

Sauvé v. Canada: The Right Thing to do for Wrongdoers?

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“The argument over prisoner voting rights comes down to one thing: are you soft on crime or do you believe that some crimes deserve taking away some rights while people are in prison? Today’s decision by the Supreme Court continues to erase the line between law-abiding citizens and those who commit crime and say they will not live by society’s rules.”

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On December 10, 2002 the Supreme Court of Canada released its judgment in the case of *Sauvé v. Canada (Chief Electoral Officer)*.¹ In a 5-4 decision, the majority judgment written by Chief Justice McLachlin held that section 51(e) of the *Canada Elections Act*² was in violation of s. 3 of the *Canadian Charter of Rights and Freedoms*.³ This provision disqualified inmates in federal penitentiaries from voting in federal elections. A vigorous and lengthy dissenting opinion was written by Justice Gonthier.⁴ While the interpretation of s. 3 of the *Charter* was a key element in the result, the real battleground between the justices was the proper function of s. 1 of the *Charter*. The position of the Supreme Court with respect to s. 1 has been the source of controversy and conflict for some time, and the opinions in this case will not harmonize the divergent views. This comment will examine the judgments, as well as the merits of inmate voting.

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¹ [2002] 3 S.C.R. 519, [2002] SCC 68.

² R.S.C. 1985, c. E-2.

³ Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11 [hereinafter *Charter*]. S.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.”

⁴ The majority consisted of McLachlin C.J., and Iacobucci, Binnie, Arbour and LeBel JJ. The dissenters were Gonthier, L’Heureux-Dubé, Major and Bastarache JJ. It should be noted that the equality provisions in s. 15(1) of the *Charter* were also argued, however, the issue was not of major significance in the case. The dissent held that the status of being a prisoner did not constitute an analogous ground under s. 15(1).

The Factual Background

The factual context is not overly complicated. Mr. Sauvé was an inmate at a federal penitentiary who desired to vote in a federal election and was disqualified through s. 51(e) of the *Canada Elections Act*. However, it is important to appreciate that this was not the first time inmate disenfranchisement was raised in the courts.

An earlier *Sauvé* case (same plaintiff) involved a previous section of the *Canada Elections Act* that had barred anyone with any criminal conviction from voting in a federal election.⁵ The Supreme Court of Canada struck down this earlier version of disqualification as unconstitutional. The federal government's response was to limit the voting disqualification to every person serving a sentence of two years or more, and it is this provision that was the subject of the Supreme Court's most recent judgments. Since there was no real controversy as to whether s. 3 of the *Charter* had been violated (it was conceded by the government), the case hinged on the proper analysis of s. 1 of the *Charter* in these circumstances.⁶ As a result the case was resolved on the Court's stridently divergent views toward s. 1 and, of course, the proper role of *R. v. Oakes* in these circumstances.⁷

Short Overview of the Majority

In simple terms, Chief Justice McLachlin drew three basic conclusions that ultimately led to the result of striking down s. 51(e) of the *Canada Elections Act* through s. 1 of the *Charter*. The first was that a high level of scrutiny of the provision was required.

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.⁸

⁵ *Sauvé v. Canada (Attorney General)*, [1993] 2 S.C.R. 438, aff'g (1992), 7 O.R. (3d) 481. Cf. *Belczowski v. Canada*, [1993] 2 S.C.R. 438, aff'g [1992] 2 F.C. 440 (C.A.). The Supreme Court of Canada reasons were brief and merely concluded that the provision was drawn too broadly and failed to meet the requirements of s. 1 of the *Charter*. Contravention of s. 3 of the *Charter* was conceded by the Attorney General of Canada.

⁶ However, see notes 84 to 89 of the dissent where Justice Gonthier intimates that the majority is too absolutist in their views toward s. 3, and reminds us that even voting is subject to rational and reasonable limitations.

⁷ [1986] 1 S.C.R. 103.

⁸ *Supra* note 1 at para. 9.

It was emphasized that voting was central to the constitution, and noted that s. 3 was exempted from the override provisions of s. 33 of the *Charter*.⁹

Secondly, and the first step in the *Oakes* analysis was for the Chief Justice to consider whether Parliament's objective in enacting the legislation was "pressing and substantial". Two objectives were put forth by the government: (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".¹⁰ While the Chief Justice had considerable doubt as to whether these purposes clearly revealed the harm intended to be remedied by the legislation, and were viewed as overly vague, the proportionality effects analysis required by *Oakes* was nevertheless examined.¹¹

When examining the proportionality aspects of the legislation, the majority was clearly of the opinion that it failed the first step or requirement of rational connection of the means to the ends. This conclusion was the main basis of the differences between the majority and dissent. In fact, the majority posited that the stated objectives of the government, or the "educative message" sought to be promoted by the disenfranchisement might be *undermined* by the means chosen. The opposite effect from that intended might result.¹²

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.¹³

⁹ *Ibid.* at para. 11. Further, "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" at 15.

¹⁰ *Ibid.* at para. 21.

¹¹ *Ibid.* at para. 26. The "objective" or "purpose" stage of the *Oakes* test has rarely been questioned by the Courts. See e.g. Hogg, *Constitutional Law of Canada*, (Student Edition, (Toronto: Carswell, 2002) at 780 ff. According to the Chief Justice: "If Parliament can infringe a crucial right such as the right to vote simply by offering symbolic or 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*" at 23.

