet-undetermined question of whether membership in a political party or political affiliation or political beliefs may constitute an "analogous ground" within the meaning of s. 15(1)".

[82] The question is explicitly answered by the Alberta Court of Appeal in the third case cited by the Applicants, *Canada (Attorney General) v. Reform Party of Canada*, 1995 ABCA 107. It says, at para. 77: "members of political parties or candidates who run for office are not within the class of persons protected by s. 15 of the *Charter*.**"** I hasten to add that if actual membership in a political party is not the kind of personal characteristic that qualifies as an analogous section 15 ground, then casting a vote for that member – an even weaker affiliation – also does not qualify.

[83] Of course, it is not only the case law that weighs against the Applicants' point in this respect; it is logic itself. To qualify as section 15 analogous ground, a status must be a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity: *Corbiere*, *supra*, at para. 13. It is hard to think of anything less immutable than who one votes for in an election.

[84] That is not to say that there are not voters who are ideologically committed to a given political party. The Applicants have included in their record a number of affidavits from individuals who depose to a lifelong commitment to the one party of their choice. The Intervener, Apathy Is Boring, likewise has produced a deponent who pronounces her allegiance to one party and her frustration in having to occasionally vote strategically for her second choice.

[85] I believe these affiants. They express their commitment to the party of their choice with obvious sincerity. But they are all committed political activists, and in that capacity are the exception rather than the rule.

[86] The fact is, if voting allegiance were generally immutable, we would not need elections at all. We could just survey the new citizens or those who have recently come of age; the rest of the electorate would be counted on to vote the same way as last time.

[87] The entire democratic point is that we engage in a nationwide exercise every four or five years in order to determine whether the electorate has changed its mind. Candidates, including previously unsuccessful candidates, do not just stand for election, they *run* for election – i.e. they campaign. They do so because they expect voters to be open minded, and open to change, not immutable in their views.

[88] An entire legislative regime is built around ensuring open and free political discourse. Importantly, this includes restricting spending on political speech in the immediate pre-election period, precisely because voting allegiance is not immutable and that is the time when voters can be most readily influenced: see *Libman v. Quebec*, [1997] 3 SCR 569, at para. 47; *Working Families Ontario v. Ontario*, 2021 ONSC 4076, at paras. 29-32.

[89] Voters can, and do, change their minds, sometimes in large numbers. In fact, the very evidence that the Applicants put forward to demonstrate the anomalous results of past elections under SMP shows this.

[90] Former MP Michael Boyer has provided the Applicants with an affidavit tracing his political fortunes over the course of several elections. He relates that, running at the time as a Progressive Conservative, he won his riding in 1984 with a plurality of 44.8% of the vote while the Liberals received 30.3% and the NDP gained 23.7%. In the next election in 1988, Boyer won 46.0% while the NDP's vote rose to 44.2% and the Liberals dropped to 7%. And in the election following that in 1993, Boyer received only 31.0% while the successful Liberals got 42.1%, the Reform Party claimed 18.8%, and the NDP received only 5%.

[91] What Mr. Boyer describes is, of course, a volatile time in Canadian politics. He makes the point in his affidavit about the difficulties of an MP trying to represent the diverse array of voters he found in his riding. I make no comment about the political issues of the day or the particular population of voters that Mr. Boyer represented. But whatever else his affidavit describes, it is the opposite of party allegiance as an immutable characteristic of the voters. He does not give raw numbers, but it is evident from the percentages that thousands of voters in his district alone

changed allegiances from the Liberals to the NDP in 1988, and then even more switched back to the Liberals in 1993.

[92] The situation is simply not analogous to the section 15 enumerated grounds. It would be so extraordinary as to be impossible for 44.2% of a given district to fall into an actual section 15 category, and then 4 years later to find that only 5% of them were in that category. The same is true with recognized analogous grounds such as citizenship status and sexual orientation: see *Andrews* v. *Law Society of British Columbia*, [1989] 1 SCR 143; *Egan* v. *Canada*, [1995] 2 SCR 513. Those characteristics cannot be compared to party allegiance, and voters' apparently large-scale openness to change their party allegiance, during 4-year intervals.

