Analysis and Highlights of *Sauvé v. Canada*

The judgement of the Supreme Court in *Sauvé* bears close attention because it helps understand why the Canadian Constitution recognizes and protects the democratic and human rights of prisoners and the legal basis for limiting those rights. At a time when prisoners' rights are increasingly the subject of political and populist attack (see my critique of Michael Harris' *Con Game*) the Chief Justice of Canada's judgement reminds us that "Charter rights are not a matter of privilege or merit" and that "a simple majoritarian political preference for abolishing a right" is not "a constitutionally valid objective". The judgement is also important in explaining the role of the courts in upholding fundamental human rights and the nature of the dialogue between the Supreme Court and Parliament. In what follows I provide a review of the history of the right to vote case and highlights of the judgement.

1. A History of Prisoner Disenfranchisement in Pre-Charter Canada *(adapted from the judgement of Mr. Justice Linden in the Federal Court of Appeal in Sauvé* [2000] 2 F.C. 117

Prisoner disenfranchisement can be traced back to the notion of "civil death", by which one consequence of being convicted of a felony was the loss of all civil rights. One of the earliest written records of civil death occurs in the law of Edward III, De Catallis Felonum. This statute laid down the doctrine of forfeiture and stated that an outlaw forfeited not only his personal property but also every possible right and means of acquiring property.

The Constitutional Act, 1791which established Upper and Lower Canada, specifically provided for prisoner disenfranchisement. It stated, in part, that "no Person shall be capable of voting at any Election of a Member to serve in such Assembly, in either of the said provinces ... who shall have been attained for Treason or Felony in any Court of Law within any of His Majesty's Dominions preserved the status quo and authorized Parliament to establish the qualifications for membership in the House of Commons and for voting.

Canada's first electoral law, The Electoral Franchise Act made no specific reference to prisoner disenfranchisement. Subsection 3(1) of that Act, however, required that voters be "of full age of twenty-one years, and ... not by this Act or any law of the Dominion of Canada, disqualified or prevented from voting." Thus, the voter disqualification contained in the Constitutional Act, 1791 and preserved by section 41 of the Constitution Act 1867 was likely the law in force at that time.

The matter was clarified in 1898. In that year, The Franchise Act, 1898 denied the vote in federal elections to "[a]ny person, who, at the time of an election, is a prisoner in a jail or prison undergoing punishment for a criminal offence". This blanket prohibition of prisoners is nearly identical to that which was in force at the time of the enactment of the Charter, and which was successfully challenged in earlier cases. The former, unconstitutional provision read as follows:

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> **(4) The following persons are not qualified to vote at an election, and shall not vote at an election:**
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> > **(e) every person undergoing punishment as an inmate in any penal institution for the commission of any offence;**

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2. Prisoner disenfranchisement in the post-Charter era

Section 3 of the *Charter* provides that

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

Following the enactment of the *Charter* there were a number of cases challenging both federal and provincial prisoner disenfranchisement statutes .The lower court judgements evinced little unanimity of reasoning. For example, in 1983, in *Re: Jolivet and Barker and The Queen* (1983) 1 D.L.R. (4th) 604, Mr Justice Taylor of the British Columbia Supreme Court upheld the validity of the federal prisoner disenfranchisement provision. His Lordship reasoned that, since prisoners could not make a "free and democratic electoral choice," it was appropriate for Parliament to deny them the vote.

In 1988, in *Badger v. Canada,* (1988) 55 Man R. (2nd) 211, Mr Justice Hirschfield of the Manitoba Court of Queen's Bench held inoperative provisions of the Manitoba Elections Act. However, Hirsch field J. expressed the view that, while excluding all prisoners from voting was too broad, the disqualification of federal prisoners serving sentences for indictable offences would likely be acceptable.

The Manitoba Court of Appeal (1988) 55 D.L.R.(4th) 177, reversed the decision of Hirschfield J., holding that the prisoner disqualification was a reasonable limit on the right to vote. After summarizing voter disqualification provisions in other democratic societies, Chief Justice Monnin wrote that the connection between voter disqualification and standing as a candidate justified the complete disqualification of prisoners:

> Sec. 14(4)(e) is a reasonable and demonstrably justified limit on the right to vote which is guaranteed to Canadian citizens by s. 3 of the Charter and it is therefore valid legislation. If inmates are enfranchised they will automatically be given the right to stand as candidates for federal elections. There is no disqualification provision in the Act with respect to a person's right to offer his/her services as a candidate. One only has to be a voter who can enter his name on the enumeration

> list and meet the residential qualification. One can recall that in recent years a member of the Sinn Fein was elected to the Mother of Parliaments at Westminster while in a penitentiary in Northern Ireland. I do not recall whether his election was annulled by the High Court of Justice of the British Parliament which has the right to rule on the eligibility of its membership.
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> ...
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> The right to vote is therefore not an absolute one although it is essential in a democracy. Unfortunately, at times, for valid reasons, that right cannot be enforced.