¹² *Ibid.* at paras. 31 and 32.

¹³ *Ibid.* at para. 34.

Having drawn these broad conclusions about the rationality of the means, it was really unnecessary to examine the further steps in the *Oakes* proportionality tests in any detail.

Short Overview of the Dissent

Needless to say, Justice Gonthier disagreed with almost every major conclusion determined by the majority. While agreeing that the case essentially concerned the appropriate constitutional limits on the right to vote in s. 3 of the *Charter*, the dissent did not view the particular subject matter as requiring any special framework of analysis for s. 1. “In the realm of competing social or political philosophies, reasonableness is the predominant s. 1 justification consideration.”¹⁴ The government was not faced with a more onerous obligation under s. 1 because it was dealing with a “core democratic right”, nor that voting rights could not be exempted through the s. 33 override of the *Charter*. “There is little evidence of the intention behind excluding democratic rights . . . from the ambit of s. 33, nor has this Court ever seriously considered the significance of such exclusion.”¹⁵ Justice Gonthier argued that voting was not to be considered as an absolute or special right. Rather, balancing of competing rationales was to be carried out in a standard, cautious and sensitive fashion, recognizing that the statutory limitations were a policy decision for which there was little quantitative or empirical evidence.¹⁶

Similarly, when it came to a discussion of whether Parliament’s objectives were “pressing and substantial”, the dissenters had little difficulty in agreeing with this conclusion. After extensive examination of practices in many jurisdictions,¹⁷ they concluded that the objectives (both educative and criminal) were “based upon a reasonable and rational social or political philosophy.”¹⁸ Again, since the reasonableness of the objectives were not capable of “scientific proof”, axiomatic arguments, value statements and symbolism could all be taken into account.¹⁹ The doubts expressed by the Chief Justice as to the vagueness of the government’s expressed objectives were criticized “as symbolic, abstract and philosophical as the government’s claim...”²⁰ Ultimately, in part, “the disenfranchisement is a civil disability arising from the criminal conviction.”²¹

¹⁴ *Ibid.* at para. 94 (emphasis removed).

¹⁵ *Ibid.* at para. 96.

¹⁶ *Ibid.* at paras. 90 and 67.

¹⁷ *Ibid.* at paras. 122-134.

¹⁸ *Ibid.* at para. 139.

¹⁹ *Ibid.* at para. 67.

²⁰ *Ibid.* at para. 100.

²¹ *Ibid.* at para. 146.

As stated earlier, the major divergence of opinion in the case concerned proportionality of means and rational connection. In a sense, having easily accepted Parliament's objectives as legitimate, rather than voicing uncertainty, it was likely that a rational connection between disenfranchisement and the purposes of the legislative provision would be found.

[R]eason, logic and common sense, as well as extensive expert evidence support a conclusion that there is a rational connection between disenfranchising offenders for serious crimes and the objectives of promoting civic responsibility and the rule of law and the enhancement of the general objectives of the penal sanction.²²

As a result, since Justice Gonthier found a rational connection, he had to proceed further, unlike the majority, and analyze the other issues in relation to proportionality. Although he canvassed numerous less stringent alternatives to the legislation,²³ he preferred to show deference to Parliament's choice, choosing a lower level of scrutiny. As he stated: "Line drawing, amongst a range of acceptable alternatives, is for Parliament."²⁴

Similarly, the final step of *Oakes*, proportionality of effects (i.e. the balancing of salutary and deleterious effects) was found to favour the government. Although, "[t]he salutary effects . . . are particularly difficult to demonstrate by empirical evidence given their largely symbolic nature",²⁵ nevertheless, "[t]his provision draws a line which sends a strong and beneficial moral message to society as a whole, the message that crime will not be tolerated."²⁶ Balanced against the temporary loss of the right to vote and the ability to exercise political expression in other ways, the benefits outweighed the negative effects.²⁷

Analysis

1. Section 1 of the Charter

(i) Background Prior to Sauvé

Ever since *Oakes* was decided in 1986 and the basic formula for interpretation of s. 1 (although not exhaustive) was set out by former

²² *Ibid.* at para. 157.

²³ *Ibid.* at paras. 162-171.

²⁴ *Ibid.* at para. 174.

²⁵ *Ibid.* at para. 180.

²⁶ *Ibid.* at para. 182.

²⁷ *Ibid.* at paras. 184-185.

Chief Justice Dickson, its appropriate role in constitutional analysis has been the focus of controversy. Seen by many as overly mechanical and technical, later judgments of the Supreme Court often sought to ameliorate its effects and provide more freedom for legislative choices. It will serve no useful purpose here to reiterate the litany of cases that followed in the ten years after *Oakes*, except to state that in general the Court became more pragmatic and deferential to legislative endeavours in many areas of law.²⁸ While the purposive framework of *Oakes* has never been rejected, the later glosses on the test were seen by many as more sensitive, normative and contextual in relation to society's needs and aspirations.²⁹ Judges sought to assess the importance of a *Charter* freedom or right in light of what they understood as the values of a "free and democratic society".³⁰ The problem for legal analysts was to determine which test was relevant to which subject matters and to what circumstances: the more stringent and principled original *Oakes* approach or the "watered down" contextual and utilitarian version that appeared after 1986.³¹

One could argue, for example, *Oakes* was a criminal case where individual liberty was at issue. Therefore, a stricter test should apply. But, there have been criminal cases where a more deferential approach was taken.³² Or, it could be argued that, regulatory legislation not involving fundamental values deserves the contextual approach. But, this was not consistent either.³³ Further distinctions were drawn between situations where the government was the "singular antagonist of the individual" or "mediating between the claims of competing

²⁸ There are many reference sources that follow these developments, not the least of which is Hogg, *supra* note 11 at 763 ff.

