Court File No. 27 677

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

B E T W E E N :

RICHARD SAUVÉ,

Applicant (Plaintiff)

- and -

CHIEF ELECTORAL OFFICER OF CANADA
THE SOLICITOR GENERAL OF CANADA
THE ATTORNEY GENERAL OF CANADA,

Respondents (Defendants)

- and -

B E T W E E N :

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,

Applicants (Plaintiffs)

- and -

THE ATTORNEY GENERAL OF CANADA,

Respondent (Defendant)

FACTUM OF THE APPELLANT RICHARD SAUVÉ

FERGUS J. (CHIP) O'CONNOR
Barrister and Solicitor
104 Johnson Street
P.O. Box 1959
Kingston, Ontario K7L 5J7
Telephone: (613) 546-5581
Facsimile: (613) 546-5540

Solicitor for the Sauvé Applicant (Plaintiff)

HENRY S. BROWN, Q.C.
Gowling, Strathy & Henderson
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 0B9
Telephone: (204) 985-8541
Facsimile: (204) 985-8544
Email: arnepeltz@pilc.mb.ca

Solicitor for the McCorrister Applicants (Plaintiffs)

HENRY S. BROWN, Q.C.
Gowling, Strathy & Henderson
Barristers and Solicitors
2600-160 Elgin Street
Ottawa, Ontario K1P 1C3
Telephone: (613) 786-0212
Facsimile: (613) 563-9869

Ottawa Agent

DAVID FRAYER, Q.C.
GERALD CHARTIER
Department of Justice
301-310 Broadway
Winnipeg, MB R3C 0S6
Telephone: (204) 983-2252
Facsimile: (204) 984-5434

Solicitors for the Respondents (Defendants)

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

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PART I

STATEMENT OF FACTS

The Appellant Sauvé

1. The Appellant, **RICHARD SAUVÉ**, is a Canadian Citizen and an adult. In 1978, he was sentenced to life imprisonment.

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Evidence of Richard Sauvé, Exhibit P-1 at Trial, Appeal Book, p. 44-45

Partial History of Jurisprudence

2. On August 29th, 1984, Robert Gould sought an interlocutory mandatory injunction entitling him to vote in the general election of that year. The Government argued that allowing prisoners to vote "would constitute a threat to good order, security and administration of the Federal penal institution," and that restrictions on exchange of information rendered it

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inappropriate to allow them to vote. A "senior policy analyst" had "for the past four years...examined in depth the concept of inmate voting," and swore that "there are experts in the field of criminology and law who have conducted studies on the desirability of retaining the type of sanction imposed by section 14(4)(e) of the **Canada Elections Act**, and given time to contact these experts, the Crown might be able to lead evidence...".

Gould v. A.G. Canada, [1984] 1 F.C. 1119, (T.D.), @ 1125- 1126.

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3. The Federal Court Trial Division found for Mr. Gould, stating "I was particularly struck by the fact that the aforementioned affidavit indicated that the issue had been under study for four years yet the conclusions it was able to come to respecting a justification for the limitation on voting rights were very tentative."

Gould v. A.G. Canada, supra., @ 1129.

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4. On August 31, 1984, the Federal Court of Appeal, with Chief Justice Thurlow dissenting, allowed the appeal of the Government; the majority did not address the merits, but held that the Government was entitled to have a full trial on the merits prior to a decision of this nature being made. On September 5, 1984, the day of the election, the Supreme Court of Canada agreed with

the Federal Court of Appeal.

Gould v. A.G. Canada, [1984] 1 F.C. 1133 (F.C.A.).
Gould v. A.G. Canada, [1984] S.C.R. 124

5. In 1988, Mr. Sauvé went to trial in the Ontario High Court seeking the right to vote. The Government stated that the objectives of the legislation were, first, to restrict the vote to a "decent and responsible citizenry", second to preserve the integrity of the voting process and thirdly, to sanction offenders. Political theorist Rainer Knopff testified. The Government was successful at trial, and the Court held, "the state has a role in preserving itself by the symbolic exclusion of criminals from the right to vote for the lawmakers."

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Sauvé v. A. G. Canada #1, (1988), 66 O.R. (2d) 234, (H.C.)

6. In 1991, after trial, having heard from the same Professor Rainer Knopff, and having heard argument as to the same three objectives, the Federal Court held that the predecessor legislation denying sentenced prisoners the right to vote was unconstitutional. "Although it is essential to a modern liberal democracy that the majority of people be 'decent and responsible' in the sense of accepting the existence of the state and the legitimacy of its legal system as well as obeying most of its positive laws, this tells us very little as to how far the state can go in suppressing those who do not conform to the majority consensus. It seems to me a very dubious proposition to accept as a corollary of such a state that it's legislators may impose tests of 'decency' and 'responsibility' on voters going beyond basic requirements of capacity (related to maturity and mental condition), to cast a meaningful vote."

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Belczowski v. Canada, (1991) 42 F.T.R 98, @ 108.

7. Mr. Justice Strayer stated also: "No extrinsic evidence was presented to me as to the purpose of Parliament in adopting this legislation, other than the retrospective rationalizations offered by Professor Knopff. His able descriptions of the ruminations of philosophers from Emmanuel Kant to George Grant gives me very little clue as to the specific purpose of the Parliament of Canada in adopting *section 51 (e)* of the **Canada Elections Act**."

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Belczowski v. Canada, supra, @ 108.

8. The Federal Court of Appeal, in 1992, addressed the same issues, and that Court took note of the difficulty that the Crown had in identifying the objectives of the legislation. "Parenthetically, it should be noted here that the Appellant has effected a remarkable *volte-face* on this point. One of the principle grounds of a vigorous defence that was raised in *Gould v.*

10 *Canada*, supra, was precisely the security and the administrative problems allegedly that would arise if inmate voting were permitted. It also seems to have been relied on in other cases dealing with prisoner's right to vote. That it has now been abandoned lends some credence to the view that the Crown itself does not know what the true objective of Paragraph 51 (e) really is."

Belczowski vs. The Queen, [1992] 2 F.C. 440, @ 455.

9. The Federal Court of Appeal went on to find that the said predecessor legislation could

20 not be justified based on the objectives advanced by the Crown and found "...it seems to me far more likely, as I have suggested earlier, that the legislation represents nothing more than an historic holdover from the time when it was thought for practical, security, and administrative reasons, that it was quite simply impossible that prisoners should vote." And later, "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 a prisoner as a no-good, almost

30 sub-human form of life to which all rights should be indiscriminately denied."

Belczowski vs. The Queen, supra, at. 458 and 459.

10. The Ontario Court of Appeal, later in 1992, agreed that the predecessor legislation was unconstitutional. That Court held as follows. "I would also add that the slow movement toward universal suffrage in Western Democracies took an irreversible step forward in Canada in 1982 by the enactment of *Section 3* of the Charter. I doubt anyone could now be deprived on the basis,

40 not merely symbolic but actually demonstrated, that he or she was not decent or responsible. By the time The Charter was enacted, exclusions from the franchise were so few in this country that it is fair to assume that we had abandoned the notion that the electorate should be restricted to a

'decent and responsible citizenry', previously defined by attributes such as ownership of land or gender, in favour of a pluralistic electorate which could well include domestic enemies of the state."

Sauvé v. A.G. Canada (#1) (1992), 7 O.R. (3d) 481, (O.C.A.), at. 487.

11. The appeal from the decisions of the Ontario Court of Appeal in *Sauvé (#1)* and the Federal Court of Appeal in *Belczowski* were dismissed by the Supreme Court of Canada. Contemporaneously, the legislation now at issue was passed, denying the vote to citizens serving two years or more.

Attorney General of Canada vs. Sauvé et.al., [1993] 2 S.C.R. 438.

12. In 1992, the Royal Commission on Electoral reform and party financing (the Lortie Commission), stated that "Confinement in prison is meant to be the extent of punishment; the rights and freedoms of prisoners are to be limited only to the degree necessary to effect confinement." Nevertheless, that Commission went on to state "limiting the right of prisoners to vote is justified, however, where the offences committed constitute the most serious violations against the country or against the basic rights of citizens to life, liberty and security of the person, including murder, kidnapping, hostage taking, treason, and certain sexual offences. Our tradition defines heinous crimes against persons or the country as those offences that are punishable by life imprisonment." As a result, that commission recommended that persons convicted of an offence punishable by a maximum of life imprisonment and sentenced for ten years or more, be disqualified from voting during the time they are in prison.

Royal Commission of Electoral Reform and Party Financing @ page 45, *Appeal Book*, p. 160.

13. The Lortie recommendation was apparently rejected because it was considered vulnerable to Charter challenge since it "wasn't related to an individual inmate, it was related to the possible sentence" and it could apply to less heinous crimes such as break and enter, yet miss such crimes as torture.

