File No.:

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

JOAN RUSSOW AND THE GREEN PARTY OF CANADA

Applicants

- and -

THE ATTORNEY GENERAL OF CANADA,
THE CHIEF ELECTORAL OFFICER OF CANADA and
HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Respondents

FACTUM

Part I Statement of Facts

(1) The Nature of the Case

1. This is an application by Joan Russow, in her personal capacity as a voter, and as the leader of and a candidate for the Green Party of Canada in the federal election that took place on November 27, 2000, for a declaration that the Canada Elections Act, S.C. 2000 c. 9 and in particular the system established in ss 2(1), 24(1) and 313, according to which votes are counted towards the selection of Members of Parliament is unconstitutional, and therefore of no force and effect, owing to its violation of ss 3 and 15(1) of the Charter of Rights and Freedoms.

2. Over the course of the last six years Joan Russow has devoted much of her life working to promote the ideals and policies of the Green Party of Canada and the election of its candidates. She has run, unsuccessfully, in two federal elections and one by-election and, as leader of the party between March 1997 and February 2001, she participated in numerous political activities that were undertaken for the purpose of persuading governments to be more vigorous in their protection of the earth's environment. She claims that the Canada Elections Act is unconstitutional because it makes it much more difficult for women and supporters of smaller parties like the Greens to secure effective representation of their views.

Affidavit of Joan Russow paras 1, 3, 9-10

3. The defining feature of every election law is the principle it uses to translate votes cast in an election into representation in a parliament or legislative assembly. There are two dominant systems used by free and democratic states in the world today. Most developed countries that qualify as free and democratic societies build their election laws around a principle of proportional representation (PR). A very few, including Canada, Great Britain, India and the United States, use a model known as the single member plurality (SMP) system. Many, including Germany, New Zealand, Italy, Japan, Mexico and Russia have developed different, mixed systems which incorporate elements of both into their election laws.

Affidavit of Professor Alan C. Cairns para 3; Affidavit of Professor Douglas Amy para 2

4. Electoral systems that are based on a principle of proportional representation allocate seats in legislatures to parties that secure a minimum, threshold level of support, in proportion to the percentage of votes they receive in an election. A party that wins 10% of the popular vote is entitled to 10% of the seats. Although there is considerable variation in how PR systems operate in different countries, they all share the common characteristic of ensuring each vote carries the same weight in the assignment of seats in the legislature. Governments are usually formed by a coalition of parties that collectively make up a majority of the members in the legislature.

Affidavit of Professor Douglas Amy paras 6-7; Affidavit of Professor Alan Cairns para 4

5. Single member plurality (SMP) systems, like the Canada Elections Act, by contrast, use a principle of first-past-the-post, or winner-take-all. SMP systems are based on the principle that each candidate who obtains a plurality of votes in an individual, geographically defined riding, is awarded a seat in the legislature. More often than not, in constituencies that are contested by three or four parties, the percentage of votes that is required to achieve a plurality is less than fifty percent. Usually, the party with the highest number of elected candidates and seats in the legislature forms the government.

Affidavit of Professor Douglas Amy paras 3-4; Affidavit of Professor Alan Cairns para 5

6. It is widely understood by political scientists that SMP election laws suffer two major disadvantages compared to regimes whose rule of representation is based on the principle of proportionality. First, because of the way votes are counted in individual ridings, they are

strikingly ineffective in providing representation to large segments of the population who do not cast their votes for a winning candidate. In addition, SMP systems also significantly impede the election of women, and anyone who is a member of a racial, ethnic, political etc. minority that is not concentrated geographically, to public office. It is the applicants' position that in each of these respects, the Canada Elections Act devalues their right to vote (section 3) and their right to the equal protection and equal benefit of the law (section 15 (1)).

Affidavit of Professor Alan Cairns para 6, Affidavit of Professor Douglas Amy para 9

2. The Canada Elections Act Denies Citizens Equal and Effective Representation

7. Under SMP laws, although every citizen has access to a representative who can act as their intermediary or ombudsperson in their relations with government, the only voters who are represented by people who share their ideas about politics are those who cast ballots for candidates who received the most votes in a specific constituency. Voters who cast ballots for losing candidates are not represented by people with a commitment to the same principles and ideals. Their circumstances would be no different if they had wasted or spoiled their ballots.

Affidavit of Professor Douglas Amy para 28
Affidavit of Joan Russow para 9

8. The disparities in voting power that are effected by the Canada Elections Act are especially egregious. Arend Lijphart, one of the leading scholars in the field, ranks the disproportionalities in representation in Canada as among the worst of the established democracies in the world. One of the most dysfunctional aspects of the Canada Elections Act is its privileging the representation of people who support regionally concentrated parties at the

expense of those who cast their ballots for parties whose supporters are more diffuse and spread out across the whole country. Studies of the results of federal elections throughout our history provide incontrovertible evidence that, because it uses the SMP model to translate votes into seats, the Canada Elections Act has consistently favoured voters who support regional parties and inhibited the representation of those who vote for a party that pitches its appeal to Canadians all across the country, unless it is the party that wins the election. The last three federal elections provide the most recent evidence of the way in which the Canada Elections Act denies voters who support national parties like the Progressive Conservatives and the New Democrats, that either infrequently or never win an election, parity of representation with those who cast their ballots for regionally based parties like Reform-Alliance and the Bloc Québécois.

