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
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 Stony 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 Stony 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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PART I - STATEMENT OF FACTS

1. Aboriginal Legal Services of Toronto Inc. ("ALST") intervenes pursuant to an order of Justice LeBel on November 17, 2000.

2. ALST is a non-profit organization that serves Canada's largest urban Aboriginal community. It has extensive experience both with issues arising from discrimination faced by the involvement of Aboriginal people with the criminal justice system and issues relating to the ability of Aboriginal people to vote.

3. ALST relies on the Respondents' concession at paragraph 25 of their factum that s. 51(e) of the *Canada Elections Act* violates the right that all citizens have to vote in federal elections.

4. Section 51(e) denies prisoners serving two years or more the right to vote in federal elections. This includes the Appellants, Sheldon McCorrister who is an Aboriginal person and is the Chairman of the Inmate Welfare Committee in Stony Mountain Institution and Aaron Spence and Clair Woodhouse who are also Aboriginal people who have held elected positions with the Native Brotherhood Organization of Stony Mountain Institution. The Appellants Emile Bear and Randy Opoonechaw are also Aboriginal.

Statement of Claim, App. Rec., Vol. I, p. 10.

5. Because of the trial judge's judgment holding that s. 51(e) was an unjustified violation of s. 3 of the *Charter*, all prisoners voted in the 1997 federal election with no notorious increase in crime or decrease in respect for the rule of law.

PART II - POINTS IN ISSUE

6. ALST will argue the following:

a) That the issues arising in this appeal should be decided in the context of how Aboriginal people have suffered and continue to suffer inequality and discrimination in **both** the criminal justice and electoral systems of Canada, in particular, the dramatic

overrepresentation of Aboriginal people among prisoners and the discriminatory history of disenfranchisement and selective enfranchisement of Aboriginal people.

b) that the courts below erred by not holding that s .51(e) of the *Canada Elections Act* violates the equality rights of prisoners and the equality rights of Aboriginal prisoners under s. 15 of the *Charter*.

c) that the violations of ss. 3 and 15 of the *Charter* have not been justified under s.1.

PART III - ARGUMENT

A. The Centrality of Equality to this Case

7. Although the s. 15 equality issue was properly pled and argued, the courts below focussed on the s. 3 issue in their judgments. ALST respectfully submits that equality issues should be at the core of this case. Discrimination and inequality have been central to the denial of the right to vote in the history of this country. Those who have been denied the vote in Canada - women, Asian people, and Aboriginal people, to name a few - were denied the vote on the basis of stereotypes that denied their equal worth and dignity as persons and citizens of Canada. The story of universal enfranchisement in Canada is closely tied to a growing respect for equality rights. The denial of the vote and attempts by governments to justify the denial should be viewed through a lens of equality rights and concerns.

R.H. Bartlett, "Citizens Minus: Indians and the Right to Vote" (1980) 44 Sask. L. Rev. 163 at 164.

B. The Context of Discrimination Against Aboriginal People

1. Discrimination and the Selective Enfranchisement of Aboriginal People in Canada

8. The right to vote was originally denied to those Aboriginal people defined as "Indian" under legislation as they were not considered to be "civilized" and, therefore, not fit to exercise the franchise.

R.H. Bartlett, "Citizens Minus: Indians and the Right to Vote", *supra,* at 163-166 and 194.

9. Prior to Confederation, the *Gradual Civilization Act* was passed in 1857. Its premise was that by eventually removing all legal distinctions between Indians and non-Indians, through the process of enfranchisement, it would be possible in time to absorb and assimilate Indian people fully into colonial society. Enfranchisement, which meant freedom

from the protected status associated with being an Indian, was seen as a privilege and there was a penalty of six months imprisonment for any Indian falsely representing himself as enfranchised. Only Indian men who were over 21, able to read and write either English or French, reasonably well educated, free of debt, and of good moral character as determined by a commission of non-Indian examiners could seek voluntary enfranchisement.

Report of the Royal Commission on Aboriginal Peoples, vol. 1 (Ottawa: Royal Commission on Aboriginal Peoples, 1996) at 271 (hereinafter "RCAP").

Gradual Civilization Act, S.C. 1857, c. 26.

10. Two years after Confederation, the *Gradual Enfranchisement Act* marked the formal adoption by Parliament of the goal of assimilation. The idea that Aboriginal people were not fit to vote, unless certain standards were met and recognized through enfranchisement, reflects invidious stereotypes that were and continue to this day to be destructive of the human dignity of Aboriginal people.