²⁹ Undoubtedly, the best resource describing this period of the refinement of *Oakes* is to be found in L. E. Trakman, W. Cole-Hamilton & S. Gatién, "R. v. *Oakes* 1986-1997: Back to the Drawing Board" (1998), 36 *Osgoode Hall L.J.* 83. They describe the changes as *Oakes- Plus*.

³⁰ These values have never been precisely articulated, but the Supreme Court's judgment in *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217 at p. 240 referred to some of them. "In our view, there are four fundamental and organizing principles of the Constitution which are relevant . . . federalism; democracy; constitutionalism and the rule of law; and respect for minorities."

³¹ Some useful information on this point can be gleaned from D. Newman, "The Limitation of Rights: A Comparative Evolution and Ideology of the *Oakes* and *Sparrow* Tests" (1999), 62 *Sask. L. R.* 543. See also, G. Davidov, "Separating Minimal Impairment From Balancing: A Comment on *R. v. Sharpe* (B.C.C.A.)" (2000), 5 *Review of Constitutional Studies* 195.

³² Egs. *R. v. Keegstra*, [1990] 3 S.C.R. 697 (Hate literature) and *R. v. Butler*, [1992] 1 S.C.R. 452 (Obscenity).

³³ Egs. *R. v. Edwards Books*, [1986] 2 S.C.R. 713 (Religion) and *Irwin Toy v. Quebec*, [1989] 1 S.C.R. 927 (Expression).

groups”; the first requiring rigorous testing and the latter more contextual.³⁴ Yet, it is possible to view most legislation from both perspectives. Attempts to predict the appropriate role for s. 1 in any set of circumstances became an exercise in futility. The situation was to become only more opaque with the release of the judgment in *RJR-Macdonald Inc. v. Canada (Attorney General)* in 1995.³⁵

RJR-MacDonald generally involved a federal scheme to regulate and ban some types of tobacco advertising. In a sense it was both a fundamental freedoms case (expression), and a business regulation case (corporate advertising). Government could be seen as both the singular antagonist and the mediator. Since the objective of the legislation (prevention of smoking by youth by placing strict limits on advertising) could not be shown to be a minimal impairment on *Charter* guarantees because of a lack of definitive social scientific evidence, contextual rationality would seem to have been the appropriate level of s. 1 scrutiny. Instead, what emerged was a classic confrontation between Justices La Forest and McLachlin (as she then was) as to the appropriate role of the Court under s. 1.

Justice La Forest followed the general trends that had developed since 1986:

It is implicit in the wording of s. 1 that the courts must, in every application of that provision, strike a delicate balance between individual rights and community needs. Such a balance cannot be achieved in the abstract, with reference solely to a formalistic “test” uniformly applicable in all circumstances. The s. 1 inquiry is an unavoidably normative inquiry . . .³⁶

While Justice McLachlin would not necessarily disagree with these sentiments, she went much further in an attempt to clarify the appropriate role for s. 1.

Essentially, Justice McLachlin attempted to reinforce and restate what she viewed as the appropriate role for the Supreme Court in relation to Parliament under s. 1 and the *Charter*. The limits and dangers of the contextual approach had to be understood. Most pointedly, she stated:

. . . while the impugned law must be considered in its social and economic context, nothing in the jurisprudence suggests that the contextual approach reduces the obligation on the state to meet the burden of demonstrating that the limitation on

³⁴ Initially postulated in *Irwin Toy*, *ibid.* at 993 and 994.

³⁵ [1995] 3 S.C.R. 199.

³⁶ *Ibid.* at 270, para. 62.

rights imposed by the law is reasonable and justified. Context is essential in determining legislative objective and proportionality, but it cannot be carried to the extreme of treating the challenged law as a unique socio-economic phenomenon, of which Parliament is deemed the best judge. This would be to undercut the obligation on Parliament to justify limitations which it placed on *Charter* rights and would be to substitute *ad hoc* judicial discretion for the reasoned demonstration contemplated by the *Charter*.³⁷

Moreover, similar constraints should be recognized in relation to deference. As she later reminds us in *Sauvé*, the *Charter* no longer creates a presumption in favour of constitutionality.³⁸

As with context, however, care must be taken not to extend the notion of deference too far. Deference must not be carried to the point of relieving the government of the burden which the *Charter* places upon it of demonstrating that the limits it has imposed on guaranteed rights are reasonable and justifiable. Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the constitution. But the courts also have a role: to determine, objectively and impartially, whether Parliament's choice fall within the limiting framework of the constitution. The courts are no more permitted to abdicate their responsibility than is Parliament. To carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded.³⁹

In the result, a 5-4 majority in *RJR-MacDonald* found the legislation unconstitutional because of the failure to satisfy the minimal impairment requirement (other options were canvassed in the case). Later cases were decided with no clear majority direction for s. 1 being established,⁴⁰ The stage was clearly set for *Sauvé*.

