Court File No. 27677

IN THE SUPREME COURT OF CANADA

(Appeal From the Federal Court of Appeal)

BETWEEN:

RICHARD SAUVE

Appellants (Plaintiff)

-and-

THE 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 CLAIRWOODHOUSE, 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)

FACTUM OF THE INTERVENERS
THE CANADIAN ASSOCIATION OF ELIZABETH FRY SOCIETIES
THE JOHN HOWARD SOCIETY OF CANADA

Elizabeth Thomas
Box 871
212-120 Clarence Street
Kingston, Ontario K7L 4X8
Telephone: (613) 531-2660
Facsimile: (613)546-5894

Allan Manson
Faculty of Law
Queens' University
Kingston, Ontario K7L
Counsel for the Interveners

Henry S. Brown
Gowling Lafleur Henderson LLP
2600 - 160 Elgin Street
Ottawa, Ontario K1P 1C3
Telephone: (613) 233-1782
Facsimile: (613) 5563-9869

Ottawa Agent

Fergus J. O'Connor
Barrister and Solicitor
104 Johnson Street
P.O. Box1959
Kingston, Ontario K7L 5J7
Telephone: (613) 546-5581
Facsimile: (613) 546-5540
Solicitor for the Appellant Sauve

Gowling Lafleur Henderson LLP
Barristers and Solicitors
2600 - 160 Elgin Street
Ottawa, Ontario K1P 1C3

Telephone: (613) 786-0212
Facsimile: (613) 563-9869
Ottawa Agent

Arne Peltz
Public Interest Law Centre
402 - 294 Portage Avenue
Winnipeg, Manitoba R3C 0B4
Telephone: (204) 985-8541
Facsimile: (204) 985-8544
Solicitor for the Appellant McCorrister et al.

Gowling Lafleur Henderson LLP
Barristers and Solicitors
2600 - 160 Elgin Street
Ottawa, Ontario K1P 1C3
Telephone: (613) 786-0212
Facsimile: (613) 563-9869
Ottawa Agent

David G. Frayer, Q.C.
Gerald L. Chartier
Department of Justice
301- 310 Broadway
Winnipeg, Manitoba R3C 0S6
Telephone: (204) 983-2252
Facsimile: (204) 984-5434
Solicitor for the Respondents

Graham Garton, Q.C.
Department of Justice
2199 East Memorial Building
284 Wellington Street
Ottawa, Ontario K1A 0H8
Telephone: (613) 957-4842
Facsimile: (613) 954-1920
Ottawa Agent

John W. Conroy, Q.C.
Conroy & Company
2459 Pauline St.
Abbotsford, B.C. V2S 3S1
Telephone: (604) 852-5110
Facsimile: (604) 859-3361
Counsel for the B.C.
Civil Liberties Association

Gowling Lafleur Henderson LLP
Barristers and Solicitors
2600 - 160 Elgin Street
Ottawa, Ontario K1P 1C3
Telephone: (613) 786-0212
Facsimile: (613) 563-9869

Ottawa Agent

Kent Roach
Aboriginal Legal Services of Toronto
415 Yonge Street
Suite 803
Toronto, Ontario M5B 2E7
Telephone : (416) 408-4041 ext. 224
Facsimile: (416) 408-4268
Counsel for Aboriginal Legal Services of Toronto

Chantal Tie
South Ottawa Community Legal Services
406-1355 Bank Street
Ottawa, Ontario K1H 8K7
Telephone: (613) 733-0140
Facsimile: (613) 733-0401
Ottawa Agent

Sylvain Lussier
Desjardins Ducharme Stein Monast
Suite 2600
600 rue de la Gauchetiere ouest
Montreal, Que. H3B 4L8
Telephone:(514) 878-5569
Facsimile: (514) 878-9092
Counsel for the Canadian Bar Association

Gowling Lafleur Henderson LLP
Barristers and Solicitors
Suite 2600
160 Elgin Street
Ottawa, Ont. K1P 1C3
Telephone: (613) 233-1781
Facsimile: (613) 563-9869
Ottawa Agent

Gerald Chipeur
Gerald D. Chipeur Professional Corp.
1500 Bankers Hall West
888 - 3rd Street S.W.
Calgary, AB T2P 5C5
Telephone: (403) 537-6537
Facsimile: (403) 537-6538
Counsel for Frederick Morton and the
Alberta Civil Society Association

Fraser Milner Cargrain
Suite 1200
180 Elgin Street
Ottawa, Ontario K2P 2K7
Telephone: (613) 783-9600
Facsimile: (613) 783-9690
Ottawa Agent

Fraser Milner Casgrain
Suite 237
4th Avenue S.W.
Calgary, Alta. T2P 4X7
Telephone: (403) 268-6861
Facsimile: (403) 268-3100
Counsel for the A.G. Alberta

Fraser Milner Casgrain
Suite 1200
180 Elgin Street
Ottawa, Ontario K2P 2K7
Telephone: (613) 783-9600
Facsimile: (613) 783-9690
Ottawa Agent

Deborah Carlson
Constitutional Law Branch
7th Floor - 405 Broadway
Winnipeg, Manitoba R3C 3L6
Telephone: (204) 945-0716
Facsimile: (204) 945-0053
Counsel for the A.G. Manitoba