RCAP, *supra,* at 274 and 287.

Gradual Enfranchisement Act, S.C. 1869, c. 6.

11. The Manitoba Aboriginal Justice Inquiry observed, with respect to the disenfranchisement of Aboriginal people, that "the removal of a fundamental right of citizenship was a profound blow to Aboriginal membership in the Canadian community."

Report of the Aboriginal Justice Inquiry of Manitoba, vol. 1 (Winnipeg: Queens Printer, 1991) at 78.

12. Aboriginal people continued to face barriers with respect to the right to vote, as the majority of Aboriginal people living on reserves could not vote in federal elections **until 1960**, when the federal franchise was finally extended, without qualification, to all Indians.

An Act to amend the Canada Elections Act, S.C. 1960, c. 7 s. 1.

13. The demeaning stereotypes that lie behind Aboriginal disenfranchisement are dramatically revealed by the history of selective enfranchisement of Aboriginal people in Canada. Aboriginal people, at times, only gained the franchise by effectively renouncing their identity as Aboriginal people or by proving to white society their worthiness by, for

example, becoming members of certain professions, such as doctors or lawyers, or serving in the armed forces.

RCAP, *supra,* at 279 and 287.

14. Despite a modern move towards universal suffrage, Aboriginal people continue to face obstacles in voting and participating in the political process. Only recently, as a result of this Honourable Court's decision in *Corbiere v. Canada* did off-reserve band members gain the ability to vote in their band's election.

Sauve v. Canada (1992), 7 O.R. (3d) 481 at 487 (C.A.).

Corbiere v. Canada (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203.

15. In 1993, Parliament accepted lower court decisions that removed denials of the franchise from judges and the mentally disabled. It responded differently, however, to this Court's decision in *Sauve* by taking the vote away from prisoners serving terms of two years or more. That group of prisoners, which includes a non-trivial and disproportionate number of Aboriginal people, are now about the only citizens in Canada that are officially excluded from the universal enfranchisement which should be the bedrock of a free and democratic society that respects the equal worth and dignity of all its citizens.

Sauve v. Canada (Attorney General), [1993] 2 S.C.R. 438.

2. Discrimination and the Imprisonment of Aboriginal People in Canada

16. The Aboriginal Justice Inquiry of Manitoba observed that, prior to World War II, Aboriginal prison populations were no greater than Aboriginal representation in the general population, a just state of affairs that the federal government has committed itself to return. By 1965, 22% of the inmates in Stony Mountain Institution were Aboriginal; by 1984, 33 % were Aboriginal; and by 1989, 41% were Aboriginal. The trial record reveals that as of April 30, 1995, 47% of the 602 inmates at Stony Mountain were Aboriginal. In 1996, Aboriginal people made up 10.6% of the population of Manitoba. The Manitoba Aboriginal Justice Inquiry found that this stark, unjust and increasing over-representation of Aboriginal people in prison populations was the result of systemic discrimination affecting all parts of the criminal justice system.

Report of the Aboriginal Justice Inquiry of Manitoba, supra, at 101.

App. Rec. Vol. IV, p. 701.

RCAP, *supra,* at 22.

17. These and many similar findings by the Royal Commission on Aboriginal Peoples and other inquiries about the causes and consequences of the drastic over-representation of Aboriginal peoples have been recognized and affirmed by this Honourable Court.

R. v. Williams, [1998] 1 S.C.R. 1128 at 1158.

R. v. Gladue [1999] 1 S.C.R. 688 at 720-723.

Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide. A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Supply and Services Canada, 1996) at 26-53.

18. Despite the Court's recognition in *R. v. Gladue* of the "sad and pressing problem" of Aboriginal over-representation and attempts to provide some remedies for it, as well as the federal government's commitment to eliminate Aboriginal overrepresentation "within a generation", Aboriginal overrepresentation in prison is increasing, not decreasing. In 1995, 13% of the penitentiary population in Canada was Aboriginal. The most recent official statistics on the matter reveal that 17% of the population in penitentiaries is Aboriginal. This is the very group that is denied the franchise under the impugned legislation and suggests that legislation affecting only this group is suspect because it may be based on stereotypes about Aboriginal people and may deny them substantive equality.

R. v. Gladue, supra, at 722.

House of Commons Debates (30 January 2001) (Speech From The Throne) online: <http://www.parl.gc.ca./37/1/parlbus/chbus/house/debates/002_2001.../han002_1420-e.ht, at 11 of 13.
App. Rec., Vol. IV, pp. 696-704.

