**IN THE SUPREME COURT OF CANADA**

(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

**RICHARD SAUVÉ**

Appellant(Plaintiff)

AND

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

Respondents (Defendants)

AND

BETWEEN:

**SHELDON McCORRISTER, Chairman, LLOYD KNEZACEK, Vice Chairman on their own behalf and on behalf of the Stony Mountain Inmate Welfare Committee, and CLAIR WOODHOUSE, Chairman, AARON SPENCE, Vice Chairman on their own behalf and on behalf of the Native Brotherhood Organization of Stoney Mountain Institution, and SERGE BELANGER, EMILE A. BEAR and RANDY OPOONECHAW**

Appellants (Plaintiffs)

AND

**THE ATTORNEY GENERAL OF CANADA**

Respondent

---

FACTUM OF THE INTERVENOR
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

---

**INTRODUCTION**

1. This case raises the question whether s. 51(e) of the *Canada Elections Act*, which disqualifies and prohibits "every person who is imprisoned in a Correctional Institution serving a sentence of 2 years or more" from voting in a federal election, is a s.1 'reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society'. S. 3 of the Canadian *Charter of Rights and Freedoms* gives every "citizen" of Canada a right to vote in an election of members of the House of Commons. This *Charter* right appears under the heading "Democratic Rights" and the sub-heading "Democratic rights of citizens" in the *Charter*. Unlike most other rights in the *Charter*, s. 33 of the *Charter* cannot be used by Parliament or any legislature to pass a law that operates "notwithstanding" s. 3 of the *Charter*. S. 33 cannot be used to circumvent s. 3 democratic rights. Only s. 1 "reasonable limits" may be imposed. As such, the democratic right of Canadian citizens to vote is a "preferred right".

2. The B.C. Civil Liberties Association ("BCCLA" or "Association") submits that the right to vote is at the very core of one's citizenship. This right is the principal means by which we as citizens collectively self-govern ourselves. Voting is the heart of democratic participation and it permits us to call our society a "free and democratic society". Strip any citizen of the right to vote and that person's citizenship becomes relatively empty.

3. The BCCLA submits that the right to vote is essential or constitutive of the status of federal prisoners as citizens and is a most important ongoing link, between them and the rest of us in civil society. Having regard to the structure of the *Charter* it is one of the most fundamental of *Charter* rights and without it all other rights would be in jeopardy. While prisoners, as an unpopular minority, might seek redress in the courts against the infringement of their rights they can only seek redress on purely political issues through dialogue with their representative politician and by ensuring that politicians are responsive to their overall political concerns through the exercise of this peaceful remedy, the casting of their ballot at the polls.

4. The BCCLA submits that section 51(e) of the *Canada Elections Act* is a serious violation of section 3 of the *Charter* that cannot be saved by s. 1. It will impact on federal prisoners in custody in a very random and highly arbitrary manner and cannot survive scrutiny under any aspect of the Oakes test. The BCCLA further submits that applying the structural approach to the interpretation of the *Charter* and having regard to the importance of s. 3 in that context as a "preferred right" immune from the s. 33 override, it is subject to a very high degree of judicial scrutiny under s. 1 and a low degree of deference to the governments objective in attempting to limit the franchise of this unpopular minority.

**PART II STATEMENT OF FACTS**

5. The BCCLA accepts the facts as set out in the Factum of the Appellant Sauve and the Factum of the McCorrister Appellants.

**PART III POINTS IN ISSUE**

6. The BCCLA is making submissions on Constitutional Questions 1 and 2 as framed by the Order of McLachlin C.J.C. dated January 19th, 2001, as follows:

1.) Does section 51(e) of the *Canada Elections Act*, R.S.C. 1985, c. E-2 infringe the right to vote in an election of members of the House of Commons as guaranteed by s. 3 of the Canadian *Charter of Rights and Freedoms*.

2.) Does paragraph 51 (e) of the *Canada Elections Act*, R.S.C. 1985, c. E-2, constitute a reasonable limit, prescribed by law, which can be demonstrably justified in a free and democratic society, pursuant to s. 1 of the Canadian *Charter of Rights and Freedoms*.

