

**IN THE SUPREME COURT OF CANADA**  
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

**FAIR VOTING BC and**  
**SPRINGTIDE COLLECTIVE FOR DEMOCRATIC SOCIETY**

**APPLICANTS**  
(Appellants)

and

**ATTORNEY GENERAL OF CANADA**

**RESPONDENT**  
(Respondent)

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**REPLY**

**(FAIR VOTING BC and SPRINGTIDE COLLECTIVE FOR**  
**DEMOCRATIC SOCIETY, APPLICANTS)**  
(Pursuant to Rule 28 of the *Rules of the Supreme Court of Canada*)

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## REPLY OF THE APPLICANTS

### A. Overview of national legal and public importance

[1] At the highest level, this case, which reviews the role of courts in assessing our national electoral system’s compliance with the *Charter* – as well as how government choices regarding the design of our electoral system are constrained – is unambiguously of national public and legal importance. Our electoral system (ie, the institution that translates votes into parliamentary seats and thus governs access to legislative power), and the ss. [3](#) and [15](#) *Charter* rights underpinning it, stand at the heart of our democracy. Thirteen groups sought leave to intervene in the Court of Appeal for Ontario on the issues, all but two focusing on SMP’s unconstitutional harms.<sup>1</sup>

[2] At a more granular level, this case invites the Court to review or clarify several areas of constitutional law on which there is confusion or which have not yet been addressed, including the scope of the s. [3](#) right to meaningful participation, the extent to which the s. [3](#) right to effective representation tolerates significant disparities in legislative representation, and the extent to which s. [15](#) prevents the legislature from continuing to use an electoral system that reduces the incentives of parties to nominate women and minorities as candidates for elections.

### B. Section [3](#) aims to treat and represent voters equally

[3] On the s. [3](#) right to meaningful participation, contrary to paragraph 34 of the Respondent’s factum, the Applicants do not claim that voters must necessarily have electoral “success”.<sup>2</sup> Rather, the Applicants argue that *Figueroa* stands for the principle that, absent s. [1](#) justification, the government cannot design electoral rules that reward certain parties in the hopes of fostering collective interests, when these rewards suppress the participation of other parties or voters for these parties.<sup>3</sup> On the Respondent’s own concession, SMP is designed specifically to reward certain parties and voters.<sup>4</sup> Ironically, therefore, it is the government itself that seeks to continue using SMP to guarantee particular electoral outcomes or “success” for groups of voters.

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<sup>1</sup> *Fair Voting BC v Canada (AG)*, [2024 ONCA 619](#).

<sup>2</sup> Although a systematically disproportional electoral result will disproportionately inflate the voice or influence of some political parties over others while the legislature is sitting, which offends the right to meaningful participation: *Ontario (AG) v Working Families Coalition (Canada) Inc*, [2025 SCC 5](#), ¶[13](#), [51-55](#) (per Karakatsanis J), [132](#) (per Wagner CJC and Moreau J, dissenting).

<sup>3</sup> *Figueroa v Canada (AG)*, [2003 SCC 37](#), ¶[25-30](#), [36](#), [50-56](#).

<sup>4</sup> [OSCJ Reasons](#), ¶[49](#).

[4] Similarly, on effective representation, the issue isn't whether this right "requires a certain form of electoral outcome", as the Respondent claims (at paragraph 33). The issue is whether an electoral system, like SMP, that provides little to no legislative representation to a rough majority of voters is unconstitutional. Importantly, the evidence confirmed that SMP cannot be justified on the basis that its levels of constituency or surrogate representation counterbalance its significant deficiency in legislative representation.<sup>5</sup> Nor does SMP provide any other type of representation to compensate voters denied legislative representation.<sup>6</sup> Put simply, voters under SMP are denied legislative representation (ie, their opportunity to have their voices heard in Parliament which is the preeminent component of effective representation)<sup>7</sup> and get nothing back. Why should that be? There are many electoral systems that provide equal levels of legislative representation to almost all voters without impairing other aspects of representation relative to what SMP provides.

[5] At paragraph 32, the Respondent cites the *Electoral Boundaries* reference for the claim that s. 3 does not require fundamental reform of Canada's democratic institutions. But the Court makes this statement to confirm that s. 3 seeks to protect the right to "effective representation" (including "the idea of having a voice in the deliberations of government") rather than the strict formalistic "one person – one vote" model "espoused by the United States Supreme Court". More importantly,

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<sup>5</sup> The Respondent expert's own evidence confirms (contrary to the Respondent's claim at paragraph 13) that SMP systems are no more effective than district-based PR systems at providing constituency representation: Loewen x-exam, qq 125-132 and Exhibit "4" (p 95) [Reply Submissions of the Applicants (**Reply**), Tabs 2B and 2Bi]; also see Hodgson Affidavit, Exhibit "T" (Report of the Special Committee of the House of Commons on Electoral Reform ([ERRE Report](#))) at [25](#), [69](#), [77-80](#), [86-87](#) [Reply, Tab 2A]. And the evidence of experts for both sides confirms that "surrogacy" cannot make up for the lack of legislative representation of voters: Tolley Affidavit, Exhibit "C", ¶15 [Application for Leave to Appeal (**ALA**), Tab 3O(i)]; Urbinati x-exam, qq 216-224, 342-344 [ALA, Tab 3R].