Statistics Canada, *Adult Correctional Services in Canada, 1999-2000* (Ottawa: Canadian Centre for Justice Statistics) at 46-47.

Corbiere v. Canada, supra, at 216-217.

C. The Equality Rights Violations

1. Section 51(e) of the *Canada Elections Act* Violates the Equality Rights of Prisoners

19. In determining the validity of a s. 15 claim in this case what must be shown is that: i) the law imposes differential treatment between the claimants (prisoners in federal institutions) and others (non-prisoners) in either purpose or effect; and

ii) that federal prisoners are an analogous group and that the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee.

Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497 at 548-549.

20. With respect to i) the law in question clearly imposes differential treatment in that all citizens other than prisoners in federal institutions have the right to vote in federal elections.

21. With regard to ii) the contextual factors that influence the determination of whether s. 15(1) has been violated include: pre-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the group. The relevant issue is not so much the immutability of the personal characteristic, but whether it is a suspect ground associated with stereotypical and discriminatory decision-making. ALST submits that the courts that have held that being a prisoner is not an analogous ground have relied on a restrictive and non-purposive definition of a personal characteristic that does not pay sufficient attention to stereotypes about prisoners or the constructive immutability of being a prisoner.

Law v. Canada, supra, at 549-550.

Corbiere v. Canada, supra, at 216-217.

22. Prisoners are a quintessential "discrete and insular minority." It is submitted that one of the hallmarks of a discrete and insular minority is a group that is subject to stereotypes and has no opportunity to address any prejudicially motivated legislation by way of political action due to, for example, denial of the vote. As will be discussed, prisoners are in fact victims of negative stereotypes. The impact of these stereotypes is magnified because if and when these stereotypes are used to craft legislation, prisoners cannot use the ballot box as a response - their views and wishes need not be accommodated politically.

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143at 152.

23. Prisoners are a prototype of those who are "lacking in political power" and "vulnerable to having their interests overlooked and their rights to equal concern and respect violated". They are vulnerable "to becoming a disadvantaged group" on the basis of their status as prisoners.

Andrews v. Law Society of British Columbia, supra, at 152.

Law v. Canada, supra, at 519-520.

24. If non-citizens are a discrete and insular minority because they do not have the right to vote, prisoners are no less so. The analogy between non-citizens and prisoners is strengthened by the fact that neither condition is permanent. Non-citizenship is hardly an unchangeable or immutable characteristic as people change their citizenship regularly. Nevertheless, the fact that a person can change their citizenship does not mean that they cannot be subject to discrimination. Although the status of being imprisoned will end in a determinate time for those not sentenced to life imprisonment, ALST submits that it is a characteristic that is constructively immutable in a sense that engages the purposes of s. 15 of the *Charter*. Prisoners cannot walk away from their status as prisoners.

Andrews v. Law Society of British Columbia, supra, at 152.

Corbiere v. Canada, supra, at 219-220.

25. ALST submits that the Court of Appeal erred by holding that because being a prisoner "for all but a few prisoners is a status that is meant to change over time" means that the status could not be constructively immutable.

Reasons for Judgment, App. Rec., Vol. XI, pp. 2147-2155.

Corbiere v. Canada, supra, at 219.

26. It is foolish to pretend that Canadian society does not hold stereotypical negative views of prisoners. The reality of these stereotypes can be seen in the fact that many human rights codes in Canada prohibit discrimination against a person on the basis of prior criminal convictions. While one need not have served time in prison to have a criminal record, at the same time, all people who have served time in prison will have criminal convictions.

W.S. Tarnopolsky and W.F. Pentney, *Discrimination and the Law*, (Toronto: Carswell, 2001) at 9-70 - 9-79.

27. The Federal Court of Appeal itself has recognized the extent to which prisoners are subject to stereotypes. In *Belczowski v. Canada*, writing for the court, Hugesson J.A. stated:

> ...the true objective of paragraph 51(e) may be to satisfy a widely held stereotype of the prisoner as a no-good almost sub-human form of life to which all rights should be indiscriminately denied.

Belczowski v. Canada, [1992] 2 F.C.440 (C.A.) at 459.

28. If the position of the Federal Court of Appeal below were accepted - that prisoners as a group have no recourse to section 15 of the *Charter* - it would mean than any degradation and humiliation short of cruel and unusual punishment could be imposed on prisoners based on the most vile and pernicious prejudices and stereotypes and prisoners would have no recourse by way of either the *Charter* or the ballot box.