Gowling Lafleur Henderson LLP
Suite 2600
160 Elgin Street
Ottawa, Ont. K1P 1C3
Telephone: (613) 233-1781
Facsimile: (613) 563-9869
Ottawa Agent

TABLE OF CONTENTS

INTRODUCTION:

1. The Interveners the CANADIAN ASSOCIATION OF ELIZABETH FRY SOCIETIES (hereinafter referred to as CAEFS) and The JOHN HOWARD SOCIETY OF CANADA (hereinafter referred to as JHSC) are both national organizations devoted to providing services to, and advocating on behalf of people who are imprisoned in Canada. CAEFS and JHSC have intervened in this case because of its implications for the recognition of prisoners as rights-bearing people and the need for a high level of scrutiny in the application of s.1 of the Charter to any legislative intrusion into constitutionally protected rights of prisoners.

2. Section 51(e) cannot be justified under s.1, and the case presented by the Respondents consisted of no more than a collection of personal views, philosophical musings and speculation that falls far below the required standards of a s.1 justification. Moreover, the intent and effect of s.51(e) violates the equality rights of prisoners, who qualify under s.15(1) of the Charter as an analogous ground, given their histories of social disadvantage and illegal and arbitrary treatment.

PART I: THE FACTS:

3. The Interveners CAEFS and JHSC rely on the facts as set out in the facta of the Appellants, as supplemented by references to the trial record.

PART II: POSITION OF CAEFS and JHSC ON THE POINTS IN ISSUE:

4. It is accepted by all parties that s.51(e) of the *Canada Elections Act* contravenes s.3 of the Charter. It is the position of the Interveners CAEFS and JHSC that s.51(e) cannot be saved by s.1 in light of (a) the relevant contextual factors; (b) the need for strict scrutiny; (c) the absence of any demonstrated "pressing and substantial" harm that s.51(e) is intended to remedy or ameliorate; (d) the arbitrariness of the application of s.51(e) to the extent that it cannot be characterized as being rationally connected to the argued objectives; and (e) the lack of a demonstrated proportionality between the alleged salutary benefits of this legislation and its obvious deleterious effects.

5. It is also the position of the Interveners CAEFS and JHSC that s.51(e) infringes the equality rights of prisoners guaranteed by s.15(1) of the Charter.

PART III: ARGUMENT:

A. The Nature of the s. 1 Inquiry:

6. For justification purposes, the "*Oakes* test" continues to provide the analytical framework. In *Oakes*, Dickson, C.J.C. was careful to emphasize that the entire exercise of justification occurs as a result of an attempt to limit, deny or curtail a constitutionally protected right. This potential consequence demands a commensurately high degree of justification.

R.v. Oakes, [1986] 1 S.C.R. 103 at 135-136

RJR-Macdonald Inc. v. A.G. Can., [1995] 3 S.C.R.199, per McLachlin J, at 329

7. Dickson C.J.C. noted that a section 1 inquiry brings to bear a matrix of fundamental values and principles through the phrase "free and democratic society":

> The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, **respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.** (emphasis added)

R. v. Oakes, supra, at 136

8. Dickson C.J.C. held that a section 1 inquiry always demands a "stringent standard of justification" and the quality of evidence offered in justification must be "cogent and persuasive", although "there may be cases where certain elements of the s. 1 analysis are obvious or self-evident". The requirement of demonstration to a high persuasive standard has been reinforced in recent cases and explained by McLachlin J., as she then was:

> The process is not one of mere intuition, nor is it one of deference to Parliament's choice. It is a process of demonstration. This reinforces the notion inherent in the word "reasonable" of rational inference from evidence or established truths.

RJR-Macdonald, supra, per McLachlin J. at 328-329

R. v. Oakes, supra, at 136-138

9. Although in some cases, an element of the s.1 consideration may not require evidentiary proof, the Supreme Court has demanded, in the place of hard evidence, irrefutable propositions which logically support the claimed inference. Accordingly, McLachlin J. observed in *RJR-Macdonald:*

> The question is not whether the measure is popular or accords with the current public opinion polls. The question is rather whether it can be justified by application of the processes of reason. In the legal context, reason imports the notion of inference from evidence or established truths. This is not to deny intuition its role, or to require proof to the standards required by science in every case, but it is to insist on a rational, reasoned defensibility. (emphasis added)

More recently, in *R.v. Sharpe*, McLachlin C.J.C. held that, although "scientific proof based on evidence" was not necessary to demonstrate harm for a s.1 purpose, a "reasoned apprehension of harm" was necessary. Judicial references to "common sense" have only meant that some propositions are self-evident, not that speculation can take the place of reason.

RJR-Macdonald, supra, per McLachlin J. at 328-331

R. v. Sharpe, [2001] 1 S.C.R. 45, per McLachlin C.J.C., at 96 and 100

10. In this case, the Respondents have relied on speculation about whether the disenfranchisement of prisoners is a good idea. As Desjardins J.A. concluded in dissent in the court below, it is "not the kind of evidence to support a section 1 analysis". The Respondent's evidence says no more than some people support it, but the question is not whether s.51(e) has academic, popular or political support. The question is whether the factual background of s.51(e) meets the justificatory standard of s.1.