(ii) *Further Comments on Sauvé and s. 1*

One of the most interesting aspects of the majority judgment was the focus on the assessment of the objective or purpose in the s. 1 analysis. The need for precision was emphasized.⁴¹

³⁷ *Ibid.* at 331, para. 134.

³⁸ *Supra* note 1 at para. 12.

³⁹ *Supra* note 35 at 332, para. 136.

⁴⁰ *Eg. Thomson Newspapers Co. v. Canada (Attorney-General)*, [1998] 1 S.C.R. 877. But, see Justice Gonthier's dissenting opinion which is a clear precursor to his judgment in *Sauvé*.

⁴¹ In fact, Chief Justice McLachlin hinted at this necessity in *RJR MacDonald*, *supra* note 35 at 335, "Care must be taken not to overstate the objective. The objective

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.

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.⁴²

The abstract and symbolic nature of the stated government objectives did not demand undue deference.⁴³ This case was more than just a situation of competing social science and political evidence; it demanded specific and concrete reasons that required the disenfranchisement of federal inmates.⁴⁴ As indicated earlier, the case was not decided on this point (as the proportionality analysis was the

relevant to the s. 1 analysis is *the objective of the infringing measure*, since it is the infringing measure and nothing else which is sought to be justified. If the objective is stated too broadly, its importance may be exaggerated and the analysis compromised.” (emphasis added) Trakman *et al.*, *supra* note 29 addressed this issue as well speaking of “varying degrees of generality” (p. 97) “making them [objectives] appear self-evidently ‘pressing and substantial’” (p. 135). Their statistics indicate that 97% of the cases passed this first stage in the Supreme Court in the eleven years after *Oakes* (p. 145).

⁴² *Supra* note 1 at paras. 22 and 23.

⁴³ *Ibid.* at para. 16.

⁴⁴ This is not to say that such a high evidentiary burden is part of every case. While deference to the legislature is not appropriate in this case, legislative justification does not require empirical proof in a scientific sense. While some matters can be proved with empirical or mathematical precision, others, involving philosophical, political and social considerations, cannot... However, one must be wary of stereotypes cloaked as common sense, and of substituting deference for the reasoned demonstration required by s. 1.” *Ibid.* at para. 18.

determining factor), but it would seem to send a clear message for future cases. It was also hotly disputed by the dissent.

Justice Gonthier was of the opinion that it was inevitable that symbolism and philosophy would be part of the process of assessing governmental objectives, especially where “there is very limited social scientific evidence . . . that seeks to establish the practical or empirical consequences of maintaining or lifting the ban on prisoner voting.”⁴⁵ It was his view that the debate in this case *was* about symbolism and abstract arguments and required deference. The government’s claim that disenfranchisement of inmates would strengthen democratic values and social responsibility was not easily demonstrated. The question was whether this social or political philosophy was reasonable. “Temporarily removing the vote from serious criminal offenders while they are incarcerated is both symbolic and concrete in effect. Returning it on being released from prison is the same.”⁴⁶

As mentioned earlier, major disagreement resulted in the approach of the two opinions toward the rational connection phase of the s. 1 analysis. Chief Justice McLachlin was very skeptical that the means chosen could achieve the goals outlined by the government, in fact, “[d]enying penitentiary inmates the right to vote misrepresents the nature of our rights and obligations under the law and consequently *undermines* them.”⁴⁷ The purported “educative message” of “civic responsibility” was therefore seen as flawed if not “anti-democratic and internally self-contradictory”.⁴⁸ The right to vote is rather an important means of teaching democratic values and social responsibility.⁴⁹ If the opposite results to those intended are likely to occur, there can hardly be a rational connection demonstrated.

The Government’s other justifications were also rejected by the majority. It was argued that allowing people who flaunt the law to vote demeans the political system. Earlier the Chief Justice reminded us: “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 . . .”⁵⁰ Thus, the postulated “moral unworthiness” of inmates was seen as “inconsistent with the respect for the dignity of every person that lies at the heart of Canadian democracy and the Charter.”⁵¹

⁴⁵ *Ibid.* at para. 101.

⁴⁶ *Ibid.* at para. 103.

⁴⁷ *Ibid.* at para. 31 (emphasis added).

⁴⁸ *Ibid.* at para. 32.

⁴⁹ *Ibid.* at paras. 38 and 39.

⁵⁰ *Ibid.* at para. 14.

⁵¹ *Ibid.* at para. 44.

Finally, the government's argument that temporary disenfranchisement of inmates was a legitimate criminal sanction was also rejected. Simply put,

Section 51(e) imposes blanket punishment on all penitentiary inmates regardless of the particular crimes they committed, the harm they caused, or the normative character of their conduct. It is not individually tailored to the particular offender's act. It does not, in short, meet the requirements of denunciatory, retributive punishment.⁵²

Perhaps, herein lies the key to enactment of future disenfranchisement legislation: more specific and selective application. Without some discretionary differentiation, the legislation becomes arbitrary. A simple two year sentence limitation was not rational.