Reasons for Judgment, App. Rec., Vol. XI, pp. 2150-2155

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29. The fact that Canadians may be increasingly intolerant of crime does not mean that they can do whatever they wish to prisoners with impunity based on stereotypes and prejudice directed at those who are incarcerated. The groups most in need of *Charter* protection are those who are the most vulnerable. Despite widespread stereotypes, prisoners truly are a vulnerable group.

30. Section 51(e) discriminates against prisoners because it assumes simply on the basis of that difficult to change status that the person is unworthy or incompetent to vote. As the trial judge recognized in this case, this presumption of unworthiness is not necessary
20 because it is possible to devise a scheme in which sentencing judges address their mind to whether particular offenders are worthy of voting. In short, there is presently no "individualized assessment" that would avoid stereotypes about presumed group characteristics based on the constructively immutable status of being a prisoner.

Winko v. British Columbia (Forensic Psychiatric Institute), [1999] 2 S.C.R. 625.

2. Section 51(e) of the *Canada Elections Act* Violates the Equality Rights of Aboriginal Prisoners

31. It has long been recognized in our equality rights jurisprudence that a law that imposes similar treatment on differently situated people may nevertheless result in
30 inequality and discrimination. Express legislative distinctions are not required, especially when adverse effects discrimination is claimed.

Andrews v. Law Society of British Columbia, supra, at 164-169.

Eaton v. Brant County Board of Education, [1997] 1 S.C.R. 241 at 272-273.

Law v. Canada, supra, at 522.

32. The fact that s .51(e) disqualifies all prisoners imprisoned for two years or more does not mean that the law does not violate the s.15 rights of Aboriginal prisoners. Even if contrary to ALST's earlier submissions, s. 51(e) was perfectly constitutional as applied to non-Aboriginal persons, s. 51(e) could still be struck down on the basis of its adverse effects on Aboriginal prisoners.

> The fact that the impugned legislation may achieve a valid social purpose for one group of individuals cannot function to deny an equality claim where the effects of the legislation upon another person or group conflict with the purpose of the s.15(1) guarantee.

Law v. Canada, supra, at 538.

33. ALST submits that the trial judge erred in holding that s. 51(e) does not violate the rights of Aboriginal prisoners on the basis that "all disenfranchised inmates suffer from this burden to the same degree." The trial judge's requirement that greater burdens be imposed on Aboriginal inmates required discriminatory intent and prevented a finding of effects-based discrimination.

App. Rec., Vol. XI, at 2085.

34. This Court has stressed that in evaluating equality rights claims, courts should attempt, insofar as possible, to adopt the perspective of the individual and group claiming that their equality rights have been violated and to examine the alleged inequality in the context of the history of the applicant's treatment.

> All of that individual's or that group's traits, history, and circumstances must be considered in evaluating whether a reasonable person in circumstances similar to those of the claimant would find that the legislation which imposes differential treatment has the effect of demeaning his or her dignity.

Law v. Canada, supra, at 533.

35. The effects of s. 51(e) on Aboriginal prisoners cannot be fully understood without appreciating both the history of disenfranchisement and selective enfranchisement of

Aboriginal people outlined above. Striking down restrictions on voting that disproportionately disenfranchise Aboriginal prisoners would accord with the purposes of s.15, in particular, its goal:

> to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society

Eaton v. Brant County Board of Education, supra, at 272.

Law v. Canada, supra, at 527.

10 36. Aboriginal people in Canada have been told in a variety of ways that they are not worthy to vote. The ancestors of many Aboriginal inmates would have been subject to selective enfranchisement laws that blatantly were based on the racist and discriminatory notion that only "good Indians" - those in the professions, those who chose to renounce their identity and ties to Bands - were good enough to vote.

37. The late date of 1960 for the unqualified enfranchisement of Aboriginal people in Canada is particularly shameful and is one of the most relevant contextual factors for this Court to bear in mind in deciding this appeal.

20 38. Voting as much as anything in our free and democratic society is "'a basic aspect of full membership in Canadian society'" with even selective disenfranchisement of a group constituting "'a complete non-recognition of a particular group'"

Law v. Canada, supra, at 540.

