

ONTARIO SUPERIOR COURT OF JUSTICE

B E T W E E N:

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

Applicants

- and -

ATTORNEY GENERAL OF CANADA

Respondent

APPLICATION UNDER Rule 14.05 of the *Rules of Civil Procedure* and the
Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*,
being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11

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SPRINGTIDE COLLECTIVE FOR DEMOCRACY SOCIETY**

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PART I – OVERVIEW

1. This case is about whether Canada’s highly disproportional method of translating votes into seats (called single member plurality (**SMP**) or, more colloquially, “first past the post” (**FPTP**)) violates ss. 3 and 15 of the *Charter*, by failing to provide effective representation to all Canadian voters and by discriminating against women and minorities.

2. Democratic theorists now agree that democracy requires “more than simply voting and... electing representatives”. It requires “[e]ffective or meaningful representation” of citizens in Parliament. This is provided through a representative who “support[s] and promote[s]” voters’ claims, ideas, and worldviews in Parliament, providing them with a “voice” in the deliberations of government. Having a “voice” also requires voters to “believe” that their representative is promoting their views. Conversely, “where our representatives are not committed to advocating for our ideas and claims, [we] may conclude that we do not have a voice in government.”¹

3. Parity of voting power is critical and must span the duration of a Parliament. Democracy is not merely “a system where people delegate their powers to representative” on election day; rather, it is a system where “citizens have an equal right to participate by voting” and, crucially, where the “voice[s] and vote[s]” of citizens carry “equal importance and political weight... from one election to the next.” As democratic theorist John Stuart Mill believed: “the basis of a democracy is that each citizen stands in a position of equality not just with respect to their right to vote, but also when it comes to having their voice heard and their positions considered.”²

4. This conception of democracy has been adopted by the Supreme Court of Canada in its s. 3 *Charter* jurisprudence. In the *Reference re Prov. Electoral Boundaries (Sask.)*, McLachlin CJC confirmed that s. 3 entitles citizens to be “represented in government”. Representation

¹ Urbinati Affidavit, ¶15-16, 36-51 [**Application Record (AR), Tab 8**]

² Urbinati Affidavit, ¶33, 45 [**AR, Tab 8**]

requires access to an elected representative who functions in a “legislative” role, by providing citizens with a “voice in the deliberations of government” (the representative also functions in an “ombudsman” role). “[E]ffective” representation requires parity of voting power. Where voting power is unduly diluted, a citizen’s “legislative power” is reduced, resulting in uneven and unfair representation. Deviations from voting power parity are permitted only to increase the “effective voice” of citizens in the legislative process (or the effective assistance from a representative in the ombudsman role). In *Dixon*, McLachlin CJBC (as she then was) confirmed that the majority of elected representatives “should represent the majority of the citizens entitled to vote”. Significant discrepancies may undermine the legitimacy of our system of government.³

5. Canada’s FPTP fails to provide voters with effective representation under s. 3 of the *Charter*. It leaves roughly half of all Canadian voters with little voice in the deliberations of Parliament, routinely allows a minority of voters to dominate the majority, arbitrarily violates the principle of voter parity, fails to represent significant minority views unless they are geographically concentrated, and discourages voter participation in general elections.

6. Canada’s FPTP also discriminates against women and minorities under s. 15 of the *Charter* by contributing to their significant underrepresentation in Parliament. The zero-sum nature of elections under FPTP incentivizes parties to place white men in most winnable ridings. Canada is increasingly falling well behind most comparable democracies on gender parity.

7. For all these reasons, countries worldwide are increasingly adopting electoral systems with proportional methods of translating votes to seats. Proportional representation (**PR**) systems operate according to the basic principles that legislators are elected in proportion to their percentage of the vote. PR’s broad usage worldwide in different political and social contexts

³ *Reference re Prov. Electoral Boundaries (Sask.)*, [1991] 2 SCR 158, p 183-185, 188; *Dixon v British Columbia (Attorney General)*, 1989 CanLII 248 (BC SC), p 30.

confirms that it provides stable, effective, accountable government. The adoption of a PR system in Canada would produce governments that represent virtually all voters, effectively represent minority views, respect the principle of majority rule, provide voters with choices close to their ideological preferences, encourage voter participation and satisfaction, and proportionally represent women and minorities in Parliament. Yet despite consistent recommendations from experts and citizens' assemblies, governments in power have rejected electoral reform for reasons of partisanship and entrenched interests. It is now solely up to this Court to strike down FPTP.

PART II – SUMMARY OF THE FACTS

A. Broad distinctions between majoritarian and PR electoral systems

8. **Majoritarian** electoral systems are typically “single-winner” systems, in which the sole representative of a district is the candidate with either the “plurality” or the “majority” of the votes.⁴ Under majoritarian systems, a substantial proportion of voters are represented by a representative for whom they have not voted. **FPTP** is the most common majoritarian system.

9. **PR** electoral systems are “multiple-winner” systems, in which districts elect multiple representatives, often from different political parties. Under PR systems, substantially all voters are represented by a representative for whom they have voted. PR systems are “very flexible” and can be designed to address a country’s particular political, social, or geographical demands. They are by far the predominant family of electoral systems in advanced democracies today, used in New Zealand, Norway, Sweden, Denmark, Finland, the Netherlands, Germany, Scotland, Wales, Ireland, Northern Ireland, Belgium, Spain, Portugal, and Switzerland. Variants include “**list PR**”, the “single transferable vote system” (**STV**), and “mixed member PR” (**MMP**).⁵ The Applicants

⁴ Carey Affidavit, ¶12-13 [AR, Tab 5]; Ferland Affidavit, Exhibit “C”, p 4 [AR, Tab 15C]; Urbinati Affidavit, ¶52 [AR, Tab 8]; Hodgson Affidavit, ¶3 [AR, Tab 2]. There are exceptions: Carey Affidavit, fn 1 [AR, Tab 5].

⁵ Carey Affidavit, ¶12-14, 32 [AR, Tab 5]; Ferland Affidavit, Exhibit “C”, p 5 [AR, Tab 15C]; Hodgson Affidavit, ¶33-43 [AR, Tab 2]; LeDuc Reply Affidavit, ¶5 [AR, Tab 22]; LeDuc Affidavit, ¶49 [AR, Tab 6]; Loewen x-exam,

do not advocate for any particular PR system, leaving it for Parliament to determine.

B. The expert consensus widely favours PR systems

10. According to Prof. Urbinati (an expert for the Applicants on “political representation” and “democratic theory”), it is the consensus of “democratic theorists” that PR systems are superior to FPTP because they more effectively, fairly, and inclusively represent all voters (including women, minorities, and disadvantaged groups).⁶ Prof. Carey (an expert for the Applicants on “electoral systems, constitutional design, and democratic representation”) notes that “political scientists” also “overwhelmingly prefer PR”, observing: “It is hard to think of another subfield of political science that shows this level of consensus.” Prof. Carey also documents the trend of countries abandoning FPTP for PR; conversely, no established parliamentary democracy has moved from some other electoral rule to FPTP. Of the 35 “fully democratic” countries in the world, only four (the UK and three former British colonies) still use FPTP.⁷

11. Prof. Larry LeDuc (an expert for the Applicants on “Electoral Systems” and “Political Behaviour”) observes that the consensus holds in Canada. The bodies mandated to recommend electoral reforms, such as the Spicer Commission (1990), the Law Commission (2004), and the Special Committee of the House of Commons (2016) have typically advocated for PR.⁸ As have citizens’ assemblies in BC (2004) and Ontario (2007). Yet because of entrenched interests and

q 38 [AR, Tab 28]. There are also “hybrid” or “mixed” systems, which combine features of majoritarian and PR systems. MMP, technically a hybrid system, is usually classified as PR system because of its proportional outcomes.

⁶ Urbinati Affidavit, ¶16, 53, 71 [AR, Tab 8].

⁷ Carey Affidavit, ¶3, 14 [AR, Tab 5]; Carey Reply Affidavit, ¶8-9; Ferland Affidavit, Exhibit “C”, p 15 [AR, Tab 15C].

⁸ The report of the Special Committee of the House of Commons (2016) recommended that Canada should develop a new electoral system “to minimize the level of distortion between the popular will of the electorate and the resultant seat allocations in Parliament”. This would mean moving to a PR system. The significant majority of individuals who presented evidence to the Committee (including dozens of expert witnesses) favoured PR and opposed FPTP: Hodgson Affidavit, Exhibit “T” (p 95, 291-295, 297-305) [AR, Tab 2T]; LeDuc Affidavit, ¶17 [AR, Tab 6].

partisanship, governments (whose electoral success are tied to FPTP) have resisted reforms.⁹

C. Canada's FPTP electoral system

12. No single legislative provision directly establishes Canada's FPTP system. Rather, FPTP is indirectly established through the operation of several provisions in the *Canada Elections Act*, [SC 2000, c 9](#), chiefly ss. [2\(1\)](#), [24\(1\)](#), and [313](#).¹⁰ Section 24(1) provides that there is one returning officer for each of Canada's 338 electoral districts. Section 313(1) of the *Act* provides that after the validation of an election's voting results, the returning officer for an electoral district "shall declare elected the candidate who obtained the largest number of votes [ie, only that candidate]." The definition of an "electoral district" in s. 2(1) confirms that these are single-member districts. In other words, the *Act* creates an electoral system in which each district elects only one MP, namely the candidate who receives the plurality of the vote.

D. FPTP in Canada fails to provide effective representation in Parliament for the majority of individual voters whose votes do not translate into Parliamentary seats

13. Under both FPTP and PR, elected representatives provide similar levels of non-partisan constituency services for their voters (such as help with government programs).¹¹ But under FPTP, representatives fail to provide any "*political* representation" (or "issue representation") at the constituency level to voters with different political affiliations.¹² This leaves these large numbers of voters with significantly reduced voices in the deliberations of government.

⁹ LeDuc Affidavit, ¶2, 44, 48-50 [AR, Tab 6]; Hodgson Affidavit, ¶40 [AR, Tab 2].

¹⁰ Other sections (or laws) may need to be amended to implement a new electoral system, such as [s. 68\(1\)](#) of the *Act* (which bars parties from nominating more than one candidate per riding).

¹¹ LeDuc Affidavit, ¶14 [AR, Tab 6]; Loewen Affidavit, Exhibit "C", p 5-6 [AR, Tab 16C]; Loewen x-exam, Exhibit "4" (p 95) [AR, Tab 28D]; Boyer Affidavit, ¶4-5 [AR, Tab 11]. Prof. Ferland (a Respondent expert) observes that it is "generally assumed" that constituency services are better under FPTP, because representatives cover districts with smaller geographical area: Ferland Affidavit, Exhibit "C", p 9 [AR, Tab 15C]. But Prof. Loewen (another Respondent expert) dispels this myth, confirming that: 1. The level of constituency services provided by representatives is similar or perhaps greater in multi-member districts (ie, PR) than single-member districts (ie, FPTP); and 2. The level of representation for voters is roughly the same in districts with large and small populations: Loewen x-exam, q 125-132, 367-378, Exhibit "4" (p 95), and Exhibit "8" [AR, Tab 28, 28D, 28H].

¹² LeDuc Affidavit, ¶14 [AR, Tab 6]; Loewen Affidavit, Exhibit "C", p 5-6 [AR, Tab 16C].

14. In Canada, millions of voters every election cast votes that do not translate into legislative seats (often called “wasted votes” in the academic literature). This characteristic of FPTP systems has long been criticized by political scientists. In the 2021 Canadian election, for example, a majority of 52.2% of voters (8.9 million voters) cast votes for candidates who did not get elected; they now find themselves represented by an MP who is unaligned with their political preferences.¹³ This is not a ‘fringe party’ problem. In fact, in the 2019 and 2021 elections, the largest group of wasted votes was cast for the Conservative Party, who won a larger share of the popular vote than the Liberal Party but obtained less seats only because Liberal votes were significantly more effective. Meanwhile, the Liberal Party’s wasted votes in the Prairies meant few Liberal MPs were elected from that region, limiting its ability to craft a balanced cabinet.¹⁴

15. Profs LeDuc and Urbinati conclude that voters who are not represented by an MP aligned with their political preferences have “significantly reduced voices in government” compared to those who voted for their MP.¹⁵ Prof. LeDuc and several lay affiants – who have voted or competed as candidates for national parties from across the political spectrum – confirm that the policy and legislative preferences of these voters are typically neither voiced by their MPs, who have in Canada increasingly voted along partisan lines, nor reflected in committee deliberations or Parliamentary votes.¹⁶ Some voters in “safe ridings” have rarely or never been represented by

¹³ Hodgson Reply Affidavit, ¶5 [AR, Tab 20]; LeDuc Affidavit, ¶14 [AR, Tab 6]; Hodgson Supplementary Affidavit, ¶5 [AR, Tab 3]; Hodgson Affidavit, ¶18-19 [AR, Tab 2]. Similarly, MPs in the large majority of ridings were elected with less than 50% of the votes in the riding: Hodgson Supplementary Affidavit, ¶4 [AR, Tab 3].

