S-187284

No. _____
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Re: The Electoral Reform Referendum 2018 Regulation, *as made by the Lieutenant Governor-in-Council on June 22, 2018 (Order-in-Council No. 313/2018)*

BETWEEN:

INDEPENDENT CONTRACTORS AND BUSINESSES ASSOCIATION, THE CANADA WEST CONSTRUCTION UNION, and KENNETH BAERG

PETITIONERS

AND:

LIEUTENANT GOVERNOR IN COUNCIL OF THE PROVINCE OF BRITISH COLUMBIA and ATTORNEY GENERAL OF BRITISH COLUMBIA

RESPONDENTS

PETITION TO THE COURT

THIS IS THE PETITION OF:

INDEPENDENT CONTRACTORS AND BUSINESSES ASSOCIATION, CANADA WEST CONSTRUCTION UNION and KENNETH BAERG
c/o Gall Legge Grant Zwack LLP
1000 – 1199 W. Hastings Street
Vancouver, B.C. V6E 3T5
ATTN: Peter A. Gall, Q.C.

ON NOTICE TO:

BRITISH COLUMBIA (LIEUTENANT GOVERNOR IN COUNCIL) and ATTORNEY GENERAL OF BRITISH COLUMBIA
Ministry of Justice
PO Box 9280 Stn Prov Govt
Victoria, B.C. V8W 9J7

This proceeding has been started by the Petitioner for the relief set out in Part 1 below.

If you intend to respond to this petition, you or your lawyer must

(a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and

(b) serve on the petitioner

(i) 2 copies of the filed response to petition, and

(ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.

Time for response to petition

A response to petition must be filed and served on the petitioner,

(a) if you reside anywhere within Canada, within 21 days after the date on which a copy of the filed petition was served on you,

(b) if you reside in the United States of America, within 35 days after the date on which a copy of the filed petition was served on you,

(c) if you reside elsewhere, within 49 days after the date on which a copy of the filed petition was served on you, or

(d) if the time for response has been set by order of the court, within that time.

(1) The address of the registry is: Supreme Court of British Columbia Vancouver Registry 800 Smithe Street Vancouver, BC V6Z 2E1
(2) The ADDRESS FOR SERVICE of the Petitioners is: Gall Legge Grant Zwack LLP 1000 – 1199 West Hastings Street Vancouver, BC V6E 2E9 Attention: Peter A. Gall, Q.C. Fax number for service (if any) of the Petitioners: (604) 669-5101 E-mail address for service (if any) of the Petitioners: pgall@glgzlaw.com
(3) The name and office address of the Petitioners' lawyer is: Peter A. Gall, Q.C. Gall Legge Grant Zwack LLP 1000 – 1199 West Hastings Street Vancouver, BC V6E 2E9

CLAIM OF THE PETITIONER

Overview

1. Since Confederation in 1867, the vast majority of federal and provincial elections in Canada have been conducted on the basis of simple democratic method: the electors in each riding choose who will represent them in the legislature by a simple plurality vote.

2. Under this electoral model, local candidates who get the most votes in their riding are elected to represent their constituents in legislatures.

3. Following the last provincial election, the second place New Democratic Party ("**NDP**") and the third place Green Party entered into a legislative coalition. The support of the Green Party was necessary for the NDP to form a government instead of the Liberal Party, who won the popular vote and the largest number of seats.

4. As a condition for the Green Party's support, the NDP and Green parties entered into a confidence and supply agreement.

5. The agreement included commitments to hold a referendum on proportional representation, that both parties would "campaign actively in support of the agreed-upon form of proportional representation", and that the "form of proportional representation approved in the referendum will be enacted for the next provincial election".

6. Based on the support of the Green Party, which will be the primary beneficiary of a proportional representation electoral model, the NDP was asked to form a government.

7. On November 30, 2017, the *Electoral Reform Referendum 2018 Act* (the "***Referendum Act***") was passed to provide for a binding referendum on a system of proportional representation.

8. The design of the referendum and the questions it will ask were delegated under the *Referendum Act* to Cabinet, which passed Order-in-Council 313, the *Electoral Reform Referendum 2018 Regulation* (the "***Regulation***") on June 22, 2018.

9. The power delegated to Cabinet to pass regulations must be exercised in accordance with the purpose and object of the *Referendum Act*, and in a manner consistent with foundational constitutional principles and the *Canadian Charter of Rights and Freedoms*.

10. In particular, in order to be legally valid, the regulations passed under the *Referendum Act* must be consistent with:

    a. The purpose and object of the *Referendum Act*, which is to obtain a clear statement of the majority of voters on whether to implement a well-defined and comprehensible new voting system, or to keep the existing electoral system;

b. Foundational constitutional principles, which require a binding referendum on matters of fundamental constitutional importance, such as the design of the electoral system, to be endorsed by a clear majority on a clear question;

c. Sections 2(b) and 3 of the *Charter*, which give British Columbians the right to meaningfully participate in a fair and comprehensible referendum process in respect of a binding vote to change the electoral system in the province; and

d. Sections 2(b) and 2(d) of the *Charter*, which require that British Columbians be able to fully express themselves and debate fundamental changes to the design of the democratic system, and to exercise these constitutional rights together with others.

11. The questions and process adopted by Cabinet through the *Regulation* are inconsistent with all of these legal preconditions to holding a valid and binding referendum on a fundamental change to the electoral system in the province.

12. The questions posed by Cabinet are confusing, and the proposed proportional representation systems are unclear and undefined. The referendum is therefore incapable of determining whether a clear majority are in favour of a concrete and understandable new voting system.

13. Voters are asked, first, whether they prefer the current voting system or a proportional representation system, which is not defined. In essence, voters are asked to choose between the current, well-understood system and some undefined concept of proportional representation.

14. There is a second ballot question that will be counted if a majority of the citizens cast ballots vote in favour of the concept of proportional representation.

15. This ballot very generally describes three proportional representation systems. Voters are asked to rank their preference, and are not given the option to choose none of the above.

16. Through this ranking of preferences, one of the three proportional representation systems could become the new voting system in British Columbia.

17. The full details of the chosen proportional representation system will be determined by the Government after the referendum.

18. For instance, unlike in the previous referendum in 2009, the Government has not indicated how the adoption of the new voting systems will impact the electoral boundaries and districts under the new electoral systems, which will be only be determined after the referendum.

19. Voters will not be given an opportunity to approve the actual system devised by the Government prior to its implementation for the next election.

20. As can be seen, the referendum process and questions are very complex. There is not a simple vote between the current system and a concrete, easily-understood new proportional representation system.

21. Rather, the initial ballot question does not describe a specific propositional representation electoral system at all. It simply asks British Columbians whether they prefer the vague concept of proportional representation over the current voting system.

22. The second ballot question sets out three alternatives to the current system – a dual-member system, a mixed-member system, and a rural-urban system – with no details or even a readily comprehensible description of the voting systems being proposed on the ballot.

23. Voters preferring another system of proportional representation are given no option to express this preference; they must choose among the three options.

24. Notably, neither the dual member nor the rural-urban proportional representation systems are currently in use in any jurisdiction, and therefore were not described or voted on in the Government's pre-referendum consultations with the public.

25. By adopting this process and asking these questions, British Columbians are left with a confusing choice. They are being asked to vote on whether to replace the current voting system with a proportional representation system that has not been clearly or sufficiently defined.

26. And if they vote in favour of an undefined proportional representation system, the Government is legally bound to enact the proportional representation system after it crafts the important details of how that system will operate.

27. Given the complexity of the process and questions, it is likely that the voter turnout in the referendum will be low. It cannot be otherwise if British Columbians do not fully understand what they are voting for, as a result of the referendum questions and process.

28. And the Government did not schedule the referendum to coincide with the upcoming municipal election or next provincial election, as has been done in previous referenda to increase voter turnout.

29. Rather, the Government wants a new electoral system in place for the next election, as it believes it will benefit the currently governing parties to have a new system in place.

30. In addition, it only takes a bare majority of votes cast – and not a majority of British Columbians or a supermajority of voters – to produce this legally binding outcome, which will fundamentally alter the right to vote of British Columbians.

31. By contrast, to ensure clear support from the population for a fundamental change to the voting system, past referenda on electoral reform required 60% of the total votes cast, and majorities in 60% of the ridings across the province, for the result to be binding.

32. Thus, by means of the referendum process and questions adopted by the Government in the *Regulation*, a proportional representation system could be implemented in British Columbia through the votes of a small percentage of British Columbians of voting age.

33. To ensure that British Columbians are kept in the dark about the proportional representation system that could be imposed through this binding referendum, the *Regulation* imposes severe restrictions on the ability of British Columbians to explain the implications of the proportional representation system being advanced by the Government.

34. The Government wants to ensure through these restrictions that British Columbians are voting on a general concept of proportional representation, without fully understanding in advance of their vote what the resulting system might be and what it will mean for voters.

35. Because these restrictions on political expression prevent British Columbians from fully debating and understanding the proposed fundamental changes to the democratic system, and joining together for that purpose, the *Regulation* also breaches ss. 2(b) and 2(d).

36. In summary, it is readily apparent that the referendum has been structured to enable the Government to create the appearance of legitimacy for the implementation of a proportional representation system by preventing voters from fully understanding the new system that would be implemented.

37. British Columbians are being asked to vote on the vague idea of proportional representation rather than an understandable, concrete, fully formed, system of proportional representation, which the Government obviously believes is to its advantage in bringing in a new voting system that will give it the best chance of continuing in power.

38. And in order to benefit the currently governing parties in the next election, the Government has chosen to schedule the referendum immediately and through a rushed process, which will lead to low voter turnout, a lack of public understanding and debate, and the possibility of adopting electoral options that are unconstitutional.

39. In particular, at least one of the proposed options in the referendum would create two different electoral systems depending on whether voters are resident in urban or rural ridings. This option would disproportionately enhance the voting power of rural residents in BC.

40. As such, it would violate section 3 of the *Charter* by undermining the equality of voting power of voters in urban ridings, and would violate section 15 of the *Charter* by having a disproportionate impact on the basis of ethnicity and national origin, given the demographic differences between urban and rural ridings.

41. This option would also violate s. 3 of the *Charter* by imposing different electoral systems on the basis of residence in an urban or rural riding. Voters cannot be effectively or fairly represented if the rules for casting and counting ballots differ depending on where they live in the province.

42. The fact that one of the options put to voters in the referendum is unconstitutional highlights the harm in undertaking a rushed, uncertain, and unclear process for fundamental changes to the democratic system, without a sufficient opportunity for clarity and debate on the options the government has chosen.

43. This unreasonable and unfair process established by the *Regulation* is inconsistent with the purpose and object of the *Referendum Act*, which is to provide definitive and clear guidance from the population on a fundamental change to the voting system, through a fair and fully informed vote.

44. And the process and questions set out in the *Regulation* are inconsistent with the fundamental rights of British Columbians to meaningfully participate in a fundamental change to the electoral process through a binding referendum, and to fully engage in public debates over the structure of their democracy.

