CANADIAN COURT OF JUSTICE

(On appeal from the Federal Court of Appeal)

BETWEEN:

CITIZENS FOR DEMOCRACY

Appellant

and

CANADA (ATTORNEY GENERAL)

Respondent

FACTUM OF THE RESPONDENT

Counsel for the Respondent

SCHOOL NUMBER 17

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PART I: OVERVIEW

[1] This appeal raises important issues about the limits of court intervention in political matters and the Governor in Council's (the "GIC") authority to make decisions that impact Canadian democratic institutions. Following an uncontrollable occupation in several Canadian cities, the GIC exercised her discretion under subsection 59(1) of the *Canada Elections Act* (the "*Act*")[1] to withdraw the writs in all 338 electoral districts for the upcoming federal election (the "Decision"). The Decision was made following the certification by the Chief Electoral Officer (the "CEO") that it is impracticable to hold the election in the 125 electoral districts directly impacted by the occupation (the "Certified Districts). At the Federal Court (the "FC"), Justice Biggar found the Decision to be unreasonable and quashed the order to withdraw the writs in the 213 unaffected electoral districts (the "Non-Certified Districts).[2] At the Federal Court of Appeal (the "FCA"), the majority allowed the appeal on the basis that the issue is not justiciable.[3]

[2] The GIC's Decision is not justiciable because it is inherently political and the Court could compromise its appearance of independence by making a decision. The Court also lacks the institutional capacity to adjudicate the issue given the policy-laden considerations that informed the Decision. The Court should not interfere with a decision made by the GIC when she possesses ultimate discretion. Finally, the existence of a *Canadian Charter of Rights and Freedoms* (the "*Charter*") claim on appeal should not make the issue justiciable.[4] The Appellant failed to raise a *Charter* claim at first instance and should not be able to do so now to get around the finding of non-justiciability.

[3] The Appellant's application should also be barred because they lack both individual and public interest standing. The Appellant, as an organization, is not directly affected by the GIC's Decision. They suffer the same inconvenience as all other voters in Canada. The Appellant should not be granted public interest standing because they failed to raise a justiciable issue and there are more effective ways of bringing this matter before the Court.

[4] In the alternative, if deemed to be justiciable and if the Appellant has standing, the GIC's Decision should be reviewed on the standard of reasonableness. This respects the discretionary language in subsection 59(1) of the *Act* and the deference owed to the GIC when making urgent decisions in times of emergency. Additionally, the correctness categories in *Vavilov* are not applicable.[5] First, this is not a constitutional question that

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[1] *Canada Elections Act*, SC 2000, c 9 [*Act*].
[2] *Citizens for Democracy v Canada (Attorney General)*, 2023 FC 129 at para 10 [*FC Judgment*].
[3] *Canada (Attorney General) v Citizens for Democracy*, 2023 FCA 7 at para 8 [*FCA Judgment*].
[4] *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*].
[5] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 69 [*Vavilov*].

requires a final and determinate answer. Second, the existence of similar provisions in provincial election statutes does not render this a general question of law of central importance. The Court should be wary of creating a new category of correctness beyond what was contemplated in *Vavilov*.

[5] Applying the *Vavilov* reasonableness review framework, the Decision meets the requisite degree of justification, intelligibility, and transparency required to meet the standard of reasonableness.[6] The reasons for her Decision are set out in a public statement issued by the Privy Council together with an Order in Council (the "Statement"). The Statement demonstrates that the GIC's decision is internally coherent and, when taken alongside the present circumstances, justified in relation to the law and facts. In particular, a contextual analysis of the governing statutory scheme, principles of statutory interpretation, and the evidentiary and factual record before her demonstrates that the GIC was entitled to exercise her statutory authority and discretion in this manner.

[6] The GIC's Decision to withdraw the writs of election in light of the circumstances was just that – a temporary response to an urgent disaster that will cause the election to take place after March 13, 2023. The Decision did not cancel the election outright but rather, postponed it for up to three months, the statutorily mandated maximum. It follows that the Decision does not infringe on the right to vote, which is protected by section 3 of the *Charter.*[7] In the alternative, if the Decision is found to infringe on the *Charter* right to vote, it is done in a manner which reflects a proportionate balancing of the right to vote with the statutory objectives of the *Act*, justifying any potential infringement. On the reasonableness standard, it is not the role of a reviewing court to conduct a *de novo* proportionality analysis or reweigh the evidence, even if it may have come to a different conclusion than the GIC ultimately did.

[7] In the event that this Honourable Court finds that the Decision is unreasonable, the appropriate remedy is to remit the decision back to the GIC for reconsideration, rather than substituting the Decision with its own conclusion.

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[6] *Ibid* at para 100.
[7] *Charter*, *supra* note 4, s 3.

PART II: STATEMENT OF FACTS AND JUDICIAL HISTORY

a) Facts

[8] The Appellant, Citizens for Democracy, applied to the FC for judicial review of the GIC's decision to withdraw the writs for all districts in the upcoming federal election pursuant to subsection 59(1) of the *Act*.[8] Citizens for Democracy is an advocacy group comprising Canadians who hold strong views about the right to vote and Canada's democratic process.[9]

[9] On January 30, 2023, Her Excellency the Governor General dissolved Parliament and called for a general election to be held on March 13, 2023.[10]

[10] Shortly after, the election date was threatened by the emergence of unruly protests in large Canadian cities. On February 15, 2023, protestors and members of the group "LIGHTS OUT" coalesced and the occupation began.[11] "LIGHTS OUT" aims to raise awareness and combat the harms caused by light pollution.[12] The protestors arrived with recreational vehicles and tents to set up camps in urban centres.[13] The occupation has become further entrenched with secondary camps being set up in industrial areas to serve as staging grounds.[14] As a result, large sectors of the cities have been paralyzed. Law enforcement has been unwilling or otherwise unable to break up the occupation.[15]

[11] Canadian cities have been severely impacted by the protests. Protestors have engaged in acts of vandalism by damaging streetlights and breaking into office buildings to turn off their lights.[16] They have also resorted to harassment of businesses for using lighting or lit signage on the street. As a result, several businesses have made the difficult decision to close operations until the occupation ends.[17]

[12] The prolonged occupation and virtual stand-still of urban centres has had numerous impacts on the upcoming federal election. Based on the concentration of protests in large cities, 125 electoral districts are seriously impacted by the occupation.[18] A truck carrying ballots was set fire to by protestors while travelling to a Returning Office.[19] Printing

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[8] *Act*, *supra* note 1, s 59(1).
[9] *FC Judgment*, *supra* note 2 at para 3.
[10] *Ibid* at para 4.
[11] *Ibid* at para 5.
[12] *Ibid*.
[13] *Ibid* at para 6.
[14] *Ibid*.
[15] *Ibid* at para 7.
[16] *Ibid*.
[17] *Ibid*.
[18] *Ibid* at para 12.
[19] *Ibid* at para 8.

companies who print the ballots have had to close their facilities.[20] Landlords have advised that previously-leased facilities for polling may not be available.[21] Returning Offices have been forced to close due to the protestors' harmful and threatening conduct.[22] As a result, polling has been significantly impacted and shows no signs of improvement prior to the originally scheduled election date.

