

Court File No. T-948-19

FEDERAL COURT

B E T W E E N:

CHANI ARYEH-BAIN and IRA WALFISH

Applicants

- and -

THE CHIEF ELECTORAL OFFICER OF CANADA

Respondent

**MEMORANDUM OF FACT AND LAW OF THE
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PART I - FACTS

Overview

1. The right to vote sits at the core of our democracy. It is enshrined both in the *Charter* and in the *Canada Elections Act*, which serve to enfranchise Canadians and to create a level playing field on which the democratic process can unfold.
2. When Parliament provided for fixed elections in 2007, it understood their inherent danger: fixed election dates could conflict with days of religious or cultural significance, making it difficult for certain religious and cultural communities to vote on election day.
3. Because this would undermine the purposes of the *Act*, Parliament provided a solution: it conferred on the Chief Electoral Officer (CEO) the discretion to change the election date if the fixed date was not suitable. In doing so, Parliament expressly turned its mind to the very conflict at issue here: Jewish holidays that occur in October that would prevent people from voting on election day.
4. In 2019, the federal election is scheduled for October 21, which is a Jewish High Holiday, Shemini Atzeret. Its observance involves refraining from numerous activities including voting and campaigning. Yet despite multiple requests, the CEO has refused to change the election date.
5. This refusal dramatically impacts the Applicants' *Charter* rights and cannot be reasonable. If the election is on Shemini Atzeret, Ms. Bain, a candidate for the Conservative Party, will have to shut down her campaign on election day – including her staff and volunteers. She will be precluded from getting out the vote on the most important day of the election (and limited in what she can do the week before). In short, she must fight the election with one hand tied behind her back.
6. If the election is held on Shemini Atzeret, Mr. Walfish, like all Orthodox Jewish voters, will not be able to vote on election day or otherwise volunteer or be involved in the election on that day. He can cast his ballot (through limited advanced polls or cumbersome special ballots), but that is all.

7. The CEO's insistence on holding the election on Shemini Atzeret thus significantly impacts the Applicants' *Charter* rights. It infringes their rights under s. 3, which protects not only the right to cast a ballot, but the right of candidates and voters to meaningfully participate in the election. By preventing Ms. Bain from campaigning on a level playing field and removing voting opportunities from Orthodox Jews because of their religion, it violates s. 15. In forcing a choice between religion or participating on election day, it impacts freedom of religion under s. 2(a).

8. These infringements can be avoided; Parliament has provided a way out. But, in planning the 2019 election, the CEO chose to ignore Parliament's intention, not even checking a calendar for conflicts. Even after being told about the conflict and asked to change the date, the CEO refused. He has subsequently justified his decision based on cost and operational concerns, namely the availability of polling places.

9. These concerns essentially amount to an argument that it is "too late" to change the date. But Parliament has said otherwise, permitting the election to be changed until August 1. And the *Act* contemplates snap elections at any time, which require the CEO to plan an election on 36 to 50 days' notice. The election is still four months away. If the CEO can plan an election in 36 days, surely, he can plan this one for October 28.

10. Moreover, there is no evidence that these operational concerns will in fact materialize if the date is changed. The CEO has not bothered to actually check polling place availability for October 28, merely saying that he "expects" some will not be available. *Charter* infringements cannot be justified by mere speculation.

11. In any event, the Supreme Court in *Doré* has said that the exercise of discretion can only limit *Charter* rights if it is required to further the statutory purpose and is proportional. Here, the CEO's decision undermines the statutory objectives: to enfranchise voters, ensure minority voices are heard and to create a level playing field. Moreover, there is nothing proportionate about disenfranchising a religious minority group and forcing a candidate to sit out election day just to make the election more convenient or easy to administer.

12. The Applicants ask this Court to quash the CEO's decision and direct the CEO to recommend to the Governor in Council that the election date be changed.

The Canada Elections Act

13. The *Canada Elections Act* governs federal elections in Canada.¹ Its central purposes are to “enfranchise all persons entitled to vote” and to promote fair elections.² It does so by, among other things, ensuring that the entire voting process “unfolds on a level playing field.”³

14. **Fixed election date.** Since 2007, federal election dates have been fixed in advance. Section 56.1(2) of the *Act* sets the general election date as the third Monday in October, four years after the last general election. Under this provision, the next federal general election would be held on October 21, 2019.

15. However, the fixed date does not affect the powers of the Governor General to call an election at any time by dissolving Parliament, either because the Prime Minister calls a snap election or loses the confidence of the House of Commons.⁴ Under s. 57(1.2), the election must occur between 36 and 50 days of being called.

16. **Flexibility to move the date.** Parliament recognized that a rigid election date could create problems and conflicts. In response, it created exceptions to the fixed date, modelled after a similar regime in the Ontario *Elections Act*.⁵ Section 56.2(1) confers on the CEO the discretion to choose an alternate day if he is of the opinion that the election date is not suitable “including by reason of its being in conflict with a day of cultural or religious significance”:

¹ S.C. 2000, c. 9, Applicant's Book of Authorities (ABOA), Tab 1 [CEA]

² *Frank v. Canada (Attorney General)*, 2019 SCC 1, para. 1, ABOA, Tab 10; *Opitz v. Wrzesnewskij*, 2012 SCC 55, para. 35, ABOA, Tab 18

³ *Rae v. Canada (CEO)*, 2008 FC 246, para. 19, ABOA, Tab 19; *Opitz*, 2012 SCC 55, para. 38, ABOA Tab 18

⁴ CEA, s. 56.1(1), ABOA, Tab 1

⁵ R.S.O. 1990, c. E.6, s. 9.1(6), ABOA, Tab 2

56.2 (1) If the Chief Electoral Officer is of the opinion that a Monday that would otherwise be polling day under subsection 56.1(2) **is not suitable for that purpose, including by reason of its being in conflict with a day of cultural or religious significance** or a provincial or municipal election, the Chief Electoral Officer may choose another day in accordance with subsection (4) and shall recommend to the Governor in Council that polling day be that other day [emphasis added].

17. Under s. 56.2(4) there are two options for the alternate day: either the day after the original polling day (here, Tuesday, October 22, 2019) or one week following the original polling day (here, Monday, October 28, 2019).

18. If the CEO recommends an alternate day to the Governor in Council, the Governor in Council may accept the recommendation and make an order changing the date.⁶ Section 56.2(5) requires that the Governor General in Council make this order no later than August 1 of the election year (this year, August 1, 2019).

19. ***Methods of voting***. The *Act* provides a variety of ways that Canadians can vote, including voting in advanced polls (where the dates are set out in the *Act*), and voting by special ballot.⁷ A special ballot involves a two-step process where voters must first register for an advanced ballot (no later than six days before the election), and then return the ballot to the returning officer or to the special voting rules administrator. The ballots must be received by 6:00 p.m. on polling day.⁸ Of course, Canadians can also vote in person on election day, and vastly prefer that option.⁹

The 2019 election day conflicts with Shemini Atzeret, a Jewish holiday

20. This year, the fixed election date conflicts with a Jewish holiday known as Shemini Atzeret.¹⁰

⁶ *CEA*, s. 56.2(3), ABOA, Tab 1

⁷ *CEA*, s. 127, ABOA, Tab 1

⁸ *CEA*, s. 232, ABOA, Tab 1

⁹ Affidavit of Chani Aryeh-Bain, affirmed June 17, 2019, para. 35, Application Record (“AR”), Vol 1, Tab 3, p. 37

¹⁰ Bain Affidavit, para. 19, AR, Vol 1, Tab 3, p. 33

21. Of the approximately 392,000 Canadians who identify as Jewish, approximately 75,000 people identify as Orthodox Jews.¹¹ Orthodox Jews live all aspects of their lives according to a particular set of rules, including the careful observance of the Jewish Sabbath and holidays that occur throughout the year. Because the Jewish calendar is lunar, the dates of these days vary from year to year with respect to the secular calendar.¹²

22. As described below, if the 2019 election continues to be held on Shemini Atzeret, Orthodox Jews, including the Applicants, will be significantly restricted in their ability to participate in the electoral process.