39. ALST submits that the effects of s. 51(e) on Aboriginal people also cannot be fully understood without appreciating the history of discrimination in the criminal justice system against Aboriginal people. Systemic discrimination resulting in gross over-representation of Aboriginal people in Canada's penitentiaries means that the seemingly neutral rule that those in penitentiaries cannot vote in federal elections catches a disproportionate number of
30 Aboriginal people. As Professor Jackson stated:

> For Aboriginal men and women who find themselves disproportionately represented in Canadian prisons, the reality is that the right to vote which was denied to their parents and grandparents for 70 years on the basis of their race is denied to them

today on the basis of the systemic discrimination with which Aboriginal people are confronted in the criminal justice system.

App. Rec., Vol. V, p. 881.

40. The issue is whether the equal dignity of Aboriginal prisoners is denied by the impugned law, not as the Court of Appeal suggested, whether Aboriginal overrepresentation in prison has reached such a magnitude that it "adversely affects the political expression of aboriginal peoples generally... "

App. Rec., Vol. XI, p. 2156.

41. Section 51(e) fails to take account of the already disadvantaged position of Aboriginal people within Canadian society and in particular their exposure to widely documented and accepted systemic discrimination in the criminal justice system. By using the criminal justice system as a proxy for denial of the right to vote, s. 51(e) compounds the discrimination suffered by Aboriginal people in the criminal justice system in a manner that draws on the history of invidious discrimination caused by the disenfranchisement and selective enfranchisement of Aboriginal people.

42. This Honourable Court has been careful not to preclude the possibility of recognizing the equality claims of those subject to double or overlapping discrimination.

Law v. Canada, supra, at 524-548.

43. It has recognized that some subsets of Aboriginal people may constitute an analogous ground of discrimination. Aboriginal prisoners are no less vulnerable to discrimination than off-reserve band members or Aboriginal people without status under the *Indian Act*. The status of being an Aboriginal prisoner is as immutable and as vulnerable to discrimination as the status of being an off-reserve band member.

Corbiere v. Canada, supra, at 221.

Lovelace v. Ontario, [2000] 1 S.C.R. 950.

44. ALST submits that Aboriginal prisoners constitute an analogous ground of discrimination that should not be ignored in assessing whether s. 51(e) violates the equality rights of Aboriginal people and prisoners. This Honourable Court has recognized that for Aboriginal people "the internment milieu is often culturally inappropriate and regrettably discrimination towards them is so often rampant in penal institutions."

R. v. Gladue, supra, at 724-725.

3. General Considerations Affecting All Equality Claims

45. In *Law*, this Court indicated that a law with an ameliorative purpose, one that seeks to assist members of groups less advantaged than the applicants in a particular case, will escape a finding that it violates s. 15(1). Such a finding is not possible in this case as denying prisoners the vote does not assist any less advantaged group in society; it simply degrades prisoners.

Law v. Canada, supra, at 539.

46. ALST also respectfully urges this Honourable Court to require the state to discharge its burden of justifying any violation of equality rights under s.1 of the *Charter*. Equality rights claimants, who are often disadvantaged, should not be expected to bear the onerous burden of demonstrating that the legal discrimination they have suffered is not justified. Rather, the state must discharge its burden of justification under s.1 of the *Charter*.

Miron v. Trudel, [1995] 2 S.C.R. 418 at 485-486.

D. The Failure to Justify Discriminatory Violations of the Right to Vote

1. General Considerations Affecting the Section 1 *Charter* Analysis

47. ALST submits that neither a s. 15 nor a s. 3 violation should necessarily receive a more deferential form of s.1 review. If anything, a violation of a fundamental democratic right that is interpreted in a contextual fashion sensitive to Canadian traditions or the equality rights of a vulnerable minority should receive a stricter form of s.1 scrutiny. As Justice Wilson stated:

> Given that s. 15 is designed to protect those groups who suffer social, political and legal disadvantage in our society, the burden resting on the government to justify the type of discrimination against such groups is appropriately an onerous one.

Andrews v. Law Society of British Columbia, supra, at 154.

48. ALST also submits that the majority of the Federal Court of Appeal erred in holding the legislation to a more deferential form of scrutiny simply because s. 51(e) can be seen as a response to this Court's previous decision in *Sauve*. The concept of dialogue between courts and legislatures would be meaningless if anything that the legislature said in response to the Court's judgment would automatically survive subsequent judicial review.

Sauve v. Canada (Attorney General), supra.

49. ALST also submits that the majority of the Federal Court of Appeal erred when it applied a defacto political question doctrine on the basis that "it is Parliament's role to maintain and enhance the integrity of the electoral process. Such considerations are by definition political and therefore warrant deference." This Court's intervention in a number of cases involving electoral policy demonstrates that there is no such rule of deference or abdication of the responsibilities of judicial review.