<u>Section 1 and the Importance of Context:</u>

11. The Supreme Court has repeatedly affirmed the importance of social and political context to

the application of section 1. Context permits the reviewing court to assess the actual objective of the impugned legislation and the extent to which the legislated means have achieved that objective. In this case, the relevant contextual factors are (a) the context of imprisonment and (b) the historical role of disenfranchisement as an impediment to the attainment of democracy and equality.

RJR-Macdonald, supra, per McLachlin J. at 330-331; per La Forest J. at 305

Thomson Newspapers Co. Ltd v. A.G. Can., 1998] 1 S.C.R. 877, per Bastarache J. at 939

M. v. H., [1999] 2 SCR 3, per Cory and Iacobucci JJ. at 61.

Context of Imprisonment:

12. Prisoners in Canadian penitentiaries are vulnerable, powerless, hidden and subject to arbitrary treatment. Overwhelmingly, they come from backgrounds of disadvantage, including high levels of unemployment, low levels of education, extensive family disruption, histories of alcohol and substance abuse, and high rates of attempted suicide and depression. A "snapshot" of the profile of penitentiary prisoners developed in 1995 by the Canadian Centre for Justice Statistics found that 46% of penitentiary prisoners had completed Grade 9 or less and that 43% were unemployed at the time of admission.

Evidence of Michael Jackson, *Appellants' Record*, vol. X, at 1989-1995

Report of the Commission of Inquiry Into Certain Events at the Prison for Women, 1996 ("Arbour Report") at 200-01

Canadian Centre for Justice Statistics, "A One-Day Snapshot of Inmates in Canada's Adult Correctional Facilities" (1998), 18 *Juristat* No.8, at p.5

13. Prisoners in Canadian penitentiaries are confined in accordance with a detailed legislative framework and the broad administrative discretion which it creates, which is often exercised arbitrarily and unfairly. All aspects of a prisoner's life are circumscribed: place of confinement, periods of confinement, food, health care, discipline, segregation, contact with families, access to lawyers, recreation, labour, visits, correspondence, reading material, educational opportunities, vocational opportunities, and every event, activity or other involvement that occurs during the period of confinement. This framework has been developed by Parliament and can be changed by Parliament. The only guarantee of minimum standards of treatment which can ensure a basic

level of fairness, equality, and respect for human dignity are found in the *Charter*. Given the context of imprisonment, the threshold of justification for legislation or governmental action which limits constitutionally protected rights of prisoners must be set at an appropriately high level.

Corrections and Conditional Release Act, S.C. 1992, c.20

Arbour Report

Historical Role of Disenfranchisement:

14. The second important contextual factor is the historical role of disenfranchisement and its relation to the attainment of democracy and equality. In *Haig v. Canada*, Cory J. said:

> All forms of democratic government are founded upon the right to vote. Without that right, democracy cannot exist. The marking of a ballot is the mark of distinction of citizens of a democracy. It is a proud badge of freedom. While the Charter guarantees certain electoral rights, the right to vote is generally granted and defined by statute. That statutory right is so fundamental that a broad and liberal interpretation must be given to it. Every reasonable effort should be made to enfranchise citizens. Conversely, every care should be taken to guard against disenfranchisement.

Haig v. Canada, [1993] 2 S.C.R. 999, at 1048

15. This quotation was relied upon by the South African Constitutional Court in *August v. Electoral Commission* in concluding that the failure to register prisoners for voting infringed s. 19(3)(a) of the 1996 South African Constitution, a similar guarantee to s.3 of our Charter. Sachs J. addressed the general issue of enfranchisement as it relates to a democratic community:

> The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity. Rights may not be limited without justification and legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement. (emphasis added)

August v. Electoral Commission et al, [1999] S.A.J. No. 16 at para.17 and note 18

16. In Canada, the process of universal enfranchisement up to the inclusion of s.3 in the Charter

in 1982 covers a history that is marked by the purposeful and discriminatory disenfranchisement until this century of women, First Nations people, racially-identified groups of immigrants, and people with mental disabilities. The disenfranchisement of prisoners is a residue from the days when a conviction also resulted in the consequences of outlawry, corruption of the blood and attainder, commonly known as "civil death". Regardless of the Respondent's efforts to claim important social objectives, the continued effect of prisoner disenfranchisement is to define this group, like other groups in the past, as being outside the scope of full and equal participation in the Canadian political community. To paraphrase Sachs J., continued disenfranchisement means that prisoners are denied the "badge of dignity and of personhood" and that in the Canada they do not count.

Per Wetston J., *Appellants'Record*, vol. XI at 2051

Per Linden J.A., *Appellants' Record*, vol. XI at 2096-97

17. In the earlier round of prisoner voting cases, *Belczowski* and *Sauve(No.1)*, the historic steps toward universal enfranchisement and the meaning of disenfranchisement were significant contextual factors in the judgments of Hugessen J.A. and Arbour J.A. Both judges also noted the significance of the fact that the right to vote guaranteed in s.3 is exempted from the operation of s.33, confirming that the framers of the Charter attempted to do as much as possible to prevent incursions into universal enfranchisement.