Ms. Bloodworth, Special Committee on Electoral Reform, March 9, 1993, *Appeal Book*, p. 188

line 23-32.

14. Those in support of the legislation, in Parliamentary committee, Senate committee, the House of Commons, and the Senate, described the objectives as follows.

a) "I think that Canadians are offended by the fact that Clifford Olson had the right to vote," and "Minor crimes, two years and less; major crimes, two and more. In major crimes, you have offended society enough for society to take away your freedom for a considerable period of time. I don't think it is unreasonable they'd deny you the right to vote."

The Honourable Harvey Andre, *Special Committee on Electoral Reform,* February 23rd, 1993, *Appeal Book*, p. 181-182.

b) "I am not sure that those who are sentenced to five or seven years in prison are in any way deserving of the right to vote. There has to be some meaning to the term punishment."

Mr. Wilson, *Special Committee on Electoral Reform*, March 9th, 1993, *Appeal Book*, p. 187, li. 23-25.

c) " Some people such as Clifford Olson...I just cannot get excited about such people losing the right to vote for the period they are incarcerated...The right to vote is there as long as the person has not committed an injury to the state but it is in a state of suspension and the person is isolated, interned, incarcerated...The argument in favour with the government is saying as to why everyone in the Federal penal institution should lose their right to vote is simple common sense. They chose to act against society. They now suffer the consequences which means denial of freedom. One of the aspects of denial of freedom, to move around and be at liberty is that they have lost the right to vote. Simple common sense tells us they have lost the privileges of free, responsible citizens, for a fixed period of time."

Mr. Pat Nowlan, *House of Commons Debates*, April 2nd, 1993, *Appeal Book*, p. 238, li.33-37;

p. 240, li.30-40.

15. In 1993, Richard Sauvé commenced a new action challenging the legislation now at issue. That action was joined with the Action commenced by Sheldon McCorrister and the other Appellants, in February of 1995.

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The Evidence at Trial

16. After ten days of evidence, and three days of argument, the Federal Court (Trial Division), struck down *Section 51(e)* of **The C.E.A.** as infringing **The Charter,** *Section 3,* and not demonstrably justified in a free and democratic society.

Judgement of the Court (Wetston, J.) Dated December 27th, 1995, Appeal Book, p. 2040

17. The Learned Trial Judge carefully reviewed the extensive *viva voce* testimony and assessed the weight of the evidence.

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Reasons for Judgement at Trial, pages 2-3, Appeal Book, p. 2043-2044.

18. The Government testimony was primarily based on United States experience, and was "academic and theoretical" , whereas the Plaintiff's expert testimony was "less lofty and is more tangible, particularly in relation to Canadian penology and social justice in prisons."

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Reasons for Judgement at Trial at page 3, *Appeal Book,* p.2044

Evidence of Lipset, Appeal Book. p. 1003-1010; p.1045, li.24 - p.1047, li.6.

See also, *Evidence of Amyot, Appeal Book,* p.1720, li.6-26.

Evidence of Pangle, Appeal Book, p. 1145, lines 1-14.

Evidence of Manfredi, Appeal Book, p. 1267, li.23-p.1268, li.3; p.1271, li.3-p.1273, li. 7; p.1316, li.1-12; p. 1320, li.17-p.1321, li.4.

Evidence of Van Den Haag, Appeal Book, p.1343, li.18-p.1351, li.13; p.1384, li.17-p.1385, li.23.

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Evidence of Hampton, Appeal Book, p. 1564, li.23 - p.1565; p. 1578, li.7-23.

See also, *Evidence of Boyd, Appeal Book,* p.1682, li.4-13.

19. The Plaintiff's experts are Canadian citizens, Canadian scholars, and Canadian residents.

(The exception is Eric Andersen of Denmark.) Witnesses Boyd, Andersen, and Jackson had extensive practical experience with prisoners.

Reasons for Judgement at Trial, page 3, Appeal Book, p. 2044.

Evidence of Boyd, Appeal Book, p.1619, li.15 - p.1624, li.3.

Evidence of Amyot, Appeal Book, p.1613, li.20 - p. 1695, li.6.

Evidence of Andersen, Appeal Book, p.1498, li.19 - p. 1506, li.23; p.1513, li.21 - p.1517, li.6; p.1536, li.12 - p. 1538, li.4; p. 1539, li.12 - p. 1540, li.6.

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Evidence of Schafer, Appeal Book, p.1774, li.23 - p.1789, li.12.

Evidence of Jackson, Appeal Book, p. 1881 - p.1901, li.16.

20. The witnesses for the Defendant had not studied the issue of prisoner disenfranchisement until being retained by the Attorney General of Canada for this proceeding, a few months in advance of Trial.

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Reasons for Judgement at Trial, page 3, *Appeal Book,* p.2044.

Evidence of Lipset, Appeal Book, p. 1044, li.1-16.

Evidence of Pangle, Appeal Book, p. 1148, li. 2-23.

Evidence of Manfredi, Appeal Book, p.1308, li.4-23.

21. The Government called no one who had "conducted Studies", as described by the Government in 1984. Empirical studies could be done.

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See *paragraph 2, supra.*

See *Evidence of Amyot, Appeal Book,* p.1749, li.8 - p.1755, li.20.

22. Some, if not all of the defendant's expert witnesses represent, even within their own respective theoretical disciplines, "non-mainstream positions".

Reasons for Judgement at Trial, page 3, *Appeal Book,* p. 2044.

Evidence of Pangle, Appeal Book, p.1188, li.8-20.

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Evidence of Amyot, Appeal Book, p.1731, li.16 - p.1732, li.8.

Evidence of Hampton, Appeal Book, p.1608, li.20 - p. 1609, li.19.

Evidence of Van Den Haag, Appeal Book, p. 1379, li.3 - p.1380, li.22.

See also *Evidence of Boyd, Appeal Book,* p. 1668, li.14 - p. 1669, li.24.

23. The Defendant witnesses had little or no knowledge of the state of the law in the United States or Canada as regards the right to vote for prisoners. Dr. Pangle attributed, in part, the disintegration of society in the United States to his erroneous belief that most prisoners are allowed to vote in the United States. Lipset was unfamiliar with the 14th amendment.

Reasons for Judgement at Trial at page 30-31, Appeal Book, p. 2071-2072.

Evidence of Pangle, Appeal Book, p.1262, li.13 - p.1263, li.20.

10 *Evidence of Manfredi, Appeal Book,* p.1324, li.18 - p.1326, li.9; p.1327, li.19 - p.1328, li.25.

Evidence of Van Den Haag, Appeal Book, p.1384, li.17 - p.1385, li.11; p.1388, li.23-26; p.1389, li.9-26.

Evidence of Lipset, Appeal Book, p.1118, li.11 - p.1121, li.18.

24. "Other than John Stuart Mill in a brief footnote reference, no well known political theorist or moral philosopher... ever considered this question. More recent political and moral 20 philosophers...have also not specifically considered this issue." The early thinkers lived either in absolute monarchies in which there was no vote, or in societies in which the vote was extremely limited (in John Stuart Mill's culture, for example, 17% of males constituted the electorate). Dahl, one of the few modern thinkers to consider the scope of the franchise, does not exclude prisoners. To Dahl, "the demos must include all adult members of the association except transients and persons proved to be mentally defective." John Rawls also suggests what persons 30 should not be permitted to vote and prisoners are, in that list, conspicuous by their absence. Rawls, in his writings, establishes principles both for an ideal and a non-ideal society, the latter being one which includes crime. To Rawls "perhaps the most obvious political inequality is the violation of the precept, one person, one vote," and, "An inequality ... must always be justified to those in the disadvantaged position." Rawls also says "the minimal requirements defining moral personality refer to capacity and not to the realization of it." Dr. Amyot opined, therefore, that the theories of both Dahl and Rawls support prisoner voting.

40 *Reasons for Judgement at Trial, page 3, Appeal Book* , p. 2044.

Evidence of Amyot, Appeal Book, p. 1696, li. 15 - p. 1702, li. 4; p. 1709 li.13 - 1719, li.12.

25. Dr. Amyot and Dr. Pangle gave diverging testimony on the significance of the footnote of

John Stuart Mill. Dr. Pangle describes it as "an important footnote...where he does address it and declares quite emphatically his view". By contrast, Dr. Amyot points out that the footnote commences with the words "I passed over the question..." and suggests that Mill was "flagging for further discussion" the issue of criminals voting; and that the footnote was in a pamphlet produced in 1859 and, in a subsequent, more comprehensive work in 1861, Mill, in a "more considered treatment" of the issue of what individuals should be disenfranchised, did not refer to

10 prisoners. Dr. Amyot concluded that, in 1861, John Stuart Mill did not advocate disenfranchising prisoners. (The institution of the penitentiary was well entrenched by 1861).