[93] As indicated in the discussion earlier in these reasons, the Applicants' argument with respect to analogous grounds states that the SMP system discriminates against women and racial minorities, and that the remedy for this discrimination is to convert to a PR electoral system. This point is then divided into a multi-part argument in Applicants' counsel's factum, addressing the issue of gender discrimination as follows: "FPTP contributes to the significant underrepresentation of Canadian women in Parliament by 1. reducing the incentives of parties to place women in the most winnable districts; and 2. reducing the electoral success of the NDP and Green Party..."

[94] The Applicants' argument goes on to explain the underrepresentation of women in Canada by comparing the Canadian Parliament to the New Zealand Parliament: "as strikingly illustrated in New Zealand, the increased success of small left parties under PR rules directly increases the number of women in Parliament while also causing a contagion effect, leading larger parties to nominate women over time. In Canada, the contagion effect would be significant."

[95] As discussed earlier, and as conceded, as it must be, by the Applicants' experts, attitude toward women in the political arena are sociologically and culturally determined. Other than a superficial inclination to think that two English-speaking, former British colonies will emulate one another, there is nothing in the record to suggest, let alone prove, that Canada will follow New Zealand's lead in any public policy area. I note in passing that since enacting its *Accident Compensation Act* in the 1970s, New Zealand has all but abolished common law tort actions: Richard Gaskins, "Tort Reform in the Welfare State: New Zealand's *Accident Compensation Act*" (1980), *Osgoode Hall L.J.* 238. Canada, on the other hand, has done nothing of the sort. The socio-economic contexts of the two societies are too different to drive parallel law reform movements.

[96] Perhaps more to the point, New Zealand is a small island nation of under 5 million people, according to its most recent published census: Stats NZ, https://www.stats.govt.nz/tools/2018-census-place-summaries/new-zealand#population-and-dwellings. Canada is the world's second largest land mass, with a population of over 40 million according to its most recent published census: Statistics Canada, https://www150.statcan.gc.ca/n1/daily-quotidien/230927/dq230927a-eng.htm. New Zealand's climate and geography range from a warm subtropical zone in the north to a mild temperate zone in the south: World Bank, Climate Change Knowledge Portal, https://climateknowledgeportal.worldbank.org/country/new-zealand. Canada's climate and geography range from a mild temperate zone in southern British Columbia to intense, arctic

conditions in the far north: World Bank, Climate Change Knowledge Portal, https:// climateknowledgeportal. worldbank.org/country/Canada.

[97] As the Supreme Court of Canada has said, designing an electoral system must take into account many factors, including the "geography, community interests and population growth patterns" as well as the country's "social mosaic": *Electoral Boundaries Reference*, *supra*, at 197, 184. The record contains no serious study of those features of the New Zealand landscape and society, and no serious comparison of them with Canada.

[98] Given the significant differences in the features of the two countries and the lack of relevant evidence in the record, there is little a court can conclude with respect to the Applicants' New Zealand comparison. It is not at all clear that a change in one aspect of Canada's political environment – from SMP to PR elections – would prompt socio-political changes that emulate New Zealand across the board.

[99] And it is certainly not clear that a lightly populated island nation with a mild climate is an appropriate role model for a vast nation that spans six time zones and reaches from the middle of North America to the remote and climatically isolating environment of the Arctic Circle. In short, 'it works for New Zealand' is not, on the basis of the record before me, a cogent constitutional argument.

[100] Turning to the other half of Applicants' argument with respect to the representation of women – that PR would increase support for the NDP and the Green Party – this seems more like partisan spin than it does legal argument. Applicants' counsel asserts in his factum that these two parties "typically nominate a higher share of women than the average larger party". That observation, phrased in that way, does not live up to a very exacting standard of proof. It is a generalization that even in its own terms will not necessarily hold in the future and has not consistently held in the past.

[101] More than that, politics is a representative enterprise. While raw numbers can be important, there are other statements about gender equality that political parties make that have equal, if not more political significance. I can count the women MPs, but I would find it very difficult to conclude which of the political parties, including those mentioned by Appellants' counsel, owns the lead role in advancing women in Canadian politics.

