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REQUEST FOR AN APPOINTMENT TO PRESENT TO THE COMMITTEE ON THE NEED FOR LEGISLATIVE CHANGES TO THE JUDGES ACT AND CANADA ELECTIONS ACT

I would like to seek your assistance to make changes to the Judges Act procedure for handling complaints of criminal misconduct by judges. I would also like Canada Elections Act changed to include a mandatory duty to provide a reason for endorsement of the affected candidate. Can you please advise on how I may appear before the Committee to make a presentation?

Thank you for your public service to our great nation of Canada. As you know, judicial independence is a constitutional doctrine, but the Parliament has exclusive constitutional jurisdiction over the criminal law and procedure in criminal matters. Judges cannot do indirectly (change the criminal code) what they lack jurisdiction to do directly.

I hereby recommend that Parliament legislate that Council must refer all allegations of criminal misconduct to the RCMP who would submit a "record of investigation" within 90 days back to Council, upon receipt of the "record of investigation", the Council would retain the power to decide whether to recommend a reprimand or removal of the judge.

Judges are claiming judicial immunity for criminal offences like assault, extortion, obstruction of justice, fraud etc. Although judicial immunity is not a constitutional principle, the police think they are unable to investigate due to the common law principle of judicial immunity, therefore Council that must be required to request an RCMP investigation of any criminal complaint.

The status quo has created a situation where judges who are subject of criminal misconduct complaints are the same judges deciding not to request a record of the investigation, the same judges return to the court to assault and extort mandatory criminal code procedures for presenting evidence to meet the test for each element of the charge for a criminal prosecution of the Canadian Judicial Council, the same judges return to courts of appeal to defraud mandatory criminal code appeal procedures, which triggers new criminal misconduct complaints to the Canadian Judicial Council, the same judges decide not to request a record of the investigation and the cycle repeats itself.

The courts have found that since the Canadian Judicial Council is implementing government policy on criminal misconduct complaints, and Council is not a court, judicial independence does not apply to judges to the Canadian Judicial Council.

Madadi v. B.C. (Ministry of Education), 2012 BCHRT 380 (CanLII) [71] …The difficulty with these decisions is that ... In the words of the Supreme Court in Ocean Port, the Tribunal has elevated a common law rule to constitutional status. .. [73] It could be argued that the constitutional guarantee of

independence extends to certain tribunals and may be inconsistent with the application of the human rights legislation to certain Court-like functions carried out by those tribunals …Conclusion Respecting Judicial Immunity [74] While ..there are sound reasons for immunizing judicial and quasi-judicial decision makers from civil suit: promoting finality of decision-making and the public interest in the integrity of the justice system, a key element of which is impartial and independent decision makers, constitutional judicial immunity does not apply to the hearing process of the TRB. As expressed in Ocean Port, "While tribunals may sometimes attract Charter requirements of independence, as a general rule they do not". Certainly it is clear that the TRB was **created for the primary purpose of implementing government policy r**especting education. It therefore does not attract constitutional guarantees of independence in my view. I am driven to the conclusion that judicial immunity does not apply to the processes of the TRB whether they be those functions that may be performed interchangeably by Courts or tribunals, such as the discipline hearing in this case or responsibilities related to the sort of policy-driven adjudicative responsibilities that could not be performed by the Courts.

http://www.duhaime.org/LegalDictionary/J/JudicialMisconduct.aspx
Misconduct Definition: **Conduct on the part of a judge that is prohibited** and which could lead to a form of discipline. .. generally, a prohibition against conduct prejudicial to the administration of justice that could bring the judicial office into disrepute**.**… Examples of specific instances of judicial misconduct include: …**Criminal conduct,**

Protection of Persons Administering and Enforcing the Law 25.1 Principle (2) It is **in the public interest to ensure that public officers may effectively carry out their law enforcement duties in accordance with the rule of law** and, …. Requirements for certain acts (9) **No public officer is justified in committing an act or omission that would otherwise constitute an offence and that would be likely to result in loss of or serious damage to property**….
Limitation (11) Nothing in this section justifies…
(b) **the wilful attempt in any manner to obstruct, pervert or defeat the course of justice**; or

R. v. Zlatic, [1993] 2 SCR 29, 1993 CanLII 135 (SCC) 1. ... the *actus reus* of fraud will be established by proof of: 1. the prohibited act, be it an act of deceit, a falsehood or some other fraudulent means; and 2. deprivation caused by the prohibited act, which may consist in actual loss or the placing of the victim's pecuniary interests at risk. Correspondingly, the *mens rea* of fraud is established by proof of: 1. subjective knowledge of the prohibited act; and 2. subjective knowledge that the prohibited act could have as a consequence the deprivation of another (which deprivation may consist in knowledge that the victim's pecuniary interests are put at risk). …. (i) Fraud by "Other Fraudulent Means" …
Most frauds continue to involve either **deceit or falsehood**. .. However, the third category of "other fraudulent means" has been used to support convictions in a number of situations where deceit or falsehood cannot be shown. These situations include ..**non-disclosure of important facts**, **exploiting the weakness** of another, …. Dishonesty is, of course, difficult to define with precision. It does, however, connote an **underhanded design** which has the effect, or which engenders the risk, of **depriving others of what is theirs**.. *Criminal Fraud* (1986), defines dishonest conduct as that "which ordinary, decent people would feel was **discreditable** as being clearly **at variance with straightforward or honourable dealings**" (p. 99). …. The dishonesty of "other fraudulent means" has, at its heart, the **wrongful use of something** in which another person has an interest, in such a manner that this **other's interest is extinguished or put at risk**. A use is "wrongful" in this context if it constitutes conduct which reasonable decent persons would

consider dishonest and **unscrupulous**.… The authorities make it clear that it is **unnecessary for a defrauding party to profit from his or her fraud** in order to be convicted; it is equally **unnecessary that the victims of a fraud suffer actual pecuniary loss** in order that the offence be made out: ...