**PART IV ARGUMENT**

**A. SECTION 3: THE DEMOCRATIC RIGHT OF CITIZENS TO VOTE**

1. **Introduction**

7. Though the respondents concede that s. 51(e) of the *Canada Elections Act*, contravenes s. 3 of the *Charter*, in order to undertake a proper analysis under s. 1 of the *Charter* it is critically necessary to understand the nature of this right and its importance both generally to civil society as a whole and specifically to those imprisoned who will be impacted by this appeal.

8. A right must be subject to a high degree of judicial scrutiny in the application of s. 1 of the *Charter* and the tests that have been developed by the Courts in interpreting that section. Most federal prisoners were citizens before their incarceration, continue to be citizens through out their incarceration and hopefully, if the purpose of the federal correctional system is achieved, will be better citizens upon their release. It is respectfully submitted that the democratic right of a Canadian citizen to vote in the election of Members of the House of Commons is of critical importance to the functioning of the Canadian state and is essential to Canadian citizenship. It is submitted that the right to vote, enshrined in s. 3 of the *Charter*, is a "preferred right". In the view of some, a persistent focus on citizenship as the primary objective in all prison programming is of critical importance in the development of the prisoner as a "subject" and an autonomous person, instead of as an "object", as an offender or degenerate, and that society must look to its "interests" rather than its "passions" in pursuing this purpose and objective. As Thomas Jefferson said in his 'Letter to William Jarvis' 29 September, 1850:
"I know of no safe depositary of the ultimate powers of society but the people themselves. And if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion."
**Duguid S., "Can Prisons Work? - The Prisoner as Object and Subject in Modern Corrections"**, University of Toronto Press, 2000, in the preface pp. vii - ix and in his conclusion at pp. 258 - 267.

2. **The General Importance of the Right to vote and Citizenship**

9. This Court has recognized that section 3 is a right that is central to a democratic society. This recognition is due to the inherent nature of the right and also reflects section 3's status within the structural framework of the *Charter* itself as exempt from section 33. Though this Court has been

reluctant to prioritize rights within the *Charter*, nevertheless the democratic right to vote guaranteed by s. 3 of the *Charter* has been described by this court as a "preferred right" and the BCCLA adopts that characterization of this right in support of its submission. In Dixon v. British Columbia, (Attorney General) McLachlin C.J. S.C. (as she then was) stated:
"Viewed in its textual context, the right to vote and participate in the democratic election of ones' government is one of the most fundamental of the *Charter* rights. For without the right to vote all other rights would be in jeopardy. The *Charter* reflects this. Section 3 cannot be overridden under s. 33(1); it is in this sense a preferred right."

***Dixon v. British Columbia***, [1989] 4 WWR. 393 (BCSC) per McLachlin C.J.C. (as she then was) at QL p.7

***Thomson Newspapers v. Canada*** (1998),159 D.L.R. (4th) 385 at para. 80 (SCC)

See also ***Hoogbruin vs. British Columbia*** (Attorney General) [1986] 2 WWR 700 at p. 702 (BCCA)

***Grondin vs. Ontario (Attorney General)*** (1998) 65 O.R. (2d) 427 at p. 430 (Ont. H.Ct.)

***Reference re: Provincial Electoral Boundaries*** (Sask) [1991], 5 W.W.R. (SCC) per Cory J at 24

***Haig vs. Canada (Chief Electoral Officer)*** (1993), 105 D.L.R. (4th) 577 at 604 (SCC)

***Somerville vs. Canada (Attorney General)*** (1996), 136 D.L.R. (4th) 205 at 218 - 219 (Alta. CA)
10. That the right to vote is a "preferred" right is given additional support by the fact that most *Charter* rights are held by "everyone" or "any person" where as this democratic right to vote is only accorded to "every citizen of Canada". Only s. 6 of the *Charter*, that gives a citizen the right to enter, remain in and leave Canada, and s. 23, which protects minority language education rights, are also given to "citizens". Most federal prisoners are Canadian citizens, and they do not lose their citizenship status under the *Citizenship Act* because of their conviction or sentence. As a preferred right, s. 3 of the *Charter* has special status. Any attempt to restrict it by the government must be subjected to a high standard of judicial scrutiny.