[102] For example, it takes only a passing knowledge of modern Canadian history to know that it was the Conservatives who produced Canada's only woman prime minister: "June 25, 1993: Kim Campbell becomes Canada's first female prime minister", History.com, https://www.history.com/this-day-in-history/kim-campbell-takes-office. It takes only a newspaper knowledge of contemporary politics to know that the current Liberal government is the first in Canada's history to commit to a gender-balanced cabinet: 'Because it's 2015': Trudeau forms Canada's 1st gender-balanced cabinet", CBC News (November 6, 2015), https://www.cbc.ca/news/politics/canada-trudeau-liberal-government-cabinet-1.3304590.

[103] And it takes only a little more reading beyond the front pages to know that although the Green Party was led during the last federal election by the first woman of colour to head a national political party, it was a divisive moment for the party rather than a unifying one. Indeed, it resulted in one of the party's only three MPs demonstrating that political allegiance is not immutable by crossing the floor to another party in protest: "Green MP Jenica Atwin crossing the floor to join the Liberals", CBC News (June 10, 2021), https://www.cbc.ca/news/politics/jenica-atwin-joining-the-liberals-1.6060501.

[104] I do not mention these political events to praise or criticize any given party. Rather, my purpose here is to remind ourselves that politics is a complicated field, full of public messages that resonate in different ways at different times. The number of women MPs can be tallied, and the policy contributions of a political party can be assessed as to whether they advance the rights and status of women in society; but beyond that, any party's overall commitment to the issue is difficult to measure. I do not know, for example, whether women's position in Canada is advanced more by having more women in Parliament or by having more women in the executive of government.

[105] As the Respondent points out in its factum, the SMP system tends toward the larger parties because its designers favour those parties, and not as a matter of political bias. The system ends up favouring larger, centrist parties because it pulls the electorate and the candidates' campaigns toward the centre. By contrast, PR fosters the rise of the smaller, more outlying parties at the further ends of the political spectrum. Each has a built-in version of equality – albeit a different version for each. While some parties may rise above others in terms of numbers of candidates, other rise in terms of policy initiatives or public appointments.

[106] The NDP and the Green Party are legitimate players on the Canadian political landscape. The Applicants are certainly within their rights to support them. But their support can be expressed at the ballot box under the prevailing electoral system. It does not conform with our constitutional traditions to fashion legal argument in support of a result that is expressly aimed at promoting one political party over another. There is no evidence in the record that actually establishes that any one or two political parties in this country are – or, more accurately, will be – better for women than another.

[107] Although it should go without saying, I do not accept that a compelled switch to PR would be an appropriate judicial intervention just because it may redound to the benefit of the NDP or the Greens. Getting a particular party elected may improve the situation of women or may be detrimental to the cause of women's rights. One cannot count on political parties, whose fortunes rise and fall with their popularity at election time, to carry out any particular measures or to nominate any particular candidates. If the constitution is a living tree, politics is part of the wind to which the tree must bend; but like the wind, its currents are never easily predictable.

[108] I accept that the percentage of women in Parliament, although slowly increasing over time, is still too low. Canadian political leaders and Canadian society overall should be encouraged to strive for gender parity in public institutions, including Parliament and the provincial legislatures.

Adopting a PR electoral system might, as the Applicants submit, provide incentives for political parties to nominate more women candidates, but that makes it a remedial social policy, not a legal remedy. Causation of the gender disparity is far from proven on the evidence before me.

[109] In her expert report, Dr. Melanee Thomas, of the University of Calgary, opines that most electoral systems will tend to produce results that reflect society's gender biases, but they do not cause them. She goes on to explain that gender disparities in politics, or the underrepresentation of women in legislatures across the country, is a product of social forces which exist independently of whatever might be contained in the applicable elections legislation. Thus, the primary barrier to the election of women to Parliament is not the challenged sections of the *CEA*, but rather society's systemic sexism – gendered behaviour and the acceptance of male overrepresentation – that is the cause.

[110] Dr. Thomas goes on to explain, convincingly, that the degree of societal sexism writ large varies from country to country, which in turn explains why electoral rules produce different results in different jurisdictions. She describes the comparative national studies as demonstrating the "causal heterogeneity" in respect of electoral systems. As a result, she concludes, at p. 4 of her Report, that a switch from an SMP system to a PR system would only increase the number of women elected as representatives if it were accompanied by a widespread initiative to identify and reform "attitudes that support, produce, and reinforce the overrepresentation of privileged groups (e.g., men), and justify the exclusion of groups such as women." The PR system, like the SMP, tends to reflect the social conditions in which it operates.

