CANADIAN COURT OF JUSTICE

(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

Between:

CITIZENS FOR DEMOCRACY

Appellant

– and –

THE ATTORNEY GENERAL OF CANADA

Respondent

FACTUM OF THE APPELLANT

SCHOOL nº 14

TABLE OF CONTENTS

PART I – OVERVIEW

[1] This case is fundamentally about executive action exceeding the bounds of statutory authority and undermining the rule of law. The first issue is whether the LIGHTS OUT protests qualify as an "other disaster" to certify impracticability in 125 districts under subsection 59(1) ("**s. 59(1)**") of the *Canada Elections Act* (the "**Act**").[1] The second issue is whether the Governor in Council (the "**GIC**") can supplant this finding by withdrawing electoral writs in districts that have not been certified by the Chief Electoral Officer (the "**CEO**").

[2] The respective decisions of the CEO to invoke the never-before used provision for 125 electoral districts (the "**CEO's Decision**"), and of the GIC to withdraw all writs and cancel the election altogether (the "**GIC's Decision**") were unreasonable.

[3] First, s. 59(1) is a last resort, not a commonplace manoeuvre. Decision-makers must exercise delegated power reasonably within the statutory bounds legislated by Parliament. This was not done in the case at bar. Both the CEO and GIC failed to demonstrate "justification, transparency and intelligibility"[2] because their decisions lacked essential elements of a coherent rationale.

[4] Second, the GIC's Decision to prolong a dissolved Parliament in the face of ongoing civil unrest and pandemic recovery leaves the Canadian economy in a fragile state. After experiencing waves of COVID-related shutdowns since 2020, businesses in urban centres and industrial corners are once again being forced to cease operations. Yet, the LIGHTS OUT movement is not an epidemic or an unstoppable natural disaster. The protestors are human actors that can be controlled and managed. With Parliament dissolved and law enforcement inactive, every day that a new government is not formed is a day where decisive action cannot be taken.

[5] Citizens for Democracy (the "**Appellant**") stands for the rule of law and democracy. The Appellant asks that this Court uphold those values by finding that the CEO and GIC exceeded their statutory authority and remit the decision to the CEO for reconsideration with directions.

1. Justiciability

[6] The CEO and GIC's Decisions are justiciable because they raise legal questions of statutory authority and interpretation. Though these decisions may give rise to political consequences, the issues are not purely political questions. In addition, the GIC's Decision raises *Charter* considerations, which fall squarely in the jurisdiction of the courts. Upholding the Federal Court of Appeal's decision on non-justiciability would improperly

---

[1] See *Canada Elections Act*, SC 2000, c 9 [*CEA*].

[2] See *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47; See also *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 86.

immunize two unprecedented and consequential decisions from review and lead to further political and legal uncertainty for Canadians.

2. Reasonableness

[7] The standard of review for both decisions is reasonableness. The CEO and GIC's Decisions are unreasonable. The CEO's Decision lacks internal coherence because it does not justify fundamental issues such as the criteria for impracticability and the impact of certifying 125 districts on the electoral process. It does not adhere to the relevant legal and factual constraints by failing to consider less disruptive alternatives in the Act or the facts that were available to the CEO that favoured no certification. The CEO's Decision should be reviewed on appeal since it was considered at the Federal Court. The GIC's Decision is unreasonable because it does not adhere to the statutory framework that limits withdrawal of writs to only those certified as impracticable and it relies on irrelevant considerations.

3. *Charter* Balancing

[8] The GIC's Decision to withdraw all electoral writs did not demonstrate an adequate balancing or justification of Canadians' s. 3 right to vote and right to effective representation with the Act's statutory objective of enfranchisement and protection of the integrity of the democratic process. This constitutional question should be heard on appeal. To send it back for determination would waste valuable court resources and time given the urgent circumstances. Further, the record is sufficient to assess the *Charter* balancing done by the GIC. At the Federal Court of Appeal, the Attorney General of Canada (the "**Respondent**") argued that the public statement issued by the Clerk of the Privy Council reflects this balancing.

4. Remedy Sought

[9] The appeal should be granted. The Federal Court of Appeal's finding of non-justiciability should be set aside. The CEO's Decision should be quashed and remitted to the CEO with instructions to explain and justify impracticability as it applies to any district certified. Alternatively, if the CEO's Decision is reasonable, this Court should quash the Order in Council and remit the decision to the GIC with directions to only consider the 125 electoral districts certified as impracticable.

PART II – STATEMENT OF FACTS

1. Facts

[10] On January 30, 2023, Her Excellency the Governor General of Canada dissolved Parliament and called for a general election to be held on March 13, 2023. Per the timing specified in the Act,[3] voter information cards were to be sent to registered voters by February 17, 2023, and candidate nominations were to close on February 20, 2023.[4]

[11] On February 15, 2023, the LIGHTS OUT social movement organized protests across Canadian cities, mainly concentrated in downtown business centres. LIGHTS OUT is a loosely organized activist group that protests commercial light pollution. Though they organized peaceful demonstrations in the past, the magnitude of current protests exceeded past ones.[5]

[12] Protesters set up camps in downtown business sectors for the most part, with small factions opting to occupy industrial areas. The establishment of camps led to congregations of protesters who reportedly harassed businesses for their use of artificial lighting or lit signage. Law enforcement in affected areas could not or would not stop the protesters. As a result, some businesses in affected areas chose to cease operations until the occupation ended.[6] However, most rural districts, including those that experienced protest activity, felt little to no impact from these protests.[7]

[13] The Returning Officers in certain affected electoral districts advised the CEO that protester tactics were escalating. They reported isolated incidents of protesters damaging streetlights and breaking into office buildings at night to turn off their lights. In one of the 338 electoral districts, protesters intercepted a truck carrying a shipment of ballots on the way to a Returning Office and lit it on fire.[8] Thankfully, no injuries were reported.

[14] These Officers reported concerns about logistical difficulties in administrating the election in their districts: leased polling facilities not being available, Returning Offices being closed, and printing companies shutting down, which restricted ballot printing. They advised Elections Canada of the need to find alternative poll locations.[9]

[15] Not long after, LIGHTS OUT published a statement on social media in support of the election. The statement indicated that they would not interfere with election-related activities, so long as they take place during daylight hours.[10]

---

[3] *CEA*, *supra* note 1 at ss 69, 95.
[4] See *Citizens for Democracy v Canada (Attorney General)*, 2023 FC 129 at para 4 [*FC Judgment*].
[5] *Ibid* at paras 4—5.
[6] *Ibid* at para 7.
[7] *Ibid* at para 12.
[8] *Ibid* at para 8.
[9] *Ibid.*
[10] *Ibid* at para 9.

1.1 The CEO's Decision to Certify Impracticability

[16] In light of the reports from certain Returning Officers, the CEO invoked s. 59(1) of the Act for the first time in its 71-year history to certify that it was impracticable to hold the election in 125 electoral districts.[11] That constitutes over one third of all electoral districts in Canada.