11. The right to vote and citizenship are integrally related. In a democratic society, a person cannot possess the right to vote without citizenship status. Conversely, one's status as citizen is centrally defined by one's ability to participate in the democratic process. The right to vote is the touchstone for democratic participation. In ***Lavoie***, the Federal Court of Appeal recognized the importance of citizenship, its relation to democracy and to the *Charter*. According to Marceau J. A., the Canadian Constitution "recognizes the concept of citizenship as lying at the very foundation of the national political community." He found that citizenship is "universally held within a democratic context to be of value to both the citizen and the state, and inherently distinctive based as it is on the idea that certain rights, privileges, and obligations will be ascribed exclusively to citizens as attributes of their status."
***Lavoie v. Canada*** (1999), 174 D.L.R. (4th) 588 (F.C.A) (leave to appeal granted to the SCC, [1999] S.C.C.A. No 383) per Marceau J. A. at 604 and 608; see also the comments by Desjardins J. A. at 614, 616-619, 621

12. The BCCLA submits that among the rights of citizenship, the right to vote is so important to the status of "citizen" that it is fundamental or constitutive of citizenship. As the court acknowledged in ***Lavoie***, it is the foremost right among the privileges of citizenship. According to ***Blackburn*** "[t]he right of every citizen to vote and take part in the political process of a State is the foundation of its democracy". Even Linden J.A. (in dissent) in Lavoie draws a clear connection between the right to vote and citizenship. After referring to the privilege of citizenship and the bonds that it creates, he says:
"...non-citizens are a group lacking in political power and as such vulnerable to having their interest overlooked and their rights to equal concern and respect violated...Non-citizens, to take only the most obvious example, do not have the right to vote.'

**Blackburn R., "The Right to Vote", Rights of Citizenship**, (London & Mansell, 1993): 75 at 75

***Lavoie v. Canada***, supra per Linden J. A. at p. 637 and 639
13. A prisoner, as a citizen without the right to vote is like the pod without the peas—he or she is only a shell of a citizen without its essence. Without the right to vote, there is no effective citizenship as there can be no effective participation by a voteless Canadian citizen in our democracy. Like non-citizens, a prisoner who is a citizen without the right to vote is characteristic in his vulnerability and lesser status in Canadian society because of the neutering of his ability to influence the democratic process and society's laws and policies. As a citizen without a voice, elected representatives need not listen to his concerns and viewpoints.
See generally **Patrick Boyer, *Election Law in Canada***, Vol. 1, Toronto: Butterworths, 1987)
14. The BCCLA submits that s. 51(e) of the *Canada Elections Act* that denies voting rights to federal prisoners imprisoned on the day of an election, undermines the objectives and spirit of citizenship as embodied in the *Citizenship Act* R.S.C. 1985, C-29. Once citizenship is established by birth, or has been officially acquired in accordance with the *Citizenship Act*, it cannot be taken away by government absent fraud in the application for citizenship in the first place. Once obtained, citizenship is enjoyed thereafter as essentially a static as opposed to a dynamic concept. Citizenship cannot be temporarily suspended for conduct that exhibits disrespect for civic responsibility, the rule of law or other democratic institutions. S. 51(e) of the *Canada Elections Act* by denying the right to vote to federal prisoners imprisoned on the day of the election, essentially denies to them the constitutive aspect of their citizenship, namely—the democratic right to vote in the Election.
The *Citizenship Act*, R.S.C.1985, C-29, s . 2-10

## 3. **Prisoners as Citizens and the Importance of the Right to Vote to Prisoners**

15. The BCCLA submits that the right to vote is more than just an important symbol of prisoners' continuing status as citizens and their bond, notwithstanding their reduced liberty, to the rest of civil society. Prisoners, despite their incarceration, remain political persons. With respect to some matters of public interest and debate, arguably no one has a more direct interest in these matters than prisoners themselves. Public debates about capital punishment, criminalization of drug use, reform to the criminal justice system and corrections system are matters of central importance to prisoners. Beyond the abstract nature of these debates, the quality and character of almost every detail of a prisoner's life is the result of laws, rules and policies within our criminal justice and correction systems. A prisoner may be concerned with

their own specific situation claiming a wrongful conviction or mistreatment by correctional officials, or, they may be concerned about government initiatives regarding a broader "law and order" agenda including proposed changes to the *Criminal Code* or the *Corrections and Conditional Release Act*.

16. From the perspective of the principle that underlies our society's democratic commitment—individuals should have the ability to participate meaningfully in matters that significantly and directly affect them—who is more directly and significantly affected by these rules and regulations than prisoners? The BCCLA submits that prisoners have at least a strong *prima facie* claim to meaningful participation in decision-making that affects them. They continue to have a pressing need to be heard by their Member of Parliament and the government generally. Conversely, they retain a need to hold that Member and the government generally accountable.

