No. S-187284

Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

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

PETITIONERS (APPLICANTS)

AND:

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

RESPONDENTS

NOTICE OF APPLICATION

Name of Applicants: Independent Contractors and Businesses Association, Canada West Construction Union, and Kenneth Baerg (the "**Petitioners/Applicants**")

To: The Lieutenant Governor in Council of the Province of British Columbia and the Attorney General of British Columbia (the "**Respondents**")

TAKE NOTICE that an application will be made by the applicants to Madam Justice Gropper at the courthouse at 800 Smithe Street, in the City of Vancouver, in the Province of British Columbia on August 7, 2018 at 9:45 am, for the orders set out in Part 1 below.

OVERVIEW OF APPLICATION

1. Pursuant to a regulation passed on June 22, 2018 under the *Election Reform Referendum 2018 Act* (the "***Regulation***"), the Government has established a rushed and flawed referendum process to reach a binding decision on the future of British Columbia's democracy.

2. The *Regulation* establishes the referendum questions, how the votes are to be counted, and the process for the referendum. It also imposes significant and unprecedented restrictions on public participation in the referendum process.

3. Given the binding nature of the referendum, it is of crucial importance to British Columbians that the referendum questions and voting process, and the restrictions on public participation in the referendum process, comply with fundamental constitutional and other legal principles.

4. The Petitioners submit that the *Regulation* violates these fundamental principles.

5. The Court needs to resolve these legal issues in a timely manner to ensure the integrity and legitimacy of the referendum.

6. The referendum period established by the *Regulation* commenced on July 1, 2018, approximately a week after the *Regulation* was passed. It continues for five months, until the end of November, 2018.

7. The restrictions on political expression and association took effect on July 1, 2018 and continue through the five-month referendum period.

8. The voting period for the referendum is scheduled to begin in three months, on October 22nd. The voting ends on November 30, 2018.

9. The Government knew that the restrictions it was imposing on the ability of British Columbians to participate in the referendum process were significantly more extensive than those imposed during a general election in BC, and more extensive than those that had previously been struck down by the courts as unconstitutional with respect to election campaigns.

10. These restrictions on participation rights significantly limit the ability of British Columbians to express their views on what are undeniably complex and confusing referendum questions.

11. The Petitioners say that the restrictions on public participation during the referendum, and the reference questions and process generally, are contrary to the enabling statute pursuant to which the *Regulation* was passed as well as the written and unwritten constitutional rights of British Columbians.

12. By passing the *Regulation* so soon before the commencement of the referendum period and the voting period, the Government has drastically limited the ability of the Petitioners to pursue their challenge to the *Regulation*.

13. Whether or not that was intentional, it is the practical effect of the Government's rushed referendum process.

14. The Government then further limited the possibility of a challenge to the *Regulation* by asserting that it needed two months to reply to the Petition, despite the fact that the Petition raised issues central to the *Regulation* and the referendum process established by the Government, and about which the Government must be intimately familiar.

15. As a result of the Government's position, the hearing of the merits of the Petition could only be held in September, at the earliest, which is over two months into the referendum period.

16. It is essential, therefore, that an injunction be granted as soon as possible, if not to suspend the referendum process generally, then at least with respect to the restrictions on the ability of British Columbians to participate in the referendum process.

17. Otherwise, if the Court rules that the referendum itself was lawful, but the restrictions on expression and association imposed throughout the referendum period were unconstitutional, the Petitioners and all British Columbians will have been denied a meaningful constitutional remedy.

18. The granting of an injunction with respect to the restrictions on political expression and association will give the Government two options.

19. First, it can accept that the restrictions on public participation will not be in effect for at least the remainder of the referendum period.

20. Alternatively, the Government can make the necessary adjustments to the referendum period so that it only commences after the issuance of the Court's decision on the merits of the Petition.

21. If the Government had not established a rushed and legally flawed process that imposed immediate and drastic restrictions on expression and association in relation to the referendum *Regulations*, then there would have been sufficient time for the public to become familiar with the proposed electoral systems set out in the *Regulation*, to debate the content of the *Regulation* openly and without restriction, and to provide feedback to the Government in that respect.

22. In addition, leaving sufficient time between the passage of the *Regulation* and the referendum and voting periods would have allowed any legal challenges, such as this Petition raising fundamental questions about the legality of the proposed *Regulations* and restrictions on political participation, to proceed without the risk of an unlawful and unfair referendum process or the need to delay the scheduled referendum.

23. In that way, British Columbians could have been assured that the referendum was being conducted in an open, fair, transparent, and legally valid manner.

24. Having chosen not to proceed in that manner, the Government should not be allowed to effectively insulate its *Regulation* regarding the referendum from a constitutional challenge by setting a timetable for the referendum that precludes the obtaining of meaningful relief.