Part 1: RELIEF SOUGHT

45. The Plaintiffs seek the following relief:

    a. An order in the nature of *certiorari* quashing Order-in-Council 313/2018, establishing the *Electoral Reform Referendum 2018 Regulation* (the "***Regulation***"), as unconstitutional, unreasonable or *ultra vires*;

    b. A declaration that the process and questions set out in the *Regulation* are inconsistent with the unwritten principles of the Canadian constitution and the fundamental right to vote, and are unreasonable or *ultra vires*;

    c. A declaration that the process and questions set out in the *Regulation* are inconsistent with sections 2(b) and 3 of the *Charter*, are not justified by section 1, and are unreasonable or *ultra vires*;

    d. A declaration that ss. 1 and 46 to 53 of the *Regulation* violate sections 2(b) and 2(d) of the *Charter*, are not justified by section 1, and are unreasonable or *ultra vires*;

    e. An order in the nature of prohibition preventing the Chief Electoral Officer, or any other provincial officer, from holding a referendum under the *Electoral Reform Referendum 2018 Act* until the legal deficiencies in the process and questions set out in the *Regulation* are remedied;

f. An interim injunction staying the planned referendum authorized by the *Electoral Reform Referendum 2018 Act* and *Regulation*, until this constitutional challenge can be adjudicated;

g. In the alternative, an order for an expedited hearing on the constitutional questions raised in this matter; and

h. Such other orders as the Court deems just and appropriate.

Part 2: FACTUAL BASIS

A. The Parties

46. The Independent Contractors and Businesses Association (the "**ICBA**") is a voluntary association of businesses in British Columbia, representing more than 2,300 companies and clients across the Province.

47. The ICBA is actively engaged in political expression and advocacy on behalf of its membership, and has a direct interest in the electoral system in the province.

48. The ICBA is concerned about the disruption and uncertainty that it believes would be caused by the adoption of a new electoral model, particularly without ensuring a fully informed and open public debate.

49. The ICBA intends to engage in expressive activities in relation to the upcoming referendum, but is restricted in communicating its message to the public, as a result of the *Regulation*.

50. The Canada West Construction Union ("**CWCU**") is an independent labour union, representing hundreds of employees in the construction industry, primarily in Alberta and British Columbia.

51. Ken Baerg is a Canadian citizen, a long-time resident of British Columbia, and is the Director of Labour Relations of the CWCU.

52. Both Mr. Baerg in his personal capacity, and the CWCU as a labour union, have a direct interest in the outcome of the referendum, and their expression on those matters will be directly restricted by the *Regulation*.

53. The Lieutenant Governor in Council is authorized to pass regulations under the *Electoral Reform Referendum 2018 Act*, SBC 2017, c. 22 ("***Referendum Act***"), which it did in making Order-in-Council 313/2018 and thereby the *Regulation*, on the advice and recommendation of the Executive Council of British Columbia.

54. The Attorney General is her Majesty's Attorney General for British Columbia, the official legal adviser of the Lieutenant Governor, the legal member of the Executive Council, and presides over the Ministry of the Attorney General.

B. Background to Voting Systems

55. Since Canada's founding in 1867, the vast majority of federal and provincial elections in Canada have been under the "first-past-the-post", or "FPTP", election model, which provides that legislative representatives are chosen for specific electoral districts based on a plurality or majority of votes within those districts.

56. This simple plurality voting model has been used primarily with single member districts, as is currently the case in all Canadian provinces and federally, but has also been applied in multi-member districts, as was the case in some ridings in British Columbia until 1991. Under either option, the candidate or candidates who receive the most votes represent(s) the riding in the legislature.

57. This plurality voting model is consistent with the preamble to the *Constitution Act, 1867*, which provides that Canada shall have "a Constitution similar in Principle to that of the United Kingdom", which from 1867 to the present date, includes a Westminster system of parliamentary democracy based on plurality elections for representatives in each riding.

58. This system is presumed elsewhere in the *Constitution Act, 1867*, which provides for elections in the federal House of Commons and for each provincial legislature, to be determined on the basis of specified "electoral districts", rather than on the basis of party lists.

59. Similarly, the BC *Constitution Act* provides that "(a) member represents the electoral district for which the member was elected", which presumes a direct link between voters in particular electoral districts and their legislative representatives, rather than representatives elected on the basis of party lists.

60. Consistent with Canada's constitutional origins and the presumptions in the *Constitution Act, 1867* and the BC *Constitution Act*, the first-past-the-post electoral system creates a direct link between each vote and a candidate in an electoral district running for office.

61. Under this system, voters choose their elected representatives directly, rather than voting in favour of a political party with seats distributed directly or indirectly by the parties.

62. There are other election models, often referred to as "proportional representation" or "PR", which fundamentally restructure the way that elections are conducted, and the way in which individuals participate in the electoral system and interact with elected representatives.

63. Some of these electoral models are reasonably straightforward and comprehensible, such as a pure list-based system of proportional representation ("**List-based PR**").

64. Under a List-based PR system, individuals do not vote for candidates or choose their elected representatives directly, but rather cast a vote for a party, which then distributes the

seats in the legislature among its candidates, often according to whatever rules or mechanisms the political party puts in place.

65. Other forms of proportional representation are more complex and difficult to understand.

66. For instance, under a form of dual member proportional representation ("**Dual Member PR**"), existing electoral districts are amalgamated with one another to create two member districts. Parties then nominate two members for each riding, and voters select from the pairs of candidates (i.e. they vote for the party, rather than a specific candidate).

67. Following the vote, the top candidate of the party that wins the popular vote within the riding (i.e. on a FPTP basis) becomes one of the elected representatives for the riding, and the second representative for the riding is based on a complex formula that combines the province-wide voting results and the individual district results.

68. Under this model, voters do not know in advance what amount of support is necessary to elect either or both representatives, and cannot vote for one representative of a party to the exclusion of the other, because the vote is cast for the political party.

69. Another form of proportional representation is called mixed-member proportional representation ("**Mixed Member PR**"), which involves a combination of first-past-the-post elections for each individual riding and List-based PR, dictated on a regional or provincial basis.

70. As under Dual Member PR, certain existing electoral ridings would be consolidated under Mixed Member PR, and one local representative would be chosen based on a majority or plurality vote in each consolidated district.

71. However, the remaining seats would not be allocated based on a candidate's connection with a particular electoral riding or constituency, but rather his or her connection with a political party. In essence, approximately half of the seats in the legislature would be used to 'top up' the representation of parties who obtained more votes across the province as a whole than were reflected in the majority or plurality votes of electoral districts.

72. Therefore, under Mixed Member PR, the overall share of seats each party holds in the Legislative Assembly is determined by the political party's share of the province-wide or regional vote, and legislative representatives are chosen by the political parties themselves, rather than the voters in each electoral district.

73. A fourth option, unknown until recently, involves a mixed voting system that combines three other methods of elections based on whether a riding is urban or rural ("**Rural-Urban PR**").

74. Under the Rural-Urban PR model, rural ridings would be chosen based on Mixed Member PR (which itself is a combination of FPTP and List-based PR), while urban and semi-urban ridings would be based on another elections model, called the single-transferrable vote model ("**STV PR**").

75. Therefore, under the Rural-Urban PR method, elected representatives would be chosen differently depending on where the riding is located in the province; some representatives would be chosen on a first-past-the-post basis, some on the basis of a List-PR model, and some on the basis of STV PR system.

76. The extent to which this creates an unequal system of voting, with greater political power being vested in political parties or in voters depending on their place of residence, depends on the details and structure of the voting system, how various ridings are classified, and other factors.

77. The STV PR model, which makes up part of the Rural-Urban PR model, is intricate and complex, and can take a number of forms. One such form is proposed as follows by the BC Citizens' Assembly on Electoral Reform, and includes the following features:

- Elements of STV as recommended by the Citizens' Assembly on Electoral Reform:
    - District magnitude between two and seven MLAs, although under Rural-Urban PR most STV districts should tend towards the higher range;
    - Droop formula used to determine electoral quota;
    - Weighted Inclusive Gregory method for distributing surplus votes, i.e. all surplus votes transferred at a fraction;
    - When voting, voters must indicate at least a first choice, but are not required to express further preferences if they do not wish to;
    - Political parties may sponsor candidates up to the number of MLAs to be elected in an STV district; and
    - Candidates grouped on ballot by party, but listed in random order within grouping, and parties listed in random order.

78. As defined by the BC Citizens Assembly on Election Reform, the Droop quota is calculated by taking the total valid vote in the electoral district, dividing that number by one plus the number of members to be elected, and adding one to the total (fractions are ignored).

79. The Inclusive Gregory method incorporates the Droop formula, and was explained by the Citizens' Assembly as follows:

> In counting votes under a single transferable vote system, if a candidate has more than the minimum number of votes needed to be elected (see Droop quota), a procedure is needed to allocate the surplus votes to other candidates. Th[is] may be done by taking a number of ballots equal to the surplus at random from the ballots of the successful candidate and assigning votes to the next available preference shown on the ballot (that is, to candidates who have not already been elected or excluded).

(...)

There are three variations of the Gregory method which differ as to the definition of 'relevant votes' for calculating the transfer value. Gregory's original suggestion was that only the ballots that last contributed to the creation of the surplus votes should be counted (the Gregory last parcel method). Some Australian elections use a second method, the Inclusive Gregory method, where relevant votes are defined as all the votes that contributed to a candidate's surplus. The BC-STV system recommended by the Citizen's Assembly uses the Weighted Inclusive Gregory method under which all votes are counted and assigned to other candidates still in the count according to the voters' preferences, but the ballots are given separate transfer values depending on their origin (that is, whether they are first preferences, or transfers from one or more other candidates).

80. While the first-past-the-post model creates a direct link between each candidate in a riding and each vote, the various methods of proportional representation typically create links between votes and political parties, rather than specific representatives.

81. As a result, these proportional representation systems allocate various degrees of power to political parties to choose legislative representatives, rather than the power being vested directly in the voters in the electoral districts that the candidates are running to represent, as has historically been the case throughout Canada and in BC.

82. Under FPTP, voters can clearly see why a particular candidate was elected to represent them: they received the most votes in the riding.

83. By contrast, models of proportional representation typically have complex counting formulas that can be difficult for voters to understand. This can impact public confidence in electoral results, particularly in close races, to the extent that the public cannot understand how the outcome of the vote translated into a seat in the legislature, and hence the overall outcome of an election.

84. Changing from a FPTP system to a system of proportional representation can have a significant impact on the way that individuals casts their ballots, the strategic choices they make in terms of how to select candidates or parties, and their interactions and connections with elected representatives.

85. It can also impact the behaviour of elected representatives and their responsiveness to constituents, the process of government formation, and lines of accountability of the government as a whole.

C. Previous Referenda on Electoral Reform in BC

86. There have been two previous electoral reform referenda in British Columbia, stemming from the recommendation of the BC Citizens' Assembly on Electoral Reform (the "**Citizens' Assembly**") that British Columbia adopt a particular type of single transferrable

vote electoral system, often called British Columbia Single Transferable Vote ("**BC-STV**") model.

87. The 2005 and 2009 referenda both put to voters a clear choice: whether to adopt the BC-STV system, which had been clearly specified in advance by the Citizens' Assembly process, or keep the current electoral model.

88. This choice was indicated on clear referendum ballots, which asked simple questions.

89. For instance, the 2005 ballot question was as follows:

> Should British Columbia change to the BC-STV electoral system as recommended by the Citizens' Assembly on Electoral Reform?
>
> [ ] Yes
>
> OR
>
> [ ] No.

90. In 2005, 57.69% of votes overall, and a majority of voters in 77 of 79 electoral districts, voted in favour of adopting the BC-STV system. This fell below the 60% popular vote threshold necessary to make the outcome binding on the Government.