Belczowski v. Canada, [1992] 2 F.C. 440 (C.A.) at 452-3; 458-59

Sauve (No. 1) v. A.G. Can. (1992), 7 O.R.(3d) 481 (C.A.) at 486-87

Thomson Newspapers v. A.G. Can., supra, per Bastarache J. at 935

Strict Scrutiny or Deference to Parliament:

18. In the court below, Linden J.A. for the majority concluded that Parliament's choice in enacting s.51(e) was entitled to "a great deal of deference" (*Appellants' Record*, at 2122-2124). He rejected the views of Hugessen J.A. in *Belczowski* and Arbour J.A. in *Sauve (No. 1)* on the basis that, since those decisions, there had been: (a) a change in Canadians' attitude about crime; and (b) Parliament's debate over s.51(e). On the first point, it was an error to rely on a perceived

change "in the views of Canadians regarding the penal sanction" because it is irrelevant. A change in public opinion cannot change the nature of Charter scrutiny which enshrines minimum guarantees based on underlying values and principles. One need only consider the issue of capital punishment to appreciate that political agendas cannot influence Charter scrutiny.

Belczowski v. Canada, supra, at *451-52*

Sauve No.(1) v. A.G. Can., supra, at 484-85

19. Parliament's debate about and subsequent enactment of s. 51(e) cannot attract deference since it represents an attempt by the State to target a vulnerable group. To suggest that Parliament acted to mediate the interests of prisoners and the interests of the remainder of the electorate, is to favour the majority by imposing a minimum standard of decency or worthiness as a pre-condition to voting. This proposition is antithetical to the values underlying s.1 which include respect for the "dignity of the human person," a "commitment to social justice" and the goal of enhancing "participation of individuals and groups in society".

R. v. Oakes, supra, at 136

Adler v. A.G. Ont., [1996] 3 S.C.R. 609, per L'Heureux-Dube J. (in dissent) at 669-670

Thomson Newspapers, supra, per Bastarache J. at 955-958

20. Because prisoners are a vulnerable group, any attempt to use legislation to limit their constitutional rights must be subjected to a high standard of justification. While section 3 of the Charter provides a clear and unqualified right, other Charter protections which apply to prisoners involve more subtle determinations of their intended scope and applicability. Whether future cases involve sections 7, 8, 9 or 12, it is inevitable that they will require decisions that must reconcile conflicting claims of liberty and fairness versus public security and accountability. If the s.1 justificatory threshold is not set at a high level for prisoners in a case such as this, where the issues are clear and devoid of complex interactions, in future cases constitutional rights may be too easily compromised.

21. In summary, the enactment of s. 51(e) does not warrant any deference and should be

approached with strict scrutiny because:

(a) the State is acting as a singular antagonist;

(b) it involves the context of imprisonment in which prisoners live in total subordination to a legislative regime;

(c) the enactment targets a relatively powerless and, hence, vulnerable group. Legislation that protects the majority in preference to the Charter rights of a vulnerable minority does not warrant deference; and

(d) the issue does not favour the dynamic of Parliament but is well-suited to judicial resolution.

Finding a Pressing and Substantial Objective

22. Since *Oakes*, the Supreme Court has maintained the need for the impugned legislation to be directed to a "pressing and substantial" goal. The word "pressing " cannot be ignored. Because the issue at stake is the application of a constitutionally protected right, Parliament must have the elimination or reduction of some identifiable and substantial harm, existing or potential, as its goal.

23. In *United Food and Commercial Workers Local 1378 v. K-Mart*, Cory J. for a unanimous court echoed the views expressed earlier in *RJR-Macdonald* by McLachlin J. that the assertion of objectives cast in overly broad terms is inconsistent with an effective section 1 inquiry. He said:

> It must be accurately and precisely defined so as to provide a clear framework for evaluating its importance and to assess the precision which the means have been crafted to fulfill that objective. If the objective is stated too broadly, its importance may be exaggerated and the analysis compromised.
>
> *United Food and Commercial Workers v. K-Mart*, [1999] 2 S.C.R. 1083, per Cory J. at 1123.
>
> *Thomson Newspapers*, supra, per Bastarache J., at 948

24. Recent decisions dealing with the electoral process have narrowed the claimed legislative objective by focussing on the "nature of the social problem which it addresses" or by isolating the type of harm (or risk of harm) that the legislation might remedy or ameliorate. For the purpose of

s.1, courts must "hone in" on the specific purpose of the legislative provision, not broad legislative objectives couched in laudable terms, such as "civic responsibility" or "respect for the rule of law.".

Thomson Newspapers, supra, per Bastarache J., at 934 and 948-954

Figueroa v. A.G. Can. (2000), 50 O.R.(3d) 161 (C.A.) per Doherty J.A. at 196-197

10

25. There is no evidence or argument to support the conclusion that the electoral policy objective claimed by the Respondent is advanced by s.51(e). To do so, the Respondent must satisfy the Court that voting by prisoners serving sentences of two years or more is somehow antithetical or harmful to electoral integrity. The record contains no evidence to support the claim that voting by prisoners has had a negative impact on the electoral policy objective or that disenfranchisement would promote it.

20

26. With respect to the penal policy objective, even if it can be argued that a disqualification presents a burden and therefore constitutes punishment, this proposition cannot, by itself, justify a provision which directly denies a constitutional right to a group of people. While Parliament may have wide legislative scope to assert and implement penal policy without the need to demonstrate efficacy, this scope diminishes dramatically when the policy confronts a Charter right. At that point, legislative scope exists only to the extent that the policy can be demonstrated

30

to be a "reasonable limit" that meets the stringent standard of s.1.