23. ***Ms. Bain is an Orthodox Jewish candidate.*** Ms. Bain is the candidate for the Conservative Party in the electoral district of Eglinton-Lawrence. She has been involved in politics since 2014 and has extensive experience in getting out the vote.¹³

24. ***Mr. Walfish is an Orthodox Jewish voter.*** Mr. Walfish is a political activist who actively engages in the electoral process. He has been actively involved in getting out the vote, both in the days leading up to election day and on election day itself. His efforts are typically focused on the Jewish community.¹⁴

25. ***Shemini Atzeret is a holiday.*** Shemini Atzeret is part of the set of Jewish holidays that occur each Fall, colloquially known as the Jewish High Holidays. Rosh Hashanah is the most well-known of these holiday, but all are equally sacred.¹⁵

26. ***Religious observance of Shemini Atzeret.*** Each of these holidays are observed through special prayers and festive meals. They are also proclaimed in the Bible as days of rest, where no work or labour is to be performed. In recognition of

¹¹ Affidavit of Ira Walfish, affirmed June 17, 2019, para. 9, AR, Vol 1, Tab 4, p. 56

¹² Affidavit of Rabbi Moshe Mordechai Lowy, affirmed June 16, 2019, para. 14, AR, Vol 1, Tab 2, p. 14

¹³ Bain Affidavit, paras. 4-7, 17, AR, Vol 1, Tab 3, pp. 31, 33

¹⁴ Walfish Affidavit, paras. 2-4, AR, Vol 1, Tab 4, pp. 54-55

¹⁵ Lowy Affidavit, paras. 19-20, 22, AR, Vol 1, Tab 2, p. 15

their sacredness, the Bible and Jewish Law prohibit many ordinary activities on these days, including writing, driving, working, using any electronic devices such as televisions, computers and phones.¹⁶ This includes voting.¹⁷

27. Orthodox Jews are also restricted in what they may ask others to do. Jewish law forbids encouraging another Jew to transgress any law (even though the other Jew may not be observant or identify as Orthodox). Orthodox Jews are also prohibited from asking or encouraging anyone (even if they are not Jewish) from doing any work or any prohibited acts on their behalf.¹⁸ This means that Orthodox Jews may not ask anyone to vote or campaign on their behalf on Shemini Atzeret.

28. ***The 2019 election period conflicts with the High Holidays.*** In 2019, both the election day itself and certain of the advanced poll days conflict with the Jewish High Holidays. In addition to the election day being on Shemini Atzeret, two of the advanced polling days (set by the *Act* as October 11 to 14) conflict with either the Sabbath (October 12) or the holiday of Sukkot (October 14).¹⁹ The next day, October 15, which is the last day to obtain a special ballot, is also Sukkot. An illustrative calendar showing conflicts between the Jewish holidays (where voting is prohibited) and the relevant election dates is attached as **Appendix A**. A chart showing available voting hours for Orthodox Jews is at **Appendix B**.

Election on Shemini Atzeret means limited participation for Orthodox Jews

29. As set out below, because of these conflicts, the ability of Orthodox Jews to participate in the election will be severely restricted, both as voters and candidates.

30. ***Ms. Bain's campaign must close on election day.*** Because of these prohibitions, Ms. Bain cannot campaign on October 21. She cannot have her staff or

¹⁶ Lowy Affidavit, paras. 14-18, Exhibit A, AR, Vol 1, Tab 2, pp. 14, 21-23

¹⁷ Lowy Affidavit, para. 29, AR, Vol 1, Tab 2, p. 17

¹⁸ Lowy Affidavit, para. 24, AR, Vol 1, Tab 2, p. 16

¹⁹ Lowy Affidavit, para. 33, AR, Vol 1, Tab 2, p. 18

volunteers do so on her behalf, or have volunteers act as scrutineers to ensure the fairness of polls. On election day, her campaign will essentially be silent.²⁰

31. A candidate's work on election day is critical, with a focus on getting out the vote to ensure that supporters get to the polls. If election day is moved to October 28, Ms. Bain and her campaign will be knocking on doors of residents they have identified as potential supporters, contacting voters by phone, email or text, and driving voters to polls who need assistance. If election day remains on Shemini Atzeret, she and her campaign will be barred from doing any and all of these activities.²¹

32. **No voting.** Orthodox Jews cannot vote on election day or on the two advanced polls that conflict with Sukkot and the Sabbath. The latest date that Orthodox Jews will be able to vote (other than through a special ballot) is in an advanced poll on Sunday, October 13, more than a week before the election date.²²

33. **No participation in the electoral process on voting day.** In addition to being prohibited from voting on election day, Orthodox Jews, such as Mr. Walfish, will also be prohibited from participating in the electoral process, including by helping to get out the vote or volunteering as scrutineers.²³

34. **Limited participation the week before election day.** Because Orthodox Jews are prohibited from encouraging any Jew from doing anything to transgress the holidays, they cannot campaign to Jews in the last week of the election. October 13 is the last non-holy day to vote in the campaign or request a special ballot; campaigning to Jews after this date is the same as asking them to violate Jewish law and vote on Shemini Atzeret. As a result, not only Ms. Bain but also her staff and

²⁰ Bain Affidavit, paras. 26-28, AR, Vol 1, Tab 3, p. 35

²¹ Bain Affidavit, paras. 26-27, AR, Vol 1, Tab 3, p. 35

²² Walfish Affidavit, paras. 15-16, AR, Vol 1, Tab 4, p. 57

²³ Lowy Affidavit, para. 30, AR, Vol 1, Tab 2, p. 17; Walfish Affidavit, para. 18, AR, Vol 1, Tab 4, p. 58

volunteers will be prohibited from asking Jews for their vote in the final week of the election. This also applies to voters like Mr. Walfish, who may wish to volunteer.²⁴

35. ***These restrictions impact Ms. Bain's candidacy.*** Ms. Bain's riding of Eglinton-Lawrence is the centre of Orthodox Jewish life in Toronto. Approximately 20% of the riding is Jewish, including at least 5,000 Orthodox Jewish voters. It is also a very competitive riding. Ms. Bain believes that the limitations on her, including her inability to get out the vote, could ultimately determine the election against her.²⁵

Requests to the CEO to change the election date

36. Concerned about how the election date will affect their ability to participate in the electoral process, many Orthodox Jews, including the Applicants, asked the CEO to exercise his discretion to recommend moving the election.

37. ***Ms. Bain's request to the CEO.*** Ms. Bain won the Conservative Party nomination on April 14, 2019. She was immediately concerned about the effect that the conflict between the election date and Shemini Atzeret would have on her campaign. On April 18, only four days later, Ms. Bain wrote to the CEO expressing her concerns and stating that the election date harmed Jewish candidates and voters in a manner contrary to their *Charter* rights.²⁶

38. ***Mr. Walfish's request to the CEO.*** When Mr. Walfish became aware of the conflict, he began to speak to others in the community about the harms it would cause. On May 31, 2018, Mr. Walfish sent the CEO an email explaining that the current timing of the election date will disenfranchise observant Jews and asking the CEO to change the date.²⁷

²⁴ Lowy Affidavit, paras. 24, 34, AR, Vol. 1, Tab 2, pp. 16, 18; Bain Affidavit, paras. 30-31, AR, Vol 1, Tab 3, p. 36

²⁵ Bain Affidavit, paras. 15-16, 34-37, AR, Vol 1, Tab 3, pp. 32-33, 36-37

²⁶ Bain Affidavit, para. 39, Exhibit B, AR, Vol 1, Tab 3, pp. 37-38, 43-44

²⁷ Walfish Affidavit, paras. 22, 39, Exhibit F, AR, Vol 1, Tab 4, pp. 58, 61, 294