25. The Government will say that the issuance of an injunction negatively impacts the public policy objectives regarding the referendum as advanced in the *Regulation*, before a hearing on the merits of the Petition.

26. But that is a problem created by the Government's rushed timetable for the referendum resulting from the passing of the *Regulation* just before the referendum period commenced.

27. The Government knew that its *Regulation* was directly limiting public participation and debate with respect to the most fundamental democratic choice: the very shape and content of the electoral system in BC. And it knew that the restrictions it was imposing were more onerous than those that had previously been struck down by the courts as unconstitutional with respect to election campaigns.

28. It, therefore, must accept the consequences of rushing the referendum process – the granting of an injunction to protect the ability of the Petitioners to proceed with their challenge to the *Regulation*, without having any relief rendered meaningless by the rushed process established by the Government, and its unwillingness to expedite the legal challenge.

29. If an injunction is not granted, the Government will have been permitted to impose unconstitutional restrictions on fundamental freedoms, during a critical period of political participation, without a judicial determination on whether it breached the *Charter*, and without the possibility of a meaningful remedy.

30. If, as the Petitioners say, the referendum as constituted is legally flawed, the Government must be held accountable for adopting an unreasonable and unconstitutional process, particularly with respect to a matter that is of fundamental importance to our democracy.

31. Therefore, if the granting of an injunction means that this delays the referendum, that is what is necessary to uphold the rule of law as reflected in the constitutional and other legal rights of British Columbians.

32. Granting the injunction would also ensure that the Government followed the well-established process established in the previous referenda on electoral reform in British Columbia in 2005 and 2009, which allowed for robust public engagement and debate, and a sufficient time for voters to become familiar with the proposed electoral systems prior to the vote.

33. Changing the electoral system is a fundamental constitutional change that will significantly impact how legislative representatives are elected, how citizens interact with their representatives, and the accountability of Governments to the population.

34. In fact, if a new electoral system is imposed, British Columbians will see a change in how the provincial government is elected that will last for generations. This is not merely a change in legislation that can be undone if a new government so chooses; the ramifications of the change proposed in this referendum go to the very core of how democracy works in British Columbia.

35. This type of fundamental change cannot be legitimately or constitutionally achieved through a process that fails to respect the *Charter* rights of British Columbians, or through a rush and flawed process that is perceived to benefit the political parties currently in power.

36. Thus, an injunction is required, at least with respect to the restrictions on the participation rights of British Columbians in the referendum process, to protect the legitimacy of a referendum on the future of our democratic system.

37. In light of the Government's rushed referendum process and unwillingness to proceed on the merits of the Petition in a timely manner, an injunction is required to ensure that the referendum is conducted in a legally valid manner that respects the fundamental rights of British Columbians.

Part 1: ORDERS SOUGHT

38. The Applicants seek the following orders in this Application:

1. A stay or suspension of the operation of sections 46 to 53 of the *Election Reform Referendum 2018 Regulations,* (Order-in-Council No. 313 of 2018), pending a final determination of the issues raised in the Petition;

2. An order prohibiting the counting of referendum ballots, pending a final determination of the issues raised in the Petition;

3. Costs; and

4. Such further and other relief as this Honourable Court may deem appropriate.

Part 2: FACTUAL BASIS

39. The Petitioners rely on the facts set out in their Petition, filed June 28, 2018, and further rely on the following facts.

40. The Petitioners prepared and filed their challenge to the *Regulation* one week after it was passed by the Government. However, because the Government said that it needed two months to respond to the Petition, the court postponed scheduling a hearing on the merits of the Petition until after a further judicial case management meeting in September.

41. This means that without an injunction, at least with respect to the challenge to the restrictions on participation in the referendum process, the Court will be unable to provide a meaningful remedy if this claim is upheld, because the violation of the *Charter* rights of British Columbians will occur for essentially the entire five-month referendum period, which will tarnish and colour the entire process and raise questions regarding the legitimacy of the result of the referendum.

42. With respect to the challenge to the referendum questions and the voting process established by the *Regulation*, it would be preferable to not proceed with the expense of a province-wide referendum when the legality of the referendum itself is in question. However, from the perspective of maintaining the possibility for meaningful relief on these issues, it is sufficient that a decision be rendered before the votes are counted, which is currently scheduled to being on November 30, 2018.

43. As such, an injunction prohibiting the counting of referendum ballots after the referendum is held, pending a determination of the Petition, will ensure that the rights of the Petitioners and British Columbians in respect of the questions and process established by the *Referendum* are not prejudiced by the delay in hearing the Petition.

