Court No: 35024

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal for British Columbia)

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant
(Appellant in Appeal)

- and –

CHRISTOPHER JOHN WHALING

Respondent
(Respondent in Appeal)

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant
(Appellant in Appeal)

- and –

JUDITH LYNN SLOBBE

Respondent
(Respondent in Appeal)

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant
(Appellant in Appeal)

- and –

CESAR MAIDANA

Respondent
(Respondent in Appeal)

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PART I - OVERVIEW

1. The Appellant, the Attorney General of Canada, appeals the B.C. Court of Appeal's decision to uphold the declaration of unconstitutionality concerning portions of section 10(1) of the *Abolition of Early Parole Act,* SC 2011, c 11 ("*AEPA*"). In the *AEPA*, Parliament abolished the Accelerated Parole Review (APR) scheme in the *Corrections and Conditional Release Act,* SC 1992, c 20 ("*CCRA*"). Under a transitional provision in section 10(1), Parliament retrospectively abolished the entire scheme for all eligible federal inmates even if they had already been sentenced.

2. This retrospective abolition resulted in offenders serving longer periods of time in jail through the extension of their parole ineligibility. In addition, the abolition of APR made it more difficult for otherwise eligible offenders to be released under stricter criteria for release.

3. By the time each of the three Respondents were sentenced and entered the federal correctional system, they were all eligible for APR release at one-sixth of their sentences. Due to the retrospective application of the repeal, however, they were no longer eligible for release under the APR scheme. The Respondents were successful in their constitutional challenge to the post-sentence abolition of the APR scheme in a summary trial before the B.C. Supreme Court.

4. The trial judge held that the abolition of APR amounted to retrospective "punishment" and therefore infringed section 11(h) of the *Charter of Rights and Freedoms.* The trial judge accordingly struck out portions of the transitional provision in the *AEPA*. The Attorney General of Canada appealed this decision to the B.C. Court of Appeal, but that appeal was dismissed.

5. The core issue in this case is whether parole ineligibility in correctional legislation for determinate sentences amounts to "punishment" under section 11 of the *Charter*. If it does, it cannot be retrospectively altered by Parliament. Courts

across Canada, and this Court itself, has consistently found that parole ineligibility provisions in the *Criminal Code* are "punishment" and cannot be retrospectively altered by Parliament. These provisions constitute "punishment" because they result in a harsher sentence with a longer period behind bars. Moreover, the purpose behind the repeal of APR itself was punitive because it was based on a desire to impose "stiffer sentences" in the interests of denunciation and deterrence.

6. Both the trial judge and the B.C. Court of Appeal held that the effect of parole ineligibility, as either enacted through the *Code* or the *AEPA*, were the same and thus amounted to "punishment". In so doing, the B.C. Court of Appeal correctly determined the constitutionality of the transitional provision based on how it actually affected people that are subject to the repeal. This approach is consistent with the jurisprudence from this Court. It is also supported by venerated principles of the Rule of Law, which find modern expression in sections 11 and 7 of the *Charter.*

7. By contrast, the technical and anaemic interpretation of "punishment" advocated by the Appellant on this appeal is inconsistent with this Court's past jurisprudence and a purposive interpretation of the *Charter.* It would also result in manifest absurdities. The appeal to this Court should be dismissed.

PART I - FACTS

8. The Respondents generally agree with the Appellant's statement of facts, but wish to provide further details in order to set out the context to the issues in these appeals.

Parole eligibility and Accelerated Parole Review scheme in the CCRA

9. Prior to the enactment of the *Corrections and Conditional Release Act* on November 1, 1992, parole was governed by the *Penitentiary Act,* RSC 1985, c P-5 and the *Parole Act,* RSC 1985, c P-5. Parole ineligibility periods were set out

in the *Parole Regulations.* Offenders serving determinate sentences were eligible for full parole at one-third of the sentence or seven years, whichever was less, and eligible for day parole at one-sixth of the sentence. These eligibility dates were subject to a six-month minimum period, which an inmate had to serve before being eligible for parole.[1]

10. When the *CCRA* came into force, day parole eligibility was changed from one-sixth to sixth months before an offender's full parole eligibility date. However, the *CCRA* retained the one-sixth eligibility date for provincial inmates.[2] Parliament also included an accelerated parole review (APR) scheme for some offenders. For those offenders, a different and more favourable test applied for full parole. In 1997, Parliament set the day parole ineligibility for APR offenders at six months or one-sixth of the sentence, whichever is longer, and applied the APR scheme to that day parole.