27. Moreover, as suggested by Desjardins J.A. in the court below, it is important to ask whether other legislation adequately addresses the objectives so as to preclude a finding that the claimed objectives are "pressing and substantial". In *R. v. Sharpe*, McLachlin C.J.C. agreed that it is a "key consideration" to ask " what the impugned section seeks to achieve beyond what is

40

already accomplished by other legislation". Of course, legislated "effective measures" cannot be rejected simply because other measures deal with the same problem, but will survive only if they are "effective" in providing "additional protection" or in "reinforcing existing protections". While this analysis related to the "rational connection" element in *Sharpe*, it is equally applicable

to the "pressing and substantial" element when the objectives offered are broad, abstract and laudable. In this case, the Respondent must show that the disenfranchisement of a group of prisoners is needed either to advance or reinforce the claimed objectives, given that other provisions are already directed to these ends.

R. v. Sharpe, supra, per McLachlin J., at 100

28. In the earlier round of prisoner voting rights litigation, both Hugessen JA. and Arbour JA. were sceptical about the broad and abstractive objectives claimed by the Respondents. Applying the analyses of Hugessen J.A. and Arbour J.A., a careful examination of the current s. 51(e) reveals only two possible goals. First, there is the goal of identifying prisoners as morally or socially unworthy of voting, which is essentially the Respondent's own characterization in paragraph 44 of its factum which speaks of a "minimal standard" for participating in the electoral process. Secondly, there is the "criminal sanction" purpose, that is, adding an additional burden as a consequence of conviction. Given its inherent deficiencies as an effective mode of punishment, especially in light of other sanctions, this can only be perceived as an added humiliation. Both goals serve to communicate a form of ostracism which is antithetical to the values which underlie s.1 and, accordingly, should not be recognized as pressing and substantial.

Belczowski v. Canada, supra, at 456-59

Sauve (No.1) v. A.G. Can., supra, at 487

Rational Connection:

29. Given the broad, abstract and laudable nature of the objectives claimed by the Respondent, the section 1 inquiry demands a high degree of demonstrated correlation between the measure chosen and the objectives claimed. Otherwise, there will always be the prospect of grand language, hypothetical problems and speculative impacts trumping constitutionally guaranteed rights or freedoms by filling the proportionality analysis with platitudes, opinions and creative musing.

R. v. Oakes, supra, at 139

30. With respect to the penal policy objective, the Respondent cannot simply assert that any new burden is a punishment which is rationally connected in the abstract to this objective. The Respondent must confront the fact that the burden of disenfranchisement also violates a constitutional guarantee. It must be shown that the disenfranchisement is not arbitrary or based on irrational considerations. The Respondent has failed to demonstrate rational connection to a penal objective for a number of reasons. First, the effect of s.51(e) is virtually unknown and therefore can provide no more than a speculative link to deterrence and denunciation. Secondly, the implementation of s.51(e) in terms of denouncing criminal behaviour is entirely arbitrary and depends on a coincidental combination of factors. The disenfranchisement operates without regard to the offence committed and only as a function of such factors as the length of sentence, the commencement date, the dates of elections, and the occurrence of events such as conditional release and subsequent suspension.

Minimal Impairment:

31. Less intrusive measures were available to Parliament which would have advanced its claimed objectives. The effect of s.51(e) is to classify a set of people as unworthy of participating in the electoral process, whether for electoral or penal policy reasons. A provision of universal applicability which uses a two year sentence as a surrogate for unworthiness cannot satisfy the minimal impairment test. The only alternative which would not be overly broad is disenfranchisement which arises from a conviction that is directly related to the electoral process.

Proportionality of Effects and Benefits:

32. In *Dagenais v. C.B.C.*, the third element of the proportionality test was refined to ensure that the analysis examined the extent of salutary benefits actually generated by the impugned legislation and the deleterious effects it produced. Here, the deleterious effects are clear: the denial of a fundamental constitutional right with the consequence of denying to a prisoner the "badge of dignity and personhood." By comparison, the Record contains no evidence that prohibiting prisoners from voting has produced any benefit. The Respondents arguments are entirely abstract, theoretical and speculative with no basis for concluding that the disenfranchisement of prisoners has, or will, produce any benefits. In terms of penal policy,

questions about the level of public knowledge of s.51(e) combined with its arbitrary and fortuitous application to some convicted persons and not others undermine any suggestion of salutary benefits. Looking at the electoral policy objective, the situation is even clearer. There was no evidence of any adverse effect on electoral integrity, respect for the law, or the occurrence of crime in the Canadian jurisdictions in which prisoners are entitled to vote.