> *Evidence of Pangle*, *Appeal Book*, p. 1146, li. 5-21.
> *Evidence of Amyot*, *Appeal Book*, p. 1705, li. 13 - p. 1708, li. 10.
> *Jackson's Expert Report*, pages 5-10, *Appeal Book*, p.842-847.

26. John Stuart Mill, in the controversial footnote, appears not to have been referring to the

20 status of prisoner in any event. Moreover, John Stuart Mill (and other deep thinkers) emphasized that virtue was a result to be achieved through involvement in the political process. Mill said,

> "To take an active interest in politics is, in modern times, the first thing which elevates the mind to large interests and contemplations; the first step out of the narrow bounds of individual and family selfishness, the first opening in the
>
> 30 contracted round of daily occupations...The possession and exercise of political, and among others of electoral, rights, is one of the chief instruments both of moral and of intellectual training for the popular mind;..."

Dr. Pangle, despite the words of Mill, contended that it is appropriate to impose a test on citizens at the beginning of the process. Dr. Amyot disagreed and described Dr. Pangle's views as "rather singular". "...it is not the sort of thing you would find in formulations by people like Mill or McPherson or any other writers."

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> *Expert Report of Pangle* @ page 53, *Appeal Book*, p. 477, li. 15-30.
> *Evidence of Amyot*, *Appeal Book*, p. 1705, li. 16-20; p. 1739, li.18 - p. 1745, li. 3.
> *See also:*
> *Evidence of Lipset*, *Appeal Book*, p. 1076, li.1 - p. 1077, li. 24.

Evidence of Manfredi, Appeal Book, p. 1307, li. 6-16; p. 1332, li.4-16; p.1333, li.16 - p. 1339, li. 15.

Evidence of Hampton, Appeal Book, p. 1575, li. 9-12; p. 1579, li. 2-9; p. 1581, li.8-17; p. 1594, li.2 - p. 1595, li. 1.

27. Witnesses for both the Plaintiff and Defendant also agreed that achieving as broad and universal an electorate as possible is to the benefit of society as a whole.

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Evidence of Pangle, Appeal Book, p. 1162, li. 7-22.

Evidence of Manfredi, Appeal Book, p. 1274, li. 10-20.

Evidence of Hampton, Appeal Book, p. 1573, li. 10-26; p. 1581, li.18 - p.1582, li. 10.

Evidence of Boyd, Appeal Book, p. 1679, li.23 - p. 1681, li. 24.

28. The evidence of the Government witnesses was to the effect that harm from allowing prisoners to vote was not demonstrable. Moreover, the harm that they hypothesized was either tenuous or minimal. As well, Government witnesses acknowledged that it was also reasonable to hypothesize that allowing prisoners to vote was positive.

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Evidence of Lipset, Appeal Book, p.1078, li.7-p.1081, li.7; p. 089, li. 4-11; p. 1112, li. 14-p.1117, li. 6; p. 1131, li. 20-p.1132, li.11.

Evidence of Pangle, Appeal Book, p.1150, li. 21 - p.1152, li.22; p. 1153, li.16-p.1158, li.19; p.1159, li.14-p.1161, li.7.

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Evidence of Van Den Haag, Appeal Book, p.1368, li.6-p.1370, li.8; p.1421, li.20-p.1423, li.12.

Evidence of Hampton, Appeal Book, p.1610, li.12-16.

Evidence of Manfredi, Appeal Book, p.1330, li.5-p.1331, li.26 and p.1332, li.4-19.

29. To the extent that they did support the impugned provision, Government witnesses diverged widely as to the rationale. Pangle's rationale would have it that we can presume prisoners lack moral capacity. Manfredi's rationale is that we can presume prisoners lack empathy and are impulsive. The rationale of Lipset is simply that the more punishment we heap on the greater will be the cost of crime and deterrence will result. Van Den Haag sees the main effect as deterrence to non-prisoners. Hampton sees herself as motivated by feminist views and seeking

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alternatives to prison.

Evidence of Lipset, Appeal Book, p. 1076, li.1-13.

Expert Report of Pangle, p. 31, Appeal Book, p.455, li.21-26.

Evidence of Manfredi, Appeal Book, p.1275, li.10-p.1276, li.3.

Evidence of Van Den Haag, Appeal Book, p.1362, li.5-18.

Hampton, Trial Transcript, vol. 7, p.1438, li.23 -- p.1440, li.15.

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30. To the limited extent that the Government witnesses did opine that harm would result from allowing prisoners to vote, the experts called by the Plaintiff gave learned opinions to the contrary.

Evidence of Amyot, Appeal Book, p. 1743, li.5 - p.1760, li.5.

Evidence of Schafer, Appeal Book, p.1849, li.12 - p. 1857, li.4; p.1858, li.7 - p.1859, li.19; p.1862, li.12 - p.1868, li.11; p.1875, li.16-25.

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31. Witnesses called by the prisoners universally saw no purpose to be achieved by disenfranchising prisoners on any theory. Based on extensive accumulated experience with prisoners and with political science and political theory, criminology, law, and philosophy, witnesses called by the plaintiffs gave reasoned opinions as to the fact that disenfranchisement would serve no useful purpose for individuals or society; whereas providing prisoners with the right to vote was purposeful for the prisoner and consistent with the Canadian Judicial,

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Legislative, and Administrative policy context. Canada overuses prisons according to witness Boyd.

Evidence of Amyot, Appeal Book, p.1759, li.26 - p.1760, li.5.

Evidence of Boyd, Appeal Book, p.1629, li.11 - p.1635, li.8; p. 1640, li.5 - p. 1654, li.12; p. 1682, li.4-13; p.1689, li.12 - p.1690, li.19.

Evidence of Andersen, Appeal Book, p. 1528, li. 3 - p.1546, li.8.

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Evidence of Jackson, Appeal Book, p.1931, li.19 - p.1944, li.6; p.1995, li.12 - p.2002, li.16.

Evidence of Schafer, Appeal Book, p.1846, li.1 - p.1853, li.3.

32. Going from the theoretical to the practical, the Plaintiff witnesses, practitioners in

prisons, applied penology, and law, gave evidence that providing the right to vote to prisoners has a positive effect in giving them a stake in the community, promoting a positive attitude toward the political system, and minimizing the stigma and detrimental effects that necessarily go with being incarcerated.

Evidence of Boyd, Appeal Book, p.1648, li.26 - p.1653, li.23.
Evidence of Andersen, Appeal Book, p.1540, li.7 - p.1545, li.10.
10 *Evidence of Jackson, Appeal Book*, p.1995, li.15 - p.2001, li.10.
See also: Evidence of Hampton, Appeal Book, p.1590, li.2 - p.1595, li.1.

33. Providing the vote to one person or group does not detract from the value of the vote for another person or group. Professor Schafer found it inappropriate to use election laws as criminal punishment. Professor Hampton, in general terms, would oppose any punishment that was degrading in the sense of suggesting that the value of one person is less than that of another
20 person.

Expert Report of Hampton at page 6, li.1-21, Appeal Book, p.715.
Evidence of Schafer, Appeal Book, p.1872, li.21 - p.1873, li.20.
Evidence of Manfredi, Appeal Book, p.1340, li.16 - p.1341, li.3.

34. The evidence of the Plaintiff Sauvé was that prisoners, in their voting patterns, consider the same issues in determining for whom to vote as do other voters and, if given the opportunity
30 to vote, vote along party lines in a pattern similar to other voters. Most prisoners, though admitting their crimes, do not see themselves as lacking allegiance to the Government, the Country, or the Canadian way of life.

Evidence of Sauvé, P 1 at Trial, page 109-114, *Appeal Book*, p.51-56.

40 35. According to Crown witness Pangle "every single person's vote must be taken seriously, and treated as a matter of moment, above all in the law and every legal proclamation."

Expert Report of Witness Pangle, @ page 54, li.30, Appeal Book, p.478.

36. Three hundred and eighty-three prisoners were admitted to Ontario Correctional Institutions, where the inmate's sentence was two years or more, during 1993/94 and, as of mid-April of 1995, 303 of those offenders were still serving their sentence. The population of Ontario is approximately 10 million and that of Canada about 27 million. Therefore, by extrapolation, it can be inferred that approximately 900 persons in provincial institutions in Canada are serving two years or more. Though arguably disenfranchised by the legislation challenged herein, these people are on their honour both in terms of knowing whether they are disenfranchised and then in revealing that status so as to decline the ballot.

Exhibit 6 at Trial, Appeal Book, p.705.

Exhibit 5 at Trial, column 2 @ page 8, Appeal Book, p. 703

37. For certain crimes, the use of the penitentiary is controversial. Furthermore, for homicide, the most serious crimes, 40% of all suspects have no previous criminal record. Many prisoners are repeat offenders, or multiple offenders; and prison population is growing.