[17] In a short letter addressed to Cabinet, the CEO justified his decision by identifying the differing impacts of the protest in urban and rural areas as reported by Returning Officers. He also cited the Merriam-Webster's dictionary definition of "impracticable" which defines the word as: "incapable of being performed or accomplished by the means employed or at command."[12] He expressly stated that the decision only applied to the 125 electoral districts and that the election would proceed in the remaining 213 districts.[13]

1.2 The GIC's Decision to Withdraw All Writs

[18] After receiving the CEO's Decision, the GIC decided to withdraw the writs of election in all 338 electoral districts. The Clerk of the Privy Council issued a public statement citing the Critical Election Incident Public Protocol Panel's **"**belief" that notwithstanding the limited certification of the CEO, it was "not advisable to proceed with the election in any electoral districts until it can proceed in all of them."[14] The public statement concluded: "On the Panel's advice, the Governor in Council has therefore ordered that the writs of election be withdrawn in all 338 electoral districts pursuant to section 59 of the Canada Elections Act."[15]

[19] The following elements were discussed to support the Decision:

a. One-third of Canada's electoral districts were impacted;
b. The protests were concentrated in urban centres;
c. In past elections, Canadians in rural areas have tended to support different political parties than those in urban centres, meaning that it may not be possible to know which party will form government without results from the remaining ridings;
d. The risk of further uncertainty and a constitutional crisis is too great to allow the vote to proceed;
e. There is no guarantee that a party would cede power if it had been invited to form government on partial results;
f. Canadians' trust in Parliament and the integrity of the electoral system could be irreparably undermined if this election proceeds at different times across the country.[16]

---

[11] *Ibid* at para 13.
[12] *Ibid.*
[13] *Ibid.*
[14] *Ibid* at para 14.
[15] *Ibid.*
[16] *Ibid.*

[20] Citizens for Democracy immediately filed an application for judicial review of both decisions, which was heard on an urgent basis.

1.3 The Legislative Context

[21] Part 5 of the Act regulates the conduct of an election and identifies the roles and duties of electoral actors such as the CEO, GIC, and returning officers. In the case of emergency or unusual circumstances, the Act provides numerous mitigating measures to accommodate difficult circumstances. Subsection 17(1) states that the CEO may adapt *any* provision in the Act "for the sole purpose of enabling electors to exercise their right to vote."[17] This may include extending the time to do any act, subject to exceptions, or to increase the number of election officers or polling stations.[18]

[22] In severe circumstances, s. 59(1) is the operative provision for the withdrawal of specific electoral writs after an election has been called. It allows the CEO to certify certain electoral districts as impracticable by reason of a flood, fire or other disaster. The certification of an electoral district requires that it is "impracticable to carry out the provisions of [the] Act."[19]

[23] Upon receipt of the certification decision, the GIC may order the withdrawal of the electoral writs for certified districts, at which point a writ ordering a new election must be issued within three months.[20] The prescribed polling day must be no later than 50 days after the date of the new writ.[21]

[24] If the GIC is of the opinion that the withdrawal of the writ is not warranted, s. 59(4) lists available alternatives. Rather than withdrawing writs, the GIC may do nothing or "postpone the election by up to seven days for that electoral district, and correspondingly, extend the election period and fix the date for the new polling day."[22] Subsection 59(5) states that postponements of the polling day will only take effect if acts that are required a certain number of days before polling day are not done. If those acts have been done before the postponement, the polling day will be deemed to still be the initially fixed date.[23]

[25] Finally, s. 3 of the *Canadian Charter of Rights and Freedoms* (the "**Charter**") guarantees that "every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein."[24]

---

[17] *CEA, supra* note 1, s 17(1).
[18] *Ibid.*
[19] *Ibid.*
[20] *Ibid*, s 59(2).
[21] *Ibid*, s 59(3).
[22] *CEA, supra* note 1, s 59(4).
[23] *Ibid*, ss 57(1.2)(c), 59(5)(a).
[24] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11, s 3 [*Charter*].

2. Judicial History

2.1 The Federal Court's Decision Quashing the Order in Council

[26] The Federal Court (the "**FC**") decided that the CEO's Decision was reasonable, but the GIC's Decision was not. Though Justice Biggar alluded to justiciability in her judgment, she made no formal finding and proceeded to conduct a judicial review of the decisions. In defining the decision under review, she identified both the CEO's "certification decision" and the GIC's Order in Council.[25] Neither party contested this.

[27] In the substantive review, she identified two issues: whether the CEO's impracticability certification was a necessary precondition for the GIC's decision to order writ withdrawal and whether the CEO's interpretation of the LIGHTS OUT protests as an "other disaster" complied with the statutory objective of s. 59.[26]

[28] On the first issue, Justice Biggar found that the CEO's impracticability certification was a necessary precondition for the GIC's authority to order withdrawal of the writ.[27] In her view, s. 59 only grants the GIC authority to order the withdrawal of a writ of election *after* the CEO has certified that it is impracticable. In this case, the CEO clearly limited his certification to the 125 affected electoral districts. Thus, the "Panel unreasonably exceeded its statutory authority."[28]

[29] On the second issue, she found that the LIGHTS OUT protests met the definition of "other disasters" as defined in s. 59. She therefore quashed the GIC's withdrawal order in the 213 unaffected electoral districts but maintained the order for the 125 affected electoral districts.[29]

[30] The Attorney General of Canada appealed the decision to the Federal Court of Appeal (the "**FCA**"), where the case was again heard on an urgent basis.

2.2 The Federal Court of Appeal's Decision Reinstating the Order in Council

[31] The majority granted the appeal and found the issue to be non-justiciable since "the decision about whether to withdraw the writs of election, and if so where, is highly discretionary."[30] In their view, the central issue was about "the timing of an election," which was not a question to be answered by the courts.[31] They opined that interfering with this exercise of discretion would "violate the unwritten separation of powers... [and] very

---

[25] FC Judgment, *supra* note 4 at paras 13—14.
[26] *Ibid* at para 18.
[27] *Ibid*.
[28] *Ibid.*
[29] *Ibid* at paras 20—22.
[30] See *Canada (Attorney General) v Citizens for Democracy,* 2023 FCA 7 at para 5 [*FCA Judgment*].
[31] *Ibid.*

likely impact the result of the election."[32] Consequently, the majority found that Justice Biggar erred in law by neglecting the preliminary question of justiciability. Thus, they set aside the FC decision and reinstated the GIC's order.[33]

[32] The dissenting judge stated that the issue of the timing of an election was justiciable, referring to the FC's past decision in *Aryeh-Bain v Canada.*[34] He found that the GIC's decision failed to reflect a balancing of the right to vote protected by section 3 of the *Charter*. He stated that the right to vote, which protects the rights of voters and candidates, should not be limited based on hypothetical worst-case scenarios or extrinsic political considerations. Consequently, the dissent would have upheld the FC decision and remitted the matter to the GIC.

PART III – OBJECTIONS TO JUDGMENT APPEALED FROM

[33] Citizens for Democracy is now appealing to the Canadian Court of Justice. This appeal should be allowed because:

1. The Federal Court of Appeal erred in concluding that the decision was non-justiciable.
2. The Federal Court of Appeal exceeded the bounds of appellate review in its analysis of the Federal Court's decision by departing from the *Agraira* framework.
3. The Federal Court did not properly apply the reasonableness standard to the CEO and GIC's Decisions.

[34] The questions at issue on this appeal are as follows:

1. Whether the review of an exercise of statutory discretion pursuant to s. 59(1) of the Act is justiciable.
2. Whether the CEO's certification of the LIGHTS OUT occupation as an "other disaster" as enumerated in s. 59(1) was reasonable.
3. Whether the GIC has the authority to withdraw writs in electoral districts that are not certified as impracticable.

---

[32] *Ibid.*
[33] *Ibid* at paras 4—5.
[34] FCA Judgment, *supra* note 30 at para 8, citing *Aryeh-Bain v Canada (Attorney General)*, 2019 FC 964 [*Aryeh-Bain*].