Dagenais v. CBC, [1994] 3 S.C.R. 835, per Lamer C,.J.C., at 887-889

B. The Equality Argument:

33. The message this law sends is that, as a class, prisoners do not deserve one of the most basic entitlements of Canadian citizenship, the right to participate in the electoral process. The sub-text of the twin objectives advanced by the appellant, the enhancement of civic responsibility and punishment, is that prisoners are not worthy of the vote. As Hugessen J.A. said of the predecessor section 51(e) in *Belczkowski*:

> Alternatively, and far less commendably, it would appear to me that 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 from of life to which all rights should be indiscriminately denied.
>
> *Belczowski v. Canada*, supra, p. 459

The Purpose of s. 15(1)

34. A law which has the effect of demeaning or degrading an identifiable group by excluding them from a benefit enjoyed by the rest of the community by ascribing to them a lesser worth is inconsistent with the s. 15(1) equality guarantee which seeks to promote all persons as equally deserving of concern, respect and recognition.

> It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration. Legislation which effects differential treatment between individuals or groups will violate this fundamental purpose where those who are subject to differential treatment fall within one or more enumerated or analogous grounds, and where the differential treatment reflects the stereotypical application of presumed group or personal characteristics, or otherwise has the effect of perpetuating or promoting the view that the individual is less capable or less worthy of recognition or

value as a human being or as a member of Canadian society.

Law v. Canada (Minister of Empl. and Imm.), [1999] 1 S.C.R. 497 at 529

35. In accordance with the principles set out in *Law*, a s. 15(1) claim must be assessed by considering whether the law imposes differential treatment, based on an enumerated or analogous ground, and whether the differential treatment is discriminatory.

10

The legislation imposes differential treatment

36. The specific exclusion of prisoners serving a prison term of two years or more from voting in federal elections clearly draws a distinction between them and all other Canadians over the age of 18 (with the exception of certain electoral officials) and therefore constitutes differential treatment for the purposes of the first stage of the inquiry.

20

The differential treatment is based on an analogous ground

37. So far the courts have rejected prisoners as an analogous ground on the basis that they have been imprisoned as a result of their conduct, and therefore cannot be distinguished as a discrete and insular minority by any personal characteristic. It is submitted that this reasoning is inimical to the purpose of s. 15(1) in several respects:

(a) it ignores the reality about who prisoners are;

30

(b) it does not take into account the effect of imprisonment in a system which has historically and continues to further disadvantage prisoners by the failure to consistently apply the rule of law;

(c) it relies on prejudicial attitudes and demeaning stereotypes about prisoners; and

(d) it assumes that by their conduct, people can be removed from the purview of the constitution.

38. The claim for prisoners as an analogous ground is based on a confluence of their personal

40 characteristics and circumstances. Prisoners have histories of social disadvantage, which are compounded by the experience of imprisonment, and are targets of social prejudice which goes beyond repudiation and disapprobation of their illegal conduct. As this court held in *Law*, an analogous ground can consist in an intersection of characteristics and circumstances:

> Where a party brings a discrimination claim on the basis of a newly postulated analogous ground, or on the basis of a combination of different grounds, this part of the discrimination inquiry must focus upon the issue of whether and why a ground or confluence of grounds is analogous to those listed in s. 15(1). This determination is made on the basis of a complete analysis of the purpose of s. 15(1), the nature and situation of the individual or group at issue and the social, political and legal history of Canadian society's treatment of the group. A ground or grounds will not be considered analogous under s. 15(1) unless it can be shown that differential treatment premised on the ground or grounds has the potential to bring into play human dignity...If the court determines that recognition of a ground or confluence of grounds as analogous would serve to advance the fundamental purpose of s. 15(1), the ground or grounds will then be so recognized...
>
> There is no reason in principle, therefore, why a discrimination claim positing an intersection of grounds cannot be understood as analogous to, or as a synthesis of the grounds listed in s. 15(1).
>
> *Law v. Canada (Min. of Empl. and Imm.)*, supra, at 555.

(a) who are prisoners

39. In deciding whether the legislation imposes a distinction based on either an enumerated or analogous ground, it is necessary to understand against whom this legislation is directed. In other words, who are "persons who [are] imprisoned in a correctional institution serving a sentence of two years or more." As Professor Michael Jackson testified, the correlation between histories of disadvantage and imprisonment is so well-known as to be almost self-evident. As a group, prisoners have been marginalized from the benefits of mainstream society by reason of race, poverty, substance abuse, mental disability, educational and other social disadvantages. Most prisoners have experienced disadvantage prior to their imprisonment based on several grounds.

Appellants' Record, vol. V, pp.772-776, 881,884,886,-90; vol X pp.1949-1959,1989-95

40. The pre-existing multiple disadvantage of prisoners has been well recognized in the 1996 *Arbour Report* and the 1977 *MacGuigan Report:*

> There is considerable overlap in the social characteristics of men and women in prison, particularly with respect to high levels of unemployment, low levels of education, extensive family disruption, histories of alcohol and substance abuse, and high rates of attempted suicide and depression.
>
> *Arbour Report*, supra, p. 200.