¹⁴ Hodgson Supplementary Affidavit, ¶5 [AR, Tab 3]; Hodgson Affidavit, ¶18-20 [AR, Tab 2].

¹⁵ LeDuc Affidavit, ¶14 [AR, Tab 6]; Urbinati Affidavit, ¶39-45, 47-51 [AR, Tab 8].

¹⁶ LeDuc Affidavit, ¶14 [AR, Tab 6]; Boyer Affidavit, ¶4, 8-13 [AR, Tab 11]; Dyck Affidavit, ¶9-12 [AR, Tab 10]; Blair Affidavit, ¶7-9 [AR, Tab 12]; Hunter Affidavit, ¶11-12, 15 [AR, Tab 9]; Laghaei Affidavit, ¶12-13 [AR, Tab 14]; Santoro Affidavit, ¶10 [AR, Tab 13]. Prof. Loewen (a Respondent expert) is generally dismissive of voters, whom he characterizes as “uninformed,” “poorly motivated and deeply biased,” “not good at assigning blame and credit”, and “make up their public opinions off the top of their heads”: Loewen Affidavit, Exhibit “D”, p 31 [AR, Tab 16D].

an MP for whom they voted. The FPTP system is particularly unfair to them.¹⁷

16. Because MPs provide political representation only to those sharing their political views (ie, they cannot speak and vote both ways on bills and motions),¹⁸ other voters in the district are forced to hope for “surrogate” representation. Surrogate representation occurs where a representative speaks for a constituency in another electoral district (eg, where an MP who speaks for small business owners in his or her district also represents the interests of small business owners elsewhere).¹⁹ Profs Tolley (a Respondent expert) and Urbinati conclude (and the evidence of lay affiants confirms) that surrogate representation is considered “second best” and “not a substitute” for direct representation, since voters have no control over surrogates.²⁰

17. Conversely, under PR systems, the vast majority of voters have an MP for whom they voted, enabling the legislature to better collectively reflect and represent their diversity of views and orientations.²¹ For this reason, according to Prof. Urbinati, democratic theorists favours PR, particularly in a pluralistic state with “various minorities, voices, and social interests”.²²

18. Prof. Hodgson (President of Applicant Fair Voting BC) and colleagues have developed three simple metrics to quantify and illustrate the lack of voter representation under FPTP compared to the three main PR systems.²³ Compared to Norway (list PR), New Zealand (MMP),

¹⁷ Blair Affidavit, ¶2 [AR, Tab 12]; Hunter Affidavit, ¶2 [AR, Tab 9]; Hodgson Supplementary Affidavit, ¶12 [AR, Tab 3]; Hodgson Affidavit, ¶116-124 [AR, Tab 2]; LeDuc Affidavit, ¶15 [AR, Tab 6].

¹⁸ Boyer Affidavit, ¶8-11 [AR, Tab 11].

¹⁹ Urbinati x-exam, q 206, 216-224, 342 and Exhibit “E” (p 397) [AR, Tab 24, 24E]; Loewen Affidavit, Exhibit “C”, p 3-4, 6 [AR, Tab 16C].

²⁰ Urbinati x-exam, q 217-224, 249, 342-344 [AR, Tab 24]; Boyer Affidavit, ¶12 [AR, Tab 11]; Hunter Affidavit, ¶11-12 [AR, Tab 9]; Tolley Affidavit, Exhibit “C”, ¶15 [AR, Tab 18C].

²¹ LeDuc Affidavit, ¶14 [AR, Tab 6]; Hodgson Affidavit, ¶34 [AR, Tab 2]; Hodgson Reply Affidavit, ¶3 [AR, Tab 20]; Boyer Affidavit, ¶13 [AR, Tab 11].

²² Urbinati Affidavit, ¶53, 57-58, 62, 64-65 [AR, Tab 8].

²³ Hodgson Affidavit, ¶71 [AR, Tab 2]. The Respondent may seek to characterize Prof. Hodgson’s evidence as opinion evidence. Prof. Hodgson’s affidavits relay observations and calculations drawn from publicly available information about elections. To the extent he provides opinions, these are drawn from his observations as a regular voter: *R v Graat*, [1982] 2 SCR 819 at 835. The Respondent has directly responded to his evidence through expert evidence from Prof. Loewen. Ultimately, whether the Court attributes any weight to Prof. Hodgson’s evidence, it is consistent with the expert evidence and a common sense understanding of the distinctions between FPTP and PR.

and Ireland (STV), Canada has: 1. far fewer voters represented by an MP for whom they voted (“Representation” metric); 2. markedly more variation in voting power (“Legislative Power”²⁴ metric), with far higher proportions of voters having no Legislative Power at all (because they are not represented by an MP for whom they voted); and 3. markedly higher deviations from parity in the distribution of Legislative Power, since relatively few voters are responsible for the election of most Canadian MPs (“Legislative Power Disparity Index”). Compared to disparities in riding sizes, which are typically plus or minus 25%, disparities in legislative power are frequently on the order of plus or minus 100% – and the situation is getting worse.²⁵

19. Prof. Loewen (a Respondent expert) terms Prof. Hodgson’s metrics “uninformed”. He speculates that “[t]here may well be other PR systems which perform much worse on the metrics” (though he does not identify any).²⁶ This Court should accept that the metrics are illustrations of common sense. PR systems waste far fewer votes than FPTP in Canada, which directly impacts legislative makeup.²⁷ Put differently, the translation of votes to seats under Canada’s FPTP means that half the voters have an amplified voice in Parliament, because they have an MP who advocates for their political claims; while half the voters have a diminished voice, because their MP does not and cannot advocate for their political claims.

E. FPTP in Canada creates a disproportional and unrepresentative Parliament, which undermines the representation of individual voters and political minorities

20. At the aggregate level, Profs Ferland (a Respondent expert) and Carey agree that citizen representation is favoured when the translation of votes to seats is proportional. Yet because of

²⁴ Prof. Hodgson adopted the term “legislative power” from the decision in *Reference re Prov. Electoral Boundaries (Sask.)*, [1991] 2 SCR 158; Hodgson Affidavit, ¶¶63-66, 77 [AR, Tab 2]; Hodgson Reply Affidavit, ¶7 [AR, Tab 20].

²⁵ Hodgson Affidavit, ¶¶63-65, 70-102 [AR, Tab 2]; Hodgson Supplementary Affidavit, ¶¶15-17, 19-20, 22, 24, 25, 27 [AR, Tab 3]; *Electoral Boundaries Readjustment Act*, RSC 1985, c E-3, s. 15.

²⁶ Loewen Affidavit #2, Exhibit “A”, p 1, 6 [AR, Tab 19A].

²⁷ Hodgson Reply Affidavit, ¶¶8-9 [AR, Tab 20].

FPTP, Canada has one of the world's more disproportional Parliaments.²⁸ This violates three democratic principles: 1. the principle of voter parity; 2. the principle of majority rule; and 3. the principle that Parliament should reflect the electorate. The violation of these principles leaves many voters and groups with significantly reduced voices in the deliberations of government.

21. First, Canada's disproportionate Parliament violates the principle of voter parity by inflating the value of a vote for a larger or regionally-based party at the expense of a vote for a smaller national party. In Canada, the Liberal and Conservative Parties typically receive significant winners' bonuses, while the Bloc Québécois is systematically overrepresented. Conversely, the NDP, Green Party, and PPC are systematically underrepresented, reflecting the arbitrary reality that only geographically-concentrated minorities benefit from FPTP.²⁹

22. The way the votes split from one election to the next can dramatically shift electoral results and reduce accountability for individual voters. From 1979 to 1996, the NDP lost shares of the vote across each of five provincial elections in BC, slipping from 46% to 39%, yet went from a minority party in opposition to a single party majority.³⁰ Nationally, the Conservative Party's share of the vote decreased from 43% in 1988 to 16% in 1993, while its seats decreased from 169 to 2, excluding it from official party status in the House of Commons. Meanwhile, the Bloc Québécois won 54 seats despite obtaining only 13.5% of the votes; while the Reform Party won 52 seats despite obtaining only 18.7% of the votes.³¹ Finally, four of Canada's last 22 elections (1957, 1979, 2019, and 2021) have produced a "perverse" outcome, called a "wrong

²⁸ Ferland Affidavit, Exhibit "C", p 5-6 [AR, Tab 15C]; Carey Affidavit, ¶17-18 [AR, Tab 5]; LeDuc Affidavit, ¶16-17 [AR, Tab 6]. A proportional Parliament would require moving to districts of magnitude 4 to 8.

²⁹ LeDuc Affidavit, ¶20 [AR, Tab 6]; LeDuc Reply Affidavit, ¶9 [AR, Tab 22]; Urbinati Affidavit, ¶74 [AR, Tab 8]. Because it does not gain many seats, the media ignores the Green Party, making it more difficult for its candidates to reach voters: LeDuc Affidavit, ¶30 [AR, Tab 6]; Dyck Affidavit, ¶14 [AR, Tab 10].

³⁰ Carey Reply Affidavit, ¶7; Carey Affidavit, ¶19 [AR, Tab 5]; Hodgson Affidavit, ¶30 [AR, Tab 2].

³¹ Boyer Affidavit, ¶14 [AR, Tab 11]; https://en.wikipedia.org/wiki/1993_Canadian_federal_election.

winner” election, where the party with the most votes did not gain the most Parliamentary seats.³² These outcomes “clearly violate the principle that all votes should count equally”.³³

23. Second, the disproportionality of votes to seats under Canada’s FPTP violates the principle that a majority “will have the power to make decisions binding upon the whole” (**majority rule**). Under FPTP, a legislative majority may be formed without the support of a majority of voters. This leads to a perverse effect where the legislative majority, comprised of a minority of voters, deprives the popular majority of power.³⁴ In the past decades, Canada has moved away from majority rule. From Confederation until 1921, federal elections were contested between two political parties. All 13 parliaments in that time had majority governments. On all but one occasion, they were led by parties who won over 50% of the popular vote. Since 1921, however, a broader range of parties have contested elections. Only three of the 30 elections since then have produced Parliaments where the winning party’s candidates won over 50% of the popular vote (and only once since 1962). Yet the winning party has held majority power close to 67% of the time (~41 of the 61 years).³⁵ In PR, given the close correspondence between vote and seat shares, majority rule is “significantly more common” and deviations significantly smaller than under FPTP.³⁶

24. Third, the disproportionality of votes to seats under FPTP violates the principle that Parliament should mirror the electorate. Under FPTP, the incentive to nominate competitive candidates in “single-winner systems” prods parties “toward homogeneity in nominees.” This

³² LeDuc Affidavit, ¶19 [AR, Tab 6]; Hodgson Supplementary Affidavit, ¶10 [AR, Tab 3].

³³ Carey Affidavit, ¶20-23 [AR, Tab 5].

³⁴ Hodgson Affidavit, fn 9 [AR, Tab 2]; Urbinati Affidavit, ¶35, 56, 61, 68 [AR, Tab 8].

³⁵ Hodgson Affidavit, ¶27 and Exhibit “T” (p 22 and fn 164) [AR, Tab 2 and 2T]; Hodgson Supplementary Affidavit, ¶9 [AR, Tab 3]. Canada also routinely violates “majority rule” at the individual riding level, given that a strong majority of candidates do not win 50% of the votes. (Some individual candidates have recently won with less than 30% of the vote.) Before 1921, candidates typically won with over 50% of the votes: Boyer Affidavit, fn 2 [AR, Tab 11]; Hodgson Supplementary Affidavit, ¶3-4 [AR, Tab 3]; LeDuc Affidavit, ¶44 [AR, Tab 6].