17. The BCCLA submits that a prisoner's direct interest in the creation of laws and governmental policy goes beyond those that impact his quotidian existence. For example, they may have been contaminated by tainted blood or lived in a leaky condo before their incarceration. They may be interested in preserving the wetlands near their hometown and wish to encourage the government to pass a strong *Species at Risk Act*. In each of these instances, prisoners as citizens need access to communicate their views to their political representatives and to hold them accountable for their representation or the lack thereof.

18. It is submitted that the right to vote is a peaceful political remedy. Stripping a federal prisoner of the right to vote is also inconsistent with s.72 of the *Corrections and Conditional Release Act* which, coupled with s. 93 of the Regulations, provides express visitation rights to Members of the House of Commons and Senators to any part of a penitentiary and to any prisoner with his consent. This right can only be limited in narrow circumstances. In the absence of a right to vote by prisoners, there would be little or no political incentive on the part of our parliamentarians to ensure that prisoners' sentences are being carried out according to law and the Constitution and that the rights of these citizens are respected. To repeat what Arbour J. (as she then was) said in Sauve, in the Ontario Court of Appeal:
"Unpopular minorities may seek redress against an infringement of their rights in the Courts. But like everybody else, they can only seek redress against a dismissal of their political point of view at the polls."

***Sauve v. Canada*** (1992), 89 D.L.R. (4th) 644 at 649 -650 (Ont. CA)

See also **Peter Lortie, Commissioner of the Royal Commission on Electoral Reform, House of Commons Special Committee on Electoral Reform**, 3rd Session, 34th Parliament, 1991-93, 1:19-1:20; and P. Milliken. Vol. XIII. February 18 - March 23, 1993 at 1667 and 18012:.See also the statement of ***Mr. Gilles Rocheleau (Hull) speaking in the House of Commons, Canada, House of Commons Debates***, (April 2, 1993) at 18013;

19. One of the statutory purposes of the federal correctional system is to make prisoners better citizens upon their return to civil society. Indeed, one of the purposes and principles of sentencing in our criminal law is to assist in rehabilitating offenders and to promote a sense of

responsibility in offenders, and acknowledgement of the harm done to victims and the community. These purposes and principles are reflected in s. 718 through 718.2 of our *Criminal Code* and s. 3 and 4 of the *Corrections and Conditional Release Act*, as well as many other policies of the Correctional Service of Canada. This makes sense given that the overwhelming majority of prisoners will return to live among us in civil society. The BCCLA submits that the right to vote is an important tool for prisoner rehabilitation and reintegration. By providing an incentive to follow civic affairs, the ability to vote provides an important mechanism for encouraging rehabilitation and reintegration into civil society. The right to vote is of course much more than just marking an X beside the name of a candidate for election. Prisoners who wish to exercise an informed vote will stay abreast of current affairs and issues and may even lobby for particular reforms. Thus, the right to vote provides a critical link between a prisoner's life on the "inside" and the life in civil society on the "outside" to which he will inevitably return. Denying the vote to prisoners thus severs and important link between prisoner and civil society and undermines an important opportunity for rehabilitation.
***Criminal Code*** R.S.C, C-34 s. 718 - 718.2

***Corrections and Conditional Release Act*** R.S.C 199, c.-20 s. 3 & 4

See generally **Duguid S., "Can Prisons Work? - The Prisoner as Object and Subject in Modern Corrections"**, University of Toronto Press, 2000

4. **The Consequences of a Denial of the Right to Vote: Revocation of Citizenship**