Bourbonnais v. Canada (Attorney General), [2006] 4 FCR 170, 2006 FCA 62 (CanLII) [26]…. Sexton J.A., after reviewing the Canadian authorities on this point and, in particular, the decision of the Supreme Court of Canada in Morier et al. v. Rivard, 1985 CanLII 26 (SCC), [1985] 2 S.C.R. 716, and the decisions of the Quebec Court of Appeal in Royer v. Mignault (1998), 1988 CanLII 445 (QC CA), 50 D.L.R. (4th) 345 (Que. C.A.) leave to appeal to the Supreme Court refused, [1988] 1 S.C.R. xiii, and Proulx v. Quebec (Attorney General) (1997), 1997 CanLII 10286 (QC CA), 145 D.L.R. (4th) 394 (Que. C.A.), in which the Court of Appeal adopted the bad faith exception formulated by Lord Denning in Sirros, concluded as follows at paragraph 41: … judicial immunity does not apply where it is shown that a judge **knowingly acts beyond his jurisdiction**.…[28]In the case at bar, the **appellant does not contend that he is entitled to judicial immunity in regard to the criminal prosecution** that has been brought against him. In my opinion, **there would be no merit whatsoever to any such claim**. As Lord Denning stated in Sirros, at page 782: "Of course, if the judge has …**has perverted the course of justice, he can be punished in the criminal courts**." …[30] ….It is clear from some of the cases discussed above, however, that the **immunity of judges from criminal liability is not total**. In this respect the law of England is the same as that of the USA. Excepting the general principles of immunity discussed above, **any judicial officer who violates the criminal law would be as liable therefore as any other private person**. According to Woodhouse J. of the New Zealand Court of Appeal, "a judge can, of course, be made to answer, and in a proper case, pay dearly, for any criminal misconduct. Like any other citizen criminal proceedings may be brought against him." **This is because "criminal conduct is not part of the necessary functions performed by public official**"… **The defence of judicial immunity from indictment was rightly rejected** in both Braatelein v. United States and United States v. Hastings (above). The law on immunity from criminal liability was aptly summed up by White J. of the US Supreme Court in O'Shea v. Littleton, We have never held that the performance of the duties of judicial . . . officers requires or contemplates the immuni-zation of otherwise criminal deprivations of constitutional rights . . . on the contrary the judicially fashioned doctrine of official immunity does not reach so far as to immunize criminal conduct proscribed by an Act of Congress. A principle similar to this would probably apply (with appropriate modifications) in most common-law jurisdictions.

Taylor v. Canada (Attorney General), [2000] 3 FCR 298, 2000 CanLII 17120 (FCA) [60]Finally, in my view, the exception to absolute immunity established in Sirros v. Moore is an extremely narrow one. It will be the rare case indeed where a **plaintiff can show that a judge acted with the knowledge that he or she had no jurisdiction**. The example cited by Lord Bridge in McC v. Mullan demonstrates both the need for an exception to the judicial immunity principle, as well as the limited nature of the exception.. Taylor v. Canada (Attorney General), [2000] 3 FCR 298, 2000 CanLII 17120 (FCA) [62]…."72 He added that a claim for malicious prosecution required a plaintiff to demonstrate "improper motive or purpose,"73 and that "**errors in the exercise of discretion and judgment are not actionable**."74 In that sense, Nelles is consistent with the proposition that the "bad faith" exception to judicial immunity cannot be engaged merely **where a judge errs in the exercise of his or her discretion**, as happened in the present case. [63]In light of the constitutional importance of judicial immunity, I conclude that any "**bad faith" exception to judicial immunity that exists** is just as narrow, if not more so, than the exception to prosecutorial immunity addressed in Nelles .

J.W. Abernethy Management & Consulting Ltd. v. 705589 Alberta Ltd. and Trillium Homes Ltd., 2005 ABCA 103 (CanLII) [24]… The only **exception is when a judge "knowingly acts outside of official capacity; without a good faith belief of jurisdiction**": ***S.G.* v. *Larochelle*** (2004), 355 A.R. 46, 2004 ABQB 123 (CanLII) at para. 10; aff'd 2005 ABCA 111 (CanLII), citing ***Royer* v *Mignault*** (1988), 1988 CanLII 445 (QC CA), 50 D.L.R. (4th) 345 at 354 (Que. C.A.). Judicial immunity clearly extends to Queen's Bench judicial settlement processes, including binding JDR's. See ***Condessa Z Holdings Ltd.* v. *Rusnak*** (1993), 1993 CanLII 5526 (SK CA), 109 Sask. R. 170 (C.A.).