PART IV – ARGUMENT

1. The CEO and the GIC's Decisions are Justiciable

1.1 The Standards of Appellate Review Apply

[35] The FCA determined that the decision to withdraw the writs of election was non-justiciable. The standards of appellate review articulated in *Housen v Nikolaisen* apply.[35] Justiciability is a pure question of law that must be assessed on a correctness standard.[36]

1.2 The Decisions Arise from Statutory Grants of Power

[36] The case is justiciable because the CEO and GIC's Decisions raise legal issues of statutory interpretation of their respective authority. Judicial review is always available to ensure that the exercise of a statutory grant of power falls within the decision-maker's jurisdiction.[37] As a creation of the *Dominion Elections Act*,[38] the CEO may only exercise power granted by statute. Though the GIC derives their authority from both statute and residual prerogative power, the latter is still subject to the doctrine of Parliamentary supremacy.[39] Parliament may withdraw or regulate prerogative powers by enactment when the statute demonstrates an intent to bind the prerogative powers of the Crown.[40] Courts have the jurisdiction to determine whether a prerogative power exists and, if so, its scope and whether it has been superseded by statute.[41] This principle has recently been affirmed in the United Kingdom as well, from which Crown prerogative in Canada is derived.[42]

---

[35] See *Housen v Nikolaisen,* 2002 SCC 33 [*Housen*].
[36] *Ibid* at para 8.
[37] See *Crevier v AG (Quebec),* [1981] 2 SCR 220.
[38] See *Dominions Elections Act,* SC 1920, c 46.
[39] See Peter W Hogg, *Constitutional Law in Canada* (Toronto: Thomson Reuters, 2017) at I-20.
[40] See *Interpretation Act,* RSC 1985, c 1-21, s 17. See also *Vancouver Island Peace Society v Canada (TD),* 1993 CanLII 2977 (FC), [1994] 1 FC 102 at paras 61, 68.
[41] See *Black v Canada (Prime Minister),* 2001 CanLII 8537 (ON CA) at para 29, 54 OR (3d) 215, leave to appeal to SCC refused.
[42] See *R (Miller) v The Prime Minister,* [2019] UKSC 41 at para 35 [*Miller UK*].

[37] Parliament's intent to bind the GIC's prerogative powers was clearly expressed by enacting s. 59(1) of the Act, which dictates the circumstances for writ withdrawal.[43] Parliament's intent to bind the Crown may be demonstrated through express wording, a "clear intention" manifest from the textual context, or an intention where the purpose of the statute would be "wholly frustrated" or result in absurdity.[44] In this case, the express wording of the GIC's role in withdrawing writs demonstrates an intention to impose statutory parameters on the exercise of their power. If the GIC's prerogative powers were meant to be untouched, this would have been expressly stated as it is in s. 56.1(1), which confirms: "Nothing in this section affects the powers of the Governor General, including the power to dissolve Parliament at the Governor General's discretion."[45]

[38] In the absence of such express language, s. 59(1) must be read as limiting the actions of the GIC. The GIC recognized this when they explicitly cited s. 59 of the Act in the public statement issued by the Clerk of the Privy Council, removing any ambiguity on the legal source of authority.[46] Thus, the GIC acted under statutory grant.

1.3 The Subject Matter of the Decisions is Justiciable

[39] If the GIC's Decision stemmed from residual prerogative power, it would still be justiciable. The questions of whether the GIC's Decision was within the scope of prerogative power and whether the CEO's statutory interpretation was reasonable would remain. The FCA incorrectly defined the subject matter as "fundamentally about the timing

[43] *CEA*, *supra* note 1, s 59(1).
[44] See *Alberta Government Telephones v Canada (Canadian Radio-television and Telecommunications Commission)*, 1989 CanLII 78 (SCC), [1989] 2 SCR 225 at 281.
[45] *CEA*, *supra* note 1; *Conacher v Canada (Prime Minister)*, 2009 FC 920 at para 53.
[46] FC, *supra* note 4 at para 14.

of an election" and characterized the issue as an exercise of discretion with which the courts should not interfere.[47] Discretionary decisions are not barred from judicial review.

[40] When determining the justiciability of an issue, courts must assess whether the issue is "purely political in nature, and should be determined in another forum," or whether there are "sufficient legal elements to render it justiciable."[48] The issues on appeal are far from being "purely political" as they involve statutory interpretation and legal jurisdiction. Nor are they analogous to past examples of political questions, such as the prosecutorial discretion, questions of parliamentary privilege, and the legislative process.[49] This Court is not being asked to decide the wisdom of a policy choice, but rather the exercise of statutory interpretation and authority under the enabling legislation. This Court's review of the executive's exercise of delegated authority is necessary to maintain the "separation of powers at the heart of Canada's democracy."[50]

[41] The FC has already found a decision surrounding election timing to be justiciable. As referenced by Justice Hamel at the FCA, judicial review has been granted for a decision affecting the timing of an election in *Aryeh-Bain v Canada.*[51] In that case, the FC conducted a judicial review of the CEO's decision not to recommend an alternate polling day due to conflict with a religious holiday.[52] The FC found the matter had sufficient legal elements to remove it from the realm of the "purely political."[53] Given the added question of statutory interpretation, there is more incentive for this Court to intervene.

---

[47] FCA Judgment, *supra* note 30 at para 5.
[48] See *Misdzi Yikh v Canada*, 2020 FC 1059 at para 20 [*Misdzi Yikh*].
[49] See *Democracy Watch v Canada*, 2019 FC 388 at para 70.
[50] FCA Judgment, *supra* note 30 at para 5.
[51] *Aryeh-Bain*, *supra* note 34.
[52] *Ibid* at para 33.
[53] *Misdzi Yikh*, *supra* note 48 at para 20.

[42] This Court's intervention in the matter is appropriate. The scope of justiciability is guided by a flexible analysis into the appropriateness of courts deciding a given issue.[54] The FCA opined it would not be appropriate because it would "undermine [the Court's] legitimacy."[55] This is not the case. The principles of the rule of law and the separation of powers require that courts play a role in "ensuring the legality of state decision making."[56]

2. The CEO's Decision Certifying 125 Electoral Districts is Unreasonable

[43] The CEO's Decision to certify 125 electoral districts is unreasonable. It fails to: (1) demonstrate his reasoning for the determination of impracticability in each district; (2) justify the departure from the longstanding practice of non-use in such a dramatic fashion; and (3) reflect the factual and legal constraints that weigh against certification.[57] Since this is the basis upon which the GIC may withdraw electoral writs, if the CEO's Decision is unreasonable, then the GIC's Decision must be as well.

2.1 The CEO's Decision Is Reviewable

[44] The CEO's Decision was reviewed by the FC, therefore it is open to this Court to review as well. Justice Biggar identified the CEO's "certification decision"[58] and the GIC's order when discussing the decision under review. She also identified issues that pertained to the separate decisions.[59] This demonstrates that she reviewed both decisions. The Respondent did not contest this at first instance, nor on appeal.

---

[54] See *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 at para 34 [*Highwood*].
[55] FCA Judgment, *supra* note 30 at para 5.
[56] *Highwood*, *supra* note 54 at para 32. See also *Miller UK*, *supra* note 42 at para 34.
[57] *Vavilov*, *supra* note 2 at paras 99—101.
[58] FC Judgment, *supra* note 4 at para 13.
[59] *Ibid* at para 16.

2.2 The Standard of Review is Reasonableness

[45] The standard of review for the CEO's Decision is reasonableness.[60] This case does not fall under any of the recognized exceptions that would displace the presumption of a reasonableness standard.[61] As per *Agraira*, this Court must "step into the shoes" of the FC to assess the standard of review identified and determine whether it was properly applied.[62]

2.3 The CEO's Decision Does Not Justify Why Electoral Districts Were Certified as Impracticable

[46] The FC record allows this Court to investigate the reasons provided and factual circumstances to assess the Decision's internal rationale. Though there are no applicable *Baker* factors that impose a duty to provide reasons,[63] the reviewing court can investigate whether a reasoned explanation can be implied from the circumstances, "including the record, previous decisions of the administrator [and] the nature of the issue."[64] In *Baker*, the Court accepted by inference the notes of the assessing officer as the reasons for the decision in the absence of formal reasons because they were offered in response to a request for reasons.[65] The same should be done in this case. The CEO's letter to Cabinet was voluntarily provided as evidence to the FC to justify his Decision. This Court should accept the letter as reasons for the purpose of judicial review.[66]

---

[60] *Vavilov, supra* note 2.
[61] *Vavilov, supra* note 2; See also *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, 2022 SCC 30.
[62] See *Agraira v Canada (Public Safety Emergency Preparedness)*, 2013 SCC 36 at para 45 [*Agraira*].
[63] See *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at para 42 [*Baker*].
[64] *Vavilov, supra* note 2 at para 137. See also *Bell Canada v British Columbia Broadband Association*, 2020 FCA 140.
[65] *Baker, supra* note 63 at para 44.
[66] *Ibid* at para 21.