20. Given that the right to vote is constitutive of citizenship, the BCCLA respectfully submits that s. 51(e) of the *Canada Elections Act* in denying the right to vote to those imprisoned in a federal correctional facility on election day is akin to taking away the essence of that persons citizenship. While this may be only temporary for those serving short sentences, the longer the sentence the more significant the effect of this deprivation. As such, the practical, if not legal, effect of this denial is to render the prisoner to be effectively "stateless" so long as the prohibition remains in effect. Yet, as noted above, the *Citizenship Act* does not currently allow for the revocation of citizenship once obtained, except if acquired by misrepresentation. Neither the simple conviction for a criminal offence, the imposition of a federal sentence, nor simply being a "bad citizen" however that may be measured, can result in the loss of citizenship. 21. Rendering a person stateless is a serious breach of international law. One's nationality of citizenship defines one as a legal person. It is the primary link between an individual and international law and creates an identity that can be supported by diplomatic protection. It is "the right, in fact, to have rights." According to the Convention of Stateless Persons, a person is stateless if they are "not considered as a national by any state under the operation of its law". **Carol Batchelor, "Statelessness and the Problem of Resolving Nationality Status,"** (1998) 10 Int'l Journal of Refugee Law 156 at 159;

**Convention on Stateless Persons**, 360 U.N.T.S. 117, Article 1.

22. Canada is a signatory to the International Convention on the Reduction of Statelessness and has been since 1978. The Convention provides a few narrow circumstances in which citizenship could be revoked. Article 8 of the Convention arguably provides a basis for the removal of the citizenship of a prisoner. However, it requires the contracting State to reserve that right at the time of accession. Canada did not enter such a reservation at that time. Current scholarship on

"statelessness" suggests that citizenship is a legitimate, albeit fledgling human right, and that its deprivation as a result of the imposition of a sentence, would not likely pass the developing international standards on "statelessness".
**Chan J., "The Right to a Nationality as a Human Right: the Current Trend Towards Recognition"**, 12 Human Rights Law Journal 1 at 8
**B. SECTION 1: ANALYSIS**

1. **Onus, Burden of Proof, Context and Deference**

23. In their Factum, the Respondents cite with approval the following portion of the majority decision of the Federal Court of Appeal:
... this statute represents an example of the state setting the ground-rules for its electoral process ... [I]t is Parliament's role to maintain and enhance the integrity of the electoral process. Such considerations are by definition political and therefore warrant deference.

**Respondents' Factum at para.31.**

***Sauve*** (2) (C.A.), supra at para.59.
24. With respect, this approach fundamentally mischaracterizes the task before the Court. It is not the government that sets the ground-rules for the electoral process in Canada. S. 3 of the *Charter* does so. This violation of the constitutionally guaranteed right to vote is a serious departure from those ground-rules. In reviewing the constitutionality of this departure, the considerations are not political but constitutional. As McLachlin J. stated in ***RJR MacDonald Inc. v. Canada (Attorney General)***:
Even on difficult social issues where the stakes are high, Parliament does not have the right to determine unilaterally the limits of its intrusion on the rights and freedoms guaranteed by the *Charter*. The Constitution, as interpreted by the courts, determines those limits.

***RJR-MacDonald Inc. v. Canada (Attorney General)***, [1995] 3 S.C.R. 199 at para.168
25. Furthermore, this is not a case in which to grant the government deference in its choice of a constitutional-limiting measure. This Court has continually emphasized the importance of context in all stages of the section 1 analysis and in ascertaining whether a limitation on a *Charter* right has been demonstrably justified. Though the standard of proof remains the civil standard, this Court will take into account various contextual factors in assessing whether the government has satisfied its heavy burden under s. 1 of the *Charter*.
***Thomson Newspapers v. Canada (Attorney General)***, [1998] 1 S.C.R. 877 at para. 90-91
26. The following factors militate against deference in this case. First, the importance of citizenship and the right to vote as a preferred right, both in the abstract and in relation to prisoners, is a critical contextual factor. Thus, this right must be accorded a high degree of constitutional protection. Second, rather than legislation that seeks to protect vulnerable citizens or society from a specific harm, this legislation actually targets a group that is arguably one of the most vulnerable to the actions of the legislative, executive and judicial branches of government. In contrast to a case like ***Thomson***, *supra*, or ***R. v. Butler***, [1991] 1 S.C.R. 452, there is no demonstrated, specific harm to any person, group or even society in general by prisoners voting in federal elections.