³⁶ Urbinati Affidavit, ¶55 [AR, Tab 8]; Loewen Affidavit, Exhibit “C”, p 6 [AR, Tab 16C]; Hodgson Reply Affidavit, ¶11-12 [AR, Tab 20].

typically yields “dramatic over-representation of the most-advantaged characteristics, and corresponding under-representation of those that are more socially marginalized and disadvantaged.” Conversely, PR generates incentives for the formation of lists that more accurately map society, including the representation of marginalized groups.³⁷

25. Prof. Ferland confirms that, under PR, representatives better match the diversity of constituents within their district. Consequently, a “diversity of *voices*” are represented in the democratic process. Prof. Urbinati confirms that the inclusion more of diverse voices, including those of minorities and disadvantaged groups, grants Parliament “more legitimacy”, while providing for more “inclusive” and “consensual” laws, “more reflective of the population”. The adoption of PR in Canada would expand the range of public debate to include more diverse perspectives, some of which already have broad public support.³⁸

26. Some Respondents claim that a shift to PR in Canada could make it easier to elect representatives of small radical right parties.³⁹ But as Profs Carey and Ferland both agree, the adoption of a PR system with small to moderate district magnitude, in the range of 4 to 8 seats per district, would prevent these small parties from being represented in Parliament, since it would require them to win 10% to 20% support within their districts.⁴⁰ Of course, larger radical

³⁷ Carey Affidavit, ¶24-25 [AR, Tab 5].

³⁸ Ferland Affidavit, Exhibit “C”, p 5, 10 [AR, Tab 15C]; Urbinati Affidavit, ¶57-58, 60 [AR, Tab 8]; LeDuc Affidavit, ¶29-30 [AR, Tab 6].

³⁹ Tolley Affidavit, Exhibit “C”, ¶69-70 [AR, Tab 18C]; Ferland Affidavit, Exhibit “C”, p 8-9 [AR, Tab 15C]. Small radical right parties receive roughly similar shares of the vote under PR and majoritarian systems. The proportional translation of votes to seats under PR makes it easier for them to gain small numbers of Parliamentary seats but there is no evidence that gaining these seats will increase their popular support. Empirically, it is also unclear whether it is better to keep small radical right parties outside or inside the legislature. Keeping them outside may encourage them to “capture” larger parties (like the Republic Party in the US) and pull them in extreme directions. Citing the Austrian People’s Party, Prof. Ferland did claim in cross-examination that the introduction of radical right parties in the legislature can result in the normalization of radical right discourse. But the Austrian People’s Party is not a small radical right party. It is a large radical right party that has won between 24% and 43% of the votes over the past 40 years. It would be an influential party under any electoral system (and might well gain majority support under a FPTP electoral system): Ferland x-exam, q 122-129, 141-154, 175, 177-184 and Exhibits “2” and “3” [AR, Tab 26, 26B, 26C]; https://en.wikipedia.org/wiki/Austrian_People%27s_Party.

⁴⁰ Carey Reply Affidavit, ¶4 [AR, Tab 21]; Ferland x-exam, q 155-157 [AR, Tab 26].

right parties, like the Front National in France, the Republican Party in the US, and the Reform Party in Canada (which can be characterized as such because of its “xenophobic appeal to the public”) can gain a significant and sometimes disproportionately large number of seats in majoritarian countries.⁴¹

27. Prof. Loewen is the sole expert to support Parliament’s disproportionality. First, he claims that “disproportionate” outcomes enable “greater representation for smaller communities.” But as plainly noted by Prof. LeDuc, FPTP “does not systematically overrepresent smaller communities or minorities; rather, it overrepresents pluralities, with the effect of frequently shutting out smaller communities and minorities who are not dominant in specific ridings.”⁴²

28. Second, Prof. Loewen notes that even a proportional Parliament will be disproportional in its translation of seats “into cabinet positions”. But this disproportionality is a function of majority rule (where 50% of the voters have the power to make decisions). In any event, the translation of seats into cabinet posts is significantly less disproportional under PR than FPTP.⁴³

F. FPTP in Canada reduces the participation and satisfaction of voters

29. Prof. Carey deposes that the empirical evidence “overwhelmingly” demonstrates that electoral turnout is lower in FPTP countries than PR countries. Under FPTP, many voters are less motivated to cast a ballot because there is little chance their votes could make a difference;

⁴¹ Ferland x-exam, q 149-150 174-175 177-178 [AR, Tab 26].

⁴² Loewen Affidavit, Exhibit “C”, p 3 [AR, Tab 16C]; LeDuc Reply Affidavit, ¶4-5 [AR, Tab 22]. More generally, Prof. LeDuc disagreed that smaller communities should be overrepresented, opining that they should be fairly represented. But in any event, PR’s flexibility allows it to overrepresent minorities.

⁴³ Loewen Affidavit, Exhibit “C”, p 7-8 [AR, Tab 16C]; Loewen x-exam, q 147, 149 [AR, Tab 28]. The current Liberal government, for example, received 33% of the votes but holds 100% of cabinet portfolios (a ratio of 3:1). Conversely, a PR system with a governing coalition will typically receive around 50% of the vote and hold 100% of the cabinet portfolios (a ratio of 2:1). According to Prof. Loewen, it is “always the case” that multi-party coalitions under PR will more proportionally allocate cabinet portfolios than a single-party cabinet under FPTP. The allocation of cabinet seats between coalition partners typically follows “Gamson’s Law”, which posits that a coalition partner’s cabinet portfolios is proportional with the weight of seats that it contributes to the coalition. Prof. Ferland confirmed that this ratio usually holds true except for the smallest coalition partner, which usually obtains a premium: Ferland x-exam, q 214-215, 218 [AR, Tab 26].

conversely under PR, almost all votes count toward the election of a representative.⁴⁴ Prof. LeDuc, who has written and worked on the Canadian decline in voter turnout (including for *Elections: Canada*), confirms that in “industrial democracies”, PR systems produce a higher turnout. He concludes that changing Canada’s voting system to PR would “very likely” increase turnout “by a few percentage points over time”. His evidence is supported by the lay affiants, some of whom confirm they did not or may no longer vote and by an academic paper written by Prof. Hodgson, which finds that voters’ likelihood of voting declines if they perceive their candidate or party is less likely to win election.⁴⁵

30. Prof. Loewen concedes that turnout is “marginally higher on average under PR systems” and cites a study that finds turnout under PR systems is “roughly three percentage points higher than turnout under other systems”. He also observes that competitive races increase turnout by a few percentage points.⁴⁶ Prof. Ferland claims that the relationship between higher levels of turnout under PR compared to majoritarian systems is “very weak” (though he does not opine on the studies of industrialized democracies discussed by Prof. LeDuc).⁴⁷

31. Related to turnout, Prof. LeDuc observes that democratic dissatisfaction is high amongst Canadian voters, in significant part for reasons related to Canada’s FPTP electoral system. Overall, satisfaction with democracy is lower in FPTP “winner-takes-all” systems than in consensus-based PR democracies; and disproportionality affects voters’ democratic satisfaction and perception of fairness. The gap in democratic satisfaction between winners and losers of elections is also smaller under PR systems than under FPTP. Anglo-Saxon democracies, specifically, face an “acute crisis of democratic faith” – aside from New Zealand, the lone

⁴⁴ Carey Affidavit, ¶36-38 [AR, Tab 5].

⁴⁵ LeDuc Affidavit, ¶4, 9, 38, 41 [AR, Tab 6]; Santoro Affidavit, ¶7 [AR, Tab 13]; Hunter Affidavit, ¶19 [AR, Tab 9]; Hodgson Affidavit, ¶108-115 [AR, Tab 2].

⁴⁶ Loewen Affidavit, Exhibit “C”, p 12-13 [AR, Tab 16C]; LeDuc Affidavit, ¶40 [AR, Tab 6].

⁴⁷ Ferland Affidavit, Exhibit “C”, p 15 [AR, Tab 15C].

member of this group with elections by proportional representation.⁴⁸

32. Similarly, Prof. LeDuc notes that while “strategic voting” occurs under FPTP and PR, “it has more negative consequences under FPTP”, leading “to disengagement from the electorate.”⁴⁹

The evidence from lay affiants confirms that voters are dissatisfied with their wasted votes, as well as with the pressure to vote strategically for a candidate they don’t support.⁵⁰ Prof. LeDuc concludes that by switching to a PR system, levels of satisfaction would “likely” increase.⁵¹

33. Prof. Loewen concedes that the literature largely supports Prof. LeDuc’s conclusions on satisfaction. Referring to a study by Plescia *et al.*, however, Prof. Loewen claimed that the satisfaction penalty for disproportional outcomes exists only among “those who vote for small parties” and that the causal effect of a disproportional outcome is “notably small”. Prof. Loewen was confronted with the paper in cross-examination, which in fact confirms that 1. voters of “large parties” (just like voters of small parties) are dissatisfied with a disproportional conversion of votes to seats; and that 2. the effect on voters is “rather strong” (and not “notably small”).⁵²

34. Prof. Loewen also claimed that his own recent paper provides “contradictory” evidence

⁴⁸ LeDuc Affidavit, ¶36-38 [AR, Tab 6]; Carey Affidavit, ¶42 [AR, Tab 5]; Ferland Affidavit, Exhibit “C”, p 16 [AR, Tab 15C]. Prof. Loewen presented turnout and satisfaction data about New Zealand out of context: see LeDuc Reply Affidavit, ¶14-19 [AR, Tab 22].

⁴⁹ LeDuc Affidavit, ¶39 [AR, Tab 6]; Ferland Affidavit, Exhibit “C”, p 7 [AR, Tab 15C].

⁵⁰ Blair Affidavit, ¶4 [AR, Tab 12]; Laghaei Affidavit, ¶9-10 [AR, Tab 14]; Santoro Affidavit, ¶8-12 [AR, Tab 13]; Dyck Affidavit, ¶13 [AR, Tab 10]; Hunter Affidavit, ¶19 [AR, Tab 9].

⁵¹ LeDuc Affidavit, ¶37 [AR, Tab 6].

⁵² Loewen Affidavit, Exhibit “C”, p 12 [AR, Tab 16C]. Specifically, the paper states: “In terms of satisfaction with the conversion of votes into seats, ...even though large parties’ voters are advantaged by the disproportional rules they still prefer proportional rules. Overall this suggests that disproportional rules make voters less satisfied: large parties’ voters especially are not simply ‘delighted voters’ that disregard how votes have been converted into seats. They want a fair system and they do not like a disproportional system, even when disproportionality advantages their party... This is a rather strong effect... This suggests that people care about the ‘fairness’ of the voting system – that is, most people support the view that a party with let us say 20 per cent of the vote should have about 20 per cent of the seats”: Loewen x-exam, Exhibit “5” (p 743-744) [AR, Tab 28E]. When confronted with these passages in cross-examination, Prof. Loewen prevaricated. On the “rather strong” effect, he claimed: “I don’t know what that means empirically and ontologically that they are strong effects” and “I think it’s at 20 percent of the size of the effect. It’s relatively meager”: Loewen, x-exam, q 240, 259-264 [AR, Tab 28]. On the dissatisfaction of “large parties’ voters”, he implied that to determine democratic satisfaction, it wasn’t relevant to assess whether voters were satisfied with the way the votes are converted into seats, although he ultimately conceded that “it is certainly clear that Plescia *et al* in that paper demonstrate that people like proportional outcomes”: Loewen, x-exam, q 247-259 [AR, Tab 28].

about democratic satisfaction in countries with PR or FPTP.⁵³ In cross-examination, it was revealed that far from being “contradictory”, Prof. Loewen’s paper concludes that the outcomes deemed most democratic are those most likely achieved in a proportional system (including MMP). Conversely, the outcomes deemed least democratic are those of countries that use a plurality/majority electoral system (eg, France and UK) or where district magnitude (like in Spain) facilitates the formation of minority single-party governments much like Canada’s current government.⁵⁴ Prof. Loewen was ultimately forced to concede that the paper was not “contradictory” but rather provided “additional” evidence.