Royer c. Mignault, 1988 CanLII 445 (QC CA) Immunity of Superior Court Judges …. What he does may be outside his jurisdiction - in fact or in law - but so long as he honestly believes it to be within his jurisdiction, he should not be liable. Once he honestly entertains this belief, nothing else will make him liable. He is not to be plagued with allegations of malice or ill-will or bias or anything of the kind. Actions based on such allegations have been struck out and will continue to be struck out. Nothing will make him liable **except it be shown that he was not acting judicially, knowing that he had no jurisdiction to do it…**. In McC. c. Mullan, (1984) 3 All E.R. 908, 816, Lord Bridge of Harwich stated: ...It is, of course, clear that the holder of any judicial office who acts in bad faith, doing what he knows he has no power to do, is liable in damages. If the Lord Chief Justice himself, on the acquittal of a defendant charged before him with a criminal offence, were to say, "That is a perverse verdict," and thereupon proceed to pass a sentence of imprisonment, **he could be sued for trespass.** … I conclude, therefore, that a superior court judge is protected by absolute immunity from any civil liability for anything he does or says in the performance of his functions as a judge. He will not be liable in damages **unless he acts outside of his jurisdiction knowing that he has no power** to do what he does.

Future Inns Canada Inc. v. Nova Scotia (Labour Relations Board), 1999 CanLII 2477 (NS CA) [113].. the Board and its members are protected from a civil action for damages arising out of any acts committed by them, provided the acts are committed in the course of judicial duties, and provided further that a member may lose his or her immunity if while acting in **bad faith** they did something which he or she knew he or she did not have the jurisdiction to do, or while not acting in the course of judicial duties **knew that he or she had no jurisdiction** to act.

Morier et al. v. Rivard et al (1985), 1985 CanLII 26 (SCC), 23 D.L.R. (4th) 1 (S.C.C.), the majority considered the extent and nature of the immunity conferred on superior court judges in Canada, and concluded that it is essentially absolute, allowing for potential liability only where a judge is shown to have **knowingly exceeded his jurisdiction in bad faith**.

Verge Insurance Brokers Limited et al. v Richard Sherk et al., 2015 ONSC 4044 (CanLII) **(b)***inherent jurisdiction is not to conflict with Rule* [61] "[T]he **inherent jurisdiction of the Court of Queen's Bench is not such as to empower a judge of that Court to make an order negating the unambiguous expression of the legislative will**": see *Baxter Student Housing Ltd. et al. v. College Housing Co-operative Ltd. et al.*, 1975 CanLII 164 (SCC), [1976] 2 S.C.R. 475 at p. 480.[62] "**Inherent jurisdiction cannot, of course, be exercised so as to conflict with a statute or Rule**": see *Montreal Trust Company et al. v. Churchill Forest Industries (Manitoba) Limited*, [1971] 4 W.W.R. 542 at p. 547, cited with approval in *Baxter Student Housing Ltd. et al. v. College Housing Co-operative Ltd…***(c)** *inherent jurisdiction limited to filling gaps* [63] "In spite of the expansive nature of this power, **inherent**

jurisdiction does not operate where Parliament or the legislature has acted": see *Stelco Inc. (Re)*, *supra*, at para. 35.

Freeman v. Canada (Citizenship and Immigration), 2013-10-23, 2013 FC 1065, IMM-6304-12, Legal Principles Relating to the Concept of Bad Faith …[24] The Supreme Court also stated in Roncarelli that "good faith" means "… carrying out the statute according to its intent and for its purpose; it means good faith in acting with a rational appreciation of that intent and purpose and not with an improper intent and for an alien purpose…". According to the Court, "good faith" does not mean acting "for the purposes of **punishing a person for exercising an unchallengeable right**" and "it does not mean **arbitrarily and illegally** attempting to divest a citizen of an incident of his civil status": at para. 46…..[26] While bad faith certainly includes situations where there is intentional fault on the part of a decision-maker (as was the case in Roncarelli), evidence of actual malice or intent to harm is not required in order to rebut the presumption of good faith: Finney v. Barreau du Québec, 2004 SCC 36, [2004] 2 S.C.R. 17, at para. 40. [27] As the Supreme Court observed in Entreprises Sibeca, above at para. 26, in addition to deliberate acts, the concept of bad faith can include "acts that are so markedly inconsistent with the relevant legislative context that a court cannot reasonably conclude that they were performed in good faith". [28] Direct evidence of bad faith is not required. It can, in the appropriate case, be inferred from the surrounding circumstances: Finney, at paras. 37-39, Enterprises Sibeca, above at para. 26. [29] "Bad faith" can encompass serious carelessness or recklessness. Indeed "**recklessness implies a fundamental breakdown of the orderly exercise of authority, to the point that absence of good faith can be deduced and bad faith presumed**":

Roncarelli v. Duplessis 1959 CanLII 50 (SCC), [1959] S.C.R. 121, ….there is no such thing as absolute and untrammeled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. "**Discretion" necessarily implies good faith** in discharging public duty; there is always a perspective within which a statute is intended to operate; and **any clear departure from its lines or objects is just as objectionable as fraud or corruption**.

Alberta Provincial Courts Act 2000 Chapter P-31 Action for damages 9.51(1) No action may be brought against a judge for any act done or omitted to be done in the execution of the judge's duty or for any act done in a matter in which the judge has exceeded the judge's jurisdiction unless it is proved that the judge acted **maliciously and without reasonable and probable cause**. … (5) The Minister of Justice and Solicitor General may make a payment for damages or costs, including lawyer's charges incurred by the judge in respect of an act, omission or matter described in subsection (1), (2) or (3).

Manitoba The Provincial Court Act C.C.S.M. C. C275 Exemption from liability 71 Except as provided in this Act, no action shall lie or be instituted against a judge or justice of the peace for any act done by him or her in the execution of a duty unless the act was **done maliciously and without reasonable and probable cause**.