<sup>6</sup> The representation design tools referenced by the Respondent at paragraph 14 – namely ethnic, geographic, linguistic and gender diversity in cabinet; federalism; district adjustments; party practices; and constitutional rules – can be incorporated into other electoral systems (including PR system), often at much greater levels than under SMP: LeDuc Reply, ¶5-6 [ALA, Tab 3P].

<sup>7</sup> *Reference re Prov. Electoral Boundaries (Sask.)*, [\[1991\] 2 SCR 158](#) at [183](#); LeDuc Reply, ¶6 [ALA, Tab 3P].

this Court continued: “This is not to suggest... that inequities in our voting system are to be accepted merely because they have historical precedent. History... has nothing to do with the specious argument that historical anomalies and abuses can be used to justify continued anomalies and abuses, or to suggest that the right to vote should not be interpreted broadly and remedially as befits *Charter* rights. Departures from the Canadian ideal of effective representation... will be found to violate s. 3 of the *Charter*.”<sup>8</sup> Here, the Applicants do not seek strict parity but rather seek to limit gross inequities of legislative representation between voters.

[6] At paragraphs 8 and 11 to 13, the Respondent mischaracterizes the choice between SMP and one of the many types of PR systems as simply involving a trade-off in values of comparable priority and importance. The application judge effectively found that PR electoral systems privilege (i) the fair and even representation of voters; and (ii) voter participation (as evidenced by their increased democratic satisfaction and electoral turnout). These are values clearly protected under s. 3. On the other hand, SMP privileges (i) political effectiveness; (ii) the promotion of regional interests, and (iii) accountability.<sup>9</sup> These values purportedly promoted by SMP are collective interests, to be balanced at the s. 1 stage rather than under the s. 3 analysis.<sup>10</sup>

### C. Section 15 prevents laws that undermine substantive equality

[7] On s. 15 of the *Charter*, the Respondent claims at paragraph 41 that that neither court below found any causal link between SMP and the underrepresentation of women and minorities. But as

<sup>8</sup> *Reference re Prov. Electoral Boundaries (Sask.)*, [1991] 2 SCR 158 at 183, 185, 187.

<sup>9</sup> *OSCJ Reasons*, ¶5-6, 10, 20-25, 27, 40-41, 49, 51-53, 56, 59, 64.

<sup>10</sup> *Figueroa v Canada (AG)*, 2003 SCC 37, ¶30-36, 120-169; *Frank v Canada (AG)*, [2019] 1 SCR 3, ¶26; *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68, ¶11; *Harvey v New Brunswick (AG)*, [1996] 2 SCR 876, ¶30. Furthermore, the judge’s claim that SMP better promotes regional interests and accountability than PR results from his misunderstanding of the ERRE Report (specifically, an incorrect reference to pages 7-14 and 16 of the Report). In reality, the Report expressly recognized that the PR systems best suited to Canada would readily protect “regional interests” and “strong, accountable local representation”; and that the failure to represent regional diversity is one of the central deficiencies of Canada’s SMP: *OSCJ Reasons*, ¶51; Hodgson Affidavit, Exhibit “T” (*ERRE Report*) at 7-14, 16, 25, 50, 55-57, 69, 77-80, 82-87, 91-92 [Reply, Tab 2A]; LeDuc Affidavit, ¶21-25 [ALA, Tab 3C].

the court of appeal observed, “everything depends on how causation is understood, and in particular what is required in order to establish it.”<sup>11</sup>

[8] Here, the application judge recognized the striking statistical disparity showing that countries with SMP elect disproportionately low percentages of women. And he agreed that the evidence “demonstrates that parties seem to become more amenable to female candidates where they will attain seats in direct proportion to their votes”.<sup>12</sup> His findings tracked the international expert consensus, the direct experience of countries like New Zealand (which switched from SMP to a mixed-member proportional system) and Australia (which has a majoritarian system for its lower house and PR for its upper house), and the overwhelming statistical evidence showing that the type of electoral system is perhaps “*the* most important” variable to explain cross-national differences in women’s representation in countries with positive gender attitudes.<sup>13</sup> The claim that SMP makes it harder to elect women and thus reduces their legislative representation (and, conversely, that PR makes it easier to elect women and increases their legislative representation) is wholly uncontentious. Even the two Respondent experts agreed it does.<sup>14</sup>

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<sup>11</sup> [ONCA Reasons](#), ¶72.