11. Because of the sixth-month floor, the earlier eligibility date of one-sixth for APR offenders only applies to offenders with sentences over 36 months.

12. The APR scheme differed from the regular day parole in that the criteria for release on APR was easier to meet. It is based on likelihood of the offender committing an offence involving violence, rather than the criteria of "undue risk" for general reoffending used in the regular day parole reviews. [*CCRA,* section 125(1)-(4)]

13. The APR regime also differed from the regular day parole scheme in that there was no discretion in the Parole Board to refuse to grant APR day parole if the criteria is met (i.e. "shall direct that the offender be released"), whereas the Parole Board retains the discretion to refuse parole in regular day parole reviews (i.e. "may grant parole"). [*CCRA,* section 102 (regular day parole); section 126(2) (accelerated parole)]

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[1] SOR/78-428, ss 5, 9, as amended by SOR/79-88, SOR/91-563
[2] *CCRA,* s 119

Abolition of the APR scheme

14. On March 28, 2011 Parliament abolished the accelerated parole regime under the *AEPA*. Under the transitional provision in section 10 of the *AEPA*, APR was abolished for all eligible federal offenders. Those already directed for APR release by the Parole Board were not, however, subject to the abolition. Section 10 read as follows:

> **10. (1)** Subject to subsection (2), the accelerated parole review process set out in sections 125 to 126.1 of the Corrections and Conditional Release Act, as those sections read on the day before the day on which section 5 comes into force, does not apply, as of that day, to offenders who were sentenced, committed or transferred to penitentiary, whether the sentencing, committal or transfer occurs before, on or after the day of that coming into force.
>
> **(2)** For greater certainty, the repeal of sections 125 to 126.1 of the Corrections and Conditional Release Act does not affect the validity of a direction made under those sections before the day on which section 5 comes into force

15. In his testimony before the Senate Legal and Constitutional Affairs committee, the Minister of Public Safety emphasized that the purpose behind the abolition of the APR scheme in the *AEPA* was "all about" making sentences "stiffer" because "serious time should get serious jail time":

> Madam Chair, over the past few months, all Canadians have heard about the need to crack down on crime, such as fraud in particular. We have heard from Canadians across the country that the sentences given to so-called white-collar criminals need to be stiffer and that serious crime should get serious jail time. That is what Bill C-59 is all about. The legislation our government is proposing will put an end to any kind of special treatment for white-collar offenders who commit fraud or other so-called nonviolent crimes. What we are saying is that these crimes are just as serious and just as devastating to victims as violent crimes....
>
> ...
>
> I want to repeat, Madam Chair, that our government believes that being granted parole is a privilege that should be earned, rather than a right

granted to any offender, regardless of the nature of the offence or whether he or she is rehabilitated.

Testimony, A.R., Vol.IV, pp.28-29, 30

16. The retrospective application of the repeal was motivated by the immediate need to target certain, notable "white collar criminals", who had already been sentenced, but who had not yet been released on APR. One Parliamentarian stated if the abolition of APR was not "retroactive" the victims of Earl Jones (a notable white collar criminal who had recently been sentenced), "will never have any kind of justice served". [Hansard, A.R. Vol.VII, p.62]

17. Prior to the enactment of the *AEPA*, Parliament attempted to repeal accelerated parole under Bill C-53: *Protecting Canadians by Ending Early Release for Criminals Act*. A transitional provision in Bill C-53, unlike the *AEPA,* sought to repeal accelerated parole, but only applied the repeal to those eligible offenders who were sentenced after the bill came into force. [BCSC Reasons, A.R., Vol.I, p.75, at para.121]

Circumstances of the Respondents

18. Following Mr. Whaling's placement in the federal correctional system, he was eligible for release on accelerated day parole on June 29, 2011 and correctional officials supported his release into the community on accelerated day parole. [BCSC Reasons, A.R., Vol.I, p.10, at paras. 28-29]

19. On December 15, 2010, Mr. Whaling was accepted into a halfway house in Vancouver on accelerated day parole. While awaiting a paper review by the Parole Board, on March 28, 2011, Parliament retrospectively abolished accelerated parole and Mr. Whaling was notified that he would no longer eligible for release on June 29, 2011. [BCSC Reasons, A.R., Vol.I, p.10, at para. 29]