Evidence of Boyd, Appeal Book, p.1677, li.7-26; p.1674, li.2-14.

Expert Report of Meredith, Appeal Book, p.566-577.

38. The penitentiary was planned as an Utopian model. Prisons that preceded it were seen as "breeding grounds of petulance and crime alike." By contrast, the penitentiary, with its goal of solitary confinement, hard work to instill habits of industry, removal from bad companionship, and introduction to serious reflection, would create individuals that would be model citizens who would , in turn, spread morality to society at large. Thus, the purpose of the **Penitentiary Act**, as envisioned, was "bringing a moral, social and industrial order to the undisciplined ways of the poor..."

Expert report of Jackson, at page 6 , *Appeal Book*, p.843.

39. Thus, the penitentiary was established "not only to serve as a model for its inmates but also as a model for society".

Expert report of Jackson, @ page 10, *Appeal Book*, p.847.

40. As history has shown, the penitentiary did not live up to that lofty goal. In fact, to enforce silence and non-communication between prisoners (essential to the Utopian goal) required measures that proved to be "barbarous and inhumane".

Expert report of Jackson, @ page 11, *Appeal Book*, p.848.

41. As it was later observed, "by establishing the penitentiary..." the government chose "to fight the disease by spreading it".

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Expert report of Jackson, @ page 11, *Appeal Book*, p.848.

42. As of 1977, according to the McGuigan Report, "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."

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Expert report of Jackson, @ page 16, *Appeal Book*, p.853.

43. In recent decades, it became clear that the original Utopian goal of the penitentiary was not achieved. It became apparent that prisons had inherent negative consequences that were not comprehended by the inventors of the penitentiary. "Even where efforts have been made to 'normalize' the prison experience, these inherent consequences of imprisonment remain... 'normalization' is a misnomer in the context of imprisonment, and at best, it refers to modest continuous efforts to humanize the prisons."

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Expert report of Jackson, @ page 24, *Appeal Book*, p.861.
Evidence of Andersen, *Appeal Book*, p.1529, li.2 - p.1530, li.1.

44. Since 1979, through architecture, jurisprudence, legislation, and executive policy, a new and different vision of the physical and legal 'architecture' has evolved. That approach is to the effect that a prisoner retains his civil rights.

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Expert report of Jackson, @ page 28-29, *Appeal Book*, p.865-866.

45. Even in this environment, "there is often an enormous distance between the official

rhetoric and the reality when it comes to respect for and protection of human rights in any country's institutions of confinement".

Expert report of Jackson, @ page 29, *Appeal Book*, p.866.

Findings of the Learned Trial Judge

46. The Learned Trial Judge was "satisfied that sentences of two years or more involve serious crimes that reflect conduct which the Court has determined to be sufficiently distasteful as to warrant such a sentence." Accordingly, in terms of objective, he found that Parliament imposed "the sanction of disenfranchisement as a further punishment for serious crime."

Reasons for Judgement at Trial, @ page 13 and @ page 20, *Appeal Book*, p.2054 & 2061.

47. The Learned Trial Judge noted that "the objective of enhancing civic responsibility through the operation of *section 51(e)* of the **Canada Elections Act** is more elusive."

Reasons for Judgement at Trial, @ page 13, *Appeal Book*, p.2054.

48. The Trial Judge specifically found that "for any particular Federal election" inmates to whom the law applies are "completely denied the right to vote".

Reasons for Judgement at Trial, @ page 25, *Appeal Book*, p.2066.

49. The Learned Trial Judge, after due consideration, made a finding that disenfranchisement on a case by case basis by the sentencing judge would be an equally effective measure, perhaps more effective; and would be significantly less intrusive. He found that the legislative history "displayed virtually no consideration of a Court based process where disqualification is considered as part of sentencing." He found that such a provision would satisfy the concerns of those who, in the House of Commons Debates, emphasized a desire to deny the vote to "a criminal like Clifford Olson".

Reasons for Judgement at Trial, @ page 26, Appeal Book, p.2067.

50. The Learned Trial Judge considered Dr. Pangle's concern that a Court imposed disqualification may lack a clear minimum standard. The Learned Trial Judge reasoned that an

analysis of minimal impairment involved consideration of the legislative breadth of application as opposed to the clarity of its objectives; and that Dr. Pangle expressed the view that an Independent Judiciary is the guardian of the rule of law against majority oppression or factionalism. The Learned Trial Judge was satisfied that concerns regarding sentencing discretion can be addressed through appellate review. Moreover, the Learned Trial Judge noted that the current disqualification "involves no sentencing process whatsoever".

10 *Reasons for Judgement at Trial*, @ page 27, Appeal Book, p.2068.

51. The Learned Trial Judge found that prisoner disenfranchisement is not well known or visible in Canada; that the public would have a greater chance of being informed of the prisoner disenfranchisement through a Court imposed disqualification; that a sentencing judge could take into account the nature of the crime and the personal circumstances of the accused, a task now entrusted to a judge in terms of "taking away a person's liberty"; and that the current law "did not
20 distinguish the type of offender whose indecency is so profound as to threaten the principles of our free and democratic society."

Reasons for Judgement at Trial, @ page 27 & 28, *Appeal Book*, p.2068-2069.

52. The Learned Trial Judge found that the Government evidence, by and large, was that the provision "would have little or no effect on the prisoner."

30 *Reasons for Judgement at Trial*, @ page 30, *Appeal Book*, p.2071.

53. The Learned Trial Judge made a finding of fact as to the effect of the provision He stated "I prefer the Plaintiff's evidence which suggests that *section 51(e)* of the **C.E.A.** hinders the rehabilitation of offenders and their successful re-integration into the community. The provision only serves to further alienate prisoners from the community to which they must return, and in which their families live."

40 *Reasons for Judgement at Trial*, @ pages 38 and 39, *Appeal Book*, p.2079-2080.

54. The Learned Trial Judge took cognizance of all sentencing principles, including the

principle of retribution, and observed "the complexity is great, and a sentencing judge is given the enormous responsibility of knowing when to impose a sentence which not only has a retributive effect, but which also emphasizes rehabilitation."

Reasons for Judgement at Trial, @ page 39, *Appeal Book*, p.2080.

55. The Learned Trial Judge found that neither reason nor common sense suggest that denial of the right to vote would deter crime in an individual or in the general populace and, in the result, determined that "the salutary effects upon which the Defendant's 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."

Reasons for Judgement at Trial, @ page 40-41, *Appeal Book*, p.2081-2082.

56. As regards *section 15*, the Learned Trial Judge found the following. "The Plaintiff's argue that systemic discrimination has resulted in an over-representation of the poor and Aboriginal people in the Canadian inmate population. The evidence appears to support the fact of this over-representation." The Learned Trial Judge went on to find that the provision, although targeting more members from the poor and Aboriginal portions of society, "does not operate more harshly in relation to these two groups."

Reasons for Judgement at Trial, @ page 44-45, *Appeal Book*, p.2085-2086.

Since Trial

57. On April 23rd, 1997, the Government brought a motion to stay the trial decision in this matter pending the outcome of the appeal. On April 27th, 1997, the Government announced a Federal Election to be held on June 2nd, 1997. Although agreeing with the Applicant that "Public interest, as an aspect of irreparable harm, may be demonstrated at a lower standard", the Court noted that "During 1996, after the filing of the Crown's Notice of Appeal in this matter, there were seven by-elections held under the **Canada Elections Act**," and "...that all inmates were allowed to vote in the 1992 Constitutional Referendum and Prisoner voting is allowed in four provinces, yet no evidence was led to prove that any negative effects have been shown to

arise from the participation of the inmates in those elections," and held "There was no evidence presented, therefore, that any harm occurred to the public interest or that public confidence in the Rule of Law was in any way affected by those occasions in which prisoners voted."The motion for a Stay was dismissed. Appeals to the Federal Court of Appeal and to the Supreme Court of Canada were dismissed.

Reasons for Order on Motion, Wetston J., [1997] F.C.J. No. 594 (F.C.T.D.), May 16, 1997, at page 4.

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Reasons for Judgement, [1997] F.C.J. 629 (F.C.A.), May 21, 1997

Reasons for Judgement, [1997] S.C.C.A. No. 264, May 29, 1997.

58. During the thirty-sixth general election of the House of Commons, held on June 2nd, 1997, all prisoners and other Canadian citizens experienced the right to vote, and Canada thus enjoyed universal suffrage.

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59. On October 21st, 1999, the Federal Court of Appeal gave judgment reversing the decision of the Federal Court (Trial Division). Mr. Justice Linden wrote a judgement with which Chief Justice Isaacs (as he then was) concurred. Madam Justice Desjardins dissented.