Manitoba The Court of Queen's Bench Act; Exemption from liability 15 Where an officer of the court, in exercising the powers and performing the duties of the officer, acts in good faith, an action shall not

be brought against the officer with respect to an act of the officer unless the act is **malicious and is done without reasonable grounds**

Prince Edward Island Provincial Court Act, RSPEI 1988, C P-25 11. Limitation of Action (1) Except as provided in this Act, no action lies or may be instituted against a judge, or justice of the peace for any act done by him or her in the execution of his or her duties unless the act was done **maliciously or without reasonable cause**.

Id. at 368-69 (Stewart, J., dissenting quoting Pierson v. Ray, 386 U.S. 547, 554 (1967) The "central feature" in *Sparkman*, he wrote, was Judge Stump's "preclusion of any possibility for the vindication of respondents' rights elsewhere in the judicial system. Powell noted that the *Bradley* Court accepted the injustices the doctrine of judicial immunity sometimes imposes because those injustices are usually mitigated by the availability of appeal. But **where a judicial officer acts in a manner that precludes all resort to appellate or other judicial remedies that otherwise would be available, the underlying assumption of the *Bradley* doctrine is inoperative...**

Piper v. Pearson, id., 2 Gray 120. … entitlement to immunity, the U.S. Supreme Court focused upon the nature of the act: is it an act ordinarily performed by a Judge? But an act done in **complete absence of all jurisdiction** cannot be a judicial act. It is no more than the **act of a private citizen, pretending to have judicial power** which does not exist at all. In such circumstances, to grant absolute judicial immunity is contrary to the **public policy expectation** that there shall be **a Rule of Law**.

State use of Little v. U.S. Fidelity & Guaranty Co., 217 Miss. 576, 64 So. 2d 697. When a judicial officer acts **entirely without jurisdiction** or without compliance with jurisdiction requisites he may be held **civilly liable for abuse of process** even though his act involved a decision made in good faith, that he had jurisdiction.

Ableman v. Booth, 21 Howard 506 (1859). "**No judicial process,** whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it is issued; and **an attempt to enforce it beyond these boundaries is nothing less than lawless violence**."

Bradley v. Fisher, 13 Wall. 335, 20 L.Ed. 646 (1872) "**Where there is no jurisdiction, there can be no discretion**, for discretion is incident to jurisdiction."

Rankin v. Howard, (1980) 633 F.2d 844, cert den. Zeller v. Rankin, 101 S.Ct. 2020, 451 U.S. 939, 68 L.Ed 2d 326. When a judge knows that he lacks jurisdiction, or acts in the face of **clearly valid statutes expressly depriving him of jurisdiction**, judicial immunity is lost.

Ashelman v. Pope, 793 F.2d 1072 (1986), the Ninth Circuit, en banc , criticized the "judicial nature" analysis it had published in Rankin as unnecessarily restrictive. But Rankin's ultimate result was Judge Howard had been independently divested of absolute judicial immunity by his **complete lack of jurisdiction.**

Stump v. Sparkman, id., 435 U.S. 349 Some urge that any act "of a judicial nature" entitles the Judge to absolute judicial immunity. But **in a jurisdictional vacuum**, (that is, absence of all jurisdiction) the second prong necessary to absolute **judicial immunity is missing**.

Davis v. Burris, 51 Ariz. 220, 75 P.2d 689 (1938) judge must be acting **within his jurisdiction** as to subject matter and person, to be entitled to immunity from civil action...

GROUNDS FOR CONSTITUTIONAILITY OF s67(4c) CANADA ELECTIONS ACT ARE;

I. Overbroad / Grossly Disproportionate To Objective of Election of Members
II. Vested, Inalienable, and Natural Justice Rights Common Law
III. Constitutional Rule of Law Common Law
IV. Abuse / Breach of Tangible / Intangible Contract Rights Common Law
V. Prospective Employment / Independent Contractor Common Law
VI. UK Political Party Human Rights Common Law

About 17 million Canadians who vote in the federal elections have, about 1.5 million party members have an s3 Charter right to be represented in government, only political parties can form a government. The effect of s67(4c) Canada Elections Act and Guergis / Pick / Grewal common law below is that; despite Figueroa, Vriend common law below; "Court should not interfere with…process…established pursuant to a statute" and it is "statutorily allowed" for party to decide "fundamental purpose…endorsing one…of its members as candidates" [Act] by violating the constitutional rule of law that fundamental values enshrined in Constitution (s3 Charter right to representation in government through a free from racial discrimination, right to abuse of contract remedy, Vested / Inalienable / Natural Justice rights) not be destroyed without court interference to set aside the decision and there is no positive obligation for the government to remedy s67(4c) Canada Elections Act.

s67 (4c) Canada Elections Act is overbroad and grossly disproportionate to the objective of "election of members to the house of commons"; s67 (4c) should read in "with reasons" just after the words "…that the prospective candidate is endorsed by the party".

In comparison to deleterious effects of destroying s3 Charter rights of about 17 million Canadians and about 1.5 million party members' right to be represented in government, S67(4c) is grossly disproportionate because the Act gives a right to endorse a candidate while creating an RWDSU duty to comply with constitutional values, Hofer test, Houle abuse of contract test. Even if a decision is set aside for breaching a constitutional value, the power to make a constitutional rule of law decision rests with the party. Set aside is not a mandamus, akin to the power of the Court to refer a matter back to a Minister for reconsideration.