20. On May 6, 2011, Mr. Whaling filed a Notice of Civil Claim challenging constitutionality of the abolition of accelerated day parole on the basis that it infringed section 11(h) and 7 of the *Charter*. A hearing took place before Madam

Justice Holmes on September 6 and 8, 2011 and she released her decision on June 26, 2012 finding in favour of the Respondents. In the meantime, the Board denied Mr. Whaling regular day parole on October 11, 2011. On November 9, 2011, the B.C. Court of Appeal subsequently released Mr. Whaling on bail pending his still outstanding conviction appeal. [BCSC Reasons, A.R., Vol.I, p.49, at paras.30, 31]

21. Following the dismissal of Mr. Whaling's conviction appeal, he was returned to federal custody. The Parole Board assessed and released on APR day parole. [Affidavit of Kelsey Hymander, Appellant's Supplementary Record ("A.S.R.") [3], at p.18]

22. Ms. Slobbe, another Respondent in this appeal, was eligible for release on accelerated day parole on July 27, 2011 until its repeal on March 28, 2011. She was eligible for regular day parole on April 30, 2012, but did not apply to the Board. [BCSC Reasons, A.R., Vol.I, p.49, at para.35]

23. Ms. Slobbe remained in custody at Fraser Valley Institution and was only released on APR day parole following the B.C. Court of Appeal's decision to lift the stay on October 2, 2013. She was released on day and full parole. [Affidavit of Kelsey Hymander, A.S.R., at p.17]

24. The third Respondent in this appeal, Mr. Maidana, is serving a sentence of 13 years and six months. When Mr. Maidana began serving his sentence, he was eligible for release on accelerated day parole on December 29, 2012. However, due to the abolition of accelerated parole, Mr. Maidana was eligible for release on regular day parole on September 30, 2014. He was released on APR day parole on December 29, 2012 and is currently on day parole. [BCSC Reasons, A.R., Vol.I, p.49, at para.37; p.50, at paras.38-40; Affidavit of Kelsey Hymander, A.S.R., at p.18]

[3] On September 18, 2013, the Appellant filed additional materials in the Record to set out new developments in the circumstances of the three Respondents,

Decision of the BC Supreme Court

25. All three Respondents sought a declaration of unconstitutionality by way of summary trial in BC Supreme Court. All three cases were heard together on September 4 and 6, 2011.

26. On June 26, 2012, Madam Justice Holmes, the trial judge, released her decision finding the repeal of APR in section 10 of the *AEPA* to be unconstitutional. She decided to grant an immediate declaration of invalidity under section 52(1) of the *Constitution Act*.

27. Because the trial judge found that section 10 of the *AEPA* infringed section 11(h) of the *Charter*, she did not address the Respondent's claim that the provision also breached section 7 of the *Charter*. [BCSC Reasons, A.R., Vol.I, p.51, at para.42]

28. The trial judge found that the APR scheme, on the whole, provided previously eligible offenders with an earlier eligibility date (i.e. one-sixth as opposed to one-third of the sentence). She also found the criteria for release on APR compared to regular parole was "easier" and "less demanding" and there was no discretion for the Board to deny parole. [BCSC Reasons, A.R. Vol.I, p.8, at paras.19-21]

29. The trial judge found that the main issue was whether the abolition of APR amounted to "punishment" within the meaning of section 11(h) of the *Charter*. It was common ground that if the repeal of accelerated parole amounted to "punishment", the retrospective repeal of APR would infringe section 11(h) of the *Charter*. [BCSC Reasons, A.R., Vol.I, p.52, at para.47]

30. Following this Court's decision in *R. v. Rogers,* 2006 SCC 15, [2006] 1 S.C.R. 554, the trial judge found that in order to constitute "punishment" for the purposes of section 11 of the *Charter*, the measure had to form part of the "larger arsenal of sanctions which respond to an offence in furtherance of the purpose and principles of sentencing". [BCSC Reasons, A.R., Vol.I,p.54, at para.56]

31. At trial, the Appellant argued that while delayed parole provisions under the *Criminal Code* were "punishment" and could not, for that reason, be enacted retrospectively under the *Charter*, delayed parole enacted through the *CCRA* was not "punishment" and thus could be imposed retrospectively. The Appellant submitted that changes to the parole regime under the *CCRA* could never amount to "punishment" because the *CCRA* only concerned the administration of an offender's sentence. [BCSC Reasons, A.R., Vol.I, p.63, at para.83]