[111] Accordingly, if Canada could engage in a totalizing reform of systemically sexist practices and attitudes, a PR system and an SMP system would reflect those changes. It is entirely speculative to say which system would do better in that hypothetical world. As it is, Dr. Thomas explains that a switch to PR itself does not address the cause; PR will tend to reflect the same social conditions as SMP currently does.

[112] Without broad social change – a goal well beyond anything this court could order – Dr. Thomas opines that those political parties that today nominate more women for SMP ridings will also do so for PR districts, and those who perceive men as more electable in our current SMP system will continue to perceive it that way under a PR regime. As Dr. Thomas puts it in her affidavit, "Systemic sexism exists independent of the electoral system, and would persist if the electoral system were changed."

[113] The expert evidence is similar on the question of whether SMP causes disproportionate effects in respect of the representation of racialized Canadians. Dr. Tolley's evidence is that there are significant disparities in economic resources, community engagement, organizational efficacy, and political interest, among racialized groups that lie at the heart of the underrepresentation of minorities in political office. These factors are all external to the electoral system. She also points out that the variances in political representation by racialized groups flows from different groups' varying abilities to run for office and their interest in doing so.

[114] Dr. Tolley concludes, convincingly, that "these differences would persist under a proportional election system and, as a result, we would likely see continued variation in representational outcomes across racialized groups, even with a shift away from SMP." Again, the electoral system may reflect, but does not cause, racial disparities. Since a switch to PR would not address the cause of minority underrepresentation, it will not remedy it and will just as likely continue to reflect it. And since the evidence does not establish that implementing PR in Canadian elections would do any better than SMP, the section 15 claim is not made out.

[115] Dr. Thomas and Dr. Tolley make essentially the same point, the former with respect to women's representation in Parliament and the latter with respect to racialized Canadians' representation in Parliament. The point is not that SMP is the best system; indeed, in some respects PR will be better. The evidence shows that it will almost certainly make many individuals happier with their ballot having been cast. But all electoral systems have their strengths and their shortcomings. The real point, as Dr. Tolley puts it in the racial minority context, is: "the impact of electoral reform on racialized representation is uncertain and decidedly not a given."

[116] Chief Justice McLachlin was clear in *Bedford*, *supra*, at para. 78, that in a claim under the *Charter* "mere speculation will not suffice to establish causation." Therefore, if "uncertain and decidedly not a given" is the highest an oft cited and credible expert on the representation of minorities in Canadian elections can put the case for a change to PR, the Applicants are a good distance from legally proving their case.

[117] Since causation is crucial to a section 15 claim, the Applicants are unable to establish an equality rights violation in the *CEA*.

VII. The *Constitution Act, 1867*

[118] In *Henry v. Canada (Attorney General)*, 2014 BCCA 30, at para. 9, the British Columbia Court of Appeal observed that, "In [Canada' SMP] system, which has been essentially unchanged since Confederation, one Member of Parliament is elected in each defined electoral district to represent the residents in that riding in Parliament." Since the electoral system being challenged has been in place since the country's inception, it is worth taking a brief look at its origins and constitutional stature.

[119] Section 37 of the *Constitution Act, 1867* provides:

> 37. The House of Commons shall subject to the provisions of this Act consist of one hundred and eighty-one members of whom eighty-two shall be elected for Ontario, sixty-five for Quebec, nineteen for Nova Scotia and fifteen for New Brunswick.

[120] Section 40 of the *Constitution Act, 1867* provides:

40. Until the Parliament of Canada otherwise provides Ontario, Quebec, Nova Scotia and New Brunswick shall for the purposes of the election of members to serve in the House of Commons be divided into electoral districts as follows:

> 1. – ONTARIO
> Ontario shall be divided into the counties, ridings of counties, parts of cities, and towns enumerated in the first schedule to this Act each whereof shall be an electoral district each such district as numbered in that schedule being entitled to return one member.
>
> 2. – QUEBEC
> Quebec shall be divided into sixty-five electoral districts, composed of the sixty-five electoral divisions into which Lower Canada is at the passing of this Act divided under chapter 2 of The Consolidated Statutes of Canada, chapter 75 of The Consolidated Statutes for Lower Canada, and The Act of the Province of Canada of the twenty-third year of the Queen, chapter 1, or any other Act amending the same in force at the Union so that each such electoral division shall be for the purposes of this Act an electoral district entitled to return one member.
>
> 3. – NOVA SCOTIA
> Each of the eighteen counties of Nova Scotia shall be an electoral district. The county of Halifax shall be entitled to return two members and each of the other counties one member.
>
> 4. – NEW BRUNSWICK
> Each of the fourteen counties into which New Brunswick is divided including the city and county of St. John shall be an electoral district. The city of St. John shall also be a separate electoral district. Each of those fifteen electoral districts shall be entitled to return one member.

[121] Sections 50-52 of the *Constitution Act, 1867* provide:

50. Every House of Commons shall continue for five years from the day of the return of the writs for choosing the house (subject to be sooner dissolved by the governor general) and no longer.

51. On the completion of the census in the year one thousand eight hundred and seventy-one and of each subsequent decennial census the representation of the four provinces shall be readjusted by such authority in such manner and from such time as the Parliament of Canada from time to time provides subject and according to the following rules:

> 1. Quebec shall have the fixed number of sixty-five members;
> 2. There shall be assigned to each of the other provinces such a number of members as will bear the same proportion to the number of its population (ascertained at such census) as the number sixty-five bears to the number of the population of Quebec (so ascertained);
> 3. In the computation of the number of members for a province a fractional part not exceeding one-half of the whole number requisite for entitling the province to a member shall be disregarded; but a fractional part exceeding one-half of that number shall be equivalent to the whole number;
> 4. On any such readjustment the number of members for a province shall not be reduced unless the proportion which the number of the population of the province bore to the number of the aggregate population of Canada at the then last proceeding readjustment of the number of members for the province is ascertained at the then latest census to be diminished by one-twentieth part or upwards;
> 5. Such readjustment shall not take effect until the termination of the then existing parliament.
>
> 52. The number of members of the House of Commons may be from time to time increased by the Parliament of Canada provided the proportionate representation of the provinces prescribed by this Act is not thereby disturbed.

[122] Collectively, these constitutional provisions set up the district, or constituency-based system for electing representatives to the House of Commons. They specifically provide for a new parliament to be elected at least every five years, and for the number of districts to be adjustable to match the population growth. Each electoral district is to be represented by a single Member of Parliament (with the original exception of Halifax, whose two MPs were allotted to the area that covered both the City of Halifax and the County of Halifax, and which in 1968 reverted to one MP per riding like the rest of the country).

[123] Sections 51 and 51A set the number of MPs for each of the original provinces. The number is fixed to match the number of electoral districts. The number of districts can be changed in accordance with a formula set out in section 51(1).

[124] Counsel for the Respondent points out that, although section 52 requires the changes in electoral districts to be in line with demographic change, these constitutional provisions do not require strict proportionality in representation. Thus, for example, the allocation formula described in s 51(1) contains a "grandfather clause" added by the *Constitution Act, 1985* which guarantees that no province shall be assigned fewer seats than it had on the date of the coming into force of that Act.

[125] Provision for representation in Parliament from newly added provinces has been made by a series of constitutional enactments during the course of Canadian history. So, for example, the

Manitoba Act, 1870, 1870 33 Vict., c. 3, which created the Province of Manitoba and set out its terms of joining the confederation, provides in section 4:

> The said Province shall be represented, in the first instance, in the House of Commons of Canada, by four Members, and for that purpose shall be divided by proclamation of the Governor General, into four Electoral Districts, each of which shall be represented by one Member.

[126] Similar provisions are found in the terms of union enactments pertaining to other provinces added over time. The Respondent and the Intervener, Canadian Constitutional Foundation ("CCF"), submits that of particular interest in this respect is section 51(2) of the *Constitution Act, 1867*, which was introduced in 1998 with the re-division of Canada's north into three territories under the *Constitution Act, 1999 (Nunavut)*, SC 1998, c. 15, part 2. That section provides, *inter alia*, that each of the three northern territories shall be represented in Parliament by one (and only one) member:

> 51(2). The Yukon Territory as bounded and described in the schedule to chapter Y-2 of the Revised Statutes of Canada, 1985, shall be entitled to one member, the Northwest Territories as bounded and described in section 2 of chapter N-27 of the Revised Statutes of Canada, 1985, as amended by section 77 of chapter 28 of the Statutes of Canada, 1993, shall be entitled to one member, and Nunavut as bounded and described in section 3 of chapter 28 of the Statutes of Canada, 1993, shall be entitled to one member.