Reasons for Judgment, App. Rec., Vol. XI, at 2122.

Libman v. Quebec, [1997] 3 S.C.R. 569.

Thomson Newspapers v. Canada, [1998] 1 S.C.R. 877.

Operation Dismantle v. Canada, [1985] 1 S.C.R. 441.

50. This case is best conceived as one in which the state acts as the singular antagonist of those individuals and vulnerable minorities denied the vote. The vote is not some scarce resource that must be allocated among competing groups. Victims of crime and those opposed to prisoners having the vote retain their vote even if prisoners have the vote.

Irwin Toy v. Quebec, [1989] 1 S.C.R. 927.

51. This is not a case where the government is acting on the basis of inconclusive social science to protect a vulnerable group. It is a case in which it can be said with certainty that the rights of vulnerable individuals and minorities will be completely denied by statutory disenfranchisement that applies only during the duration of their imprisonment and where the trial judge found "a complete lack of empirical evidence" supporting the benefits that the Respondents claim is achieved by prisoner disenfranchisement.

App. Rec., Vol. XI, at 2061

Contra R. v. Keegstra, [1990] 3 S.C.R. 697.

Contra R. v. Butler, [1992] 1 S.C.R. 452.

Contra R. v. Sharpe, [2001] 1 S.C.R. 45.

52. ALST submits that the clear and total denial of voting rights and the denial of the rights of individuals and groups most vulnerable to discrimination in the majoritarian legislative process are crucial contextual factors that should inform every stage of the justification analysis under s.1 of the *Charter*.

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2. The Government's Objectives for Limiting the Right are Not Pressing and Substantial

53. ALST submits that this is one of the rare cases where the objectives advanced by the government are not pressing and substantial enough to justify a violation of *Charter* rights.

R. v. Big M Drug Mart, [1985] 1 S.C.R. 295 at 351-353 and 361-362.

Vriend v. Alberta, [1998] 1 S.C.R. 493 at 556-557.

54. The objectives advanced by the Respondents - the idea that disenfranchisement may supplement the criminal sanction and the enhancement of civic responsibility and the rule of
20 law - may be valid explanations for the politics behind the enactment of s. 51(e), but they cannot constitute pressing and substantial objectives important enough to justify the violation of the *Charter*. The Respondents' submissions, at paragraph 3 of their factum, that "Canada has never embraced lawlessness as a tradition to be tolerated or respected" and at paragraph 43 that "it is surely always a pressing and substantial objective to foster and enhance civic responsibility and law-abidingness in a democracy" reveal the emptiness behind the government's objectives once the political rhetoric about allowing Clifford Olson to vote has been rightly discarded.

> An 'objective', being a goal or a purpose to be achieved, is a very different concept than an 'explanation' which makes plain that which is not immediately obvious. In
30 my opinion, the above statements fall into the latter category and hence are of little help.

Vriend v. Alberta, supra, at 556-557.

55. Objectives that really amount to objections to the very idea that all citizens are given the right to vote in s. 3 of the *Charter* do not amount to pressing and substantial objectives. As in *R. v. Big M Drug Mart*, the acceptability of the government's objectives under s .1 of the *Charter* is a question of law and the Court of Appeal erred by holding that the trial judge's conclusions that the government's objectives were pressing and substantial were "findings of adjudicative facts...Hence, much deference is paid..."

R. v. Big M Drug Mart, supra, at 352-353

Reasons for Judgment, App. Rec., Vol. XI, at 2111.

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56. This is not a case about the appropriate blend of penal philosophies. There is absolutely no evidence to support the Court of Appeal's suggestion that disenfranchisement of prisoners is being used as an alternative to imprisonment. Section 51(e) is not a conditional sentence.

App. Rec., Vol. XI, at 2143.

57. This is a not a case about a relational approach to competing *Charter* rights or competing rights that may not have been fully considered by this Honourable Court previously in *Sauve*. It is also significant that the impugned legislation does not have a
20 preamble that indicates new considerations that influenced Parliament to enact the legislation.

Sauve v. Canada (Attorney General), supra.

Contra R. v. Mills, [1999] 3 S.C.R. 668.

Contra R. v. Darrach, [2000] 2 S.C.R. 443.