91. Following the 2005 referendum, the Government realized that voters did not have enough information about how the BC-STV voting system would operate in practice, and in particular its effect on existing electoral boundaries. As the Chief Electoral Officer has explained in a 2009 Report:

> [The Government] stated that voters [in 2005] had been missing a critical piece of information that may have affected how they would vote: an understanding of how the provincial electoral map and the resulting distribution of MLAs would be configured under BC-STV.
>
> Consequently, government announced that it would task the Electoral Boundaries Commission – scheduled to be appointed by November 30, 2005 – with proposing electoral boundaries for both electoral systems. The boundaries would be presented to the public as part of an extensive education campaign, culminating in a second referendum on electoral reform to be held in conjunction with the November 2008 municipal elections. If passed, BC-STV would be used for the next scheduled general election, on May 12, 2009.
>
> Due to concerns about the short implementation period and potential jurisdictional confusion between provincial and municipal electoral events, in April 2006 government rescheduled the referendum to occur in conjunction with the May 12, 2009 Provincial General Election. If passed, BC-STV would be used for the next scheduled general election in May 2013.

92. After this information had been provided to voters, the 2009 referendum had an equally clear and straightforward ballot question, as follows:

> Which electoral system should British Columbia use to elect members to the provincial Legislative Assembly?
>
> [ ] The existing electoral system (First-Past-the-Post)
>
> OR
>
> [ ] The single transferable vote electoral system (BC-STV) proposed by the Citizens' Assembly on Electoral Reform

93. In 2009, only 39.09% votes overall, and a majority in 8 of 85 electoral districts, voted in favour of adopting the BC-STV system.

94. This fell well below the 60% popular threshold set to make the outcome binding on the Government, and below the requirement for a majority in 60% of the voting districts.

D. BC Elections

95. Since becoming a province in 1871, all but two of British Columbia's elections have been conducted exclusively on the basis of a system designed to return legislators who obtained the most votes in a riding, in either single member districts or, prior to 1991, in some multi-member districts.

96. Elections in multi-member districts were conducted in a manner similar to the first-past-the-post model under single member districts, except that each individual voter in a multi-member district had multiple votes, equal to the number of representatives in the riding.

97. The candidates elected would be those who obtained the most votes in the riding, i.e. the top two vote getters in a two member district, the top three vote getters in a three member district, and so on. This electoral system maintains the critical features of the FPTP model.

98. The two exceptions to the plurality FPTP voting model were the elections of 1952 and 1953, which were conducted under an "alternative voting" model, where voters ranked their preferences among candidates.

99. Under the alternative voting model, if a single candidate does not get a majority of votes on the first round of voting, the last place candidate would be dropped off the list and their votes redistributed based on the voters' second choice. This process was followed until a candidate had a majority of votes.

100. While this differs from plurality voting under the FPTP model, voters still knew which candidates they were voting for in advance, and seats were not distributed by party list or as a proportion of a province-wide or regional vote, or any complex formula.

101. This deviation from the single member or multi-member plurality election model arose out of an attempt by the governing parties of the day – a coalition of the Liberal and Conservative parties – to ensure that the Cooperative Commonwealth Federation could not form a government. The alternative vote model was abandoned after the 1953 election.

102. There have been eight provincial elections in BC since 1986, all based on the familiar single-member and multi-member plurality voting model. With the exception of the 2017 election, discussed below, all of these elections resulted in majority governments.

103. Under an electoral system in which seats in the legislative assembly are distributed by proportion of party vote, only one of those elections – in 2001 – would have resulted in a majority government. For instance:

    a. the 1986 general election would not have resulted in a majority government, with the third place Liberal Party holding the balance of power, with 6.74% of the seats;

    b. the 1991 general election would not have resulted in a majority government, with the third place Social Credit Party holding the balance of power, with 24.05% of the seats; and

    c. the 1996 general election would not have resulted in a majority government, with the Reform Party and the Progressive Democratic Alliance holding the balance of power, with 9.27% and 5.74% of the seats, respectively.

104. Over the three general elections immediately preceding the 2017 election, neither of the two leading vote getters – the Liberal Party and the New Democratic Party ("**NDP**") – would have obtained a majority government under a system where seats are distributed in proportion to the popular vote for each party.

105. In all three of those elections, the third placed party – the Green Party – would have held the balance of power in the Legislative Assembly.

106. By contrast, under the FPTP system, all three elections immediately preceding the 2017 general election resulted in majority governments, in which the party with the most votes also obtained a majority of seats in the Legislative Assembly.

107. With the exception of 1996, the party winning the popular vote across the province in the eight previous elections under the first-past-the-post electoral system also obtained a majority of seats, and therefore controlled the legislative agenda in the province.

E. The 2017 BC Election

108. Under the FPTP electoral system in the 2017 election, no party obtained a majority of the popular vote or the 44 seats necessary to form a majority in the Legislative Assembly.

109. The 2017 election had the following results:

a. The Liberal Party won the popular vote, and obtained 43 seats out of 87, one short of a legislative majority;

b. The NDP was a close second in the popular vote, and a close second in seat count with 41 seats, three short of a legislative majority; and

c. The Green Party obtained a distant third in the popular vote, and a distant third in seat count, with 3 seats.

110. Under a system where seats are allocated as a proportion of popular vote between the three main parties, the Liberal Party would have lost the most seats (approximately 9 in total), the NDP would have lost approximately 5 seats, and the Green Party would have gained approximately 12 additional seats.

111. As a result of the outcome of the 2017 general election, the Green Party held the balance of legislative power.

112. On May 30, 2017, the second place NDP and the third place Green Party entered into a Confidence and Supply Agreement, which allowed the NDP to secure the right to form a government.

113. One term of that Confidence and Supply Agreement was as follows:

> **b. Proportional Representation**
>
> i. Both the BC New Democrat Government and the BC Green Caucus are committed to proportional representation. Legislation will be introduced in the 1st sitting of the next session of the BC Legislative Assembly with a BC New Democrat Government establishing that:
>
> > (1) A referendum on proportional representation will take place in the fall of 2018, concurrent with the next municipal election; and
> >
> > (2) The form of proportional representation approved in the referendum will be enacted for the next provincial election.
> >
> > ii. The parties agree that they will work together in good faith to consult British Columbians to determine the form of proportional representation that will be put to a referendum.
> >
> > iii. The parties agree to both campaign actively in support of the agreed-upon form of proportional representation. [emphasis added]

114. Therefore, the current BC Government has expressed its commitment to have a form of "proportional representation approved in [a] referendum", as part of their agreement with the Green Party to form a government.

115. On the basis of its support from the Green Party, bringing their combined seat total to 44, the NDP was asked to form a government by the Lieutenant Governor.

F. The *Electoral Reform Referendum 2018 Act*

116. On November 30, 2017, the Legislative Assembly passed the *Electoral Reform Referendum 2018 Act*, SBC 2017, c. 12 (the "***Referendum Act***").

117. The *Referendum Act* provides that a "referendum respecting a proportional representation voting system must be conducted throughout British Columbia" (s. 2(1)).

118. Section 2(2) of the *Referendum Act* gives the Lieutenant Governor in Council, acting on advice of Cabinet, the power to "state the question or questions that will be put to the electorate at the referendum", and to specify the date on which the distribution of voting packages must commence and the date on which voting closes, which must be no later than November 30, 2018.

119. The *Referendum Act* further specifies that "(t)he chief electoral officer is responsible for conducting the referendum in accordance with the regulations" (s. 6).

120. Section 9 of the *Referendum Act* provides that the results of the referendum are "binding on the Government", and that the Government must table legislation in the Legislative Assembly to give effect to the outcome of the vote, under the following conditions:

> **Duty if referendum is binding**
>
> 9 (1) The result of the referendum is binding on the government only if more than 50% of the validly cast ballots
>
> > (a) vote the same way on a question stated, if the question has the option of 2 answers, or
> >
> > (b) are in favour of the same voting system, if a question has the option of more than 2 answers.
>
> (2) If
>
> > (a) the result of the referendum is binding on the government in accordance with subsection (1), and
> >
> > (b) the ballots referred to in that subsection are in favour of adopting a proportional representation voting system,
>
> the government must take steps that the government considers necessary or advisable to implement the result of the referendum, including introducing the legislation needed to implement the proportional representation voting system in sufficient time for that voting system to be in place for a general election called on or after July 1, 2021.

121. Therefore, section 9(1) of the *Act* makes the result of the referendum binding if "more than 50% of the validly cast ballots" vote in favour of the "same voting system".

122. The *Referendum Act* does not have a minimum voter turnout necessary in order to make the referendum binding, as is the case for other similar statutes.

123. The *Recall and Initiative Act*, RSBC 1996, c. 398, for instance, requires 50% of the total number of registered voters in British Columbia, and 50% majorities in at least two thirds of the ridings, to vote in favour of the initiative, in order to ensure sufficient popular and regional support.

124. There are other ways to ensure widespread democratic support across the province. For instance, past referenda on electoral reform – such as the electoral reform referenda in 2005 and 2009 – required a two-tiered threshold for approval to change the electoral system, in order to ensure sufficient popular and regional support for a fundamental change to the electoral system:

    i) sixty percent (60%) of the votes cast; and

    ii) sixty-percent (60%) of the ridings across the province achieving fifty-percent (50%) voter support.

125. By contrast, under the *Referendum Act,* a bare majority of votes cast in favour of rejecting the existing first-past-the-post system would suffice to require a fundamental change to the electoral system, which is binding on the Government, regardless of the voter turnout in the referendum and regardless of the breadth of regional support.

126. Turnout in the referendum under the *Referendum Act* may be low for several reasons, including that:

    a. the mail-in process may result in lower turnout than in-person voting, as has previously been the case;

    b. referenda are often held in conjunction with provincial or municipal elections to avoid low voter turnout, but the 2018 referendum is deliberately being held after the 2018 municipal elections, and in advance of the provincial election scheduled for 2021;

    c. two of the five months of the referendum period will be during the summer when voters are unlikely to be engaged with provincial electoral reform;

    d. the complexity of the particular versions of proportional representation proposed by the Government in the referendum, the lack of information on how the systems will operate in practice, and the complexity of the questions, may deter participation; and

    e. there was no Citizens' Assembly process to build trust and legitimacy in the proposed PR systems on the ballot, and indeed, two of the three electoral systems

proposed by the Government (Dual Member PR and Rural-Urban PR) are either not currently in use anywhere around the world or have never been used before.

127. To ensure a higher voter participation rate, the Government could have held the referendum in conjunction with the municipal elections to be held across the Province on October 20, 2018.

128. The Government also could have waited to hold the referendum during the next provincial election, as was done with the 2005 and 2009 referenda, which would have increased voter turnout, ensured a more representative selection of voters, and also would have given British Columbians more time to debate and fully understand the proposed systems.

129. The Government chose neither of those options.

130. The *Referendum Act* does not specify what options or questions will be put to the electorate, the process to be followed in the referendum, what restrictions (if any) will be placed on free expression, debate, and association in connection with the referendum, or otherwise specify the details of the referendum.