[47] The CEO's Decision is unreasonable because it lacks vital information upon which to base a rationale. If the reasons read in conjunction with the record make it impossible to "understand the decision maker's reasoning on a *critical point*," then the decision will be unreasonable.[67] The lack of identification of what factors were considered to designate a district as affected, and thus impracticable, is a critical flaw that fails to meet the requisite standard of justification, transparency, and intelligibility.[68]

[48] The CEO failed to provide an explanation for the criteria used to certify a district as affected and impracticable, affected but not impracticable, or unaffected. In his letter, the CEO noted the differing impacts of the protests in urban and rural areas.[69] According to the record, the affected areas do not comprise all districts in which protest activity is occurring. Justice Biggar stated that "the protests are *largely concentrated* in 125 electoral districts,"[70] meaning they are not strictly limited to those districts. Due to this regional variability, there must be districts that are affected, but not to the extent of impracticability. This implies the use of some benchmark to make the determination. The CEO's omission of this benchmark makes it impossible to understand why his conclusions were reached.

2.4 The CEO's Decision Does Not Align with the Governing Statutory Scheme

[49] The CEO's Decision is unreasonable because it cannot be justified in light of the relevant legal and factual constraints elaborated in *Vavilov*. In this case, the governing statutory scheme, past practice, the principles of statutory interpretation, and the evidence before the CEO weigh against certifying 125 electoral districts as impracticable.[71]

---

[67] *Vavilov, supra* note 2 at para 103 [emphasis added].
[68] *Dunsmuir, supra* note 2 at para 49.
[69] FC Judgment, *supra* note 4 at para 13.
[70] *Ibid* at para 12 [emphasis added].
[71] *Vavilov, supra* note 2 at para 106.

2.4.1 The CEO Failed to Show Compliance with the Statute and Relevant Alternatives

[50] Impracticability certifications are meant to be used as last resorts, as evidenced by the Act's array of discretionary powers provided to the CEO to enable the exercise of the right to vote. As per *Vavilov,* the "governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision."[72] In this case, the governing statutory scheme provides numerous options to allow the vote to take place. Section 17 grants the CEO power to adapt any provision in the Act in the case of an emergency or "unusual or unforeseen circumstance[s]" for the sole purpose of enabling "electors to exercise their right to vote."[73] This includes increasing the number of polling stations as per s. 17(1) or merging polling divisions as per s. 108(1), which would allow Returning Officers to redirect voters in urban centres to less affected areas.[74]

[51] The CEO should have been aware of the relevant and less disruptive alternatives. Elections officers have the authority to eject protesters who intentionally obstruct voting as this is an offence under the Act. Section 479 endows elections officers with the duty and authority to order persons who are committing offences under the Act to leave the premises where the vote is taking place.[75] Subsection 480(2) creates an offence where a person intentionally obstructs the electoral process and "acts [...] in a disorderly manner with the intention of preventing [...] a public meeting called for the purposes of the election."[76] Subsection 17(1) also allows the CEO to increase the number of election officers on election day, which is notable when read in conjunction with ss. 479—480, as it would

---

[72] *Vavilov, supra* note 2 at para 108.
[73] *CEA, supra* note 1, s 17(1).
[74] *Ibid,* ss 17(1), 108(1).
[75] *Ibid,* s 479.
[76] *Ibid,* s 480(2).

permit more enforcement. This interpretation is supported by s. 61(1) which authorizes returning officers to "appoint the staff that they consider necessary for the purposes of the Act"[77] such as security or private enforcement. Further, any criminal conduct surpassing the offences listed in the Act would still be subject to criminal sanction.

[52] Finally, the Act prioritizes polling stations in residential areas, not commercial ones. Per s. 122(2), "whenever possible, a returning officer shall establish a polling station in a school or other suitable public building."[78] This already eliminates many of the occupied urban centres as options for polling day.

[53] Based on the record, the CEO did not consider the alternatives to impracticability in the Act. Though reviewing courts are expected to show deference to decisions "within a range of possible, acceptable outcomes, that are defensible on the facts and law,"[79] failure to show compliance with the statutory scheme may constitute an error.[80] In this context, the alternatives available within the statute were highly relevant to the CEO in deciding how to address election concerns. The CEO's letter to Cabinet failed to consider and explore the range of options under the Act, thus making it unreasonable.

2.4.2 The CEO Failed to Justify His Departure from Past Practice and Interpretation

[54] The CEO departed from the longstanding practice of *non-use* of s. 59(1), which was enacted in 1952.[81] For comparison, one may look at recent events in which it was *not* invoked. Even in extenuating circumstances like the COVID-19 pandemic, s. 59(1) was not used to certify any districts. This suggests there is a high threshold for certifying

[77] *Ibid*, s 61(1).
[78] *Ibid*, s 122(2).
[79] *Dunsmuir, supra* note 2 at para 47.
[80] See *Penez v Canada (Citizenship and Immigration),* 2017 FC 1001 at paras 24—25.
[81] *Vavilov, supra* note 2 at para 131.

impracticability. If a public health emergency and significant risk of contagion were not enough to suspend the election, then protests would not be.

[55] The CEO departed from a prior persuasive interpretation. The wording of "other disaster" in s. 59(1) has been interpreted by an administrative tribunal to exclude human activity. In *Treasury Board v Professional Institute of the Public Service of Canada*,[82] the Board considered the question of impracticability in relation to potential strikes by public servants. Having the benefit of expert testimony by Elections Canada officials, the Board determined that an "other disaster… must be a natural disaster since floods and fires are natural disasters."[83] While not binding, the analysis is relevant and applicable to ongoing protests which are also human activities designed for disruption.[84] The Board also found that: "[Election Canada]'s lack of preparedness for an election cannot be viewed as an "other disaster" within the meaning of the provision."[85]

2.4.3 The CEO Failed to Abide by the Principles of Statutory Interpretation

[56] The CEO's interpretation of "other disaster" was unreasonable considering the text, context, and purpose of the Act. The modern principle of statutory interpretation mandates that the words of a statute be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[86] The CEO's Decision failed to properly consider all three.

---

[82] See *Treasury Board v Professional Institute of the Public Service of Canada*, 2009 PSLRB 120 [*Treasury Board*].
[83] *Ibid* at para 219.
[84] *Ibid* at para 85.
[85] *Ibid* at para 219.
[86] *Vavilov, supra* note 2 at para 118. See also *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para 21; *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 26.