Three days after the decision of Hirschfield J., Madam Justice Van Camp of the Ontario Court in *Sauvé v. Canada* (1988) 66 O.R.(2nd) 234, (hereafter referred to as *Sauvé I*) upheld as constitutional the same provision which Justice Hirschfield had held to be of no force and effect. Of some historical importance, this was the first voting challenge initiated by Rick Sauvé. Her Ladyship noted the historic value placed on ensuring a responsible electorate:

> The history of the disqualifications of voters over the years has reflected the different understanding of who would be responsible. The specific question now before the court is whether it is justifiable that the person who breaks the law should participate in the choice of those who make the law. The right of every citizen to vote has not been a part of our history. Historically, a vote has been deemed to more likely be responsible if the person casting it:
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> 1. had a demonstrable stake in the community and its public affairs;
> 2. took an active interest in public affairs, and
> 3. was adequately informed about public issues.
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> Consequently, there have, in the past, been requisite property, wealth, literacy and residential qualifications. However, these different qualifications have been repealed as such criteria have come to be seen as inadequate tests of the desired responsibility. There remains then the citizenship qualification with its included qualification of age. Until now, there has persisted the disqualification of criminals and those involved in corrupt electoral practices on the ground that they are not responsible citizens, and that they have demonstrated beyond all doubt their lack of commitment to the well-being of the community

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While her ladyship reasoned that neither punishment nor administrative convenience would be sufficient to justify the disqualification of all prisoners, she accepted that the disqualification could stand as a proxy for a responsible electorate:

> However, it seems to me that Parliament was justified in limiting the right to vote

> with the objective that a liberal democratic regime requires a decent and responsible citizenry. Such a regime requires that the citizens obey voluntarily; the practical efficacy of laws relies on the willing acquiescence of those subject to them. The state has a role in preserving itself by the symbolic exclusion of criminals from the right to vote for the lawmakers. So also, the exclusion of the criminal from the right to vote reinforces the concept of a decent responsible citizenry essential for a liberal democracy.

In 1991, in another challenge to the *Canada Election Act*, Mr Justice Strayer of the Federal Court, in the case of *Belczowski v. Canada* [1991] 3 F.C. 151, rejected the objectives of "affirming and maintaining the sanctity of the franchise in our democracy" and "preserving the integrity of the voting process" as being pressing and substantial objectives. A third objective was presented to Strayer J., that being to sanction offenders. Strayer J. considered this objective to be rationally connected to the legislation, but held that the legislation was neither minimally impairing nor proportionate. He wrote that:

> Again, however, it cannot be said that this means of punishment impairs the section 3 right "as little as possible". Instead it directly and completely abolishes that right for the period of imprisonment. In this it is in contrast to incidental abridgment, brought about by imprisonment, of other Charter rights and freedoms such as freedom of association or assembly or expression.
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> Finally, with respect to voting disqualification as punishment, the government has not demonstrated to my satisfaction that the outright denial of the vote of every prison inmate is proportional to this objective. First, it may be noted that paragraph 51(e) applies no matter what the seriousness of the crime may be for which the inmate is being punished. Secondly, the actual effect on the inmate's right to vote will be quite arbitrary, depending on fortuitous circumstances such as the timing of federal elections in relation to the period he happens to serve his sentence. Thus someone in prison for two weeks for non-payment of parking fines could lose his vote for four years because his sentence happened to coincide with a federal election. On the other hand, someone sentenced to prison for five years for fraud or sexual assault and released on parole after three and one-half years might never miss the opportunity to vote. Thus there is no necessary coordination between serving of a prison sentence and the actual loss of a right to vote. Thirdly, there is a lack of proportionality between the objective and the denial of the vote in that corrections theory in Canada for the last fifty years has moved in the direction of rehabilitation and the preparation of inmates for re-entry into society.

The decision of Strayer J. was upheld by the Federal Court of Appeal. Writing for the Court Mr Justice Hugessen found that the objectives as presented were too abstract to warrant the infringement of constitutionally protected rights. He wrote that:

> Viewed together and collectively, the most striking point about the alleged objectives of paragraph 51(e) is that they are all symbolic and abstract…For my part, I must say that I have very serious doubts whether a wholly symbolic objective can ever be sufficiently important to justify the taking away of rights which are themselves so important and fundamental as to have been enshrined in our Constitution. To accept symbolism as a legitimate reason for the denial of Charter rights seems to me to be a course fraught with danger… To adopt the other course would, it seems to me, expose us to Voltaire's famous jibe that the English had executed Admiral Byng on his own quarterdeck "pour encourager les autres".
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> Assuming, however, for the sake of argument, that a purely symbolic objective may be sufficiently serious in some circumstances, it is my view that it cannot be so in this case. **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 persons 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. (emphasis added)

Mr Justice Hugessen. refused to accept the government's objectives. He was of the view that the true objective of prisoner disqualification was to further degrade the inmate:

> 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 form of life to which all rights should be indiscriminately denied. That, it need hardly be said, is not an objective which would satisfy section 1 of the Charter

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Mr Justice Hugessen. did, however, suggest that a denial of the right to vote for people convicted of certain crimes might be acceptable. To him it was unacceptable that all prisoners be disenfranchised as a consequence of their condition. He wrote that:

> A denial of the right to vote for persons convicted of treason or felony can readily be understood as a punishment for those crimes. A similar denial imposed only on those who are actually in prison looks more like a consequence of that condition than a sanction for the conduct which brought it about in the first place

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With regard to proportionality, the Federal Court of Appeal in *Belczowski* agreed with the trial judge that the former provision was not proportional. Hugessen J.A. held that the legislation failed at every stage of the proportionality test. First, he contended that the fact of being in prison was not a rational indication of irresponsible citizenship:

> First, there is the requirement that paragraph 51(e) be rationally connected to the alleged objectives. It is not. The fact of being in prison is not, by any means, a sure or rational indication that the prisoner is not a decent and responsible citizen. I have already mentioned fine defaulters who shockingly constituted a huge proportion of our prison population. By no means can they be described as ipso facto indecent and irresponsible. It is also not impossible in our society for persons to be in prison for reasons of conscience and I doubt that as a society we feel that such persons are not decent and responsible whatever else we might think of them.