58. Another reason for not accepting the Respondents' claimed objectives is that they are so vague and amorphous as to make subsequent s. 1 analysis redundant. As explanations, as opposed to goals, the ideas of affirming law-abidingness and supplementing the criminal sanction are self-fulfilling or, as the Respondents assert at paragraph 71 of their
30 factum, "fully met" merely by judicial acceptance of them as sufficiently important to justify a *Charter* violation and without further exploration of whether the violation is a rational and proportionate way to advance such objectives. The majority of the Court of Appeal also

erred by applying such a tautological or circular approach that short circuits well established s. 1 analysis when it stated that to conclude that the measures were not proportional "would be to challenge Parliament's right to utilize the law to enhance civic responsibility and to establish consequences which express Canada's abhorrence of serious crime."

App. Rec., Vol. XI, p.2147.

59. The Court should not accept such vague and inherently self-fulfilling objectives that makes s. 1 analysis a one stage process that simply depends on the objectives of the impugned legislation.

> The question is not whether the measure is popular or accords with current public opinion polls. The question is rather whether it can be justified by application of the processes of reason...Context is essential in determining legislative objective and proportionality, but it cannot be carried to the extreme of treating the challenged law as a unique socio-economic phenomenon, of which Parliament is deemed the best judge. This would undercut the obligation on Parliament to justify the limitation it places on Charter rights.

RJR-MacDonald Inc. v. Canada (A.G.), [1995] 3 S.C.R. 199 at 328 and 331.

Belczowski v. Canada, supra, at 456.

3. Section 51(e) Not Rationally Connected to the Government's Objectives

60. Although deference may usually be in order in determining whether a violation of a right is rationally connected to the government's objectives, ALST submits that no rational connection has been demonstrated, despite the Respondents' attempts to bolster their case with much expert evidence.

61. It defies logic to see the denial of the vote as rationally connected to the deterrence of crime. People who commit crimes are to some extent already alienated from the community. If the prospect of conviction and imprisonment does not deter them, the prospect of perhaps losing the vote should they be sentenced to two years imprisonment or more and should there happen to be a federal election while they are in prison will not deter them. As Arbour J.A. (as she then was) has stated:

> If the objective of s. 51(e) is to punish offenders, that objective is missed altogether by a provision that punishes inmates and that is therefore both over- and under-inclusive.

Sauve v. Canada, (1992) (Ont. C.A.), *supra*, at 488.

62. The most recent statistics regarding those imprisoned in federal penitentiaries indicates that over 46% are sentenced to between 2 and 3 years in prison and 68% to between 2 and 4 years in prison. Given the rules regarding parole eligibility and statutory release, it will only be a matter of happenstance if some of these individuals are in prison when and if any election is held. The complete randomness of this process militates against any coherent or rational message being sent to the majority of people sentenced to terms of imprisonment in a federal prison.

Statistics Canada, *Adult Correctional Services in Canada, 1999-2000* (Ottawa: Canadian Centre for Justice Statistics) at 43.

63. It also defies logic to conclude that the denial of the vote to prisoners is rationally connected to the enhancement of civic responsibility and respect for the rule of law when most people who commit crimes are not apprehended and sentenced to two years of imprisonment. Furthermore, as found by the trial judge, most offenders committed to federal institutions between 1989 and 1990 would not even have been disenfranchised in the 1993 federal election. Even taken on its terms, the impugned legislation is self-defeating because it does not actually deny those it deems unworthy the right to vote in any particular election. The mixed messages sent by the legislation are increased by the fact that all prisoners can vote in provincial elections in five provinces and that all those in provincial institutions can vote in federal elections. At best, society is sending very conflicting messages about the connection between being a prisoner and one's worthiness to vote.

App. Rec., Vol. II, pp. 257-309, Vol. XI at 2065.

64. Section 51(e) applies regardless of the particular crime committed and is overbroad compared to restrictions on voting that are tied to the commission of abuses against our democratic electoral system or tailored restrictions on running for or holding public offices if sentenced to 2 years imprisonment or more.

Harvey v. New Brunswick, [1996] 2 S.C.R. 896.

Criminal Code, R.S.C. 1985, c. C-46, as amended, s. 750.

4. Section 51(e) Not a Proportionate or Least Restrictive Alternative to Advance the Respondents' Objectives

65. ALST submits that the Respondents have not discharged their onus under s. 1 to explain why the less restrictive alternative of denying the vote to those subject to 10 years imprisonment, as recommended by the Lortie Royal Commission on Electoral Reform, would not be equally as effective in advancing the objectives that it claims to advance.

RJR-MacDonald v. Canada, supra, at 310.

