Court File No. 27677

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

Between:

Richard Sauvé

Appellant
(Plaintiff)

- and -

Chief Electoral Officer of Canada, The Solicitor General of Canada
and The Attorney General of Canada

Respondents
(Defendants)

- and -

Between:

Sheldon McCorrister, Chairman, Lloyd Knezacek, Vice Chairman
on their own behalf and on behalf of the Stoney Mountain Institution Inmate
Welfare Committee, and Clair Woodhouse, Chairman, Aaron Spence, Vice Chairman
on their own behalf and on behalf of the Native Brotherhood Organization of
Stoney Mountain Institution, and Serge Belanger, Emile A. Bear
and Randy Opoonechaw

Appellants
(Plaintiffs)

- and -

The Attorney General of Canada

Respondent
(Defendant)

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In other words, do prisoners serving a sentence of two years or more have a constitutional right to vote in a federal election?

B. Brief Answers

4. Prisoners serving a sentence of two years or more do not have a constitutional right to vote in a federal election. The questions set by the Chief Justice may be answered as follows:

1. Yes.

2. Yes, section 51(e) of the Canada Elections Act [hereinafter the Act] is a reasonable limit in a free and democratic society and, in particular, minimally impairs the right to vote guaranteed in section 3 of the Charter.

3. No.

4. It is unnecessary to answer this question. No infringement of section 15 of the Charter has been established.

III. Argument

A. The Supreme Court of Canada's 1993 Decision in Sauvé v. Canada Left One Outstanding Question

1. Section 1 Queries

5. The Queen v. Oakes, [1986] 1 S.C.R. 103 and subsequent Supreme Court decisions discussing section 1 of the Canadian Charter of Rights and Freedoms set out the questions which must be answered in order to apply the constitutional measure which section 1 represents. They are as follows:

1. Is the limit prescribed by law? A limit on a Charter right or freedom will not be "prescribed by law" if it fails to provide an intelligible legal standard.

2. What is the objective of the challenged law?

3. Is the objective an "important government objective", the test Chief Justice Lamer utilized in Re Provincial Court Judges, [1997] 3 S.C.R. 3, 110. In the RJR – MacDonald Inc. v. Canada, [1995] 3 S.C.R. 199, 268, Justice La Forest asked if the "objective the limit is designed to achieve [is] ... of sufficient importance to warrant overriding the constitutionally protected right or freedom". The Oakes test, [1986] 1 S.C.R. 103, 138-39 dealt with the issue this way:

> [T]he objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": R. v. Big M Drug Mart Ltd. .... The standard must be high enough in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain section 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

See Thomson Newspapers Co. v. Canada, [1998] 1 S.C.R. 877, 948 & Libman v. Quebec, [1997] 3 S.C.R. 569, 597.

4. What means were selected to promote the objective of the law?

5. Whose interests are affected, either positively or negatively, by the legislative means? Chief Justice Dickson in Oakes, [1986] 1 S.C.R. 103, 139 observed that "courts will be required to balance the interests of society with those of individuals and groups".

6. Are the means "rationally connected to the objective"? The Queen v. Oakes, [1986] 1 S.C.R. 103, 139. More recently, Chief Justice Lamer in

Re Provincial Court Judges, [1997] 3 S.C.R. 3, 110 stated that the "party seeking to uphold the impugned state action must demonstrate a rational connection between the objective and the means chosen". Justice Iacobucci in RJR – MacDonald Inc. v. Canada, [1995] 1 S.C.R. 199, 352 stated that "[r]ational connection is to be established upon a civil standard, through reason, logic or simply common sense". Justice McLachlin, as she then was, in the RJR – MacDonald Inc. case, [1995] 3 S.C.R. 199, 328 & 333 reminded readers that section 1 emphasizes the "process of reason", but was quick to point out that this process does not "deny intuition its role". She also wrote that "[d]ischarge of the civil standard does not require scientific demonstration; the balance of probabilities may be established by the application of common sense to what is known, even though what is known may be deficient from a scientific point of view". See Sauvé v. Canada, [2000] 2 F.C. 117, 163 (C.A. 1999) ("a court should be willing to find causal connection between legislation and its intended benefits on the basis of reason, deduction, or inference"). This approach is consistent with the Supreme Court of Canada's judgments in Irwin Toy Ltd. v. Quebec, [1989] 1 S.C.R. 927, 994, The Queen v. Butler, [1992] 1 S.C.R. 452, 503 and Thomson Newspapers Co. v. Canada, [1998] 1 S.C.R. 877, 952-53 recognizing the need for judicial deference to legislative decisions for which there is a reasonable basis even though there is competing social science evidence. See also The Queen v. Butler, [1992] 1 S.C.R. 452, 504 (Parliament entitled to respond to reasoned apprehension of harm).

7. Do the means impair a constitutional freedom in a "minimal" manner? Justice McLachlin explained this feature of section 1 in RJR – MacDonald Inc. v. Canada, [1995] 3 S.C.R. 199, 342-43 which was approved by the full court in Libman v. Quebec, [1997] 3 S.C.R. 569, 605:

> [T]he government must show that the measures at issue impair the right of free expression as little as reasonably possible in order to achieve the legislative objective. The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement .... On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail.

The full court in Libman v. Quebec, [1997] 3. S.C.R. 569, 605 affirmed this standard, as did Justice Bastarache, for the majority in Thomson Newspapers Co., [1998] 1 S.C.R. 877, 965. But Parliament is not required to adopt the "absolutely least intrusive means". The Queen v. Swain, [1991] 1 S.C.R. 933, 983. See also The Queen v. Laba, [1994] 3 S.C.R. 965, 1009.

8. Is the deleterious impact of the law on those whose rights or freedoms are infringed greater than the ameliorative values associated with the contested law? See The Queen v. Oakes, [1986] 1 S.C.R. 103, 140. Chief Justice Lamer explained this aspect of the proportionality analysis in Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835, 889: "[T]here must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, and there must be a proportionality between the deleterious and the salutary effects of the measures". See also Thomson Newspapers Co. v. Canada, [1998] 1 S.C.R. 877, 967.

6. The Supreme Court of Canada has consistently followed this ordered and analytical approach to Charter problems and, in The Queen v. Big M. Drug Mart Ltd., [1985] 1 S.C.R. 295,

353 & 360-62, specifically rejected reversing the order of the analysis. It has recognized the inherent value in identifying the right questions and posing them in the correct order. In so doing, the court starkly isolates the value judgments which the Charter requires legislators to make in this branch of constitutional law. Professor Lederman emphasized the critical importance of this approach in division-of-powers cases, in his leading essay "The Concurrent Operation of Federal and Provincial Laws in Canada" (W. Lederman, Continuing Canadian Constitutional Dilemmas: Essays on the Constitutional History, Public Law and Federal System of Canada 279 (1981)):

> At this point one may well ask: why all the emphasis on the analytical logic of classification that characterizes the present essay, if in the end logic alone is indecisive? The answer is that such analytical reasoning is necessary to prepare the way for and reveal the need of the value judgments that are in the end decisive. Good analytical jurisprudence isolates issues of form and reveals issues of substance in their true colours. If you can frame the right questions and put them in the right order, you are half way to the answers. In other words, by proper questions and analysis, the issues requiring value decisions are rendered specific and brought into focus one by one in particular terms, so that ordinary mortals of limited wisdom and moral insight can cope with them.

Charter and division of power cases are alike in the sense that good analytical jurisprudence contributes to sound and defensible judgments.

2. The Court's 1993 Decision in Sauvé v. Canada Resolved Most Section 1 Questions Regarding the Constitutionality of Laws Disenfranchising Prisoners

7. There is no reason to believe that the Supreme Court of Canada did not adhere to this logical format in Sauvé v. Canada, [1993] 2 S.C.R. 438 [hereinafter Sauvé No. 1]. It follows that when the court determined that section 51(e) of the Act failed to meet the "minimal impairment component of the test" ([1993] 2 S.C.R. at 439-40) it must have concluded that the challenged legislation contained a constitutional purpose and that disenfranchising prisoners was a rational means of accomplishing the designated constitutional purpose. More specifically, Supreme

Court practice in the application of section 1 of the Charter, together with the court's decision in Sauvé No. 1, compels the following conclusions:

1. Section 51(e) of the Act is a law which limits the right to vote guaranteed in section 3 of the Charter.

2. Section 51(e) of the Act was not passed for an unconstitutional purpose.

3. Parliament passed section 51(e) to promote respect for the rule of the law, enhance civic responsibility or provide for criminal sanction, objectives recognized in the lower court decisions.

4. The objectives identified in (3) constitute important government objectives. The salutary effect of the ban on prisoner voting is apparent and has been demonstrated by Canada.

5. There is a rational connection between the stated objectives and the limitation on the right to vote during periods of incarceration.