Again, strong disagreement with these conclusions characterized the dissenting opinion. These positions were set out earlier in this comment.⁵³ The fact that disenfranchisement of inmates (sometimes for life) was common in many free and democratic countries supported the view that the legislative provision met the rational connection test.⁵⁴ As mentioned earlier, the other steps in the *Oakes* proportionality test were also fulfilled according to the dissent.

2. *The Merits of Prisoner Disenfranchisement*

(i) *General Comments*

Despite the result in *Sauvé* the issue of prisoner voting rights remains one of significant controversy. Many Canadians would probably support reinstatement of some form of ban on inmate voting, or even a constitutional amendment.⁵⁵ The legal situation in Canadian

⁵² *Ibid.* at para. 51.

⁵³ *Infra* note 22, ff.

⁵⁴ *Supra* note 1, paras. 157 and 158.

⁵⁵ The Canadian Justice Foundation is a research and public policy organization based in Calgary, Alberta, that focusses on justice issues. They have supported a private members motion by Vic Toews, Member of Parliament (Alliance, Provencher) to amend the *Charter* by adding "Subsection (1) does not apply to any person who is imprisoned" to s. 3. See Canadian Justice Foundation, Media Advisory: "National Justice Organization Supports Move to Limit Prisoners' Voting Rights", (Dec. 10, 2002) online: Prisoner-Voting <www.justicefoundation.ca>. See also the Report of the MLA Justice Committee in Alberta, "Promoting Responsible Citizenship", (November 16, 1998) where they found that 80% of Albertans supported a ban on inmate voting, and that "allowing prisoners to vote would reduce the respect the rest of Albertans have for voting" online: <http://www.justice.gov.ab.ca/publications/downloads/promoting_responsible_citizenship.html>

Provinces and throughout the world is very mixed, with some states having no restrictions on prisoner voting, some having partial bans, others are more complete and some American states have permanent voting disenfranchisement for life (with or without a petition, pardon or reinstatement).⁵⁶

Successful constitutional attacks in other western democracies have not been frequent. For example, in the United Kingdom, the law prohibits voting by all convicted prisoners in all elections.⁵⁷ It is estimated that this prohibition affects an estimated 60,000 persons.⁵⁸ In the leading case of *Pearson v. Secretary of State*,⁵⁹ even the application of the *European Convention on Human Rights* was unable to overturn the statutory restrictions.⁶⁰ The reasoning of the judgment is comparable to that of the dissent in *Sauvé*, with a recognition that the legitimate aims of disenfranchisement were difficult to articulate, and therefore deference to Parliament was appropriate.⁶¹

In a like manner, in the United States, where traditionally the most severe restrictions on the prisoner franchise are to be found, the results have generally been the same. A California requirement that imposed a lifetime ban on ex-felons was upheld by the Supreme Court of the United States in *Richardson v. Ramirez* as not violating the Equal Protection Clause of the Fourteenth Amendment.⁶² The number of

⁵⁶ The dissent in *Sauvé* has a fairly comprehensive review of the comparative situation. See, *supra* note 1 at paras. 122-134. See also the Canada Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy*, Minister of Supply and Services Canada, 1991 [Lortie Commission], pp. 41 ff.

⁵⁷ *Representation of the People Act, 1983*, c.2, s. 3(1) (U.K.), “A convicted person during the time that he is detained in a penal institution in pursuance of his sentence is legally incapable of voting at any parliamentary or local government election.” Voting rights revive on release.

⁵⁸ See H. Lardy, “Prisoner Disenfranchisement: Constitutional Rights and Wrongs”, [2002] P.L. 524 at p. 525.

⁵⁹ [2001] EWHC Admin. 239.

⁶⁰ *European Convention Human Rights*, 213 U.N.T.S. 221, Art. 3 of First Protocol (Incorporated into English law by the *Human Rights Act, 1998*, c. 42), Sch 1, Part II, Article 3 “The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

⁶¹ *Supra* note 59 at para. 23 (Lord Justice Kennedy).

⁶² 418 U.S. 24 (1974). Again, familiar arguments about deference were raised. It was argued that the traditional justifications for disenfranchisement were no longer valid. Mr. Justice Rehnquist replied (at p. 55):

Pressed upon us by the respondents . . . are contentions that these notions are outmoded, and that the more modern view is that it is essential to the process of rehabilitating the ex-felon that he be returned to his role in society as a fully

persons affected by such laws in the United States is staggering. Estimates are that up to 3.9 million United States' citizens are unable to vote in federal or state elections because of felon disenfranchisement. This number includes 1.4 million persons who have completed their sentences.⁶³

In Canada the "Lortie Commission" completed a major examination of the electoral process in the early nineteen nineties.⁶⁴ The Commission did not refer to numbers of federal prisoners, but a current estimate is placed at 13-15 thousand at any particular time.⁶⁵ However, the Commission did criticize the traditional reasons for disqualification which they identified as follows:

The first concerns the administrative requirements of prisons to maintain security. The second relates to the capacity of prisoners to cast an informed vote. The third involves the criterion of a decent and responsible citizenry.⁶⁶

All of these justifications were discounted and the Commission concluded: "without minimizing the gravity of the offences committed by a number of prisoners, allowing some prisoners to vote would not

participating citizen when he has completed the serving of his term. We would by no means discount these arguments if addressed to the legislative forum which may properly weigh and balance them against those advanced in support of California's present constitutional provisions. But it is not for us to choose one set of values over the other. If respondents are correct, and the view which they advocate is indeed the more enlightened and sensible one, presumably the people of the State of California will ultimately come around to that view. And if they do

not do so, their failure is some evidence, at least, of the fact that there are two sides to the argument.