27. With respect, the BCCLA submits that Linden J.A. at the Federal Court of Appeal erred in suggesting that a growth in public concern regarding crime and punishment was an important contextual factor to grant greater deference to Parliament. While Parliament is entitled to and indeed expected to be responsive to "public opinion" in legislating, such opinions can never be the basis for granting greater deference to the government's claim of justification for limiting a *Charter* right. To permit reference to public opinion as a contextual factor that is indicative of a need for greater deference would fundamentally undermine the nature of this Court's role in applying the *Charter* as a check on the tyranny of the majority. To demonstrate the inappropriateness of Linden J.A.'s analysis, if this Court took into account popular opinion as a contextual factor, it would then be appropriate to give greater deference to Parliament if it decided to disenfranchise drug addicts, prostitutes or the homeless simply because a majority of Canadians so desired. Instead, the BCCLA submits that, taking into account the contextual factors of this case, the government bears a substantial onus to prove that the limitation on prisoners' right to vote satisfies the onerous s.1 test.
***Sauve*** (2) (C.A.), supra at para. 61.

***RJR-MacDonald***, *supra* per McLachlin J. (as she then was) at para.129.
2. **Pressing and Substantial Objective**

28. The importance of careful scrutiny at this stage in the analysis was emphasized by McLachlin J. in RJR MacDonald supra:
"The question at this stage is whether the objective of the infringing measure is sufficiently important to be capable in principle of justifying a limitation on the rights and freedoms guaranteed by the constitution. Given the importance of the *Charter* guarantees, this is not easily done. To meet the test, the objective must be one of pressing and substantial importance.

Care must be taken not to overstate the objective. The objective 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 compromise. [emphasis added]"

***RJR-MacDonald***, *supra* per McLachlin J. (as she then was) at para.143.
29. At trial and in the Federal Court of Appeal, the Crown asserted and the Court accepted the characterization of the objectives of the impugned measure as follows: (a) the enhancement of civic responsibility and respect for the rule of law; and (b) the enhancement of the general purposes of the criminal sanction. 30. The BCCLA disagrees with this overly broad characterization of the impugned measure. Instead, the BCCLA submits that proper characterization of the objectives of s.51(e) of the *CEA* would be:

(a) To teach prisoners the importance of the right to vote and citizenship

(b) To provide a symbolic educational tool for the general public regarding the importance of the right to vote and citizenship

(c) To provide a proxy for determining fitness to participate in democracy, and

(d) To further punish prisoners.

31. The BCCLA submits that objectives that are only educational are never sufficient to override constitutional rights much less the "preferred right" in section 3. Though educational objectives may be important justifications for political decision-making, constitutional rights play too important a role in a free and democratic society to ever be sacrificed on the alter of education. *Charter* limitations must be reserved for matters for which there are compelling public reasons such as avoiding a specific public harm. Violating *Charter* rights as a means of education demonstrates that the government has a severe disrespect for the importance of the right itself. Objectives (a) and (b) are therefore unconstitutional.

32. With respect to the third objective, the BCCLA submits that it should always be beyond the state's authority to engage in a process to determine whether a citizen is "fit" to exercise his or her democratic rights. Engaging in such an assessment fundamentally undermines the philosophy of universal suffrage and takes away the gains made in enfranchising all citizens regardless of standing or circumstance. The movement for universal franchise was borne out of a recognition that fitness to vote must not be tied to a person's race, religion, economic or other personal circumstances or characteristics.

33. Today, even those with diminished mental capacity hold the right to vote because they are worthy of our respect as full human beings. Thus, the moral source for a right to vote, as long as one qualifies as a citizen, springs from a person's basic humanity and thus is an aspect of human dignity. Even Linden J. agreed that "the notion of ensuring a "decent" or "moral" electorate may have very little place in today's society". Thus, objective (c) - to provide a proxy for determining fitness to participate in democracy - is not "of sufficient importance to warrant overriding a constitutionally protected right."
***Sauve*** (2) (C.A.), supra at para.59.

***R. v. Oakes***, [1986] 1 S.C.R. 103 at 138.
34. The BCCLA submits that the law's goal to further punish prisoners is also unconstitutional. First, there is ample punishment accorded to prisoners in the deprivation of their liberty. If this punishment is not adequate, the government bears considerable onus to justify why further punishment is required. It has not done so. Second, the addition of further punishment, with respect to those prisoners who received their sentence before the enactment of the law that disenfranchises them is an affront to a basic principle of the rule of law: the rule against retroactivity. In this respect, the objective to punish prisoners in fact undermines the government a first alleged objective, which is to engender a respect for the rule of law.