With regard to minimal impairment, Hugessen J.A. held that by virtue of the design of the legislation, the right to vote was taken away in an irregular and irrational way:

> There is little that need to be said of the second branch of this part of the test which requires that the legislative measure impair the guaranteed right as little as possible. I would only note that, not only is the right taken away [page160] altogether, but, because of the very nature of the right to vote itself, it is taken away in an irregular and irrational pattern: persons who happen to be in prison on enumeration day, or voting day, no matter how short their sentence, lose the right to vote; others may serve up to four years and three hundred and sixty-four days in prison and never be deprived of the franchise at all.

With regard to proportionality, Hugessen J.A. held that the legislation was both over- and under-inclusive in that it made no attempt to balance the seriousness of the offender's conduct to the effects of the legislation:

> Finally, the third branch of the test requires an examination of the proportionality between the effect of the legislation and its objectives. For reasons which have already been suggested, paragraph 51(e) cannot meet this test. I have already commented on the over- and under-inclusiveness of the legislation when viewed in the light of its alleged objectives. I have also indicated that the legislation makes no attempt to weigh, assess or balance the seriousness of the conduct which may have resulted in imprisonment and the resultant deprivation of a Charter guaranteed right. Finally, I have indicated that as a necessary result of the legislation, and not merely of its imperfect application, its actual operation in any particular case will depend on wholly fortuitous circumstances which bear no relationship either to the alleged objectives or to the conduct of the prisoners whose rights are thus taken away. Even assuming the alleged objectives to be valid, paragraph 51(e) simply cannot be characterized as a measured and

> proportionate means of achieving them with due regard for the importance of the rights taken away.

Shortly after this Court's decision in Belczowski, the Ontario Court of Appeal overturned the judgment of Van Camp J. in the Sauvé case (1992) 7.O.R. (3d) 481. Speaking for that Court, Madam Justice Arbour (who, after serving as Chief Prosecutor for the International War Crimes Tribunal, was appointed to the Supreme Court of Canada in 2001) agreed with Hugessen J.A. that the symbolic nature of the objectives detracted from its importance as a justification for the violation of the Charter-protected right to vote.

While Madam Justice Arbour accepted that the most plausible objective presented was to sanction offenders, she felt that objective was missed by a provision which punishes inmates generally. She wrote that:

> If the objective of s. 51(e) is to punish offenders, that objective is missed altogether by a provision that punishes inmates and that is therefore both over- and under-inclusive. Whether this is viewed as a question of proportionality or objective, the result remains that it fails as a constitutional justification. The same can be said of all three objectives which, even taken collectively, are either insufficiently important or unacceptable objectives or are expressed in means which are not rationally connected with the objectives or which impair the right to vote far more than necessary. I find no need to analyze in detail the proportionality flaws of this legislation as I agree substantially with the reasons of both Strayer J. and Hugessen J.A. in Belczowski, supra, on the question of proportionality.

The Supreme Court dismissed appeals from both the decisions of the Ontario Court of Appeal in *Sauvé I* and the Federal Court of Appeal in *Belczowski* at the same time in a short three paragraph judgment.[1993] 2 S.C.R. 438.

> The Attorney General of Canada has properly conceded that s. 51(e) of the Canada Elections Act, contravenes s. 3 of the Canadian Charter of Rights and Freedoms but submits that s. 51(e) is saved under s. 1 of the Charter. We do not agree. In our view, s. 51(e) is drawn too broadly and fails to meet the proportionality test, particularly the minimal impairment component of the test, as expressed in the s. 1 jurisprudence of the Court.

Shortly before the Supreme Court's decision in the Sauvé and Belczowski matters, Parliament passed amendments to the *Canada Elections Act* which contained the prisoner disenfranchisement provision that was before the Supreme Court in *Sauvé II.* The difference between the amended

version challenged in *Sauvé II* and the one struck down in *Sauvé I* is that under the amended version only prisoners serving sentences of two years or more are barred from voting.

3. The Sauvé Case Returns to The Supreme Court

The trial and subsequent appeals of Rick Sauvé's second challenge to the *Canada Election Act* was joined with a parallel challenge initiated by prisoners from Stoney Mountain Institution, a federal prison in Manitoba, including the Chairman of the Stony Mountain Institution Inmate Welfare Committee and the President of the Native Brotherhood. The evidence given by the prisoners themselves at the trial was summarised by Mr Justice Weston:

> Mr. Sauvé was convicted of aiding and abetting in the murder of a rival bike-gang member. He was sentenced to twenty-five years of incarceration, and was released in May of 1994. Since his release, Mr. Sauvé has been living in a half-way house, and currently works as a furniture maker. He has worked with young offenders in a program known as Youths at Risk, and is now a candidate for a Master of Arts degree in Criminology from the University of Ottawa.
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> Mr. Sauvé believes that offenders are not born as criminals, but become criminals as a result of circumstances. He asserted that inmates would feel more linked to society if they were granted the right to vote. Furthermore, Mr. Sauvé testified that he had not lost his right of citizenship, nor his concern for society and his country, when he was sent to prison. He implied that prisoners eventually must return to society, and indicated that prisons are hostile environments containing many hurt individuals. He talked about various voluntary efforts within the Collins Bay penal institution which were organized by prisoners, including the sponsorship of camps for disadvantaged kids, foster parents, and a special olympiad for the "developmentally handicapped". ".
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> Mr. Spence [the President of the Native Brotherhood of Stoney Mountain] has a very different criminal record from that of Mr. Sauvé. Mr. Spence is an Aboriginal who is presently serving four years of incarceration for a combination of offences, including break and enter, theft, breach of a recognizance, and assault against another Aboriginal person. His record is extensive, and dates back to 1984. Mr. Spence now considers himself on the road to rehabilitation. He agreed that he has been acting dysfunctionally, selfishly, and irresponsibly. He also agreed that the right to vote is valuable, and that he does feel a deprivation as a result of this loss. He also feels that being inside a penal institution does not mean that his family on the outside are not being affected by government actions. Mr. Spence knows that he will return to society. In his words, "at one time or another, we are going to be part of that society, whether we like it or not."