[13] In response to these concerns, "LIGHTS OUT" issued a statement on social media.[23] They said that they support the election and do not intend to interfere with election activities, so long as they are conducted within daylight hours.[24] However, the voting hours prescribed in the *Act* extend beyond daylight hours, which "LIGHTS OUT" failed to comment on.[25]

The Chief Electoral Officer's Decision

[14] In response to the disastrous state of affairs surrounding polling, the CEO took the unprecedented action of invoking subsection 59(1) of the *Act*.[26] This provision states:

> **59(1)** The Governor in Council may order the withdrawal of a writ for any electoral district for which the Chief Electoral Officer certifies that by reason of a flood, fire or other disaster it is impracticable to carry out the provisions of this Act.[27]

[15] Once the CEO certifies that it is impracticable to hold the election in an electoral district, the GIC has three options: postpone the election by up to seven days, withdraw the writ and cancel the election, or do nothing and let the election proceed.[28] Based on the entrenchment of the occupations, a postponement would not resolve the challenges.[29] If the GIC chose to withdraw the writ and cancel the election, the *Act* requires that a new writ be issued within three months.[30]

[16] The CEO's decision was set out in a letter to Cabinet.[31] The CEO explained the differing impacts of the protest in urban and rural areas. The CEO quotes Merriam-Webster's definition of "impracticable", which is "incapable of being performed or accomplished by the means employed or at command". Based on this decision and the

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[20] *Ibid*.
[21] *Ibid*.
[22] *Ibid*.
[23] *Ibid* at para 9.
[24] *Ibid*.
[25] *Ibid*.
[26] *Ibid* at para 10.
[27] *Act, supra* note 1, s 59(1).
[28] *FC Judgment*, *supra* note 2 at para 11.
[29] *Ibid*.
[30] *Act*, *supra* note 1, s 59(2).
[31] *FC Judgment*, *supra* note 2 at para 13.

concerns expressed by the Returning Officers, the CEO certified that it is impracticable to conduct the election in the 125 Certified Districts. However, the CEO stated that the election would proceed in the remaining 213 Non-Certified Districts.[32]

The Governor in Council's Decision

[17] Based on the CEO's certification, the GIC decided to withdraw the writs in all of the electoral districts.[33] Deliberations leading to the Decision are subject to Cabinet confidence, but a Statement was issued from the Clerk of the Privy Council explaining the decision.[34] The Statement was issued the day after the CEO's letter to Cabinet[35] and was accompanied by an Order in Council.[36]

[18] The Statement explains the Panel's considerations in reaching a decision. The Panel expressed their understanding that their Decision may be unexpected, but in their view, the harm created by the occupation required extraordinary measures.[37] The following factors were weighed by the Panel:

a. More than one third of the electoral districts are impacted by the occupation;
b. Canadians in remote and rural areas have tended to support different political parties from those in urban centres;
c. There is a risk of uncertainty and a potential constitutional crisis if the vote is allowed to proceed in part of the country;
d. If the election only proceeds in the 213 Non-Certified Districts, it may not be possible to know which party will form government and whether the party who holds the majority after this first vote would cede power once the remaining districts have voted;
e. There is uncertainty about whether Parliament could be recalled before the election is held in all electoral districts; and
f. Canadians' confidence in the integrity of the electoral system and their trust in Parliament could be irreparably undermined by such a result.[38]

[19] Based on these concerns, the Panel advised the GIC to withdraw the writs of election in all 338 electoral districts.[39]

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[32] *Ibid*.
[33] *Ibid* at para 15.
[34] *Ibid* at para 14.
[35] *Ibid*.
[36] *Ibid* at para 15.
[37] *Ibid* at para 14.
[38] *Ibid.*
[39] *Ibid*.

b) Judicial History

[20] The Appellant applied to the FC to review the Decision of the GIC to withdraw the writs in all 338 electoral districts.

Federal Court

[21] Justice Biggar of the FC held that the Decision was unreasonable and quashed the GIC's order to withdraw the writs in the 213 Non-Certified Districts. The order to withdraw the writs in the 125 Certified Districts was deemed reasonable, and therefore undisturbed.[40]

[22] The Court briefly dispensed with the preliminary threshold issues of justiciability and standing by concluding that the Court can and should review the GIC's Decision to withdraw the writs, and, furthermore, that the Appellant's application raises pressing and fundamental issues which ought not to be resolved on the basis of legal technicalities.[41]

[23] The Court then conducted an analysis of two substantive issues in this proceeding:

1. Can the GIC order the withdrawal of the writ in an electoral district where the CEO has not certified that conducting the election is impracticable?

2. Do the "LIGHTS OUT" protests constitute an "other disaster" within the meaning of section 59 of the *Act*?[42]

[24] On the first issue, the Court ruled that the CEO's impracticability certification was a necessary precondition to the authority to order withdrawal of the writ.[43] Justice Biggar interpreted the wording of section 59 to mean that the GIC is only granted the authority to order that a writ of election be withdrawn after the CEO has certified that it is impracticable to conduct the election. Therefore, the Court held that the Panel unreasonably exceeded its statutory authority, and the GIC lacked the authority to order that the writs be withdrawn in the 213 Non-Certified Districts.[44] Notwithstanding the fact that the CEO's certification decision is not under review, Justice Biggar also noted that they might have been persuaded that it is indeed unreasonable to proceed with the election in only two thirds of the country, if that were the issue before the Court.[45]

[25] On the second issue, the Court was satisfied that the ongoing occupation of major urban centres by the "LIGHTS OUT" protestors constituted an "other disaster" within the

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[40] *Ibid* at para 22.
[41] *Ibid* at paras 1-3.
[42] *Ibid* at para 16.
[43] *Ibid* at para 18.
[44] *Ibid.*
[45] *Ibid* at para 19.

meaning of section 59.[46] The Court noted that the fact that this disaster was the result of deliberate human action does not make it any less a disaster.[47] Furthermore, Justice Biggar was not persuaded by the Appellant's argument that the protests can only constitute a disaster where provincial or local authorities have declared a state of emergency.[48] The Court concluded that widespread public references to "gridlock" and "occupations" in the affected urban centres, along with the large number of businesses that have been forced to scale back or shut down their operations, was sufficient evidence that the situation meets the ordinary and common-sense definition of "disaster."[49]

[26] The Respondent appealed this judgment to the FCA.