## 3. **Rational Connection**

35. To be rationally connected, a prohibition on voting by those citizens who have breached the rule of law must be related to that breach. That is not the case with the impugned provision. The prohibition is not based on the offence committed, the moral culpability of the citizen or even the sentence received. It is based on the presence of a citizen in a federal penitentiary on the date of the election. The BCCLA submits that this penitentiary-presence rule of thumb does not meet the exacting demands of the rational connection stage of the analysis, which requires the impugned

provision to be "carefully designed to achieve the objective in question" and must not be "arbitrary, unfair, or based on irrational considerations."
***R. v. Oakes***, supra at 139.
36. The irrationality of choosing this penitentiary-presence test is best exposed by the practical operation of the provision. A prisoner who is sentenced to exactly two years for her third offence of impaired driving may be deprived of her right to vote in an election, while a prisoner who is sentenced to 12 years for trafficking in heroin but receives full parole after four years may not. Furthermore, since many federal prisoners who have committed serious crimes and have been given long sentences will not be disenfranchised in any one election, the very educative objectives of the impugned measure are severely undermined by the government's lack of care in designing the prohibition. 37. The range of offences a person present in a penitentiary on election day may have committed also reveals the lack of care in designing this measure. Such offences range from theft under $5000.00 and possession of cannabis (marihuana) if proceeded with by indictment, to first-degree murder. Thus, the law is arbitrary in that the means chosen to violate this *Charter* right is the same regardless of the degree of moral culpability and the gravity of the offending. As such, it violates the fundamental principle of sentencing, proportionality, which is in itself a constitutional principle.
***Criminal Code*** , R.S.C, C-34 s.718.1.

***R. v. Martineau*** , [1990] 2 S.C.R. 633 per (Lamer C.J.C. for the majority) at p. 645-647(SCC)
38. The operation of the impugned measure will impact arbitrarily in a variety of other ways. First, persons who commit similar offences will retain or be deprived of the right to vote depending on the geographical location of their offence. Due to variation in sentencing across Canada, a state of the law accepted by this Court, the applicability of this admitted contravention of s.3 may depend on which province or territory the offence was committed. Second, Canadian citizens who commit crimes in foreign countries, but serve their sentence in a Canadian federal penitentiary, may not have normally received a sentence of 2 years of more if the matter was prosecuted within Canada and yet they lose the right to vote upon transfer back to Canada. Third, because there is a wide sentencing range for most offences, not all individuals who commit comparable crimes will be deprived of the right to vote. This would not be the case if the prohibition was determined by the nature of the offence.

39. The BCCLA further submits that the legislation is arbitrary in the legislation's contradiction that it denies federal prisoners the right to vote yet does not interfere with the voting rights of other citizens who have demonstrated serious misconduct with respect to their general civic responsibilities and the rule of law. Many other citizens are guilty of breaches of law that demonstrate serious disrespect for the rule of law and the obligations of citizenship. For example, convictions for election fraud with a sentence of less than two years, the willful failure to pay child maintenance despite the means to do so, willful contravention of any court order and contempt of court all evince a serious disrespect for civil responsibility and the rule of law that can have an impact, such as the prolonged enforced poverty of children by a debtor parent that is, as great or greater than that of many other criminal offence.

40. Moreover, civic responsibility includes the obligation to undertake certain actions, including voting, discouraging discrimination and injustice and serving jury duty. Yet, the legislation does not punish those who do not carry out these responsibilities. Finally, the legislation conveniently

ignores the fact that some prisoners, despite their crime, exhibit conduct while in prison that can be commended as an example of upholding one's civic duty. For example, some prisoners undertake important community service, write about their experiences both in and outside the corrections system for public consumption, and exhibit behavior that is commendable from the point of view of citizenship and civic responsibility. In sum, the legislation's assumption of the prisoner as the "bad citizen" that is deserving of being disenfranchised is both arbitrary and a myth.