The read in does not substantially change status quo, it simply means any reason given can be tested for vested, inalienable and natural justice if necessary. In comparison to the objective of giving parties power to endorse candidates, refusing to mandate reasons will disproportionately affect persons at higher risk (visible minorities, immigrants) of discrimination.

Guergis v. Novak, 2013 ONCA449 "[90] Even if the allegation regarding the Prime Minister's involvement is read as proven, s. 67(4)(c) of the Canada Elections Act, S.C. 2000 c.9, gives the leader of a political party the authority to refuse to endorse a candidate. **As it is statutorily allowed, it therefore cannot be an unlawful act**"…

Pick v. Conservative Party of Canada, 2004 CanLII 38425 (SK QB) It is neither surprising nor offensive to the logic of the above candidate selection process that Article 3, subsection k of the **Candidate Nomination Rules and Procedures, as well as Section 67(4)(c) of the Act should be compatible with one another**. It makes no sense to me that an application for the position of a "nomination contestant" should have his application accepted in the first instance, proceed to the riding election and if duly elected, subsequently fail to receive the endorsement of the party under Section 67(4)(c)…

Grewal v. Conservative Party of Canada, 2004 CanLII 9568 (ON SC) [29] I cannot accept the plaintiff's position on the meaning of s. 67(4)(c) and the restrictive application of that section. [30] Firstly, there is nothing in that section that stipulates that a leader must give reasons for not endorsing a candidate. In any event, in this case **reasons were articulated and the plaintiff was advised of the reasons by the Interim Council**. [31] Secondly, the Party, determines the candidates he wishes to have representing the Party. It is not for the Court to make those determinations. The Court should not interfere with a process that has been established by a Party or a **process that has been established pursuant to a statute**..

Figueroa v. Canada (Attorney General), 2003 SCC 37 (CanLII), 227 D.L.R. (4th) 1... the purpose of the right to vote enshrined in s. 3 of the Charter is not equality of voting power per se, but the right to "effective representation". Ours is a representative democracy. **Each citizen is entitled to be represented in government**. Representation comprehends the idea of having a voice in the deliberations of government as well as the idea of the right to bring one's grievances and concerns to the attention of one's government representative…… Put simply, full political debate ensures that ours is an open society with the benefit of a broad range of ideas and opinions: This…ensures not only that policy makers are aware of a broad range of options, but also that the determination of social policy is sensitive to the needs and interests of a broad range of citizens….

Vriend v. Alberta, [1998] 1 SCR 493, 1998 CanLII 816 (SCC) 2 66 … submission has failed to distinguish between "private activity" and "**laws that regulate private activity".** The former is not subject to the Charter**, while the latter obviously is**. …to **wait until someone is discriminated against …challenge the validity of the provision** in each appropriate case… would not only be wasteful of judicial resources, but also unfair in that it would impose burdens of delay, cost and personal vulnerability to discrimination for the individuals involved in those eventual cases…. provisions… **do not depend on any particular factual context in order to resolve their constitutional status,** there is really no need to adduce additional evidence…

Gosselin v. Québec (Attorney General), [2002] 4 SCR 429, 2002 SCC 84… By enacting the Social Aid Act, the Quebec government **triggered a state obligation**…C. Negative vs. Positive Rights and the Requirement of State Action [319] … rights include a positive dimension, such that they are not merely rights of non-interference but also what might be described as **rights of "performance",** then they may be violable by **mere inaction** or failure by the state to actively provide the conditions necessary for their fulfilment... 320] … As a theory of the Charter as a whole, any claim that only negative rights are constitutionally recognized is **of course patently defective**. The rights to vote **(s. 3),** to trial within a reasonable time (s. 11(b)), to be presumed innocent (s. 11(d)), to trial by jury in certain cases (s. 11(f)), to an interpreter in penal proceedings (s. 14), and minority language education rights (s. 23) to name but some, all **impose positive obligations of performance on the state** and are therefore best viewed as positive rights (at least in part). … Finally, decisions like Schachter v. Canada, 1992 CanLII 74 (SCC),

[1992] 2 S.C.R. 679, and Vriend, supra, confirm that "[i]n some contexts it will be proper to **characterize s. 15** as providing **positive rights**"…. [327]… Therefore, Blencoe … implies that **such protection will sometimes be engaged by mere state inaction**… [359] …whether a fundamental freedom can be infringed through the lack of government action was canvassed most recently in the case of Dunmore… **underinclusive legislation** might in some contexts constitute "affirmative interference with the effective exercise of a protected freedom" …we confirmed… in Haig v. Canada, 1993 CanLII 58 (SCC), [1993] 2 S.C.R. 995 …"a situation might arise in which, in order to make a fundamental freedom meaningful, **a posture of restraint would not be enough**, and **positive governmental action might be required**". [360] … Most obviously, they stand for the proposition that the Charter's fundamental freedoms can be infringed **even absent overt state action**. Mere restraint on the part of government from actively interfering with protected freedoms is not always enough to ensure Charter compliance; sometimes **government inaction can effectively constitute such interference**."

OVERBROAD / GROSSLY DISPROPORTAIONATE TO s3 CHARTER RIGHT OF REPRESENTATION IN POLITICAL PARTY GOVERNMENT THROUGH AN "ELECTION"

RWDSU v. Dolphin Delivery Ltd., [1986] 2 SCR 573, 1986 CanLII 5 (SCC) 39:…where no act of government is relied upon to support the action, the Charter will not apply. I should make it clear, however, that this is a distinct issue from the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the **fundamental values enshrined in the Constitution**. The answer to this question must be in the affirmative.