[57] The CEO's statutory interpretation "reverse-engineered [the analysis] to achieve a desired outcome on policy grounds."[87] The CEO failed to demonstrate he interpreted the words of s. 59(1). He instead relied on the Merriam-Webster definition of "impracticable." While a dictionary definition is permissible, the CEO did not substantiate what impracticable means within the statutory context. He simply provided a decontextualized definition and failed to apply it to the facts. Where reasons "simply repeat" language and "then state a peremptory conclusion," this does not provide a reviewing court with enough support to understand the rationale underlying a decision.[88]

[58] The wording of s. 59(1) suggests that an "other disaster" must be a natural disaster. The text of the provision lists the circumstances of "flood, fire or other disaster" as cause for impracticability. The interpretive maxim of *noscitur a sociis* or the associated words rule states that "two or more terms linked by "and" or "or" serve an analogous grammatical and logical function."[89] The common denominator between terms is used to resolve ambiguity and limit the scope so that each word takes on a more restrictive meaning.[90] Further, *ejusdem generis* or the "limiting class principle" states that when the last term of an enumeration is general, it must be interpreted in light of the terms that precede it. [91] This approach was applied in *Treasury Board* to interpret s. 59(1).[92] More persuasively, the Supreme Court continues to endorse it to resolve ambiguities in statutory and contractual

[87] *Vavilov, supra* note 2.
[88] *Vavilov, supra* note 2 at para 102.
[89] See Ruth E Sullivan, *The Construction of Statutes*, 7th ed (Toronto: LexisNexis, 2022) at § 8.06[1]. See also *R v Goulis,* [1981] OJ No 637, 33 OR (2d) 55 at 61 (Ont CA).
[90] *Ibid.*
[91] *Ibid* at § 8.07[1]. See *Canadian Pacific Railway Company v Canada*, 2021 FC 1014 at paras 537—539.
[92] *Treasury Board, supra* note 82.

interpretation cases, particularly when interpreting *force majeure* clauses.[93] Subsection 59(1) can be likened to such clauses since it enumerates the extenuating circumstances in which exceptional measures are available. Given the preceding terms, protests must be comparable to natural disasters.[94] That is not the case. Natural disasters are inevitable, uncontrollable, and indiscriminate. Protests are targeted, planned and human.

[59] The CEO's Decision must be based on objective facts for every certified district, rather than a broad judgment call across all affected ones. The list of applicable circumstances in s. 59(1) is "precise and narrow" which demonstrates the legislature's intent to "tightly constrain the [CEO]'s ability to interpret the provision."[95] The CEO is statutorily limited to a "certification" of impracticability, which is a fact-driven inquiry, rather than a mere recommendation like other sections.[96] By certifying nearly every affected urban district without explanation, the CEO did not demonstrate that he was alive to the varying realities across districts and the potential circumstances that may have made the election possible in some affected areas despite the protests.

[60] The provision's location in the Act further supports a narrow statutory interpretation. Each Part in the Act creates and delimits varying duties for both the CEO and the GIC. Subsection 59(1) is found under the title "Writs of Election" within Part 5 of the Act: "Conduct of an Election." This placement allows for a comparison with the preceding title "Date of General Election" which comprises of s. 56.1. The title employs the word "recommend[s]" five times in relation to the CEO's power to recommend an

---

[93] See e.g. *Atlantic Paper Stock Ltd. v St. Anne-Nackawic Pulp and Paper Co.*, 1975 CanLII 170 (SCC), [1976] 1 SCR 580 at 583; *Consolidated Fastfrate Inc v Western Canada Council of Teamsters*, 2009 SCC 53 at paras 42—43.
[94] *Treasury Board*, *supra* note 82 at para 219.
[95] *Vavilov, supra* note 2 at para 110.
[96] *CEA*, *supra* note 1, s 56.2(2).

alternate day. In contrast, the "Writs of Election" section, comprising of ss. 57—62 does not use the word 'recommend' in any provisions, suggesting a more restrictive standard.

[61] As for purpose, even if Parliament intended for the list to include human acts, it would require a high threshold to qualify as a "disaster" to ensure impracticability is not invoked for human activity that simply poses an inconvenience. Such a threshold could be akin to the declaration of a state of emergency – as seen during the COVID-19 pandemic where no districts were certified notwithstanding the threat of contagion. The fact that the federal government has not declared a state of emergency shows that it does not consider the protests to be a serious enough threat to public order or public welfare.[97]

2.4.4 The CEO Misapprehended the Facts and Evidence Before Him

[62] The CEO inflated specific facts as though they applied to all sites equally. In his letter to Cabinet, the CEO describes facilities not being available, Returning Offices shutting down, and printing companies ceasing operations in urban centres.[98] However, the record does not show that facilities outside of those centres were incapacitated, nor that electoral facilities could not have been relocated to less affected areas.

[63] It is apparent from the incidents noted in the CEO's reasons that the LIGHTS OUT movement would have a negligible impact on the election since the protests coalesced in limited areas. Protests occurring in downtown business sectors and industrial areas would likely not substantially affect residential polling locations established near voters' homes. Yet, the CEO's reasons contain no mention of the relative proportion of polling locations within electoral districts that would be affected.

---

[97] See *Emergencies Act*, RSC 1985, c 22 (4th Supp), ss 3, 6, 16.
[98] *Ibid* at para 8.

[64] The CEO inflated the threat of the LIGHTS OUT movement. Rather than being antagonistic to the election process, LIGHTS OUT issued a statement supporting the election.[99] Protestors did not plan to interfere with election-related activities if they were conducted during daylight hours. The record also mentioned the occurrence of one ballot truck being set on fire by protesters.[100] While concerning for that one district, the CEO did not cite any evidence of this occurring in any of the other 124 districts.

[65] The outcome of the indiscriminate certification of all affected districts is unreasonable because it entrenches the occupation by leaving people in urban centres without federal recourse and affected businesses without income. It creates confusion surrounding the status of elected MPs in unaffected districts. As long as Parliament is not fully formed, the incumbent government is limited in the actions it can take to quell protests and legislate other matters of economic significance.

[66] The CEO's reasons fail to: (1) interpret "other disaster" according to modern principles, (2) address his ability to adapt the Act in response to unforeseen events, and (3) reflect the evidence that supports holding the election. While we do not have all the evidence before the CEO, his interpretation did not consider "the legislative wording and the larger… context."[101] These failures render the CEO's Decision unreasonable.

3. The GIC's Decision to Withdraw Writs in All Electoral Districts is Unreasonable

[67] The GIC's Decision contains three distinct errors. It fails to: (1) respect the constraints of its governing statute; (2) provide coherent reasons that justify its conclusions; and (3) proportionately balance *Charter* rights with the statutory objective.

---

[99] *Ibid* at para 9.
[100] FC Judgment, *supra* note 4 at para 8.
[101] *Dunsmuir*, *supra* note 2 at para 76.

3.1 The Standard of Review is Reasonableness

[68] The applicable standard for reviewing the GIC's Decision is reasonableness.[102] This Court must "step into the shoes" of the FC to assess the standard of review identified and determine whether it was properly applied.[103] The standard of review for administrative *Charter* analysis is also reasonableness.[104]

3.2 The GIC Did Not Respect the Governing Statute Which Mandates the CEO's Certification as a Precondition for Withdrawal

[69] The GIC exercised authority that was not delegated to them.[105] The FC rightfully concluded that the CEO's Decision was a necessary precondition for the withdrawal of writs. Subsection 59(1) states: "The Governor in Council may order the withdrawal of a writ for any electoral district *for which* the Chief Electoral Officer certifies."[106] Subsection 59(4) gives the GIC three options: (1) withdraw the writ for a certified district, (2) postpone the election "for that electoral district" by up to seven days, (3) do nothing and allow the election to proceed.[107] A plain language reading clearly indicates the GIC's withdrawal order must be for a district that is certified by the CEO.

[70] The only reasonable interpretation of the statute is that the GIC could not withdraw the electoral writs in districts that were not certified. In so doing, the GIC exceeded their statutory authority and "arrogate[d] powers to themselves that they were never intended to have."[108] If Parliament wanted the GIC to have an unbridled ability to withdraw any writs,

---

[102] *Vavilov, supra* note 2 at paras 85, 99.
[103] *Agraira, supra* note 62 at para 45.
[104] *Vavilov, supra* note 2; see also *Doré v Barreau du Québec,* 2012 SCC 12 [*Doré*].
[105] *Vavilov, supra* note 2 at para 109.
[106] *CEA, supra* note 1, s 59(1).
[107] FC Judgment, *supra* note 4 at para 11; *CEA, supra* note 1, ss 59(1)—(4) [emphasis added].
[108] *Vavilov, supra* note 2 at para 109.

it would have explicitly stated so as it did in s. 56.1(1), which preserves the Governor General's prerogative power to dissolve Parliament.