35. On the issue of dissatisfaction, Prof. Ferland is the lone dissenter, claiming that the finding that citizens are on average more satisfied with the functioning of democracy under PR than majoritarian systems is “not robust” and that his own research reveals otherwise.⁵⁵

Ultimately, however, this Court should conclude that the full body of evidence is consistent with Prof. LeDuc’s conclusions that changing Canada’s voting system from FPTP to PR would increase democratic satisfaction and turnout by a few percentage points over time.

G. FPTP in Canada contributes to the underrepresentation of women in Parliament

36. With respect to women’s representation in Parliament, Canada’s world rank has dropped

⁵³ Loewen Affidavit, Exhibit “C”, p 12 [AR, Tab 16C]. In fact, Prof. Loewen accused Prof. LeDuc of “advocating for a position” by not “highlight[ing]” or “putting on the table” this contradictory paper. However, in cross-examination, he was forced to apologize to Prof. LeDuc since the paper was published one year after Prof. LeDuc submitted his affidavit: Loewen x-exam, q 259, 266-270 [AR, Tab 28].

⁵⁴ Loewen x-exam, q 286-296, 306, 322-339 [AR, Tab 28]; LeDuc Reply Affidavit, ¶10 [AR, Tab 22]. In cross-examination, Prof. Loewen: 1. had significant difficulty conceding that the most favoured democratic outcome is “unlikely to be achieved in a majoritarian system in which the typical outcome is a single-party government where the governing party has about 35%-40% of the vote” – ultimately claiming that “I don’t like the formulation of the second sentence” (the sentence was read directly from his paper); and 2. claimed that to achieve the most favourable outcomes, you “have to exclude small parties”, which requires “a certain degree of disproportionality” – though he was forced to concede that the Netherlands, which has a single national district of 150 representatives (see Hodgson Affidavit, ¶37 [AR, Tab 2]) and a “very low effective vote threshold” (and therefore one of the highest degrees of proportionality in the world), ranked second in his study.

⁵⁵ Ferland Affidavit, Exhibit “C”, p 16 [AR, Tab 15C].

from 16th in 1997, to 52nd in 2021, to 61st today.⁵⁶ Comparative scholars agree that electoral systems are “an important—if not *the* most important—variable” to explain cross-national differences in women’s representation. The evidence is stark: among established Western democracies, Canada as of 2021 (30% women in Parliament), ranked behind New Zealand (48%, MMP electoral system), Sweden (47%, list PR), Finland (46%, list PR), Norway (44%, list PR), Spain (44%, list PR), Belgium (42%, list PR), Switzerland (42%, list PR), Portugal (40%, list PR), Austria (40%, list PR), Denmark (40%, list PR), Iceland (40%, list PR), France (40%, majoritarian), Italy (36%, list PR), the UK (34%, majoritarian), the Netherlands (33%, list PR), Luxembourg (32%, list PR), Germany (31%, MMP), and Australia (31%, majoritarian), ranking ahead of only the US (23%, FPTP), Ireland (23%, STV), and Greece (22%, list PR).⁵⁷

37. Profs Bird, LeDuc, Carey, and even Loewen⁵⁸ agree that by incentivizing parties to run women in winnable seats, the adoption of PR in Canada would contribute to increase the share of women in Parliament – similarly to New Zealand following its electoral reform 25 years ago.⁵⁹ (Prof. Thomas, a Respondent expert, is the sole outlier; her evidence will be addressed below.)

38. There are two main reasons why PR would increase women’s representation in Canada’s Parliament.⁶⁰ First, under FPTP, elections are zero-sum games. A candidate from only one gender can win an election, and parties overwhelmingly nominate men in the most winnable seats.

⁵⁶ Bird Affidavit, ¶9, 19 [AR, Tab 7]; Thomas Affidavit, Exhibit “G” (p 153) [AR, Tab 17G]; <https://data.ipu.org/women-ranking?month=5&year=2023>.

⁵⁷ Thomas x-exam, Exhibit “6” (p 1-2) [AR, Tab 32F]; Bird Affidavit, ¶19-21 [AR, Tab 7]. In countries using MMP, women are also more likely to be elected as list MPs (which uses PR rules) than district MPs (which uses FPTP rules): Bird Affidavit, ¶21 [AR, Tab 7].

⁵⁸ In the context of his testimony to the House of Commons Special Committee on Electoral Reform, Prof. Loewen unequivocally stated that “electoral reform [in Canada] would likely increase gender balance in our Parliament. This is an unalloyed good.” He did not mention the representation of women in his expert report: LeDuc Reply Affidavit, ¶19 [AR, Tab 22]; Loewen x-exam, q 50 [AR, Tab 28].

⁵⁹ Bird Affidavit, ¶9 [AR, Tab 7]; Bird x-exam, q 51-57 [AR, Tab 34]; LeDuc Affidavit, ¶35 [AR, Tab 6]; Carey Affidavit, ¶26 [AR, Tab 5]; LeDuc Reply Affidavit, ¶19 [AR, Tab 22].

⁶⁰ The best way to significantly increase women’s representation in Canada would be to adopt a PR system with statutory quotas. Quotas can be more easily and effectively implemented in PR systems: Bird Affidavit, ¶28-32, 34, 76-77 [AR, Tab 7]; Bird x-exam, q 139-151 [AR, Tab 34]; Thomas x-exam, q 67, Exhibit “1” (p 379), Exhibit “2” (p 165), and Exhibit “6” (p 2, 5) [AR, Tab 32, 32A, 32B, 32F].

Conversely, in a PR country where gender attitudes about women are relatively positive, parties have incentives to run women on balanced tickets to appeal to the full electorate.⁶¹ Even Prof. Thomas concedes that multimember districts in PR “makes it easier to elect women” because people “don’t mind” giving additional seats to women.⁶² In Canada, attitudes about women are generally positive (as in European and Scandinavian PR countries, which elect high numbers of women). Indeed, “there is little or no evidence of voter bias against female candidates” in Canada. It follows that the introduction of PR “would likely raise the share of elected women”.⁶³

39. Second, PR creates a “contagion” effect, in which the success of small leftist parties that promote women causes larger parties to emulate them by nominating more women.⁶⁴ This contagion effect was “significant” in increasing women’s representation in New Zealand following its switch from FPTP to MMP both in immediate terms, because the parties underrepresented under FPTP were those that ran more gender-balanced slates, and in the longer term, because the success of parties that elect more women (which were underrepresented under FPTP) led other parties to follow suit over time.⁶⁵ In Canada, Prof. Bird would expect the effect to be significant as well, since small left parties (particularly the NDP) are underrepresented relative to their vote share and have a stronger record of nominating women; PR would increase their competitiveness and pressure the larger parties to similarly balance their candidate slates.⁶⁶

⁶¹ Carey Affidavit, ¶24-26 [AR, Tab 5]; LeDuc Affidavit, ¶34 [AR, Tab 6]; Thomas Affidavit, Exhibit “C”, p 19 [AR, Tab 17C]; Thomas x-exam, q 73 and Exhibit “6” (p 2-3, 6-7) [AR, Tab 32, 32F]; Bird Affidavit, ¶20-23 [AR, Tab 7]; Bird x-exam, q 99-103 [AR, Tab 34]. Technically, the distinction isn’t between FPTP and PR, but between systems with multimember districts and single-member districts: Bird Affidavit, ¶20-21 [AR, Tab 7].

⁶² Thomas x-exam, q 73, 145 [AR, Tab 32]; Thomas Affidavit, Exhibit “C”, p 19 [AR, Tab 17C].

⁶³ Bird Affidavit, ¶9, 20 [AR, Tab 7]; Bird x-exam, q 101-102 [AR, Tab 34].

⁶⁴ Bird Affidavit, ¶33 and fn 3 [AR, Tab 7]; Bird Reply Affidavit, ¶10-13 [AR, Tab 23]; Thomas Affidavit, Exhibit “C”, p 21 [AR, Tab 17C]; Thomas x-exam, Exhibit “6” (p 2, 9) and Exhibit “3” (p 728) [AR, Tab 32C, 32F]; Tolley Affidavit, Exhibit “C”, ¶55 [AR, Tab 18C].

⁶⁵ Bird Affidavit, ¶33 [AR, Tab 7]; Bird Reply Affidavit, ¶10-12 [AR, Tab 23].

⁶⁶ Bird Affidavit, ¶33 [AR, Tab 7]; Bird Reply Affidavit, ¶13 [AR, Tab 23]; Bird x-exam, q 221-223, 231-238 [AR, Tab 34]. Prof. Thomas claims that a “genuine” contagion effect may require the party nominating more women to be competitive: Thomas Affidavit, Exhibit “C”, p 21 [AR, Tab 17C]; also see Thomas x-exam, q 136-139 [AR, Tab

40. Prof. Thomas is the only expert to claim – against the strong consensus of experts in the field – that Canada’s FPTP does not contribute to the underrepresentation of women.⁶⁷ According to her, “attitudes about women and politics” are the only cause of women’s underrepresentation in Canada.⁶⁸ Despite presenting herself as an expert in “comparative politics”, including “comparative electoral systems”, the cross-examination revealed that Prof. Thomas is not an expert in these fields. She has never published comparative research about women in different types of electoral systems,⁶⁹ about PR electoral systems (or any electoral system outside Canada and the US), and does not teach courses on these topics.⁷⁰ Prof. Bird (who has published widely on comparative politics, including electoral systems) confirmed that Prof. Thomas was a “Canadianist”, who is not recognized in comparative politics or comparative electoral systems.⁷¹

41. Prof. Thomas relies on two sources to support her contrarian claim. First, she mischaracterizes a comparative electoral systems study by Roberts, Seawright, and Cyr (2012) assessing the impact of electoral systems on women’s representation.⁷² Taken at its strongest, this study finds only that the mechanisms through which electoral systems impact women’s representation run “in large part” through attitudes (thus conceding that there are instances

32]. But this is exactly what would happen in Canada if the electoral system changed from FPTP to PR, since relatively uncompetitive parties such as the Green Party and NDP would suddenly become much more competitive.

⁶⁷ Prof. Tolley was also asked whether FPTP contributes to the underrepresentation of women. She claimed it was her “personal” opinion that it did not, instead noting factors like district magnitude (which is an element of FPTP) and party choice (which is shaped by FPTP). When asked whether single-member districts contributed to the women’s underrepresentation, she said she had not looked at the issue: Tolley x-exam, q 27-33 [AR, Tab 33].

⁶⁸ Thomas Affidavit, Exhibit “C”, p 6-7 [AR, Tab 17C]; Thomas x-exam, q 146 [AR, Tab 32].

⁶⁹ Though she claimed that this was only “[b]ecause it’s a saturated field”: Thomas x-exam, q 34 [AR, Tab 32].

⁷⁰ Thomas x-exam, q 29-29, 33, 35-36 [AR, Tab 32]; Thomas Affidavit, Exhibit “C”, p 1 [AR, Tab 17C]. Prof. Thomas claimed that “anybody who is an expert in Canadian politics is an expert in comparative politics”: Thomas x-exam, q 32 [AR, Tab 32]. Prof. Tolley (also a Respondent expert) disagreed that an expert in Canadian politics is necessarily an expert in comparative politics: Tolley x-exam, q 69 [AR, Tab 33].

⁷¹ Bird Affidavit, ¶3-4 and Exhibit “A” [AR, Tab 7 and 7A]; Bird x-exam, q 47, 262 [AR, Tab 34].

⁷² In cross-examination, it also was revealed that Prof. Thomas has never engaged with the Roberts article in the context of peer-reviewed literature. Her only reference to this article in her career appears to be in a general four-sentence excerpt from a 2014 book chapter in a non-peer-reviewed Canadian politics textbook where she was the junior author: Thomas x-exam, q 38-59 and Exhibit “1” (p 379) [AR, Tab 32, 32A].

attitudes play no role).⁷³ More importantly, the study finds, consistently with the consensus outlined above, that “advanced industrialized countries appear to fit expectations [about the impact of electoral systems on women’s representation] very well.”⁷⁴ These countries, like Canada, share generally positive attitudes about women.⁷⁵ Finally, a follow-up study conducted over a longer timeframe than the Roberts, Seawright, and Cyr (2012) study confirmed that electoral systems “do matter” for the representation of women and that “electoral reforms involving an increase in district magnitude [and] a shift from a majoritarian to a more proportional system... caused an increase in women’s seat share over time.”⁷⁶

42. Prof. Thomas also relies on a study by Profeta and Woodhouse (2022). However, as Prof. Thomas agreed in cross-examination, this study in fact supports the consensus that that proportional electoral rules contribute to women’s representation.⁷⁷ Ultimately, this Court should reject Prof. Thomas’ evidence and find (as accepted by the consensus of experts in the case and the empirical evidence) that FPTP contributes to the underrepresentation of women in Canada.