A great deal of "expert" evidence was given at trial on behalf of both the prisoners and the Government. As described by the trial judge

> The experts, on behalf of both the plaintiffs and defendants, were almost exclusively academics who advanced opinions in the areas of political theory, moral philosophy,

> political philosophy, philosophy of law, criminology, correctional policy and penal theory. Given the issues in this case, the type of expert evidence adduced represents a most reasonable approach to assisting the Court in its determination as to whether the disenfranchisement of prisoners is justified.
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> Almost all of the defendants' witnesses are American citizens, American scholars, or American residents, or they have been primarily educated and trained in the United States. In contrast, most of the plaintiffs' experts are Canadian citizens, Canadian scholars, and Canadian residents…
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> None of the defendants' witnesses, despite their impressive academic backgrounds and contributions to scholarship, has ever considered the issue of prisoner disenfranchisement, before being retained by the Attorney General of Canada in this proceeding. Indeed, other than John Stuart Mill in a brief footnote reference, no well-known political theorist or moral philosopher, including de Tocqueville, Kant, Locke, Rousseau or Hobbes, has ever considered this question. More recent political and moral philosophers, such as Rawls, Hart, Murphy and Morris, have also not specifically considered this issue.
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> For the most part, with the exception of a report submitted by Dr. Colin Meredith, the evidence of the defendants may be characterized as academic and theoretical. While the plaintiffs also adduced considerable academic and theoretical evidence, on balance, their evidence is less lofty and is more tangible, particularly in relation to Canadian penology, social justice, and prisons. However, the evidence consists of virtually no observable phenomena. Indeed, the plaintiffs described the defendants' case as highly theoretical and abstract. While it is possible that some areas of social science theory may be confirmed by empirical observation, there was little in this case that could be assigned to that category. The evidence of the defendants was provided principally as part of an ex post facto analysis.

I was one of the experts called by the prisoners. My evidence reviewed (1) whether prisoners, in an historical and contemporary context have suffered or continue to suffer social, economic or legal disadvantage, (2) whether those who are socially or economically disadvantaged, and particularly Aboriginal persons, are disproportionately represented among prisoners, and (3) whether the denial of the vote to prisoners is consistent with federal correctional policy as reflected in the Correctional Service of Canada's Mission Statement and the *Corrections and Conditional Release Act.* At the end of my evidence I concluded:

> The combination of judicial review, grievance procedures and the Office of the Correctional Investigator do not substitute for the ability to participate in the democratic process which is provided by voting for elected representatives who collectively have the power to make and change the law. The disability under which prisoners labour has a corrosive effect upon the correctional mission of encouraging prisoners to take responsibility and to develop a commitment to values and lifestyles consistent with living within society and within the law…Based upon the 25 years I have worked in prisons and with prisoners, it is my opinion that the experience of imprisonment uniquely retains the ability to crush the human spirit. A law, which, for the duration of imprisonment, crushes the democratic spirit,

> can only intensify that effect. To the extent that correctional law and policy is directed towards rehabilitation and reintegration, the provisions in the *Canada Elections Act* denying prisoners the vote, not only have no rational connection to but indeed directly undermine and controvert that law and policy.

Mr Justice Wetston ruled that s. 51(e) of the *Canada Elections Act* violated the Charter guarantee of the right to vote without being demonstrably justified, and was therefore void. Although he found that the government's objectives were pressing and substantial, he concluded that the denial of voting rights to all inmates serving a sentence of two years or longer was overbroad and failed the minimal impairment test. In addition, he found that denying the right to vote "hinder[ed] the rehabilitation of offenders and their successful reintegration into the community". The negative consequences of the challenged provision were thus disproportionate to any benefits it might produce.

The majority of the Federal Court of Appeal, in a judgement written by Mr Justice Linden, reversed the trial judge and upheld the denial of voting rights, holding that Parliament's role in maintaining and enhancing the integrity of the electoral process and in exercising the criminal law power both warranted deference. The denial of the right to vote at issue fell within a reasonable range of alternatives open to Parliament to achieve its objectives and was not overbroad or disproportionate. Madam Justice Desjardins, applying the "stringent formulation of the Oakes test," emphasized the absence of evidence of benefits flowing from the denial and would have dismissed the appeal.

The majority of the Supreme Court of Canada reversed the Federal Court of Appeal. In contrast to the three-paragraph judgement in *Sauvé I*, Sauvé *II* is a fully elaborated and articulated statement of the principles at stake. What follows is the highlights of Chief Justice McLachlin,s judgement, concurred in by Justices Iacobucci, Binnie, Arbour and LeBel:

1 **McLACHLIN C.J.** The right of every citizen to vote, guaranteed by s. 3 of the Canadian Charter of Rights and Freedoms, lies at the heart of Canadian democracy. The law at stake in this appeal denies the right to vote to a certain class of people -- those serving sentences of two years or more in a correctional institution. The question is whether the government has established that this denial of the right to vote is allowed under s. 1 of the Charter as a "reasonable limit ... demonstrably justified in a free and democratic society". I conclude that it is not. The right to vote, which lies at the heart of Canadian democracy, can only be trammeled for good reason. Here, the reasons offered do not suffice.