[71] The GIC's interpretation leads to the absurd conclusion that they may withdraw any electoral writs regardless of whether the CEO has certified any districts as impracticable. Absolute authority to withdraw writs would obviate the need for the CEO's role in certifying electoral districts altogether. Given that the CEO has been given an explicit role within the provision, bypassing the necessary first step of certification would usurp legislative intent and be unreasonable. The GIC's disregard of this statutory limitation on their power should make the Court lose confidence in the outcome.[109]

[72] The ordinary tools of statutory interpretation lead to one reasonable interpretation of s. 59(1): the CEO's certification is a necessary precondition to the GIC's withdrawal of writs.[110] In cases where the "range of reasonable outcomes"[111] is necessarily limited to a single reasonable interpretation, the decision-maker must adopt it.[112] The GIC's different interpretation is unreasonable.

3.2.1 The GIC Failed to Justify its Departure from the Past Practice of Non-Use

[73] The GIC's Decision is unreasonable as the GIC does not justify their departure from the longstanding practice of non-use. Subsection 59(1) has never been invoked in its 71 years of existence. The unprecedented nature of the situation accords the GIC a heightened responsibility to justify their Decision and ensure the "reasons demonstrate consideration for [their] consequences."[113] The reasons in the statement did not explain

---

[109] *Vavilov, supra* note 2 at para 122.
[110] See e.g., *Dunsmuir, supra* note 2 at para 75; see also *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 at para. 34.
[111] See *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 4.
[112] See *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at para 38.
[113] *Vavilov, supra* note 2 at para 135.

why they were bypassing the required certification prescribed in s. 59 to withdraw all writs. While this situation is unprecedented, that does not give the GIC unlimited discretion. This lack of justification demonstrates a fundamental flaw in the GIC's reasoning.

3.3 The GIC's Decision is Based on Internally Incoherent Reasons

3.3.1 The GIC's Decision Relies on Hypotheticals and Speculations

[74] The GIC's Decision is based on (1) an absurd premise and (2) unfounded generalizations, which call its internal rationality into question.[114] The Decision is not justifiable, transparent, or intelligible.[115]

[75] The GIC's reasons articulated in the public statement are based on an unjustifiable premise: "there is no guarantee that a party would cede power if it had been invited to form government."[116] This reasoning implies that candidates would not adhere to the rule of law and try to usurp federal leadership. This implication is unjustified since election results cannot be validated when incomplete.[117] Subsection 328(2) prohibits the transmission of election results before the close of all polling stations.[118] The Supreme Court held that "restraining publication of election results until most or all Canadians have voted"[119] maintains confidence in the electoral process and ensures informational equality.[120] Given these safeguards, government cannot form until all electoral districts have been verified.

[76] The GIC's Decision relies on irrelevant generalizations such as past election trends to suggest that Canadians in rural areas tend to support different political parties than those

---

[114] *Vavilov, supra* note 2 at para 104.
[115] *Dunsmuir, supra* note 2.
[116] FCA Judgment, *supra* note 30 at para 14.
[117] *CEA, supra* note 1, ss 293(1)—(2). See also *Treasury Board, supra* note 82 at paras 79, 83.
[118] *CEA, supra* note 1, s 328(2).
[119] See *R v Bryan*, 2007 SCC 12 at paras 45, 49.
[120] See *Harper v Canada*, 2004 SCC 33 at para 47.

in city centres.[121] There may be variability in political preferences among areas due to a constellation of factors. Yet, whether there is statistical correlation between rural districts and specific parties is an improper consideration. The GIC must assess if it is impracticable to proceed with elections in affected districts, an objective and functional determination, not which political party may benefit. The irrelevant generalizations and unjustifiable premise relied upon by the GIC are an improper basis for the withdrawal of all writs.[122]

3.4 The GIC Failed to Proportionately Balance s.3 Charter Rights

3.4.1 The GIC's Decision Raises a *Charter* Issue

[77] The GIC's Decision to withdraw all electoral writs and cancel the upcoming election engages the s. 3 *Charter* rights of Canadian voters to have effective representation and candidates to play meaningful roles in the electoral process.[123] *Figueroa v Canada* clarified that a "meaningful role" signifies the right of each citizen to a certain level of participation in the electoral process.[124] The GIC had a duty to exercise their statutory grant of power with respect for *Charter* rights.[125]

[78] The primacy of s. 3 is reflected in its broad scope, which protects both the right to vote or be a candidate, and conditions under which these rights are exercised.[126] It includes a positive rights dimension; the government has an obligation to create an electoral system

---

[121] FCA Judgment, *supra* note 30 at para 14.
[122] *Vavilov, supra* note 2 at para 86.
[123] *Charter, supra* note 24, s 3; *Frank v Canada*, 2019 SCC 1 at para 26 [*Frank*]; *Figueroa v Canada (Attorney General)*, 2003 SCC 37 at para 33 [*Figueroa*]; *Reference re Prov Electoral Boundaries (Sask)*,1991 CanLII 61 (SCC), [1991] 2 SCR 158 at para 41 [*Re Sask*].
[124] *Figueroa, supra* note 123 at para 26.
[125] *Doré, supra* note 104 at para 35.
[126] *Figueroa, supra* note 123; *Frank, supra* note 123; *Re Sask, supra* note 123.

that maximizes access as much as possible.[127] Government's failure to take positive action establishing appropriate mechanisms to enable citizens to vote may infringe s. 3.[128]

[79] As raised by Justice Hamel, *Aryeh-Bain* is persuasive about the need to balance s. 3 rights when exercising statutory discretion under Part 5 of the Act.[129] In *Aryeh-Bain*, the FC held that the CEO's decision not to exercise discretion to change the date of the election due to conflict with a religious holiday squarely engaged plaintiffs' democratic rights and failed to reflect a balancing of the right to vote.[130]

3.4.2 The Court Should Exercise its Discretion to Hear the *Charter* Issue on Appeal

[80] This Court should exercise its discretion to hear the *Charter* issue as it is in the public interest and does not cause prejudice to the Respondent.[131] The Appellant was not able to raise *Charter* issues before the GIC prior to their deliberations, nor was the Appellant prepared to discuss the *Charter* issue when Justice Hamel raised it at the FCA, given the urgent nature of the proceedings. Upon Justice Hamel's prompting, the Respondent argued that the "Panel's public statement reflects this balancing."[132] The Appellant disagrees and is now prepared to provide submissions on the *Charter* issue.

[81] Public interest considerations favour this Court allowing the Appellant to raise a *Charter* claim. The test for whether new issues should be considered on appeal was confirmed in *Guindon*. The Court should use its discretion to authorize a *Charter* claim if it is "without procedural prejudice to the opposing party" and "where refusal to do so

---

[127] See *Henry v Canada (Attorney General),* 2014 BCCA 30 at para 103.
[128] *Ibid*. See also *Hoogbruin v A.G.B.C.,* 1985 CanLII 335 (BC CA), 24 DLR (4th) 718.
[129] FCA Judgment, *supra* note 30 at paras 8—9.
[130] *Aryeh-Bain, supra* note 34 at para 60.
[131] See *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 [*Alberta Teachers*].
[132] FCA Judgment, *supra* note 30 at para 10.

risk[s] an injustice."[133] The Supreme Court has adopted a "wide latitude in formulating constitutional questions" including questions put before courts of their own initiative.[134]

[82] First, this would pose minimal procedural prejudice to the Respondent since they have sufficient notice and can respond fully to the *Charter* argument, rather than relying on their "quick thinking" as they had done at the FCA.[135] In addition, where the reasons and the record provide sufficient context to determine whether *Charter* rights were adequately balanced, courts have agreed to hear constitutional arguments.[136] In this case, the Respondent conceded at the FCA that the public statement issued by the Panel reflects the *Charter* balancing done by the GIC. This Court may review the reasons given for indicia of appropriate *Charter* considerations.