⁷³ Not so, according to Prof. Thomas, who (although she cited this passage in her report) hypothesizes that the words “in large part” serve merely as a “hedge” designed to get the paper through “peer review”: Thomas, Exhibit “C”, p 7 [AR, Tab 17C]; Thomas x-exam, q 149 [AR, Tab 32]. Similarly, when the Roberts article concludes that “there is a plausible case that PR laws may help women... only if certain background conditions are met” – a passage that Prof. Thomas also reproduced in her report – Prof. Thomas speculated that these words stood merely as a “nod to the people who have read the literature, probably superficially” and an attempt to respond to “dumb[]” comments from peer reviewers. For good measure, she globally attacked “economists” who mostly “make assumptions about what people think and do that do not match political realities at all”: Thomas Affidavit, Exhibit “C” (p 7-8) and Exhibit “D” (p 1575) [AR, Tab 17C, 17D]; Thomas x-exam, q 177-182 [AR, Tab 32].

⁷⁴ Thomas Affidavit, Exhibit “D”, p 1569 [AR, Tab 17D].

⁷⁵ Bird x-exam, q 101-102 [AR, Tab 34]. Prof. Thomas disputes the comparison to advanced industrialized countries because Canada is a “settler colonial” country with similarities to Latin America: Thomas x-exam, q 167, 190-191, 232, 248 [AR, Tab 32].

⁷⁶ Thomas Affidavit, Exhibit “D”, p 1564 [AR, Tab 17D]; Thomas x-exam, Exhibit “5” (p 384, 398-400) [AR, Tab 32E]; Bird Affidavit, ¶35 [AR, Tab 7].

⁷⁷ Thomas x-exam, q 169, 171 and Exhibit “4” (p 1484, 1490, 1492) [AR, Tab 32, 32D]; Thomas Affidavit, Exhibit “C”, p 6-7 [AR, Tab 17C]. In Italy, reform to PR increased women’s representation from 12% to 17% in 2005 (it is now at 36%: Bird Affidavit, fn 2 [AR, Tab 7]). Profeta and Woodhouse claim that countries with less gender inequality than Italy might see a greater increase following electoral reform. In footnote 5 of her report, Prof. Thomas’ also refers to publications by “[o]ther Italian scholars, writing in Italian,” who claim that party gatekeeping is the only barrier to women’s representation in Italy. Prof. Thomas does not speak Italian at an academic level, but has spoken with one Italian author, who advised her that there are other Italian scholars who share her viewpoint: Thomas Affidavit, Exhibit “A”, p 9 [AR, Tab 17A]; Thomas x-exam, q 154-158, 163 [AR, Tab 32].

H. FPTP in Canada contributes to the lack of racial diversity in Parliament

43. The evidence confirms that because of its winner-takes-all characteristics, Canada's FPTP has a clear mechanical effect of disproportionately advantaging geographically clustered minority voters and candidates (eg, the Bloc Québécois and voters of South Asian descent) and disadvantaging more geographically dispersed ones (eg, Indigenous Peoples, Blacks, Filipinos, and Chinese Canadians)⁷⁸. As a result, FPTP has the problematic effect of "siloining" 89% of racialized candidates in a small number of electoral districts with large minority populations, where they largely run against each other. Comparing Canada to other countries, racialized Canadians have reasonably high rates of representation, although the varying definition of minorities across national contexts makes it hard to confirm (and many countries lack disaggregated data on candidates).⁷⁹

44. Under PR rules, minorities in Canada would likely be more broadly and fairly represented. Parties would have incentives to engage in "ticket-balancing", running "ethnically diverse slates, which could lead to wider distribution of seats across diverse visible minority groups". These balanced slates would include minorities that are not geographically concentrated, including Indigenous Peoples and Francophones outside Quebec. A proportional system would also correct the overrepresentation of an ethnoregional minority like the Bloc Québécois.⁸⁰

45. As opposed to women's representation, where PR's effect is clear and consistent (with exceptions in countries with poor attitudes toward women), Prof. Bird opines that broadly and

⁷⁸ National minorities, such as Francophones outside Quebec, also do poorly under FPTP, although strategies of limited effectiveness (such as "exceptional ridings" with significant deviations from voting parity) have been established to enable these minorities to elect representatives: Bird Affidavit, ¶42-43 [AR, Tab 7].

⁷⁹ Bird Affidavit, ¶10, 39-46, 56 [AR, Tab 7]; Tolley Affidavit, Exhibit "C", ¶49-52 [AR, Tab 18C]; Tolley x-exam, Exhibit "1", p 9 [AR, Tab 33A]. Following the 2019 Canadian election, Indigenous MPs held 3.0% of seats compared to their 4.9% share of the population, although census counts underestimate urban Indigenous populations by factors of 2 to 4. Racialized MPs held 15.1% of seats compared to their 22.3% share of the population. The number of racialized candidates is growing throughout the major political parties: Bird Affidavit, ¶38-39 and fn 20 [AR, Tab 7]; Tolley Affidavit, Exhibit "C", ¶7, 27-30, 33 [AR, Tab 18C].

⁸⁰ Bird Affidavit, ¶11, 41-44, 55-56, 59 [AR, Tab 7].

fairly representating Canada’s diverse minorities would require a PR system that meets several condition: modest district magnitude in most ridings (3 to 7 members per district); the establishment of malapportioned districts with 2 members or small “exceptional districts” in northern areas with high Indigenous populations; and a role for diverse local populations in the prioritization and ranking of suitable candidates (ie, open list PR). PR’s flexibility provide several structural options to meet these conditions.⁸¹

46. Given its similarity to Canada, the New Zealand experience provides a “natural experiment” to understand what might happen if Canada were to switch to a PR system (MMP in that case).⁸² There, the reform to MMP has brought about a significant and sustained 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). The Indigenous Māori population, the Pacific Islander population, and “other” minority populations are now all at least proportionally represented.⁸³ In fact, the Māori population gained representation both through the party lists and through the emergence of a viable Māori party, features that were a direct result of the reform to PR.⁸⁴ The only currently underrepresented minorities are “Asian” New Zealanders, though it is notable that there had never been an Asian MP prior to the adoption of MMP in 1996.⁸⁵ These gains compare favourably to Canada’s gains over the same time period. The conclusion from the scholarship is that MMP “has clearly been a success if we are concerned with diversifying parliament and achieving higher levels of descriptive representation that reflect substantial demographic change in NZ... and reflected the

⁸¹ Bird Affidavit, ¶11, 63, 65-67, 77 [AR, Tab 7].

⁸² Loewen Affidavit, Exhibit “C”, p 15-17 [AR, Tab 16C]; LeDuc Reply Affidavit, ¶13-19 [AR, Tab 22].

⁸³ Tolley x-exam, q 84-91 and Exhibit “3” (p 7-8) [AR, Tab 33, 33C].

⁸⁴ Bird x-exam, q 205-214 [AR, Tab 34].

⁸⁵ Tolley x-exam, q 98, Exhibit “3” (p 7-8), Exhibit “4” [AR, Tab 33, 33C, 33D].

ability of PR to represent society more fully.”⁸⁶

47. In response, Prof. Tolley claims that while voters are willing to vote for racialized candidates, party selectors are less likely to pick racialized candidates than white candidates. This is “likely to persist regardless of electoral system”. She also claims that a shift to PR could centralize responsibilities away from local party organizations, which would “likely erode the political power that racialized Canadians have managed to assemble and mobilize under SMP”.⁸⁷

48. The evidence does not support Prof. Tolley’s fears. First, Prof. Tolley concedes that, aside from South Asians, racialized groups such as Blacks and Chinese have not mobilized political power.⁸⁸ Second, the evidence from countries with MMP systems confirms that centralized party selectors do place racialized MPs on lists as part of balanced tickets. In fact, racialized MPs are more likely to be elected through lists than through districts.⁸⁹ Third, centralized party selectors in Canada, such as the NDP in recent years, have shown sensitivity to racialized minority concerns and, according to Prof. Tolley, are increasingly aware “that electoral victory requires parties to attract Canada’s growing racialized population”.⁹⁰ Finally, there are PR systems that do not require or minimize the role of centralized party selectorates (such as open list PR systems).

49. Although the evidence in Canada confirms that racialized candidates “do not face racial discrimination from white voters”, Prof. Tolley also fears that a reform to open list PR could lead voters to vote against racialized candidates. But evidence from municipal elections in European PR countries confirms that open list PR systems have helped increase minority representation (in fact, these systems allow minorities to circumvent party elites who otherwise marginalize

⁸⁶ Tolley Affidavit, Exhibit “C”, ¶25-31 [AR, Tab 18C]; Bird x-exam, q 218 and Exhibit “3” (p 627) [AR, Tab 34, 34C]; Bird Affidavit, ¶12 [AR, Tab 7].

⁸⁷ Tolley Affidavit, Exhibit “C”, ¶43, 46 [AR, Tab 18C]. Prof. Tolley also worries that a shift to PR could make it easier to elect radical right parties. The evidence discussed above (at ¶26) confirms that these worries are overblown.

⁸⁸ Tolley Affidavit, Exhibit “C”, ¶39 [AR, Tab 18C].

⁸⁹ Bird Affidavit, ¶57 [AR, Tab 7].

⁹⁰ Tolley Affidavit, Exhibit “C”, ¶33, 60 [AR, Tab 18C].

racialized candidates).⁹¹ Prof. Tolley, who candidly conceded that she is “[a]bsolutely not” a comparative scholar, did not always appear to be familiar with other systems.⁹²

50. All in all, the evidence establishes that FPTP contributes to the underrepresentation of minorities (including Indigenous groups) and that careful reform (given PR’s flexibility and adaptability) would improve their descriptive representation (like in New Zealand). Furthermore, the evidence suggests that the problem of underrepresentation of minorities is largely a problem of underrepresentation of racialized women. This suggests that improving the representation of women (which PR is known to do) would also improve the representation of minorities.⁹³

I. Despite significantly underrepresenting voters, FPTP does not provide more stable or accountable government than PR

51. As will be discussed below, the government may seek to justify breaches of individual rights of voters and candidates on the grounds that moving away from FPTP to a PR system could generate instability or a lack of voter accountability. In reality, the empirical evidence confirms that the flexibility and adaptability of PR systems enables them to perform as well or better than FPTP on these outcomes, while ensuring effective representation of voters.

52. **FPTP does not produce more “stable” government than PR:** On the whole, FPTP and PR both produce stable democratic governments, though they do so in different ways. In Canada, however, FPTP produces many minority governments. These are “demonstrably less stable than formal coalitions in other countries and lead to more frequent elections, because small shifts in votes can lead to large shifts in seats and because minority governments lead to electioneering.”⁹⁴

53. Taking a 50,000-foot view, countries with PR are more stable than countries with FPTP.

⁹¹ Bird Affidavit, ¶52, 58 [AR, Tab 7]; Tolley Affidavit, Exhibit “C”, ¶66 [AR, Tab 18C].

⁹² Tolley x-exam, q 58-63, 68 [AR, Tab 33].

⁹³ Tolley x-exam, q 23-33 and Exhibit “1” (p 15) [AR, Tab 33, 33A].

⁹⁴ Carey Affidavit, ¶43-49 [AR, Tab 5]; LeDuc Affidavit, ¶27 [AR, Tab 6]; Hodgson Supplementary Affidavit, ¶10 [AR, Tab 3].