The 14th Amendment refers to disenfranchisement "for participation in rebellion, or other crime". "Or other crime" was interpreted as a general phrase, not one related solely to rebellion.

⁶³ See, G. Metzger, "Cruel and All Too Usual", *The National Law Journal* (June 28, 1999) online: <http://www.brennancenter.org/presscenter/oped_1999/oped_1999_0628.html>. Currently, 49 of 50 states have disenfranchisement laws, and 14 states go so far as to disenfranchise criminal felons permanently.

⁶⁴ *Supra* note 56.

⁶⁵ See also Justice Linden's judgment in the Federal Court of Appeal, and relied upon heavily by Justice Gonthier's dissent, [2000] 2 F.C. 117 (C.A.). He refers to a study of approximately 15,000 prisoners and the nature of the federal prison population and disenfranchisement at para. 145. See Statistics Canada, "The Daily: Adult Correctional Services" (October 30, 2002) online: <<http://www.statcan.ca/Daily/English/021030/d02103b.htm>>.

⁶⁶ *Supra* note 56 at 42.

undermine public confidence in the value of the vote or threaten the interests of other citizens”.⁶⁷

While undoubtedly, there will continue to be disagreement among the general population about the morality of the suspending of some political rights for criminal offenders, it would seem that in one sense the Supreme Court of Canada has gotten it right. Disenfranchisement is not concerned with the traditional aims of criminal sanctions of deterring crime or rehabilitation of criminals. Crimes are not prevented under the threat of losing the vote. It is pure retribution: punishment and vengeance for violation of the social compact. We should be conscious of its long term effects on the community. In the opinion of one observer:

Even prison regimes that involve curtailment of the moderate set of rights may, over a sufficient period of time, threaten prisoners’ abilities to act rationally and responsibly or weaken their willingness to do so. This will especially be true if prisoners are deprived of opportunities for developing or exercising responsibility for working or participating (admittedly, in attenuated form) in the governance of civil society.⁶⁸

These sentiments seem to form the foundation of the majority opinion in *Sauvé*.

. . . 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.⁶⁹

It may be that disenfranchisement is an appropriate sanction in some cases. However, its general effects on those individuals removed from mainstream society require a sensitive balance to be struck in relation to the specific circumstances leading to incarceration. After all, in a very real sense we are dealing with the purest form of free expression.

(ii) *Racial Implications of Inmate Disenfranchisement*

Both the majority and dissent in *Sauvé* (as well as the majority in the court below) made reference to the disparate effect that disenfranchisement has on the aboriginal population in Canada.⁷⁰

⁶⁷ *Ibid.* at 44.

⁶⁸ R. L. Lippke, “Toward a Theory of Prisoners’ Rights” (2002), 15 *Ratio Juris* 122 at p. 140.

⁶⁹ *Supra* note 1 at para. 38.

⁷⁰ Estimates tend to vary widely and, of course, change over time, but the Federal

Neither the majority or the dissent (using either s. 3 or s. 15(1) of the *Charter*) held that the over-representation of Aboriginal peoples in federal prisons had any negative constitutional implications for the legislation.⁷¹ Even though not conclusive, Chief Justice McLachlin offered the following comments:

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 message 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.⁷²

Solicitor-General recently claimed that while Aboriginals made up approximately 2.8% (or 3.7%) of the general population, they constituted up to 16% of federal inmates. Estimates range from 50% to 70% for the number of federal offenders in some western provinces, Public Safety and Emergency Preparedness Canada, online: <http://www.psepc_sppcc.gc.ca/index_e.asp>. The majority in *Sauvé* referred to 1,837 Aboriginal persons who were disenfranchised by the Federal law.

⁷¹ Justice Linden said the following about this issue in the Federal Court of Appeal. *Supra* note 65 at para. 169:

Finally, an alternative argument was made before this Court that imprisonment should be recognized as an analogous ground because Aboriginal peoples make up a disproportionate percentage of prisoners. I am not persuaded by this argument. First, since, according to the data offered, 1,837 Aboriginal people are disenfranchised by this law, it cannot be said that the over-representation of Aboriginal peoples in the prison system adversely affects the political expression of Aboriginal peoples generally, as there are over six hundred thousand registered Aboriginal people in Canada. If Aboriginal people generally, or a particular group of Aboriginal people, could show that disenfranchisement effectively and adversely compromised their political expression, a constitutional exemption from the operation of paragraph 51(e) of the CEA might conceivably be justified. This has not been done. Second, it cannot be said that the over-representation of Aboriginal peoples in prison is so overwhelming as to justify a conclusion that a law aimed at prisoners is *de facto* a law aimed at Aboriginal peoples. If the over-representation of Aboriginal peoples in prisons reaches a level where it could be said that a law aimed at prisoners was, *de facto*, a law aimed at Aboriginal peoples, then constitutional exemption from the operation of paragraph 51(e) of the CEA might be considered.