131. All of the details are left to Cabinet, to be set by regulation, as set out in section 12 of the *Referendum Act*.

132. In particular, under the *Referendum Act*, the Lieutenant Governor in Council may, by regulation:

    a. Require that provisions of the *Election Act,* the *Local Elections Campaign Finance Act,* the *Recall and Initiative Act* or the regulations of those statutes apply to the referendum (s. 12(2));

    b. Decide how the referendum is to be conducted, how voting is to take place, "advertising in relation to the referendum", and the "availability of information respecting the matters to be voted on" (s. 12(3));

    c. Decide how the questions posed in the referendum should be stated, what questions are to be asked, what options to put to voters, and how votes are to be counted (ss. 2, 12(3)(c), 12(4));

    d. Establish "opponent groups or proponent groups", provide them with public funding, determine how they can collect and spend money, and determine the publication of any matter in relation to a payment made to opponent groups or proponent groups (s. 12(5)); and

    e. Prescribe penalties and offences for failure to comply with the regulations, and make regulations for any other matter for which regulations are contemplated (s. 12(7).

133. The *Referendum Act* was given royal assent on November 30, 2017.

G. Consultation Process

134. Prior to enacting regulations under the *Referendum Act*, the Government undertook a public consultation process to provide an opportunity for some members of the public to express their views on how the referendum should be conducted, and what options should be put to the electorate in terms of alternatives to the first-past-the-post system.

135. The purpose of the consultation process was not to collect information on the preferences of members of the public on whether or how to reform the electoral system, but rather on how the referendum should be conducted.

136. The Government sought input on this process through submissions, website voting (on the How We Vote website), as well as a demographically balanced panel of 1,101 British Columbians.

137. The consultation process materials included descriptions of a number of PR systems that the Government was contemplating, including List PR, STV, Mixed Member PR, and Mixed Member Majoritarian.

138. The materials distributed by the Government did not include a description of either Dual Member PR or Rural-Urban PR, and participants in the consultation process were not asked to vote on whether to include either of those systems on the ballot.

139. The strongest support during the consultation process among the PR voting systems was for the most straightforward system, List-based PR. The List-based PR option garnered the most votes among those consulted, both on the website and during the panel process, and as noted above, is the easiest proportional representation system to understand.

140. The preference for List-based PR is consistent with the values most important to voters, as indicated during the consultation process; the option that garnered the most votes both online and through the panel-process was for "(a) voting system that is easy to understand".

H. The Attorney General's Report

141. On May 30, 2018, the Attorney General of BC issued a report entitled "How We Vote: 2018 Electoral Reform Referendum" (the "**AG's Report**"), which made a series of recommendations, including the proposed the questions to be asked to the electorate on the referendum and which electoral systems should be put on the ballot.

142. The AG's Report did not recommend a single proportional representation system, which could be specified and understood in advance, and voted on by the electorate.

143. The AG's Report also did not recommend putting to voters the system of proportional representation most favoured during the consultation process, and the one most easily comprehensible to voters, the List-based PR model.

144. Rather, the Attorney General proposed that three different proportional representation electoral systems should be put on the ballot: Mixed Member PR, Dual Member PR, and Rural-Urban PR.

145. As noted above, the second and third options – Dual Member PR and Rural-Urban PR – were not described in the public engagement materials during the consultation process, nor were they voted upon by respondents during the consultation process. According to the AG's Report, that was because these systems "are not currently in use".

146. To the Petitioners' knowledge, both systems have only been invented recently and remain untested in any jurisdiction, but were recommended for inclusion on the ballot by the AG's Report over other systems that were part of the public consultation process and favoured by participants, such as List PR.

147. Rather than adopting a simple question as between two clearly defined electoral systems, the Attorney General recommended a two question process for the referendum, to include the following two questions:

1. Which should British Columbia use for elections to the Legislative Assembly?

   (Vote for only one.)

   - The current First Past the Post voting system
   - A proportional representation voting system

2. If British Columbia adopts a proportional representation voting system, which of the following voting systems do you prefer?

   (Vote for the voting systems you wish to support by ranking them in order of preference. You may choose to support one, two or all three of the systems.)

   - Dual Member Proportional (DMP)
   - Mixed Member Proportional (MMP)
   - Rural-Urban PR

148. According to the AG's Report, the proposed process for the voting and the counting the referendum votes should be as follows:

That voters be permitted to:

- vote for either question or both questions as they wish; and
- indicate support for one, two or all three of the proportional representation voting systems in the second question.

Votes for the second question should be counted according to the Alternative Vote system, as follows:

- if no voting system receives more than 50% of first-choice votes, then the system that receives the fewest first-choice votes is dropped from further consideration;
- the second choices of the voters who voted for the system that has been dropped are redistributed to the other two systems;
- whichever of the two remaining systems has the most votes at that point would be the system that is adopted.

149. In addition to these recommendations as to the referendum questions and process, the AG's Report proposed significant restrictions on expressive and associational activities tied to the referendum.

150. In particular, the AG's Report recommended that:

a. The referendum campaign period (the period during which referendum advertising is regulated) begin on July 1, 2018 and end at the end of the referendum voting period on November 30, 2018 (the "**Referendum Period**");

b. Third parties wishing to engage in referendum related advertising be subject to an expenses limit of $200,000 during the five month Referendum Period;

c. Referendum advertising sponsors be regulated in a manner similar to election advertising sponsors under Parts 10.1 and 11 of the *Election Act*, RSBC 1996, c. 106 ("***Election Act***"), including but not limited to restrictions on the source and amounts of permissible sponsorship contributions, a requirement to register in advance of conducting referendum advertising, and a requirement to file disclosure reports; and

d. Provincial political parties be subject to the same referendum campaign rules as other referendum advertising sponsors, except that any contributions raised by political parties for referendum activities be treated as political contributions under the *Election Act*.

151. The AG's Report proposed that the Referendum Period, during which these limits on political expression would be in place, should be for the entire five month Referendum Period starting July 1, 2018 and ending on the final day of the referendum, November 30, 2018.

152. The Referendum Period proposed by the Attorney General is five times longer than the "campaign period", which is 28-days before election day, during which limits on political expression are imposed under the *Election Act*.

153. The AG's Report also recommended that voters be asked to cast their vote between October 22, 2018 and November 30, 2018, which begins less than five months after the AG's Report initially proposing the new PR voting systems was issued.

154. The AG's Report noted that some respondents during the consultation process were concerned about the risk of low voter turnout, but otherwise does not address the issue or explain why the referendum would not be scheduled to coincide with the 2018 municipal elections in order to encourage greater turnout.

155. The AG's Report – which has been publicized by the Government – generally includes praise and support for each of the three proportional representation options, calling them fair, proportionate, and easy to understand, to varying extents.

156. Consistent with the Government's commitment to campaign in favour of changing the electoral system, the AG's Report does not indicate or identify any arguments against the adoption of the proposed PR systems, but rather serves as a general endorsement of the three alternative proportional representation methods proposed in the report.

157. For instance, the Report provides the following arguments in favour of Dual Member PR:

> DMP can provide highly proportional results because the second seat in each electoral district is allocated based on province-wide election results.
>
> DMP is a relatively simple system to understand and for voters to use. The election ballot would change little from the current voting system.
>
> The system meets the principle of local representation because, although most electoral districts would double in size, they would retain two MLAs serving the same total area as present, with no MLAs elected on a regional basis. The largest rural electoral districts would not change.
>
> DMP could be implemented in B.C. relatively easily, since it would require an Electoral Boundaries Commission only to make proposals for amalgamating existing electoral districts as well as proposals for districts that should remain single-member. DMP could be implemented with either no increase or a modest increase to the size of the Legislative Assembly.

158. By contrast, in its description of the existing FPTP electoral model, the AG's Report emphasizes specific "characteristics" that are often highlighted by opponents of that election model, including the claims that:

    i. It "(d)oes not usually produce proportional results";

    ii. a "political party's share of the popular vote usually does not match its share of the seats" in the legislature;

    iii. it "only rarely" leads to the election of candidates of small parties or independents; and

iv. it "(o)ften produces" governments "that win less than a majority of the popular vote".

159. The AG's Report also notes that the referendum will not specify the details of the complex proportional representation electoral systems, which will be left to the Government to address following the referendum.

160. For instance, if the Government's proposed Mixed Member PR model is chosen, the AG's Report lists a number of questions that will be left for a future decisions after the referendum:

- Total number of MLAs in the province: either a specific number or a range, up to a maximum of 95.
- Exact ratio of FPTP seats to List PR seats: up to a maximum of 40% List PR seats.
- Ballot options for List PR vote:
    - closed list – the order of candidates is determined by the party
    - open list – voters vote for specific candidates, or
    - open list with party option – voters can vote for a specific candidate or endorse the party's order of candidates
- Whether voters will have:
    - one vote which counts for both the local candidate and the List PR seat allocation;
    - two votes, one for local candidate and one for the List PR seat allocation;
- Whether candidates for a local FPTP seat may be on the party's list for regional List PR seats.
- Method for determining the order in which List PR seats are allocated.
- Whether to permit "overhang" seats – that is, have a fixed number of total seats in the Legislative Assembly – potential added seats to compensate if a party wins a greater share of the FPTP seats than its overall vote share would entitle it to.
- Whether the order of candidates on the List PR ballot should be randomized or not.
- Method(s) for filling single-member districts and List PR seat vacancies.
- Number and configuration of regions.
- Number and configuration of FPTP districts in each region.
- Number of list seats in each region.

161. If the Rural-Urban PR method – which combines the Mixed Member PR and STV methods – is chosen, all of the above questions will be left for future specification, along with which regions will be covered by which voting model, the configuration of the regions, the

number of List-based PR seats in each Mixed Member PR region, and the number and configuration of STV districts.

162. As a result of these important details not being specified in the referendum questions, as well as other important details with respect to the other proposed PR systems, it is unknown to voters in advance of the referendum how each of the proposed options would operate in practice, what constituency the voters will be in, and in the case of the Rural-Urban PR model, what electoral model the voters constituency will fall under.

I. Restrictions on Political Expression in the *Election Act*

163. The *Election Act* restrictions on political expression, which the AG's Report recommended should be imposed during the referendum, fall into four general categories: (1) restrictions on political contributions to political parties; (2) registration, reporting, disclosure, auditing and banking requirements for third parties engaged in political expression; (3) spending restrictions on third parties engaged in political expression; and (4) restrictions on contributions to third parties engaged in political expression.

1. Political Contributions

164. "Political contributions" are defined in the *Election Act* as money or services provided to a political party or emanations of a political party, including a constituency association, a candidate, a leadership or nomination contestant.

165. Political contributions can only be made by "eligible individuals", namely, individual residents of British Columbia who are citizens or permanent residents of Canada (*Election Act*, ss. 1, 186).

166. The *Election Act* therefore prohibits organizations – including corporations, unions, advocacy groups, religious groups, and other non-governmental organizations – making political contributions in BC to political parties and other registered entities, like candidates.

167. Following recent amendments, the *Election Act* also places limits on the amount that eligible individuals can contribute to political parties and candidates annually. The province previously had no contribution ceiling.

168. Under section 186.01 of the *Election Act*, an eligible individual is restricted from making political contributions in 2018 that are greater than C$1,200:

- to any one registered political party, the candidates of that political party, the constituency associations of that political party and the nomination contestants of that political party;
- to an independent candidate and the constituency association that supports the independent candidate, or to an independent candidate who is not supported by a constituency association; and

- to each leadership contestant, in relation to that individual's seeking of the leadership.

2. Third Party Sponsors – Registration, Reporting, Disclosure, Banking and Auditing Requirements

169. Under the *Election Act,* an individual or organization cannot engage in "election advertising" during the "campaign period" (i.e. 28 days before the election date) or the "pre-campaign period" (i.e. 60 days prior to the campaign period), unless the individual or organization registers in advance with Elections BC as a "third party sponsor" (*Election Act,* s. 239(1)).