Affidavit of Prof. Alan Cairns para 6; Affidavit of Prof. Douglas Amy para 34
Lawrence Leduc, "New Challenges Demand New Thinking About our Antiquated Electoral System", in H. Milner (ed.), *Making Every Vote Count*, (Broadview Press, 1999); L. Massicotte, "Changing the Canadian Electoral System" vol. 7 *Choices* IRPP, Fed 2001; Trevor Knight "Unconstitutional Democracy …. (1999) 57 U.T. Faculty L. Rev. 1.

9. In the most recent election on November 27, 2000, citizens who voted for Progressive Conservative or New Democratic Party candidates got substantially less representation in the House of Commons than they would have received if the seats had been distributed on the basis of their share of the popular vote. The Conservatives were limited to 4% of the seats in the Commons, even though they won 12% of the vote. They elected no representatives from Ontario and Québec even though they received 15% and 6% of the vote, respectively, in each province. The percentage of Canadians who voted for New Democratic Party candidates was twice the percentage of seats that they were awarded in the House of Commons. As a matter of parity of voting power, (calculated by dividing the number of seats a

party occupies in the House of Commons by the number of votes it received), the Liberal Party was able to claim a seat in the House of Commons for every 30,184 votes they cast. Bloc seats were worth 36,258 votes. By contrast, each Progressive Conservative and New Democratic Party MP represents 130,582 and 84,134 voters respectively. Rather than equality of voting power, Liberal votes were almost three times more valuable than those that were cast for the NDP and more than four times those that were marked for a Conservative.

Affidavit of Professor Alan Cairns para 8; Affidavit of Professor Douglas Amy para 30

10. The disparities in the 1997 and 1993 federal election were of a similar order of magnitude. In 1997, the Bloc Québécois, running candidates only in Québec, won a seat for every 31,233 votes it received. For Reform, with its supporters concentrated in the West, each seat was worth 41,501 votes. Because their support was more evenly spread across the country, each New Democratic and Progressive Conservative MP effectively represented 67,723 and 121,287 votes respectively. The Conservatives ended up with fewer than half the seats that were held by the Bloc Québécois, even though they received almost twice as many votes. In the 1993 election the inequalities were even more extreme. In that election, slightly more citizens cast ballots for the Progressive Conservatives than for the Bloc Québécois but the latter won 54 seats in the Commons while the Conservatives were reduced to 2. As a matter of voting parity, supporters of the Bloc Québécois won a seat for every 34,186 votes whereas each Conservative M.P. spoke for 1,058,211 Canadians. In effect, a vote cast for the Bloc Québécois was thirty-two times more valuable than a ballot that was marked for a Conservative. Even within the province

of Québec, a vote for the Bloc was worth almost twice as much as a ballot that was cast for the Liberals.

Affidavit of Professor Alan Cairns paras 9-10; Affidavit of Professor Douglas Amy paras 30-31

11. Studies by political scientists show that the results of the past three federal elections are not exceptional. The Canada Elections Act has consistently underrepresented voters who support national parties that do not win an election and overrepresented supporters of parties who are concentrated geographically. Voters who have cast ballots for the NDP for example, have never received the level of representation in Parliament that equals the strength of their support in the country. In six elections out of ten between 1935 and 1965, the CCF/NDP received less than half the seats to which it would have been entitled if representation in the House of Commons had been awarded according to each party's share (proportion) of the popular vote.

Affidavit of Professor Alan Cairns para 7. William P. Irvine, *Does Canada Need A New Electoral System*, Queen's, 1979, pp 15-16

12. As well as under-representing people who vote for national parties that do not win an election, the Canada Elections Act also impacts adversely on the representation of regional interests in parties that aspire to build a national political base. For much of our history, voters in Québec who have supported the Progressive Conservatives and New Democrats have not been represented in Parliament in proportion with their share of the popular vote. Nor, until recently, have Liberals and New Democrats in Ontario. On occasion, as in 1979 when the Conservatives

won only two seats in the province of Québec, notwithstanding receiving 13% of the popular vote, it can happen that an entire region or province is denied effective representation in the cabinet. In 1980, because the Liberals failed to elect any candidates in three of the four western provinces, their supporters west of Ontario were not represented in the Government as effectively as they would have been if representation had been based on each party's share of the popular vote. The Reform/Alliance Party experienced the regional distortions of the Canada Elections Act in the last federal election when it won fifty times fewer seats in Ontario than the Liberals, even though it received almost half as many votes. Overall, the Canada Elections Act has made the regional cleavages between and within all of the national parties more pronounced in Parliament than they are in the electorate at large.

Affidavit of Professor Alan Cairns, paras 11-15

13. The regional bias of SMP laws is not unique to Canada. Supporters of small parties who are geographically concentrated tend to be better represented in legislatures than people who vote for parties, like the Greens, that are more geographically diffuse. In Great Britain, for example, the regional concentration of supporters of small Welsh and Scottish nationalist parties have allowed them to enjoy a measure of representation in Westminster that the Green party has never enjoyed.

Affidavit of Professor Douglas Amy para 37;
Affidavit of Marian Coyne para 8.

14. Supporters of small issue-based parties, like the Greens, are much better represented in legislatures that elect their members under a system of proportional representation than ones that use the rule of winner-take-all. Green party candidates have been elected all over Europe and are included in the ruling coalitions of many countries, including Germany, Finland, Italy and Belgium. The difference between the two systems is dramatically illustrated in the election that was held in New Zealand in 1999. New Zealand changed its election laws in 1993 and adopted the German model of proportional representation in which half the members of Parliament are elected in single member constituencies and half from party lists. In the 1999 election, four small parties including the Greens, won 24% of the vote but only 4.5% of seats that were elected from geographical constituencies. Because of the principle of proportional representation, these parties and the voters who supported them ended up with 25% of the seats in parliament. In Canada, no Green Party candidate has ever been elected to the House of Commons or any provincial assembly.