⁷² *Supra* note 1 at para. 60. Justice Gonthier had a different perspective for the dissenters at para. 203:

The key is that the fact of incarceration does not necessarily arise due to any personal attribute such as race or ethnic origin and neither does it necessarily relate to social condition. It necessarily relates to having committed crimes. If Aboriginal inmates had their votes taken away for life, while non-Aboriginal inmates only suffered a temporary suspension, or if Aboriginal inmates were disenfranchised

If not the source of constitutional infirmity, the impact on the Aboriginal population was an issue to be carefully considered.

Concerns about over-representation of Aboriginals in the criminal justice system was highlighted by Parliament's 1995 amendment to the *Criminal Code* by Parliament in 1995 with the enactment of s. 718.2(e) which dealt with sentencing principles.⁷³ Among other things, sentencing courts were mandated to consider:

(e) all available sanctions other than imprisonment that are reasonable in the circumstances . . . with particular attention to the circumstances of [A]boriginal offenders.⁷⁴

Two major Supreme Court of Canada cases have recently dealt with the interpretation of this provision, in which the Court noted that the aim of the section was to deal with "a crisis in the Canadian criminal justice system."⁷⁵ The provision has been criticized, for example, as adding nothing to the sentencing process to address over-representation to being viewed as an unwarranted preference for a particular racial group. A leading author on sentencing sees it as no more than a codification of existing practise.⁷⁶ Others have been less kind in their assessment:

In our view, those last nine words in paragraph 718.2(e), and the Supreme Court's efforts to interpret and apply them to the sentencing of Aboriginal offenders, can rightly be seen as offering little more than an empty promise to Aboriginal people and a bitter pill for sentencing judges who struggle to do the right thing, but become daily more aware of their powerlessness in the face of a situation far beyond their control. It would have been better if those last nine words had never been included in paragraph 718.2(e); then, the unrealistic expectation that they would help alleviate the current excessive entanglement of Aboriginal people in the criminal justice system would not have arisen. Alternatively, had Parliament added more inclusive words to the paragraph (such as "or other similarly disadvantaged offenders") . . . at least concerns about unacceptably discriminatory sentencing might have been allayed somewhat while still legislatively acknowledging the plight of Aboriginal people.⁷⁷

but not non-Aboriginal inmates, then such differential treatment would clearly warrant different analysis. But this is not the case here.

⁷³ R.S.C. 1985, c. C-46, as am. by S.C. 1995, c. 22.

⁷⁴ *Ibid.* [emphasis added].

⁷⁵ *R. v. Gladue*, [1999] 1 S.C.R. 688 at para. 64; see also *R. v. Wells*, [2000] 1 S.C.R. 207.

⁷⁶ Allan Manson, *The Law of Sentencing* (Toronto: Irwin Law, 2001), pp. 78 ff.

⁷⁷ P. Stenning and J. Roberts, "Empty Promises: Parliament, The Supreme Court, and the Sentencing of Aboriginal Offenders" (2001), 64 Sask. L.R. 138 at p. 166-167.

Whatever the solution to criminal justice issues in regard to Aboriginals, their over-representation in the system and prisons has been undeniably recognized by both the Parliament and the Courts. It may be that provision of special considerations in sentencing are a poor substitute for the real issues for the Aboriginal population which deal with the connection between poverty and crime.

Earlier in this comment the situation of felon disenfranchisement in the United States was briefly addressed.⁷⁸ Most constitutional attacks on such provisions have failed, but the issue of the disparate impact on blacks has continued to be a source of concern. Estimates vary, but it is argued that 1.4 million African-Americans are disenfranchised, and 50 percent of America's prisoners are black.⁷⁹ Figures from Florida are illustrative:

According to 1990 census data on the proportion of black and white prisoners to the total black and white population for the state, out of a black population of 1,759,534 there were 25,385 prisoners. Although the white population in Florida totalled 10,749,285 the number of white prisoners was significantly less than the black prisoners, numbering 18,206. That is, while the white population in Florida outnumbered blacks by ten million, black inmates outnumbered white inmates by over seven thousand.⁸⁰

Many observers argue that President Bush's narrow margin of victory in Florida would have changed to Al Gore with even a small turnout of prisoners and ex-felons.⁸¹ Yet, constitutional infringements based on

See also, R. Pelletier, "The Nullification of Section 718.2(e): Aggravating Aboriginal Over-Representation in Canadian Prisons" (2001), 39 O.H. L.J. 469 at p. 489.

Parliament has revamped its sentencing provisions in an attempt to address the problem of Aboriginal over-representation. The Supreme Court of Canada has acknowledged that the criminal justice system has failed Aboriginal people. Despite the legislature's attempts and the Court's acknowledgments, section 718.2(e) has been stripped of its potential to reduce Aboriginal incarceration rates. The framework provided by the Court to the sentencing judge for interpreting the provision, . . . are likely to aggravate Aboriginal over-representation in prisons. One can only hope that it will not take a more drastic increase in the Aboriginal prison population for the legislature and the courts to recognize their mistakes.

⁷⁸ See, *infra* note 62, ff.