Judgement of the Federal Court of Appeal and Reasons, Appeal Book, p.2088-2188.

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PART II

<u>POINTS IN ISSUE</u>

60. The following points are in issue.

a) Does *Section 51(e)* of the **Canada Elections Act** infringe *Section 3* of the **Charter of Rights and Freedoms**?

b) If the answer to question (a) is yes, has the evidence submitted in this case demonstrated that *Section 51(e)* of the **Canada Elections Act** is justified as a reasonable limitation in a free and democratic society, notwithstanding that it violates *Section 3* of **The Charter**?

(c) Does *Section 51(e)* of the **Canada Elections Act** infringe *Section 15(1)* of the **Canadian Charter of Rights and Freedoms**?

(d) If the Court finds it necessary to address (c) and if the answer to (c) is yes, has the evidence submitted in this case demonstrated that *Section 51(e)* of the **Canada Elections Act** is justified as a reasonable limitation in a free and democratic society, notwithstanding that it violates *Section 15(1)* of the **Charter**?

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PART III

ARGUMENT

Does the impugned provision violate Section 3 of the Charter?

62. It is respectfully submitted that the impugned provision does violate *Section 3* of the **Charter**. The Government, at Trial, conceded a *section 3* violation. Moreover, *section 3*, unlike other sections of the **Charter,** contains no limiting or qualifying adjectives. As well, in framing *section 3*, the Government had every opportunity to make exceptions to the right to vote; in this regard the **United States Constitution** stands as a precedent. The Government considered the issue of prisoner voting for at least two years prior to the enactment of the **Charter**.

Reasons for Judgement at Trial, page 2, Appeal Book, p.2043.

Gould v The Queen, supra @ paragraph 2.

Re: Grondin and A. G. Ontario (1988), 65 O.R. (2d) 425, at 430.

R v Turpin and Siddiqui, [1989] 1 S.C.R. 1296, @1328.

A.G. (Que) v Quebec Protestant School Board, [1984] 2 F.C.R. 66, at 88.

Has the evidence demonstrated that the provision is justified as a reasonable limitation on the *Section 3* guarantee, in a free and democratic society?

Introduction to *Section 1* Argument

63. Oakes provides the steps to take in the analysis, but does not mandate rigid compartmentalization. The history of this matter illustrates the difficulty that even the Government has in identifying the objectives of the legislation. Views vary as to what, if any, rational connection there is between the means and the objectives. As to minimal impairment, there is some debate as to what latitude Parliament must have in choosing alternatives that either draw a line, cast a net, or aim a harpoon. However, on the issue of proportionality, involving the weighing and comparing of salutary effects and detrimental effects, the result is easier.

R v Oakes [1986] 1. S.C.R. 103

Canada (Human Rights Commission) v Taylor, [1990] 3 S.C.R. 892.

64. Accordingly, we will first address proportionality. We will then argue, that applying the same evidence and findings of fact to the other branches of the Oakes Test will make it clear that there is no rational connection to the proposed objectives. We will also argue that the proposed objectives have not been demonstrated to be the actual objectives of Parliament. We will argue that this legislation is calculated to stereotype prisoners improperly.

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65. The legislation at issue links disenfranchisement not to any crime or crimes, or to any process, but to the response of the Government to various and sundry forms of conduct and a variety of individuals; namely, the status of long-term imprisonment. This is problematic for many reasons, one of which is that the manner and extent to which long-term imprisonment is used, and the utility of long-term imprisonment itself, is controversial. The Trial evidence as to the historical development and contemporary wisdom as to penitentiary policy, as expressed by legislation, jurisprudence, and executive statement establishes that this deprivation is a gratuitous, irrational aggravation of an already severe punishment.

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Proportionality

66. It is respectfully submitted that the Trial Judge's finding that virtually no salutary effect has been demonstrated is a finding based on credibility of witnesses and the weight of the evidence, and one with which an appellate court ought not to interfere.

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Supra, paragraphs 48-55.

67. It is respectfully submitted that the dissenting judgement in the Court below was correct that there was no demonstration in the case at bar. This is particularly significant since the matter had been examined in depth by the Government since 1980. The **Charter** mandates a contextual, rather than an abstract, approach.

Gould v The Queen, supra @ paragraph 2.

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Reasons for Judgement (Desjardins, J. A. - dissenting) @ paragraph 51, Appeal Book, p.2185.

Edmonton Journal v Alberta (Attorney General), [1989] 2 S.C.R. 1326, @1352-1353.

68. This law suffers from imprecision. Approximately 900 persons in provincial institutions are serving sentences of two years or more and apparently bound for the penitentiary. As well, prisoners in provincial institutions who receive a consecutive sentence after serving a portion of their original sentence may be serving two years or more but not be bound for the penitentiary. Furthermore, many prisoners in the penitentiary may be serving a sentence consisting of several consecutive sentences, one or more of which may be less than two years. Those sentences, arguably, do not merge for the purposes of the **Canada Elections Act**. Sentence calculation issues have caused Court comment: "...the net effect of such ill-expressed legislation is a residue of uncertainty, ill-will and a sense of dubious justice, which must rankle in those least able to cope in such a situation." The disenfranchisement of those serving two years or more compounds this problem. Rendering uncertain the entitlement of even one person to vote is unacceptable.

Paragraph 46, supra.
R v Hendricks (1999), 173 C.C.C. (2d) 445.
Re Dean and The Queen, 35 C.C.C. (2d) 217, (Ontario High Court).
Corrections and Correctional Release Act, *s. 139(1).*
Criminal Code of Canada, *s. 743.1.*
Evidence of Pangle, paragraph 35, supra.
R v Smith [1987] 1 S.C.R. 1045.

69. An undeterminate number of prisoners in the penitentiary who have been released are in custody in the penitentiary by reason of temporary suspension of their parole, awaiting a decision by the National Parole Board as to whether they have indeed breached a condition of their release or are likely to do so. An undetermined number of these are thus in a position analogous to a person on bail and will be released following a hearing before the National Parole Board. As well, the Parole Board can re-incarcerate for any breach, however minor.

Corrections and Conditional Release Act, *section 135.*
Gallichon v Commissioner of Corrections (1995), 101 C.C.C. (3d) 414, @444.

70. It is respectfully submitted that the majority of the Court below erred in holding "it is also

the case that, in order to be disenfranchised, the prisoner must have exhausted all appeals, including sentencing appeals".

Reasons for Judgement (Linden, J. A.), paragraph 94, Appeal Book, p.2146

Criminal Code of Canada, *s. 679.*

71. It is respectfully submitted that the majority of the Court below erred in finding it to be a salutary effect that the legislation sends a message "signalling Canadian values" and that the message is that prisoners lose their right to vote. It is circular to suggest that the effect is to send the message that you have denied the right to vote. Furthermore, it is respectfully submitted that our society unequivocally repudiates crime and the dissenting judgement in the Court below was correct that "no evidence was presented to establish that the Criminal Code and the other Rules aimed at accomplishing that objective need to be supplemented by this legislation".

Reasons for Judgement (Linden, J. A.) @ paragraph 82, Appeal Book, p.2137-2138.

Reasons for Judgement (Desjardins, J. A.) @ paragraph 32, Appeal Book, p.2175.

Edmonton Journal v Alberta (Attorney General), supra, at paragraph 67, @ 1352.

72. It is respectfully submitted that disenfranchisement of prisoners only degrades, and is contrary to the philosophy expressed by witnesses called by both plaintiffs and defendants. Therefore, enfranchisement of a prisoner is not "kindness towards the criminal", but an acknowledgment of his humanity, and is not "an act of cruelty towards the victim and the community". The victims and the members at large in the community retain their right to vote, and their votes are not devalued.

See, supra. Paragraph 33.

Law v Minister of Human Resources, [1999] 1 S.C.R. 497.

73. It is respectfully submitted that the majority of the Court below erred in holding that to allow prisoners to vote "undermines our democratic values". It is respectfully submitted that universal suffrage will not undermine democratic values. In provinces within which it has been enjoyed, no degeneration is in evidence. The same is true following universal suffrage in Canada In 1997. Likewise for Denmark and other countries in which prisoners vote. Universal suffrage

will, in a sense, achieve democracy. Society is richer when there is universal suffrage. To deny one group the right to vote impoverishes the nation. To allow the vote to unpopular minorities demonstrates tolerance. It demonstrates courage on the part of those who hold power and strength and cohesion in the fabric of society.

Reasons for Judgement (Linden, J. A.), paragraph 84, Appeal Book, p.2139.

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74. There is no evidence to suggest that prisoners would abuse the vote or even vote in favour of laws that are soft on crime. Prisoners can contribute to the debate as to how society should respond to crime and how society should organize itself to minimize criminal activity. They are deeply affected by substantive law, as well as procedure. Conditions of confinement and the frequency and length of jail sentences are important policy questions. There will be a spectrum of opinion from the extremely punitive on one hand to the extremely liberal on the other. Arguably, Canada overuse prisons. (No doubt, some would argue the opposite.) A free and

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democratic society, our society, need not fear input on these issues, at the electoral level, from all citizens.