3. The Question Sauvé No. 1 Left Unresolved

8. The question which Sauvé No. 1 left unresolved is the value judgment inextricably linked with deciding whether Parliament overlooked "a significantly less intrusive and equally effective measure". This is question 7 in paragraph 5 of the factum.

9. But what about question 8 in paragraph 5, the one requiring a determination whether the challenged law does more harm than good? Did Sauvé No. 1 address that issue? The better view is that the Supreme Court of Canada in Sauvé No. 1 did by implication opine that a law which disenfranchises prisoners in a "minimal" manner does provide sufficient benefit to society to outweigh the harm represented by the disenfranchisement of a defined class of prisoners. Had the court intended to express no opinion on the point, surely it would have said so. Courts engaged in constitutional adjudication often observe that a determination already made relieves them of the obligation to resolve another related question.

10. If this reading of Sauvé No. 1 is correct, the only question this appeal raises is whether An Act to amend the Canada Elections Act, S.C. 1993, c. 19, s. 23(2) represents a legislative means which falls within a set of reasonable legislative solutions that are not overbroad. The court must not ask if Parliament has selected a means which is the best way to limit the right in question. That question is appropriately left with the legislature under the Constitution of Canada. Instead, the court must simply ask, as it did in Libman v. Quebec, [1997] 3 S.C.R. 569, 605, whether the "law falls within a range of reasonable alternatives", or whether there was "a significantly less intrusive and equally effective measure" which Parliament declined to implement.

11. Justice Wetston in Sauvé v. Canada, 132 D.L.R. 4th 136, 163 (Fed. Ct. Tr. Div. 1995) did ask himself the last question recorded in Libman v. Quebec and on that basis rejected the legislative models advanced by the plaintiffs. But he concluded that Parliament, whom he acknowledged "must have some latitude to choose alternatives" (132 D.L.R. 4th at 163), should have granted sentencing judges the power to disenfranchise convicted persons. He adjudged that judicial determination "would ... be a significantly less intrusive, and equally effective means of infringing a citizen's democratic right to vote". 132 D.L.R. 4th at 165.

12. It is unclear why Justice Wetston believed his own legislative preference would be "significantly less intrusive" than the Parliamentary decision to disenfranchise those receiving a sentence of two years or more. He could not have known what individual judges may do with this never before exercised jurisdiction. It may be that judges would routinely disenfranchise any person sentenced to serve a sentence of imprisonment or any sentence of imprisonment that was not very short. If this happened, how could such a legislative model be described as abridging the section 3 Charter right to vote in a "significantly less intrusive manner". The point is a simple one – Justice Wetston has done nothing more than allocate to the judiciary responsibility for a decision which Parliament has the constitutional mandate to make.

13. Justice Wetston may have assumed that the legislative model he preferred would result in fewer prisoners losing the right to vote than if the bright line test Parliament favoured were in

place. He did not articulate this assumption. If Justice Wetston did make this assumption and if this assumption proved to be correct, one could safely conclude that Justice Wetston's preference would have allowed more prisoners to vote than Parliament's challenged law and provided some justification for his conclusion that judge-based disenfranchisement would be a "significantly less intrusive" measure. But this scenario only addresses one of the two criteria which must be met before Parliament's decision to disenfranchise prisoners serving a prison sentence of two years or more may be rendered ineffective by a declaration of constitutional validity. The Supreme Court of Canada has adjudged that the availability of another option which is both significantly less intrusive of a Charter right or freedom and equally effective in achieving an important government objective may strip a Parliamentary choice of its constitutional status. Justice Wetston failed to explain how the exercise of sentencing powers by judges would be equally effective as Parliament's bright line test in promoting civic responsibility and respect for the rule of law and enhancing the general purposes of the criminal sanction. Indeed, Justice Wetston appears not to have even considered this issue. The following sentence from his judgment suggests that he concluded judicial discretion would be just as effective as section 51(e) of the Act in infringing section 3 of the Charter: "This process would, in my opinion, be a significantly less intrusive, and equally effective, means of infringing a citizen's democratic right to vote". 132 D.L.R. 4th 136, 165. Needless to say, this is not how the test is supposed to be applied. Parliament's goal was not to infringe a citizen's democratic right to vote, but to enhance respect for that right and the importance of the rule of law.

14. Justice Wetston should have afforded Parliament more respect than he did. The orientation displayed by Justice Linden in the following passage from his judgment in Sauvé v. Canada, [2000] F.C. 117, 177-78 is consistent with the current state of section 1 Charter jurisprudence:

> [T]he Trial Judge himself noted that the legislative history reveals that Parliament, in tailoring this law, considered and rejected judge-imposed disenfranchisement ... .
>
> ...

> That Parliament considered and rejected that option should be a signal to the courts that it was acting neither arbitrarily nor in haste. In my respectful view, Parliament need not examine the finest details of each and every option open to them in order to warrant deference. Nor must Parliament choose the absolutely least intrusive means of achieving a legislative goal, particularly where one objective of the law is to loudly denounce serious criminal behaviour. Before coming to this conclusion, Parliament expressly considered the Lortie Commission recommendation that prisoners serving a sentence of ten years or more be disenfranchised, following which it considered and rejected a motion to enact the disenfranchisement on sentences of five years or more, as well as a motion to repeal the disenfranchisement entirely. ... All of these options were weighed and rejected. It cannot be said in this case that Parliament acted arbitrarily, or that Parliament insufficiently considered the matter, or that it chose an unreasonable solution to this difficult social problem.

See also [2000] F.C. at 185 & 189.

B. The Supreme Court of Canada's Decision in Sauvé No. 1 Striking Down the Old Federal Law Denying All Prisoners the Right to Vote Was Made with Knowledge of the New Federal Law

15. The Supreme Court of Canada's oral decision in Sauvé No. 1 given on May 27, 1993 striking down a part of the Act settled a conflict in the case law on the validity of the longstanding ban on prisoners voting in a federal election. Three courts had earlier dismissed challenges to the federal legislation and as many superior courts granted the orders of invalidity sought by prisoners. The Manitoba Court of Appeal (Badger v. Canada, 55 D.L.R. 4th 177 (1988)), the Ontario High Court of Justice (Sauvé v. Canada, 53 D.L.R. 4th 595 (1988)) and the British Columbia Supreme Court (Jolivet v. Canada, 1 D.L.R. 4th 604 (1983)) characterized the federal ban as a valid exercise of federal jurisdiction consistent with the Charter. The Federal Court of Appeal (Belczowski v. Canada, 90 D.L.R. 4th 330 (1992)), the Federal Court - Trial Division (Belczowski v. Canada, [1991] 3 F.C. 151) and the Ontario Court of Appeal (Sauvé v. Canada, 89 D.L.R. 4th 644 (1992)) came to the opposite conclusion.

16. The Supreme Court of Canada dealt with Sauvé No. 1 May 27, 1993 without issuing written reasons. This economy of judicial analysis, coupled with the fact that the new federal

law limiting prisoner voting came into effect on May 6, 1993, tends to support the conclusion that the new law (An Act to amend the Canada Elections Act, S.C. 1993, c. 19, s. 23(2)) did not offend the court's Charter sensitivity at the time. Had the court thought the 1993 balance chosen by Parliament was not correct, it could have said so eight years ago or expressed in a general way any reservations the court may have had about the validity of denying any group of prisoners the right to vote. If the right to vote was being notoriously limited in an unconstitutional manner, surely it is extremely unlikely that the court would have failed to give guidance to Parliament so that legislators could immediately correct any defects in the Act. The Alberta Court of Appeal adopted this course in Byatt v. Alberta, 158 D.L.R. 4th 644, 650 (1998). Justice Côté, after declaring Alberta's existing Election Act ban on prisoner voting unconstitutional on account of Sauvé No. 1, stated that the appeal court should "not make the Alberta legislature play a game of Twenty Questions, having to guess whether the constitutional problem is curable, and if so, how".

17. There is another reason one would reasonably have expected the Supreme Court of Canada to have commented on the validity of An Act to amend the Canada Election's Act, S.C. 1993, c.19, s. 23(2) had it any serious reservations about its constitutionality. A ban on prisoner voting has been a feature of Canadian electoral laws for a very long time. The Alberta Report of the MLA Committee Making Recommendations on Restrictions on Prisoner Voting in the Alberta Election Act to the Minister of Justice entitled "Promoting Responsible Citizenship" submitted on November 16, 1998 [hereinafter the Alberta Report] pointed out at page 8 of Part Two that, "[t]he prohibition against prisoner voting in federal statutes may be traced from its current form ... back to [The Franchise Act, 1898, S.C. 1898, c.14]. Section 6(4) of the 1898 Act denied the vote in a federal election to '[a]ny person who, at the time of an election, is a prisoner in a jail or a prisoner undergoing punishment for a criminal offence'". The Alberta Report also noted at page 7 of part two that

> The Constitution Act, 1791, 31 Geo.III, c.31, s. XXIII, the enactment which established Upper Canada and Lower Canada, provided that "no Person shall be capable of voting at any Election of a member to serve in such Assembly, in either of the said Provinces ... who shall have been

> attainted for Treason or Felony in any Court of Law within any of his Majesty's Dominions ... ." This norm continued in force after the passage of The Union Act, 1840, 3 & 4 Vict., c. 35, s. XXVII.