Affidavit of Marian Coyne paras 3-9
Affidavit of Professor Douglas Amy paras 36, 38

15. The representational biases and distorting effects of the Canada Elections Act can on occasion result in the party that wins the most votes losing the election and being denied the powers of Government. In 1957 and again in 1979 the Progressive Conservatives were able to assume the powers of government even though they received fewer votes than the Liberals. More recently, in the 1998 provincial election in Québec, the Parti Québécois elected 50% more members than the Liberals and formed the Government even though they received a smaller percentage of the popular vote.

Affidavit of Professor Douglas Amy para 33

16. As a practical matter, the Canada Elections Act can effectively disenfranchise large numbers of voters for their entire lives. In districts like Mont-Royal and Algoma-Manitoulin which have elected only Liberal candidates for more than half a century, supporters of other parties have never had their own member of Parliament who shares their political principles and priorities to represent them.

Affidavit of Professor Douglas Amy para 35

3. <u>The Canada Elections Act Disadvantages Women and Minority Candidates</u>

17. Currently, women occupy roughly one seat in five in the House of Commons. Studies consistently show that women, (and minorities, like aboriginals, who are geographically dispersed), are far better represented in legislative chambers that elect their members on the principle of proportional representation. The countries with the highest representation of women in their parliaments all use some variant of the principle of proportional representation. Depending on the time frame that is used, the percentage of women who have been elected to the House of Commons varies between one quarter and one-half of the percentage of women elected to the national legislatures of countries like Sweden, Norway and Germany.

Affidavit of Professor Douglas Amy paras 11-14

18. Although no one factor explains the systemic under-representation of women in countries like Canada, Great Britain and the United States, it is accepted as a fact among political scientists that the choice of electoral system is crucial. The type of voting system, much more than social, economic, and cultural factors, is the best predictor of how well women are represented in the national legislature of any country.

Affidavit of Professor Douglas Amy para 15; Professor Lisa Young, "Electoral Systems and Representative Legislatures ….." (Ottawa: Canadian Advisory Council on the Status of Women, 1994)

19. The bias of SMP laws against the representation of women is most evident in countries like Germany and New Zealand which use both principles to elect members of parliament. In both countries three to four times more women have been elected to seats that are filled using the principle of proportional representation than to seats assigned to specific geographic constituencies. A similar disparity can be observed in Australia which uses the SMP rule and the principle of proportionality to elect members to its lower and upper houses of Parliament respectively.

Affidavit of Professor Douglas Amy paras, 9, 16-18

20. One widely accepted reason why SMP systems elect fewer women than those that are based on the principle of proportional representation is that women are nominated much less frequently in SMP countries because there is an incentive for parties trying to win a plurality of votes in each district to nominate candidates they regard as the safest and least controversial. In

PR systems, by contrast, the political pressures run in exactly the opposite direction and create incentives for parties to put more women (and other minority) candidates on their lists.

Affidavit of Professor Douglas Amy paras 21-22 Professor Lisa Young, "Electoral Systems and Representative Legislatives: ….." (Ottawa, Canadian Advisory Council on the Status of Women, 1994); T. Knight "Unconstitutional Democracy ….." (1999) 57 U.T. Fac L. Rev 1, 12-13.

Part II Statement of Law

1. The Right to Vote (Section 3)

21. The representational biases and distortions effected by the Canada Elections Act constitute a clear violation of Joan Russow's and countless other Canadians' right to vote as it has been interpreted by the Supreme Court of Canada in its decision in the *Saskatchewan Electoral Boundaries Comm'n Act* case.

Ref. Re: Electoral Boundaries Comm'n Act, [1991] 2 S.C.R. 158.

22. In that case, the Court defined the purpose underlying the right to vote to be the guarantee of equal and effective representation of all citizens in the country.

The Meaning of the right to vote

> "It is my conclusion that the purpose of the right to vote enshrined in s. 3 of the Charter is not equality of voting power *per se*, but the right to "effective representation". Ours is a representative democracy. Each citizen is entitled to be represented in government. Representation comprehends the idea of having a voice in the deliberations of government as well as the idea of the right to bring one's grievances and concerns to the attention of one's government representative; as noted in *Dixon v. British Columbia (Attorney-General)* (1989), 59 D.L.R. (4th) 247 at pp. 265-6, [1989] 4. W.W.R. 393, 35 B.C.L.R. (2d) 273 (S.C.), elected representatives function in two roles – legislative and what has been termed the "ombudsman role".
>
> What are the conditions of effective representation? The first is relative parity of voting power. A system which dilutes one citizen's vote unduly as compared with another citizen's vote runs the risk of providing inadequate representation to the citizen whose

> vote is diluted. The legislative power of the citizen whose vote is diluted will be reduced, as may be access to and assistance from his or her representative. The result will be uneven and unfair representation.
>
> Ref. *Re: Electoral Boundaries Comm'n Act* [1991] 2 S.C.R. 158, 183 per McLachlin J.