Federal Court of Appeal

[27] At the FCA, Justice Castonguay, writing for the majority, allowed the appeal on the basis that the issue was not justiciable, and reinstated the GIC's order.[50]

[28] The Court determined that the issue in this case cannot be answered by the judiciary out of respect for the separation of powers, which is necessary to the legitimacy of the judiciary.[51] Justification for this decision was based on the fact that this case is fundamentally about the timing of an election, a subject in which the Court should not interfere. In particular, the majority noted that the GIC's decision about whether to withdraw the writs of election and, if so where, is highly discretionary, and one that should not be subject to judicial review.[52] This interference, in the words of Justice Castonguay, "would violate the unwritten separation of powers that is at the heart of Canada's democracy."[53] Furthermore a decision from the Court that could impact the results of a federal election would leave them open to claims of judicial activism, which would undermine their legitimacy.[54]

[29] In dissent, Justice Hamel explained that they would not have dispensed with the case on the question of justiciability and believed that this exercise of discretion should be subject to judicial review.[55] The dissent was of the opinion that the GIC's decision failed to reflect a balancing of the right to vote, including the right to run for office, as protected by section 3 of the *Charter*.[56] This issue was not raised by the Appellant, and Justice Hamel brought it up on their own initiative. The dissent was critical of the purported lack of detail

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[46] *Ibid* at para 20.
[47] *Ibid*.
[48] *Ibid* at para 21.
[49] *Ibid*.
[50] *FCA Judgement, supra* note 3 at paras 4-6.
[51] *Ibid* at para 5.
[52] *Ibid.*
[53] *Ibid.*
[54] *Ibid.*
[55] *Ibid* at para 8.
[56] *Ibid* at paras 9, 11.

in the GIC's reasons and was also concerned about the possibility that the GIC's order may have been motivated by political considerations.[57] In light of these issues, the dissent would have upheld the FC's decision and remitted the matter to the GIC.[58]

[30] The Appellant now appeals this judgment to the Canadian Court of Justice.

[57] *Ibid* at para 10.
[58] *Ibid* at para 12.

PART III: STATEMENT OF RESPONDENT'S POSITION CONCERNING THE POINTS IN ISSUE

[31] The FCA was correct in finding that the GIC's Decision is not justiciable.

[32] The Appellant does not have individual or public interest standing to bring this application.

[33] In the alternative, if the issue is justiciable and the Appellant has standing, the standard of review is reasonableness.

[34] The Decision is reasonable under the *Vavilov* framework.

[35] The Decision does not infringe on the right to vote protected by section 3 of the *Charter*. In the alternative, the GIC properly balanced the right to vote with the statutory objectives of the *Act* under the *Doré* framework, justifying any infringement.

[36] The Federal Court of Appeal decision should be upheld. In the alternative, the Decision should be remitted back to the GIC for reconsideration.

PART IV: ARGUMENT

1. The GIC's Decision is Not Justiciable

[37] Justiciability is defined as "a set of judge-made rules, norms and principles delineating the scope of judicial intervention in social, political and economic life."[59] To be justiciable, the Court must have the institutional capacity and the legitimacy to adjudicate the matter.[60] Although political questions are not a bar to judicial involvement, some questions are so political that the Court should not intervene.

1.1 The Decision to Withdraw the Writs of Electoral Districts is Inherently Political

[38] The GIC's Decision to withdraw the writs is inherently political. Political questions are those that include "moral, strategic, ideological, historical or policy considerations" that cannot be resolved through the adversarial process.[61] In this case, the GIC alone has the ultimate authority to weigh the various policy considerations and reach a conclusion. The *Act* does not impose statutory obligations or limitations on her discretion.

[39] This is similar to *Samson* where the Governor General's power to appoint someone to the Senate was determined to be purely political.[62] Justice McGillis held if the GIC makes a recommendation that ignores the statutory provisions, she "proceeds at [her] own political peril. However, that is a purely political decision to be made by politicians, without the interference or intervention of the Court."[63] In the current case, the GIC made

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[59] Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Toronto: Carswell, 2012) at 7.
[60] *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 at para 34.
[61] *Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852 at para 21.
[62] *Samson v Canada (Attorney General)*, [1998] FCJ No 1208 at para 6, 165 DLR (4th) 342 (FCTD) [*Samson*].
[63] *Ibid*.

an inherently political choice to withdraw the writs in all electoral districts. The recourse for this Decision lies in the political process, not with the Court.

[40] The political nature of the Decision could compromise the Court's legitimacy. The incumbent government is falling out of favour with the public as the occupation continues.[64] In light of these allegations, the Court could compromise its appearance of independence and face backlash for any decision that it makes. The Appellant argues that the claims of judicial activism are hypothetical and should not be considered.[65] However, what the Court should be concerned about is tarnishing its appearance of independence and impacting the public's trust in the non-partisan nature of the justice system.

1.2 The Court Does Not Have the Institutional Capacity to Adjudicate the Issue

[41] The GIC's Decision required consideration of a multitude of issues, within the realm of Cabinet's competence, that are not well suited for adjudication by the Court. This Decision was based on advice from the Panel established under the Critical Election Incident Public Protocol.[66] The Panel is comprised of senior civil servants and is uniquely situated to bring together "national security, foreign affairs, democratic governance and legal perspective[s], including a clear view of the democratic rights enshrined in the Canadian Charter of Rights of Freedoms."[67] The Court does not have the institutional capacity to review a decision that encompasses such a wide variety of policy factors. This is similar to *Friends of the Earth* where the applicant alleged that the GIC failed to observe

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[64] *FC Judgment, supra* note 2 at para 10.
[65] Appellant Factum (School 11) at para 39 [*School 11 Factum*].
[66] *FC Judgment*, *supra* note 2 at para 14.
[67] "Critical Election Incident Public Protocol" (7 Sept 2012), online: *Government of Canada* <https://www.canada.ca/en/democratic-institutions/services/protecting-democracy/critical-election-incident-public-protocol.html> [https://perma.cc/YD4N-678P].

provisions of the *Kyoto Protocol Implementation Act*.[68] However, the FC held that this was not justiciable because the provisions contemplated duties with "policy-laden considerations which are not the proper subject matter for judicial review."[69] The same applies here. The legislature's intent was to give the GIC ultimate discretion in withdrawing the writs because of the policy-laden considerations involved.

1.3 A Policy Decision Within the Discretion of the GIC is Not Justiciable

[42] The decision to withdraw the writs was within the ultimate discretion of the GIC. The legislature deliberately created a double-level of decision-making in subsection 59(1) of the *Act*.[70] The legislature's intention in making the GIC the final authority shows that the Decision was based on factors outside of the competence of the CEO. While the Court may be well-suited to review administrative decisions, they should not intervene with highly discretionary decisions of the GIC.

[43] Despite Cabinet decisions being justiciable,[71] the decision in this case is not simply a Cabinet decision. The decision was made by the GIC which is "the Governor General of Canada acting by and with the advice of, or by and with the advice and consent of, or in conjunction with the Queen's Privy Council for Canada."[72] Multiple cases have held that discretionary decisions made by the GIC are not justiciable. In *Soth*, the Court found that the question of whether regulations made under the *Health Insurance Act* were *ultra vires* was not justiciable because the GIC had the authority to make regulations which required

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[68] *Friends of the Earth – Les Ami(e)s de la Terre v Canada (Governor in Council)*, 2008 FC 1183 at para 2 [*Friends of the Earth*].
[69] *Ibid* at para 33.
[70] *Act*, *supra* note 1, s 59(1).
[71] *Operation Dismantle Inc v R*, [1985] 1 SCR 441 at para 68, 18 DLR (4th) 481.
[72] *Interpretation Act*, RSC 1985, c I-21, s 35(1).

intergovernmental consultation.[73] In *Thorne's Hardware*, the Supreme Court of Canada (the "SCC") held that "decisions made by the Governor in Council in matters of public convenience and general policy are final and not reviewable in legal proceedings."[74] Justice Dickson (as he then was) said that in these cases, the Court should only intervene where statutory conditions have not been met and that it would take "an egregious case to warrant such action."[75] Here, the decision to withdraw the writs was a matter of public convenience because of the debilitating disruptions caused by the occupation. There are no statutory conditions on the GIC's discretion to warrant Court intervention.