For other historical references see Sauvé v. Canada, [2000] 2 F.C. 117, 151-52 (C.A. 1999).

18. Parliament and Canadians deserved early notice of a fundamental shift in the judicial approach to the constitutionality of limitations on prisoner voting if one was to occur. That no such notice was given allows one to conclude that Sauvé No. 1 signalled no dramatic changes to Canada's legal landscape. Justice Linden developed this theme in Sauvé v. Canada, [2000] 2 F.C. 117, 175 (C.A. 1999): "[In Sauvé No. 1] the Supreme Court of Canada had an opportunity to state that Parliament could not disenfranchise prisoners. It did not do so, choosing only to state that the former legislation was too broad. This left Parliament the option of enacting narrower legislation".

C. In Byatt v. Alberta the Court of Appeal of Alberta Accepted the Notion That the Constitutional Right to Vote May Be Limited

19. Prisoners have, on a number of occasions, contested the validity of provincial laws depriving them of the right to vote in provincial elections. They have done this both before and after the Supreme Court of Canada decision in Sauvé No. 1. See Driskell v. Manitoba, [1999] M.J. No. 352 (Q.B.) (disenfranchisement of prisoners serving a sentence of more than five years declared unconstitutional); Byatt v. Alberta, 158 D.L.R. 4th 644 (Alta. C.A. 1998) (prisoners serving more than very short sentences do not have a constitutional right to vote); Byatt v. Alberta, 47 Alta. L.R. 3d 385 (Q.B. 1997) (applied Sauvé No. 1 and declared complete ban on prisoner voting unconstitutional); Grondin v. Ontario, 65 O.R. 2d 427 (H.C.J. 1988) (a comprehensive ban on prisoner voting in the Ontario Election Act, 1984 was unconstitutional; Badger v. Manitoba, 32 D.L.R. 4th 310 (Man. C.A. 1986) (no order made allowing inmates to vote in upcoming provincial election); Badger v. Manitoba, 30 D.L.R. 4th 108 (Man. Q.B. 1986) (intimated that prisoners serving sentences "for grave breaches of the criminal law" may not have a constitutional right to vote); Reynolds v. British Columbia, 11 D.L.R. 4th 380 (B.C.C.A. 1984) (no assertion that prisoners have a constitutional right to vote); Reynolds v. British

Columbia, 32 C.R. 3d 274 (B.C.S.C. 1982) (prisoners do not have a constitutional right to vote);. For a detailed discussion of these cases see Part Two of the Alberta Report 22-41.

20. In Byatt v. Alberta, 47 Alta. L.R. 3d 285 (Q.B. 1997) the plaintiffs attacked the total ban on prisoner voting in Alberta's Election Act, R.S.A. 1980, c. E-2, s. 41(d).

21. Justice McKenzie declared Alberta's prisoner voting ban unconstitutional, concluding that the Supreme Court of Canada's Sauvé No. 1 decision compelled this result

22. Alberta appealed. A panel of the Court of Appeal of Alberta unanimously agreed with Justice McKenzie that Sauvé No. 1 was controlling. 158 D.L.R. 4th 644 (1998). Justice Côté, with whom Chief Justice Fraser concurred, stated that he "cannot see any real distinction between the wording of the two disqualification sections, federal and provincial" (158 D.L.R. 4th at 648) and could not "distinguish the Sauvé case" (158 D.L.R. 4th at 649). Justice Conrad agreed that Sauvé No. 1 "cannot be distinguished". 158 D.L.R. 4th at 664. For this reason, the Court of Appeal dismissed Alberta's appeal.

23. Had Chief Justice Fraser and Justice Côté been content to say nothing more, the Byatt case would not merit further mention. But they were not willing to play such a passive and unhelpful role. Instead, Justice Côté (and Chief Justice Fraser) expressed the opinion that "not all bans on inmate voting would be unconstitutional" and suggested that the overbreadth of the Alberta legislation would be capable of "easy amendment". 158 D.L.R. 4th at 650.

24. Justice Côté suggested (158 D.L.R. 4th at 654) that Alberta would be able to defend a ban on prisoner voting that did not include persons who were awaiting sentencing (158 D.L.R. 4th at 651), were imprisoned for refusal or failure to pay a fine (158 D.L.R. 4th at 652) or were "serving very short sentences." (158 D.L.R. 4th at 653-54). This view is comparable to that expressed by Justice Scollin in Badger v. Manitoba, 30 D.L.R. 4th 108, 114 (Man. Q.B. 1986), a case dealing with the constitutionality of the prisoner voting ban in section 31(d) of Manitoba's Elections Act.

25. Justice Côté was content to let the Legislative Assembly of Alberta decide "where to draw the line" because "[d]ebates in Court about how many hairs made a beard are rarely

profitable" and a "mere quibble about a precise number, is the very place for the Courts to accord elbow room to Legislatures under s. 1".. 158 D.L.R. 4th at 653. This view harmonizes nicely with Justice La Forest's willingness, expressed in Harvey v. New Brunswick, [1996] 2 S.C.R. 876, 905 & 906, to give the legislature some rope when it decides the appropriate duration of a period that a dishonest politician is ineligible to run for office.

26. Justice Côté disagreed with many of the opinions expressed by judges who had struck down limits on prisoner voting. For this and other reasons, it is helpful to summarize here the important features of his opinion:

1. Justice Côté did not characterize Alberta's goals in banning prisoner voting as merely symbolic. 158 D.L.R. 4th at 654. He believed that a law "[m]andating a bar on voting strongly deters, generally and specifically" (158 D.L.R. 4th at 658), as did the Supreme Court of Canada in Harvey v. New Brunswick, [1996] 2 S.C.R. 876, 90). He said this: "Canada survives and works only because the vast majority of residents of Canada support the law and the values which it reflects. So they voluntarily obey the law. That is not symbolic. That is a stark necessity." 158 D.L.R. 4th at 654. Justice Côté also regarded symbolism as an important factor in our society. He said this: "[W]hen interpreting the Charter, it is inappropriate to denigrate social aims and objectives as merely symbolic. Still less should one thus denigrate respect for the rule of law." 158 D.L.R. 4th at 656. He believed that the Supreme Court of Canada's decision in Harvey v. New Brunswick, [1996] 2 S.C.R. 876 was consistent with his view of the law. 158 D.L.R. 4th at 658.

2. Justice Côté was convinced that Canadians share common values and realize that citizenship is a meaningful concept. His views on this subject are set out below:

> Some reported cases say that they do not see the force of the allegedly symbolic nature of citizenship and in turn respect for the rule of law. They suggest that therefore the people of Alberta or Canada would not see it either. Again, I must disagree. ... Members of the Canadian public know that the law (including the Charter) protects their own lives, health, liberties, and property. They are not blasé on the subject, and rarely forget the intimate connection.

158 D.L.R. 4th at 657.

10 3. Justice Côté recognized that legislators need "some elbow room" to solve their problems. 158 D.L.R. 4th at 659. Supreme Court of Canada decisions in Saskatchewan Electoral Boundaries Reference, [1991] 2 S.C.R. 158 and Harvey v. New Brunswick, [1996] 2 S.C.R. 876 lead him to this opinion.

4. Justice Côté did not agree with the Federal Court of Appeal's statement in Belczowski v. The Queen, 90 D.L.R. 4th 330, 336 (1992) that the state was the "singular antagonist" in prisoner voting litigation. 158 D.L.R. 4th at 660-61. His reasons for holding the opposite view are set forth below:

> So long as there are elections, the government will always be chosen by election, whether or not prisoners (or any other group) vote. That was so even in the days when only men with property could vote. It would be so, even if we let every resident over 12 vote, without exception. The government would still be as much the creature of the voters in any of those scenarios. ... The government's interests are not at stake.
>
> Instead, the contest of competing interests is between those who can vote, and those who cannot vote but want to. Adding one new person to the voters' rolls dilutes the vote of every existing voter. ...
>
> [W]hen we speak of reconciling competing interests under s. 1 of the Charter, the competing interests here are serving prisoners on one side, and all other citizens on the other. In

> this litigation, the Legislature and Crown speak for the latter group.