170. The definition of "election advertising" in the *Elections Act* captures expression on virtually any issue that may be the subject of political commentary or debate during the campaign period ("campaign period election advertising"), as well as virtually all advertising that directly opposes or supports a party or candidate during the pre-campaign period ("pre-campaign period election advertising").

171. A third party "sponsor" in the *Election Act* is any individual or group who purchases such advertising services during the "pre-campaign period" or the "campaign period", or who receive those services free of charge.

172. This captures all expressive activity that involves a payment made to a third party (or the gratuitous receipt of services for which there is a market value), including expression online, in print, on television, or radio, as well as conventional methods, such as mass mail outs, pamphletting, signs, and billboards.

173. Therefore, everyone – whether individuals, corporations, unions, or organizations – who intends to incur any expenses in relation to political advertising (or to receive those services free of cost) during the campaign or pre-campaign periods, as described above, must register with Elections BC as "third party sponsors" of elections advertising.

174. In order to become a third party sponsor, an individual or organization must be independent of registered political parties, registered constituency organizations, candidates, agents of candidates and financial agents, and must not sponsor election advertising on behalf of or together with any of these groups or individuals (*Election Act,* s. 239(3)).

175. Individuals or groups who register as "third party sponsors" of election advertising are also under a range of reporting, disclosure, auditing and banking obligations, and are under restrictions in terms of the receipt of contributions that are used for election related advertising.

176. In particular, in order to engage in election related spending, third party sponsors must do the following:

(a) Register with Elections BC and file an application with the Chief Electoral Officer which includes the name of the applicant, the address of the applicant, the name of principal officers of the organization, contact information, and any other information required by regulation (*Election Act,* ss. 239, 240);

(b) Obtain the consent of any contributors to use their funds for the purposes of election advertising (*Election Act,* ss. 235.04(3), 235.041);

(c) Ensure that all contributors are eligible individuals (i.e. BC resident individuals), and that they make contributions in specified forms (*Election Act,* ss. 235.04, 235.07);

(d) Not accept or use more than C$1,200 from any contributor for election advertising, alone or together with other third party sponsors (*Election Act,* s. 235.05);

(e) Not use anonymous contributions over a specified limit, both in terms of individual donations and total dollars spent (*Election Act,* s. 235.06);

(f) Maintain records in relation to all sponsorship contributions received, proof of consent to use such contributions for election related advertising, as well as the date, total amount, and other information in relation to each sponsorship contribution (*Election Act,* s. 241);

(g) If the third party sponsors advertising in a total amount more than $500, file with the Chief Electoral Officer an "election advertising disclosure report" (*Election Act,* s. 244), which must include:

a. the value of election advertising sponsored by the third party sponsor;

b. the separately reported value of each of the following classes of advertising, as required by the *Advertising Sponsor Disclosure Report Regulation*, BC Reg 431/99, as amended ("***Disclosure Regulations***"):

(a) brochures, pamphlets, flyers and similar forms of advertising;

(b) newspaper, magazine, journal and similar forms of advertising;

(c) radio;

(d) signs, such as lawn signs and billboards, and similar forms of advertising;

(e) television;

(e.1) canvassing, in person or by telephone;

(e.2) internet;

(f) any other forms of advertising.

c. the amount of sponsorship contributions accepted and not previously reported;

d. the amount of the third parties' assets (i.e. not contributions) that were used to pay for election advertising;

e. any other information required by regulation;

f. the full name and address of any sponsorship contributor who donated more than $250 for the purposes of election advertising; and

g. information on anonymous sponsorship contributions (*Election Act,* s. 245);

(h) Maintain all of the above records for at least 5 years in British Columbia, or for such amount of time as required by the Chief Electoral Officer (*Election Act,* s. 249); and

(i) If the third party obtains more than $10,000 in sponsorship contributions, it must open a "sponsorship account" at a savings institution, comply with the specifications for that account in the *Election Act,* and must ensure that the only amounts deposited into that account are valid "sponsorship contributions" discussed above (*Election Act,* s. 235.071, 235.08);

(j) If the third party sponsors election advertising in an amount more than $10,000, it must file with the Chief Electoral Officer an "initial disclosure report" within 14 days of engaging in such election advertising, which includes the full name of each contributor who made a sponsorship contribution of more than $250 and the value of each contribution, and additional reports that cover any individual who donates more than $250 after that date (*Election Act*, s. 243.01), and

(k) If the third party sponsors election advertising in an amount more than $10,000, it must appoint an authorized auditor in writing, comply with the same auditing requirements as apply to political parties, deliver the Chief Electoral Officer a copy of the appointment, and the auditor must audit the election advertising disclosure report of the third party sponsor (*Election Act,* s. 245.01).

177. As noted above, these requirements and obligations apply to anyone who seeks to engage in either "campaign period" election advertising (i.e. during the 28 days before the election) or "pre-campaign" period election advertising (i.e. during the 60 days before the campaign period).

178. However, during the pre-campaign period, there is no requirement to register as a third party sponsor for engaging in advertising on issues merely associated with a candidate or party, i.e., political expression that does not directly promote or oppose a party or the election of candidate.

179. Individuals or groups engaging in political expression at any other time other than the roughly three months prior to the election day (i.e. the campaign period and the pre-campaign period) do not have to register or undertake the above reporting, disclosure, auditing, and banking obligations.

3. Third Party Sponsors – Spending Restrictions

180. Section 235.1 of the *Election Act* sets out the spending restrictions on third party sponsors, as follows:

235.1 (1) In respect of a general election, an individual or organization other than a candidate, registered political party or registered constituency association must not sponsor, directly or indirectly, campaign period election advertising during the campaign period

(a) such that the total value of that campaign period election advertising is greater than

(i) $3 000 in relation to a single electoral district, and

(ii) $150 000 overall, or

(b) in combination with one or more individuals or organizations, or both, such that the total value of that campaign period election advertising is greater than

(i) $3 000 in relation to a single electoral district, and

(ii) $150 000 overall.

181. Thus, registered third party sponsors of election advertising under the *Election Act* are only permitted to spend, directly or indirectly, $3,000 in relation to a single electoral district, and $150,000 in total, for the duration of the campaign period (i.e. the 28 days between when the election is called and when the election is held).

182. They are also not permitted to combine with other individuals or organizations in such a way that the total amount spent exceeds those limits, even if each individual sponsor stays under the limit.

183. However, as noted above, these spending restrictions in the *Election Act* only apply to election advertising during the 28-day "campaign period". They do not extend into the "pre-campaign" period, which is the 60 days prior to the campaign period, where there are no restrictions on third party spending.

184. Election spending limits that extended beyond the 28-day campaign period were struck down as an unconstitutional restriction on freedom of expression twice by the BC Court of Appeal, in *British Columbia Teachers' Federation v. British Columbia (Attorney General)*, 2011 BCCA 408 and *Reference re Election Act (BC)*, 2012 BCCA 394.

4. Restrictions on Contributions to Third Party Sponsors

185. Provisions were recently added to the *Election Act* that regulate sponsorship contributions, which are contributions provided by individuals to third party sponsors for the purpose of sponsoring election advertising.

186. Only "eligible individuals" can make sponsorship contributions to third party election advertising sponsors, and sponsorship contributions to a third party must not exceed C$1,200 (in 2018) per year from an eligible individual (*Election Act,* ss. 235.04, 235.05).

187. Corporations, unions, and other non-governmental organizations or advocacy groups, are therefore prohibited from contributing to third party sponsors of election advertising.

188. In order to participate in any election advertising, these organizations must themselves become third party sponsors by registering with Elections BC, through the process described above, and subject to the restrictions and obligations described above.

189. The effect of the restriction on third party contributions to third party sponsors is that

    a. Individuals cannot pool their resources in amounts greater than $1,200 per individual; and

    b. Groups – including corporations, unions, advocacy groups, religious congregations, and others – cannot pool their resources for the purposes of election spending, because they are prohibited from making donations to third party sponsors.

190. In addition, as noted above, if third party sponsors want to combine their resources to make their expression more effective, they all become subject to the same spending limit.

191. Therefore, individuals or organizations that are registered as sponsors can each spend $150,000 separately and apart, but if they join together with other sponsors to sponsor advertising, the group as a whole is subjected to $150,000 limit, rather than their combined spending limits.

192. In effect, this places any forms of advertising that cost more than $150,000 out of reach for any third parties, regardless of whether it combines the expression of multiple individuals or groups, all of whom are registered as sponsors.

193. If two or more third party sponsors combine to engage in election advertising during the campaign period, they are not permitted to spend more than $1,200 from a single contributor (*Election Act,* s. 235.05(3)).

194. Third-party sponsors are not permitted to use contributions to sponsor election advertising unless they first obtain from the contributor a confirmation that the contributor is a British Columbia resident who is a citizen or permanent resident of Canada, and that the contributor consents to the third-party sponsor using all or part of the contribution to sponsor election advertising (*Election Act,* s. 235.041).

195. Finally, individuals and organizations are restricted from making sponsorship contributions indirectly by giving money, or providing property or services without compensation, to a person who uses the money, property or services to make a sponsorship contribution, or as consideration for that person making a sponsorship contribution (*Election Act,* s. 235.051).

J. The Order-in-Council: the Election Reform Referendum 2018 Regulations

196. On June 22, 2018, Cabinet approved all of the Attorney General's recommendations as set out in the AG's Report, through Order-in-Council 313/2018 ("**OIC**") passing the *Electoral Reform Referendum 2018 Regulation* (the "***Regulation***").

i. Process and Questions

197. The *Regulation* confirms that the questions for the referendum will generally be those proposed by the AG's Report, as set out above; that the options to be put to voters on the ballot are those proposed by the Attorney General, as set out above; and that the process proposed by the Attorney General will be followed, as set out above (*Regulation,* ss. 5-8).

198. The wording of the first question as set out in section 5 of the *Regulation* is nearly identical to that proposed by the AG's Report. The *Regulation* stipulates that the first question will be "Which system should British Columbia use for provincial elections?", rather than "Which should British Columbia use for elections to the Legislative Assembly?", as set out in the AG's Report.

199. With respect to the second question, whereas the AG's Report recommended asking voters to "(v)ote for the voting systems *you wish to support* by ranking them in order of preference" (emphasis added), the *Regulation* simply directs voters to "(r)ank in order of preference" the proposed PR systems set out on the ballot.

200. For the purposes of the second question on the ballot, the *Regulation* adopts the three forms of proportional representation recommended in the AG's Report – Mixed Member PR, Dual Member PR, and Rural-Urban PR.

201. Each of the proposed PR systems are defined in the regulations as being those models as "described in the report titled "How We Vote: 2018 Electoral Reform Referendum Report and Recommendations of the Attorney General", i.e., the AG's Report (*Regulation*, ss. 1, 5).

202. Thus, the *Regulation* defines the proposed electoral systems to be put on the ballot by referring voters back to the AG's Report, which favourably reviews the proposed new electoral systems, as noted above, and is generally critical of the FPTP model.

203. The *Regulation* provides no further specification as to how those systems will operate in practice, beyond the details contained in the AG's Report (*Regulation*, ss. 1, 5).