> The failure for some began from birth, or even prenatally in homes where parents were deprived, incompetent or themselves delinquent. It was compounded in schools, foster homes, group homes, orphanages, the juvenile system, the courts, the police station, provincial jails, and finally in the "university " of the system, the penitentiary...
>
> *MacGuigan Report, Appellants' Record,* vol. V, p. 853

(b) the experience of imprisonment

41. The loss of liberty experienced by prisoners as a result of incarceration is more than a separation from the community. Every aspect of their lives is controlled by legislation, regulation, internal policy directives, and discretionary decisions made by prison staff. While it could be argued that these are legitimate consequences of imprisonment, the subjugation of prisoners to the control of prison administrators makes them vulnerable to illegal and arbitrary treatment, which is a feature of life in Canadian prisons. In her 1996 Report of the *Commission of Inquiry Into Certain Events at the Prison for Women in Kingston,* Madam Justice Arbour concluded that there was a serious and longstanding breakdown of the rule of law within federal penitentiaries in the administration of sentences of imprisonment:

> On the one hand the multiplicity or regulatory sources largely contributed to the applicable law or policy being often unknown or easily forgotten and ignored. On the other hand, despite this plethora of normative requirements, one sees little evidence of the will to yield pragmatic concerns to the dictates of a legal order. The Rule of Law is absent, although rules are everywhere. (emphasis added)
>
> *Arbour Report,* supra, p. 181

42. The Arbour Report is the most recent in a series of reports by Parliamentary committees and commissions dating from 1849 which have documented egregious prison conditions, the failure of prison administrators to apply the law and the deleterious effects of imprisonment on prisoners. In his evidence, Professor Jackson concluded that despite changes in some features of imprisonment, such as the abolition of corporal punishment (as late as 1972), the experience and effects of imprisonment have remained remarkably constant. In his evidence, Professor Jackson quoted from the 1977 *MacGuigan Report,* which described the impact of imprisonment:

> Most of those in prison are not dangerous. However, lock up, isolation, the injustices and

> harassment deliberately inflicted on prisoners unable to fight back make none-violent inmates violent and those already dangerous more dangerous...From the inmates' perspective, imprisonment in Canada where it is not simply inhumane, is the most individually destructive, psychologically crippling and socially alienating experience, that could conceivably exist within the borders of the country.
>
> ....
>
> There is a great deal of irony in the fact that imprisonment...the ultimate product of our system of criminal justice itself epitomizes injustice.

Appellants' Record, vol. V, pp. 850-3; 855
Appellants' Record, vol. X, pp. 1913-19,1928-9

43. Professor Jackson testified that the explanation for the disregard for the law in prison administration can be attributed to the traditional judicial policy of deference to decision making by prison officials, based on the historical concept of prisoners as persons without rights and the view that second guessing those decisions would subvert prison discipline and the authority of prison administrators. The 1977 *MacGuigan Report* concluded that

> ..the present judicial policy [of judicial deference] invites the perpetuation by the authorities of a system that is so far removed from normal standards of justice that it remains safely with the class of matters in which the imposition of judicial or quasi-judicial procedures would clearly be, in most instances, inconceivable. Further, this would ensure that the sheer immensity of the task of straightening it out is enough to discourage even the most committed members of the judiciary. The worse things are in the penitentiary system, therefore, the more self-evident it is to the courts that parliament could not possibly have intended them to intervene. Injustice, as well as virtue, can be its own reward.

MacGuigan Report, Appellants' Record, vol. V, p. 856

44. As Professor Jackson outlined in his evidence, although the advent of the Charter has led to an enhanced scope of judicial intervention, the reality is that judicial decisions and legislated principles do not necessarily translate into the daily experience of imprisonment: "...there remains an enormous difference between what is in the federal *Corrections Act* and *Regulations* and in commissioners' directives and what I see happening on a daily basis in prisons." As an example, he referred to the abusive and illegal practices surrounding events at Prison for Women in 1994, which included the well known strip search of women prisoners, and led to the appointment of the Arbour Commission. In her 1996 *Report*, Madam Justice Arbour concluded that the culture of

disrespect for the law was so entrenched in the Correctional Service of Canada, that compliance with legislation could be ensured only if mechanisms for judicial scrutiny were built into some of the most critical decisions affecting the liberty of prisoners.

> In terms of general correctional issues, the facts of this inquiry have revealed a disturbing lack of commitment to the ideals of justice on the part of the Correctional Service. I firmly believe that increased judicial supervision is required. The two areas in which the Service has been the most delinquent are the management of segregation and the administration of the grievance process. In both areas, the deficiencies that the facts have revealed were serious and detrimental to prisoners in every respect, including in undermining the rehabilitative prospects. There is nothing to suggest that the service is either willing or able to reform without judicial guidance or control. (emphasis added)
>
> *Arbour Report*, supra, p. 198
> Evidence of Michael Jackson, *Appellants' Record, vol. V, p. 867; vol X, p. 1943*

45. The Interveners CAEFS and JHSC submit that the arbitrary and illegal practices to which prisoners are subject can only have the effect of exacerbating their pre-existing disadvantages because they are already vulnerable. In addition, however, the practice of arbitrary and illegal treatment in itself creates a group which is disadvantaged and vulnerable because they do not "enjoy equal recognition at law as human beings," in that the failure to apply the law to them has been, at least to some extent, tolerated..

(c) prejudice and stigmatization

46. Repudiation and disapprobation of criminal conduct is a valid expression of the values of a community built on the foundation of the rule of law. However, the prejudice and stereotyping directed against prisoners goes beyond that and finds expression in such attitudes as prisoners shouldn't have rights, or that respecting rights of prisoners somehow disrespects and demeans the rights of victims and the community. The social construction of prisoners as persons of lower status less deserving of respect as human beings has long historical roots.