[127] Applicants' counsel submits that the original parliamentary representation provisions in the *Constitution Act, 1867* are spent, as they have been replaced over time by the *CEA* and the *EBRA*. While it is true that the particular districts and allocations established in 1867 have changed over time, the basic structure of these sections of the *Constitution Act, 1867*, and in particular the one-member-per-district formula, has not changed. This includes the specific addition of the right to vote in section 3 of the *Charter*, which contains no provision repealing section 40 (or any of the other electoral sections).

[128] As a matter of interpretation, the s. 3 voting rights provision is to be read in harmony with the older electoral provisions, in keeping with the principle of interpretive harmony: *Canada (Citizenship and Immigration) v. Nilam*, 2017 FCA 44, at para. 21. In constitutional law, this principle translates into the idea that the several documents that make up the Canadian constitution have a coherent internal architecture. The Supreme Court has specifically instructed that, "The individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole": *Reference re Secession of Québec*, [1998] 2 SCR 217, at para. 50.

[129] In fact, the electoral sections of the *Constitution Act, 1867* continue to be cited as alive and well by the Supreme Court of Canada. For example, in *Opitz v. Wrzesnewskyj*, [2012] 3 SCR 76,

a disappointed candidate in the Ontario riding of Etobicoke Centre challenged the election results based on an allegation of voter irregularities. The Court embarked on its analysis with the following introduction, at para. 11:

> Canada is divided into 'electoral districts' (commonly known as 'ridings'): *Charter*, s. 3, and *Constitution Act, 1867*, ss. 40, 51 and 51A. Etobicoke Centre is an electoral district. Section 6 of the Act requires that a qualified elector be ordinarily resident in one of the polling divisions within the electoral district. Persons who are qualified as electors are entitled to vote for a member of Parliament for the electoral district in which the elector is ordinarily resident.

[130] Similarly, in *Ontario (Attorney General v. G*, 2020 SCC 38, at para. 97, the Court upheld a statute requiring registration of certain sex offenders. In the course of doing so, it cited the electoral sections of the *Constitution Act, 1867* in explaining that "[p]arliamentary sovereignty is an expression of democracy" and that legislation is produced by an "elected chamber, without whose consent no law can be made (*Constitution Act, 1867*, ss. 17, 40, 48, 55 and 91; *Charter*, ss. 3 and 4…)".

[131] Even more to the point, the Court in *Frank v. Canada (Attorney General)*, [2019] 1 SCR 3 considered whether Canadians residing abroad retain the right to vote. In its analysis it invoked, at para. 155, the original electoral provisions of the *Constitution Act, 1867*. The Court described those sections as "spent" in detail, but still very much alive in principle:

> Under our Westminster parliamentary system, then, Canadian electors vote for a Member of Parliament (specifically, a member of the House of Commons), who serves as the representative of the electorate in a geographically defined community (*Haig v. Canada (Chief Electoral Officer)*, 1993 CanLII 58 (SCC), [1993] 2 S.C.R. 995, at p. 1031). At Confederation, this regional nature of the composition of the House of Commons was constitutionally entrenched (*Constitution Act, 1867*, ss. 37 and 40). (Although s. 40 is now considered spent, Parliament continues to provide for electoral districts under the *Electoral Boundaries Readjustment Act*, R.S.C. 1985, c. E-3; see A. Dodek, *The Canadian Constitution* (2nd ed. 2016), at p. 54.) While Parliament, as the aggregate of its members, represents "all constituencies, all of the territory, all parties, all interests, all citizens, all inhabitants" (J. Ajzenstat, *The Canadian Founding: John Locke and Parliament* (2007), at p. 61), the s. 3 voting right is premised upon electors voting for a representative of their community. This regional structure must therefore inform any consideration of the electoral system, and Canadians' participation therein.