2 The predecessor to s. 51(e) of the Canada Elections Act, R.S.C. 1985, c. E-2, prohibited all prison inmates from voting in federal elections, regardless of the length of their sentences. This section was held unconstitutional as an unjustified denial of the right to vote guaranteed by s. 3 of the Charter: Sauvé v. Canada (Attorney General), [1993] 2 S.C.R. 438. Parliament responded to this litigation by replacing this section with a new s. 51(e) (S.C. 1993, c. 19, s. 23), which denies the right to vote to all inmates serving sentences of two years or more.

Issues

1. Does s. 51(e) of the Canada Elections Act infringe the guarantee of the right of all citizens to vote under s. 3 of the Charter and if so, is the infringement justified under s. 1 of the Charter?
2. Does s. 51(e) of the Canada Elections Act infringe the equality guarantee of s. 15(1) of the Charter and if so, is the infringement justified under s. 1 of the Charter?

Analysis

The Approach to Section 1 Justification

7 To justify the infringement of a Charter right, the government must show that the infringement achieves a constitutionally valid purpose or objective, and that the chosen means are reasonable and demonstrably justified: R. v. Oakes, [1986] 1 S.C.R. 103. This two-part inquiry -- the legitimacy of the objective and the proportionality of the means -- ensures that a reviewing court examine rigorously all aspects of justification. Throughout the justification process, the government bears the burden of proving a valid objective and showing that the rights violation is warranted -- that is, that it is rationally connected, causes minimal impairment, and is proportionate to the benefit achieved.

8 My colleague Justice Gonthier proposes a deferential approach to infringement and justification. He argues that there is no reason to accord special importance to the right to vote, and that we should thus defer to Parliament's choice among a range of reasonable alternatives. He further argues that in justifying limits on the right to vote under s. 1, we owe deference to Parliament because we are dealing with "philosophical, political and social considerations," because of the abstract and symbolic nature of the government's stated goals, and because the law at issue represents a step in a dialogue between Parliament and the courts.

9 I must, with respect, demur. The right to vote is fundamental to our democracy and the rule of law and cannot be lightly set aside. Limits on it require not deference, but careful examination. This is not a matter of substituting the Court's philosophical preference for that of the legislature, but of ensuring that the legislature's proffered justification is supported by logic and common sense.

12 At the s. 1 stage, the government argues that denying the right to vote to penitentiary inmates is a matter of social and political philosophy, requiring deference. Again, I cannot agree. This Court has repeatedly held that "the general claim that the infringement of a right is justified under s. 1" does not warrant deference to Parliament: M. v. H., [1999] 2 S.C.R. 3, at para. 78, per Iacobucci J. Section 1 does not create a presumption of constitutionality for limits on rights; rather, it requires the state to justify such limitations.

13 The core democratic rights of Canadians do not fall within a "range of acceptable alternatives" among which Parliament may pick and choose at its discretion. Deference may be

appropriate on a decision involving competing social and political policies. It is not appropriate, however, on a decision to limit fundamental rights. This case is not merely a competition between competing social philosophies. It represents a conflict between the right of citizens to vote - one of the most fundamental rights guaranteed by the Charter -- and Parliament's denial of that right. Public debate on an issue does not transform it into a matter of "social philosophy", shielding it from full judicial scrutiny. It is for the courts, unaffected by the shifting winds of public opinion and electoral interests, to safeguard the right to vote guaranteed by s. 3 of the Charter.

14 Charter rights are not a matter of privilege or merit, but a function of membership in the Canadian polity that cannot lightly be cast aside. This is manifestly true of the right to vote, the cornerstone of democracy, exempt from the incursion permitted on other rights through s. 33 override in fulfilling their constitutional duty to protect the integrity of this system.

15 The Charter charges courts with upholding and maintaining an inclusive, participatory democratic framework within which citizens can explore and pursue different conceptions of the good. While a posture of judicial deference to legislative decisions about social policy may be appropriate in some cases, the legislation at issue does not fall into this category. To the contrary, it is precisely when legislative choices threaten to undermine the foundations of the participatory democracy guaranteed by the Charter that courts must be vigilant in fulfilling their constitutional duty to protect the integrity of this system

<u>The Government's Objectives</u>

21 Section 51(e) denying penitentiary inmates the right to vote was not directed at a specific problem or concern. Prisoners have long voted, here and abroad, in a variety of situations without apparent adverse effects to the political process, the prison population, or society as a whole. In the absence of a specific problem, the government asserts two broad objectives as the reason for this denial of the right to vote: (1) to enhance civic responsibility and respect for the rule of law; and (2) to provide additional punishment, or "enhance the general purposes of the criminal sanction". The record leaves in doubt how much these goals actually motivated Parliament; the Parliamentary debates offer more fulmination than illumination. However, on the basis of "some glimmer of light," the trial judge at p. 878 concluded that they could be advanced as objectives of the denial. I am content to proceed on this basis.

22 This leaves the question of whether the objectives of enhancing respect for law and appropriate punishment are constitutionally valid and sufficiently significant to warrant a rights violation. Vague and symbolic objectives such as these almost guarantee a positive answer to this question. Who can argue that respect for the law is not pressing? Who can argue that proper sentences are not important? Who can argue that either of these goals, taken at face value, contradict democratic principles? However, precisely because they leave so little room for argument, vague and symbolic objectives make the justification analysis more difficult. Their terms carry many meanings, yet tell us little about why the limitation on the right is necessary, and what it is expected to achieve in concrete terms. The broader and more abstract the objective, the more susceptible it is to different meanings in different contexts, and hence to distortion and manipulation. One articulation of the objective might inflate the importance of the objective;

another might make the legislative measure appear more narrowly tailored. The Court is left to sort the matter out.