[44] This case is distinguishable from *Aryeh-Bain*, cited by Justice Hamel in dissent at the FCA for the proposition that the timing of an election is justiciable.[76] In *Aryeh-Bain*, the decision not to change the election date following a request from a candidate was made by the CEO.[77] The GIC was not involved. Concerns about political interference and the Court's institutional capacity to consider policy factors were not present. Therefore, reviewing the GIC's Decision in this case would interfere with the separation of powers in a more intrusive way than in *Aryeh-Bain*.

1.4 The *Charter* Claim Raised on Appeal Does Not Make the Issue Justiciable

[45] Raising a *Charter* argument at this stage of the proceeding should not make an otherwise non-justiciable issue justiciable. The Appellant argues that where a matter

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[73] *Soth v Ontario*, 2012 ONSC 5172 at para 4 [*Soth*].
[74] *Thorne's Hardware Ltd v R*, [1983] 1 SCR 106 at para 9, 143 DLR (3d) 577 [*Thorne's Hardware*].
[75] *Ibid*.
[76] *FCA Judgment, supra* note 3 at para 8.
[77] *Aryeh-Bain v Canada (Attorney General),* 2019 FC 964 at para 1 [*Aryeh-Bain*].

involves consideration of *Charter* rights, the Court has a duty to intervene.[78] However, this is an overly broad statement that could have serious impacts of the law of justiciability.

[46] This is the first time that the Appellant is raising a *Charter* argument in these proceedings. Neither the FC nor the majority decision of the FCA makes reference to the *Charter*. Notably, Justice Hamel in dissent at the FCA, said that when asked about the impact on the right to vote, neither party was prepared to discuss the issue.[79] It is evident from the record that the *Charter* claim was not part of the Appellant's original application. Making a *Charter* claim at this stage to bring the issue within the competence of the Court cannot be allowed. This strategy would effectively undermine the jurisprudence on justiciability and allow applicants to overcome findings of non-justiciability simply by raising a *Charter* issue on appeal.

[47] Further, there are instances where the Court has found an issue to be non-justiciable notwithstanding the presence of a *Charter* claim. In *La Rose*, the applicants raised *Charter* claims under sections 7 and 15 but the FC still found that the claims were non-justiciable.[80] This supports that raising a *Charter* claim does not automatically make an issue justiciable. To hold otherwise could lead to a flood of otherwise non-justiciable issues where a *Charter* argument is raised. Caution should be exercised in setting this precedent.

2. The Appellant Does Not Have Standing to Bring this Application

2.1 The Appellant is Not Directly Affected by the GIC's Decision

[48] The Appellant has failed to establish that their legal rights as an organization are directly affected. Subsection 18.1(1) of the *Federal Courts Act* requires applications for

[78] Appellant Factum (School 5) at para 32; *School 11 Factum, supra* note 65 at para 38.
[79] *FCA Judgment*, *supra* note 3 at para 9.
[80] *La Rose v Canada*, 2020 FC 1008 at para 26 [*La Rose*].

judicial review to be made by anyone "directly affected" by the matter.[81] To be directly affected, the decision must affect the party's legal rights, impose obligations on it, or prejudicially affect it directly.[82] This requires more than a general interest in the issue.

[49] The Appellant is an "advocacy group comprising Canadians who hold strong views about the right to vote and Canada's democratic process."[83] Although they have an interest in protecting the right to vote, their personal legal rights are not directly affected. Similarly, in *League for Human Rights*, the FCA held that the applicants' interest "exists in the sense of seeking to right a perceived wrong."[84] This interest was not sufficient to give the applicant standing because their legal rights were not impacted.[85]

[50] Further, the individual members of the Appellant organization are in the same position as all voters. To be a "person aggrieved", the applicant must suffer some peculiar grievance beyond a grievance suffered by them in common with the public.[86] Since the GIC withdrew the writs in all electoral districts, the Appellant's inconvenience is shared with all voters and precludes them from being granted individual standing.

2.2 The Appellant Should Not be Granted Public Interest Standing

[51] Public interest standing should not be granted because the issue is not justiciable and there are more effective ways to bring the issue before the Court. The test for public interest standing requires three elements to be established: a serious justiciable issue, a real

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[81] *Federal Courts Act*, RSC 1985, c F-7, s 18.1(1).
[82] *League for Human Rights of B'Nai Brith Canada v Canada*, 2008 FC 732 at para 24 [*League for Human Rights*].
[83] *FC Judgment*, *supra* note 2 at para 3.
[84] *League for Human Rights*, *supra* note 82 at para 26.
[85] *Ibid* at para 27.
[86] *Re Civil Service Association of Alberta and Farran et al*, [1976] AJ No 357, 68 DLR (3d) 338 (ABCA).

or genuine interest, and the proposed suit is a reasonable and effective way to bring the issue before the Court.[87] This test is purposive and the Court must weigh the factors in light of the underlying purposes of both limiting and granting standing.[88]

[52] First, the Appellant does not raise a justiciable issue. This factor ensures that courts stay "within the bounds of [their] proper constitutional role."[89] Based on the above analysis, the political nature of this decision and the wide discretion granted to the GIC makes the issue non-justiciable.

[53] Second, the proposed suit is not an effective way of bringing the issue before the Court. To determine whether the application is effective, the Court can consider "the potential impact of the proceedings on the rights of others who are equally or more directly affected."[90] Any potential impact of the Decision would be felt more directly by other possible applicants: people who live in the Non-Certified Districts or people who campaigned in the election. The Court should be reluctant to grant standing to the Appellant since they have failed to establish that they bring a "distinctive and important interest" that differs from those directly affected.[91] This is similar to *Conacher* where the applicant, Democracy Watch, was a not-for-profit organization that advocated for democratic reform and voter participation.[92] The applicant argued that the Prime Minister's early calling of the election may have caught certain political parties off guard. At the

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[87] *Downtown Eastside Sex Workers United Against Violence Society v Canada (Attorney General)*, 2012 SCC 45 at para 37 [*Downtown Eastside*].
[88] *British Columbia (Attorney General) v Council of Canadians with Disabilities*, 2022 SCC 27 at paras 29-30 [*Council of Canadians with Disabilities*].
[89] *Ibid* at para 40.
[90] *Downtown Eastside*, *supra* note 87 at para 51.
[91] *Ibid*.
[92] *Conacher v Canada (Prime Minister)*, 2009 FC 920 at para 8 [*Conacher*].

FCA, Justice Stratas questioned "the appellant's standing to litigate those parties' section 3 rights" because the political parties "were well-placed to bring such a claim themselves."[93] Finally, unlike the plaintiff in *Council of Canadians with Disabilities* who had several hundred thousand members,[94] the Appellant has not established that they are composed of those affected by the Decision. Organizations who claim to represent affected people but fail to establish their membership should not be granted public interest standing.