R v Laba, [1994] 3 S.C.R. 965.

75. It is respectfully submitted that the majority in the Court below erred in finding that the difficulty in proving salutary effects of the impugned provision should not be controlling because

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it would call into question the use of imprisonment. The **Canadian Charter of Rights and Freedoms**, by its own terms, approves of the practice of imprisonment, including long-term imprisonment. *Section 7*, by implication, approves of the deprivation of liberty as long as it is in accordance with the principles of fundamental justice. *Section 9*, by implication, allows for detention or imprisonment to the extent that such is not arbitrary. *Section 10*, by implication, allows for arrest or detention and specifies certain rights that emanate therefrom, including the right to habeas corpus "and to be released if the detention is not lawful." *Section 11(f)* envisions

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long-term imprisonment by guaranteeing the benefit of trial by jury in cases where a person may be subject to imprisonment "for five years or a more severe punishment". By contrast, *section 3* of **The Canadian Charter of Rights and Freedoms** provides simply that every citizen of

Canada has the right to vote in an election of members of the House of Commons.

*Reasons for Judgement (Linden, J. A.) @ paragraph 79, Appeal Book, p.*2136-2137.

76. Moreover, the goals originally envisioned by long-term imprisonment in the penitentiary have not been achieved. Current wisdom acknowledges this in all branches of Government. Accordingly, promotion of opportunities to exercise responsibility and achieve reform is the emphasis of today. Thus, as problematic as long-term imprisonment is, to disenfranchise those prisoners who are citizens will not alleviate the problem; to enfranchise citizens who are imprisoned, may help the problem.

Re Grondin vs A.G. Ontario, supra., @ 430-432

77. Modern jurisprudence holds that prison law is social law. Once the protection of society is established, rehabilitation is the goal. It is respectfully submitted, that in this context, the protection of society is established by the prison walls.

Collin v Lussier [1983] 1 F.C. 218, (T.D.), at 236.

78. Similarly, legislative policy states, as a matter of principle, "that offenders retain the rights and privileges of all members of society, except those rights and privileges that are necessarily removed or restricted as a consequence of the sentence."

Corrections and Conditional Release Act, *section 4(d)*

79. As well, the Executive Branch of government, through the Correctional Service of Canada, in its Mission Statement, makes very clear how our government interprets the legislated policy, by saying "Because the special powers conferred on us by law impact on individual liberty and security of the person, we have a specific obligation to treat offenders humanely. It goes beyond our legal obligation to ensure that offenders are properly housed, clothed and fed. We have a responsibility to deal with them fairly bearing in mind that they retain their rights as members of society, except those that are removed by the fact of their incarceration". (emphasis added)

Mission Statement of the Correctional Service of Canada, page 6, Appeal Book, p.987.

80. The said judicial, legislative, and executive statements, that assert the importance of giving civil rights to prisoners, are logical and purposive. The best protection for society in relation to any given prisoner is the rehabilitation of that prisoner.

Re Rowling and The Queen (1980), 57 C.C.C. (2d) 169 at 177

Expert report of Jackson, @ page 58, Appeal Book, p.895.

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81. It is respectfully submitted that the removal of an enumerated **Charter** right as punishment is not justified, whatever be the sentencing principle relied upon, namely whether it be retribution, rehabilitation, or general deterrence. Other means of punishment are available that do not violate **Charter** rights. Gratuitous infliction of pain is detrimental to the punished as well as the punisher. As Shakespeare said, "Heat not a furnace for your foe so hot that it doth singe thyself" (Henry VIII, (1613), Act 1, Sc.1, line 140). If, indeed, some criminals are properly characterized as "domestic enemies", then, particularly in the absence of capital punishment, we do not destroy those enemies. Therefore, we must reconcile them.

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82. Sweeping statements made by the majority of the Court below to the effect that persons disenfranchised by this law are those who "repudiate Canada's sense of community and which demolish the dignity of their victims" are unfounded on the evidence and promote stereotyping and alienation. This is the very problem that the Learned Trial Judge found as a fact to flow from this legislation. It follows that the majority of the Court below erred in emphasizing prison as separation from community and approving accordingly of the loss of the right to vote as furthering that separation. This is an archaic approach not in keeping with contemporary wisdom. Mr. Andersen, not only a Danish jailer of many decades experience, but also a consultant and student of prison matters throughout the world, made it clear that prison practitioners today consider it important to provide to prisoners features of belonging to society. This is seen as important because of the debilitating effects of imprisonment and because most prisoners come to prison already disadvantaged. Evidence confirms that this is also the current wisdom in Canada. "As far as possible, they should be members of the community as long as they are in prison, as well as when they are outside of prison." "Absolutely there is a trend

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towards keeping prisoners as members of a society."

Reasons for Judgement (Linden, J. A.), paragraph 87, Appeal Book, p.2141.
Evidence of Andersen, Appeal Book, p.1532, li.1-5; p.1533, li.25-26.
See also, *Supra, paragraphs 42-45, 53.*

83. No evidence was tendered to establish that denying the vote to an undesirable group of people promotes civic responsibility, either in that group, or in the rest of society.

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See *paragraph 21, supra.*

84. The persons who invented the penitentiary had hoped to provide an environment conducive to the reform of the individual to return him or her to society a better person and indeed an exemplary person. This can not be achieved through additional deprivations beyond the loss of freedom and certainly not by the deprivation of a fundamental **Charter** right. Instead, a person who has the ability and takes the opportunity to take part in the positive process of the electorate will feel and be more at one with the community and will tend, therefore, to foster within himself or herself desirable qualities of civic responsibility. Thus, allowing the vote is in keeping with the goals of the originators of the penitentiary, revised to accommodate the present.

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Supra, *paragraphs 38-45.*
See also Rothman, David J. The Discovery of the Asylum, Chapter 4, *The Invention of the Penitentiary*, @ page 107.

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85. It is respectfully submitted that the majority of the Court below erred in describing the legislation as a declaration of principle. Declarations of principle are to be found in the **Corrections and Conditional Release Act,** the **Criminal Code**, and the preamble to the **Charter**. Declarations of principle are useful as statements of societal values to guide executive decision-makers and courts in interpreting their duties.

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"Depriving prisoners of the vote is not a ringing and unambiguous public declaration of principle. On the contrary it is an almost invisible infringement of the rights of a group of person who, as long as they remain inside the walls, are to our national disgrace, almost universally unseen and unthought of. If, as I think, therefore, the alleged symbolic objective is

one whose symbolism is lost on the great majority of citizens, it is impossible to characterize that objective as pressing or substantial."

Reasons for Judgement (Linden, J. A.) @ paragraph 86, Appeal Book, p.2140.

Corrections and Conditional Release Act, *section 4*, see paragraph 78, supra.

Canadian Criminal Code, *section 718, 718.1, 718.2*

Canadian Charter of Rights and Freedoms, preamble.

Belczowski v Canada, (F.C.A.) , supra.

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86. It is respectfully submitted that respect for the Rule of Law, in prisoners, and others, is better promoted through enfranchisement than disenfranchisement.

Supra, paragraphs 26-35, 52-53.

Minimal Impairment

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87. Having regard to the fact that this legislation denies, for any given general election, the right to vote to all <u>individuals</u> affected irrevocably; and denies the right to vote to the <u>group</u> permanently and completely; and having regard to the failure to demonstrate salutary effect; and having regard to the fact that voting by prisoners has a positive effect; it follows, *ipso facto*, that impairment is excessive.

88. The option of giving a sentencing judge the power to disenfranchise addresses many of the objectionable features of the legislation at issue.

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a) Such a provision would require that the disenfranchisement be stated publicly and thus, the message would be conveyed explicitly.

b) If, as with the legislation considered in the *Harvey* case, the provision empowered the judge to disenfranchise for a specified period, such as a five-year period in *Harvey*, there is an added certainty and such a provision ensures "that the appellant is ineligible to run in the next general election".

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Harvey v New Brunswick [1966] 2 S.C.R. 896 at 905.

c) Such a provision, arising from a sentence in court and not from the mere status of incarceration, is not afflicted with the concerns about inconsistency with government

policy generally as regards prisoners.

d) Such an approach can never lead to the accusation that the legislation casts too wide a net, because it involves specific consideration of the offence, the offender, and all surrounding circumstances.

e) Such a measure need not be linked to imprisonment at all. Thereby, it avoids the concern mentioned by the majority of the Court below as to whether imprisonment itself is beneficial.

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f) Such a measure could be used as an alternative to imprisonment.