23 At the end of the day, people should not be left guessing about why their Charter rights have been infringed. Demonstrable justification requires that the objective clearly reveal the harm that the government hopes to remedy, and that this objective remain constant throughout the justification process. As this Court has stated, the objective "must be accurately and precisely defined so as to provide a clear framework for evaluating its importance, and to assess the precision with which the means have been crafted to fulfil that objective". A court faced with vague objectives may well conclude, as did Arbour J.A. (as she then was) in Sauvé No. 1, supra, at p. 487, that "the highly symbolic and abstract nature of th[e] objective ... detracts from its importance as a justification for the violation of a constitutionally protected right". If Parliament can infringe a crucial right such as the right to vote simply by offering symbolic and abstract reasons, judicial review either becomes vacuously constrained or reduces to a contest of "our symbols are better than your symbols". Neither outcome is compatible with the vigorous justification analysis required by the Charter.

Proportionality

27 At this stage the government must show that the denial of the right to vote will promote the asserted objectives (the rational connection test); that the denial does not go further than reasonably necessary to achieve its objectives (the minimal impairment test); and that the overall benefits of the measure outweigh its negative impact (the proportionate effect test). As will be seen, the vagueness of the government's justificatory goals coupled with the centrality of the right to vote to Canadian democracy, the rule of law, and legitimate sentencing, make the government's task difficult indeed.

1. Rational Connection

28 Will denying the right to vote to penitentiary inmates enhance respect for the law and impose legitimate punishment? The government must show that this is likely, either by evidence or in reason and logic.

29 The government advances three theories to demonstrate rational connection between its limitation and the objective of enhancing respect for law. First, it submits that depriving penitentiary inmates of the vote sends an "educative message" about the importance of respect for the law to inmates and to the citizenry at large. Second, it asserts that allowing penitentiary inmates to vote "demeans" the political system. Finally, it takes the position that disenfranchisement is a legitimate form of punishment, regardless of the specific nature of the offence or the circumstances of the individual offender. In my respectful view, none of these claims succeed.

30 The first asserted connector with enhancing respect for the law is the "educative message" or "moral statement" theory. The problem here, quite simply, is that denying penitentiary inmates the right to vote is bad pedagogy. It misrepresents the nature of our rights and obligations under the law, and it communicates a message more likely to harm than to help respect for the law.

31 Denying penitentiary inmates the right to vote misrepresents the nature of our rights and obligations under the law and consequently undermines them. In a democracy such as ours, the power of lawmakers flows from the voting citizens, and lawmakers act as the citizens' proxies. This delegation from voters to legislators gives the law its legitimacy or force. Correlatively, the obligation to obey the law flows from the fact that the law is made by and on behalf of the citizens. In sum, the legitimacy of the law and the obligation to obey the law flow directly from the right of every citizen to vote. As a practical matter, we require all within our country's boundaries to obey its laws, whether or not they vote. But this does not negate the vital symbolic, theoretical and practical connection between having a voice in making the law and being obliged to obey it. This connection, inherited from social contract theory and enshrined in the Charter, stands at the heart of our system of constitutional democracy.

32 The government gets this connection exactly backwards when it attempts to argue that depriving people of a voice in government teaches them to obey the law. The "educative message" that the government purports to send by disenfranchising inmates is both anti-democratic and internally self-contradictory. Denying a citizen the right to vote denies the basis of democratic legitimacy. It says that delegates elected by the citizens can then bar those very citizens, or a portion of them, from participating in future elections. But if we accept that governmental power in a democracy flows from the citizens, it is difficult to see how that power can legitimately be used to disenfranchise the very citizens from whom the government's power flows.

33 Reflecting this truth, the history of democracy is the history of progressive enfranchisement. The universal franchise has become, at this point in time, an essential part of democracy. From the notion that only a few meritorious people could vote (expressed in terms like class, property and gender), there gradually evolved the modern precept that all citizens are entitled to vote as members of a self-governing citizenry. Canada's steady march to universal suffrage culminated in 1982, with our adoption of a constitutional guarantee of the right of all citizens to vote in s. 3 of the Charter.

34 The right of all citizens to vote, regardless of virtue or mental ability or other distinguishing features, underpins the legitimacy of Canadian democracy and Parliament's claim to power. A government that restricts the franchise to a select portion of citizens is a government that weakens its ability to function as the legitimate representative of the excluded citizens, jeopardizes its claim to representative democracy, and erodes the basis of its right to convict and punish law-breakers.

36 More broadly, denying citizens the right to vote runs counter to our constitutional commitment to the inherent worth and dignity of every individual. As the South African Constitutional Court said in August v. Electoral Commission, 1999 (3) SALR 1, at para. 17, "[t]he vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts." The fact that the disenfranchisement law at issue applies to a discrete group of persons should make us more, not less, wary of its potential to violate the principles of equal rights and equal membership embodied in and protected by the Charter.