3. The Standard of Review is Reasonableness

[54] In the alternative, if the issue is deemed justiciable and the Appellant is granted standing, the Decision should be reviewed on the standard of reasonableness. The presumption of reasonableness is not displaced by any of the correctness categories from *Vavilov*.[95] The *Charter* claim must also be reviewed on the standard of reasonableness.[96]

3.1 The Language of s. 59(1) of the *Elections Act* is Discretionary

[55] The Court should not intervene with the legislature's intent to give wide discretion to the GIC. Subsection 59(1) of the *Act* says that the GIC "may" order the withdrawal of a writ that the CEO certifies is impracticable.[97] The word "may" shows the legislature's intention to give the GIC ultimate discretion. The Court in *Vavilov* emphasized that the reasonableness review is intended to give full effect to legislative intent.[98] Absent another indication of legislative intent, the Court should give deference to the decision maker.

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[93] *Conacher v Canada (Prime Minister)*, 2010 FCA 131 at para 11.
[94] *Council of Canadians with Disabilities*, *supra* note 88 at para 6.
[95] *Vavilov, supra* note 5 at para 69.
[96] *Doré v Barreau du Quebec*, 2012 SCC 12 at para 45 [*Doré*].
[97] *Act*, *supra* note 1, s 59(1).
[98] *Vavilov*, *supra* note 5 at para 12.

3.2 This is Not a Constitutional Question

[56] There is no constitutional gap that requires the correctness standard. Despite the Appellant's argument,[99] the question before the Court is not a constitutional question about the relationship between the legislature and the other branches of the state. In *Vavilov*, the majority held that "a legislature cannot alter the scope of its own constitutional power through statute" or "alter the constitutional limits of executive power by delegating authority to an administrative body."[100] There is no evidence that the legislature lacked authority to regulate the withdrawal of writs or that power was usurped.

[57] The Appellant argues that "there is a gap because there are no provisions restraining the length of time for which the Parliament may be dissolved for."[101] This is incorrect. Section 4 of the *Charter* forbids a legislative assembly from continuing for longer than 5 years and section 5 limits the time of dissolution by requiring Parliament to sit at least once every 12 months.[102] Subsection 59(2) of the *Act* requires a new writ to be issued within 3 months of withdrawal and subsection 59(3) requires polling within 50 days of the new writ.[103] Together, these provisions address the concern that the GIC could indefinitely withdraw the writs and leave Parliament dissolved.

3.3 This is Not a General Question of Law of Central Importance

[58] Being of "wider public concern" is not sufficient to rebut the presumption of reasonableness. In *Vavilov*, the majority held that questions that require uniform and consistent answers because of their impact to the administration of justice should be

[99] *School 11 Factum, supra* note 65 at para 56.
[100] *Vavilov*, *supra* note 5 at para 56.
[101] *School 11 Factum, supra* note 65 at para 59.
[102] *Charter*, *supra* note 4, ss 4, 5.
[103] *Act*, *supra* note 1, ss 59(2), 59(3).

reviewed on the standard of correctness as general questions of law of central importance.[104]

[59] This case is unlike other cases where the Court has found a general question of law of central importance. In *University of Calgary*, the Court applied a standard of correctness because the issue was about the scope of solicitor-client privilege, an issue which would have broad impacts across the justice system.[105] In this case, the question being reviewed concerns a specific provision in the *Act*. This is not a question of broad applicability that will impact other statutes, decision-makers, or the justice system as a whole. The majority in *Vavilov* held that "the mere fact that dispute is of wider public concern is not sufficient for a question to fall into this category."[106]

[60] The resolution of this dispute does not impact provincial election statutes. The scope of the GIC's authority is specific to subsection 59(1) of the *Act*. Provincial provisions about the withdrawal of writs can each be interpreted differently. In *McLean*, the SCC considered the interpretation of the statutory limitation period in paragraph 161(6)(d) of the British Columbia *Securities Act*.[107] The Court dismissed the argument that the interpretation of the limitation period was a general question of law of central importance. Writing for the majority, Justice Moldaver said the potential for different interpretations in other statutes did not require the correctness standard:

> "... while it is true that reasonableness review in this context necessarily entails the possibility that other provincial and territorial securities commissions may arrive at different interpretations of their own statutory

[104] *Vavilov*, *supra* note 5 at para 58.
[105] *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53 at para 20 [*University of Calgary*].
[106] *Vavilov, supra* note 5 at para 61.
[107] *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at para 18 [*McLean*].

> limitation periods, I cannot agree that such a result provides a basis for correctness review – and thus judicially mandated "consistency across the country". No one disputes that each of the provincial and territorial legislatures can enact entirely different limitation periods."[108] [emphasis added]

The same reasoning applies here. Provisions in provincial elections statutes about the withdrawal of writs does not affect the interpretation of subsection 59(1) of the *Act*.

3.4 Deference is Owed to the Decision-Maker Based on the Nature of the Decision

[61] The GIC was in the best position to consider the contextual factors affecting the election and to make a decision in the best interest of Canadians. Giving deference to the executive for contextual, urgent decisions is not a foreign concept. The Court showed immense deference to the executive in responding to the COVID-19 pandemic.[109] The pandemic required "rapid, flexible responses on the part of public officials" and favoured "broad delegations of decision-making authority."[110] Similar conditions exist here: the prolonged occupation required the executive to make rapid decisions in the best interest of the public. The GIC needs flexibility when responding to emergencies and the Court should not interfere with such decisions. This supports using the reasonableness standard to protect the sphere of decision making required in times of emergency.

3.5 The Court Should Not Create a New Category of Correctness

[62] The court should be reluctant to create a new category of correctness and disrupt the comprehensive analysis in *Vavilov*. The Court in *Vavilov* established five categories where a decision will be reviewed for correctness. These categories were the "product of

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[108] *Ibid* at para 29.
[109] Paul Daly, "Judicial Review and the COVID-19 pandemic", 20 December 2021, online: <https://www.administrativelawmatters.com/blog/2021/12/20/judicial-review-and-the-covid-19-pandemic/> [https://perma.cc/EML8-6NTP].
[110] *Ibid*.

careful consideration undertaken following extensive submissions and based on a thorough review of the relevant jurisprudence".[111] The Appellant argues that the correctness standard should be applied to promote stability and consistency for election dynamics across Canada.[112] This request should be refused because it does not have the "signal of legislative intent as strong and compelling as those identified" in *Vavilov* that would warrant a derogation from the presumption of reasonableness.[113] Nor does the failure to apply the correctness standard "undermine the rule of law and jeopardize the proper functioning of the justice system."[114] The Court in *Vavilov* was clear: the creation of a new correctness category will be "exceptional." The Appellant has failed to provide sufficient reasons to warrant such an exception.

4. The Decision is Reasonable According to the *Vavilov* Reasonableness Review

[63] The Appellant has failed to meet its burden[115] of showing that the decision is unreasonable. As articulated in *Vavilov,* an unreasonable decision must have "serious shortcomings…such that it cannot be said to exhibit the requisite degree of justification, intelligibility, and transparency."[116] On this standard, a decision must not contain either of the fundamental flaws characterizing an unreasonable decision, including (1) when there is a "failure of rationality internal to the reasoning process" or (2) it is "untenable in light of the relevant factual and legal constraints."[117]

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[111] *Vavilov*, *supra* note 5 at para 69.
[112] *School 11 Factum, supra* note 65 at para 66.
[113] *Vavilov*, *supra* note 5 at para 70.
[114] *Ibid.*
[115] *Ibid* at para 100.
[116] *Ibid*.
[117] *Ibid* at para 101.