23. Based on the test of equal and effective representation that the Supreme Court articulated in the *Saskatchewan Electoral Boundaries* case, it is clear that in adopting the SMP system, and the principle of winner-take-all, as the method of translating votes cast in federal elections into seats in the House of Commons, the Canada Elections Act violates the right to vote guaranteed in section 3. The election results documented by Professors Cairns and Amy in their affidavits, and confirmed in studies by other political scientists, establish that the system provides neither parity of voting power nor effective representation for large numbers of people who support national parties that do not win an election and whose members are not concentrated in one region, like the New Democrats and more recently the Progressive Conservatives, as well as supporters of smaller, issue-based parties like the Communists and the Greens.

24. The distortions created by the principle of winner-take-all have been much larger than those that were at issue in the *Saskatchewan Boundaries* case. In that case, the Court was faced with deviations in the number of voters registered in urban and rural constituencies in the province that ranged from 25-50% from the provincial quotient (calculated by dividing the number of voters by the number of ridings). In effect, the number of voters in the most populous riding was just double that with the sparsest population. An MLA from Saskatoon represented twice as many voters as the MLA from the riding of Athabasca in the far north of the province

and so a vote cast for the former was only half as valuable as one cast in the latter in terms of securing representation of their views.

25. By comparison, in the 1993 federal election, the value of a vote cast for a Conservative candidate was thirty-four times less than a ballot that was marked for a Liberal. In the same election, even though Conservatives won more votes than the Bloc Québécois and almost as many as Reform, they won only two seats while the other two won 54 and 52 respectively. In terms of deviation from the electoral quotient, Conservatives were under-represented by 2,226%! In 1997, the Conservatives did better but they received less than half the seats awarded to the Bloc Québécois, even though they received almost twice as many votes. In the election that took place in November 2000, a Conservative vote was still four times less valuable than a vote for a Liberal and more than three times less valuable than the vote of a supporter of the Bloc Québécois.

Affidavit of Professor Alan Cairns paras 8-10; Affidavit of Professor Douglas Amy paras 30-32

26. As the studies by Professor Alan Cairns and others have shown, voters casting ballots for candidates of the New Democratic Party have been underrepresented in virtually every election since their founding and the inequalities they have endured have been as or more severe than the differentials the Court accepted in the *Saskatchewan Reference* case. In 1993, for example, more than three times as many voters stood behind each New Democratic Party M.P. than those who sat on the (Liberal) Government side of the House. In the current Parliament,

again votes cast for Liberal candidates turned out to be almost three times as valuable as ballots that were marked for the NDP.

27. In its judgment in the *Saskatchewan Electoral Boundary Reference*, the Supreme Court recognized that deviations from absolute votes parity could be justified where it could be shown that they promoted the overarching goal of guaranteeing effective representation for all Canadians, as the preferential treatment of rural voters did in that case. The disparities in the voting power of the supporters of the different political parties who participate in federal elections cannot, however, be defended in this way. Indeed unlike the disparity of voting power between rural and urban ridings, the inequalities that are caused by the rule of winner-take-all frustrate rather than foster more effective representation of voters. Denying voters who support parties like the New Democrats and the Greens, and more recently the Progressive Conservatives, parity of voting power means that the effective representation of their values and interests is compromised as well. Even if all citizens can look to their Member of Parliament to act as an ombudsperson in their dealings with government, those who have supported parties like the Conservatives and New Democrats have had much less effective representation of their views. Voters, like Joan Russow, who support small parties like the Greens, have no one in Parliament who will represent their interests and ideas on the political issues they care about most. In terms of the number of representatives their votes elected to the House of Commons, supporters of all of these parties had far less involvement in the legislative process and the formation of policy than Canadians who cast their ballots for the Liberals, the Bloc Québécois and Alliance/Reform. Even supporters of national parties that win an election can suffer the

adverse effects of the Canada Elections Act if they live in regions where, though significant, their numbers are not sufficient to win any ridings and elect any members to represent them inside the Government.

2. Equal Benefit and Protection of the Law (Section 15)

(a) The Meaning of Equality

28. The impugned sections of the *Canada Elections Act* infringe section 15 of the *Canadian Charter of Rights* in two different ways. First, the Act has the effect of making it more difficult for some Canadians, especially women, but also including indigenous peoples and other geographically dispersed minorities to get elected as Members of Parliament in proportion to their numbers in the general population. Second, the Act makes it more difficult for voters who support national parties like the New Democrats and the Greens to elect representatives than for people who support the party that wins an election or is geographically centered in one region of the country. Although each of these infringements is factually distinct the analytical framework embedded in section 15 is common to both.

29. In its landmark judgment, *Law v. Canada*, the Supreme Court made an extensive review of its earlier jurisprudence and offered a new and comprehensive definition of the right to equality that is enshrined in section 15. In a unanimous judgment, Iacobucci J, writing for the Court, summarized the approach which the courts should follow in future cases in the following terms:

> "[a] court that is called upon to determine a discrimination claim under section 15(1) should make the following three broad inquiries. First, does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society, resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics? If so, there is differential treatment for the purposes of section 15(1). Second, was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds? And third, does the differential treatment discriminate in a substantive sense, bringing into play the purpose of section 15(1) of the Charter in remedying such ills as prejudice, stereotyping, and historical disadvantage? The second and third inquiries are concerned with whether the differential treatment constitutes discrimination in the substantive sense intended by s.15(1)
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> *Law v. Canada* (Minister of Employment and Immigration) [1999] 1 S.C.R. 497, pr 39

30. Elaborating on the third and final stage of the section 15 inquiry, the Court said that the purpose of section 15 was to:

> " … prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or *political* or social *prejudice*, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration. Legislation which effects differential treatment between individuals or groups will violate this fundamental purpose where those who are subject to differential treatment fall within one or more enumerated or analogous grounds, and where the differential treatment reflects the stereotypical application of presumed group or personal characteristics, or otherwise has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society. (emphasis added)
>
> *Law v. Canada*, ibid, para 51

31. In its judgment, the Court underscored the importance of considering each claim in its own particular context. Iacobucci J. drew attention to four distinct contextual factors which he said should guide a court's analysis when it is deciding whether a distinction in a law does discriminate in the substantive sense that s.15 is meant to proscribe. They included: (a) any pre-existing disadvantage endured by those who were adversely affected by the law; (b) any correspondence between the ground of distinction in the law and the actual need or capacity of the group affected; (c) any ameliorative purpose or effect of the impugned law towards other even more disadvantaged groups; and, (d) the nature and scope of the interest prejudicially affected. These factors, although not exhaustive, were intended by the Court to provide guidance to judges in identifying those cases of unequal treatment that pose a threat to the section's overriding concern with the guarantee of human dignity. The Court also said that not all of the factors need to be satisfied in order for a claim to succeed. Depending on the weight of each, in any given context, they may operate independently such that a particularly severe impairment of an important human interest could be sufficient to ground a claim of discrimination, whether or not any of the other factors were implicated.

Law v. Canada, paras 63-75

32. To summarize the Court's ruling in *Law*, in order for an infringement of section 15 to be found, a court must first establish that the law creates a distinction or causes "differential treatment" in its purpose or its effects. Second, it must be found that the distinction is drawn on an enumerated or an analogous ground. Third, it must be established that the differential treatment conflicts with the purposes of section 15(1) in that it constitutes discrimination in the

substantive sense of offending the dignity of different individuals and the groups to which they belong. In the third stage, courts must consider the context of the claim and look to the sorts of contextual factors identified by Justice Iacobucci. In the Court's words, discrimination will be found where "it can be demonstrated that, from the perspective of a reasonable person in circumstances similar to the claimant who takes into account the contextual factors relevant to the claim, the legislative imposition of differential treatment has the effect of demeaning his or her dignity." In summarizing its approach, the Court emphasized that the purpose of s15(1) is "to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping or *political* or social *prejudice* …."

Each of the two types of section 15 claims made against the Canada Elections Act will be considered separately, according to this test.

Law v. Canada paras 51, 74, 88. (emphasis added)

(b) The Election and Representation of Women, Aboriginal People and Regionally Dispersed Minorities

(i) Step 1 – Differential Treatment

33. At the first stage of the equality analysis, it is incumbent on the claimant to establish that the law being challenged treats individuals and/or groups differently. This can be done either by pointing to the presence of a direct, explicit distinction drawn by the impugned law or by showing it has that effect. According to the Court in *Law*, differential treatment will be established where a law " …. fail[s] to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics.

Law v. Canada paras 8

34. The evidence summarized in Part one of this factum establishes incontrovertibly that women and minority groups who are geographically dispersed, such as aboriginal people and other visible minorities, are represented in significantly smaller numbers in legislatures elected through SMP systems than those elected under electoral laws that are based on the principle of proportionality. Political scientists and intergovernmental agencies have conducted studies showing that women and visible minorities are much better represented in legislatures elected by PR than those elected by SMP electoral systems. No one, in fact, questions that electoral laws like the *Canada Elections Act*, that adopt the SMP rule of winner-take-all, have a serious, adverse impact on the representation of these groups.

Affidavit of Professor Douglas Amy paras 11-14, 24-27

(ii) Step 2 – Enumerated Grounds

35. The second part of the test enunciated in *Law* asks whether the differential treatment is effected on the basis of grounds enumerated in the text of section 15 or on grounds that are analogous to those that are explicitly proscribed. Claims by women and members of minority groups about the differential treatment they suffer under the *Canada Elections Act* clearly meet this test. Again, the evidence is unequivocal and incontrovertible that our electoral laws treat women differently than men, and geographically dispersed ethnic and racial minorities (such as aboriginal people and people of African-Canadian heritage) differently than those that

are geographically concentrated. Such differential treatment based on sex, race and ethnic origin undeniably discriminates on the basis of enumerated grounds.

(iii) Step 3 – Substantive discrimination

36. From its judgment in *Law*, it is clear that the Supreme Court anticipates that the fate of most s.15 claims will be settled at the third stage of the inquiry when it considers whether the differential treatment effected by a law constitutes discrimination in the substantive sense intended by section 15(1). In this case, the under-representation of women (as well as aboriginal peoples, and other non-geographically concentrated minorities) that is the product of the *Canada Elections Act* clearly conflicts with the overriding purpose of s.15 of protecting the equal human dignity of all Canadians. It will be recalled that, in addressing this issue, Iacobucci J. identified four contextual factors to aid courts in determining whether a discriminatory piece of legislation can be said to result in the impairment of a person's dignity. Of these, the first and fourth are especially relevant to this case.

37. The first – pre-existing disadvantage – was acknowledged by Iacobucci J. to be, "…probably the most compelling factor favouring a conclusion that differential treatment imposed by legislation is truly discriminatory." According to Iacobucci, it is logical to conclude that laws which discriminate against those who have already been subject to unfair circumstances or treatment in society:

> "… will contribute to the perpetuation or promotion of their unfair social characterization, and will have a more severe impact upon them, since they are already vulnerable.