39. ***Others have written the CEO.*** Over 140 Canadians wrote to the CEO to express concerns and to ask the CEO to respect their right to vote and change the election date.²⁸ These included a detailed letter on the religious implications of the date from the Vaad Harabonim of Toronto, which represents the religious leadership of Orthodox Jews.²⁹ In addition, three MPs, from both the Liberal and Conservative parties wrote to the CEO requesting a change in the election date, including Marco Mendocino, MP for Eglington-Lawrence, who is also Ms. Bain’s opponent.³⁰

40. ***CIJA’s request to change the election date.*** The Centre for Israel and Jewish Affairs (CIJA) is a Jewish umbrella organization. It considers issues generally as they apply to Jews of different denominations and various levels of observance. It is not an Orthodox organization and does not speak for the Canadian Orthodox community. Importantly, it does not always reflect the perspectives of all Jewish Canadians, particularly those in the Orthodox Jewish community.³¹

41. In August 2018, CIJA sent a letter to the CEO to alert him of the conflict between Shemini Atzeret and the election date. CIJA asked that the CEO give special consideration to the situation, though it expressly stated that it was “not asking that the date of the election be changed.” There is no evidence that CIJA consulted with the Orthodox community before writing to the CEO.³²

42. When CIJA learned that there would be an Orthodox Jewish candidate running in the 2019 election, it reversed its position. On May 17, 2019, CIJA wrote a second letter expressly asking the CEO to give “urgent consideration” to “moving the election date to the following week (i.e., October 28, 2019).” CIJA was concerned that, if the date was not moved, religiously observant candidates would be

²⁸ Rule 317 Documents, AR, Vol 3, Tabs 7-9, 11-13, 15-17, 27-29, 32-137, 139-170, pp. 826-31, 834-37, 846-49, 867-875, 880-1004, 1008-39

²⁹ Lowy Affidavit, paras. 26-27, Exhibit C, AR, Vol 1, Tab 2, pp. 16, 27-29

³⁰ Walfish Affidavit, paras. 23-25, Exhibit B, AR, Vol 1, Tab 4, pp. 58-59, 160-64

³¹ Walfish Affidavit, para. 40, AR, Vol 1, Tab 4, pp. 61-62

³² Walfish Affidavit, paras. 41, 47, Exhibit G, AR, Vol 1, Tab 4, pp. 62-63, 296

“faced with numerous constraints that will compromise their ability to contest the election on a level playing field.”³³

The CEO’s decision not to recommend a change in the election date

43. The CEO began to prepare for the upcoming general election in April 2018, including by looking for polling locations and negotiating with school boards to confirm their availability.³⁴

44. *April 2018: the CEO failed to consider whether the date was suitable.* However, in planning the election, the CEO simply assumed that the fixed date was suitable and began to plan accordingly. There is no evidence that he even consulted a calendar to determine whether there was a conflict with any day of religious or cultural significance. He did not consult any religious authorities about this question.

45. *August 2018: the conflict is brought to the CEO’s attention.* As explained above, in August 2018, CIJA advised the CEO of the conflict and that Orthodox Jews could not vote on election day. But even after he became aware of the conflict, there is no evidence that the CEO took any steps to consult with the Orthodox Jewish community to determine the level of impediment on Orthodox Jewish voters or to consider the impact on their *Charter* rights. There is no evidence that he considered exercising his s. 56.2(1) discretion to recommend changing the election date at all.

46. Instead, the CEO focused solely on communication plans and public relations. Elections Canada began to work on a “communications plan” and developed talking points entitled “Media Lines.” The Media Lines, dated August 29, 2018, state that Elections Canada “does not choose the election date” but that the date is fixed by the *Act*. It does not mention the exception in the *Act* if the fixed date conflicts with a day of “religious significance.” Instead, the Media Lines refer only

³³ Walfish Affidavit, paras. 43-45, Exhibit H, AR, Vol 1, Tab 4, pp. 62, 298

³⁴ Affidavit of Michel Roussel, sworn June 25, 2019, para. 86, Exhibit N, AR, Vol 2, Tab 5, pp. 391-92, 457

to Elections Canada's adjustment of operations, including increased staff and information campaigns.³⁵

47. With a PR campaign in hand, the CEO continued to proceed in committing Elections Canada to the October 21, 2019 election date. For example, after the receipt of the CIJA letter, in the fall of 2018 the CEO entered into an agreement with the Toronto District School Board to use schools as polling stations.³⁶

48. ***March 2019: the CEO failed to consider Charter values.*** It appears that the CEO only considered his s. 56.2(1) discretion in March 2019 after receiving an email from a Toronto lawyer, Jack B. Siegel, asking him to change the election date. Mr. Siegel explained that “to a relatively non-observant Jew like me, it is not a big deal, but to those who are observant, the opposite is true.”³⁷

49. On March 14, 2019, after having spent over a year planning the election, Elections Canada finally “perform[ed] a scan of which other religious holidays fall during the election period and potential impacts on participation.” It noted that the “holidays that would have the strongest impact on electoral participation” were “primarily observed within, more orthodox [Jewish] denominations.” This included Shemini Atzeret on which “no working or writing” was permitted.³⁸

50. The scan included holidays of all faiths but, with one exception, the only holidays that would affect electoral participation were Jewish. No holidays of any faith fell on October 28, 2019, the alternate date permitted under the *Act*.³⁹

51. The next day, March 15, 2019, for the first time, the CEO made an express decision not to recommend a change in the election date. That decision was not

³⁵ Documents of the Respondent Pursuant to Rule 317 of the *Federal Courts Rules* (“Rule 317 Documents”), AR, Vol 3, Tabs 4A and 4E, pp. 796-97, 802-03

³⁶ Roussel Affidavit, para. 26, AR, Vol 2, Tab 5, p. 374

³⁷ Rule 317 Documents, AR, Vol 3, Tab 2, p. 792

³⁸ Rule 317 Documents, AR, Vol 3, Tab 4H, pp. 814-17

³⁹ Rule 317 Documents, AR, Vol 3, Tab 4H, p. 815

based on a consideration of the *Charter* rights at play or the objectives of the *Act*. Rather, the “rationale [was] that our work with the community to date indicates they are happy to work with Elections Canada to ensure all voting options are explored and electors are made aware of those options.”⁴⁰

52. Although relying on their “work with the community to date,” there is no evidence of such work. Before March 15, 2019, Elections Canada had consulted with a single organization, CIJA, that did not represent the relevant affected group: Orthodox Jews. On March 15, Elections Canada appeared itself to question this reliance, asking whether “CIJA [was] a credible organization” or whether there were “others we should be working with.”⁴¹ Indeed, it appears that the only other consultation done was 11 years prior, in the context of a different holiday in a different election.⁴²

53. Rather than considering consultation and rights, the CEO’s focus was on public relations and avoiding any discussion about changing the date. On March 15, Elections Canada updated its Media Lines to include a response to questions about the CEO’s discretion to change the date, but only “if pressed.”⁴³

54. ***Spring 2019: the CEO refuses to reconsider.*** Throughout April, May and June of 2019, the CEO received mounting evidence that revealed the significant impact of his decision on the Orthodox Jewish community. As detailed above, he received letters from the Applicants, rabbis, MPs and over 140 members of the Orthodox community, asking him to change the fixed election date.⁴⁴ As the initial rationale that the community was “happy” faded away, the CEO replaced it with

⁴⁰ Rule 317 Documents, AR, Vol 3, Tab 5, p. 822

⁴¹ Rule 317 Documents, AR, Vol 3, Tab 5, p. 823

⁴² Rule 317 Documents, AR, Vol 3, Tab 4I, pp. 818-21; Letter from Christine Muir (BLG) to Torys dated July 3, 2019, AR, Vol 4, Tab 171, p. 1040

⁴³ Rule 317 Documents, AR, Vol 3, Tab 5, p. 822

⁴⁴ Rule 317 Documents, AR, Vol 3, Tabs 7-9, 11-13, 15-17, 27-29, 32-137, 139-170, pp. 826-31, 834-37, 846-49, 867-875, 880-1004, 1008-39

justifications based on cost and operational concerns. He continued to avoid considering the *Charter* rights at play, focusing instead on public relations.