158 D.L.R. 4th at 660-61.

5. Justice Côté, like Justice McLachlin in the Saskatchewan Electoral Boundaries Reference, [1991] 2 S.C.R. 158, 181, 185 & 187-88, was mindful of the need not to overlook practical problems. He put it this way: "The Charter cannot make cucumbers out of moonbeams". 158 D.L.R. 4th at 662. Where, he asked, will prisoners vote? Will they vote in the constituency within which the jail is located? Or will they vote in the constituencies where they resided before they went to jail? If prisoners have the right to vote, do they have the right to participate in the electoral process? Does involvement in the electoral process entitle a prisoner to attend a political meeting outside prison? 158 D.L.R. 4th at 663.

6. Justice Côté disagreed with those who dismissed the importance of taking into account laws of other free and democratic countries. His opinion is recorded below:

> I cannot omit one striking fact. The great majority of other countries studied bar at least longer-term prisoners from voting. That includes the most respected free and democratic countries. Indeed, many other jurisdictions have harsher restrictions which disqualify from voting more types of convicts and for longer periods. Some ban voting for life. But Alberta restores the franchise the day the prisoners stop sleeping in jail at night for any reason.

158 D.L.R. 4th at 663. See also RJR-MacDonald Inc. v. Canada, [1995] 3 S.C.R. 199, 308-09 (practices of other democratic nations referred to as "of great significance"); Saskatchewan Electoral Boundaries Reference, [1991] 2 S.C.R. 158, 186 (referred with approval to the experience of other Commonwealth countries); Harvey v. New Brunswick, [1996] 2

S.C.R. 876, 914 (McLachlin, J. referred to the practices of the legislative assemblies of the United Kingdom, Australia and New Zealand).

D. Parliament Has Carefully Considered Which Prisoners May Vote in Federal Elections

27. Parliament responded to the litigation which led to Sauvé No. 1 by passing An Act to amend the Canada Elections Act, S.C. 1993, c. 19, s. 23(2). The new version of section 51(e) of the Act allowed more prisoners to vote in a federal election than the repealed version. Now, as a rule of thumb, prisoners not in a penitentiary may vote in a federal election. See Canada Elections Act, S.C. 2000, c. C-9, s. 4 for the current law.

28. Parliament has made a choice to limit the vote of prisoners. It would be inappropriate for this court to substitute its view, as Justice Côté said in Byatt, on "where to draw the line". This is in part because parliamentarians have the skills and resources needed to understand the constitutional issues a ban on prisoner voting raises. They are in the best position to evaluate the response of Canadians to the salutary effects of the ban. Parliament should be vested with the responsibility to make decisions which will have a substantial impact on how the legislative branch operates. And such decisions should be respected by the courts unless the choice of Parliament is clearly constitutionally wrong. The Supreme Court of Canada's judgments in Harvey v. New Brunswick, [1996] 2 S.C.R. 876, 906 and the Saskatchewan Electoral Boundaries Reference, [1991] 2 S.C.R. 158 and the Alberta Court of Appeal's judgment in Byatt v. Alberta 158 D.L.R. 4th 644 (1998) support this assertion.

29. Section 1 of the Charter expressly directs the judiciary to consider whether any other values not recorded in the Charter supersede those proclaimed in the Charter. The Charter is not the sole repository of values Canadians cherish and protect, as Professor Lederman explained in this passage:

> Section 1 of the Charter in effect warns us that the accepted values and goals of a free and democratic society are not just those expressly declared in the Charter. The full range of values and goals of such a society is broader than the latter, so that constitutionally and legally, these other

> values and goals may well come into play by virtue of section 1 of the Charter.

"Democratic Parliaments, Independent Courts and the Canadian Charter of Rights and Freedoms", 11 Queen's L.J. 1, 24 (1985). See also Egan v. Canada, [1995] 2 S.C.R. 513, 535-38 (importance of marriage and family units recognized); Vriend v. Alberta, [1998] 1 S.C.R. 493, 563 ("rights and freedoms are not absolute").

30. The Constitution of Canada establishes a system of governance under which the legislative, executive and judicial branches each play critical roles. See Fraser v. Public Service Staff Relations Board, [1985] 2 S.C.R. 455, 469-70 ("There is in Canada a separation of powers among the branches of government - the legislative, the executive and the judiciary"); Harvey v. New Brunswick, [1996] 2 S.C.R. 876, 899. There are occasions when the legitimate exercise of power by more than one branch of government creates tension between two or more of the branches. If Parliament passes a law that reflects an assessment of interests that does not meet with universal approval and if a person with standing asks the judiciary to declare the work of the legislative branch unconstitutional the tension manifests itself in a legal proceeding. This happened before the Charter came into force and continues with more frequency given the additional limits the Charter imposes on the jurisdiction of legislators.

31. Justice Iacobucci discussed this tension which marks the relationship between the legislative and judicial branches in Vriend v. Alberta, [1998] 1 S.C.R. 493, 562-66. Parts of his discussion follow:

> [I]t seems that hardly a day goes by without some comment or criticism to the effect that under the Charter courts are wrongfully usurping the role of the legislatures. ...
>
> ... Simply put, [with the introduction of the Charter] each Canadian was given individual rights and freedoms which no government or legislature could take away. However, as rights and freedoms are not absolute, government and legislatures could justify the qualification or infringement of these constitutional rights under s. 1 .... Inevitably disputes over the meaning of the rights and their justification would have to be settled, and

> here the role of the judiciary enters to resolve these disputes. Many countries have assigned the important role of judicial review to their supreme or constitutional courts ... .
>
> ...
>
> So courts in their trustee or arbiter role must perforce scrutinize the work of the legislature and executive not in the name of the courts, but in the interests of the new social contract that was democratically chosen. ...
>
> Because the courts are independent from the executive and the legislature, litigants and citizens generally can rely on the courts to make reasoned and principled decisions according to the dictates of the constitution even though specific decisions may not be universally acclaimed. In carrying out their duties, courts are not to second-guess legislatures and the executives; they are not to make value judgments on what they regard as the proper policy choice; this is for the other branches. ... [R]espect by the court for the legislature and executive role is as important as ensuring that the other branches respect each others' role and the role of the courts.
>
> ...
>
> To my mind, a great value of judicial review and this dialogue among the branches is that each of the branches is made somewhat accountable to the other. The work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation ... . This dialogue between and accountability of each of the branches have the effect of enhancing the democratic process, not denying it. (emphasis added)

32. The Supreme Court of Canada has adopted the thesis that the Oakes analysis does not impose a single standard of review. Justice La Forest said as much in Harvey v. New Brunswick, [1996] 2 S.C.R. 876, 900. Writing for Justices Sopinka, Gonthier, Iacobucci and Major, he observed that the "Oakes methodology has been applied in a flexible manner". [1996] 2. S.C.R. at 900. Justice Linden in Sauvé v. Canada, [2000] 2 F.C. 117, 163 observed that the dominant lesson Oakes teaches is that this "application of the Oakes test is particularly sensitive to context".

33. A court may only select the appropriate standard of review if attention is paid to the characteristics of the legislative branch and the nature of the law under review. We do not argue that the same degree of deference is due all acts of Parliament. However, we do argue that Canadian courts should be extremely reluctant to substitute their views for those of legislators when a legislative decision subject to a Charter challenge engages some or all of the following criteria:

1. Legislators are in a better position than litigants and judges to compile information which is needed to make a sound decision about the governmental issues the challenged legislation presents. Justice La Forest put it well in The Queen v. Edwards Books and Arts Ltd., [1986] 2 S.C.R. 713, 795 when he observed that politicians are "in the business of government". Justice McLung in Vriend v. Alberta, [1996] 5 W.W.R. 617, 643 (Alta. C.A.) made a similar point in noting that "the legislature has the tools ... to make laws of general application".

2. Some Charter problems have dimensions which are so readily grasped and understood that legal training and experience are not needed to develop a legislative solution that is Charter compliant. In these situations, it is less likely that legal training and experience will produce a more rational decision than that arrived at by legislators. Judges should not be too quick to assume that the best interests of the community are served by their intervention. E.g. The Queen v. Goltz, [1991] 3 S.C.R. 485, 502 (legislators in most cases should be allowed to decide which conduct warrants criminalization and the appropriate sanction).

3. An issue raised by a Charter challenge may have a substantial impact on how the political (legislative and executive) branch of government operates. Those decision makers with day-to-day responsibility for the operation of a particular branch are in the best position to regulate the

affairs of that branch. Justice La Forest's opinion in Harvey v. New Brunswick, [1996] 2 S.C.R. 876, 906 exemplifies this theme:

> I can see no reason why this Court should interfere with the balancing engaged in by the Legislature. A degree of deference is especially appropriate in this case where the impugned legislative provisions are aimed at transgressing members of the New Brunswick Legislative Assembly. Surely the members of that body are in the best position to choose between available options when it comes to deterring other members from breaching the trust that exists between them, the electorate, and the House as a whole.