204. Sections 12 and 13 of the *Regulation* set out the procedure that individuals are to follow in casting a mail-in ballot:

> **What is included in voting package**
>
> 12 (1) A voting package must include all of the following:
>
> (a) an outer envelope for shipping the voting package;
>
> (b) a referendum ballot;

(c) a secrecy sleeve for the marked referendum ballot;

(d) a certification envelope;

(e) instructions advising the voter in the referendum on the procedure for marking the referendum ballot and how the secrecy sleeve and certification envelope are to be used;

(f) information referred to in section 17 [information to be available] that the chief electoral officer considers advisable;

(g) a postage-paid return envelope.

(2) Certification envelopes

(a) must be prepared as follows:

(i) with a space in which to record the date of birth of the individual who is voting;

(ii) with a printed declaration, to be signed by the individual who is voting, stating as follows:

"I am the voter identified above. I am eligible to vote and have not already voted in this referendum.";

(iii) with a space for change of residential address, and

(b) may include any other information that the chief electoral officer considers advisable.

(3) If the chief electoral officer considers it advisable for the purposes of conducting the referendum, the Chief Electoral Officer may, on the certification envelope, request further information from the individual who is voting.

How to vote using voting package

13 (1) To vote using a voting package, a voter in the referendum must do all of the following:

(a) review for accuracy the voter's name and residential address printed on the certification envelope;

(b) mark the referendum ballot in accordance with the instructions referred to in section 12 (1) (e) [what is to be included in voting package];

(c) place the referendum ballot in the secrecy sleeve provided;

(d) place the secrecy sleeve in the certification envelope provided and seal the certification envelope;

(e) complete the certification envelope by

(i) providing the date of birth of the individual voting, and

(ii) signing the declaration printed on the certification envelope;

(f) place the certification envelope in the return envelope provided;

(g) seal the return envelope;

(h) deliver the sealed return envelope containing the voting materials referred to in the previous paragraphs to

(i) Elections BC at the official address printed on the return envelope,

(ii) a Service BC Centre, or

(iii) another location designated by the chief electoral officer so that it is received by close of voting.

205. If this process is not followed by the voter, or if the choice of the voter is unclear, the ballot may be rejected or cannot be counted, subject to the voter obtaining an alternative voting package in time to cast a new vote prior to the last day of voting (*Regulation,* ss. 18-20).

ii. Proponent and Opponent Groups

206. As recommended by the AG's Report, the *Regulation*, in Part 4, establishes a process for choosing one "proponent" group and one "opponent" group, each of which will be entitled to receive C$500,000 of public money for the purpose of campaigning for and against proportional representation generally.

207. There are not separate "proponent" groups for each of the three systems of proportional representation listed on the ballot; rather, the single proponent group is charged with using public money "for the purposes of supporting proportional representation, including the proportional representation voting systems on the referendum ballot" (*Regulation,* ss. 27(2)(g), 31(3)).

208. Each of the proponent and opponent groups will be entitled to additionally raise and spend up to the spending limit for third party sponsors, which brings their total spending power over the five month Referendum Period to $700,000 (*Regulation*, s. 37).

iii. Registration, Reporting, Disclosure, Auditing and Banking Requirements, and Spending Restrictions

209. As recommended by the AG's Report, the *Regulation* also imposes a wide range of restrictions on political expression by third party sponsors for the duration of the five month

Referendum Period, which are generally consistent with the restrictions set out above in the context of the *Election Act* (*Regulation,* ss. 1, 46-53).

210. The definition of "referendum advertising" is set out in s. 1 of the *Regulation*, as follows:

> "referendum advertising" means the transmission to the public by any means, during the referendum campaign period, of an advertising message that promotes or opposes, directly or indirectly, a specific response to a referendum question, but does not include the following:
>
> (a) the publication without charge of news, an editorial, an interview, a column, a letter, a debate, a speech or a commentary in a bona fide periodical publication or a radio or television program;
>
> (b) the distribution of a book, or the promotion of the sale of a book, for no less than its commercial value, if the book was planned to be made available to the public regardless of whether there was to be a referendum;
>
> (c) the transmission of a document directly by a person or a group to their members, employees or shareholders;
>
> (d) the transmission by an individual, on a non-commercial basis on the internet, or by telephone or text messaging, of his or her personal views respecting the referendum;

211. This captures effectively all advertising messages that take a position on the referendum, including by *indirectly* taking a position for or against a particular election model.

212. In particular, the definition of "referendum advertising" in the *Regulation* effectively captures both overt advocacy for or against a particular election model, as well as any criticism of the method adopted for or the legitimacy of the referendum, as such expression could indirectly be seen to oppose changing the electoral model through this process.

213. As recommended by the AG's Report, the *Regulation* generally adopts the *Election Act* requirements in terms of the applicable registration, reporting, disclosure, banking, and auditing requirements, as well as contribution limits and prohibitions on contributions to third party sponsors, including:

    a. The requirement that third parties must register in advance of engaging in any "referendum advertising" during the Referendum Period, and the restrictions on who can register (*Regulation,* s. 46);

    b. The restrictions on contributions to referendum advertising sponsors, including the prohibition on contributions by groups, and the $1,200 limit on contributions by eligible individuals, to third party sponsors (*Regulation,* s. 47); and

    c. Restrictions on the use of contributions by a single eligible individual in relation to referendum advertising, which prohibits registered sponsors from using, in

combination, more than $1,200 from a single eligible individual (*Regulation*, s. 47(5));

d. The applicable reporting, disclosure, auditing, and banking requirements, as set out in the *Election Act* and the *Disclosure Regulations*, as modified by the *Regulation* (*Regulation*, s. 50); and

e. The imposition of fines and the creation of offences under the *Election Act* for non-compliance with the requirements in the *Regulation*, as modified by the *Regulation* (*Regulation*, ss. 54-63).

214. In terms of spending limits on third parties, section 49(a) of the *Regulation* prohibits third party sponsors from sponsoring, directly or indirectly, referendum advertising in an amount greater than $200,000 during the five month Referendum Period, and section 49(1)(b) prohibits each sponsor from sponsoring "in combination with one or more referendum advertising sponsors such that the total value of that referendum advertising is greater than" the same spending limit.

215. Political parties will be subject to the same spending limits as third party sponsors of referendum advertising, and the proponent and opponent groups are entitled to spend up to the maximum for third party sponsors, in addition to the $500,000 in public funding (*Regulation*, ss. 37(2), 46(2)).

iv. <u>*Breadth of Registration Requirements and Spending Restrictions*</u>

216. There are a number of differences in the restrictions on political expression contained in the *Regulation* as compared with the restrictions in the *Election Act*, which make the *Regulation* more restrictive of political expression.

217. First, under the *Election Act* regime, individuals and groups are only required to register as sponsors, and hence fulfill the range of applicable reporting, disclosure, banking, and auditing obligations, as a result of advertising during the pre-campaign period (i.e. 60 days before the 28-day campaign period) if they *directly* support or oppose a political party or candidate.

218. Under the *Regulation*, anyone who wants to directly *or indirectly* take a position on the referendum, during the full five month Referendum Period, must register prior to engaging in any such expression and must fulfill all of the applicable reporting, disclosure, auditing and banking obligations thereafter.

219. Thus, the *Regulation* imposes registration and reporting requirements over a longer period than applies in a general election (i.e. five months instead of approximately three months), and captures a broader range of expression (i.e. the direct *and indirect* expression of support for or opposition to a position during the entire five month Referendum Period, rather than only the direct support for or opposition to political parties or candidates during the pre-campaign period under the *Election Act*).

220. Second, the spending restrictions under the *Regulation* of $200,000 for each third party sponsor (or for multiple third party sponsors acting in combination) apply to the entire five month Referendum Period, which begins only a few weeks after the Government indicated which systems of proportional representation would be on the ballot.

221. As the electoral systems that would be placed on the referendum ballot were only recently revealed to the public, and remain undefined in some critical respects, it will not be possible for individuals or groups to engage in meaningful, informed or sustained advocacy or educational advertising prior to the beginning of the five month Referendum Period.

222. By contrast, the spending restrictions on advertising in provincial elections under the *Election Act* only apply during the 28-day campaign period, and there are nearly four years prior to each election in which advertising in relation to political parties, candidates and issues is unrestricted.

223. Therefore, the Referendum Period during which third party expression is restricted by the *Regulation* is five times the length of the period in which spending restrictions are in place under the *Election Act*, and without any period for unrestricted political expression leading up to that period.

224. Nor will individuals or groups have much time to obtain legal counsel, additional staffing or accounting assistance in order to help them navigate the complex restrictions on political expression set out in the *Regulation*, and to obtain legal advice on which types of political expression are prohibited and what forms of liability they face for non-compliance, prior to engaging in any captured political expression with respect to the referendum.

225. Third, there are additional substantive restrictions on expression in the *Regulation* which do not exist in the *Election Act*, including that individuals who are engaged in referendum advertising are prohibited from also criticizing or supporting a political party or candidate.

226. In particular, section 53 of the *Regulation* provides as follows:

> 53. Referendum advertising must not
>
> (a) directly promote or oppose a registered political party or the election of a candidate, as defined in the *Election Act*, in an election under the *Election Act*,
>
> (b) directly promote or oppose an elector organization or the election of a candidate, as defined in the *Local Elections Campaign Financing Act*, in an election to which the *Local Elections Campaign Financing Act* applies, or
>
> (c) be combined with advertising described in paragraph (a) or (b).

227. In effect, section 53 of the *Regulation* forces third parties to elect whether they want to spend their limited funds on engaging in political expression favouring or opposing a political party, or to engage in referendum related advertising. If they choose the latter,

they are prohibited from combining that message with a message on which political party or candidates they favour or oppose.

228. Fourth, the restrictions on the total amount that can be spent by all referendum advertisers, and therefore on the amount of information about the referendum that voters will be exposed to, are significant.

229. The $200,000 spending limit that applies to third parties will be applied to political parties as well, and the one proponent and one opponent group will each be entitled to spend $700,000 in total.

230. By way of comparison, previous referenda in the province have generally imposed no spending restrictions on third parties, and spending limits for elections expenses over the 28-day campaign period for political parties and candidates are over $8 million dollars for each party fielding candidates in every riding.

K. The Order-in-Council Restricts Freedom of Expression and Debate on Matters of a Public Interest

231. The registration, reporting, disclosure, auditing and banking requirements, the spending and contribution restrictions, and the additional restrictions set out in the *Regulation* for the purposes of the referendum ("**Expression Restrictions**"), significantly limit the ability of individuals and groups to meaningfully express their views and debate the future shape of the democratic system in British Columbia.

232. The Expression Restrictions can be reasonably expected to deter many individuals and groups from engaging in political expression, as a result of the onerous regulatory and auditing requirements and the associated costs, and the fear of prosecution or the risk of substantial fines if the intricate regulatory regime is not followed.

233. The obligations to create an expensive reporting and accounting machinery, coupled with the risk prosecution or significant fines if the complex regulations are not complied with, will have the effect of crowding out smaller voices who would choose to engage in third party advertising in relation to the referendum, but are unable or unwilling to incur the onerous expenses or navigate the procedural machinery associated with being a registered third party sponsor.

234. This will effectively limit the ability to engage in expressive activities during the Referendum Period to those with the resources and organizational capacity to navigate the complex regulatory machinery and hire the necessary lawyers, auditors and accountants.

235. This effect is exacerbated by the fact that the Expression Restrictions limit the ability of individual British Columbians to pool their resources in order to more effectively campaign or advertise in favour of their preferred options, and prohibit groups – including unions, minority religious or cultural groups, and advocacy organizations – from pooling their resources through contributions to third parties.