55. Elections Canada again considered the issue internally on April 22. The CEO dismissed the exercise of the s. 56.2(1) discretion given to the CEO by Parliament, because of issues of public perception: “s. 56.2 (1) if invoked and pending the timing may be **perceived by the public** to be undermining the powers of the GG” (emphasis in original).⁴⁵ Rather than engage with serious *Charter* issues, Elections Canada considered communication strategies, education and enhanced staffing models, which would “reflect positively on Elections Canada.”⁴⁶

56. When the CEO responded to Ms. Bain on May 7, 2019, the letter was not a reasoned response to her concerns, but rather part of Elections Canada’s public relations strategy, following the Media Lines that Elections Canada had drafted more than 7 months prior. The CEO did not acknowledge his s. 56.2(1) discretion, writing only that the conflict with Shemini Atzeret “is unfortunate” but that “Elections Canada does not choose the election date” and the *Act* provides for a “fixed date.”⁴⁷ The letter included no reasons for not exercising his discretion given to him by the *Act*.

57. Instead, the CEO’s response highlighted opportunities for early voting and expanded services that would be available to all voters in the 2019 election. It did not address her concerns about her *Charter* rights, including as a candidate. A virtually identical letter was sent to Joseph Adler, an Orthodox Jewish voter who was not a candidate.⁴⁸ The other Applicant, Mr. Walfish, has received no response at all.⁴⁹

⁴⁵ Roussel Affidavit, Exhibit H, AR, Vol 2, Tab 5, p. 434

⁴⁶ Roussel Affidavit, attachment to Exhibit H “Accommodating Jewish Electors During the 43rd GE”, AR, Vol 2, Tab 5, p. 440

⁴⁷ Bain Affidavit, Exhibit C, AR, Vol 1, Tab 3, pp. 46-47

⁴⁸ Rule 317 Documents, AR, Vol 3, Tabs 25-26, pp. 863-66

⁴⁹ Walfish Affidavit, para. 39, AR, Vol 1, Tab 4, p. 61

58. *The CEOs concerns: costs and operational issues.* In May, Elections Canada again shifted its rationale of not moving the election to October 28. Costs figured prominently: in a conference call on May 22, Elections Canada discussed the implications of moving the election by one week; the majority of the impacts related to “costs” or budgets, including those of leases, office budgets, telephone services and staffing costs.⁵⁰

59. An email summarizing the call noted that returning officers (ROs) have been planning the election since 2018, including that ROs had worked with schools for a year to secure them as polling places. Once again, Elections Canada was concerned with public relations, worried that they would “lose credibility with schools and school boards” that had acted on the basis that the election would be held October 21, 2019. Instead of considering whether it was necessary to move the date, Elections Canada decided that it “need[ed] to stay focused on planned work.”⁵¹ It did so, in May 2019 authorizing ROs to sign leases based on an October 21, 2019 date.⁵²

60. The first time the CEO referred to these rationales publicly – indeed the first time he ever justified his refusal to exercise his s. 56.2(1) discretion – was in his May 30 response to CIJA’s request to move the election date. The CEO provided three concerns to justify not moving the election. Two relate to cost: the employment of field staff and extension of contracts for field services, each for one week. The third was an operational concern: the “availability of suitable polling places” given that accessibility reviews had been conducted for 15,000 polling places.⁵³

61. This letter to CIJA was also the first time the CEO ever addressed the concerns of a candidate, like Ms. Bain. He did so summarily, noting only that Elections Canada did not impose any “administrative requirements” on candidates that would have to be conducted on a holiday. Because Elections Canada could

⁵⁰ Rule 317 Documents, AR, Vol 3, Tab 30, pp. 876-77

⁵¹ Rule 317 Documents, AR, Vol 3, Tab 30, p. 876 (emphasis in original)

⁵² Roussel Affidavit, para. 86, AR, Vol 2, Tab 5, pp. 391-92

⁵³ Rule 317 Documents, AR, Vol 3, Tab 31, pp. 878-879

provide all candidate services in advance of the “Jewish High Holy Days,” its mandate was not affected, and the CEO could not recommend changing the election date.⁵⁴

62. ***June 2019: consultations with the Orthodox community.*** It was only in June 2019, after this application was commenced, that Elections Canada spoke directly to the Orthodox community. However, its discussions were not about how the October 21 election date affected the community or whether it should be changed.

63. Instead, consistent with its approach in 2018, Elections Canada focused on messaging, providing information about alternate voting options.⁵⁵ Its staff never raised the CEO’s discretion to change the date and, when voters raised the issue, it was dismissed as out of scope. While some voters appreciated the information, there is no evidence that Elections Canada asked what effect the conflict with Shemini Atzeret would cause or whether the alternative voting options were sufficient.⁵⁶

Provincial elections show need to move election

64. In recent memory, both Ontario and Québec had elections scheduled on Shemini Atzeret. They took divergent approaches.

65. ***Ontario moved the 2007 election.*** In advance of the 2007 provincial election, Ontario “consulted broadly with Ontario’s diverse communities,” reaching out to 278 religious and cultural organizations to determine if the fixed election date was suitable.⁵⁷ It recommended moving the original date to avoid conflicting with Shemini Atzeret, when “members of the Orthodox Jewish community would not be

⁵⁴ Rule 317 Documents, AR, Vol 3, Tab 31, p. 879

⁵⁵ Roussel Affidavit, Exhibits T and V, AR, Vol 2, Tab 5, pp. 479-81, 485-86

⁵⁶ Roussel Affidavit, Exhibit Y, AR, Vol 2, Tab 5, pp. 494-96

⁵⁷ Walfish Affidavit, Exhibits L and M, AR, Vol 1, Tab 4, pp. 358, 361

able to vote.”⁵⁸ Ontario’s experience was actively discussed before Parliament in its amended of the *Act* to add the fixed election regime.⁵⁹

66. ***Québec did not move the 2018 election.*** When Québec held its election on Shemini Atzeret in 2018 it directly impacted the Jewish community, with voter turnout dropping dramatically in ridings with a high percentage of Jews.⁶⁰ The CEO acknowledged “the negative outcomes” of holding the election on Shemini Atzeret.⁶¹

PART II – ISSUES

67. There is only one issue: is the CEO’s decision not to recommend that the election date be moved because of a conflict with Shemini Atzeret unreasonable?

PART III – SUBMISSIONS

Charter values must be balanced against the objectives of the *Act*

68. The CEO’s decision is an exercise of discretion that is reviewed on a reasonableness standard.⁶² But discretion is not absolute; to be reasonable, discretion must be exercised consistently with the objects of the act conferring it.⁶³

69. Where the exercise of discretion impacts *Charter* rights and values, a higher threshold is imposed.⁶⁴ The Supreme Court in *Doré* set out a two-part test for judicial review of these decisions: (1) does the decision engage *Charter* protections? and (2)

⁵⁸ Walfish Affidavit, Exhibits J and L, AR, Vol 1, Tab 4, pp. 311, 358

⁵⁹ See e.g., Parliament, *House of Commons Debates*, 39th Parliament, 1st Session, No. 47 (18 September 2006) (Hon. Robert Nicholson), ABOA, Tab 27; Parliament, *Standing Committee on Procedure and House Affairs*, 39th Parliament, 1st Session, No. 18 (26 September 2006) (Hon. Robert Nicholson), ABOA, Tab 28

⁶⁰ Walfish Affidavit, paras. 59-61, AR, Vol 1, Tab 4, p. 65

⁶¹ Bain Affidavit, Exhibit C, AR, Vol 1, Tab 3, p. 47

⁶² *Doré v. Barreau du Québec*, 2012 SCC 12, paras. 3, 45, ABOA, Tab 8; *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, para. 4, ABOA, Tab 15

⁶³ *Roncarelli v. Duplessis*, [1959] S.C.R. 121, p. 140, ABOA, Tab 22; *Criminal Lawyers’ Assn. v. Ontario (Ministry of Public Safety & Security)*, 2010 SCC 23, para. 46, ABOA, Tab 6

⁶⁴ *Doré*, 2012 SCC 12, paras. 24, 28, 54, ABOA, Tab 8

does the decision proportionately balance *Charter* protections with the statutory mandate?⁶⁵ A court must consider “how substantial the limitation on the *Charter* protection [is] compared to the benefits to the furtherance of the statutory objectives.”⁶⁶ *Charter* rights must be affected “as little as reasonably possible.”⁶⁷

70. Here, the CEO’s decision not to change the election date has a significant impact on the Applicants’ *Charter* protections and the values that animate them: their right to vote in s. 3, equality in s. 15, as well as freedom of religion in s. 2(a).