44. But that is clearly not the case with respect to the challenge to the restrictions on expression and associational rights of the Petitioners, which are currently being imposed contrary to the *Charter* rights of British Columbians, and which will continue throughout the referendum period if an injunction is not granted.

Part 3: LEGAL BASIS

45. This Application is brought under Rule 10-4 of the *Supreme Court Civil Rules*, BC Reg 168/2009, s. 39 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, and the Court's inherent jurisdiction.

46. The Petitioners rely on the legal basis as set out in the Petition, and in addition, the following grounds.

47. To be entitled to an interlocutory injunction, the Plaintiffs must satisfy the test set out by the Supreme Court of Canada in *RJR-MacDonald v. Canada (Attorney General)*, [1994] 1 SCR 311 ("***RJR***"):

> (a) there is a serious question to be tried,
>
> (b) there will be irreparable harm if an injunction or stay is not granted, and
>
> (c) the balance of convenience favours granting an injunction or stay.

48. For the reasons set out below, the Petitioners have met each of these requirements.

a) Serious Question to be Tried

49. Unless the constitutional challenge can be said to be frivolous or vexatious, the first part of the *RJR MacDonald* test is satisfied.

50. There is clearly a serious issue to be tried in this Petition.

51. The Government has set up a flawed process for holding a binding referendum on a fundamental change to the electoral system in BC, which cannot actually ascertain the true wishes of voters, as required by the governing legislation.

52. The reference questions are complicated and confusing, with important details about the proposed systems to be decided after the referendum, so British Columbians do not know what they are voting for.

53. And, the Supreme Court of Canada has held that there must be a clear majority on a clear question in order to create binding legal obligations with respect to fundamental

constitutional changes, a standard that is not met by the process established by the Government in the *Regulation*.

54. The process of having two questions will not result in a fair or accurate assessment of the views of British Columbians on the democratic system in British Columbia, particularly given that a simple majority is required for a proportional representation system to be implemented by the Government.

55. Also, there are severe restrictions on advertising spending and onerous registration, reporting, disclosure and auditing requirements, which will discourage ordinary British Columbians from engaging in any meaningful referendum related expression.

56. The spending restrictions on political advertising apply for a period that is five times as long as current restrictions in the *Election Act*, and two months longer than the restrictions on advertising that the BC Court of Appeal has twice struck down in the context of election advertising because they unduly violated the freedom of expression rights of British Columbians.

57. Clearly, the Petition raises serious legal questions to be adjudicated.

58. But, more importantly for this particular injunction application, the Petitioners submit that their legal claims are very strong.

59. There can be little doubt that the confusing and complex representation questions and process are inconsistent with established constitutional principles and the purpose and wording of the *Referendum Act*, or that the extreme restrictions on the expression and associational rights of British Columbians are inconsistent with the *Charter*.

60. This needs to be taken into account in determining whether an injunction should be granted in the circumstances of this case; that is, the strength of the Petitioners' case strongly supports granting the injunction.

b) Irreparable Harms

61. Irreparable harm in the context of a *Charter* challenge will be established where, in the absence of the stay or injunction, the interests sought to be protected by the *Charter* would be irreparably infringed or harmed.

62. In the present case, if the injunction is not granted, irreparable harm will be caused to the Petitioners and other British Columbians who want to meaningfully participate in the referendum process by expressing themselves on the referendum, or associating for that purpose, and engaging in a referendum process that respects their fundamental freedoms and right to vote.

63. These harms are not reversible or compensable in damages, in light of the difficulty of obtaining damages in *Charter* litigation, and they are therefore by definition irreparable.

64. In addition, even if the referendum questions and process are determined to be lawful, the referendum itself will be tainted by unconstitutional conditions on speech and association leading up to the vote.

65. If the Government is subsequently bound to initiate legislation giving effect to a result achieved through a constitutionally tarnished process, that will irreparably undermine the legitimacy of the electoral system moving forward, which is an additional irreparable harm.

c) Balance of Convenience

66. At the balance of convenience stage, there is no presumption of constitutionality where interim injunctive relief is sought, nor does the government hold a monopoly over the public interest; in each case, a court must consider the consequence to the public interest of not enforcing a law pending a determination of its constitutionality.

67. In this case, the public interest clearly favours suspending the immediate legal effects of the *Regulation* pending a ruling on the Petition.

68. The Government cannot, in the face of the previous decisions of the BC Court of Appeal striking down less onerous restrictions on expression, deny that the more onerous restrictions on expression and association in the *Regulation* directly and seriously infringe the *Charter* rights of British Columbians, which will mar the entire referendum process.

69. The prospect of a binding referendum on a fundamental change to the electoral system taking place under conditions that did not respect the fundamental rights of British Columbians would render any result illegitimate, and would lead to an enormous waste of resources – by the Government, voters, and third party advertisers – if the Petition is successful.