This factor describes precisely the circumstances of women, aboriginal people, and various non-geographically concentrated groups, who are among the most disadvantaged and vulnerable in our society, especially in terms of their representation in the central institutions of government. An electoral system which systematically results in their constitutional under-representation can only further compound their disadvantage and demean their dignity as persons. This is true both to the extent that representation in governmental institutions is a good in itself, and also instrumentally, to the extent that under-representation will contribute to the enactment of laws which do not reflect the needs of these already disadvantaged groups.

Law v. Canada para 63

38. The fourth contextual factor which Iacobucci considered in *Law* was the nature and the scope of the interest affected. He said:

> "…the discriminatory calibre of the differential treatment cannot be fully appreciated without evaluating not only the economic but also the constitutional and societal significance attributed to the interest or interests adversely affected by the legislation in question. Moreover, *it is relevant to consider whether the distinction restricts access to a fundamental social institution*, or effects '*a basic aspect of full membership in Canadian society*'… [emphasis added].

Law v. Canada para 74

The interests that are affected by the impugned provisions of the *Canada Elections Act* are of critical importance to every Canadian as a citizen and the harm to them is especially widespread and severe. There is no "fundamental social institution" of greater significance than Parliament and the ability to vote for and to be represented in the House of Commons by a representative of one's choice must be a "basic aspect of full membership in Canadian society."

An election law that imposes barriers which inhibit the election of women, aboriginal people and geographically dispersed ethnic and racial minorities constitutes a profound affront to the dignity of all of these persons and the groups to which they belong.

(c) Supporters of Small and National Parties that do not Win an Election

39. As the evidence summarized in Part One of this Factum makes clear, the *Canada Elections Act* also discriminates against the members of smaller, non-geographically concentrated political parties and their supporters. Their claims under section 15 follow exactly the same framework of analysis that was used to evaluate the impact of the *Canada Elections Act* on women, aboriginal peoples and non-geographically concentrated minorities, with one important modification. At the second stage of the analysis these groups cannot claim the differential treatment which they suffer under the *Act* is based on any of the grounds that are enumerated in section 15. People who vote for and belong to smaller political parties, like the New Democrats and the Greens, must establish that the ground upon which the differential treatment is effected is analogous to those enumerated in section 15(1).

(i) Step 1 – Differential Treatment

40. The election results and reports that Professors Cairns and Amy refer to in their affidavits constitute irrefutable evidence that the Act treats supporters and members of different political parties unequally in translating their votes into seats in the House of Commons. In the last three federal elections the value of votes cast by Conservatives, New Democrats and supporters of the Green Party was worth much less than the value of a ballot cast for the Liberals, who won all three elections, and parties whose support was regionally concentrated like the Bloc Québécois and Alliance/Reform. As their affidavits make clear, supporters of parties

like the New Democrats and the Greens have had to endure this differential treatment since their inception.

Affidavit of Professor Alan Cairns paras 8-10
Affidavit of Professor Douglas Amy paras 30-32

(ii) Step 2 – Analogous Grounds

41. Although no court has yet to characterize membership in, or affiliation with, a political party as an analogous ground, there is good reason to do so in this case. In many constitutions and international human rights instruments including some, like the International Covenant on Civil and Political Rights (Article 26) to which Canada is signatory, include political opinions and beliefs alongside race, religion and sex etc. as grounds of discrimination that are explicitly proscribed. In its decision in the case of *Reform Party v. Canada*, the Alberta Court of Appeal expressly acknowledged that "in some circumstances, membership in a political party may be an analogous ground". The circumstances which prevail in this case are exactly those in which a finding that membership or affiliation in a political party is an analogous ground is both legitimate and appropriate. Dicta from both the Supreme Court and academic commentators also strongly support such a conclusion.

> *Reform Party of Canada v. Canada (Attorney-General)* (1995), 123 D.L.R. (4th) 366, 391 (Alta, C.A.).

42. In *Law*, Justice Iacobucci commented on how courts should identify an analogous ground as follows:

> "where a party brings a discrimination claim on the basis of a newly postulated analogous ground, … this part of the discrimination inquiry must focus upon the issue of whether and

> why a ground … is analogous to those listed in section 15(1). This determination is made on the basis of a complete analysis of the purpose of section 15(1), the nature and situation of the individual or group at issue, and the social, political and legal history of Canadian society's treatment of the group. A ground or grounds will not be considered analogous under section 15(1) unless it can be shown the differential treatment premised on the ground or grounds has the potential to bring into play human dignity … . If the court determines that the recognition of a ground … as analogous would serve to advance the fundamental purpose of section 15(1), the ground … will then be so recognized …".

Prior to *Law*, the Court had said repeatedly that there is no single test or formula which a court should use to determine whether a particular ground is analogous to those listed in section 15. In *Law*, the Court referred to a variety of factors, many of which – including political powerlessness, a history of prejudice and stereotyping, and whether the ground has characteristics related to a specific enumerated ground, – apply precisely to membership in a political party.

Law v. Canada para 93

43. Perhaps the strongest indicator that political values and beliefs may be an analogous ground, which the courts have used in the past, is the factor of political power. In *Andrews v. Law Society* of *B.C.*, Wilson J. recognized that citizenship was an analogous ground because, "relative to citizens, non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated." Like non-citizens, supporters and members of small political parties like the Green Party or the Communist Party lack political power to a degree not reasonably related to their numbers in the population at large.