71. The evidence shows that the CEO *never* considered these impacts. Moreover, this is not a case where *Charter* limitations can be balanced by the statutory objectives of the *Act*.

72. Indeed, in dealing with the logistics of the election, the CEO lost sight of the purposes of the *Act* and his statutory mandate: to enfranchise voters, to allow full and meaningful participation in elections, and to create a level playing field. The CEO’s decision, which prevents Ms. Bain from fairly contesting the election and which disenfranchises an entire community because of their religion, undermines these objectives rather than furthers them. It cannot be reasonable under *Doré*.

The CEO’s decision infringes the Applicants’ *Charter* rights

73. The decision of the CEO infringes the *Charter*-protected rights of the Applicants. These *Charter* rights, and the *Charter* values that flow from them, are especially important in the context of a general election. Preserving Canada as “a true democracy” demands that every Canadian must have a genuine opportunity to participate in elections, free from prohibition or discrimination.

⁶⁵ *Doré*, 2012 SCC 12, para. 57, ABOA, Tab 8; *Loyola*, 2015 SCC 12, paras. 7, 39, 57, ABOA, Tab 15

⁶⁶ *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, para. 36, ABOA, Tab 14; *Loyola*, 2015 SCC 12, para. 68, ABOA, Tab 15; *Doré*, 2012 SCC 12, para. 56, ABOA, Tab 8

⁶⁷ *Loyola*, 2015 SCC 12, para. 40, ABOA, Tab 15

Section 3: The Applicants' democratic rights are infringed

74. Section 3 of the *Charter* provides: “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.”

75. At its foundation, section 3 protects the right to vote. It guarantees a “fair election” because “electoral fairness is a fundamental value of democracy.”⁶⁸ Canadians have a right to choose and elect effective representation in Parliament.⁶⁹

76. However, this right is broader than the mere right to cast a ballot. It ensures that each citizen, including candidates, has the right to “participate meaningfully in the electoral process.”⁷⁰ It includes the right to make an informed choice at the ballot box; Canadians have a right to learn about the strengths and weakness of candidates and parties.⁷¹ It also guarantees the rights of political candidates. The rights of voters and candidates are often reciprocal. For example, limiting the rights of candidates to communicate detracts from the ability of voters to make an informed choice.⁷²

The democratic rights of Ms. Bain, as candidate, are infringed

77. The CEO’s decision has denied Ms. Bain, a candidate for federal office, meaningful participation in the election. Most importantly, the CEO’s refusal to move the election date means that neither Ms. Bain nor her campaign team can participate in the most significant date in the election calendar: election day.

⁶⁸ *Figueroa v. Canada (Attorney General)*, 2003 SCC 37, para. 51, ABOA, Tab 9

⁶⁹ *Reference re Prov. Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158, pp. 183, 188, ABOA, Tab 20; *Harper v. Canada (Attorney General)*, 2004 SCC 33, para. 68, ABOA, Tab 12

⁷⁰ *Frank*, 2019 SCC 1, para. 26, ABOA, Tab 10

⁷¹ *Harper*, 2004 SCC 33, para. 71, ABOA, Tab 12; *Figueroa*, 2003 SCC 37, para. 54, ABOA, Tab 9

⁷² *Figueroa*, 2003 SCC 37, para. 50, ABOA, Tab 9

78. It is hard to overemphasize the importance of election day, when 75% of Canadians choose to cast their vote.⁷³ If the election date is moved, then Ms. Bain will be able to work to get out the vote on election day: knocking on doors, getting in touch with voters, and helping them get to the polls. She would appoint scrutineers to provide accountability for electoral fairness. Instead, the observance of Shemini Atzeret prohibits these activities for Ms. Bain and her staff. Denying Ms. Bain the ability to take part in a key moment in the electoral process is a fundamental breach of her s. 3 rights.

79. Section 3 also imposes on the state the obligation not to benefit one candidate over others.⁷⁴ Yet this is exactly the effect of the CEO's decision. Ms. Bain's opponents will be free to campaign on election day by engaging with electors and getting out the vote. In contrast, Ms. Bain's campaign will be shut down.

80. Finally, holding the election on Shemini Atzeret could well change the course of the election by side-lining one of the candidates. Eglinton-Lawrence is a competitive riding, with a historically small margin of victory. Ms. Bain's ability to get out the vote could cost her the election.

81. Each of these breaches affects not only Ms. Bain but also the electorate of Eglinton-Lawrence. Their right to an informed choice, a fair election, and effective representation are all impaired by silencing Ms. Bain and her team on election day.

The democratic rights of Mr. Walfish, as voter, are infringed

82. Mr. Walfish's s. 3 rights are equally infringed because he is prohibited from voting or volunteering on election day if it falls on Shemini Atzeret.

83. It is no answer to this infringement to say that Mr. Walfish can vote in the advanced polls. Requiring Mr. Walfish to vote in an advance poll does not give him the same rights of meaningful participation as other voters. Section 3 is not simply

⁷³ Bain Affidavit, para. 35, Exhibit A, AR, Vol 1, Tab 3, pp. 37, 41

⁷⁴ *Figueroa*, 2003 SCC 37, para. 54, ABOA, Tab 9

about casting a ballot; it is the right to express an informed view on ideas and policies offered by the various candidates. An election period may be as short as 36 days after the writ is dropped; Mr. Walfish would miss over 20% of this period, including the dialogue, discussion, and news that happen during that period.

84. Adding a special ballot does little to alleviate these issues. It is a cumbersome two-step process where voters must first register before October 15 (which, because of Sukkot is effectively October 13). Only then can voters vote any later than October 13. Few Canadians use this process voluntarily: in 2015, only 3% of Canadians chose to vote through special ballot.⁷⁵

85. Indeed, the *Act* recognizes the importance of ensuring that all Canadians have the right to vote on election day. Indeed, Canadians who are working on election day are not required to vote in an advanced poll or through special ballot. Instead, with one exception, Canadians are guaranteed time off from employment to vote on election day.⁷⁶ Moreover, despite the availability of advanced polls and special ballots, the *Act* provides the CEO with the discretion to recommend a change to the election date in the event of a conflict with a day of religious significance.

The decision infringes the Applicants' equality and religious rights

86. In addition to the s. 3 violation, the CEO's refusal to recommend moving the election date infringes the Applicants' ss. 15 and 2(a) rights.

87. ***Right to equality.*** The CEO's decision infringes s. 15 by creating an arbitrary disadvantage based solely on the applicants' religion. Canada's history is one of majoritarian Christianity, which is still reflected in the legal and cultural protections given to Christian holidays but not to those of other faiths. The *Act* itself embodies such a distinction, prohibiting any election, including a snap election, from

⁷⁵ Bain Affidavit, Exhibit A, AR, Vol 1, Tab 3, p. 41

⁷⁶ *CEA*, s. 132, ABOA, Tab 1

coinciding with Christmas or Easter.⁷⁷ Holding the election on a Jewish holiday perpetuates the historical disadvantage of religious minorities by prioritizing majoritarian Christian beliefs over their own.⁷⁸

88. Indeed, by choosing October for the fixed election date, which will often coincide with the Jewish High Holidays, Parliament created the risk of repeatedly treating Orthodox Jews as inferior voters, prevented from voting or campaigning in the same manner as other Canadians, especially if the CEO refuses to exercise the discretion given to him to avoid such a conflict.