4.1 The Decision is Based on Internally Coherent Reasoning

[64] The GIC's reasons are based on rational, logical, and internally coherent reasoning.[118] The GIC provided reasons for her Decision which are contained in the Statement.[119] The Statement articulates a logical chain of reasoning to support that it was necessary to withdraw the writs in all districts.[120] The Statement outlines the Panel's advice which was based on competing considerations, including the CEO's decision, the political climate, the constitutional implications, and other factors.[121] This thorough explanation provides sufficient justification that the Decision is based on rational and logical reasoning.

4.2 The Decision is Justified in Light of the Legal and Factual Constraints

[65] The GIC's Decision is also justified in light of the law and facts.[122]

(i) The Governing Statutory Scheme

[66] The statutory scheme of the *Act,* together with subsection 59(1)*,* delegates broad supervisory discretion to the GIC when determining whether to withdraw a writ for any district. In drafting subsection 59(1), Parliament reserved the ultimate authority to order the withdrawal of a writ exclusively for the GIC. The CEO's decision-making power under this provision is limited to certifying whether it would be impracticable to carry out the provisions of the *Act* in any district.[123] By contrast, elsewhere in the *Act,* the CEO is granted broad discretion as the final decision-maker. The powers and duties of the CEO are set out in section 16 and include the duty to exercise general direction and supervision over the

[118] *Ibid* at para 102.
[119] *FC Judgment, supra* note 2 at para 14.
[120] *Ibid*.
[121] *Ibid*.
[122] *Vavilov, supra* note 5 at para 105.
[123] *Act, supra* note 1, s 59(1).

conduct of elections.[124] In section 17, the CEO may adapt any provision of the *Act,* subject to certain limitations.[125] Subsection 59(1) does not import final decision-making power on the CEO in the same way. It is more similar to subsection 56.2(1), where the CEO may choose an alternate election date if he believes that the date mandated in subsection 56.1(2) is not suitable (subject to certain limitations) and may "recommend to the [GIC] that polling be on that other day".[126] The latter type of provision allows the CEO to make a preliminary assessment, but ultimate discretion lies with the GIC.

[67] Taken together, the scheme suggests that the CEO should have final decision-making power over minor changes to the conduct of an election, but the GIC should decide on major changes that would overhaul the entire electoral process. If Parliament believed that the final decision under subsection 59(1) should be left to the CEO on the basis of his certification of impracticability alone, it could have written the statute as such. The choice to enact supervision over the CEO and leave the ultimate power with the GIC reflects Parliament's intent to give the GIC residual discretion of the highest degree on this matter.

[68] Cabinet is a political body with capacity to consider a broader range of factors than the CEO, including public safety and constitutional considerations. The Statement shows consideration of multiple factors within, but also beyond the scope of the CEO's expertise. Among the factors influencing the Decision, the Statement references: (1) the impracticability of conducting the election during the protests (within the CEO's scope); (2) the disparity in support for political parties as between rural and urban areas (beyond

[124] *Ibid,* s 16.
[125] *Ibid,* s 17.
[126] *Ibid,* s 56.2(1).

the CEO's scope); and (3) the risk of further uncertainty and a potential constitutional crisis if the election proceeds in the Non-Certified Districts only (beyond the CEO's scope).[127]

[69] The CEO's impracticability certification is not a necessary precondition to the GIC's authority to order the withdrawal of a writ. Decision-makers who are afforded broad discretionary power "may not fetter the exercise of their discretion by relying exclusively on an administrative policy."[128] Similarly, it would be unreasonable for the GIC to fetter her discretion by relying exclusively on the CEO's certification, rather than conducting her own analysis. After the CEO certified that it would be impracticable to hold the election in more than one third of the electoral districts, the GIC recognized that her Decision must consider the broader context of the entire election, not just the Certified Districts.[129]

(ii) Statutory Interpretation

[70] The GIC's interpretation of subsection 59(1) is reasonable. The modern principle of statutory interpretation provides that "the words of an Act are to 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."[130] This approach requires an analysis of the plain meaning of the words in a statute, considering its context and purpose. Furthermore, a "large and liberal" interpretation of every act must be applied to best attain its "true intent, meaning, and spirit."[131]

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[127] *FCA Judgment, supra* note 3 at para 14.
[128] *Stemijon Investments Ltd v Canada (Attorney General),* 2011 FCA 299 at para 24.
[129] *FC Judgement, supra* note 2 at para 14.
[130] *Rizzo & Rizzo Shoes Ltd (Re),* [1998] 1 SCR 27 at para 21, 154 DLR (4th) 193 [*Rizzo*].
[131] *Ibid* at para 21; *Interpretation Act, supra* note 72, s 12.

Textual Interpretation

[71] Considering the plain language meaning of the terms "other disaster" and "impracticable," the GIC's Decision is reasonable in light of the factual record. The Respondent agrees with Justice Biggar's conclusion that the "LIGHTS OUT" protests constitute an "other disaster" within the meaning of the *Act;* the fact that this disaster is a product of human action does not make it less of a disaster.[132] Merriam-Webster defines a disaster as a "sudden calamitous event bringing great damage, loss or destruction."[133] The Cambridge Dictionary defines a disaster as "(an event that results in) great harm, damage, or death, or serious difficulty."[134] These definitions are marked by the consequences of an event, not its source. The protests, which rapidly escalated into an uncontrollable occupation, have paralyzed Canadian cities and forced businesses to close.[135] Protestors set fire to a truck containing ballots and committed other acts of vandalism.[136] These actions are damaging and destructive, resulting in a disaster in the ordinary sense.

[72] Impracticability in its ordinary sense does not require a standard of impossibility, but a determination that it would not be feasible to carry out the provisions of the *Act*, or to do so would come at too great a cost. Merriam-Webster's definition of "impracticable," as cited by the CEO in his certification decision, stipulates that something is impracticable if it is "incapable of being performed or accomplished by the means employed or at

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[132] *FC Judgement, supra* note 2 at para 20; *Act, supra* note 1, s 59(1).
[133] "Disaster" (last visited 23 Jan 2023), online: *Merriam-Webster* <https://www.merriam-webster.com/dictionary/disaster> [https://perma.cc/FAN9-97YF].
[134] "Disaster" (last visited 27 Jan 2023), online: *Cambridge Dictionary* <https://dictionary.cambridge.org/dictionary/english/disaster> [https://perma.cc/85WG-SKWZ].
[135] *FC Judgement, supra* note 2 at para 7.
[136] *Ibid* at para 8.

command."[137] The Cambridge Dictionary's definition of impracticable states that "if a course of action, plan, etc. is impracticable, it is impossible to do it in an effective way,"[138] while the Oxford Advanced Learner's Dictionary describes something that is impracticable as "impossible or very difficult to do; not practical in a particular situation."[139]