App. Rec., Vol. I, p. 160.

66. The proper question at this stage of the s. 1 analysis is not so much whether the Court should second guess the government's cutoff at 2, as opposed to 5, as opposed to10 years, but whether the government has established that the less restrictive alternatives - ones that would have been obvious to the government when it enacted the 2 year cut-off - would not as effectively advance the government's rather vague objectives.

5. The Overall Imbalance Between the Clear Harms of Discriminatory Denials of the Vote Compared to the Elusive Benefits of Impugned Denials of the Vote

67. The overall balance stage of the s. 1 analysis, as reformulated by this Honourable Court in *Dagenais v. Canadian Broadcast Company*, is not redundant and has indeed assumed increased important in recent jurisprudence.

Dagenais v. Canadian Broadcast Company, [1994] 3 S.C.R. 835 at 887-888.

> The third stage of the proportionality analysis performs a fundamentally distinct role...[it] provides an opportunity to assess, in light of the practical and contextual details which are elucidated in the first and second stages, whether the benefits which accrue from the limitation are proportional to its deleterious effects as measured by the values underlying the Charter....the focus at that stage is more in determining whether there is a significant harm which the government is addressing. Comparing the harm which may be prevented with the harm of the infringement itself is a balancing which can most effectively take place within the context of the proportionality analysis.

Thomson Newspapers Co. v. Canada (A.G.), supra, at 968-970.

68. ALST submits that s. 51(e) clearly fails to achieve the overall balance that must be established by the government to justify a violation of a *Charter* right. The Respondents are unable to point to tangible benefits that will be achieved by s. 51(e) in the form of increased deterrence of crime, public safety and the enhancement of civic responsibility and the rule of law. Given that some prisoners can vote and the objectives behind the legislation are so vague and amorphous, it is not clear what harm the Respondents are trying to prevent by taking the vote away from some prisoners. At the very least, the gravity of any harm has not been established by the Respondents, as required under s.1 of the *Charter*.

69. Although many experts were commissioned to produce lengthy reports and were subsequently called by the Respondents, at the end of the day, they were unable to produce tangible evidence, even given due allowance for the imprecision of the social sciences. Typical was the testimony of Dr. Lipset, who conceded that Canada's distinctive and communitarian political culture could be served by both the enfranchisement and the disenfranchisement of prisoners, and Dr. Pangle, who as the trial judge found was under the erroneous impression that "most prisoners vote in the United States, and claimed that this is one factor that has led to social disintegration and a loss of a sense of community." In fact, massive and often permanent disenfranchisement exists in the United States without any noticeable decrease in crime or enhancement of civic responsibility and that country's Constitution, unlike Canada' s, specifically contemplates prisoner disenfranchisement.

App. Rec., Vol. VI, p.1115 and Vol. XI, p. 2071.

70. As the trial judge concluded "the salutary effects upon which the defendants rely are tenuous in the face of the denial of the democratic right to vote, and are insufficient to meet the civil standard of proof." The harm of the impugned legislation is not abstract. The fundamental right to vote will be completely lost by those prisoners who happen to be caught by the law when an election is called.

App. Rec., Vol. XI, p. 2082.

71. Balanced against these tenuous benefits of s. 51(e) is not only the manifest and clear harm of the denial of the democratic right to vote but other harms related to inequality,

discrimination and the denial of the equal worth and dignity of all persons. One is the enduring loss to human dignity caused by knowing that Canadian society has adjudged you unworthy to vote when it allows virtually every citizen to vote. Another harm is the disadvantage imposed on prisoners as a politically vulnerable group. This group's insecurity and vulnerability is only increased by the knowledge that the legislature can strip them of the most fundamental democratic rights. If democratic rights can be taken away, what other rights can be taken away and what other abuses perpetuated? Finally, s. 51(e) inflicts serious harms on the dignity of all Aboriginal people and Aboriginal prisoners in particular. It re-enforces the discriminatory and colonial legacy that only "good Indians" are fit to vote and that Canadian society will determine which Aboriginal people are worthy enough and which are not.

PART IV - ORDER REQUESTED

72. It is respectfully submitted that this Court should allow the appeal and declare section 51(e) of the *Canada Elections Act* to be of no force and effect.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of July 2001.

per: Kent Roach

Brian Eyolfson

Counsel for the Intervener,
Aboriginal Legal Services of Toronto Inc.

PART V - TABLE OF AUTHORITIES

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ARTICLES, REPORTS AND TEXTS

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