89. The section 15 analysis may consider how comparator Canadians are treated.⁷⁹ The decision puts Ms. Bain at a significant disadvantage as compared to her opponent. While her campaign will be closed on election day, her opponent will be actively getting out the vote. In the week before, her opponent can campaign to the riding's 20% Jewish population; she cannot. Similarly, while most Canadians have the option to vote on election day, Orthodox Jews will be denied this opportunity.

90. **Religious freedom.** The decision contravenes s. 2(a). Religious freedom protects the exercise of religious beliefs without coercion or constraint,⁸⁰ be they direct or indirect, such as burdens on religious practice.⁸¹

91. The effect of the decision is to put observant Jews to the choice of abandoning their faith or their right to vote. This is not a fair or meaningful choice. Indeed, the Supreme Court has held that the “competitive pressure” to “abandon the observance” of a Jewish holiday impinges on the religious freedoms protected by s.

⁷⁷ *CEA*, s. 57(4), ABOA, Tab 1; *Interpretation Act*, R.S.C. 1985, c. I-21, s. 35(1) “holiday,” ABOA, Tab 3

⁷⁸ *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, para. 20, ABOA, Tab 13

⁷⁹ *Withler v. Canada (Attorney General)*, 2011 SCC 12, paras. 61-63, ABOA, Tab 26

⁸⁰ *TWU*, 2018 SCC 32, para. 211, ABOA, Tab 14

⁸¹ *R. v. Edwards Books & Art Ltd.*, [1986] 2 S.C.R. 713, paras. 96-97, ABOA, Tab 23

2(a).⁸² The state cannot “promote the participation of certain believers or non-believers in public life to the detriment of others.”⁸³ The CEO’s decision does just that.

The Decision is contrary to the *Charter*’s values

92. After *Doré*, decisionmakers are required to consider not only rights under the *Charter*, but also the values embedded within them.⁸⁴ Here, values such as the importance of enfranchisement and substantive equality are clearly contravened. Finally, directly set out in s. 27 of the *Charter* is the overarching value of multiculturalism, which calls for “promoting and enhancing diversity.”⁸⁵ It cannot accord with Canada’s multicultural fabric to choose Shemini Atzeret as the date for a federal election, when a day with no religious holidays is also available.

The CEO failed to reasonably balance *Charter* rights with statutory objectives

93. In refusing to recommend a change to the election date, the CEO repeatedly failed to turn his mind to his discretion, failed to consider the impact of the election date on *Charter* rights and values, and failed to appropriately balance that impact with the objectives of the *Act*. His decision was therefore unreasonable.

Statutory objectives: to enfranchise voters

94. The *Doré* analysis is a balancing exercise that requires *Charter* protections to be limited no more than necessary given the applicable statutory objectives.⁸⁶ However, here, the statutory objectives cannot possibly be used to justify limits on *Charter* rights because the purpose of the *Act* is to further those same rights and values, including the constitutionally enshrined right to vote.

⁸² *Edwards*, [1986] 2 S.C.R 713, para. 112, ABOA, Tab 23

⁸³ *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, para. 76, ABOA, Tab 16

⁸⁴ *Doré*, 2012 SCC 12, para. 24, ABOA, Tab 8

⁸⁵ *Saguenay*, 2015 SCC 16, para. 74, ABOA, Tab 16

⁸⁶ *Loyola*, 2015 SCC 12, para. 4, ABOA, Tab 15

95. Indeed, the purposes of the *Act* coincide with those of s. 3: to enfranchise Canadian citizens and protect the integrity of the electoral process, to provide a “voice to those who might otherwise not be heard,” and to create a “level playing field for those who wish to engage in electoral discourse.”⁸⁷

96. Moreover, because the right to vote is a core tenet of our democracy, courts have jealously guarded it and given a broad and liberal interpretation to statutes that provide for it.⁸⁸ Courts have therefore imposed a “stringent justification standard” on any impairment of the right to vote.⁸⁹ Indeed, the right is exempt from legislative override under the notwithstanding clause.⁹⁰

97. ***Objectives of s. 56.2(1): to prevent impairment of the right to vote.*** In setting out fixed election dates, Parliament recognized that unforeseen conflicts with a day of religious significance would seriously undermine the objectives of the *Act*. That is precisely why it created the power to move the date in s. 56.2(1). This section must be interpreted broadly, consistent with the *Act*’s broader enfranchising purpose.⁹¹

98. In enacting s. 56.2(1), Parliament expressly turned its mind to the Jewish High Holidays, including Shemini Atzeret. In a discussion about what was meant by “a day of cultural or religious significance,” it was explained that this included “Yom Kippur or another Jewish holiday that usually falls in the month of October and that are important religious holidays, very significant for the Jewish people.”⁹² Mr. Peter Hogg, a committee witness, referenced the 2006 Ontario experience where the election was moved because the “previous date, which fell on a Jewish holiday – and

⁸⁷ *Opitz*, 2012 SCC 55, para. 1, ABOA, Tab 18; *Harper*, 2004 SCC 33, para. 62, ABOA, Tab 12

⁸⁸ *Haig v. Canada; Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995, paras. 104, 130, ABOA, Tab 11; *Frank*, 2019 SCC 1, para. 1, ABOA, Tab 10

⁸⁹ *Opitz*, 2012 SCC 55, para. 35, ABOA, Tab 18

⁹⁰ *Frank*, 2019 SCC 1, para. 25, ABOA, Tab 10

⁹¹ *Opitz*, 2012 SCC 55, para. 37, ABOA, Tab 18

⁹² Senate, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, Issue 21 – Evidence (8 February 2007) (Mr. Warren Newman), ABOA, Tab 30

not one of the common ones – would have precluded orthodox Jews from voting.”⁹³ He was referring to Shemini Atzeret. Like the High Holidays, days that “impede the ability to participate in the election” would make the fixed election day “not suitable” under s. 56.2(1).⁹⁴

The CEO’s decision is a moving target, but was always unreasonable

99. The CEO’s decision not to recommend a change in the election date has evolved over time, from an initial failure to consider the issue at all, to concerns over costs and logistics. However, at no time did the CEO ever attempt to balance the impairment of *Charter* rights and values against the objectives of the *Act*.

100. As set out below, the CEO’s decision was unreasonable in April 2018, when he started planning the election; it was unreasonable in August 2018 when CIJA alerted him to the issue; and it is unreasonable today.

The CEO’s failure to exercise his discretion at the outset is unreasonable

101. At the outset, the CEO misinterpreted the *Act* by ignoring the discretion conferred on him. In planning the upcoming federal election, the CEO relied on s. 56.1(2) of the *Act* to determine the fixed date of the election but ignored his discretion to change that date if it was not suitable under s. 56.2(1).

102. The CEO’s reliance on s. 56.1(2) in isolation is contrary to the modern principles of statutory interpretation, that the words of the act are to be read in their entire context, harmoniously with the scheme, object and purpose of the act.⁹⁵ The

⁹³ Senate, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, Issue 21 – Evidence (8 February 2007), ABOA, Tab 30

⁹⁴ Senate, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, Issue 21 – Evidence (8 February 2007) (Sen. Raynell Andreychuk), ABOA, Tab 30

⁹⁵ *Wilson v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 47, para. 18, ABOA, Tab 25; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, para. 21, ABOA, Tab 21

fixed election date provision must be read together with the remedy that Parliament provided for a conflict: it granted to the CEO the discretion to change the date.

103. The CEO could not rely on the fixed election date to plan the election without also inquiring whether the date was a suitable one. He could have followed the example of the Chief Electoral Officer in Ontario and broadly canvassed Canada's diverse religious or cultural communities. Or he could have looked at a calendar. He did neither. The CEO cannot now justify refusing to move the date because he has spent a year planning an election that conflicts with a date of religious significance.