Alberta Soccer Association v. Charpentier, 2010 ABQB 715 "Hofer: First Test:….Did the society's rules (as applied) violate a law? Are the society's rules (as applied to individuals) unreasonable, arbitrary or capricious? or Do the society's rules jeopardize **a matter of public policy** so significant it has province-wide or national effect?..... does the society's breach under the second part of the First test violate a fundamental right under the Constitution of Canada (e.g. **s.15 of the Canadian Charter of Rights and Freedoms**)?"

University of Victoria Students' Society v. Canadian Federation of Students, 2011 BCSC 122 [34] … It is clear that the court is entitled to intervene in some circumstances to **set aside decisions made within private associations**. It necessarily follows that the court must also have the power to make ancillary or consequential directions.

Kaplan v. Canadian Institute of Actuaries, 1994 CanLII 9065 (AB QB), [1994] A.J. No. 868 (Q.B.); aff'd 1997 ABCA 310 (CanLII), [1997] A.J. No. 874 (C.A.), is decisive of this issue. Hunt J…. thoroughly reviewed the case law relating to availability of judicial review of consensual (domestic) tribunals. …It was argued by the Respondents that certiorari will not lie in relation to such a body...It seems to me that even if certiorari will not lie against a consensual tribunal, the court possesses broad enough powers … to grant the remedy it considers appropriate to the particular case, including the **setting aside of an invalid decision or action**.

Allard v. Canada, 2016-02-24, 2016 FC 236, T-2030-13 [125]….**principles of fundamental justice**. With respect to the principles of arbitrariness, overbreadth, and gross disproportionality, the specific questions are whether the law's purpose, taken at face value, is connected to its effects and whether the negative effect is grossly disproportionate to the law's purpose… **whether the negative impact of a**

law on the rights of individuals is proportionate to the pressing and substantial goal of the law in furthering the public interest... [126]….**weigh the negative impact of the law on people's rights against the beneficial impact** of the law in terms of achieving its goal for the greater public good. The impacts are judged both qualitatively and quantitatively. …[255]…whether a law that **takes away rights in a way that generally supports the object of the law**, **goes too far by denying the rights** of some individuals in a way that bears no relation to the object:… [272]… gross disproportionality only applies in extreme cases where the **seriousness of the deprivation is totally out of sync with the objective of the measure**…It balances the negative effect on the individual against the purpose of the law, not against societal benefit that might flow from the law…gross disproportionality is not concerned with the number of people who experience grossly disproportionate effects; a **grossly disproportionate effect on one person is sufficient to violate the norm**.

VESTED, INALIENABLE AND NATURAL JUSTICE RIGHTS

The business dictionary defines vested rights as a "right that has accrued, or is secured, to its possessor and is not contingent on any event that may or may not occur".

The Miriam Webster dictionary defines vested rights as "right belonging so absolutely, completely, and unconditionally to a person that it cannot be defeated by the act of any private person and that is entitled to governmental protection usually under a constitutional guarantee"

The legal dictionary describes inalienable as a "incapable of being conveyed, incapable of being sold, incapable of being transferred, non-transferable, not able to be conveyed, quod abalienari non-protest, secured by law, unable to be bought, unable to be disposed of, unforfeitable, untouchable"

Natural rights are those not contingent upon the laws, customs, or beliefs of any particular culture or government, and therefore universal and inalienable (i.e., rights that cannot be repealed or restrained by human laws).

Knox v. Conservative Party of Canada, 2007 ABQB 180[41] … Justice Acton of this Court stated as follows in International Association of Bridge Structural, Ornamental and Reinforcing Iron Workers, Local 720 v. International Brotherhood of Broilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, (2000) 272 A.R. 1, 2000 ABQB 586 (CanLII) at para. 33: As the courts have noted, a consensual tribunal's jurisdiction is **founded on contract**. The rationale underlying the courts' jurisdiction to review a tribunal protected by a privative clause is equally applicable to a contractual situation. Just as the courts have held that a **legislature would not have intended** to give a statutory tribunal the jurisdiction to make a **patently unreasonable decision or to breach the rules of natural justice** or to make a biased decision, **it would be unreasonable to conclude that the parties in the consensual regime would have agreed that a domestic tribunal could do so**…[44] Justice Martin went on at para. 51 to state: Therefore, in view of the nature of the decision at issue, I conclude that this court must have the authority to **review the Nomination Committee's decision**, **particularly in the absence of an impartial "disciplinary " tribunal to review matters** such as this and resolve them in accordance with procedural fairness and **rules of natural justice**.

Supreme Court of Canada in Lakeside Colony of Hutterian Brethren v. Hofer, 1992 CanLII 37 (SCC), [1992] 3 S.C.R. 165, wherein Gonthier J. held for the majority, at para.10: It is not incumbent on the court to review the merits of a decision to expel. It is, however, called upon to determine whether the purported

expulsion was carried out according to the applicable rules, with regard to the principles of **natural justice, and without mala fides**.

B.C. Supreme Court …decision…National Hockey League as it re…coach Patrick Quinn.…[13] The review by the court of orders made by an **unincorporated association** such as the N.H.L. through its president and chief executive officer (a domestic tribunal as it were) is limited. The power in no way includes the right in the court to substitute its decision for that of the domestic tribunal. The court is not a court of appeal. Rather, its power is narrow and it may only interfere If the order was made without jurisdiction (or against the rules) or if it was made in bad faith or contrary to the **rules of natural justice**.