See also New Brunswick Broadcasting Co. v. Nova Scotia, [1993] 1 S.C.R. 319, 389 (each branch of government must "show proper deference for the legitimate sphere of activity of the other"); Dixon v. British Columbia, 59 D.L.R. 4th 247, 271 (B.C.S.C. 1989) ("courts ought not to interfere in the legislature's electoral map ... unless it appears that reasonable persons applying the appropriate principles ... could not have set the electoral boundaries as they exist"); Saskatchewan Electoral Boundaries Reference, [1991] 2 S.C.R. 158, 189 (referred with approval to Dixon); Turner v. Safley, 482 U.S. 78, 89 (1987) ("[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests"); McWhinney, "Forfeiture of Office on Conviction of an 'Infamous Crime'", 2 Can. Parl. Rev. 1, 6 (Spring 1989) ("courts should sensibly defer to the Legislative judgment [except] ... in case of allegedly abusive action").

4. Deference is appropriate where the legislators are promoting a fundamental objective, such as the rule of law, which is expressly referred to in the Charter. There can be no doubt in such cases that the legislative objective is of the highest governmental importance when it is mentioned

in the Constitution of Canada as a founding principle. See Egan v. Canada, [1995] 2 S.C.R. 513, 574 (courts must encourage legislative promotion of human rights). To this end, judges should accord legislators considerable leeway in selecting reasonable means. See Irwin Toy Ltd. v. Quebec, [1989] 1 S.C.R. 927, 983 & 989-90 (judges should not second guess reasonable legislative decisions); The Queen v. Edwards Books and Arts Ltd., [1986] 2 S.C.R. 713, 781-82 & 794-95 (judges should not substitute judicial opinions for reasonable legislative ones); Dixon v. British Columbia, 59 D.L.R. 4th 247, 271 (B.C.S.C. 1989) (judges should defer to reasonable decisions legislators make in pursuing "better government"); The Queen v. Goltz, [1991] 3 S.C.R. 485, 502 (courts should interfere with decisions made by Parliamentarians only in the clearest cases). See also Martin, "Balancing Individual Rights to Equality and Social Goals", 80 Can. B. Rev. 299, 348 (2001) ("[while] deference was at first invoked to protect vulnerable groups, its present application concerns primarily complex social legislation, the limits of judicial expertise, and the legitimacy of judicial review".)

E. The Determination of Justices Wetston and Linden That the Federal Ban on Prisoner Voting Promoted Pressing and Substantial Objectives and Contained Rational Means to Promote the Objectives Is Sound

34. Justice Wetston concluded that Parliament enacted An Act to amend the Canada Election Act, S.C. 1993, c. 19 s. 23(2) to enhance civic responsibility and respect for the rule of law and the general purposes of the criminal sanction. Sauvé v. Canada, 132 D.L.R. 4th 136, 144 & 151 (Fed. Ct. Tr. Div. 1995). Justice Linden, for the majority, reviewed the Parliamentary debate and expressed the opinion that "the federal government enacted this legislation both as an exercise of its criminal law power and as an exercise of its right to legislate about electoral law". [2000] 2 F.C. 117, 166.

35. The trial judge and Justice Linden held that the objectives they concluded accounted for the contested section qualified as pressing and substantial. 132 D.L.R. 4th at 153 & [2000] 2 F.C. at 167. Justice Wetston observed that "it is clear from the evidence in this trial that civic and moral responsibility are key components of our liberal democratic traditions" (132 D.L.R. 4th at 152) and Justice Linden developed a similar theme opining that "fostering civic responsibility and respect for the rule of law is important enough, in some cases, to warrant compromise of Charter rights" ([2000] 2 F.C. at 167).

36. Both the trial and appellate judge held common views on the next phase of the section 1 journey. The former's reasons for finding a rational connection between the legislative means and objectives is recorded in the following passage:

> It is reasonable to suggest that the provision sends a very strong message that certain forms of criminal behaviour are not acceptable in a society that is both free and democratic. I find the morally educative function of the law to be compelling. While this education may have little or no effect on the offender, it nevertheless sends a powerful message to society that good citizenship and serious crimes are inconsistent with liberal democratic principles.

132 D.L.R. 4th at 157-58. The next passage is an account of Justice Linden's thinking:

> I agree with the Trial Judge that the legislation is rationally connected to the government's first objective. While it can be argued that all legislative action is meant to foster civic responsibility and enhance respect for the rule of law, a government may infringe a Charter right in order to foster objectives which are broadly stated. An abstract governmental objective is not, in and of itself, irrational. Undue breadth, of course, may give rise to difficulty at other stages of the test, but the rationality of an objective cannot be undermined by its breadth alone.

[2000] 2 F.C. at 170.

37. That Canada led no scientific evidence to establish a causal link between disenfranchising prisoners and promoting responsible citizenship and sentencing objectives did not diminish the strength of Canada's case in the eyes of Justices Wetston and Linden. 132 D.L.R. 4th at 159-60

& [2000] 2 F.C. at 170-71. Chief Justice Fraser and Justice Côté expressed a similar common sense approach in Byatt v. Alberta, 158 D.L.R. 4th 644, 654 (Alta. C.A. 1998). See also Harvey v. New Brunswick, [1996] 2 S.C.R. 876, 906 (quaere whether conclusion that the five year disqualification allows cleansing of the electoral process "in the minds of the electorate" was based on evidence).

F. Justice Wetston Erred in Determining That Parliament Was Constitutionally Compelled to Adopt Other Means to Accomplish Its Goals

1. The Sentencing Model Is Not Less Invasive of the Right to Vote and Equally Effective in Promoting Responsible Citizenship As Is Legislative Means Incorporated in the Act

38. While Justices Wetston and Linden agreed that a legislative choice which a court adjudges is a reasonable way to accomplish an important governmental objective is immune from judicial intervention (132 D.L.R. 4th at 160 & [2000] 2 F.C. at 182-83), Justice Linden was unable to endorse his Federal Court colleague's opinion that Parliament had strayed from the constitutional path when it declined to incorporate into the Act the sentencing model Justice Wetston preferred ([2000] 2 F.C. at 176). Justice Linden was convinced that the trial judge erred when he concluded that the Charter compelled Parliament to select a model which did not appeal to the legislators. Justice Linden thought Justice Wetston failed to heed his own comment that "Parliament must have some latitude to choose alternatives". 132 D.L.R. 4th at 163.

39. The appeal judge explained the bases for his opinion in great detail. A summary follows:

> [T]his prohibition is a hybrid which possesses elements of the criminal sanction as well as elements of civil disability based on electoral law. While it is linked to the exercise of the criminal law power, the provision also pursues valid electoral goals. With respect, the Trial Judge impoverished the provision when he reasoned that it was merely a supplementary sentencing provision. Parliament, basing itself on electoral policy, is entitled to add civil consequences to the criminal sanction in subtle, multi-dimensional ways. This legislation is just that – a complex mixture of criminal and electoral law which creates a disqualification following criminal conviction, a type of measure that is not unknown to federal legislation. Parliament may pass the scrutiny of section 1 of the

> Charter by considering alternative means and choosing a law which "falls within a range of reasonable alternatives".

[2000] 2 F.C. at 182.

40. Justice Linden detailed the reasons he relied on to support his conclusion that the legislative model Parliament selected was one "within a range of reasonable alternatives". [2000] 2 F.C. at 176-82. The following is a summary of his views and, where appropriate, Justice Wetston's position on the same issue:

1. Under the Act, only the most serious offenders lose the vote. [2000] 2 F.C. at 176. Justice Wetston expressed a similar opinion: "The statistics do verify that the federal inmate population consists of individuals with long histories of involvement in serious criminal activities. Thus, these statistics appear to support Parliament's choice for selecting two years as the cut-off for the disqualification of individual offenders who have exhibited bad criminal conduct". 132 D.L.R. 4th at 163.

2. The Act disenfranchises only persons who are incarcerated. Those on parole or out of prison for other reasons may vote. [2000] 2 F.C. at 177 & 182. In Justice Linden's mind, the temporal nature of the incapacity was important. Justice Wetston, while aware of these features of the Act, did not appear to place the same weight on them as Justice Linden did. 132 D.L.R. 4th at 160.

3. Parliament "considered and rejected" the sentencing model. [2000] 2 F.C. at 177. Justice Wetston's scheme would be expensive to administer and may sanction inconsistent results attributable in part to the quality of the sentencing submissions of defence counsel. Justice Wetston's opinion suggests that he may take issue with Justice Linden's reading of the Parliamentary record: "The legislative history of s. 51(e) of the CEA displays virtually no consideration of a court-based process where

disqualification is considered as part of sentencing". 132 D.L.R. 4th at 163.