The CEO's decision after learning of the conflict was unreasonable

104. After learning of the conflict from CIJA in August 2018, the CEO again failed to consider his s. 56.2(1) discretion. In doing so, the CEO appears to have exclusively relied on CIJA's statement that it was not asking for the election to be moved. However, once he became aware that the fixed election date did conflict with a day of religious significance – one that affects the ability of a minority group to participate in the election – he had a statutory obligation to consider whether the date was suitable, including the impact on *Charter* rights. He did not.

105. Moreover, CIJA (which is not even an Orthodox Jewish organization) cannot waive *Charter* rights for Orthodox Jews. Any waiver of *Charter* rights must be an informed and clear choice *by the right-holder*⁹⁶: thus “a right that has a ‘collective’ or ‘public’ quality cannot be waived by any individual (or group of individuals).”⁹⁷ CIJA's statement cannot absolve the CEO of his failure to consider his discretion and the *Charter* rights affected by his decision.

The CEO's response to requests to change the date was unreasonable

106. The CEO has consistently refused to recommend a change in the election date, despite multiple requests and the mounting constitutional impacts of his

⁹⁶ *R. v. Reeves*, 2018 SCC 56, para. 52, ABOA, Tab 24

⁹⁷ Peter Hogg, *Constitutional Law of Canada*, 5th ed. Loose-leaf (Toronto: Carswell, 2018), 37.3(b), ABOA, Tab 29

decision, including the severe limitations on Ms. Bain's ability to campaign. While the reasons for his refusal have evolved, none show the balancing required by *Doré*.

107. ***It is not too late to change the election date.*** In justifying his decision, many of the CEO's arguments about logistics and operations essentially amount to "it is too late." However, that argument is undermined by the *Act* itself, which provides that the election date may be changed any time up to August 1, 2019.

108. In creating the fixed election regime, Parliament carefully balanced competing objectives: on the one hand is the predictability that allows the CEO to pre-plan the election, on the other hand is the interest of enfranchisement of religious minorities. The later an election could be changed, the greater the number of operational hurdles to be imposed on the CEO. But despite knowing about the numerous obligations on the CEO in planning an election, Parliament nonetheless decided that an election could be moved as late as August 1.

109. In doing so, Parliament determined that protecting the franchise of religious minorities was more important than the logistical concerns of Elections Canada. It is not within the CEO's authority to second-guess Parliament's decision. He cannot claim that the perfectly foreseeable consequences of changing the election date justify not exercising the power Parliament created within the timeframe it set out.

110. It also cannot be too late in practice. The *Act* provides that a snap election may be called on 36–50 days' notice, giving the CEO relatively little time to organize an election. When snap elections occur, the CEO finds accessible and suitable polling places and ensures that the election happens while preserving the voting rights of Canadians. It is not credible to believe that Elections Canada cannot do so here on 4 months' notice.

111. The CEO's argument is exceptionally problematic for Ms. Bain. She wrote to the CEO only four days after her nomination in April. Under the *Act*, she was on notice that the election could be changed until August 1. The CEO's response that it

was too late to change the election ignores and belittles both her statutory and s. 3 rights.

112. The CEO's desire for time to perfectly plan an election is admirable. But it is not consistent with the *Act* and cannot outweigh *Charter* rights. In any event, any consequences of moving the election are a problem of the CEO's own making. Having originally ignored the question of whether the election date was suitable, and instead ploughed ahead with planning, the CEO cannot now argue that it is too late.

113. ***Working with the community does not make the decision reasonable.*** The CEO has rationalized his decision based on his work with the community.⁹⁸ But the CEO only worked with CIJA – not the Orthodox community. When he finally reached out to the right community in June 2019, it was only to provide information about alternative voting options.⁹⁹ Even if the CEO had consulted with the affected group (and he did not), reasonableness cannot be determined by the public relations question of “is the community okay with this?” In any event, the over 140 letters and emails from the Orthodox community shows that it is not.¹⁰⁰

114. ***Alternative voting options are not a reasonable solution.*** Throughout his decision process, the CEO has relied on alternative voting options.¹⁰¹ However, those “accommodations,” (open to all Canadians), in no way address the impacts of the date on Ms. Bain's *Charter* rights. They also relegate Orthodox Jews to second class citizens in the electoral process, uniquely disenfranchised on election day.

115. Moreover, this approach reveals that to the extent any balancing was done at all, it was based on an impoverished view of s. 3, wrongly assuming it is only a “bare

⁹⁸ Rule 317 Documents, AR, Vol 3, Tab 5, pp. 822-23; Roussel Affidavit, Exhibit Y, AR, Vol 2, Tab 5, pp. 492-96

⁹⁹ Roussel Affidavit, Exhibit T, AR, Vol 2, Tab 5, pp. 479-81

¹⁰⁰ Rule 317 Documents, AR, Vol 3, Tabs 7, 12-13, 15, 27, 29, 32-137, 139-170, pp. 826, 835-37, 846, 866-69, 871-75, 880-1004, 1008-39

¹⁰¹ Roussel Affidavit, Exhibit I, AR, Vol 2, Tab 5, pp. 443-44; Rule 317 Documents, AR, Vol 3, Tabs 19-26, 31, 138, pp. 851-65, 878-79, 1005-07

right to place a ballot in a box.”¹⁰² It entirely ignores the impacts of the decision on the full ambit of s. 3 rights, including Ms. Bain’s rights to compete as an equal on election day.¹⁰³ It also ignores the solution that Parliament intended: for the CEO to recommend a change in the election date. Since they fail to impact *Charter* rights “as little as reasonably possible,” these alternative voting options cannot be reasonable.¹⁰⁴

116. ***Costs cannot outweigh Charter protections.*** In its internal May 23 email and its letter to CIJA on May 30, the CEO focusses on costs of moving the election, including the employment of field staff and the extension of contracts by an extra week. However, the Supreme Court has confirmed that courts will “look with strong skepticism at attempts to justify infringement of *Charter* rights on the basis of budgetary constraints.”¹⁰⁵ That is precisely what the court should do here.

117. ***The CEO’s operational concerns are speculative.*** The CEO similarly highlights operational concerns. In many ways, these concerns simply amount to the “it is too late” argument addressed above. They are also speculative. The CEO’s affiant, Mr. Roussel, repeatedly states that appropriate polling locations that have already been sourced “**may** not be available,” and that he “**expects**” that new locations would be inferior to previous locations, and that this would “impact the ability of voters to exercise their right to vote and negatively impact voter turnout.”¹⁰⁶ However, there is no evidence that the CEO has even inquired about the availability of locations for October 28, 2019. In contrast, it is certain that Orthodox Jews will be unable to vote on that date, and that Ms. Bain’s campaign will go dark.

118. The CEO has expressed his desire to make polling places proximate and accessible. But accessibility is required by both the *Act* and the 15 mandatory

¹⁰² *Figueroa*, 2003 SCC 37, para. 19, ABOA, Tab 9

¹⁰³ *Figueroa*, 2003 SCC 37, para. 25, ABOA, Tab 9

¹⁰⁴ *Loyola*, 2015 SCC 12, para. 40, ABOA, Tab 15

¹⁰⁵ *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66, para. 72, ABOA, Tab 17

¹⁰⁶ Roussel Affidavit, paras. 81, 86-87, AR, Vol 2, Tab 5, pp. 390-92

accessibility standards established by the Canadian Human Right Commission.¹⁰⁷ It begs belief that the CEO cannot meet his legal obligations on four months' notice when the *Act* requires him to do so in a 36-day snap election. And it is hard to understand how ensuring maximum proximity of election day polls could justify denying Orthodox Jews meaningful participation in an election. Indeed, by forcing Orthodox Jews to vote at advanced polls or at a returning office, the decision denies them the benefit of *any* proximate polling place. For example, Elections Canada was told that one community could not vote by special ballot in the returning office because it was located too far away. Elections Canada's solution: "consider another voting option."¹⁰⁸

119. In fact, Election Canada's concerns about the proximity and accessibility of election day polling places demonstrate the importance that they ascribe to "the ability of voters to exercise their right to vote" on election day. It is troubling that the CEO does not share the same concern for the same rights of Orthodox Jews.