[132] Respondent's counsel submits that the principles that live on in these provisions, spent as they are in their detailed distribution of representatives, are those of local electoral districts represented by a single Member of Parliament (although the original Halifax allocation of two

representatives may leave some small room for debate on necessity of a single member). Moreover, as can be seen in the Supreme Court's recent jurisprudence invoking section 40 and other electoral system sections of the *Constitution Act, 1867*, those sections were neither explicitly repealed by the *Charter*'s enactment nor were they implicitly overridden by any contrary language of the constitutional text.

[133] Counsel for the Intervener, Canadian Constitutional Foundation ("CCF") adds to this that since these electoral principles are entrenched in the *Constitution Act, 1867* and have never been repealed, they cannot be challenged under the *Charter* or *Constitution Act, 1982*. As the Supreme Court has put it on a number of occasions, "One part of the Constitution cannot abrogate another part of the Constitution": *Canada (House of Commons) v. Vaid*, [2005] 1 SCR 667, at para. 30. Neither section 3 nor section 15 of the *Charter* can be invoked in a way that would "hold one section of the Constitution violative of another": *Adler v. Ontario*, [1996] 3 SCR 609, at para. 35.

[134] To take the point even further, the immunity of one part of the Constitution from review under another part holds true even where – as the Applicants would say is the case here – the older provisions "sit uncomfortably with the concept of equality embedded in the *Charter*": *Reference re Bill 30, An Act to Amend the Education Act (Ont.)*, [1987] 1 SCR 1148, at 1197. The SMP system enacted at Confederation, and whose basic principles remain with us today, might well, as the Applicants' experts demonstrate, work an unfairness on some voters and import an inequality of voting power. But as Justice Wilson succinctly put it, "[i]t was never intended…that the *Charter* could be used to invalidate other provisions of the Constitution": *Ibid*.

[135] To be clear, the Applicants cannot, under the guise of a "living tree" interpretation of the Constitution, strike out or interpret away constitutional principles which the Supreme Court has said remain valid. The metaphor of the living tree is a potent one in Canadian jurisprudence, but it has always been constrained by its "natural limits": *Reference re Meaning of Word "Persons" in Section 24 of British North America Act, 1867: Edwards v. A.G. of Canada*, [1930] 1 DLR 98, at 106-107.

[136] The Supreme Court has admonished that while constitutional interpretation is not to be legalistic or antiquated, the Constitution of Canada should not be approached "as an empty vessel to be filled with whatever meaning we might wish from time to time": *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313, at para. 151. Rather, interpretation is to be "guided by the words of the Constitution itself viewed in light of their historical context, the larger objects of the Constitution, and, where applicable, the meaning and purpose of associated provisions in the Constitution": *Canada v. Boloh 1(a)*, 2023 FCA 120, at para. 23.

[137] The *Charter* is a crucial part of the Canadian constitution; nevertheless, it is only a part of a larger whole and must be approached with that in mind. For that reason, the Court has admonished that "constitutional interpretation must first and foremost have reference to, and be restrained by, [its] text": *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, at para. 65.

[138] The upshot of this is that PR may well be made to comply with the Constitution's existing electoral principles, if not its mechanics. In fact, there are scholars who view all questions of constitutional interpretation to ultimately be grounded in the principle of proportionality: see David M. Beatty, *The Ultimate Rule of Law* (Oxford University Press, 2004), at 159-188.

[139] However, even if a PR system could be made to fit the Constitution's requirements, one cannot say on the basis of the constitutional text that an SMP system is ***un***constitutional. As indicated at the outset of these reasons, the question is not whether PR works, but whether SMP is prohibited. SMP is, in fact, the paradigmatic example of a constitutionally valid electoral system in Canada; it is specifically called for in the *Constitution Act, 1867*.

[140] An alternative to SMP might or might not be made to fit the bill, but that is not relevant to the constitutional question raised here. The relevant constitutional sections, and the Supreme Court of Canada in its elections jurisprudence, actually describe SMP as the constitutionally valid system against which challenges are measured.