4. **Minimal Impairment**

41. Not only does the government carry the full onus under the minimal impairment test, but also "if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail."
***RJR McDonald*** , supra per McLachlin J. (as she then was) at para.160.
42. The BCCLA submits that if ever one could make a principled argument for violating a citizen's right to vote it would be where the citizen had commit offences "subversive to the system on which democracy rests", the electoral process itself. Even in those circumstances, Dickson J. found that there were other means to achieve a response to this fundamental breach of the rule of law other than by denying the citizen their right to vote as guaranteed by s.3 of the *Charter*. In Harvey v. ***New Brunswick (Attorney General)***, Dixon J. concluded that a provision that prohibited a person from voting for 5 years after they had been convicted of a corrupt or illegal practice did not represent a reasonable limit demonstrable justified in a free and democratic society. That part of his decision was not appealed. In striking down this prohibition on voting, he said:
"Their prescription accomplishes little which could not be accomplished by other valid means, for instance by merely providing some more appropriate scale of penalties under the Elections Act for electoral offences." ***Harvey v. New Brunswick (Attorney General)***, (1993), 133 N.B.R. (2d) 181, 341 A.P.R. 181 (N.B. Q.B.)
43. In this case, the government describes and the Court below accepted the objectives of the impugned measure as being the "enhancement of civic responsibility and respect for the rule of law and the enhancement of the general purposes of the criminal sanction." [emphasis added] The enhancement of those values can, ironically, be forthcoming through education without having to deprive federal prisoners of their s.3 right to vote. If the government has failed to sufficiently meet that challenge through the correctional model it has chosen for offenders, then the obvious reasonable alternative is to modify and improve the correctional model, not violate a *Charter* right. Similarly, if the purposes of the criminal sanction are in need of enhancement, a need the government has not demonstrated, Parliament can create further penalties that do not violate the *Charter* rights of citizens. The government has failed to explain why these reasonable alternatives would not meet the objectives of the impugned measure.

44. Even if this Court finds that the deprivation of the right to vote for some criminal offenders could meet the minimal impairment test, the government in this case has failed to a show why denying prisoner the right to vote in a single election only as a less intrusive measure would not meet the objectives: 45. This Court has recognized that the complete denial of the right to freedom of expression "will only be constitutionally acceptable under the minimal impairment stage of the analysis where the government can show that only a full prohibition will enable it to

achieve its objective." Voting is the irreplaceable form of expression in a democracy and the government has failed to show that only this complete prohibition on voting in an election, a denial that for many prisoners will repeat itself many times, is the only means of achieving the enhancement of the highlighted social and political values.
***RJR MacDonald***, *supra* at para.163.

5. **Proportionality**

46. Bearing in mind the significant onus on government and the inappropriateness of giving deference to the government's actions in the context of this case, the BCCLA submits that the importance of the objectives of the impugned law—education, fitness and punishment—do not outweigh the significantly deleterious effects of the law. In addition, the government has not demonstrated that the alleged beneficial impacts of the law outweigh its obvious negative impacts on denying federal prisoners the right to vote.
***Dagenais v. Canadian Broadcasting Corp.***, [1994] 3 S.C.R. 835 at 887-88.
47. The government has failed to prove the actual educational benefits of the law in concrete terms. Even using common sense or logic, the law's benefit with respect to education is at best uncertain. Second, there is little benefit in using the penitentiary-presence test as a proxy for fitness. Third, since prisoners already receive ample punishment in deprivation of their liberty due to their incarceration, there is no significant gain in terms of punishment.

48. In contrast, the BCCLA submits that the deleterious effects of the law, both generally and specifically with respect to prisoners, are serious and outweigh any salutary benefits which may flow from the alleged objectives:

- As demonstrated in our arguments under the rational connection branch, the law operates arbitrarily in many ways. The law thus sends the contradictory message to citizens that while they are expected to meet certain standards of behavior to maintain their constitutional rights, the state, in its zeal to make citizens present in a penitentiary the scapegoat for lack of civic virtue, may violate a *Charter* right with poorly crafted and arbitrary laws;

- Denying the right to vote deprives prisoners an important tool for democratic participation and accountability both in relation to matters that have significant import to their personal lives but also as members of the wider polity;

- Denying federal prisoners the right to vote eliminates a significant opportunity for the enhancement of civic rehabilitation in preparing them to return to live, work and engage in debate with other citizens in the democratic forum.

## PART V: ORDER SOUGHT

48. That Constitutional Question 1 be answered in the affirmative and Constitutional Question 2 be answered in the negative, the judgment of the Federal Court of Appeal be set aside and that s. 51(e) of the *Canada Elections Act* be declared to be of no force and effect pursuant to s. 52(1) of the Canadian *Charter of Rights and Freedoms*.

All of which is respectfully submitted this 27th day of July, 2001.

_____

John W. Conroy, Q.C.
Counsel for the Appellant