120. ***The Nunavut election.*** In this judicial review, for the first time, the CEO raises Nunavut's Municipal Council election on October 28, 2019. Since this was never mentioned or considered in the CEO's decision, the Court cannot consider it now.¹⁰⁹ In any event, there is no evidence that asking Nunavut voters to vote in two elections on the same day poses any concerns to either one, particularly given the Nunavut CEO's mandate to cooperate with "organizations administering elections within Nunavut."¹¹⁰ In any event, since voting in a municipal election has no *Charter* protection, it is unreasonable to limit the *Charter*-protected rights of Orthodox Jews to vote in a federal election to advance the administration of a local election.¹¹¹

¹⁰⁷ *CEA*, s. 121, ABOA, Tab 1; Roussel Affidavit, paras. 81-82, Exhibits DD and EE, AR, Vol 2, Tab 5, pp. 390, 608-80

¹⁰⁸ Roussel Affidavit, Exhibit Y, AR, Vol 2, Tab 5, p. 493

¹⁰⁹ *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, para. 29, ABOA, Tab 7

¹¹⁰ *Nunavut Elections Act*, S.Nu. 2017. c. 17, s. 189(2)(i), ABOA, Tab 4

¹¹¹ *Baier v. Alberta*, 2007 SCC 31, para. 39, ABOA, Tab 5; *Haig*, [1993] 2 S.C.R. 995, para. 61, ABOA, Tab 11

Conclusion: the CEO's decision is and has always been unreasonable

121. None of the issues raised by the CEO, alone or collectively, can justify the significant *Charter* infringements on the Applicants and on the entire Orthodox Jewish community. Limiting the rights of a minority group to fully take part in the election and forcing them to use second class voting options like advanced polls and special ballots, is antithetical to the enfranchising objectives of the *Act*. Forcing Ms. Bain to compete with one hand tied behind her back – unable to get out the vote on election day, and unable to campaign to a significant group of supporters the week before – upends the level playing field that the *Act* is meant to create.

122. While Parliament created a fix, the CEO deliberately ignored it. His refusal to turn his mind to his discretion, coupled with his concerns over costs, logistics, and operational concerns (none of which are captured within the purposes of the *Act*), cannot be reasonable. Here, there is only one reasonable solution: for the election date to be moved to October 28, 2019.

PART IV – ORDER SOUGHT

123. The Applicants respectfully request:

- (1) an order quashing the decision of the CEO, and directing the CEO to recommend that the polling date for the election be changed from Monday, October 21, 2019 to Monday, October 28, 2019;
- (2) in the alternative, an order referring the matter back to the CEO for redetermination in accordance with such directions as this Court considers appropriate;
- (3) an order granting the Applicants its costs of this application; and
- (4) such further and other relief as to this Honourable Court seems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of July 2019.

Yael Bienenstock
Jeremy Opolsky
Stacey Reisman
Lawyers for the Applicants

PART V – AUTHORITIES**A. Statutes and Regulations**

1. *Canada Elections Act*, S.C. 2000, c. 9
2. *Elections Act*, R.S.O. 1990, c. E.6
3. *Interpretation Act*, R.S.C. 1985, c. I-21
4. *Nunavut Elections Act*, S.Nu. 2017. c. 17

B. Authorities and Secondary Sources

5. *Baier v. Alberta*, 2007 SCC 31
6. *Criminal Lawyers' Assn. v. Ontario (Ministry of Public Safety & Security)*, 2010 SCC 23
7. *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2
8. *Doré v. Barreau du Québec*, 2012 SCC 12
9. *Figuroa v. Canada (Attorney General)*, 2003 SCC 37
10. *Frank v. Canada (Attorney General)*, 2019 SCC 1
11. *Haig v. Canada; Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995
12. *Harper v. Canada (Attorney General)*, 2004 SCC 33
13. *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30
14. *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32
15. *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12
16. *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16
17. *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66
18. *Opitz v. Wrzesnewskyj*, 2012 SCC 55
19. *Rae v. Canada (CEO)*, 2008 FC 246
20. *Reference re Prov. Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158
21. *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27

22. *Roncarelli v. Duplessis*, [1959] S.C.R. 121
23. *R. v. Edwards Books & Art Ltd.*, [1986] 2 S.C.R. 713
24. *R. v. Reeves*, 2018 SCC 56
25. *Wilson v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 47
26. *Withler v. Canada (Attorney General)*, 2011 SCC 12
27. Parliament, *House of Commons Debates*, 39th Parliament, 1st Session, No. 47 (18 September 2006)
28. Parliament, *Standing Committee on Procedure and House Affairs*, 39th Parliament, 1st Session, No. 18 (26 September 2006)
29. Peter Hogg, *Constitutional Law of Canada*, 5th ed. Loose-leaf (Toronto: Carswell, 2018), 37.3(b)
30. Senate, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, Issue 21 – Evidence (8 February 2007)

Appendix A

October 2019

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
Sep 29	30 Rosh Hashanah (1 st day)	Oct 1 Rosh Hashanah (2 nd day)	2	3	4	5 Sabbath
6	7	8	9 Yom Kippur	10	11 First day of advance polls	12 Sabbath
						Second day of advance polls
13 Third day of advance polls	14 Sukkot (1 st day)	15 Sukkot (2 nd day)	16 Hol HaMoed Sukkot	17 Hol HaMoed Sukkot	18 Hol HaMoed Sukkot	19 Sabbath Hol HaMoed Sukkot
	Fourth day of advance polls					
20 Hol Hamoed Sukkot Hoshanah Rabbah	21 Shemini Atzeret	22 Simchat Torah	23	24	25	26 Sabbath
	Current federal general election date					
27	28 Proposed alternate date for federal general election	29	30	31	Nov 1	2 Sabbath

Appendix B

In-person Voting Opportunities

Date	Event	Voting Hours for all Canadians	Voting Hours for Observant Jew
Friday, Oct. 11 (Shabbos)	Advance Poll	12	8 (9:00am – 5:00pm) ¹¹²
Saturday, Oct. 12	Advance Poll	12	1 (8:00pm-9:00pm) ¹¹³
Sunday, Oct. 13 (Sukkot)	Advance Poll	12	8 (9:00am – 5:00pm) ¹¹⁴
Monday, Oct. 14 (Sukkot)	Advance Poll	12	0
Monday, Oct. 21 (Shemini Atzeret)	Election Day	12	0
Totals		60 hours	17 hours

¹¹² Sabbath starts at 6:20pm, meaning that Orthodox Jews will not have an opportunity to vote after 5:00pm as they would have to be home for the Sabbath

¹¹³ Orthodox Jews could vote in the last hour, after the Sabbath

¹¹⁴ Sabbath starts 6:20pm, meaning that Orthodox Jews would not have an opportunity to vote after 5:00pm as they would have to be home for the Sabbath

Conclusion: the CEO's decision is and has always been unreasonable

121. None of the issues raised by the CEO, alone or collectively, can justify the significant *Charter* infringements on the Applicants and on the entire Orthodox Jewish community. Limiting the rights of a minority group to fully take part in the election and forcing them to use second class voting options like advanced polls and special ballots, is antithetical to the enfranchising objectives of the *Act*. Forcing Ms. Bain to compete with one hand tied behind her back – unable to get out the vote on election day, and unable to campaign to a significant group of supporters the week before – upends the level playing field that the *Act* is meant to create.

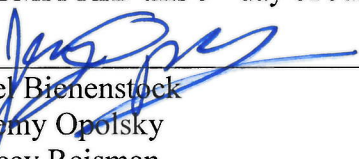
122. While Parliament created a fix, the CEO deliberately ignored it. His refusal to turn his mind to his discretion, coupled with his concerns over costs, logistics, and operational concerns (none of which are captured within the purposes of the *Act*), cannot be reasonable. Here, there is only one reasonable solution: for the election date to be moved to October 28, 2019.

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