Data spanning the 19th and 20th centuries demonstrates both the increasing use of PR systems and the higher rate of survival of democratic regimes under PR.⁹⁵ This may be because FPTP can produce (and has produced in Canada) highly distorted regional representation. In Canada, these distortions have overrepresented regional parties (such as the BQ) and have led to divisive policy choices that exacerbate the country's "sectional, linguistic and ethnic divisions". For example, Pierre Trudeau formed a Liberal majority government in 1980 with no seats in Saskatchewan, Alberta, or British Columbia (despite receiving more than 20% of the vote in these provinces); the National Energy Policy, and the animosity it caused in Alberta, directly resulted from this distortion of regional representation.⁹⁶

54. **FPTP does not produces more "accountable" government than PR:** Prof. Ferland suggests that two conditions are important for an electoral system to achieve accountability: first, voters must be able to assign responsibility to the parties in government; second, the share of voting should influence the composition of the government after elections. On the first condition, it may be more difficult for voters to identify which parties are responsible for government initiatives when there are many parties in government; and PR countries on average have more parties in government than FPTP countries.⁹⁷ But by limiting the number of parties in government, PR systems with district magnitudes of 4 to 10 seats are equally capable of allowing voters to identify responsibility for government decisions.⁹⁸

55. More importantly, on the second condition, PR is better able to influence the composition

⁹⁵ Carey Affidavit, ¶14 [AR, Tab 5].

⁹⁶ LeDuc Affidavit, ¶21-25 [AR, Tab 6]; Bird Affidavit, fn 16 [AR, Tab 7]; Urbinati Affidavit, ¶68 [Tab 8].

⁹⁷ Ferland Affidavit, Exhibit "C", p 7, 11, 12 [AR, Tab 15C]; Carey Affidavit, ¶54 [AR, Tab 5].

⁹⁸ Carey Affidavit, ¶55 [AR, Tab 5]; Carey Reply Affidavit, ¶4, 11. Prof. Ferland agreed that the number of effective parties can largely be predicted through district magnitude and Parliament's size (ie, design features of a PR system can limit the number of parties): Ferland x-exam, q 198-210 and Exhibit "4" (p 8) [AR, Tab 26, 26D]. This is also consistent with the New Zealand experience, where electoral reform only led to an increase of 0.68 effective parties: Ferland Affidavit, Exhibit "C", p 7 [AR, Tab 15C]. Prof. Carey also notes that Canada's FPTP system has not had the usual suppressing effect on party fragmentation, suggesting that a reform to PR wouldn't meaningfully increase the number of parties: Carey Reply Affidavit, ¶3 [AR, Tab 21].

of government after elections. First, the more precise calibration of vote shares to seat shares afforded by PR systems offers greater accountability by ensuring that drops or increases in voter support are accurately reflected in the seat share.⁹⁹

56. Second, PR produces legislatures that more closely correspond to the preferences of the median voter than FPTP and governments and policies that equally correspond to the preferences of the median voter after elections. This confirms that voters under PR are equally or more able to assign responsibility in a way that results in the legislatures, governments, and policies that they prefer.¹⁰⁰ Under FPTP, governments can also experience “policy lurches”, in which new majority governments abruptly and substantially shift policy following their election.¹⁰¹

57. Third, and more generally, FPTP emphasizes accountability of the individual candidate in a district whereas PR emphasizes the collective accountability of political parties. But under FPTP, individual accountability may be compromised in a safe seat where there is effectively no chance that a party’s candidate will lose. There are PR design features that seek to deliver on both individual and collective accountability in a way that FPTP cannot. For example, STV and open list PR allow voters to shift their support to another candidate from the same party in the next election; MMP allows voters to shift their local support from one candidate to another, while maintaining their national support for the party. Ultimately, accountability scholars are “increasingly leaning away from a strict dichotomy between FPTP versus PR, and exploring a

⁹⁹ Carey Reply Affidavit, ¶5-7 [AR, Tab 21]. Without reference to any data, Loewen talks about how voters “may” prefer frequent alterations in power and the ability to “throw the bums out”. But the evidence is that Canada in fact has lengthy periods of one-party rule in times of declining voter support: Loewen Affidavit, Exhibit “C”, p 5 [AR, Tab 16C]; Hodgson Supplementary Affidavit, ¶9 [AR, Tab 3].

¹⁰⁰ Carey Affidavit, ¶55 [AR, Tab 5]; Carey Reply Affidavit, ¶16 [AR, Tab 21]; Ferland x-exam, q 80-81, 92-96, 112-113 [AR, Tab 26]. The concept of the “median voter” is used in political science to provide the perspective considered to be “the most representative of the citizenry as a whole”: Ferland x-exam, q 59 [AR, Tab 26]. Prof. Loewen claimed that “substantial recent evidence suggests that majoritarian systems are just as good as or better than proportional systems” at delivering policy outcomes supported by a majority of voters: Loewen Affidavit #2, Exhibit “A”, p 5 [AR, Tab 19A]. In cross-examination, he was forced to concede that these studies did not make out the claim that majoritarian systems are better: 78-79, 92-93, 100-113, Exhibit “1”, “2”, and “3” [AR, Tab 28].

¹⁰¹ LeDuc Affidavit, ¶24 [AR, Tab 6]; although also see Carey Affidavit, ¶53 [AR, Tab 5].

wider range of institutional design features”.¹⁰²

58. Reviewing the entire body of evidence, Prof. LeDuc concludes:

While we cannot predict all of the longer term effects that a PR system would have on the distribution of parliamentary seats in Canada (and these effects would necessarily depend on the details of the particular PR system), experience elsewhere tells us that in a Canadian PR system of low to moderate district magnitude, there might be one or two more political parties represented in Parliament than there are at present, that these additional parties would ensure that a wider variety of voters are represented (as discussed under question 2 below), that the parties would be represented much more proportionally in Parliament, that the largest party would be less dominant than it frequently is under FPTP, that governments would likely be formed by coalitions of two or more parties — generally one large party and one smaller party — and that government would probably operate in a more consensual manner with no drop-off in economic performance. For example, List PR’s wide usage around the world in different political and social environments demonstrates that it provides stable, effective, accountable government.¹⁰³

PART III – ISSUES AND THE LAW

59. Canada (like all British colonies) inherited its FPTP electoral system from Britain, at a time when there was virtually no debate about its suitability in Canada. Prof. LeDuc concludes that if Canada chose “an appropriate electoral model today without reference to the past, it would almost certainly not adopt FPTP”.¹⁰⁴ Prof. Tolley confirmed that our FPTP and other democratic institution were the product of an age where few were represented:

The roots of electoral under-representation are multi-faceted, but rooted in legislation, processes, and institutions [that] were foundationally discriminatory. The House of Commons was constituted to represent the interests of propertied men, most of whom were white and of European descent. Its design, organization, and practices were modelled after the British Westminster system, and these roots are evident today. Further, until 1960, there were racial restrictions on the franchise, with Chinese Canadians and Indigenous peoples being denied the right to vote or run for office at various points in Canada’s history.¹⁰⁵

60. For much of Canadian history, these various failures of representation were understood to be constitutional, even normal. But the legal, social, and evidentiary context has changed. Today, these restrictions would all be struck down as contrary to the *Charter*.

61. Three significant new developments have arisen since we inherited FPTP in 1867. First,

¹⁰² Carey Affidavit, ¶55-56 [AR, Tab 5].

¹⁰³ LeDuc Affidavit, ¶26 [AR, Tab 6].

¹⁰⁴ LeDuc Affidavit, ¶44, 48 [AR, Tab 6].

¹⁰⁵ Tolley Affidavit, Exhibit “C”, ¶19 [AR, Tab 18C].

in the past century and specifically over the 40 years, Canadians courts and society have developed a better understanding of democratic representation, including the right to vote. Much of this understanding is a product of the adoption of the *Charter* 40 years ago. Frequently as the result of Court decision, we have extended the franchise to women, racial minorities, Indigenous Peoples, individuals formerly described as having a “mental disease”, judges, penitentiary inmates, and Canadian residents living abroad.¹⁰⁶ Over the last 25 years, democratic theorists have also come to accept that representative democracy is not simply a vote to delegate decision-making to our representatives but, rather, that it requires representatives to advocate for the claims of voters. Democratic theorists have also rejected the idea that political constituencies should be defined by “territorial districts” (as has the Supreme Court in *Frank*, as will be discussed below), since these “tend to justify and stabilize existing patterns of disadvantage”. Representation is more than the right to vote for someone in our constituency: it is also the right to a Parliamentary representative who advocates for our claims and worldview.¹⁰⁷

62. Second, in a number of respects, Canada’s Parliament has lost important ground on representation. It has fully become unhinged from the principle of majority rule. Its MPs are now elected by significantly fewer voters than in the past. And other countries worldwide have moved much more quickly on gender parity.

63. Third, a significant body of comparative empirical evidence, outlined in the facts section above, has developed, enabling us to comprehensively compare types of electoral systems. Much of this body of evidence was generated over the past two decades. It confirms that Canada’s Parliament is a relic of a previous era, failing to effectively represent Canadian voters and groups. It is this Court’s role to strike laws that have not adapted to changing societal and democratic

¹⁰⁶ *Frank v Canada (Attorney General)*, [2019 SCC 1](#), ¶2.

¹⁰⁷ Urbinati Affidavit, ¶36-46, 59 [AR, Tab 8].

norms. In 1929, for example, 62 years after Confederation, the British Privy Council adopted in the *Persons* case the doctrine that the Canadian Constitution is a living tree that must be read in a broad and purposive manner to adapt to changing times. Accepting for the first time that women can serve in the Senate, the Privy Council stated: “[t]he exclusion of women from all public offices is a relic of days more barbarous than ours”.¹⁰⁸ In the *Reference re Prov. Electoral Boundaries (Sask.)*, the Supreme Court confirmed that courts should not accept “inequities”, “anomalies”, and “abuses” in our voting system “merely because they have historical precedent”.¹⁰⁹ Almost 100 years after the *Persons* case (40 years after the adoption of the *Charter*), this Court should confirm that an electoral system that significantly diminishes the effectiveness of several groups of voters, reduces the incentives of voters to participate in elections, unfairly and arbitrarily allocate seats and legislative power to some voters, and systematically underrepresents women, visible minorities, and political minorities as MPs is unconstitutional.

ISSUE 1: The FPTP method of translating votes to seats violates the s. 3 right to vote

1. Section 3 is an individual right that protects against inequality of voting power

64. The Supreme Court has confirmed that a broad interpretation of s. 3, followed by a balancing of the relevant conflicting values under s. 1, is analytically preferable. Section 3 of the *Charter* protects, in addition to voting and running for office, (at least) the following democratic rights: (1) the right to effective representation; (2) the right to meaningful participation; and (3) the right to fair and legitimate elections.¹¹⁰ Each of these underlying rights is concerned with a particular facet of democratic participation and governance. FPTP violates all three.

¹⁰⁸ *Reference to Meaning of Word “Persons” in Section 24 of British North America Act, 1867: Edwards v. A.G. of Canada*, [1929] UKPC 86, p 2, 9.

¹⁰⁹ *Reference re Prov. Electoral Boundaries (Sask.)*, [1991] 2 SCR 158, p 187.

¹¹⁰ *Harvey v New Brunswick (Attorney General)*, [1996] 2 SCR 876, ¶30; *Reference re Prov. Electoral Boundaries (Sask.)*, [1991] 2 SCR 158, p 183; *Figueroa v Canada (Attorney General)*, 2003 SCC 37, ¶51; Yasmin Dawood, The Right to Vote and Freedom of Expression in Political Process Cases Under the Charter, 2021 100 *Supreme Court Law Review* 104, 2021 CanLII Docs 13648, p 115-116; *Dixon v British Columbia (Attorney General)*, 1989 CanLII 248 (BC SC), p 40

2. Section 3 violates the right to effective representation

65. As summarized in the Overview, the right to effective representation (also characterized as the right to a “high degree of equality of voting power”) grants all citizens an equal right to an elective representative who functions in a “legislative” role. Citizens are effectively represented where they hold relatively equal voting power and legislative power. Deviations from parity of voting power are permitted only to increase the “effective voice” of citizens in the legislative process (or the effective assistance from their representatives in the ombudsman role). In *Dixon*, McLachlin CJBC further explained that “[i]n the legislative role, it is the majority of elected representatives who determine who forms the government and what laws are passed. In principle, the majority of elected representatives should represent the majority of the citizens entitled to vote... If there are significant discrepancies in the numbers of people represented by the members' of the Legislature, the legitimacy of our system of government may be undermined.”¹¹¹

66. In *Sauvé*, the Supreme Court of Canada concluded that denying the right to vote curtails the rights of citizens to political expression and participation in our country’s political life.¹¹² In *Frank*, the Court added that in a current democratic society, political representation should no longer necessarily be tethered to place of residence. The Court noted that while the right to vote was historically linked to the ownership of land and that only male property owners could vote, “the world has changed”.¹¹³ Because the world has changed, 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. As such, FPTP, which prevents roughly 50% of the voters from having an MP aligned with their political preferences,

¹¹¹ *Reference re Prov. Electoral Boundaries (Sask.)*, [1991] 2 SCR 158, p 183-185, 188; *Dixon v British Columbia (Attorney General)*, 1989 CanLII 248 (BC SC), p 30, 40

¹¹² *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68 at ¶32, 58.