[83] Second, the refusal to hear the *Charter* issue is contrary to public interest as the Decision affects the rights of every voter by cancelling the election on speculative grounds. No purpose is served by insisting on notice provisions at lower courts, since it would amount to an "enormous waste of judicial resources" and render the matter moot.[137] Canada is faced with a crisis that requires rapid resolution by this Court.

[84] This case is one where the Canadian Court of Justice should follow the Supreme Court's approach in *Guindon* and exercise discretion to hear the constitutional issue.[138]

3.4.3 The GIC's Decision Fails to Proportionately Balance s. 3 *Charter* Rights

[85] The GIC's Decision does not reflect a proportionate balancing for three reasons: (1) it undermines the objectives of the Act; (2) there is an alternative that more fully gives

---

[133] See *Guindon v Canada,* 2015 SCC 41 at para 33 [*Guindon*].
[134] *Ibid* at para 32. See also *R v Kapp,* 2008 SCC 41.
[135] FCA Judgment, *supra* note 30 at para 10.
[136] *Guindon, supra* note 133 at paras 26—30.
[137] *Ibid* at para 36.
[138] *Ibid* at para 34.

effect to the *Charter* right in light of the Act's objectives; and (3) the impact on *Charter* rights is severe while the benefit to the statutory objective is ambiguous.

[86] The GIC's Decision does not "comply with the *Charter* and its values."[139] The approach articulated by the Supreme Court in *Doré* and elaborated in *Loyola* applies.[140] Under the *Doré* framework, the court assesses how the decision-maker applies *Charter* values in the exercise of their statutory discretion.

[87] The Respondent conceded that s. 3 *Charter* rights are engaged by the Decision when they claimed *Charter* balancing was shown in the reasons of the Panel.[141] This balancing, however, is disproportionate as it fails to "confer as much protection as possible to the *Charter* right considering the [Act]'s mandate."[142] Canadians' democratic rights are engaged since the GIC's Decision is a *prima facie* infringement of the right to vote. The serious impacts include a removal of Canadians' right to vote and a lack of federal representation for potentially up to 140 days.[143] This uncertainty heightens the impact.

(i) The GIC's Decision Undermines the Statutory Objectives

[88] First, the GIC's Decision undermines the objectives of the Act. While the Act does not have a stated objective, the Supreme Court recently identified the Act's objective as a "broad enfranchising purpose" whose "central purposes are to enfranchise all persons who are entitled to vote, and to protect the integrity of the democratic process."[144] This objective complements the content of the s. 3 right to vote under the *Charter*, which protects the right to "effective representation" and includes the right to bring grievances and concerns

---

[139] See *R v Conway*, 2010 SCC 22 at para 41
[140] See *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 [*Loyola*].
[141] FCA Judgment, *supra* note 30 at para 10.
[142] *Loyola, supra* note 140 at para 39.
[143] *CEA, supra* note 1, ss 59(2)—(3).
[144] *Frank, supra* note 123 at para 11, citing *Opitz v Wrzesnewskyj*, 2012 SCC 55 at para 35.

to the attention of one's government representative.[145] These rights cannot be safeguarded when no government representative is elected.

[89] The conclusion that it is "not advisable to proceed with the election in any electoral districts until it can proceed in all of them" is contradictory to the purpose of the provision and objectives of the Act. The very existence of s. 59(1) allows exactly that.

[90] The statutory objective of respecting the integrity of the democratic process aligns with the s. 3 *Charter* right. Both reinforce allowing the vote to proceed and do not lead to the conclusion advanced by the Respondent that "uncertainty around the result justifies limiting the voting rights of Canadians living in the 213 unaffected electoral districts."[146] Where the enabling statute's own statutory objective is so closely aligned with a protected *Charter* right – in fact, it is the enabling statute that facilitates the s. 3 right to vote federally – the required balancing becomes more important.

[91] The statutory objectives of enfranchisement and public confidence are undermined by this Decision that creates uncertainty and insecurity. Canadians' confidence in the electoral system would be compromised if the executive could overstep the bounds of its democratically enacted statutory authority and unreasonably cancel an entire election.

(ii) The GIC's Decision is Not Minimally Impairing

[92] Second, there was an alternative that more fully gives effect to the *Charter* right considering the Act's objectives. The second step requires an analysis of minimal impairment and a balancing of salutary and deleterious effects.[147] Salutary effects must be

---

[145] *Re Sask*, *supra* note 123 at 183; affirmed in *Harper v Canada*, 2004 SCC 33 at para 68, cited in *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 at para 45 [*City of Toronto*].
[146] FCA Judgment, *supra* note 30 at para 10.
[147] *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 8 [*TWU*].

proportionate to impacts on the *Charter* right.[148] The statutory objective of democratic enfranchisement and integrity in the democratic process is weighed against the substantial interference and denial of the right to vote and have effective representation.

[93] The *Charter* reasonableness analysis does not involve reweighing the GIC's balancing of the evidence. Nonetheless, the serious consequences for voters of a country without government or functional democracy are disproportionately balanced with the speculations raised in the public statement upon which the GIC's Decision is based.

[94] There is no indication that any of the options that were available to the GIC to render this Decision minimally impairing were exercised or considered. Options at the government's disposal include deploying the police forces to secure election sites, moving elections offices to less affected areas, limiting voting times to daylight hours, and any other means available to the government.[149] A delay of the election to ensure all voters vote at once could have been accomplished through other less infringing means – the GIC can postpone the election under s. 59(4). The GIC had the discretionary and statutory power to consider and employ these means.

(iii) Deleterious Effects on Citizens are Tangible While Statutory Benefits Are Not

[95] The GIC provided no reasons in the public statement to justify the Decision to limit *Charter* rights and cancel the election. The justificatory reasoning relies on speculations such as the eventuality of a political party not ceding power, disruption by protestors during dark hours in the winter, and an impending constitutional crisis.[150] This reasoning is unfounded since the government cannot form until all the electoral districts are verified.

---

[148] *Ibid.*
[149] *CEA*, *supra* note 1, ss 17(1).
[150] FC Judgment, *supra* note 4 at para 14.

[96] The severe impacts on voters are tangible, while the benefits to statutory objectives are ambiguous. The points identified in the public statement accord little weight to the democratic rights of voters and candidates to meaningfully participate in elections and have effective representation. The reasons are sparse beyond acknowledging the Decision is "unexpected" and the situation "unprecedented and calls for extraordinary measures."[151] Canadians are left without meaningful representation. This significant impact requires justification. The public statement does not explain the *Charter* balancing to Canadians.

[97] The judiciary must review the executive's decision to act outside its statutory scope of authority and create a state of uncertainty by disallowing citizens their right to electoral participation. As in *City of Toronto*, the timing of the GIC's Decision "in the middle of an ongoing election, breathed instability into the election."[152]

[98] The role of courts includes overseeing the legitimate exercise of statutory authority to ensure responsible government and the separation of powers. The GIC has withdrawn all electoral writs and in so doing, surpassed their authority under the Act. The democratic rights of Canadian voters and candidates now depend on the judiciary to enforce the separation of powers and ensure executive accountability.

4. The Just and Fair Remedy Would Be to Remit to the CEO with Directions

4.1 The Appellant Requests the FCA Decision be Overturned and the CEO Decision Quashed

[99] The Appellant asks the Canadian Court of Justice to overturn the FCA finding of non-justiciability, quash the certification decision and remit the decision to the CEO with directions. Those directions should instruct the CEO to explain and justify his application

[151] *Ibid.*
[152] *City of Toronto, supra* note 145 at para 147, Abella J, dissenting.

of impracticability on the record if electoral districts are to be certified as impracticable. Since the CEO's Decision is the basis for the GIC's Decision, this remedy would have the effect of quashing the Order in Council.