37 The government's vague appeal to "civic responsibility" is unhelpful, as is the attempt to lump inmate disenfranchisement together with legitimate voting regulations in support of the government's position. The analogy between youth voting restrictions and inmate disenfranchisement breaks down because the type of judgment Parliament is making in the two scenarios is very different. In the first case, Parliament is making a decision based on the experiential situation of all citizens when they are young. It is not saying that the excluded class is unworthy to vote, but regulating a modality of the universal franchise. In the second case, the government is making a decision that some people, whatever their abilities, are not morally worthy to vote -- that they do not "deserve" to be considered members of the community and hence may be deprived of the most basic of their constitutional rights. But this is not the lawmakers' decision to make. The Charter makes this decision for us by guaranteeing the right of "every citizen" to vote and by expressly placing prisoners under the protective umbrella of the Charter through constitutional limits on punishment. **The Charter emphatically says that prisoners are protected citizens, and short of a constitutional amendment, lawmakers cannot change this**. (emphasis added)

38 The theoretical and constitutional links between the right to vote and respect for the rule of law are reflected in the practical realities of the prison population and the need to bolster, rather than to undermine, the feeling of connection between prisoners and society as a whole. The government argues that disenfranchisement will "educate" and rehabilitate inmates. However, disenfranchisement is more likely to become a self-fulfilling prophecy than a spur to reintegration. Depriving at-risk individuals of their sense of collective identity and membership in the community is unlikely to instill a sense of responsibility and community identity, while the right to participate in voting helps teach democratic values and social responsibility (testimony of Professor Jackson, appellant's record at pp. 2001-2). As J. S. Mill wrote:

> 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 contracted round of daily occupations... . The possession and the 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 ... .
> (J. S. Mill, "Thoughts on Parliamentary Reform" (1859), in J. M. Robson, ed., Essays on Politics and Society, Vol. XIX (1977), at pp. 322-23)

To deny prisoners the right to vote is to lose an important means of teaching them democratic values and social responsibility.

39 Even if these difficulties could be overcome, it is not apparent that denying penitentiary inmates the right to vote actually sends the intended message to prisoners, or to the rest of society. People may be sentenced to imprisonment for two years or more for a wide variety of crimes, ranging from motor vehicle and regulatory offences to the most serious cases of murder. The variety of offences and offenders covered by the prohibition suggest that the educative message is, at best, a mixed and diffuse one.

40 It is a message sullied, moreover, by negative and unacceptable messages likely to undermine civic responsibility and respect for the rule of law. Denying citizen law-breakers the right to vote sends the message that those who commit serious breaches are no longer valued as members of the community, but instead are temporary outcasts from our system of rights and democracy. More profoundly, it sends the unacceptable message that democratic values are less important than punitive measures ostensibly designed to promote order. If modern democratic history has one lesson to teach it is this: enforced conformity to the law should not come at the cost of our core democratic values.

41 I conclude that denying penitentiary inmates the right to vote is more likely to send messages that undermine respect for the law and democracy than messages that enhance those values. The government's novel political theory that would permit elected representatives to disenfranchise a segment of the population finds no place in a democracy built upon principles of inclusiveness, equality, and citizen participation. That not all self-proclaimed democracies adhere to this conclusion says little about what the Canadian vision of democracy embodied in the Charter permits. Punitive disenfranchisement of inmates does not send the "educative message" that the government claims; to the contrary, it undermines this message and is incompatible with the basic tenets of participatory democracy contained in and guaranteed by the Charter.

42 The government also argues that denying penitentiary inmates the vote will enhance respect for law because allowing people who flaunt the law to vote demeans the political system. The same untenable premises we have been discussing resurface here -- that voting is a privilege the government can suspend and that the commission of a serious crime signals that the offender has chosen to "opt out" of community membership. But beyond this, the argument that only those who respect the law should participate in the political process is a variant on the age-old unworthiness rationale for denying the vote.

43 The idea that certain classes of people are not morally fit or morally worthy to vote and to participate in the law-making process is ancient and obsolete. Edward III pronounced that citizens who committed serious crimes suffered "civil death", by which a convicted felon was deemed to forfeit all civil rights. Until recently, large classes of people, prisoners among them, were excluded from the franchise. The assumption that they were not fit or "worthy" of voting -- whether by reason of class, race, gender or conduct -- played a large role in this exclusion. We should reject the retrograde notion that "worthiness" qualifications for voters may be logically viewed as enhancing the political process and respect for the rule of law. As Arbour J.A. stated in Sauvé No. 1, supra, at p. 487, since the adoption of s. 3 of the Charter, it is doubtful "that anyone could now be deprived of the vote on the basis ... that he or she was not decent or responsible".

44 Denial of the right to vote on the basis of attributed moral unworthiness is inconsistent with the respect for the dignity of every person that lies at the heart of Canadian democracy and the Charter: compare August, supra. It also runs counter to the plain words of s. 3, its exclusion from the s. 33 override, and the idea that laws command obedience because they are made by those whose conduct they govern. For all these reasons, it must, at this stage of our history, be rejected.

45 This brings us to the government's final argument for rational connection -- that disenfranchisement is a legitimate weapon in the state's punitive arsenal against the individual

lawbreaker. Again, the argument cannot succeed. **The first reason is that using the denial of rights as punishment is suspect**. The second reason is that denying the right to vote does not comply with the requirements for legitimate punishment established by our jurisprudence. (emphasis added)

46 The argument, stripped of rhetoric, proposes that it is open to Parliament to add a new tool to its arsenal of punitive implements -- denial of constitutional rights. I find this notion problematic. I do not doubt that Parliament may limit constitutional rights in the name of punishment, provided that it can justify the limitation. But it is another thing to say that a particular class of people for a particular period of time will completely lose a particular constitutional right. This is tantamount to saying that the affected class is outside the full protection of the Charter. It is doubtful that such an unmodulated deprivation, particularly of a right as basic as the right to vote, is capable of justification under s. 1. Could Parliament justifiably pass a law removing the right of all penitentiary prisoners to be protected from cruel and unusual punishment? I think not. What of freedom of expression or religion? Why, one asks, is the right to vote different? The government offers no credible theory about why it should be allowed to deny this fundamental democratic right as a form of state punishment.