Falk v Calgary Real Estate Board Co-operative Ltd, 2000 ABQB 296 (CanLII), 265 AR 60, [13] [22] Ms. Falk argued that **a private organization, such as the Board, cannot rely upon such an exclusionary clause to oust the jurisdiction of the court**..… [23] I agree that it is against public policy to recognize clauses which purport to exclude entirely the jurisdiction of the court. This is confirmed in G.H.L. Fridman, *The Law of Contract in Canada (3rd)* (Scarborough, ON: Carswell, 1994) at 380-381:…In other words, if sued, a party cannot raise as a defence that the other party agreed that resort would not be had to the courts. [24] Alberta courts have also relied on this principle. Laycraft J. (as he then was) in *Lambert* v. *A.T.A.* (1978), 1978 CanLII 792 (AB QB), 17 A.R. 364 (S.C.T.D.), quoted with approval the following passage of Denning L.J. in *Lee* v. *Showmen's Guild of Great Britain*, [1952] 1 All E.R. 1175 at 1180-1181: Although the jurisdiction of a domestic tribunal is founded on contract, express or implied, nevertheless the parties are not free to make any contract they like. There are important limitations imposed by public policy. The tribunal must, for instance, observe the principles of natural justice...They can, of course agree to leave questions of law, as well as questions of fact, to the decision of the domestic tribunal. They can, indeed, make the tribunal the final arbiter on questions of fact, **but they cannot make it the final arbiter on questions of law. They cannot prevent its decisions being examined by the courts**

ABUSE / BREACH OF TANGIBLE / INTANGIBLE CONTRACT RIGHTS COMMON LAW
Houle v. Canadian national bank, [1990] 3 SCR 122, 1990 CanLII 58 (SCC) **abuse of contractual rights** is part of Quebec civil law. The doctrine serves the important social as well as economic function of controlling the exercise of contractual rights and is consistent with today's trend towards a just and fair approach to rights and obligations. Bad faith or malice in the exercise of a contractual right is no longer the only criterion for assessing whether such a right has been abused. The standard of the prudent and reasonable individual can also form the basis for liability resulting from an abuse of contractual rights. **An abuse of rights may occur when the contractual right is not exercised in a reasonable manner**, i.e. in accordance with the rules of equity and fair play. The abuse of a contractual right gives rise to contractual liability. This liability is based on art. 1024 C.C.L.C. and the underlying principle of good faith in the execution of contracts. …**The fact that two parties have contracted, however, does not shield them from their extra-contractual responsibilities to those outside the contractual sphere**. In order to find delictual liability between a contracting party and a third party, there must exist, independently of the contract, a legal obligation deriving from art. 1053 C.C.L.C. … The well-known maxim Neque malitiis indulgendum est (Digest, 6.1.38) seems to confirm it: malice would never be permitted, even if a right were being exercised…. paraphrasing the Latin maxim Summum jus summa injuria, is quoted as saying (Josserand, De l'esprit des droits et de leur relativité (2nd ed. 1939), at p. 5): **A right taken too far becomes an injustice**… **Every right has a particular purpose**: it is conferred to meet social imperatives or economic needs, not to assuage instincts of

vengeance or spitefulness. The exercise of contractual rights has to be seen from this perspective. A legal order, which is a pale reflection of the moral order, unavoidably must accommodate egoism; in no case should it tolerate malice. Angus, op. cit., shares the same opinion, at p. 157: If one looks at the true spirit of our civil law, **it is clear that contractual rights cannot be totally absolute. Contracting parties do not foresee all eventualities expressly and so their formal accord is limited to the essential**… The Implicit Contractual Obligation of Good Faith Contractual obligations are not limited to those expressly mentioned in a contract, as enunciated in art. 1024 C.C.L.C.: 1024. The **obligation of a contract extends not only to what is expressed in it, but also to all the consequences which, by equity, usage or law, are incident to the contract**, according to its nature. …Good faith has been regarded as one such implicit, necessary obligation in all contractual relationships. Even in Roman law, an implicit obligation to execute contracts in good faith was found to exist.

Wabasso Ltd. v. National Drying Machinery Co., [1981] 1 SCR 578, 1981 CanLII 16 (SCC) It is true that the **existence of contractual relations does in no way exclude the possibility of a delictual** or quasi-delictual obligation arising out of the same fact.

Hanson v. Ontario Universities Athletic Association et al., 1975 CanLII 489 (ON SC) In determining **whether a by-law of an association is invalid as being unreasonable** the Court may consider the authority under which the by-law was made to see if it was in the power of the association. This is reasonableness in the wide sense and is the only proper way for a Court to consider a by-law in terms of reasonableness. Reasonableness in the narrow sense relates to merits of the policy and substance of the by-law. A Court should not direct its attention to reasonableness in the narrow sense when considering the validity of the by-law. Unless a contrary indication is provided, a body other than Parliament or the Legislature has no power to pass a by-law or other form of legislation which is **unequal in its operation as between different classes, manifestly unjust, made in bad faith, or which involves oppressive or gratuitous interference** with the rights of those subject to it.

J.R.S. v. Glendinning, 2000 CanLII 22641 (ON SC) All religious organizations are regarded by the common law as voluntary associations, **equally protected in their enjoyment of property**. The authority of a religious organization over its members rests upon their voluntary membership and mutual, contractual consent to the doctrine and discipline of the organization. Since contract is the legal basis for the authority of a religious organization over its members and affairs, the courts should interpret internal rules according to the principles for the interpretation of contracts, and should not interfere with them unduly; interference with such internal rules will be justified, however, where they interfere with **civil rights**.