Contextual Interpretation

[73] When subsection 59(1) is read in its entire context and given a large and liberal interpretation, it should allow the GIC to determine when a "disaster" would render an election "impracticable," without being limited to the CEO's certification. The scheme gives the GIC a wide margin of discretion when deciding whether to withdraw a writ. The GIC "may" (or may not) adopt the CEO's certification based on her own analysis of what constitutes a "disaster" such that it would be "impracticable" to hold the election.[140]

Purposive Interpretation

[74] The phrase "other disaster," should be given a broad purposive interpretation, as the statute leaves the definition open ended to account for a wide range of circumstances that might render an election "impracticable," including those beyond contemplation at the time of drafting.[141] Both a textual and contextual interpretation of subsection 59(1) operate

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[137] "Impracticable" (last visited 23 Jan 2023), online: *Merriam-Webster* <https://www.merriam-webster.com/dictionary/impracticable> [https://perma.cc/V86R-8DWQ].
[138] "Impracticable" (last visited 27 Jan 2023), online: *Cambridge Dictionary* <https://dictionary.cambridge.org/dictionary/english/impracticable> [https://perma.cc/GVA5-BCCB].
[139] "Impracticable" (last visited 27 Jan 2023), online: *Oxford Learner's Dictionaries* < https://www.oxfordlearnersdictionaries.com/us/definition/english/impracticable?q=impracticable> [https://perma.cc/UW28-E467].
[140] *Act, supra* note 1, s 59(1).
[141] *Ibid.*

harmoniously with the legislation's purpose.[142] The *Act* has multiple objects, including enfranchisement, protecting the integrity of democratic processes, and ensuring the "democratic legitimacy of federal elections in Canada."[143] On this reading, the provisions of the *Act* safeguard the integrity and legitimacy of elections. Subsection 59(1) fulfills this purpose by allowing the election to be postponed when circumstances are so disastrous that the election's integrity and legitimacy could be compromised.[144] An election amidst occupied cities without sufficient polling stations and ballots cannot be legitimate.

[75] A restrictive interpretation of "disaster" that excludes events caused by deliberate human action would be arbitrary and absurd, inconsistent with the *Act*'s purpose. On this reading, the provision could be applied during a hurricane, but not a mass shooting, though both would threaten public safety and render an election impracticable. In *Rizzo Shoes*, the SCC stated that "it is a well established principle […] that the legislature does not intend to produce absurd consequences."[145] The Court noted that an interpretation can be absurd:

> "…if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, …if it is incompatible with other provisions or with the object of the legislative enactment… [or if it defeats] the purpose of a statute or [renders] some aspect of it pointless or futile."[146]

Distinguishing between disasters that are caused purely by humans or purely by nature unnecessarily restricts the application of the statue without furthering its purpose.

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[142] *Rizzo, supra* note 130 at para 21.
[143] *Opitz v Wrzesnewskyj,* 2012 SCC 55 at paras 38, 145 [*Opitz*].
[144] *Act, supra* note 1, s 59(1).
[145] *Rizzo, supra* note 130 at para 27.
[146] *Ibid.*

[76] The evidence before the CEO led him to conclude that the election could not be conducted in an effective way in the Certified Districts.[147] The occupation of urban centres has limited the number of available polling stations, forced some Returning Officers to close their offices, and prevented some ballot printing companies from operating their facilities.[148] Even electoral districts beyond those directly occupied by protestors may feel the impact of ballot supply chain issues and other strains on resources. These circumstances have undoubtedly created serious logistical barriers to organizing the election. Given the state of the occupation, it was reasonable for the GIC to adopt the CEO's finding that it was not practicable to hold the election in the Certified Districts and go further in finding that the election should not proceed in the Non-Certified Districts.[149]

[77] Furthermore, while the protestors claim that they do not intend to interfere with election-related activities as long as they are conducted during daylight hours,[150] this statement is contradictory to the provisions of the *Act*. Section 128 of the *Act* prescribes voting hours to extend beyond "daylight hours," while sections 121 and 122 limit the characteristics of acceptable polling stations to be accessible and take place in public buildings.[151] Allowing protestors to hijack the election and require it to take place on their terms would set a dangerous precedent and be contrary to subsection 59(1), which indicates than an election should not proceed unless "the provisions of this *Act*" can be carried out.[152]

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[147] *FC Judgement, supra* note 2 at para 13.
[148] *Ibid* at para 8.
[149] *Ibid* at paras 14-15.
[150] *Ibid* at para 9.
[151] *Act, supra* note 1, ss 121-122.
[152] *Ibid,* s 59(1)

(iii) Correctness Standard

[78] In the alternative, the Decision is also correct, and the Respondent is prepared to address this point in oral argument if necessary.

5. The Decision Does Not Constitute an Unjustified *Charter* Infringement

5.1 The Decision Does Not Infringe on the Right to Vote

[79] Section 3 of the *Canadian Charter of Rights and Freedoms* provides 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."[153] Invoking subsection 59(1) does not deprive Canadians of this right. As discussed, the writs can only be withdrawn for up to three months.[154] The Decision to postpone the election is merely temporary and is not rights-infringing. When the writs of election are re-issued and a new election date is set, meaningful participation in the democratic process will take place.

5.2 In the Alternative, the Decision Reflects a Proportionate Balancing

[80] If this Court finds that the Decision does infringe on Canadians' *Charter* protected right to vote, the Decision is reasonable because it reflects a proportionate balancing of the *Charter* right with statutory objectives.[155] Where a decision limits a *Charter* right, the test for determining whether it was properly balanced requires an analysis of "whether the limitation of the right is proportionate in light of the statute's objective, and hence is justified as a reasonable measure in a free and democratic society."[156]

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[153] *Charter, supra* note 4, s 3.
[154] *Ibid,* ss 4, 5; *Act*, *supra* note 1, s 59(2).
[155] *Doré, supra* note 96 at para 7.
[156] *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 112 [*Trinity*].

(i) Statutory and Charter Objectives

[81] In making the Decision, the GIC considered the extent to which it would restrict democratic participation alongside the need to fulfil the statutory purpose of the *Act.* As discussed, the purposes of the *Act* include enfranchisement, protecting the integrity of democratic processes, and ensuring the "democratic legitimacy of federal elections in Canada."[157] Interrelated values of Canada's electoral system also include "certainty, accuracy, fairness, accessibility, voter anonymity, promptness, finality, legitimacy, efficiency and cost."[158] Subsection 59(1)'s purpose within Part 5 of the *Act* (Conduct of an Election) is to provide an exception, in response to a disaster, to the provisions regulating the date of a general election.[159] The central purpose of section 3 of the *Charter* is to ensure the right of Canadian citizens to participate meaningfully in the electoral process.[160]

(ii) Charter Rights can be Considered by Implication

[82] While the Statement does not make direct reference to the *Charter,* it acknowledges that its conclusion is such that the vote will not be allowed to proceed, which is an implicit reference to the right to vote.[161] A decision-maker can implicitly consider *Charter* values without making explicit reference to a protected *Charter* right.[162] The Decision can be distinguished from the decision in *Aryeh-Bain*, where the record did not disclose a proper balancing.[163] Here, the Statement acknowledges and grapples with the unexpected and