⁷⁹ See, Robert Drinan, "Let Prisoners Keep the Right to Vote", *Boston Globe*, (July 14, 2000) online: Common Dreams News Center: <http://www.commondreams.org/views/071400_101.htm>.

⁸⁰ J. O. Calmore, "Race-Conscious Voting Rights and the New Demography in a Multiracing America" (2001), 79 N.C.L. L.Rev. 1253 at p. 1276 (notes excluded).

⁸¹ See, e.g. T. Dugree-Pearson, "Disenfranchisement – A Race Neutral Punishment for Felony Offenders or a Way to Diminish the Minority?" (2001), 23 Jour. Pub. Law

this racial imbalance have largely been unsuccessful.⁸² Still, the issue creates a serious unfairness in the justice system. As one observer concluded:

We see then that felon disenfranchisement, as a collateral consequence of mass incarceration, not only disproportionately affects nonwhites and their communities, but it also offends racial justice and fundamental fairness. It embarrasses, or ought to embarrass, our Democracy.⁸³

3. *Conclusions and the Future*

Sauvé is truly a remarkable and controversial judgment of the Supreme Court of Canada. Like many other cases dealing with the *Charter*, it is essentially concerned with the appropriate roles of the Courts and the Legislatures in relation to the determination of sensitive public policy issues. At the heart of this ongoing debate is the appropriate function of s. 1 of the *Charter*, and the Court was bitterly split regarding the appropriate level of judicial scrutiny and the amount of deference owed to legislative policy choices.⁸⁴ If the position of the Chief Justice is maintained, it appears that the Court will continue with a rigorous approach to the analysis of governmental justifications for infringements of *Charter* guarantees (especially at the objective stage). Obviously, this will only enhance the role of the Court in the political debate.⁸⁵

The often referred to “dialogue”⁸⁶ between the Courts and legislatures may tend to become more monolithic. It should be remembered that the law tested in this case was a Parliamentary attempt to conform with earlier judgments striking down a stricter

and Policy 359 at p. 374.

⁸² However, see *Hunter v. Underwood*, 471 U.S. 232 (1985) where a disenfranchisement provision of the Alabama Constitution was invalidated because it was originally motivated by a desire to discriminate against blacks.

⁸³ *Supra* note 80 at 1280.

⁸⁴ Note the recent controversy over same-sex marriage validated by *Halpern v. Canada* [2002] O.J. No. 2714 (Ont. C.A.), June 10, 2003.

⁸⁵ This is not to say that the proper approach to s. 1 and the *Oakes* test has in any way been finally resolved by *Sauvé*. Much uncertainty will continue, even among the judiciary itself. See, for example, the extensive and often caustic comments on *Oakes* in *Newfoundland (Treasury Board) v. Newfoundland Assn. of Public Employees*, Newfoundland C.A., Dec. 6, 2002, [2002] N.J. No. 324 (C.A.) per Marshal J.A. Essentially, he makes a two hundred page plea for courts to show more deference to legislatures and staunchly criticizes the *Oakes* test as counter to the separation of Powers doctrine.

⁸⁶ Phrase originally coined in P. Hogg and A. Bushell, “The Charter Dialogue Between Courts and Legislatures” (1997), 35 Osgoode Hall L.J. 75.

disenfranchisement rule. These circumstances did not warrant more deference in the majority's view:

... , the fact that the challenged denial of the right to vote followed judicial rejection of an even more comprehensive denial, does not mean that the Court should defer to Parliament as part of a "dialogue". Parliament must ensure that whatever law it passes, at whatever stage of the process, conforms to the Constitution. The healthy and important promotion of a dialogue between the legislature and the courts should not be debased to a rule of "if at first you don't succeed, try, try again".⁸⁷

Yet, this approach avoids the central question in *Sauvé*. Other than concluding that the law was overly broad and vague as to its purpose, is there a future for disenfranchisement of inmates in Canada? On this issue the Court provided little concrete guidance.⁸⁸ If Parliament wants a new law, it will have to carefully consider the many obscure and indistinct messages that are found in *Sauvé*.⁸⁹

⁸⁷ *Supra* note 1 at para. 17. The dissent also addressed this issue at para. 104. (emphasis added).

In my view, especially in the context of the case at bar, the heart of the dialogue metaphor is that neither the courts nor Parliament hold a monopoly on the determination of values. Importantly, the dialogue metaphor does not signal a lowering of the s. 1 justification standard. It simply suggests that when, after a full and rigorous s. 1 analysis, Parliament has satisfied the court that it has established a reasonable limit to a right that is demonstrably justified in a free and democratic society, the dialogue ends; the courts lets Parliament have the last word and does not substitute Parliament's reasonable choices with its own.

⁸⁸Some comments were made. *Ibid* at paras. 54-56 (majority); 160-174 (dissent). No obvious constitutional alternative emerged. It may be that there is none.

⁸⁹ It is worth noting that the "Lortie Commission", *supra* note 56, vol. 1, p. 45 had this final recommendation:

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. Persons convicted of these crimes are considered to have gone beyond the pale of civilized behaviour.

People convicted of offences for which the maximum sentence is life imprisonment and who have been sentenced to prison for a period of 10 years or more have clearly violated the social contract. Society is therefore justified in disqualifying them from voting for the duration of their sentence.