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143

44. Another indicator of whether a distinction is analogous to those enumerated in section 15 is whether members of groups defined by particular grounds have suffered from a history of prejudice and stereotyping. Clearly this is the case for a number of political movements, including the Communist Party of Canada, which have sought relief from the courts against arbitrary and discriminatory treatment from government in the past.

> *Figueroa v. Canada* (A.G.) 189 D.L.R. (4th) 577, 2000 Ont. (C.A.) *Switzman v. Ebling* [1957] SCR 285.

45. A third feature the Court has emphasized in its discussion of analogous grounds is whether the basis of the distinction has characteristics which are tied to one of the enumerated grounds. This is clearly the case where parties are defined along religious lines, such as the Christian Heritage Party, or linguistic or ethnic lines, such as the Bloc Québécois. In fact, many political parties which might otherwise represent the identities of persons defined by enumerated grounds are adversely affected by electoral laws that use the SMP rule. For example, the efforts of women to form political parties in Canada, the US and the UK, have been made more difficult in part by the workings of the SMP electoral systems that prevail in these countries. The fact that no pan-aboriginal political party has ever emerged in Canada can be partially attributed to the *Canada Elections Act* and the SMP rule as well. No matter how attractive such a party would be to aboriginal people, it could never be successful in electing representatives because of the geographic dispersion of its supporters.

(iii) Step 3 – Substantive Discrimination

46. There are strong reasons, then, why membership in a political party should be recognized as a ground analogous to those enumerated in section 15. In the words of Justice Iacobucci in *Law*, recognition of party membership as an analogous ground would "serve to advance the fundamental purpose of section 15(1)". Political parties are groups of individuals sharing a common commitment to a particular set of moral beliefs. Political ideas are to the individual's public, community persona what his or her religious and ethical ideas are to his or her private being. Like religious beliefs, there is a deep connection between people's political commitments and their dignity as human beings. An electoral system which interferes with the freedom of individuals to express and find representation for their public values and beliefs depreciates and denigrates an essential element of what it means to be human and in so doing is deeply offensive to the dignity of those who hold such views.

3. Section One – The violations of the applicants' right to vote and right to equal benefit of the law cannot be demonstrably justified in a free and democratic society

(a) <u>The Oakes Test</u>

47. To establish that the impugned provisions of the *Canada Elections Act* can be demonstrably justified in a free and democratic society in spite of the violations of the applicants' voting and equality rights, it is necessary for the Government to prove that the purposes of the legislation are "pressing and substantial" and that they pass the now familiar three part proportionality test that the Court laid out in its internationally acclaimed ruling in *Regina v. Oakes*. It is the submission of the applicants that the Government cannot identify any

legitimate purpose that is furthered by the Canada Elections Act, and in particular its rule of winner-take-all, nor can it meet the requirements of the second proportionality principle of minimal impairment.

Regina v Oakes [1986] 1 S.C.R. 103, 138-40

(b) <u>No Pressing and Substantial Objective</u>

48. Within the analytical framework established by *Oakes*, the Government must prove that the actual purpose that motivated the legislation when it was first enacted is pressing and substantial. The Court has repeatedly stressed that it does not permit the Government to support impugned legislation on the bases of an ex post facto analysis or on the basis of a shifting purpose.

R. v. Big M Drug Mart [1985] 1 S.C.R. 295, at 335 per Dickson C.J.C.

49. When the SMP method of translating votes into seats in the Commons was first adopted in 1867, there was no conscious, intentional decision to adopt that model in preference to a system that was based on a principle of proportionality. As Professor Amy notes in his affidavit, electoral laws using the principle of proportional representation did not begin to appear in Europe until the very end of the century and the British Parliament simply extended 'the Westminister Model' to Canada, as it did with all of its colonies, without ever addressing the question that is now before this Court. The exclusive reliance on constituency based

representation was simply the product of an age when only those with property had the right to vote.

Affidavit of Professor Douglas Amy paras 4-5

50. Even though, in its origins, the Canada Elections Act made no clear and conscious decision to choose the principle of winner-take-all over the principle of proportional representation, as the way in which votes are translated into seats in the House of Commons, defenders of SMP laws sometimes argue that they are kept on the books because they generally produce more stable and therefore more effective governments. They say election laws based on the principle of proportional representation typically result in coalition governments that are inherently unstable and that renders policy making less efficient. On this view, the Canada Elections Act simply favours an electoral regime that opts for stability over a commitment to a rigid and unqualified equality of voting power.

Affidavit of Professor Douglas Amy paras 40-41

51. The argument that electoral laws that are based on the principle of proportional representation create government instability cannot be supported on the facts. Recent studies by some of the world's leading scholars of election systems have effectively refuted such claims. Many countries, like Germany, the Netherlands and the Scandanavian countries that use the principle of proportionality in their election laws have enjoyed long histories of stable and effective government. Elected on a mixed system of SMP and PR, German governments led by

Chancellors Adenauer, Brandt, Schmidt and Kohl have been among the most stable in the free and democratic world. If election laws are deliberately designed to encourage an unlimited proliferation of political parties, – by, for example, having a very low threshold for parties to satisfy in order to claim representation in the legislative chamber, – instability in government is likely to become characteristic of the system, as it has, for example, in Israel, but the experience in Germany, and the Scandinavian countries proves that laws based on a principle of proportional representation don't have to be designed in that way. Moreover, there is simply no evidence to support the idea that durable cabinets formulate better social and economic policy or are capable of more effective governance.