89. It is respectfully submitted that the majority of the Court below erred in suggesting that disenfranchising prisoners is useful as an alternative to increasing sentences of imprisonment. There is no evidence that prison sentences have been or would be avoided or reduced by reason of blanket disenfranchisement of prisoners.

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Reasons for Judgement (Linden, J. A.) @ paragraph 96, Appeal Book, p.2147.

90. The appellant does not concede that even a judge-imposed disenfranchisement would be constitutional. Arguably, the *Harvey* case, justified by the objective of maintaining the integrity of the electoral process in relation to electoral offences, is as far as the legislature should go. Even for the most serious offences, such as murder, wisdom suggests a proper emphasis is on rehabilitation, hope for redemption, and the acknowledged benefit of taking part in the electoral process. To disenfranchise based on a supposed standard of moral capacity is a dangerous and slippery slope. It is preferable to accept all votes and thus enjoy universal suffrage, rather than give the Government (even the Judiciary) the right to choose the electorate.

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91. It is respectfully submitted that the majority of the Court below erred in its conception of deference to Parliament . Undue deference to Parliament is to patronize Parliament. The Trial process, and the independent role of the judiciary, puts the Courts in a better position than Parliament to ascertain effectiveness of various options. Moreover, there is danger in relaxing the process required by *section 1* and the jurisprudence. This danger is particularly evident in a

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case like this, when one starts with very broad objectives, accepts rational connection as anything that is less than arbitrary, thus catapulting to the minimal impairment test and then, by reference back to the importance of the objectives, and adding an ambient deference to Parliament to the mix, allows the abrogation of a **Charter** right.

Reasons for Judgement (Linden, J. A.), at paragraph 59, Appeal Book, p.2122-2123.

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Rational Connection

92. The Learned Trial Judge accepted as an abstract notion the connection between the objects and the concerns. However, his duty, it is respectfully submitted, went beyond that. It is respectfully submitted that, in fact, the findings of fact that he made suggest that there is no rational connection. In particular, there is nothing in the findings of fact of the Learned Trial Judge to support the conclusion that the provision had any rational connection to the enhancing of civic responsibility or the promotion of respect for the Rule of Law.

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Paragraph 47, supra.

93. The legislation aggravates the punishment of imprisonment but that does not mean, *ipso facto*, that it is an enhancement of the criminal sanction. An enhancement means an improvement. The evidence in this case does not establish that disqualifying prisoners from voting improves the criminal sanction. On the contrary, the evidence and the findings of the Learned Trial Judge lead to the opposite conclusion. Allowing prisoners the right to vote provides rehabilitative benefits and a motive to improve the bonds between the individual and the community. On the other hand, disenfranchisement stigmatizes and alienates and compounds the problems derived from imprisonment. No benefit to the general public was demonstrated. The Learned Trial Judge found that Parliament imposed sentences of two years for crimes that were "sufficiently distasteful as to warrant such a sentence". However, he failed to find any rational link between disenfranchisement and the status of prisoner that resulted from the two year sentence. In fact, his findings of fact were that the effect of the provision was destructive and not helpful.

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Supra, paragraphs 46, 48, 52, 53.

94. In logic, the fact that there is a rational connection between "a" and "b" and between "a" and "c" does not justify the conclusion that there is a rational connection between "b" and "c". We punish certain crimes through long-term imprisonment. There is a rational connection. We punish certain crimes by disenfranchisement. There is a rational connection. It does not follow that there is a rational connection between imprisonment and disenfranchisement.

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95. Madame Justice Desjardins, dissenting in the Court below, found a limited rational connection to the goals. However, even at that, when after the evidence is in, as in this case, there has been no demonstration that the goals are advanced by this provision, we respectfully submit that it is inaccurate to suggest that there is a rational connection.

Reasons for Judgement (Desjardins, J. A.-dissenting), @ paragraph 36, Appeal Book, p.2177.

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96. In general terms, it is respectfully submitted, once findings of fact have been made at Trial, it is inappropriate to be blind to those findings of fact in assessing rational connection.

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97. We will argue in the next section that the Parliamentary debates, the evidence and the reasoning in the Courts below, together suggest that the true objectives amount to stereotyping prisoners by reason of their status. If, instead, the objective was to target for disenfranchisement those prisoners guilty of the most heinous crimes and exhibiting the most severe insensitivity to others and a rejection of the fundamental values of our society, it is respectfully submitted that, by a blanket provision disenfranchising all prisoners serving two years or more, a much wider net is cast. Thus, penitentiary sentences are imposed for a great variety of crimes and offenders, including impaired driving (maximum of five years); driving while disqualified (maximum five years); and theft under $5000.00 (maximum two years). Some regulatory offences that do not even require willful misconduct can result in sentences in excess of two years.

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Criminal Code of Canada, *sections 253, 255, 259(4), and 334.*

R vs Whole sale Travel Group Inc, [1991] 3 S.C.R. 154, at 171.

See also, *supra, paragraphs 34-37.*

98. It is further respectfully submitted, in any event, that the goal of disenfranchising persons

by reason of misconduct does not, inherently, have any rational connection. It is consequential and not deontological, meaning that, although it may be "common sense" to some, it must be scrutinized to the point of asking whether it achieves a purpose. It is respectfully submitted that it does not. Again, the findings of the Learned Trial Judge should be applied at this stage of the test.

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99. It is respectfully submitted that the description of the first objective as "the enhancement of civic responsibility and respect for the Rule of Law" is problematic. The Rule of Law is a concept generally understood to apply to the conduct of Government to its subjects. Respect for the Rule of Law is, arguably, best achieved by Government action that is fair, open, and consistent. This law is little known, imprecise, and inconsistent with Government pronouncements in all branches of Government. The Rule of Law is of paramount importance in the conduct of correctional matters. It has been seen to be lacking. It is respectfully submitted that allowing prisoners to vote will promote respect for the Rule of Law.

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Reasons for Judgement at Trial, page 7, Appeal Book, p.2048.

McRuer, J. "Control of Power", *LSUC Special Lectures*, 1979, pages 2-5.

Commission of Inquiry into Certain Events at the Prison for Women in Kingston, 1996, at pages xi - xiii, and 173-182.

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Objectives

100. There is no preamble, statement of principle, or other guidance within the statute itself to assist in determining the objectives. It is respectfully submitted that the record herein, including Parliamentary debates, evidence at trial, and history of jurisprudence, reflects that the objective here is the stereotyping of prisoners serving two years or more. Depending on what evidence or statement one looks to, that stereotype may vary. (Moral incapacity, impulsivity, "like Clifford Olson", et cetera.) The evidence does not demonstrate how many, if any, such persons fit into those stereotypes. Whatever be the stereotype alleged, it is alleged against all persons serving two years or more. Moreover, stigmatizing a class by reference to stereotype is inappropriate and calculated to alienate that class and thus, is an invalid objective. The uninformed public

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holds stereotyped views of prisoners; this legislation improperly feeds those exaggerated and false notions.

See *supra, paragraphs 9 and 14.*

101. It is respectfully submitted that the reasoning applied by the majority of the Court below in purporting to justify this legislation is stereotypical reasoning when the Court suggests that all persons affected by this legislation have "contempt for our basic societal values" and "repudiate Canada's sense of community" and "demolish the dignity of their victims". Citizens guilty of offences such as impaired driving, drive while disqualified, and certain drug offences may not even have specific victims. Many individuals are serving sentences for property offences. Even prisoners guilty of serious crimes of violence in moments of passion or under provocation may hold the same values as are shared by other members of the community. People guilty of regulatory offences that do not even require willful misconduct do not, arguably, deserve this stigma.

102. It is further respectfully submitted that no cogent evidence has been tendered to show that the objectives, in the context of this legislation, are pressing and substantial. The Government, after many years of preparation, chose its case and failed in its onus. If the legislative purpose becomes pressing and substantial at some future time, it is open to the Government to legislate accordingly and tender proof then. At best, the Government's case established that, to some witnesses, this legislation is as desirable as chocolate, or perhaps red wine.

Paragraph 28, supra.

Irwin Toy v A.G. Quebec [1989] 1. S.C.R. 927, at 973.

Re Lukes and Badger and the Chief Electoral Officer (1986), 21 C.R.R., 379 (Man. C.A.)

Levesque v A.G. Canada, (1985), 25 D.L.R. (4th) 184.

Re Hoogbruin et al v A.G.B.C. (1985), 24 D.L.R. (4th) 718.

103. Even after many years of litigation, and up to the point of decision of the Court below, the objectives remain unclear. On the one hand, the majority of the Court below agreed with the objectives found by the Learned Trial Judge. Yet, that majority decision went on the criticize the

Learned Trial Judge for seeing the objectives as "one dimensional". That majority decision also, by implication, saw the objective as being "to maintain and enhance the integrity of the electoral process", an objective not argued. This quandary is further complicated by the majority of the Court below stating "I would leave to philosophers the determination of the 'true nature' of the disenfranchisement." In this regard, comments of the Federal Court of Appeal and the Ontario Court of Appeal in relation to the predecessor legislation, remain as persuasive in relation to this legislation.