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[157] *Opitz*, *supra* note 143 at paras 38, 145.
[158] *Ibid* at para 44.
[159] *Act, supra* note 1, ss 56.1(2), 59(1).
[160] *Figueroa v Canada (Attorney General),* 2003 SCC 37 at paras 25-26; *Frank v Canada (Attorney General)*, 2019 SCC 1 at para 26; *Aryeh-Bain*, *supra* note 77 at para 49.
[161] *FC Judgement*, *supra* note 2 at para 14
[162] *Aryeh-Bain*, *supra* note 74 para 62.
[163] *Ibid* at para 57.

unprecedented nature of the circumstances which call for extraordinary measures.[164] It also notes that historically, Canadians in remote areas have tended to have differing political views than those in urban areas, where the protests are largely concentrated.[165] As the Statement explains: "the risk of further uncertainty and even a potential constitutional crisis is too great to allow the vote to proceed."[166] Therefore, the right to vote is balanced with the aspiration of providing clarity and upholding the integrity of the electoral system. A Decision to proceed with the election in the Non-Certified Districts only would be problematic and contrary to statutory and constitutional objectives.[167]

(iii) Any Negative Impacts on the Right to Vote are Proportionate

[83] Any negative impacts on *Charter* rights are proportionate to the benefits secured by the Decision,[168] which protects the integrity and legitimacy of Canadian elections. Section 59 does not cancel the election but postpones it for a maximum of three months.[169] This impact is minimal compared to the alternate options available, which could risk facing uncertainty, a potential constitutional crisis, or compromising the integrity of the election.

5.3 It is Not the Role of an Appellant Court to Conduct a New Proportionality Analysis

[84] When applying the reasonableness standard, the Court should not ask what decision it would have made, attempt to ascertain the "range" of possible conclusions, or conduct a *de novo* analysis to determine the correct solution to the problem.[170] The decision maker

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[164] *FC Judgement, supra* note 2 at para 14.
[165] *Ibid*.
[166] *Ibid.*
[167] *Ibid*.
[168] *Trinity, supra* note 156 at para 144.
[169] *Act*, *supra* note 1, s 59(2).
[170] *Vavilov, supra* note 5 at para 83.

is in the best position to weigh *Charter* protections with their statutory mandate in light of the specific facts,[171] and there may be more than one outcome that strikes this balance.

[85] The SCC has noted that reasons do not have to be perfect – they may not necessarily include all details "the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis."[172] In dissent at the FCA, Justice Hamel takes issue with the Statement's failure to make specific reference to historical trends, elections statistics, or the rights of candidates.[173] These details should not be required where the GIC has already conducted a proportionate balancing of competing objectives and provided detailed reasons to justify her conclusion.

6. If the Decision was Unreasonable, the Appropriate Remedy is to Remit the Decision Back to the Governor in Council

6.1 The GIC Should Maintain the Ability to Exercise Her Statutory Discretion

[86] If a decision is deemed unreasonable, "it will most often be appropriate to remit the matter to the decision maker to have it reconsider the decision, this time with the benefit of the court's reasons."[174] It is not the role of the Court to substitute the GIC's Decision on this matter with its own. A *mandamus* order directing the GIC to decide a certain way would be inappropriate in these circumstances.[175] The reasonableness standard empowers decision makers to come to a number of possible conclusions within a range of reasonable outcomes.[176] If this Court finds that the decision to withdraw the writs in the Non-Certified

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[171] *Doré, supra* note 96 at para 54; *Aryeh-Bain, supra* note 77 at para 36.
[172] *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16; *Vavilov*, *supra* note 5 at para 91.
[173] *FCA Judgement*, *supra* note 3 at para 10.
[174] *Vavilov, supra* note 5 at para 141.
[175] *Aryeh-Bain, supra* note 77 at para 67.
[176] *Vavilov, supra* note 5 at para 83.

districts was outside of the acceptable range, the GIC should have the opportunity to select one of the alternatives. For example, she may decide to hold the election in the Certified Districts or to withdraw the writs in the Certified Districts only.

[87] The circumstances also do not warrant use of the subsection 24(1) *Charter* remedy to make any order beyond remitting the matter to the GIC.[177] In *PHS,* this remedy was applied where a government decision was found to infringe the *Charter* and the Court held that quashing the decision and remitting it back for reconsideration would be inadequate.[178] Unlike in the present case, the infringement threatened the health and lives of the claimants, and the Court determined that there was only one constitutional response.[179] Similarly, in *Vavilov,* the Court held that declining to remit a decision may be appropriate where "a particular outcome is inevitable and … remitting the case would therefore serve no useful purpose."[180] By contrast, in this case, where there are multiple reasonable outcomes, there is no reason to deny the proper exercise of the GIC's statutory discretion.

[88] In summary, the Respondent submits that this issue is inherently political and not justiciable. Nor does the Appellant have standing to bring this application. In the alternative, the Decision should be reviewed on a standard of reasonableness. The Decision is reasonable because it is internally coherent, justified in relation to the law and facts, and either does not infringe upon any *Charter* right, or reflects a proportionate balancing of the *Charter* right with statutory objectives. Nevertheless, if this Honourable Court finds that the Decision is unreasonable, it should remit the matter to the GIC for reconsideration.

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[177] *Charter, supra* note 4, s 24(1).
[178] *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 at para 146 [*PHS*].
[179] *Ibid.*
[180] *Vavilov, supra* note 5 at para 142.

PART V: ORDER SOUGHT AND NAMES OF COUNCIL

[89] The Respondent requests that the Canadian Court of Justice:

DISMISS the appeal; and

AWARDS COSTS throughout.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of January, 2023.

Grace Bryson
Grace Bryson
Counsel #1 for the Respondent

Danielle Wierenga
Danielle Wierenga
Counsel #2 for the Respondent

APPENDIX A: LIST OF AUTHORITIES REFERRED TO

LEGISLATION

Canada Elections Act, SC 2000, c 9.
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.
Federal Courts Act, RSC 1985, c F-7.
Interpretation Act, RSC 1985, c I-21.

JURISPRUDENCE

Alberta (Information and Privacy Commissioner) v University of Calgary, 2016 SCC 53.
Aryeh-Bain v Canada (Attorney General), 2019 FC 964.
British Columbia (Attorney General) v Council of Canadians with Disabilities, 2022 SCC 27.
Canada (Attorney General) v Citizens for Democracy, 2023 FCA 7.
Canada (Attorney General) v. PHS Community Services Society, 2011 SCC 44.
Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65.
Citizens for Democracy v Canada (Attorney General), 2023 FC 129.
Conacher v Canada (Prime Minister), 2009 FC 920.
Conacher v Canada (Prime Minister), 2010 FCA 131.
Doré v Barreau du Quebec, 2012 SCC 12.
Downtown Eastside Sex Workers United Against Violence Society v Canada (Attorney General), 2012 SCC 45.
Figueroa v Canada (Attorney General), 2003 SCC 37.
Frank v Canada (Attorney General, 2019 SCC 1.
Friends of the Earth – Les Ami(e)s de la Terre v Canada (Governor in Council), 2008 FC 1183.
Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall, 2018 SCC 26.
La Rose v Canada, 2020 FC 1008.
Law Society of British Columbia v Trinity Western University, 2018 SCC 32.
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