236. For those able to become third party sponsors, the spending restrictions set out in the *Regulation* limits their ability to engage in meaningful expressive activities during the entirety of the five month Referendum Period, rather than for the 28-day period under the *Election Act*.

237. The maximum $200,000 limit for the five month Referendum Period is insufficient to engage in meaningful expression on the proposed fundamental changes to the electoral system, including by engaging in province wide advertising or meaningful targeted spending in key ridings, and places certain forms of advertising out of reach entirely.

238. In proportional terms, the Expression Restrictions impose a limit of $40,000 per month on each third party advertiser, which is less than one third of the spending permitted during a 28-day campaign period under the *Election Act*, and is less than the per-month amounts previously held to be unconstitutional.

239. By contrast, there is no express limit on the spending of the Government in relation to the referendum in the *Regulation*, which is able to marshal its considerable resources to subtly or overtly support or campaign in favour of the electoral system or systems that it prefers, as it has committed to do.

L. The Order-in-Council Restricts Freedom of Association

240. The Expression Restrictions also restrict the ability of groups or individuals to join together for the purposes of engaging in expressive activities in relation to the referendum and otherwise meaningfully participating in the electoral process.

241. Electoral spending restrictions are typically designed to ensure that no individual or group exceeds the spending limit by collusion or evasion, e.g., by splitting into numerous corporate entities.

242. For instance, the federal *Canada Elections Act*, SC 2000, c. 9 and the *Ontario Election Finances Act*, RSO 1990, c. E.7, do not restrict donations or contributions to third parties from Canadian individuals or organizations, because third parties are already subject to spending limits and reporting requirements, and because those statutes contain provisions designed to prevent evasion of those restrictions.

243. However, the Expression Restrictions adopted in the *Regulation* significantly limit the ability of individuals to contribute to third party sponsors, and prohibits all contributions by groups to third party sponsors, regardless of whether there is an attempt to evade the spending restrictions.

244. In addition, the *Regulation* not only prohibits individuals or groups from indirectly or covertly evading the spending limits, as is done elsewhere, but also prohibit third party sponsors from combining their resources to more effectively engage in expressive activities, even if each individual or group stays within their overall spending limit as registered sponsors.

245. If individuals or groups who are registered as third party sponsors decide to engage in some expressive activities captured by the *Regulation* in association with other individuals or groups, their combined expression becomes subject to the spending limit of a single sponsor, rather than the combined limit of the sponsors.

246. The effect of these restrictions is to prohibit or significantly hinder the ability of individuals and groups to pool their resources or otherwise join together in order to more effectively express themselves with respect to the proposed change to the electoral system.

Part 4: LEGAL BASIS

1. The Petitioners plead and rely on the following:

    a. *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241;

    b. *Supreme Court Civil Rules*, B.C. Reg. 168/2009, in particular Rule 16-1;

    c. *Electoral Reform Referendum 2018 Act*, SBC 2017, c. 22 (the "***Referendum Act***");

    d. *Constitution Act*, RSBC 1996, c. 66, in particular ss. 18, 35, 36;

    e. *Constitution Act, 1867*, in particular the preamble, ss. 37, 40, 41, 51, 52, 69-90;

    f. Order of Her Majesty in Council admitting British Columbia into the Union, dated the 16th day of May, 1871 ("***BC Terms of Union***");

    g. *Constitution Act, 1982*, in particular ss. 44, 45, 52, 53;

    h. *Canadian Charter of Rights and Freedoms* (the "***Charter***"), in particular ss. 2(b), 2(d), 3, 15 and 24(1); and

    i. The inherent jurisdiction of the Court.

2. In relation to the claims under the *Charter*, in particular, the petitioners have direct or private interest standing as an individual and groups whose expression and/or right to vote will be directly impacted by the *Regulation*, as well as public interest standing to raise these important constitutional issues.

A. Fundamental Change to the Electoral System is a Constitutional Change

3. The *Constitution Act, 1867* provides that Canada is to have "a Constitution similar in Principle to that of the United Kingdom", which was extended to British Columbia through the *BC Terms of Union*.

4. From the time of Confederation to today, that constitution was grounded in the Westminster model of parliamentary democracy, which historically, in both the United Kingdom and Canada, has involved legislative representatives being elected for particular ridings by a plurality or majority of voters in each electoral district.

5. This simple democratic method provides a direct link between each individual vote cast and a particular representative in the legislative assembly, is clearly understood by voters, and is an established part of the Canadian constitutional architecture.

6. This system is also reflected in the BC *Constitution Act*, which provides that:

> **Members represent electoral districts**
>
> 18 (1) For returning members of the Legislative Assembly, there are to be the number of electoral districts established by the Electoral Districts Act, with the names, boundaries and areas determined in the manner provided for by the *Electoral Boundaries Commission Act*.
>
> (2) The Legislative Assembly consists of the members elected in the manner provided for by the *Election Act*.
>
> (3) A member represents the electoral district for which the member was elected.

7. The systems of proportional representation proposed in the *Regulation* generally do not contemplate each member of the Legislative Assembly being elected by plurality or majority vote to represent an electoral district, but rather involve at least some representatives being chosen by political parties based on overall provincial or regional votes.

8. Under some of the electoral models in the proposed referendum, many elected representatives in the legislature may have no link to an electoral district, and hence no link to a particular constituency of voters defined by electoral districts, at all. They will be accountable not to their constituents directly, but to their political parties, which may impact their behaviour and priorities as legislators.

9. The adoption of a new electoral model will significantly impact the interaction and relationship between elected representatives and the population, as well as the scope and content of each individual's right to vote in provincial elections, as guaranteed by section 3 of the *Charter*.

10. As proponents of electoral reform suggest, a change in the way that legislative representatives are chosen, and provincial governments are formed, can also fundamentally alter the way that British Columbia's most fundamental democratic institutions function, and therefore will impact "the operation of an organ of the government of the province".

Ontario (Attorney General) v. OPSEU, [1987] 2 SCR 2.

11. As such, the proposed changes to the electoral system in place in British Columbia constitute a foundational change to the democratic system and constitutional architecture, and require an amendment to the provincial constitution under section 45 of the *Constitution Act, 1867*.

12. Any change to this electoral system through a binding vote of the electorate must be done in a manner that is consistent with the *Referendum Act,* the *Constitution Act, 1867,* underlying constitutional principles, the fundamental right to vote, and the *Canadian Charter of Rights and Freedoms.*

B. Binding Nature of the Referendum

13. Section 9 of the *Referendum Act* makes the outcome of the referendum binding on the Government, and is intended to be indirectly binding on the current and future legislatures.

14. The purpose of holding a binding referendum is to confer a broader democratic legitimacy on the outcome of the vote, which will have the intended effect of indirectly binding members of the legislative assembly to vote in accordance with the outcome of the referendum.

15. While the legislative assembly will retain formal control over any change to the electoral system and therefore could "in theory" ignore the results of the referendum, both the purpose and "practical effect" of holding a binding referendum is to effectively bind the legislative assembly to implement a change to the electoral system chosen through the referendum.

Reference re Senate Reform, [2014] 1 SCR 704, 2014 SCC 32.

16. Therefore, in substance, the binding nature of the referendum means that the Legislative Assembly will be obliged to follow the result, regardless of the turnout in the referendum, the merits of proposed electoral system, or the chosen system's compliance with the *Charter*.

C. Order-in-Council is Inconsistent with the *Act*

17. The object and purpose of the *Referendum Act* is to obtain a clear statement of a majority of voters on whether to keep the current electoral system or to adopt a specific alternative voting system.

18. Section 2(1) of the *Referendum Act* mandates that a "referendum respecting *a proportional representation voting system* must be conducted throughout British Columbia", which presumes that voters will be able to select a concrete and clearly specified alternative system.

19. Similarly, section 9(1) of the *Referendum Act* presumes that voters will be offered clear voting systems in the referendum, as well as questions that can identify whether a clear majority are in favour of one of those systems, in order for the referendum to be binding:

> 9 (1) The result of the referendum is binding on the government only if more than 50% of the validly cast ballots
>
> (a) *vote the same way* on a question stated, if the question has the option of 2 answers, or

(b) *are in favour of the same voting system*, if a question has the option of more than 2 answers. [emphasis added]

20. Both of these voting options presume clearly articulated systems to be put to voters in the referendum, with more than 50% of the voters in favour of adopting the same system.

21. And the very fact that the referendum is binding, and contemplates the modification of a fundamental democratic right and a change to the provincial constitution, indicates that it must be based on a clear expression that a majority of voters favour a particular voting system.

22. Contrary to the purpose and object of the *Referendum Act,* the referendum questions cannot identify whether a clear majority of voters are in favour of the same voting system.

23. Rather, the questions as framed by the *Regulation* cannot ascertain whether a clear majority of voters are in favour a particular voting system, and if so, which system, because:

    a. Voters casting ballots on the first question are not choosing between particular electoral systems, but choosing between the current system and a general and undefined concept, which may result in the adoption of a broad range of very different electoral systems, unknown to the voter in advance;

    b. Voters casting ballots on the second question are not able to meaningfully participate or make an informed choice about which system to choose, because the contours of each proposed system are not clearly specified in advance, and significant details are left up to the Government's discretion after the vote;

    c. Voters casting ballots on the second question are not asked to vote on their preferred voting system, but to "rank" their ballots from the most to least preferred, and hence some of the votes will not be for a voting system of which the voter is "in favour", as required by section 9(1)(b) of the *Regulation*;

    d. Voters on the second question will include voters who prefer to keep the present system, but who have a preference among the proposed new voting systems, and therefore who are not voting "in favour" of the proportional representation system at all;

    e. Voters casting ballots in favour of the Urban-Rural PR system do not know in advance which voting system – either the Mixed Member PR or STV system – their electoral district will be operating under, because that is not specified in advance;

    f. Voters may prefer one of the three proportional representation options, but may prefer the present FPTP system to the other alternatives, and those voters are not able to express that clear preference given the wording and structure of the questions;

g. Voters may not understand that a vote in favour of a proportionate representation system effectively delegates the choice of which particular system to the complex aggregated preferences of electors, and subject to further specification or amendment by the Government after the referendum; and

h. Voters may not understand the PR electoral systems presented, as they are not described on the ballot or clearly specified in advance of the referendum, and the Rural-Urban PR and Dual Member PR options have never been used in Canada or, indeed, anywhere in the world.

24. Because the proposed process and questions established by the *Regulation* do not present a clear choice between concrete voting systems, and cannot identify whether a majority of voters are voting in favour of any of the newly proposed electoral systems, the *Regulation* is inconsistent with the purpose and object of the *Referendum Act*, making it unreasonable or *ultra vires*.

D. The *Regulation* Is Inconsistent with Unwritten Constitutional Principles

25. In order to change a core aspect of the democratic system through a binding referendum, the referendum must be conducted in a manner that is fair, comprehensible, and consistent with the underlying principles of the Canadian constitutional order, most notably the principle of democracy.

26. Democracy "expresses the sovereign will of the people" and "is commonly understood as being a political system of majority rule".

Reference re Secession of Quebec, [1998] 2 SCR 217

27. The preamble to the *Constitution Act, 1867* "invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text".

Ref re Remuneration of Judges of the Prov. Court of P.E.I.; Ref re Independence and Impartiality of Judges of the Prov. Court of P.E.I., [1997] 3 SCR 3

28. As such, the unwritten principles of the constitution, including the principle of democracy, can "constitute substantive limitations upon government action" and "are binding upon both courts and governments".