¹¹³ *Frank v Canada (Attorney General)*, 2019 SCC 1, ¶28-35.

unduly dilutes the legislative power of these voters as well as their voices in the deliberations of government and their ability to participate in political life. Voters within local geographical pluralities have access to an MP who can promote their voices in government; while voters of smaller or more geographically dispersed groups are shut out. Many of these voters are chronically underrepresented, because they live in “safe ridings” (see above at ¶13-28).

67. As the Supreme Court confirmed in *Haig*, “in a democratic society, the right to vote as expressed in s. 3 must be given a content commensurate with those values embodied in a democratic state.”¹¹⁴ Yet FPTP fundamentally ignores that “representation”, which entails “more than voting”, requires representatives to support and advocate for the claims and worldviews of their voters. Representation also requires voters to believe that their representatives are advocating on their behalf. Voters without an MP aligned with their own political preferences have less effective representation than others. They are forced to hope for “surrogate” representation, over which they have no control. This is “not a substitute” for representation from their own group. For voters of smaller political parties, specifically, surrogate representation may come from the other side of the country (Green voters in Manitoba, for example, who are forced to rely on Elizabeth May on Vancouver Island) or from other political parties (PPC voters, for example, who don’t have any elected representative despite obtaining 4.9% of the votes).

68. The extent to which Canada’s FPTP violates the right to effective representation is further observed in the aggregated election results, where outcomes are logically inconsistent with overall voting patterns. For example, parties that lose votes over the course of several elections can find themselves with an increased number of Parliamentary seats; their voters gain legislative power, have a greater voice in the deliberations of government, and are more effectively

¹¹⁴ *Haig v Canada; Haig v Canada (Chief Electoral Officer)*, [1993] 2 SCR 995, p 1031.

represented in government. A party that receives the largest share of the popular vote can find itself with fewer seats than a party that receives less votes; its voters will have less legislative power, a lesser voice in the deliberations of government, and will be less effectively represented in government. The supporters of small national parties in Canada have significantly less legislative power than supporters of large national parties or regional parties and, consequently, their representation is drastically less effective. And in about half of elections since 1921, Canada's FPTP has entitled a minority of voters to a majority of seats, significantly amplifying their legislative power, their voice in the deliberations of government, and their representation. The effect of these deviations from parity of voting power limit the range of public debates about issues and reduce the diversity of perspectives in Parliament, particularly from individuals who belong to socially marginalized and disadvantaged groups. Prof. Urbinati concludes that "PR takes more seriously than FPTP the principle underlying universal suffrage: that every individual has the right to a vote that is counted fairly."¹¹⁵ This Court should confirm that disparities in "legislative power" are only justified where they make representation more effective.

69. Finally, by contributing to the underrepresentation of women, racialized minorities, and Indigenous peoples in Parliament, Canada's FPTP diminishes their legislative power and their voices in the deliberations of government relative to others in the population, thus further violating their right to effective representation (see above at ¶36-50). Unlike the *Reference re Prov. Electoral Boundaries (Sask.)* case, therefore, where deviations from voting parity were found to increase the legislative power and voters from particular communities and rural areas, the deviations from voting parity caused by FPTP suppress the representation of political minorities in favour of political pluralities that are already effectively represented.

¹¹⁵ Urbinati Affidavit, ¶55 [AR, Tab 8].

3. Section 3 violates the right to meaningful participation

70. The right to meaningful participation provides that “each citizen must have a genuine opportunity to take part in the governance of the country through participation in the selection of elected representatives.” Each citizen must be allowed to exercise their right to vote in a manner that accurately reflects his or her preferences. Parliament also cannot enhance the capacity of one citizen to participate in the electoral process at the expense of another. For example, legislation “that contributes to a disparity in the capacity of the various political parties to participate in that dialogue” also infringes the right to meaningful participation, by providing some persons with a more effective vehicle for their ideas and opinions than others. The right to meaningful participation also includes the right to an informed vote.¹¹⁶

71. The evidence summarized above confirms that Canada’s FPTP breaches the right to meaningful representation. First, under FPTP, voters whose votes have little chance of making a difference in the election of a representative have less incentive to vote. These voters have less of an opportunity to take part in the governance of the country through participation in the selection of elected representatives. In practice, this depresses aggregate levels of satisfaction and turnout in Canada compared to similar industrial democracies with PR systems. Second, FPTP reduces the incentives of voters in safe ridings to participate in the electoral process. In fact, the evidence confirms that safe ridings in Canada have lower turnout rates than other ridings. Third, by deflating the value of votes for small national parties, FPTP reduces the capacity of these voters and parties to participate in the electoral process and dialogue. For example, the evidence revealed that the media ignores the Green Party, which doesn’t have legislative representation commensurate with its votes, making it more difficult for its candidates to reach voters. Fourth,

¹¹⁶ *Figueroa v Canada (Attorney General)*, [2003 SCC 37](#), ¶30, 50-54; *Harper v Canada (Attorney General)*, [2004 SCC 33](#), ¶71, 87.

by wasting a substantial number of votes, FPTP distorts the incentives of citizens to vote in a manner that accurately reflects their preferences, instead encouraging them to vote for representatives who are not aligned with their political preferences – or discouraging them from voting at all. This increases “negative” strategic voting, which leads to disengagement from the electorate (see above at ¶29-35 and fn 29).

4. Section 3 violates the right to fair elections

72. The right to fair elections offers a promising way for courts to ensure the fairness and legitimacy of the electoral process.¹¹⁷ This court should define it as: the right to electoral rules (including voting methods, electoral riding boundaries, and financial spending limits) that generate fair, non-arbitrary outcomes and treat individual voters on a basis of relative equality. The values of dependability and predictability in a democratic context are recognized through the unwritten constitutional principle of the “rule of law”. Likewise, the principle of “democracy” recognizes that democratic institutions are legitimate where they are accountable to the people and foster the consent of the governed (including the losers of elections).¹¹⁸ And the fairness and legitimacy of an electoral regime depends upon how citizens assess the extent to which the regime advances the values of their electoral democracy, as well as on the subjective perceptions of voters about its fairness and legitimacy.¹¹⁹ As Bastarache J. recognized in *Harper*: “Electoral fairness is key. Where Canadians perceive elections to be unfair, voter apathy follows shortly thereafter.”¹²⁰ In *Sauvé*, McLachlin CJ confirmed that courts must be “vigilant in fulfilling their

¹¹⁷ Yasmin Dawood, “Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review” (2012) 62 *University of Toronto LJ* 499, p 504; Yasmin Dawood, The Right to Vote and Freedom of Expression in Political Process Cases Under the Charter, 2021 100 *Supreme Court Law Review* 104, 2021 *CanLIIDocs* 13648, p 115-116; *Figueroa v Canada (Attorney General)*, 2003 SCC 37, ¶51, 161.

¹¹⁸ *Reference re Secession of Quebec*, [1998] 2 SCR 217 at ¶67, 70.

¹¹⁹ *Harper v Canada (Attorney General)*, 2004 SCC 33 at ¶82; *R v Bryan*, 2007 SCC 12 at ¶25; also see ¶104 (Abella J., in dissent).

¹²⁰ *Harper v Canada (Attorney General)*, 2004 SCC 33 at ¶82; also see *R v Oakes*, [1986] 1 SCR 103 at ¶64.

constitutional duty to protect the integrity” of our participatory democracy.¹²¹

73. Canada’s FPTP violates the right to fair elections through its arbitrary and disproportional translation of votes to seats. It frequently enables a minority to rule over a majority, allows minor changes in population distribution, voting patterns, and district boundaries to dramatically shift electoral results, over- or under-represents voters and parties based their place of resident, and persistently underrepresents a number of disadvantaged groups and minorities. The arbitrariness, disproportionality, and underrepresentation of various groups reduce voters’ satisfaction and perception of fairness and legitimacy. In fact, voters everywhere agree that the most democratic outcomes are those most likely achieved in a proportional system (see above at ¶34).

ISSUE 2: FPTP discriminates against women and minorities under s. 15 of the *Charter*

1. The s. 15 legal test

74. Section 15 of the *Charter* protects substantive equality. The two-step s. 15 test requires a claimant to demonstrate that the impugned law:

- (i) **creates or contributes to a disproportionate impact on the claimant group based on a protected ground.** This necessarily entails drawing a comparison between the claimant group and other groups or the general population. The impugned law need not be the only or dominant cause of the disproportionate impact. The evidentiary burden at the first step should not be undue.
- (ii) **imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating a disadvantage.** The presence of “arbitrariness”, “prejudice”, and “stereotyping” can help a claimant to prove this step. To determine whether a distinction is discriminatory, courts should also

¹²¹ *Sauvé v Canada (Chief Electoral Officer)*, [2002 SCC 68](#) at ¶15.

consider the broader legislative context. Relevant considerations include: the objects of the scheme, whether a policy is designed to benefit a number of different groups, the allocation of resources, particular policy goals sought to be achieved, and whether the lines are drawn mindful as to those factors.¹²²

2. FPTP discriminates against women, Indigenous Peoples, racialized minorities, and “national” minorities

75. Women, Indigenous Peoples, racialized minorities, and Francophone and Anglophone “national minorities” are all members of groups protected on the basis of enumerated grounds.

76. At the first step of the s. 15 test, the strong consensus of experts agrees that 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 (which typically nominate a higher share of women than the average larger party), thus preventing any contagion effect between these and larger parties. Conversely, in PR systems where gender attitudes about women are relatively positive, the nomination of women is seen in positive-sum terms, leading parties to present a more “balanced” ticket. Furthermore, 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” (see above at ¶36-42).

77. Similarly, FPTP contributes to the underrepresentation of national (including Indigenous) and racialized minorities, by favouring white men and siloing minorities into the few racialized districts where they are forced to run against each other. A carefully structured PR system, on the other hand, would provide ticket-balancing incentives that could lead to wider distribution of

¹²² *R v Sharma*, [2022 SCC 39](#), ¶28, 31, 37, 45, 50, 53, 56, 59.

seats across diverse visible minority groups. The New Zealand experience is persuasive (see above at ¶43-50).

78. At the second step of the s. 15 test, the evidence confirms that the underrepresentation of these groups in Parliament has the effect of reinforcing, perpetuating, or exacerbating disadvantages. A group's descriptive representation in Parliament sends a powerful message "about who belongs and, by extension, who does not". Demographic role models shape young people: "if you don't see it, you can't be it." Women, particularly, face pernicious political stereotypes: that they are worse leaders than men, are too emotional or nice for politics, and are unable to rule. Women politicians also face gender-based violence. The continued exclusion of women in politics rests in part on these stereotypes and increasing women's presence in politics could strengthen public belief in women's ability to govern and help correct these stereotypes.¹²³

79. A group's lack of descriptive representation in Parliament means that its preferences may be ignored and jeopardizes the legitimacy of the electoral system. Profs Thomas, Tolley, and Bird agree that proportionally representing underrepresented groups would positively impact the deliberation and policy process, increase advocacy in Parliament on issues relevant to these groups, and strengthen public belief in their ability to govern.¹²⁴

80. A review of the broader legislative context fails to dispel the conclusion that FPTP is discriminatory. FPTP was imported from the UK at a time when women and racialized minorities did not have the right to vote or run for office. While the law has since changed to permit them to run, the *Canada Elections Act* does nothing to bring their representation even to average levels. In fact, the Respondent's evidence (principally through the affidavits of Profs Tolley and

¹²³ Tolley Affidavit, Exhibit "C", ¶15 [AR, Tab 18C]; Thomas x-exam, q 89-93, 100, and Exhibit "2" (p 154-155, 158-165) [AR, Tab 32, 32B]; Bird Affidavit, ¶13 [AR, Tab 7].