70. In addition, the relief sought in this Application is a stay of subordinate regulations issued by the *executive* branch of the Government, not the legislature, and as such there is no 'presumption' that the regulation serves a valid public purpose or the public interest.

71. There can be no presumption that the executive branch of government is always acting in the public interest, particularly with respect to a fundamental change in the electoral system that will serve to benefit the governing parties. The excesses of duly elected governments are often, and rightly, curtailed by the courts, given that courts are the last and final resort to protect the fundamental rights of citizens seeking relief from Government.

72. To the extent that granting an injunction will lead the Government to decide to delay the referendum, that is the direct result of the unnecessarily rushed process that the Government has established, and its unwillingness to proceed to the merits of the Petition in a timely manner.

73. The Government set up timelines to ensure the coalition parties could benefit from a new electoral system in the next election; it delayed the passing of the *Regulation* until a week before the referendum period began; and it argued that the Respondents were unable to respond to the Petition within the timelines set in the rules.

74. After creating this timeline and opposing a quick resolution on the merits, the Government cannot now claim an injunction should not be issued to preserve the rights of British Columbians because it would require the Government to delay the referendum.

75. Moreover, there is no urgency to holding the referendum at this time.

76. A referendum could be held in 2019 and still result in a new electoral system in place prior to the next scheduled election in 2021, if the referendum is held in compliance with the Government's legal and constitutional obligations.

77. And if a majority of British Columbians are truly in favour of fundamentally changing the electoral system in the province, than a delay in holding the referendum will not change that fact; to the contrary, it will ensure that the intention of voters is clear, informed, unambiguous, and beyond question, hence ensuring the legitimacy of the process.

78. The only thing that can change is that British Columbians become more familiar with the proposed electoral systems, and have a period of uncensored access to a range of opinions, views, information, and commentary about the questions being posed and the implications of the vote, prior to the Government's restrictions on expression and association.

79. Or the referendum could be held in conjunction with the next provincial election in 2021 (similar to past referenda in 2005 and 2009), which would increase voter turnout and hence the legitimacy of the vote, would ensure British Columbians have enough time to meaningfully debate and become informed about the electoral systems being proposed, and would ensure that the process and any restrictions are legally and constitutionally sound.

80. This option would mean that a new electoral system, which would likely benefit the parties to the current governing coalition, is not in place prior to the next election, but again, if a clear majority of British Columbians are in favour of the change after engaging in open and unrestricted public debate over the issue, it will become binding after the next election.

81. There is no valid policy reason for denying British Columbians a fair, open, and transparent opportunity to consider this important matter, especially given that it will impact how Governments are elected in British Columbia, likely for generations to come.

82. If a delay in the referendum is required to provide for this opportunity, then it is clearly in the public interest to delay the referendum.

83. And there is no resulting prejudice or harm to the public interest or to the public policy agenda set out by the Government, as it will not prevent a referendum from being held. It will only ensure it is done lawfully.

84. For all of the above reasons, the balance of convenience favours staying or suspending the *Regulation* pending a determination on the merits of its legality and constitutionality.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Kenneth Baerg, made June 28, 2018;
2. Affidavit #2 of Christopher Gardner, made July 10, 2018;
3. The pleadings and proceedings herein; and
4. Such further and other material as counsel may deem necessary and this Court may permit.

The applicants estimate that the application will take two days.

[ ] This matter is within the jurisdiction of a master

[X] This matter is not within the jurisdiction of a master

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application

a) file an application response in Form 33,

b) file the original of every affidavit, and of every other document, that
   i. you intend to refer to at the hearing of this application, and
   ii. has not already been filed in the proceeding, and

c) service on the applicant 2 copies of the following, and on every other party of record one copy of the following:
   i. a copy of the filed application response;
   ii. a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
   iii. if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

DATED: July 24, 2018

Peter A. Gall
Counsel to the Applicants

To be completed by the court only:

Order made

[ ] in the terms requested in paragraphs _____ of Part 1 of this notice of application

[ ] with the following variations and additional terms:

Date: _____ _____

Signature of [ ] Judge [ ] Master

APPENDIX

THIS APPLICATION INVOLVES THE FOLLOWING:

[ ] discovery: comply with demand for documents
[ ] production of additional documents
[ ] other matters concerning document discovery
[ ] extend oral discovery
[ ] other matter concerning oral discovery
[ ] amend pleadings
[ ] add/change parties
[ ] summary judgment
[ ] summary trial
[ ] service
[ ] mediation
[ ] adjournments
[ ] proceedings at trial
[ ] case plan orders: amend
[ ] case plan orders: other
[ ] experts