Reasons for Judgement (Linden, J. A.) Paragraph 38, 40, 44, 59, 69; Appeal Book, p.2111, 2112, 2114, 2122, 2129.

See, *supra, paragraphs* 8-10.

Section 15

104. It is respectfully submitted that prisoners are a distinct and insular minority within the meaning of *Section 15*. They share the immutable personal characteristic of being prisoners.

105. It is respectfully submitted that the availability of the *Section 15* remedy does not depend on proof that individual members of the group have some innate immutable personal characteristic. It is the membership in the group and the consequences of that membership that should be examined. People may come and go from within a group, whether that be a religious organization, the group comprised of pregnant women, or the group comprised of prisoners serving sentences of two years or more.

Brooks v Canada Safeway [1989] 1. S.C.R. 1219.

Dartmouth/Halifax County Regional Housing Authority v Sparks (1993), 119 N.S.R. (2d) 91 (N.S.C.A.).

106. It is respectfully submitted that it is a fiction to suggest that such persons volunteer for the status of prisoner. A person who puts his hand on a hot stove and is burned may bear the sole responsibility for his action. However, when a person commits an offensive act and another person, as a consequence, forces him to put his hand on the stove and be burnt, both the perpetrator and the punisher bear responsibility for the burn. The Government, as a policy choice,

is responsible for long-term imprisonment. In doing so, the Government has created a class of persons. To proceed to disenfranchise those members of that class who are citizens denies those citizens equal protection of law. This includes access to their elected representatives in their ombudsman capacity.

> *Reference Re Provincial Electorial Boundaries (Saskatchewan)*, [1991] 2 S.C.R. 158.
> See also,
> *Dixon v Attorney General of British Columbia*, [1989] 4 W.W.R. 393 (B.C.S.C.)
> *Haig v Canada*, [1993] 2 S.C.R. 995.

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107. It is particularly important not to deny this group protection from discrimination because the group is created by Government action and because the group is a particularly unpopular one and thus vulnerable to the tyranny of the majority and lynch mob mentality. Protection of such a group is the essence of *section 15*. "Prisoners" as a class, are distinct from, yet confused with, "criminals" as a class.. Criminals are generally considered to be those people who, by their lifestyle, flaunt the laws of the country. Some of those become prisoners through Government action. However, "prisoners", are that specific class or group that are, more than any other group, totally at the mercy of Government officials. In the words of the majority of the Court below, "Parliament has chosen to deny the rights of a group of relatively powerless people".

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> *Reasons for Judgement (Linden, J. A.), paragraph 59, Appeal Book, p.*2122.

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108. The characteristic of being a "prisoner" is immutable in that it cannot be changed by the individual but only by Government action, namely release from confinement. Citizens who happen to be prisoners on election day bear the burden of this law. Justificatory factors are best considered under *section 1*.

> *R v Turpin and Siddiqui*, supra, at paragraph 62.
> *Andrews v L.S.B.C.*, [1989] 1 S.C.R. 143.

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109. If prisoners have the intrinsic characteristics attributed to them by Crown witnesses Pangle, or Manfredi, they are, arguably, being discriminated against for that reason. If they do not have those intrinsic characteristics, this law promotes an unfair stereotype.

See *supra, paragraph 29.*

110. It is respectfully submitted that certain issues, such as those that go to security of Correctional Institutions (e.g. compulsory urinalysis) do not invoke *Section 15* because they relate directly to the status of prisoner and thus do not discriminate. By contrast, political rights of a general nature such as the right to vote have no direct relationship to the status of prisoner and deprivation of such a right of general application is properly considered within *Section 15(1).*

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111. Consideration of *Section 15(1)* and its applicability takes place in the framework of consideration of the human dignity of each individual and of each group within society. A punishment that has the effect of degrading an individual citizen to a position inferior to any other individual in society in terms of basic human worth, is contrary to *Section 15*.

See, *supra, paragraph 33.*

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Law v Ministry of Human Resources, supra @ paragraph 72.

112. The fact that Canadian aboriginal people are disproportionately placed in prison means that the disenfranchisement of prisoners diminishes proportionately the voting power of the aboriginal community. The full proportionate contribution of the aboriginal people to the electoral mosaic will improve and enlighten society as regards both the prevention of crime and the treatment of those who commit crimes. Crime is caused by the way we organize our society and the values that we promote within it.

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> The generosity of the Indian in relieving the necessities of others of the tribe, scarcely knows any bounds, and only stops short of an absolute community of goods. No member of a tribe can be in the least danger of starving, if the rest have wherewithal to supply him. Children rendered orphans by the casualties to which savage life is subject, are immediately taken in charge by the nearest relative, and supplied with everything needful, as abundantly as if they were his own. Nothing gives them a more unfavourable opinion of the

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French and English, than to see one portion reveling in abundance while the other suffers the extremity of want; but when they are told that for want of these accommodations, men are seized by their fellow creatures, and immured in dungeons, such a degree of barbarism appears to them almost incredible.

Willis N.P., **Canadian Scenery**, illustrated in a series of views by W.H. Bartlett, @ page 12 (published between 1838 and 1842 in England, reprinted by Peter Martin Associates Ltd., 1967).

See also: Ross, Rupert, *Returning to the Teachings*, 1996, at p.5, 16-19, 246-247.

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113. Similarly, over-representation of the poor and socially disadvantaged group in the penitentiary dilutes and diminishes, proportionately, the vote of those groups as a result of the impugned provision.

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Expert report of Jackson, @ page 44, *Appeal Book*, p.881.

114. It is respectfully submitted, whereas it may be sufficient to justify imprisonment of the poor and of Aboriginal people disproportionately by suggesting that crime will inevitably concentrate among the disadvantaged, the same does not hold true of the right to vote. By weakening the voting power of Aboriginal people, all Aboriginal people are weakened, not just those who have committed crimes. Those people, particularly the law-abiding ones, who, as a group, are greatly over-represented in prison, and who are more heavily policed and more harshly punished for their crimes, have a right to a proportionate representation in the electorate.

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Expert report of Jackson, @ page 45 to 50, *Appeal Book*, p.882-887.

115. It is respectfully submitted that the Learned Trial Judge erred in his analysis of *section 15*. The fact that the law imposes equal effect on individuals is not controlling. By treating all equally, unequal effect on Aboriginal people and on poor and disadvantaged people results.

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116. *Section 15* of the **Charter** informs in terms of other fundamental rights. Denial to this group of protection of *section 15* may have significant detrimental effects on unlitigated matters

and matters yet to be considered. One example is health care. Should prisoners, for example, be entitled to *section 15* protection in terms of access to treatment, including drug treatment, subject only to *section 1* limitations ? If not, prisoners will be the one group in society who is reliant on the pre-**Charter** doctrine of the supremacy of Parliament, and thus be totally dependent on the wisdom of the Government.

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Section 1* in light of *Section 15

117. It is respectfully submitted that, no salutary effects having been established, and detrimental effects having been shown, the provision cannot be justified.

118. It is respectfully submitted that this provision impinges upon values fundamentally linked to the guarantee of *section 15*, and, by contrast, is only indirectly and, at that, tenuously, linked, if at all, to the objectives alleged.

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PART IV

Order Sought

119. The appellant respectfully requests that the Court order

(a) that *section 3* is infringed by *section 51(e)* of the **Canada Elections Act**; and

(b) that the infringement of *section 3* of the **Charter** by *section 51(e)* of the **Canada Elections Act** is not justified as a reasonable limitation in a free and democratic society, within the meaning of *section 1* of the **Charter**; and

(c) that *section 51(e)* of the **Canada Elections Act** infringes *section 15* of the **Charter**; and

(d) that the infringement of *section 15* of the **Charter** by *section 51(e)* of the **Canada Elections Act** is not justified as a reasonable limitation in a free and democratic society, within the meaning of *section 1* of the **Charter**.

120. In the result, the appellant requests that the judgement of the Federal Court of Appeal be set aside with costs and *section 51(e)* of the **Canada Elections Act** be declared to be of no force and effect.

All of which is respectfully submitted this 28th day of February 2001.

FERGUS J. O'CONNOR,
Counsel for the Appellant Richard Sauvé

NOTICE TO THE RESPONDENT: Pursuant to subsection 44(1) of the Rules of the Supreme Court of Canada, this appeal will be inscribed by the Registrar for hearing after the respondent's factum has been filed or on the expiration of the time period set out in

paragraph 38(3)(b) of the said Rules, as the case may be.

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