[100] This Court is empowered by the *Federal Courts Act* to refer decisions back to the decision-maker with directions as it considers appropriate.[153] Providing directions is appropriate since only instructions explicitly stated in the judgment bind the decision-maker.[154] Otherwise, the decision-maker may merely consider, but choose not to follow recommendations in the judgment.[155] To ensure that impracticability is properly justified, this Court should direct the CEO to do so. This remedy is different from requesting a directed verdict since this Court would leave the final determination of which, if any, districts should be certified as impracticable.

4.2 Alternatively, the Appellant Requests the GIC Decision be Quashed and Remitted to Consider Postponement or Limited Withdrawals

[101] If the CEO's Decision is reasonable, this Court should quash the GIC's Decision and remit with directions to adequately reflect balancing of the s. 3 *Charter* right to effective representation and the statutory objective of enfranchisement. This Court should also give effect to the statutory objective of s. 59(1) by directing the GIC to consider only the writs that the CEO has certified as impracticable and base their Decision in justified reasoning, not hypotheticals and speculation. The need for directions mirrors that stated above for the CEO. This direction would dictate that only certified districts may be considered but not how they should be addressed, leaving ultimate authority with the GIC.

---

[153] See *Federal Courts Act*, RSC 1985 c F-7, s 18(3)(b).
[154] See *Canada (Citizenship and Immigration) v Yansane*, 2017 FCA 48 at para 19; *Ouellet v Canada (Attorney General)*, 2018 FCA 25.
[155] *Ibid*.

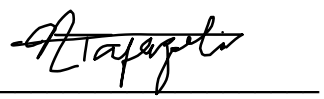
[102] "Elections are to democracy what breathing is to life."[156] Canadian democracy and the rule of law are suspended until an election can take place. Neither interest is served by needlessly prolonging a dissolved Parliament. The just and appropriate remedy would be to remit the CEO's Decision or, in the alternative, remit the GIC's Decision, so that the executive may render reasonable decisions that are justified in light of the facts and law. This remedy would allow the election proceedings, and the future of Canadian society, to be decided promptly, legally, and with a more robust justification by the executive. We are asking this Court to "breathe life into democracy" and affirm the legal parameters of democratic dialogue.

PART V – ORDERS SOUGHT

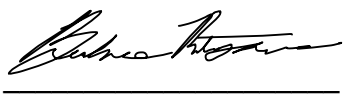
[103] For these reasons, the Appellant requests that the Canadian Court of Justice:
ALLOW the appeal;
QUASH the impracticability certification of the CEO;
REMIT the CEO's Decision to certify electoral writs back for determination.

[104] Alternatively, if the Court concludes that the CEO's Decision is reasonable:
ALLOW the appeal with respect to the GIC's Decision;
QUASH the GIC's Decision;
REMIT the Decision to the GIC with directions to only consider the 125 electoral writs that were certified by the CEO;
REMIT the Decision to the GIC with directions to reflect an appropriate *Charter* balancing of the Act's statutory objective with the s. 3 right to vote;
WITH COSTS throughout.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of January 2023.



Nikita Tafazoli
Counsel for the Appellant



Béatrice Rutayisire
Counsel for the Appellant

[156] *City of Toronto*, *supra* note 145 at para 86, Abella J, dissenting.

APPENDIX A – LIST OF AUTHORITIES

LEGISLATION

Canadian Charter of Rights and Freedoms, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11.
Canada Elections Act, SC 2000, c 9.
Dominions Elections Act, SC 1920, c 46.
Emergencies Act, RSC 1985, c 22 (4th Supp).
Interpretation Act, RSC 1985, c 1-21.
Federal Courts Act, RSC 1985 c F-7.

JURISPRUDENCE: CANADA

Agraira v Canada (Public Safety Emergency Preparedness), 2013 SCC 36.
Alberta Government Telephones v Canada (Canadian Radio-television and Telecommunications Commission), 1989 CanLII 78 (SCC), [1989] 2 SCR 225.
Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association, 2011 SCC 61.
Aryeh-Bain v Canada (Attorney General), 2019 FC 964.
Atlantic Paper Stock Ltd. v St. Anne-Nackawic Pulp and Paper Co., 1975 CanLII 170 (SCC), [1976] 1 SCR 580.
Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817.
Bell Canada v British Columbia Broadband Association, 2020 FCA 140.
Bell ExpressVu Limited Partnership v Rex, 2002 SCC 42.
Black v Canada (Prime Minister), 2001 CanLII 8537 (ON CA), [2001] OJ No 1853 (QL).
Conacher v Canada (Prime Minister), 2009 FC 920.
Canada (Canadian Human Rights Commission) v Canada (Attorney General), 2011 SCC 53
Canada (Attorney General) v Citizens for Democracy, 2023 FCA 7.
Canada (Citizenship and Immigration) v Khosa, 2009 SCC 12.
Canada (Citizenship and Immigration) v Yansane, 2017 FCA 48.
Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65.
Canadian Pacific Railway Company v Canada, 2021 FC 1014.
Citizens for Democracy v Canada (Attorney General), 2023 FC 129.
Crevier v AG (Quebec), [1981] 2 SCR 220.
Consolidated Fastfrate Inc v Western Canada Council of Teamsters, 2009 SCC 53.
David Suzuki Foundation v Canada-Newfoundland and Labrador Offshore Petroleum Board, 2020 NLSC 94.
Democracy Watch v Canada, 2019 FC 388.
Doré v Barreau du Québec, 2012 SCC 12.
Dunsmuir v New Brunswick, 2008 SCC 9.
Figueroa v Canada (Attorney General), 2003 SCC 37.
Frank v Canada, 2019 SCC 1.

Guindon v Canada, 2015 SCC 41.
Harper v Canada, 2004 SCC 33.
Henry v Canada (Attorney General), 2014 BCCA 30.
Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall, 2018 SCC 26.
Housen v Nikolaisen, 2002 SCC 33.
Knox v Conservative Party of Canada, 2007 ABCA 295.
Law Society of British Columbia v Trinity Western University, 2018 SCC 32.
Loyola High School v Quebec (Attorney General), 2015 SCC 12.
McLean v British Columbia (Securities Commission), 2013 SCC 67.
Misdzi Yikh v Canada, 2020 FC 1059.
Opitz v Wrzesnewskyj, 2012 SCC 55.
Ouellet v Canada (Attorney General), 2018 FCA 25.
Pacific Centre for Reproductive Medicine v Medical Services Commission, 2019 BCCA 315.
Penez v Canada (Citizenship and Immigration), 2017 FC 1001.
R v Bryan, 2007 SCC 12.
R v Conway, 2010 SCC 22.
R v Goulis, [1981] OJ No 637, 33 OR (2d) 55.
R v Kapp, 2008 SCC 41.
Re Hoogbruin and Attorney General of British Columbia, 1985 BCCA, 24 DLR 4th 718.
Reference re: Saskatchewan Electoral Boundaries, [1991] 2 SCR 158.
Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 SCR 27.
Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association, 2022 SCC 30.
Toronto (City) v Ontario (Attorney General), 2021 SCC 34.
Treasury Board v Professional Institute of the Public Service of Canada, 2009 PSLRB 120.
Vancouver Island Peace Society v Canada (TD), [1994] 1 FC 102.

JURISPRUDENCE: UNITED KINGDOM

R (Miller) v The Prime Minister, [2019] UKSC 41.

SECONDARY MATERIALS: MONOGRAPHS

Peter W Hogg, *Constitutional Law in Canada*, (Toronto: Thomson Reuters, 2017).
Ruth E Sullivan, *The Construction of Statutes*, 7th ed (Toronto: LexisNexis, 2022).