4. Parliament considered a number of alternative approaches with sufficient care that it "cannot be said ... that Parliament acted arbitrarily, or that Parliament insufficiently considered the matter, or that it considered an unreasonable solution to this difficult social problem". [2000] 2 F.C. at 178. Justice Wetston's review of the legislative history suggests that he would not take issue with Justice Linden's conclusion that Parliament considered a number of alternative laws and did not act in an arbitrary manner: "The House of Commons Debates reveal the differences of opinion expected when Parliamentarians are dealing with a knotty social policy question. A number of legislators were opposed to any type of disqualification; others were clearly in favour of a disqualification on the basis of the two-year cut-off; others favoured something in between". 132 D.L.R. 4th at 149.

5. Justice Linden was satisfied that the Supreme Court of Canada's judgment in Harvey v. New Brunswick, [1996] 2 S.C.R. 876, 905-06 buttressed his view. If the New Brunswick legislature had a constitutional right to ban a dishonest politician from running as a candidate for a fixed term, why could Parliament not select the term a hardened criminal would lose the vote? [2000] 2 F.C. at 178-80. The Harvey judgment was released on August 22, 1996, almost nine months after Justice Wetston filed his opinion on December 27, 1995. Obviously, Justice Wetston worked without the advantage of a critically important Supreme Court decision on a related electoral law concern.

6. Justice Linden believed that Justice Wetston mistakenly characterized the Act "as an exercise in sentencing only". [2000] 2 F.C. at 180. The appeal

judge opined that "Parliament enacted this law in pursuit of objectives which are not so one-dimensional". Id. He asserted that the trial judge overlooked the electoral dimension of the law. This is a fair reading of Justice Wetston's opinion. Needless to say, nothing in Justice Wetston's judgment suggests he would agree with this criticism of his judgment.

7. Justice Linden concluded that there was an adequate correlation between the length of sentence and the deprivation of the right to vote – the longer a prisoner's sentence, the more likely he or she would be disenfranchised. [2000] 2 F.C. at 181. He explained his thinking in these two sentences: "If offenders are incarcerated for only two years, they may not even actually be deprived of their vote, depending, of course, on the timing of any election. On the other hand, a person incarcerated for twenty years is likely to miss voting in several elections". Id. The trial judge, of course, realized that there was a relationship between the length of sentence and the number of federal elections which were likely to occur during the period of incarceration. 132 D.L.R. 4th at 160-61.

41. There is no doubt that Parliament could have constitutionally opted for the sentencing model Justice Wetston liked best. But Alberta contests Justice Wetston's determination that the Wetston approach represents a "significantly less intrusive" abridgment of prisoners' right to vote, which at the same time is an "equally effective measure" in promoting responsible citizenship. For the reasons set out in paragraphs 10 to 14 above, Justice Wetston misapplied the test Justice McLachlin introduced in RJR – MacDonald Inc. v. Canada, [1995] 3 S.C.R. 199, 342-43.

42. The difference of opinion which distinguishes the approach Parliament incorporated into the Act to amend the Canada Elections Act, S.C. 1993, c. 19, s. 23(2) and that of Justice Wetston expressed in Sauvé v. Canada, 132 D.L.R. 4th 136 (Fed. Ct. Tr. Div. 1995) often occur in political debate. Another example of clashing opinions emerges in the facta filed in this appeal.

For example, the appellant Sauvé appears to argue at page 31, paragraph 97 of his factum that impaired driving, driving while disqualified and theft under $5,000 are not serious offences. This argument does not reflect the Criminal Code penalties (up to five years in prison are provided for such crimes in section 253 and 255(1)(b) of the Criminal Code) and is out of touch with the values Parliamentarians share. It certainly conflicts with the views of the government of Alberta. It matters not, for constitutional purposes, who is right. What matters is who has been given the responsibility to set forth society's response to criminal activity. Under the Constitution, it is legislators. Canada's legislators must make the judgment calls on the desirability of legislation. Courts may not intervene just because its members may be convinced the challenged legislation is socially undesirable. They may only intervene where a legislative work product interferes with a Charter right in a manner which cannot be justified in a free and democratic society.

2. Justice Linden's Determination That the Benefits Associated with Limited Prisoner Disenfranchisement Exceed the Detriments Associated with Limited Prisoner Disenfranchisement Is Sound

43. Justice Linden catalogued the salutary and harmful effects associated with the limited ban on prisoner voting. He concluded that the benefits and detriments had an electoral and sanction dimensions and that the benefits were greater than the detriments. [2000] 2 F.C. at 183-92.

44. The harm triggered by the enforcement of the Act was self-evident. It was on the electoral dimension. A prisoner serving a sentence of two years or more would not be able to vote in a federal election that was held while he or she was in custody. [2000] 2 F.C. at 189. As one would expect, the judge labelled this deprivation as "serious". [2000] 2 F.C. at 190. But he also referred to two facts only those with a working knowledge of corrections would have. First, "75% of prisoners incarcerated in federal penitentiaries are serving sentences of 5 years or less". [2000] 2 F.C. at 190. This means that "[u]nder normal circumstances, these people will miss voting in only one election". Id. Second, the evidence revealed that the "total number of convictions for the sample of federal inmates was found to be, on average, 29.5 convictions". [2000] 2 F.C. at 190-91. This statistic suggested to Justice Linden that the Act "targets not only

serious criminals but repeat offenders". [2000] 2 F.C. at 191. Justice Linden regarded these statistics as mitigating factors. [2000] 2 F.C. at 190.

45. In Justice Linden's opinion, the "main salutary effect" was also on the electoral dimension. [2000] 2 F.C. at 185. He regarded it as an "important one". Id. In summary, the judge found that the Act denounces anti-social conduct and proclaims the paramountcy of the rule of law and the value of a system of government featuring representatives freely chosen by the people in a democratic election and an electorate aware of the importance of participating in the electoral process. The following extract from Justice Linden's decision records the text related to electoral considerations on which the summary just given is based:

> The main salutary effect of this legislation is a complex but important one. The legislation dramatically expresses the sense of societal values of the community in relation to serious criminal behaviour and the right to vote in our society. It is not merely symbolic. This legislation sends a message signalling Canadian values, for the effect that those people who are found guilty of the most serious crimes will, while separated, lose access to one of the levers of electoral power. This is an extremely important message, one which is not sent by incarceration alone. Incarceration alone signals a denunciation of the offender's anti-societal behaviour and indicates society's hope for rehabilitation through separation from the community. Incarceration by itself, however, leaves those convicted of serious crimes free to exercise all the levers of electoral power open to all law-abiding citizens. This maintains a political parity between those convicted of society's worst crimes and their victims. Disqualification from voting, however, signals a denunciation of the criminal's anti-societal behaviour and sends the message that those people convicted of causing the worst forms of indignity to others will be deprived of one aspect of the political equality of citizens – the right to vote. ...
>
> ...
>
> This legislation proclaims that values of civic responsibility are important to Canadians. The signal itself is an important benefit of the law. The signal itself is a double signal, a message about the community's view of crime and a repudiation of the indignity perpetrated on victims of crime. Where someone, by committing a serious crime evinces contempt for our basic social values, their right to vote may be properly suspended. Indeed, not to do so undermines our democratic values.

[2000] 2 F.C. at 185-86.

46. The sanction considerations may be easily related. First, Justice Linden held that "disenfranchisement is a meaningful sanction which is noticed by offenders". [2000] 2 F.C. at 188. Presumably, a criminal who realizes his or her criminal conduct has a range of detrimental consequences may be more likely to refrain from committing criminal acts in the future. Second, disenfranchisement may reduce the likelihood Parliament decides to increase sentences "to further denounce crime". [2000] 2 F.C. at 189. One must recall that Justice Linden treated these as less important features than the electoral ones.

47. Justice Linden adjudged that the benefits the community derived from positive consequences caused by the Act, on both the electoral and sanctions dimensions, exceeded the harm prisoners denied the right to vote under the Act endured. [2000] 2 F.C. at 192. The trial judge came to a contrary conclusion. While he and the appeal judge had the same understanding of the harm prisoners denied the right to vote experienced (132 D.L.R. 4th at 177 & [2000] 2 F.C. at 189), the two had sharply differing opinions on the benefits side. Justice Wetston was convinced that the "prisoner disqualification [law] is not well-known in Canadian society". 132 D.L.R. 4th at 172. See also 132 D.L.R. 4th at 164. He believed that the "public has a greater chance of being informed of the prisoner disenfranchisement through a court-imposed disqualification, rather than under the current scheme". 132 D.L.R. 4th at 164. There was no evidence that Canadian citizens thought prisoners could vote. Indeed, the evidence suggests just the opposite. 132 D.L.R. 4th at 147-149, 152 & 155-160. The trial judge came to this questionable conclusion after noting that the prisoner disqualification rule receives little mention in academic texts on sentencing or a 1982 publication of the federal government on the Charter. One should have a better basis for a finding that members of the community are not familiar with the law, especially one which has been in force in British North America since at least 1791. Furthermore, the evidence proffered by the appellants seems to contradict the notion that no one knows and no one cares. The appellants suggested that there was evidence to prove that the prisoner voting ban was enacted in response to popular pressure. See Factum of McCorrister

Appellants at pages 9-11 & 25. They cannot have it both ways. Either the public is aware of the ban or it is not. The public cannot exert pressure, if the public is not aware of the law.