47 The social compact requires the citizen to obey the laws created by the democratic process. But it does not follow that failure to do so nullifies the citizen's continued membership in the self-governing polity. Indeed, the remedy of imprisonment for a term rather than permanent exile implies our acceptance of continued membership in the social order. Certain rights are justifiably limited for penal reasons, including aspects of the right to liberty, security of the person, mobility, and security against search and seizure. But whether a right is justifiably limited cannot be determined by observing that an offender has, by his or her actions, withdrawn from the social compact. Indeed, the right of the state to punish and the obligation of the criminal to accept punishment is tied to society's acceptance of the criminal as a person with rights and responsibilities. Other Charter provisions make this clear. Thus s. 11 protects convicted offenders from unfair trials, and s. 12 from "cruel and unusual treatment or punishment".

52 When the facade of rhetoric is stripped away, little is left of the government's claim about punishment other than that criminals are people who have broken society's norms and may therefore be denounced and punished as the government sees fit, even to the point of removing fundamental constitutional rights. Yet, the right to punish and to denounce, however important, is constitutionally constrained. It cannot be used to write entire rights out of the Constitution, it cannot be arbitrary, and it must serve the constitutionally recognized goals of sentencing. On all counts, the case that s. 51(e) furthers lawful punishment objectives fails.

53 I conclude that the government has failed to establish a rational connection between s. 51(e)'s denial of the right to vote and the objectives of enhancing respect for the law and ensuring appropriate punishment.

2. Minimal Impairment

54 If the denial of a right is not rationally connected to the government's objectives, it makes little sense to go on to ask whether the law goes further than is necessary to achieve the objective. I

simply observe that if it were established that denying the right to vote sends an educative message that society will not tolerate serious crime, the class denied the vote -- all those serving sentences of two years or more -- is too broad, catching many whose crimes are relatively minor and who cannot be said to have broken their ties to society. Similarly, if it were established that this denial somehow furthers legitimate sentencing goals, it is plain that the marker of a sentence of two years or more catches many people who, on the government's own theory, should not be caught.

2. Proportionate Effect

57 If a connection could be shown between the denial of the right to vote and the government's objectives, the negative effects of denying citizens the right to vote would greatly outweigh the tenuous benefits that might ensue.

58 Denial of the right to vote to penitentiary inmates undermines the legitimacy of government, the effectiveness of government, and the rule of law. It curtails the personal rights of the citizen to political expression and participation in the political life of his or her country. It countermands the message that everyone is equally worthy and entitled to respect under the law -- that everybody counts: see August, supra. It is more likely to erode respect for the rule of law than to enhance it, and more likely to undermine sentencing goals of deterrence and rehabilitation than to further them.

59 The government's plea of no demonstrated harm to penitentiary inmates rings hollow when what is at stake is the denial of the fundamental right of every citizen to vote. When basic political rights are denied, proof of additional harm is not required. But were proof needed, it is available. Denying prisoners the right to vote imposes negative costs on prisoners and on the penal system. It removes a route to social development and rehabilitation acknowledged since the time of Mill, and it undermines correctional law and policy directed towards rehabilitation and integration (testimony of Professor Jackson, appellant's record at pp. 2001-2). As the trial judge clearly perceived at p. 913, s. 51(e) "serves to further alienate prisoners from the community to which they must return, and in which their families live".

60 The negative effects of s. 51(e) upon prisoners have a disproportionate impact on Canada's already disadvantaged Aboriginal population, whose over-representation in prisons reflects "a crisis in the Canadian criminal justice system": R. v. Gladue, [1999] 1 S.C.R. 688, at para. 64, per Cory and Iacobucci JJ. To the extent that the disproportionate number of Aboriginal people in penitentiaries reflects factors such as higher rates of poverty and institutionalized alienation from mainstream society, penitentiary imprisonment may not be a fair or appropriate marker of the degree of individual culpability. Added to this is the cost of silencing the voices of incarcerated Aboriginal people; with due respect, the fact that 1,837 Aboriginal people are disenfranchised by this law, while close to 600,000 are not directly affected, does not justify restricting the rights of those 1,837 individuals for reasons not demonstrably justified under the Charter: see Court of Appeal decision at para. 169. Aboriginal people in prison have unique perspectives and needs. Yet, s. 51(e) denies them a voice at the ballot box and, by proxy, in Parliament. That these costs are confined to the term of imprisonment does not diminish their reality. The silenced

messages cannot be retrieved, and the prospect of someday participating in the political system is cold comfort to those whose rights are denied in the present.

61 In the final analysis, even if there were merit in the Court of Appeal's view that the trial judge relied too heavily on the absence of concrete evidence of benefit, it is difficult to avoid the trial judge's conclusion, at p. 916, that "the salutary effects upon which the defendants rely are tenuous in the face of the denial of the democratic right to vote, and are insufficient to meet the civil standard of proof".

62 I conclude that s. 51(e)'s disenfranchisement of prisoners sentenced to two years or more cannot be justified under s. 1 of the Charter.

The Guarantee of Equality under Section 15(1) of the Charter

63 Having found that s. 51(e) unjustifiably infringes s. 3 of the Charter, it is unnecessary to consider the alternative argument that it infringes the equality guarantee of s. 15(1).

The main thrust of the dissenting judgement of Mr Justice Gonthier, concurred in by Justices L'Heureux-Dube, Major and Bastarache , is that the voting prohibition is one involving competing social or political philosophies and is one in which the courts ought to show deference to Parliament. If the social or political philosophy advanced by Parliament reasonably justifies a limitation of the right then it ought to be upheld as constitutional.