Affidavit of Professor Douglas Amy paras 41-44

(c) <u>The Act Cannot Meet the Principle of Minimal Impairment</u>

52. The principle of winner-take-all that the Canada Elections Act uses to count votes in an election in order to assign seats in the House of Commons cannot pass the test of minimal impairment that is established by the second proportionality principle in Oakes. As Professors John Low-Beer and Lani Guinier have made clear, only systems of proportional representation can fully achieve the goals of equal and effective representation in a way that does not trade off one against the other. Under the SMP rule, effective representation of geographically diffused populations can only be achieved by compromising the goal of equal voting power to some degree. Thus rural voters were guaranteed effective representation in the *Saskatchewan* case only by giving their votes more weight than those of urban voters. Conversely, equal voting

power can be assured between ridings but only at the expense of compromising the effective representation of some groups.

53. By contrast, electoral laws based on the principle of proportional representation reconcile the goals of effective representation and parity of voting power in a way that is supportive of both. Effective representation is guaranteed by ensuring that everyone's vote carries the same weight. PR systems guarantee equally meaningful votes to all minority groups, regardless of whether they are geographically concentrated or not. Voters in different parts of the country can combine their votes to support a common vision and political agenda. The fact that women, minority groups, and people sharing the same political ideals are not concentrated in a single region no longer acts as a bar to their electing their own candidates.

J. Low-Beer, "The Constitutional Imperative of Proportional Representation" (1984) 94 Yale L.J. 163 and L. Guinier, "[E]racing Democracy: The Voting Rights Cases" 108 Harv. L. Rev. 109.

(d) <u>Deference</u>

54. Although the Supreme Court of Canada has repeatedly stressed that the tests that it articulated in *Oakes* must be applied flexibly and with respect for the representative function of the legislature, particularly when complex issues of economic and social policy are at stake, this is a case which calls for the strict enforcement of the proportionality tests and the most rigorous standards of review. None of the major political parties that have any chance of winning a federal election has any incentive to alter a system which allows it to control the executive branch of government with considerably less than 50% of the popular vote. The last Royal

Commission on Electoral Reform established by the Conservative Government in 1989 was specifically instructed not to consider systemic changes like the introduction of proportional representation. Even a party like the NDP, that has no realistic prospect of winning a federal election in the foreseeable future, has little incentive to push for reform because it too has been the beneficiary of the SMP system, and the principle of winner-take-all, in various provincial elections. To defer to the judgment of Parliament when questions about the fairness of the processes and structures of politics are at stake is to defer to the decision of one of the parties that has an interest in the dispute.

Professor Lawrence LeDuc, "New Challenges Demand New Thinking About Our Antiquated Electoral System", in H. Milner (ed.) *Making Every Vote Count*, Broadview Press, 1999; ….F.L. Seidle, "The Canadian Electoral System and Proposals for Reform" in A.B. Tanguay and A.G. Gagnon (eds) *Canadian Parties in Transition* 2nd edit. (Scarborough, Nelson, 1994, p 300.

55. Even the most deferential theories of constitutional review insist that courts must be vigilant in ensuring that the basic institutions and processes of politics measure up to the highest constitutional standards. The American constitutional law scholar, John Hart Ely, for example, considers judicial supervision of the basic institutions and processes of government to be the single most important function of the courts. Even though Ely believes that social and economic value choices in a democracy must be left to the legislature, he argues the courts have a duty to ensure that the legislature making those policy choices is not chosen by unfair or unconstitutional means. He writes that "[m]alfunction occurs when the *process* is undeserving of trust, when the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out." Professor Patrick Monahan of the Osgoode Hall Law School has argued that Ely's thesis has even more validity in Canada where the values of democracy and

community explicitly infuse the *Charter*. He concludes that "the courts should direct their energies towards policing the political process, rather than to determining the correct allocation of resources in society." For Ely, Monahan and other prominent constitutional theorists, courts have an obligation to ensure that the rules of the political game, by which legislators are chosen, are fair for everyone involved.

John Hart Ely, *Democracy and Distrust*: *A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980) at 103. P. Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell, 1987) at 252. See also, J. Habermas, *Between Facts & Norms*, M.I.T. Press 1996.

56. In this case, the Court should follow the lead of the Supreme Court of Japan which, although generally regarded to be one of the most cautious and deferential courts in the world, has ruled on three separate occasions that its country's election laws, which used the rule of winner-take-all in constituencies of multiple, rather than single members, violated the Japanese constitution. The experience in Japan, which has resulted in that country adopting its own unique mixed SMP/PR law provides a strong precedent for our courts to hold the *Canada Elections Act* to the highest standards that are embedded in our constitution.

H. Hata "Malapportionment of Representation in the National Diet" (1990) 53 Jnl. of Law & Contemp Probs 157. K. Asaka "Electoral Reform in Japan: A Comparative Constitutional Perspective" (1997) 27 Vict U. L Rev 25: L.W. Beer & H. Itoh (eds) *The Constitutional Caselaw of Japan* 1970-1990; Univ of Washington Press 1996.

Part III Remedy and Order Requested

57. The applicant seeks an order from this court declaring that the impugned sections of the Canada Elections Act violate sections 3 and 15(1) of the Charter of Rights of Freedoms and, pursuant to section 52, are to that extent null and void. However, because election laws that

are based on the principle of proportional representation vary considerably in their structure and design, the applicants urge this Court to 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 to selecting the model that is most suitable to Canada's constitutional traditions and political needs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Ed Morgan
Counsel for the Applicants