BAILII CASE NUMBER: [2004] UKEAT 0907_03_2402 THAT SHOWS THAT;

1. UK Race Relations Act “engagement” is a word of very wide import [Authorities page 49 para 18] able to include PARTIES Constitution / Nomination Rules which is an agreement affecting recruitment.

2. UK Race Relations Act “body which can confer an authorization or qualification” [Authorities page 45 para 1] is PARTIES depriving the individual of present and future employment opportunities

3. UK Race Relations Act ”needed for … engagement in a particular profession or trade” [Authorities page 45 para 1] is other matter relating to employment or prospective employment

4. UK Race Relations Act "authorization or qualification" includes, recognition, registration, enrolment, approval and certification" Authorities page 45 para 2 is otherwise adversely affect the status Authorities page 52 para 29

5. UK Race Relations Act "recognition" includes recognition to receive canvassing support from PARTIES and entitlement to be described as a parties candidate Authorities page 48 para 14

6. UK Race Relations Act "approval" includes approval to contest nomination Auth. page 48 para 14

7. UK Race Relations Act "employment…contract personally to execute any work or labour and related expressions" Authorities page 47 para 9 is contractual relationship with an individual for services

8. UK Race Relations Act"needed for …particular profession" means "Party approval is manifestly an approval needed for engagement in the particular profession" of party elected officer, "majority of votes cast does not deny… Party approval the description of being needed". Authorities page 48 para 15

9. UK Race Relations Act "confer a recognition..enrolment…certification" is akin to "chartered accountant", QC for lawyers and greater profession of parties elected officer, just because there are alternative political parties does not exclude parties Authorities page 48 para 15

10. UK Race Relations Act "Discrimination by other bodies" "Discrimination in the Employment Field" Authorities page 49 para 19 is akin to contractual relationship with an individual for services

11. UK Race Relations Act "authorization" is "adoption as a prospective parliamentary candidate…which facilitated engagement in a particular profession" of parties' elected officer.

12. UK Race Relations Act qualification refers to "circumstances in which A confers on B a qualification which will enable B to render services for C. Authorities page 53 para 33,34,36

13. "Party itself being a "body", it is an unincorporated association whose members are bound to another in contract…there is no reason to exclude unincorporated associations" Authorities page 47 para 12

14. S3 Charter Rights is like European Convention on Human Rights "value of effective Political Democracy" Authorities page 45 para 6

15. Dictionary "profession of politics" can be compared to self-employed young barrister or architect or resting actor or holy order under vow of poverty, judo referee volunteer, substantial or any remuneration is not required Authorities page 48 para 13 Authorities page 48 para 25

16. United Nations Conventions On Civil and Political Rights recognizes burden on political parties that form government "each state party shall prohibit...by all appropriate means…racial discrimination… …inter alia the right to take part in the conduct of public affairs at all levels" Authorities page 45 para 6

17. Public refusal "humiliatingly discriminatory", cannot be outside reach of the Act Authorities page 47 para 8

18. Part time politician is like a part time "Minister of Religion" it is still employment Auth. page 50 para 21

19. Just "filtering applications" is not a sufficient defence because their approval is needed, the Court "feel some unease at drawing careful lines between filtering and other processes; all too easily advantage could be taken to open a highway to discrimination" Authorities page 50 para 22

20. "endorsement of a candidate by the relevant process .. thus enabling him..to describe himself as the …Party Candidate for election….as being an approval by a body which approval is needed for (and may also facilitate) engagement in the particular occupation" of parties`` elected officer Authorities page 50 para 24

21. "job prospects" is wide enough to include party elected officer or Minister Authorities page 51 para 25 it is occupation exclusive privilege to be a party elected officer within the wider occupation of elected officer Authorities page 51 para 27 Authorities page 52 para 28

22. Parties' Councils are bodies empowered to grant recognition for the purpose of enabling..to engage in or at least attempt to engage in a calling or occupation" Authorities page 52 para 28

23. Parties "plainly confers a "status" on a candidate and that devoid of such approval, the person concerned is not already qualified to perform as a Parties' MP. Authorities page 53 para 29

24. Political office is not hobby because "put down and taken up again at the will of the individual" Authorities page 53 para 31 is not possible

25. Parties will give a reason or reasons Authorities page 77 para 85

26. A parties' conscious decision not to give a reason while slanderous ethnic origin stereotypes reasons are spread is grounds for discrimination trial Authorities page 71 para 31, Authorities page 72 para 41

27. Accepting one racialized candidate does not mean rejecting another racialized candidate is not discrimination Authorities page 70 para 26,. Authorities page 73 para 51, Authorities page 76 para 75

28. The 1st test is to ascertain the characteristics, the 2nd test is to identify a person, the 3rd test is whether person received less favourable treatment than comparator, the 4th test is if reason for less favourable test is a prohibited ground Authorities page 74

29. "factor alleged to be causative of the matter complained of need not be the only or even the main cause of the result complained of, though it must provide more than just the occasion for the result complained of. "It is enough if it is *an* effective cause" Authorities page 76 para 78

30. Membership sales lead is a factor in assessing a 100% probability of being selected Authorities page 70 para 30, Authorities page 81 para 15, Authorities page 83 para 17

I look forward to your response. Ade Olumide