48. Had Justice Wetston not concluded that there was a "pervasive lack of awareness of the provision" (132 D.L.R. 4th at 178), an extremely questionable finding, he may have modified his opinion about the positive consequences of the limited disenfranchisement of prisoners under the Act. It may be that the difference between Justices Linden and Wetston is attributable to the latter's belief that most Canadians were unaware of Canadian prisoner disenfranchisement rules.

49. Justice Wetston should have deferred to the legislative judgment, just as the Supreme Court of Canada did in Harvey v. New Brunswick, [1996] 2 S.C.R. 876, 907. The Alberta Court of Appeal's judgment in Byatt v. Alberta, 158 D.L.R. 4th 644, 653 (1998) and the Manitoba Court of Appeal's judgment in Badger v. Canada, 55 D.L.R. 4th 177,188 & 189-90 (1988) counsel judicial caution in this area. The fact that prisoners in most free and democratic nations do not have the right to vote indicates that Parliament's judgment is sound. As well, one should note that the Australian Constitutional Commission recently recommended that the Commonwealth of Australia Constitution Act be amended to allow federal, state and territorial lawmakers to disenfranchise serving prisoners. See paragraphs 64 to 69 of this factum for a more detailed account of the Australian experience.

G. Parliament Acted in a Manner Which Meets the Proportionality Test in the Charter

1. Electoral Laws in Free and Democratic Jurisdictions Merit Review

50. The best evidence that Parliament has limited prisoners' right to vote in a constitutional manner is the practice of many free and democratic jurisdictions disenfranchising persons convicted of criminal acts. While this reality does not prevent Canadian courts from declaring unconstitutional legislation which denies prisoners the right to vote, it must, at the very least, cause Canadian courts to proceed with the utmost caution when reviewing voter eligibility laws.

51. In Byatt v. Alberta, 158 D.L.R. 4th 644, 663 (C.A. 1998) Justice Côté took into account whether prisoners in other free and democratic countries had the right to vote:

> I cannot omit one striking fact. The great majority of other countries studied bar at least longer-term prisoners from voting. That includes the most respected free and democratic countries. Indeed, many other jurisdictions have harsher restrictions which disqualify from voting more types of convicts and for longer periods. Some ban voting for life. But Alberta restores the franchise the day the prisoner stops sleeping in jail at night for any reason.

52. Justice Scollin also favoured review of the practices in other free and democratic countries. In Badger v. Manitoba, 30 D.L.R. 4th 108, 113 (Q.B. 1986) he observed that "[m]any western democracies have accepted the principle of the culpable loss of civic capacity, even though no system is likely to survive an academic test or absolute internal logic or consistency". See The Queen v. Butler, [1992] 1 S.C.R. 452, 497 (significant that legislation prohibiting obscenity exists in most free and democratic societies) & August v. Electoral Commission, [1999] S.A.J. No. 16 at para. 31 (S. Africa Const. Ct.) ("[m]any open and democratic societies impose voting disabilities on some categories of prisoners".)

53. Not all judges share the enthusiasm exhibited by Justices Côté and Scollin for comparative law. Justice Wetston in Sauvé No. 2, 132 D.L.R. 136, 152 (Fed. Ct. Tr. Div. 1995) and Justice Strayer in Belczowski v. Canada, [1991] 3 F.C. 151, 170 (Tr. Div.) did not. The former was concerned that "it is difficult to draw any meaningful conclusions as to the reasons why prisoners are disenfranchised in some free and democratic societies, but not in others". The latter paid little attention to foreign jurisdictions because he had "no idea what objective these countries had in mind, if any, in adopting these provisions", although he did refer with approval to the laws in countries which reflected his views. [1991] 3 F.C. at 174.

54. The approach selected by Justices Côté and Scollin is to be preferred. One need not understand why other free and democratic nations deal with an issue the way they do before taking note of the solution they adopted. The condition that makes the comparison worthwhile is the fact that the nation whose practices are under scrutiny is free and democratic.

(a) Europe and the United Kingdom

55. Article 3 of Protocol No. I to the European Convention on Human Rights provides that the "Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature". On at least three occasions and in full view of this undertaking the European Human Rights Commission has considered and rejected claims that prisoners have a right to vote on account of Article 3.

56. In H. v. Netherlands, 33 Eur. Comm., H.R. 242 (1983) the Commission dismissed a complaint filed by a person who was sentenced to eighteen months imprisonment for draft evasion and as a result of Netherlands' Electoral Law was deprived of the right to vote for a period exceeding the duration of his sentence by three years. The Commission acknowledged that Article 3 recognizes the principle of universal suffrage but pointed out that the right to vote is not absolute and noted that "a large number of State Parties to the Convention have adopted legislation whereby the right to vote of a prisoner serving a term of imprisonment of a specific duration is suspended in certain cases, even beyond the duration of the sentence ... ." 33 Eur. Comm. at 245. See also X. v. Germany, App. No. 4984/71, at p. 28 (E.H.R.C. Oct. 5, 1972); X. v. Germany, App. No. 2728/66, at p. 38 (E.H.R.C. Oct. 6, 1967) ("it is generally recognized that certain limited groups of individuals may be disqualified from voting").

57. In the United Kingdom a person who is in a penal institution serving a sentence may not vote at any parliamentary election, including the European Assembly, or local government election. These rules are set out in the Representation of the Peoples Act, 1983, c. 2, s. 3 and the European Assembly Elections Act 1978, c. 10, Sch. 1, s. 2.

(b) United States of America

58. In the United States of America, state laws determine who is eligible to vote in state and federal elections. U.S. Const. Art. 1, § 2, cl. 1 (qualifications for electors of the House of Representatives); U.S. Const. amend. XVII (qualifications for electors of the Senate). The

Constitution of the United States of America allows a state to disenfranchise persons "for participation in rebellion or crime". U.S. Const. amend. XIV, § 2. This constitutional provision allowed the United States Supreme Court in Richardson v. Ramirez, 418 U.S. 24, 55 (1974) to uphold a California law denying the vote to "convicted felons who have completed their sentences and paroles."

59. It follows that state voting laws are of great importance in the United States. There is a chart in the Alberta Report at part two, page 85 recording the state voting rights of persons convicted of a crime.

60. Forty-eight of the fifty American states currently maintain some limitation on the right of prisoners to vote in state and federal elections. On November 7, 2000 Massachusetts voters approved a state constitutional amendment limiting prisoners' voting rights. Maine and Vermont are the only American jurisdictions which do not restrict prisoners or convicts from voting.

61. A majority of the states which deprive felons of the right to vote do so for the entirety of the conviction. It is only a handful of states (Hawaii, Illinois, Indiana, Michigan, Montana, New Hampshire, New York, North Dakota, Ohio, Oregon, Pennsylvania and South Dakota) which allow a convicted felon to vote once incarceration ends.

62. Some states only strip a felon of the vote if he or she has committed specified crimes. For example, Alaska and Georgia prohibit persons convicted of crimes of moral turpitude from voting.

63. A felon automatically regains the right to vote in most states upon completion of the sentence. In a few jurisdictions (Alabama, Florida, Iowa, Nebraska and Virginia), a felon must apply for a pardon.

(c) Australia

64. Most prisoners in Australia do not have the right to vote in federal or state elections.

65. The federal norm is set out in section 93(8)(b) the Commonwealth Electoral Act 1918. It denies the federal franchise to those persons "serving a sentence of five years or longer for an offence against the law of the Commonwealth or of a State or Territory" or who have been convicted of treason and treachery and have not been pardoned.

66. The Northern Territory (Electoral Act 1995, s. 28), Queensland (Electoral Act 1992, s. 64) and Victoria (Constitution Act 1975, s. 48) utilize the current federal standard.

67. The law in New South Wales, Tasmania and Western Australia is more restrictive than the federal law. In New South Wales a person cannot vote if serving a sentence of twelve months or greater for commission of a crime. Parliamentary Electorates and Election Act 1912, s. 21. The rule is almost identical in Western Australia, with one exception. A person who has been convicted of treason cannot vote. Electoral Act 1907, s. 18(c). Tasmania has the harshest rules. In Tasmania, no person "in prison under any conviction" may vote. Constitution Act 1934, s. 14(2).

