Sauvé v. Canada (2002) – Limits on Voting Rights for Prisoners

This article was written by a law student for the general public. In 1993, the Supreme Court of Canada affirmed the rulings of several lower courts and declared the provision in the *Canada Elections Act* which excluded prisoners from voting to be unconstitutional.[1]Section 51(e) of the Act, which denied voting rights to all prisoners, was declared unconstitutional in 1993. Parliament responded by enacting a new provision which disqualified only prisoners who were serving sentences of two years or more. This was Parliament's attempt to tailor the limitation on the right to vote under section 3 of the *Canadian Charter of Rights and Freedoms* so as to bring it within the realm of a "reasonable limit prescribed by law" as set out in section 1 of the *Charter*. The new restriction on prisoners' voting rights was challenged. And once again, the challenge made its way to the Supreme Court.[2] This time the Court was sharply divided over whether the legislation was a limitation on a *Charter* right that could be justified as reasonable. In a 5-4 decision, Chief Justice McLachlin for the majority declared that the right to vote is fundamental to our democracy and that the government failed to demonstrate the reasonableness of the new limit on that right.

Charter Dialogue

It has been suggested that there ought to be a dialogue of sorts between the judiciary and the legislatures. That is, if a law is struck down by the courts, legislators ought to respond with new legislation that addresses the problems described by the court. The Supreme Court was sharply divided as to whether Parliament had responded appropriately to the 1993 *Sauvé* decision. Justice Gonthier, writing in dissent, stressed the importance of giving "deference to Parliament's reasonable view."[3] The matter at issue – whether limiting prisoner voting rights promotes or impedes democracy – essentially involves a question of "social or political philosophy" which may not be conclusively proven.[4] Parliament has one point of view and Chief Justice McLachlin has a different view. In cases like this, Parliament ought to have "the last word" and the Court should not "substitute Parliament's reasonable choices with its own."[5] Chief Justice McLachlin agreed that there are instances when deference to Parliament may be appropriate, but it is never appropriate to defer to a decision to limit a fundamental right.[6] The right to vote is not a matter that may be subject to public debate. Rather, it is a matter that the courts must protect from "the shifting winds of public opinion and electoral interests."[7] The Chief Justice sent a clear message that there can be no compromise on the right to vote. Responding to the suggestion that a second version of legislation should be accorded more deference, the Chief Justice said, "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'."[8]

The Government's Objectives

The first step in determining whether legislation is a reasonable limit prescribed by law is to identify its objective. The objective must be "pressing and substantial" to warrant overriding *Charter* rights. The two objectives that the government suggested for limiting prisoner voting rights were: (1) to enhance civic responsibility and respect for the rule of law; and (2) to provide additional punishment. Chief Justice McLachlin noted that these objectives are not aimed at any specific problem. Rather, they are "vague and symbolic"[9] objectives of a "rhetorical nature."[10] Because "the government has failed to identify particular problems that require denying the right to vote, [it is] hard to say that the denial is directed at a pressing and substantial purpose."[11] Justice Gonthier, in dissent, maintained that "it is important not to downplay the importance of symbolic or abstract arguments."[12] In fact, he said, the Chief Justice had herself relied on equally vague concepts, such as "rule of law" and "democratic values."[13] Even where it is difficult to provide evidence of clear and concrete effects of a policy, when it is based on a reasonable social or political philosophy, it is legitimate.[14] Justice Gonthier looked to the examples of other liberal democracies and found that there are different, but equally reasonable, approaches taken to the objective of maintaining the integrity of the electoral process.[15] Thus, he determined, the government's objectives are no less pressing and substantial because they are not amenable to proof, nor consistent with the reasoning of the Chief Justice. "Reasonable and rational persons and legislatures disagree on the issue of prisoner disenfranchisement."[16]

Proportionality

The second step in the reasonable limits test is to determine whether the legislative measures are proportional and not more intrusive of *Charter* rights than necessary to achieve the identified objective. The proportionality analysis is further divided into three sub-steps: a rational connection test, a minimal impairment test, and a proportionate effect test.[17]

Rational Connection

The government suggested three theories that show a rational connection between the limitation on prisoner voting rights and the objective of enhancing respect for the law.[18]

1. Its sends an educative message about the importance of respect for the law.
2. Allowing prisoners to vote demeans the political system.
3. Disenfranchisement is a legitimate form of punishment.