[141] Respondent's counsel point out that, in fact, implementing PR will inevitably entail some form of constitutional amendment, even if it is held to be a system that in principle conforms to constitutional norms. Assuming that PR representation in the House of Commons were to be determined on a province-by-province basis, as it would have to be under the *Constitution Act, 1867*, section 51A guarantees four seats to Prince Edward Island. Given P.E.I.'s small percentage of the national population, that would, in turn, require the addition of hundreds of additional House seats to other regions of the country in order to maintain the proportionality of result the Applicants seek.

[142] This addition of seats would itself require amendment to s. 37 of the *Constitution Act, 1867*. That section provides that the House of Commons consists of 308 members allocated in accordance with section 51.

[143] As a final note on the electoral provisions of the *Constitution Act, 1867*, the allocation of districts, etc. contained in section 40 is "spent" by virtue of having been recalculated numerous times since 1867. But the definition and allocation of electoral districts to the three northern territories contained in section 51(2) is not spent. This section was introduced in 1998-99 with the re-division of the north into the Yukon, Northwest Territories, and Nunavut. The allocation of one electoral district, with one Member of Parliament, to each of those territories is up-to-date, not just in principle but in the most literal sense.

[144] Applicants' counsel points to the Halifax example in section 40 of the *Constitution Act, 1867*, to indicate that it is conceivable under our electoral first principles to have multiple representatives in a given electoral district. As indicated previously, Halifax is an anomaly in this respect. One would have to come to a deeper understanding of the historical currents that gave rise to that district being allocated two Members of Parliament in 1867 in order to take any point of principle from it.

[145] But it is beyond debate that the three norther territories cannot have multiple members. Section 51(2) makes each territory a single district and allocates one representative to each. By express constitutional design, they can each only have one representative.

[146] Accordingly, the Constitution effectively bars Yukon, Northwest Territories, and Nunavut from introducing a PR system. As explained earlier in these reasons, PR, by its own logic, requires an electoral district to elect two or more representatives.

[147] The Applicants' experts say that for PR the ideal number of MPs per riding would be closer to four. The electorate would be represented in proportion to the way its popular vote is divided. Unless an election were to proceed by unanimous acclamation, it is not "proportional" to have only one representative. The three northern territories would, therefore, of necessity be left out of any conversion to a PR system.

[148] That cannot be. The citizens in Yukon, Northwest Territories, and Nunavut have the same rights as all other citizens. If, in order to be constitutionally valid, an election had to give every citizen the right to a representative of their choice by implementing a PR system, the citizens of the three territories could not be denied those rights.

[149] Since the citizens of the three territories cannot, pursuant to section 51(2) of the *Constitution Act, 1867*, be permitted to vote for their representatives on a proportionate basis, but rather are compelled to vote for only one representative – i.e. for the first past the post – a move to PR cannot be said to be constitutionally required. In fact, at least in this respect, PR encounters a constitutional roadblock.

[150] The Applicants' answer to these impediments is insightful. In their factum issued in response to the Interveners, Applicants' counsel argues, at para. 20, that if the constitutionally feasible PR options are not satisfactory, Parliament "could amend the Constitution unilaterally pursuant to its s. 44 power under the *Constitution Act, 1982*…"

[151] I make no comment on whether this really would be a readily available 'solution', as Applicants' counsel proposes. However, invoking it in this way tends to give away the entire contest. As Respondent's counsel say at para. 43 of their factum issued in response to the Interveners, "[t]he Court's duty is to interpret and apply the Constitution as it is written, not as it may be amended." By definition, if a constitutional amendment is needed to implement PR for the entire country, then PR is not constitutionally compelled.

[152] PR has its merits and its shortcomings, as do all electoral systems in a large and complex country, including SMP. To be sure, the Applicants have shown that PR would be a fair system. It is not, however, required by the Constitution. The existing SMP system is compliant with the Constitution and need not change.

IV. Disposition

[153] Sections 2(1), 24(1), and 313(1) of the *CEA* are constitutionally valid. They do not violate sections 3 and/or 15(1) of the *Charter*.

[154] The Application is dismissed.

Released: November 30, 2023

Morgan J.

CITATION: CITATION: Fair Voting BC v. AG Canada, 2023 ONSC 6516
COURT FILE NO.: CV-19-628833
DATE: 20231130

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

FAIR VOTING BC and SPRINGTIDE COLLECTIVE FOR DEMOCRACY SOCIETY

Applicants

– and –

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT

E.M. Morgan J.

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