Evidence of Michael Jackson, *Appellants' Record*, vol. X, p1904-1913; vol. V, p. 838-49.

(d) conduct

47. Prisoners are incarcerated because they have committed offences, and as Professor Jackson

testified, the fact that prisoners are for the most part persons with histories of social disadvantage and disproportionately Aboriginal, does not mean that these factors cause crime or that their presence absolves personal responsibility for the commission of offences. Equally, however, the conduct which results in a penitentiary sentence does not erase the pre-existing social history and life circumstances of prisoners, and the impact of imprisonment upon them. These amount to personal characteristics and circumstances which they did not choose and, for the most part, cannot change.

48. A focus on conduct and rejection of the claim for an analogous ground on that basis alone is tantamount to creating a bar which reduces the scope of the inquiry in a manner which is not consistent with the overall purpose of s. 15(1).

49. The proposition that a ground upon which discriminatory treatment is based is not analogous when the ground is crystallized by the conduct of the claimant is not consistent with the many provisions in the *Charter* which protect the rights of individuals whose conduct has led them to be charged or convicted of criminal offences. In *Corbiere*, this Court held that s. 15(1) includes persons within its protection even where there is an element of choice in the personal characteristics and circumstances which qualify as an analogous ground. To conclude otherwise would mean that the *Charter* contemplates an exclusion of categories of persons from its protection without considering the <u>many</u> factors set out in *Law* which must be taken into account in determining whether the claimant has established an analogous ground.

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

Law v. Canada (Min. of Empl. and Imm.), supra

<u>Is the differential treatment discriminatory</u>

50. Whether a law is discriminatory depends on how the law impacts on those affected, both from the subjective perspective of a reasonable person with the claimant's particular traits, history and circumstances, and from an objective determination of the larger context in which the impugned legislation operates, taking into account society's past and present treatment of the

claimant. A number of factors are taken into account in this contextual analysis.

Law v. Canada (Min. of Empl. and Imm.), supra

Corbiere v. Canada (Min. of Indian and Northern Affairs), supra

(a) pre-existing disadvantage

51. For the reasons set out in paragraphs 39 to 45 of this factum, it is submitted that prisoners are a group which suffers significant disadvantage, prejudice, vulnerability and stigmatization. The voting prohibition reinforces the belief that they are less worth of recognition or value as human beings and as members of Canadian society. A law which imposes differential treatment upon a group which is already disadvantaged is more likely to be found to be discriminatory.

> As has been consistently recognized throughout this Court's jurisprudence, probably the most compelling factor favouring a conclusion that differential treatment imposed by legislation is truly discriminatory will be, where it exists, pre-existing disadvantage, vulnerability, stereotyping or prejudice experienced by the individual or group. These factors are relevant because to the extent that the claimant is already subject to unfair circumstances or treatment by reason of personal circumstances or characteristics, persons like him or her have often not been given equal concern, respect and consideration. It is logical to conclude that in most cases, further differential treatment will contribute to the perpetuation or promotion of their unfair social characterization, and will have a more severe impact upon them since they are already vulnerable

Law v. Canada (Min. of Empl. and Imm.), supra, p. 534-5

(b) relationship between the basis of the differential treatment and the claimant's characteristics or circumstances

52. The disenfranchisement of prisoners does not correspond to their characteristics and circumstances in a way which respects their dignity. There is nothing about prisoners or the fact of their imprisonment, which suggests they do not have the capacity or ability to exercise their vote, unless it is assumed that, because of their criminal convictions, they are unworthy. Furthermore, as in *Corbiere,* the power of the electorate affects the interests of the claimants as well as the interests of voting public. This is especially true with respect to laws which affect their imprisonment and release.

(c) ameliorative purpose or effect

53. It is submitted that the disenfranchisement of prisoners has no ameliorative purpose or effect either for them or for the voting public. Regardless of whether a penalty can be said to have a valid penal objective, such as deterrence or denunciation, it will infringe the purpose of s. 15(1) if it is degrading or demeaning. Furthermore, civic responsibility and the value of an elector's vote cannot be enhanced by excluding others who are viewed as less worthy.

10

(d) nature of the interest affected

54. Disenfranchisement "restricts access to a fundamental social institution" and affects a "'basic aspect of full membership in society'." As this Court held in *Corbiere*, "...the more important and significant the interest affected, the more likely it will be that differential treatment affecting the interest will amount to a discriminatory distinction within the meaning of s. 15(1)."

20

Corbiere v. Canada (Min. of Indian and Northern Affairs), supra, p. 264

Section 1

55. In the case of equality rights, the legislative objective must be sufficiently pressing and substantial to justify a law that infringes the essential human dignity of the claimant, contrary to s. 15(1). For the reason set out in paragraphs 23 to 33 of this factum, the disenfranchisement of prisoners cannot be justified under s. 1.

30

Corbiere v. Canada (Min. of Indian and Northern Affairs), supra, p. 275

PART V - RELIEF SOUGHT

56. It is requested that the judgement of the Federal Court of Appeal be set aside and that s. 51(e) of the *Canada Elections Act* be declared to be of no force or effect.

40

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of July, 2001

Allan Manson
Counsel for the Interveners CAEFS and JHSC

Elizabeth Thomas

PART V - LIST OF AUTHORITIES

Page