Chief Justice McLachlin called the first theory "bad pedagogy."[19] If the government's aim is to educate prisoners about respect for the law, then the message it is sending by taking away voting rights is more likely to have the opposite effect.[20] Because the law's legitimacy flows from the democratic right of every citizen to vote, the government undermines the principles of democracy when it takes away the right to vote. The Chief Justice asserted that "the history of democracy is the history of progressive

enfranchisement."[21] Taking away the right to vote "sends the unacceptable message that democratic values are less important than punitive measures ostensibly designed to promote order."[22] The second theory – that the political system is demeaned by allowing morally blameworthy citizens to take part – was rejected by the Chief Justice as a relic of a less enlightened past.[23] Canadian democracy has progressed to the recognition that universal enfranchisement means that "moral unworthiness" is not a legitimate rationale for taking away the right to vote.[24] The final theory – that disenfranchisement is a legitimate form of punishment – failed for being arbitrary and "not tailored to the particular offender's act."[25] The Chief Justice acknowledged that Parliament may limit *Charter* rights for the purpose of punishment.[26] However, a "blanket punishment" that indiscriminately takes away a *Charter* right from all offenders regardless of the seriousness of their crimes, fails for arbitrariness.[27] Justice Gonthier, in his dissent, was of the opinion that a rational connection between the legislation and its objective is a matter of reason, logic and common sense.[28] The connection need only be shown upon a balance of probabilities: it should be "reasonable to presume" that there is a connection.[29] There are differing philosophies about the effect on democracy and prisoners of limiting their right to vote. The Chief Justice has one theory, based on her reading of philosopher John Stuart Mill. The trial judge had a different, but equally rational and plausible theory, based upon expert evidence presented by scholars.[30] There is no reason to replace one reasonable position with another. Justice Gothier also disagreed with the suggestion that the legislation was not sufficiently tailored. Given that prisoners incarcerated for two years or more have committed an average of 29.5 offences, it is hard to suggest that the legislation catches prisoners who are not serious offenders.[31]

Minimal Impairment

Because the Chief Justice determined that the denial of the right to vote was not rationally connected to the government's objective, she did not find it necessary to provide much analysis on the second step of the proportionality test.[32] However, she noted that even if a rational connection could be established, the legislation would still fail for not being minimally impairing. The suggestion that the class of people affected is restricted – those serving two years or more – is not a sufficient answer to any individual whose rights are unjustifiably limited.[33] Justice Gonthier accepted the Crown's reasoning as to why the legislation was minimally impairing of the right to vote. First of all, it only affects prisoners serving at least two years. Secondly, it only affects perpetrators of "serious" offences. Justice Gonthier was satisfied that Parliament had made a reasonable decision in defining "serious crime" as those penalized by two years or more.[34] And, finally, the disenfranchisement is temporary and is fully restored upon release from prison.[35]

Proportionate Effect

The final step in the proportionality analysis requires finding that the effects of the challenged legislation do not trench upon *Charter* rights in a manner that is severe and disproportionate to the legislative objective.[36] The Chief Justice ended her analysis by noting the disproportionate effect that taking voting rights from prisoners would have on

the Aboriginal population. She noted the disproportionate representation of Aboriginals and said that the social cost of silencing such a large proportion of the Aboriginal people is not justifiable.[37] Justice Gonthier, on the other hand, was satisfied that the positive effects of the legislation outweighed the infringement of a *Charter* right. The effect of taking voting rights from prisoners is largely symbolic and not amenable to empirical evidence.[38] When it comes to competing social philosophies and symbolic measures meant to uphold the values of democracy, it is not the courts' role to replace Parliament's rational perspective.[39] Essentially, Justice Gonthier could not agree with the majority's ruling that forbidding any limitations on voting is the only reasonable policy directed towards promoting the symbolic promotion of democracy. Nonetheless, the majority's ruling stands as the law in Canada: the right to vote may not be taken away from any prisoner irrespective of the length of his sentence or the seriousness of his offence. Jim Young (May 26, 2010)

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[1]*Sauvé v. Canada (Attorney General),* [1993] 2 S.C.R. 438. [2] *Sauvé v. Canada (Chief Electoral Officer),* [2002] 3 S.C.R. 519. [3] *Ibid.* at para. 68. [4] *Ibid.* at para. 93. [5] *Ibid.* at para. 104. [6] *Ibid.* at para. 13. [7] *Ibid.* at para. 13. [8] *Ibid.* at para. 17. [9] *Ibid.* at para. 22. [10] *Ibid.* at para. 24. [11] *Ibid.* at para. 26. [12] *Ibid.* at para. 99. [13] *Ibid.* at para. 100. [14] *Ibid.* at paras. 102-103. [15] *Ibid.* at paras. 122-134. [16] *Ibid.* at para. 142. [17] *Ibid.* at para. 27. [18] *Ibid.* at para. 29. [19] *Ibid.* at para. 30. [20] *Ibid.* at para. 30. [21] *Ibid.* at para. 33. [22] *Ibid.* at para. 40. [23] *Ibid.* at para. 43. [24] *Ibid.* at para. 44. [25] *Ibid.* at para. 51. [26] *Ibid.* at para. 46. [27] *Ibid.* at para. 48. [28] *Ibid.* at para. 157. [29] *Ibid.* at para. 150. [30] *Ibid.* at para. 153. [31] *Ibid.* at para. 155. [32] *Ibid.* at para. 54. [33] *Ibid.* at para. 55. [34] *Ibid.* at para. 174. [35] *Ibid.* at para. 166. [36] *Ibid.* at para. 175. [37] *Ibid.* at para. 60. [38] *Ibid.* at para. 180. [39] *Ibid.* at para. 186.