68. South Australia allows prisoners to vote. Electoral Act 1985, s. 29.

69. It is instructive to note that the Australian Constitutional Commission in its 1988 Final Report recommended at pages 128-29 that the Commonwealth of Australia Constitution Act be amended to provide that the federal and state parliaments and the legislature of a Territory may make laws disqualifying from voting Australian citizens who have attained the age of eighteen years who "are undergoing imprisonment for an offence". The Constitutional Commission recognized at page 142 that opinion was "divided" on the wisdom of denying prisoners the vote. Its

> recommendation would, if adopted, permit a legislature to disqualify persons who are undergoing imprisonment for a criminal offence. We are not saying that such persons should be disqualified; merely that we think that legislatures should have power to disqualify on this ground if they think fit. Such a power would have been preserved under the Constitution Alteration (Democratic Elections) Bills of 1974, 1985 and 1987.

The Honourable E. G. Whitlam, A.C., Q.C., the Prime Minister of Australia from 1972 to 1975 and the leader of the Australian Labour Party from 1966 to 1977, was a member of this Commission.

(d) New Zealand

70. A prisoner in New Zealand is not qualified to vote if serving a sentence for a term of three years or more, preventative detention or life imprisonment. New Zealand Electoral Act, s. 80(1)(d).

(e) Provincial and Territorial Legislation

71. Some provincial election acts disenfranchise inmates serving sentences of imprisonment (The Election Act, 1996, S.S. 1996, c. E-6.01, s. 17; Election Act, R.S.N.B. 1973, c. E-3, s. 43(2)(e); Elections Act, R.S.N.S. 1989, c. 140, s. 29 & Elections Act, R.S.Y. 1986, c. 48, s. 5(d)) and some do not (Election Statute Law Amendment Act, S.O. 1998, c. 9, s. 13, Loi Electorale, L.R.Q. 1989, c. E-3.3; Elections Act, 1991, S.N. 1991, c. E-3.1 & Election Act, S.P.E.I. 1996, c. 12). Manitoba's Elections Amendment Act, S.M. 1998, c. 4, s. 21 disqualifies "[e]very inmate of a correctional facility serving a sentence of five years or more" from voting. The Manitoba Court of Queen's Bench in Driskell v. Manitoba, [1999] M.J. No. 352 declared this provision unconstitutional. Alberta's Election Amendment Act, 1998, S.A. 1998, c. 34, s. 5, passed in response to the opinion of the Court of Appeal of Alberta in Byatt v. Alberta, 158 D.L.R. 4th 644 (1998) denied the vote in provincial elections to prisoners serving a sentence of more than ten days. The Northwest Territories and Nunavut (Elections Act, R.S.N.W.T. 1988, c. E-2, s. 27(3)) follow the federal law and disqualify prisoners serving a sentence of two years or more.

72. The Legislative Assembly of Alberta passed the Election Amendment Act, 1998, S.A. 1998, c. 34 on December 7, 1998 and it received assent on December 9, 1998. This enactment was the culmination of a process which started with the Attorney General for Alberta requesting a committee of three members of the Legislative Assembly to consult Albertans and to recommend amendments to the inmate voting provisions in Alberta's Election Act (Alberta

Hansard 2024 (November 23, 1998)) and produced the Alberta Report and extensive legislative debate (Alberta Hansard 1943 (November 18, 1998); Alberta Hansard 1996-2001 (November 19, 1998); Alberta Hansard 2022-28 (November 23, 1998); Alberta Hansard 2262-64 (December 1, 1998) & Alberta Hansard 2337-39 (December 7, 1998)).

H. Serious Criminal Misconduct Has Always Disqualified Persons From Participating in the Legal Process

73. Parliament's decision to disenfranchise prisoners who are serving sentences attributable to the commission of criminal offences is in line with other prohibitions on participation in the law making process to which other law makers are subject. Both before and after the advent of the Charter, the courts have recognized the desirability of excluding law breakers from the legal process.

1. Limitation on Membership in Legislative Assemblies

74. As the Alberta Report noted at part two page 9, "[h]istorically in Canada and England, Parliament has expelled or replaced members who are convicted of serious crimes and imprisoned". See Beauchesne's Parliamentary Rules & Forms of the House of Commons of Canada 16 (6th ed. 1989) & 34 Halsbury's Laws of England para. 1026 (4th ed. reissue 1997). The Supreme Court of Canada's decision in Harvey v. New Brunswick, [1996] 2 S.C.R. 876 affirmed the constitutionality of a legislative decision to expel a member for illegal activity.

75. Section 750 of the Criminal Code of Canada, R.S.C. 1985, c. C-46 provides that serious criminal misconduct disqualifies an individual from serving as a legislator:

> (1) Where a person is convicted of an indictable offence for which the person is sentenced to imprisonment for two years or more and holds, at the time that person is convicted, an office under the Crown or other public employment, the office or employment forthwith becomes vacant.
>
> (2) A person to whom subsection (1) applies is, until undergoing the punishment imposed on the person or the punishment substituted therefor for the competent authority or receives a free pardon from Her Majesty, incapable of holding any office under the Crown or other public

employment, or of being elected or sitting or voting as a member of Parliament or of a legislature or of exercising any right to suffrage.

2. Limitations on Law Society Membership

76. Section 80 of Alberta's Legal Profession Act, S.A. 1990, c. L-9.1 authorizes the Law Society of Alberta to suspend the membership of a lawyer convicted of an indictable offence or sentenced to a term of imprisonment. See also Rule 4-40 of the Rules of the Law Society of British Columbia. These provisions recognize that those who seriously violate the law should not play a part in the legal process. Justice Stevenson made just this observation in Achtem v. Law Society of Alberta, 126 D.L.R. 3d 364, 373-74 (Alta. C.A. 1981): "[I]t may be thought to be unseemly to permit someone to practice law who has been found guilty of a serious violation of the law which he is bound to uphold. The legislature may have recognized the undesirability of permitting a serving prisoner the privilege of membership in the Law Society". See also Sychuk v. Law Society of Alberta, [1999] L.S.D.D. No. 15 (Law Society Alta. Hearing Committee) (convicted murderer's application for reinstatement "may compromise the public's respect for the law and the legal profession".)

3. Judges May be Removed for Criminal Misconduct

77. On June 7, 2001, in Therrien v. Quebec, [2001] S.C.J. No. 36, the Supreme Court upheld a process established in Quebec for the removal of a provincial court judge and approved the application of the process to a judge who failed to disclose a prior criminal conviction during the appointment process. Justice Gonthier, for the court, emphasized the critical role judges play in a democratic society committed to the rule of law: "The judge is the pillar of our entire justice system, and of the rights and freedoms that system is designed to promote and protect. Thus, to the public, judges not only swear by taking their oath to serve the ideals of Justice and Truth on which the rule of law in Canada and the foundations of our democracy are built, but they are asked to embody them". [2001] S.C.J. No. 36 at para. 109.

I. Equality Arguments

78. The Government of Alberta adopts the arguments of the Government of Canada regarding section 15 of the Charter and provides the following responses to certain of the appellants' arguments.

79. The McCorrister Appellants suggest at paragraph 4 that there is an "admitted relationship between impoverishment and crime". Alberta does not accept that there is a causal connection between poverty and crime. Nor does it understand that the Government of Canada made the admission suggested by the appellants.

80. In paragraph 7 of the Factum of McCorrister Appellants the theme is extended from poverty to race. The Government of Alberta strongly disagrees with the suggestion that race is tied to crime.

81. The arguments of the McCorrister Appellants may be summarized briefly. They suggest at paragraph 5 that the over representation of aboriginal peoples within the prison population reveals a sad and pressing social problem and, therefore, no other social problems may be addressed by the government until this over representation problem is addressed. This cannot be logical. If society cannot promote respect for the rule of law and civic responsibility while this problem exists, then logically neither can it promote respect for life through laws against murder and child abuse or respect for property through laws against theft.

82. The McCorrister Appellants take the definition of minority to its illogical extreme at paragraph 17 and in so doing deprive the word of any meaning. Prisoners are no more a minority for the purposes of the Charter than are murderers or rapists.

IV. Order Sought

83. These appeals should be dismissed and the decision of the Federal Court of Appeal to dismiss the actions of the plaintiffs should be confirmed.

Respectfully submitted

Fraser Milner Casgrain LLP

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Thomas W. Wakeling

Counsel for the Attorney General for Alberta
July 25, 2001

List of Authorities

Cases

Constitutions, Statutes and Conventions

Articles, Reports and Miscellaneous Material

Appendix A

Applicable Charter and Statutory Provisions

Sections 1, 3 and 52(l) of the Canadian Charter of Rights and Freedoms read as follows:

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

52(l) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Section 51 of the Canada Elections Act, R.S.C. 1985, c. E-2 as amended reads as follows:

51. The following persons are not qualified to vote at an election and shall not vote at an election:

(a) the Chief Electoral Officer;

(b) the Assistant Chief Electoral Officer;

(c) the returning officer for each electoral district during his term of office, except when there is an equality of votes on recount, as provided in this Act;

...

(e) every person who is imprisoned in a correctional institution serving a sentence of two years or more;

...

(g) every person who is disqualified from voting under any law relating to the disqualification of electors for corrupt or illegal practices.