<sup>12</sup> [OSCJ Reasons](#), ¶28-29.

<sup>13</sup> Specifically, under SMP, elections are zero-sum games. A candidate from only one gender can win an election in a single-seat district, and parties overwhelmingly nominate men in the most winnable seats. Conversely, in PR countries where gender attitudes about women are positive, the availability of multiple seats in each district “strongly compels” parties to “balance the ticket” by nominating women, to appeal to the full electorate. PR allows a country’s positive attitudes about women (like in Canada and Scandinavian countries) to translate “more effectively” into the selection of female candidates. It also explains why countries using mixed-member proportional systems (like Germany and New Zealand) are more likely to elect women as list MPs (which uses PR rules) than as district MPs (which uses SMP rules): Bird Affidavit, ¶19-23, 33 [ALA, Tab 3D] and 73 [Reply, Tab 2C]; Bird Reply, ¶10-13 [ALA, Tab 3Q]; Bird x-exam, qq 70, 87-103, 161-171 [ALA, Tab 3V]; Carey Affidavit, ¶24-26 [ALA, Tab 3B]; LeDuc Affidavit, ¶31-35 [ALA, Tab 3C]; LeDuc Reply, ¶18-19 [ALA, Tab 3P]; Thomas x-exam, Exhibit “6”, pp 1-3, 6-7 [ALA, Tab 3T(i)]; Hodgson Affidavit, Exhibit “T” ([ERRE Report](#)) at 330-331 [Reply, Tab 2A].

<sup>14</sup> Loewen x-exam, q 50 [ALA, Tab 3S]; Thomas Affidavit, Exhibit “C”, p 19 [ALA, Tab 3N(i)]; Thomas x-exam, q 73 [ALA, Tab 3T].

[9] The application judge found that the legal threshold for causation was not met because SMP was not the “primary barrier” to women’s legislative representation and because rectifying SMP’s disincentives for the nomination of women was “a remedial social policy, not a legal remedy”.<sup>15</sup> This Court should decide whether SMP’s statistically and qualitatively proven impacts on the nomination of electoral candidates meet the s. 15 legal threshold by “contribut[ing] to” (ie, a “lower threshold that invites consideration of degree”) the underrepresentation of women in Parliament.<sup>16</sup>

[10] The Respondent also claims (at paragraph 43) that determining the proper standard of review to apply to the application judge’s findings on causation would be a “new issue”, raised for the first time before this Court. This is wrong on its face. Courts of appeal must always determine the standard of review to apply to an issue. More importantly, deciding what standard of review applies to findings of mixed fact and law in a constitutional appeal (such as the application judge’s finding that SMP’s harmful effects on the representation of women do not meet the s. 15 legal threshold for causation) is an issue on which courts need clarity. In *Société des casinos du Québec* (released after the Applicants filed their factum in the court of appeal), this Court held that findings of mixed fact and law made in connection with a constitutional question in administrative proceedings are subject to a correctness standard.<sup>17</sup> Since then, some courts have found that the correctness standard applies also in civil or criminal constitutional appeals;<sup>18</sup> other courts (and a dissent in this Court) have continued to apply the deferential standard found in *Housen v Nikolaisen*.<sup>19</sup> This Court should clarify what standard applies. Comprehensive unity in standard of review doctrines for constitutional questions, including questions of mixed fact and law, is preferable because the rationales that underwrite the doctrine in both constitutional and administrative fields are virtually identical.<sup>20</sup>

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<sup>15</sup> [OSCJ Reasons](#), ¶108-109.

<sup>16</sup> *R v Sharma*, [2022 SCC 39](#), ¶50; [ONCA Reasons](#), ¶72.

<sup>17</sup> *Société des casinos du Québec inc v Association des cadres de la Société des casinos du Québec*, [2024 SCC 13](#), ¶45, 92-97.

<sup>18</sup> *Jacob v Canada (AG)*, [2024 ONCA 648](#), ¶53; *R v Pike*, [2024 ONCA 608](#), ¶31.

<sup>19</sup> *Grandel v Government of Saskatchewan*, [2024 SKCA 53](#), ¶35, 57; *Amalgamated Transit Union, Local 113 v Ontario*, [2024 ONCA 407](#), ¶31-33 (but also see Nordheimer JA, dissenting, ¶191-194); *Ontario (AG) v Working Families Coalition (Canada) Inc*, [2025 SCC 5](#), ¶108-09.

<sup>20</sup> Anthony Sangiuliano & Mark Friedman, [“What is the Standard of Review for \(Mixed\) Constitutional Questions?”](#) (April 02, 2025), forthcoming, *UBC Law Review*, p 3.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 24<sup>th</sup> day of November, 2025.



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