Reference re Secession of Quebec, [1998] 2 SCR 217 ("***Secession Reference***").

29. In the 1998 *Secession Reference*, the Supreme Court of Canada held that the unwritten principles of the constitution, including the principle of democracy, require any binding referendum to reshape the nature of the federation to be held on the basis of a clear majority on a clear question. As the Court explained:

> Although the Constitution does not itself address the use of a referendum procedure, and the results of a referendum have no direct role or legal effect in our

> constitutional scheme, a referendum undoubtedly may provide a democratic method of ascertaining the views of the electorate on important political questions on a particular occasion...

30. However, the Court held that in order for a binding referendum to deserve recognition, it had to be based on a "a clear majority on a clear question":

> In this context, we refer to a "clear" majority as a qualitative evaluation. The referendum result, if it is to be taken as an expression of the democratic will, must be free of ambiguity both in terms of the question asked and in terms of the support it achieves. [emphasis added]

31. Holding a referendum that is directly binding on the Government, and effectively binding on the legislative assembly, on a fundamental question that changes the electoral system and constitution of the province, equally requires a clear majority support on a clear question.

32. The referendum in this case, as established by the *Regulation*, does not require a clear majority of the constituents of the province, or voters in the referendum, to vote in favour of any particular change.

33. There is no minimum vote threshold in order for the referendum to be directly "binding" on the government and effectively binding on the legislative assembly, nor is there any mechanism for ensuring a clear and representative majority of voters in favour of a change to the electoral system, as was in place for previous referenda on electoral reform in the province.

34. Moreover, the questions posed by the referendum are unclear, the structure of the voting is confusing and misleading, and individuals do not know in advance which system they will be voting for, or how it will operate. That is not a clear question.

35. By failing to require a clear majority on a clear question, the referendum authorized by and set out in the *Regulation* is inconsistent with the underlying principles of the Canadian constitution, and is therefore unconstitutional, *ultra vires* or unreasonable.

E. Section 3 – Right to Meaningful Participation in the Democratic System

36. The Supreme Court of Canada has emphasized that "the right of each citizen to participate in the political life of the country is one that is of fundamental importance in a free and democratic society", which suggests that section 3 should be interpreted broadly and "in a manner that ensures that this right of participation embraces a content commensurate with the importance" of this right.

Figueroa v. Canada (Attorney General), [2003] 1 SCR 912, 2003 SCC 37.

37. Therefore, the purpose of section 3 "cannot be less than to guarantee to citizens their full democratic rights in the government of the country and the provinces".

Dixon v. British Columbia (Attorney General), [1989] B.C.J. No. 583, per McLachlin J.

38. In light of this broad purpose, section 3 of the *Charter of Rights and Freedoms* protects a bundle of democratic rights, including the rights to effective representation, meaningful participation in the democratic process, and the right to a free and informed vote.

39. In light of the fact that the outcome of the vote will be binding on the Government and effectively binding on the legislature, and that it may change the scope and structure of each individual's right to vote as guaranteed by the *Charter*, the referendum must be conducted in a manner consistent with section 3, including the a right to be reasonably informed of all the possible choices.

40. The structure and process of the referendum as set out in the *Regulation* denies British Columbians a meaningful opportunity to participate in the decision to fundamentally change the electoral system in place in the province, and denies them a right to an informed vote on the future scope and content of the right to vote in elections.

41. In particular, the referendum process denies British Columbians the ability to meaningfully participate in a fundamental change to the electoral system by:

    a. establishing a binding referendum based on unclear questions and with respect to proposed electoral systems the details of which are unknown and unknowable to voters in advance;

    b. failing to provide sufficient information to fulfil the right of each individual to be reasonably informed of all possible choices; and

    c. by failing to require a clear majority of voters to vote in favour of a clearly articulated voting system, therefore permitting a small minority of the electorate to fundamentally change the electoral system in place in the province.

42. This referendum process established by the *Regulation* breaches section 3 of the *Charter* in a manner that is not justified by section 1, and is *ultra vires* and unreasonable.

F. Section 2(b) – Freedom of Expression

43. The *Regulation* imposes significant restrictions on freedom of expression guaranteed by the *Charter*, and these restrictions are not justified under section 1.

44. Political expression – and in particular political expression over the future scope and content of the fundamental right to vote and a change to the provincial electoral system – fall at the very core of the section 2(b) guarantee.

Harper v. Canada (Attorney General), [2004] 1 SCR 827, 2004 SCC 33 at para 84.

45. In addition, section 2(b) is animated by a number of core objectives, including "the ability to make informed choices". This principle and objective of section 2(b) recognizes that "people will perceive their own best interests if only they are well enough informed, and

that the best means to that end is to open the channels of communication rather than to close them".

Ford v. Quebec (Attorney General), [1988] 2 S.C.R. 712.

46. Thus, section 2(b) "protects listeners as well as speakers", and as such, members of the public have a right to be informed about matters of public interest and public institutions.

Edmonton Journal v. Alberta (Attorney General), [1989] 2 SCR 1326.

47. Potentially fundamental changes to the scope and content of the right to vote, the composition of the legislature, and the interaction between BC residents and their elected representatives, are matters of the greatest possible public interest and importance.

48. The public is constitutionally entitled to as broad a range of information about this change as possible, from as many sources as possible, particularly in light of the confusing nature of the questions and the undefined nature of the electoral systems as proposed in the *Regulation*.

49. The registration, reporting, disclosure, auditing and banking requirements, and the spending and contribution limits, are more restrictive than any others that have been upheld by the courts, involve expression relating to a fundamental democratic change, and unlike spending limits during elections, are not justified by the need to avoid the reality or perception of corruption tied to political expression or the need to maintain the integrity of spending limits by political parties.

50. In addition, the restrictions set out in section 53 of the *Regulation* effectively prohibit anyone from both expressing a view on the referendum while at the same time criticizing or supporting a political party or candidate, which is a significant and additional restriction on the content of the regulated expression, constituting an independent breach of 2(b) that cannot be justified.

51. Therefore, the *Regulation* breaches freedom of expression in four primary ways:

    a. By failing to offer clear questions and clear options, and by structuring the questions in such a way that individual's preferences cannot be meaningfully expressed or ascertained, the *Regulation* denies British Columbians an opportunity to express their informed views on whether to fundamentally change the electoral system in the province;

    b. By establishing onerous registration, reporting, disclosure, auditing and banking requirements, with a risk of prosecution or significant fines, the *Regulation* will chill free expression by deterring small or medium-sized voters from expressing themselves at all on the proposed fundamental changes to the electoral system;

    c. By establishing strict spending and contribution limits on third parties who want to express themselves on matters that fall at the core of section 2(b), namely, political

expression on a fundamental constitutional change, the restrictions constitute a clear breach of section 2(b); and

d. By prohibiting anyone from both expressing a preference on the referendum and criticizing or supporting a political party and candidate in the context of a single advertisement, the *Regulation* imposes an additional and severe content-based restriction on core political communications.

52. The restrictions on expressive activities set out in the *Regulation* therefore breach section 2(b) in a manner that is not justified under section 1, and are *ultra vires* and unreasonable.

G. Section 2(d) – Freedom of Association

53. The section 2(d) freedom of association, like all *Charter* rights, must be interpreted in a purposive and generous fashion.

54. Section 2(d) protects, *inter alia*, "the right to join with others in the pursuit of other constitutional rights", including engaging in constitutionally protected expression and exercising democratic rights, and "the right to join with others to meet on more equal terms the power and strength of other groups or entities".

Mounted Police Association of Ontario v. Canada (Attorney General), [2015] 1 SCR 3, 2015 SCC 1.

55. As the Supreme Court has recognized, these rights are critical in a free and democratic society, and "(f)reedom of association is most essential in those circumstances where the individual is liable to be prejudiced by the actions of some larger and more powerful entity", such as the Government.

Mounted Police Association of Ontario v. Canada (Attorney General), [2015] 1 SCR 3, 2015 SCC 1, quoting *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, per Dickson CJ.

56. The *Regulation* directly limits the ability of individuals to contribute to groups engaged in expression in relation to the proposed change to the electoral system, and prohibits groups from joining together and pooling their resources to make their expressive activities more effective.

57. The *Regulation* also effectively penalizes registered third parties who decide to engage in political expression in combination with other registered third parties, by:

a. placing all such individuals and groups under the same spending limit applicable to a single sponsor if they decide to express themselves in combination, and

b. prohibiting them from combining to sponsor advertising where it would result in over $1,200 from a single contributor being spent on a particular advertisement.

58. The restrictions in the *Regulation* on pooling of resources by groups and individuals, and limits on combining to engage in referendum related advertising, has the purpose and effect of imposing "state-enforced isolation in the pursuit of his or her ends", and in relation to the exercise of a fundamental *Charter* right.

Mounted Police Association of Ontario v. Canada (Attorney General), [2015] 1 SCR 3, 2015 SCC 1.

59. The restrictions on associational expressive activity in the *Regulation* therefore breach section 2(d) in a manner that is not justified under section 1, and are *ultra vires* and unreasonable.

H. Sections 3 and 15 – Rural-Urban PR

60. In addition, at least one of the proposed methods of proportional representation proposed by the *Regulation* – the Rural-Urban PR model – violates sections 3 and 15 of the *Charter* in a manner that is not saved by section 1.

61. Rural-Urban PR violates section 3 by denying urban and semi-urban voters a right to meaningful representation and effective representation in the province. It does so by enhancing rural representation over the representation of urban and semi-urban voters.

62. Rural-Urban PR also violates section 15 by creating two different electoral systems that will operate simultaneously across the province, thereby arbitrarily discriminating against some provincial voters.

63. The criteria for deciding which voter gets the benefit of which system are to be decided by the Government and may be subject to arbitrary or irrelevant criteria, such as partisan advantage.

64. Moreover, by favouring rural voters and disfavouring voters in urban and semi-urban ridings (which typically have higher proportions of racial or ethnic minorities and naturalized citizens), this electoral regime can be expected to have a differential impact on the basis of race and national origin, and in relation to a fundamental democratic right.

65. Therefore, the proposed referendum provides at least one option that the Government may be bound to accept that would violate the *Charter*, which undermines the outcome and legitimacy of the proposed referendum, and all of the votes cast in the referendum.

66. The fact that one of the options put to voters in the referendum is unconstitutional, which would essentially nullify the results of the referendum regardless of whether that option is chosen, highlights the error in undertaking a rushed, uncertain and unclear process for fundamental changes to the democratic system.

67. By including at least one unconstitutional option on the referendum, the *Regulation* is *ultra vires* and unreasonable.

Part 4: MATERIAL TO BE RELIED UPON

1. Affidavit #1 of Chris Gardner, made June 28, 2018;
2. Affidavit #1 of Kenneth Baerg, made June 28, 2018;
3. Such further and other material as counsel may deem necessary and this Court may permit.

The Petitioner estimates that the hearing of the Petition will take four days.

Date: June 28, 2018

Signature of Peter A. Gall, Q.C.
☐ petitioner ☒ lawyer for Petitioner

To be completed by the court only:

Order made
[ ] in the terms requested in paragraphs ..... of Part 1 of this petition
[ ] with the following variations and additional terms:
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Date: .....[*dd/mmm/yyyy*]..... .....
Signature of [ ] Judge [ ] Master