¹²⁴ Bird Affidavit, ¶13 [AR, Tab 7]; Thomas Affidavit, Exhibit "C" p 5 [AR, Tab 17C]; Thomas x-exam, q 101-108 [AR, Tab 32]; Tolley Affidavit, Exhibit "C", ¶15 [AR, Tab 18C].

Thomas) and the lack of remedial legislation suggests that the government is washing its hands of the problem, mostly placing the onus for improvement on private political parties.

3. FPTP discriminates against voters of small national parties

81. Political affiliation is an analogous ground under s. 15 of the *Charter*. While not technically immutable, it is changeable only at unacceptable personal cost to personal identity. It is not a characteristic we should be expected to change to receive equal treatment under the law. The evidence of lay voters in this case confirms the extent to which political affiliation (though it can technically change, like marital status) is part of a voter's personal identity.¹²⁵

82. At the first step of the s. 15 test, the evidence confirms that FPTP, through its disproportional translation of votes to seats, contributes to the significant underrepresentation of small national parties and, therefore, to less legislative power for voters affiliated with these parties and less opportunity to be represented by an MP affiliated with their political beliefs compared to voters of larger and regional parties (see above at ¶15-18, 21). At the second step, the disproportional translation of votes to seats for these parties reinforces their disadvantage and that of their voters. These parties and their voters are less able (or completely unable, in the case of the PPC) to have their voices heard in the deliberations of government. They are also less able to attract attention in election campaigns. All that voters of small national parties want is for their votes to have equal value to the votes of other Canadians.

ISSUE 3: There is no s. 1 justification

83. In *Dixon*, McLachlin CJBC (as she then was) noted that the s. 3 right to a “high degree of equality of voting power is one of great importance; it is one of the most fundamental freedoms

¹²⁵ Dyck Affidavit, ¶4-5 [AR, Tab 10]; Santoro Affidavit, ¶8-9 [AR, Tab 13]; Hunter Affidavit, ¶3 [AR, Tab 9]; *Quebec (Attorney General) v A*, [2013 SCC 5](#), ¶334; *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [\[1999\] 2 SCR 203](#), ¶12-15; *Reform Party of Canada v. Canada (Attorney-General)*, [1995 ABCA 107](#), ¶77; *Longley v Canada (Attorney General)*, [2007 ONCA 852](#), ¶102.

granted by the *Charter* upon which all the other rights and freedoms guaranteed ultimately depend. Therefore, it cannot lightly be undermined.”¹²⁶ As such, the Supreme Court of Canada has confirmed that when reviewing the government’s justification for a breach of s. 3, a stringent standard should be applied. In *Sauvé*, the Court emphasized that deference is not appropriate on a matter where “legislative choices threaten to undermine the foundations of the participatory democracy guaranteed by the *Charter*”.¹²⁷ A method of translating votes to seats that drastically reduces the legislative power of half of the electorate constitutes such a “legislative choice”.

84. In *Sauvé*, the Court added that “[i]t is for the courts, unaffected by the shifting winds of public opinion and electoral interests, to safeguard the right to vote guaranteed by s. 3 of the Charter”. This caution is particularly apposite in the present case, where the legislature has an inherent conflict of interest in determining how its membership is chosen. For reasons of partisanship and entrenched interests, governments in power (whose electoral success is closely tied to FPTP) have consistently resisted electoral reform efforts.¹²⁸ Voters whose rights are violated by the current electoral system have no recourse other than to the courts.

85. The legislative objective ostensibly furthered by the FPTP system is the creation of a method for the translation of votes into seats in a way that enables stable and accountable representative democratic government. This purpose would constitute a **clear pressing and substantial objective**. FPTP also appears to have a **rational connection** to the objective it was designed to achieve, in that it has mostly delivered stable and accountable government in Canada.

86. It is at the **minimal impairment** stage that FPTP’s problems become obvious. This stage requires the government to show that the measure at issue impairs the right as little as reasonably

¹²⁶ *Dixon v British Columbia (Attorney General)*, [1989 CanLII 248 \(BC SC\)](#), p 40.

¹²⁷ *Sauvé v Canada (Chief Electoral Officer)*, [2002 SCC 68](#), ¶13-15; *Figueroa v Canada (Attorney General)*, [2003 SCC 37](#), ¶60; *Frank v Canada (Attorney General)*, [2019 SCC 1](#), ¶43.

¹²⁸ LeDuc Affidavit, ¶44, 48, 50 [AR, Tab 6].

possible in furthering the legislative objective. Some deference must be accorded to the legislature by giving it a certain latitude: “If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement.”¹²⁹

87. The breaches of ss. 3 and 15 are not minimally impairing. Far from being a measure “carefully tailored so as to impair fundamental rights of representation and equality no more than is reasonably necessary”, FPTP was simply imported wholesale from the UK, at a time when there was little discussion about its suitability in Canada. These were times when only propertied white men could vote. Today, we live in a pluralistic state with various minorities, voices, and social interests. We understand that representation requires more than simply the right to vote.¹³⁰

88. On an election-to-election basis, FPTP runs roughshod over the right of effective representation of the 50% of voters who don’t belong to pluralities, depriving them of an equal share of voting or legislative power and reducing their voices in the deliberations of government. At a systemic level, FPTP arbitrarily favours voters of large and regional parties over other (often sizeable) groups of voters affiliated with smaller national parties (or voters affiliated with larger parties in regions where they do not constitute the plurality). It enables a minority of voters to rule over the majority and underrepresents a number of disadvantaged groups and minorities. These features affect voting incentives, turnout, and perceptions of fairness and legitimacy.

89. Aside from the establishment of exceptional districts in more rural areas, FPTP also fails to take any steps to provide equal representation for minorities and women throughout the country. In fact, its incentive structure pushes parties to nominate white men in winnable districts rather than present balanced slates where women and minorities have genuine chances to win.

¹²⁹ *Frank v Canada (Attorney General)*, [2019 SCC 1](#), ¶66.

¹³⁰ *Frank v Canada (Attorney General)*, [2019 SCC 1](#), ¶67.

90. Conversely, a proportional method of translating votes to seats would equally and effectively represent substantially all voters while increasing the shares of women and minorities in Parliament to the levels of other established Western democracies. There are many PR systems that could be conceived to ensure an equal or superior level of stability and accountability compared to FPTP. One of PR's primary virtues is that it offers sufficiently flexible and adaptable design elements to appropriately address concerns linked to Canada's geographical, political, and social interests (whether racial, ethnic, religious or linguistic).

91. This Court should strike down FPTP. Its failure to provide effective representation for substantially all citizens and its suppression of gender and racial representation in Parliament make it a relic of a past era, one where representation was restricted to propertied men.

PART IV – ORDER SOUGHT

92. The Applicants request that this application be granted and that ss. 2(1), 24(1), and 313 of the *Canada Elections Act* be declared unconstitutional to the extent that they create FPTP.

93. Because election laws based on the principle of proportional representation vary considerably in their structure and design, this Court should suspend the operation of its ruling for a period of two years, to give Parliament sufficient time to study the available alternatives with a view toward creating the most appropriate model for Canada's traditions and needs.

94. The Applicants request that no costs be awarded, given the public importance of the case.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS this 16th day of June, 2023.



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SCHEDULE A – TEXT OF STATUTES, REGULATIONS & BY-LAWS

Canada Elections Act, [SC 2000, c 9](#)

Definitions

[2 \(1\)](#) The definitions in this subsection apply in this Act.

...

electoral district means a place or territorial area that is represented by a member in the House of Commons. (circonscription)

...

Appointment of returning officers

[24 \(1\)](#) The Chief Electoral Officer shall appoint a returning officer for each electoral district in accordance with the process established under subsection (1.1) and may only remove him or her in accordance with the procedure established under that subsection.

Party may endorse only one candidate per district

[68 \(1\)](#) A political party may endorse only one prospective candidate in each electoral district for a given election.

Return of elected candidate

[313 \(1\)](#) The returning officer, without delay after the sixth day that follows the completion of the validation of results or, if there is a recount, without delay after receiving the certificate referred to in [section 308](#), shall declare elected the candidate who obtained the largest number of votes by completing the return of the writ in the prescribed form on the back of the writ.

Electoral Boundaries Readjustment Act, [RSC 1985, c E-3](#)

Rules

15 (1) In preparing its report, each commission for a province shall, subject to subsection (2), be governed by the following rules:

(a) the division of the province into electoral districts and the description of the boundaries thereof shall proceed on the basis that the population of each electoral district in the province as a result thereof shall, as close as reasonably possible, correspond to the electoral quota for the province, that is to say, the quotient obtained by dividing the population of the province as ascertained by the census by the number of members of the House of Commons to be assigned to the province as calculated by the Chief Electoral Officer under [subsection 14\(1\)](#); and

(b) the commission shall consider the following in determining reasonable electoral district boundaries:

(i) the community of interest or community of identity in or the historical pattern of an electoral district in the province, and

(ii) a manageable geographic size for districts in sparsely populated, rural or northern regions of the province.

Departure from rules

(2) The commission may depart from the application of the rule set out in paragraph (1)(a) in any case where the commission considers it necessary or desirable to depart therefrom

(a) in order to respect the community of interest or community of identity in or the historical pattern of an electoral district in the province, or

(b) in order to maintain a manageable geographic size for districts in sparsely populated, rural or northern regions of the province,

but, in departing from the application of the rule set out in paragraph (1)(a), the commission shall make every effort to ensure that, except in circumstances viewed by the commission as being extraordinary, the population of each electoral district in the province remains within twenty-five per cent more or twenty-five per cent less of the electoral quota for the province.

SCHEDULE B – LIST OF AUTHORITIES

Jurisprudence

Corbiere v Canada (Minister of Indian and Northern Affairs), [\[1999\] 2 SCR 203](#)
Dixon v British Columbia (Attorney General), [1989 CanLII 248 \(BC SC\)](#)
Figueroa v Canada (Attorney General), [2003 SCC 37](#)
Frank v Canada (Attorney General), [2019 SCC 1](#)
Haig v Canada; Haig v Canada (Chief Electoral Officer), [\[1993\] 2 SCR 995](#)
Harper v Canada (Attorney General), [2004 SCC 33](#), ¶71, 87.
Harvey v New Brunswick (Attorney General), [\[1996\] 2 SCR 876](#)
Longley v Canada (Attorney General), [2007 ONCA 852](#)
Quebec (Attorney General) v A, [2013 SCC 5](#)
R v Bryan, [2007 SCC 12](#)
R v Graat, [\[1982\] 2 SCR 819](#)
R v Oakes, [\[1986\] 1 SCR 103](#) at ¶64.
R v Sharma, [2022 SCC 39](#), ¶28, 31, 37, 45, 50, 53, 56, 59.
Reference re Prov. Electoral Boundaries (Sask.), [\[1991\] 2 SCR 158](#)
Reference re Secession of Quebec, [\[1998\] 2 SCR 217](#) at ¶67, 70.
Reference to Meaning of Word “Persons” in Section 24 of British North America Act, 1867: Edwards v. A.G. of Canada, [\[1929\] UKPC 86](#)
Reference re Prov. Electoral Boundaries (Sask.), [\[1991\] 2 SCR 158](#)
Reform Party of Canada v. Canada (Attorney-General), [1995 ABCA 107](#)
Sauvé v Canada (Chief Electoral Officer), [2002 SCC 68](#) at ¶32, 58.

Doctrine

Yasmin Dawood, The Right to Vote and Freedom of Expression in Political Process Cases Under the Charter, 2021 100 *Supreme Court Law Review* 104, [2021 CanLIIDocs 13648](#)

Yasmin Dawood, “Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review” [\(2012\) 62 University of Toronto LJ 499](#), p 504

SCHEDULE C – EXCERPTS OF AUTHORITIES (not available online)

N/A

**FAIR VOTING BC
and
SPRINGTIDE COLLECTIVE FOR
DEMOCRACY SOCIETY**
Applicants

- and -

ATTORNEY GENERAL OF CANADA

Respondent

ONTARIO
SUPERIOR COURT OF JUSTICE
(Proceedings commenced at TORONTO)

**FACTUM OF THE APPLICANTS, FAIR
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