32. The trial judge rejected this bright line distinction between the *CCRA* and the *Code*. [BCSC Reasons, A.R., Vol.I, p.72, at para.111]

33. While the sentencing regime in the *Code* and the parole regime in the *CCRA* had different functions and spheres of responsibility, the trial judge found that they did not exist in "separate watertight compartments" and changes to the *CCRA* were not "for that reason alone incapable of imposing or increasing punishment inherent in the sentences offenders serve". [BCSC Reasons, A.R., Vol.I p.73, at para.112]

34. The trial judge found that this did not mean that any retrospective changes to parole in the *CCRA* would amount to "punishment". However, in the circumstances of this case, she found that the retrospective abolition of the APR regime constituted "punishment" under section 11(h) of the *Charter* because: (1) it ousted the Board's exercise of discretion; (2) it increased the harshness of the sentence after the sentence itself was imposed; (3) the purpose for abolition of APR was punitive and in furtherance of the principles of denunciation and deterrence.

35. With respect to the purpose of the abolition of APR, the trial judge stated it was not her task to judge the validity or merits of Parliament's decision to abolish APR. The trial judge found that the rationales provided by Members of Parliament did, however, suggest that the abolition of APR was intended to advance the interests of deterrence and denunciation. [BCSC Reasons, A.R., Vol.I, p.35, at para. 112; Appendix "A", A.R, Vol.I, pp.78-82]

36. The Appellant submitted that the infringements were demonstrably justified under section 1 of the *Charter*. The Appellant sought to uphold the infringement based on criticisms of the APR regime expressed by members of the public, Parliament, and one member of the judiciary. This judicial criticism consisted of comments by Mr. Justice Wagner made while he was a trial judge in Quebec in the case of *R. v. Lacriox,* 2009 QCCS 4519.[4] [Affidavit of Daryl Churney, A.R. Vol.IV, at p.187, at paras.20-22]

37. The Appellant further submitted that the retrospective nature of the *AEPA* was the result of "overriding public interest concerning offenders already serving their sentences, whose crimes caused devastating consequences to a large number of Canadians". [Affidavit of Daryl Churney, A.R., Vol. III, at pp.82-83]

38. The trial judge found that the infringement had not been demonstrably justified. The trial judge ruled that the Appellant failed on the minimal impairment branch of the section 1 test. The trial judge found that all the evidence adduced by the Appellant was "silent about whether less intrusive means could have achieved the legislative objective without the wholesale abolition of APR on a retrospective basis". [BCSC Reasons, A.R., Vol.I, p.75, at paras.121-122]

39. The trial judge finally concluded that a suspension of invalidity was not warranted because: (1) no legislative void would exist without the transitional provision as the APR regime would continue to be in force as it had been for many years; (2) to allow the repeal to continue in force would further deprive the Respondents of their liberty in a time sensitive situation; and (3) the effect of a suspension would largely render the declaration itself moot. [BCSC Reasons, A.R., Vol.I, p.76, at para.126]

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[4] The Respondents submit that it is improper and incorrect to impute into Justice Wagner's reasons a criticism of the APR regime, which was then a duly enacted scheme enacted by Parliament. [A.R., Vol.III, at pp.78; see also, *R. v. Oostenbroek,* 2007 BCCA 4752007 CarswellBC 2370 at paras 9,14, RBOA, Vol.I, Tab 11]

Before the B.C. Court of Appeal

40. The Appellant appealed the trial judge's decision to the B.C. Court of Appeal, and also applied for a stay of the declaration of invalidity granted in the court below.

41. On July 24, 2012, Saunders J.A. granted a stay of the declaration, but only for a limited time until the appeal was heard on an expedited basis on October 5, 2012. She left it up to the panel hearing the appeal to decide on whether to continue the stay. [BCCA Stay Decision, A.R. Vol.II, p.136]

42. On October 5, 2012, the B.C. Court of Appeal (Levine, Groberman, D. Smith JJ.A.) heard the appeal. The Appellant also applied for a continuation of the stay imposed by Saunders J.A. earlier in the summer. After hearing the submissions of the parties, the Court of Appeal decided that the stay would be lifted and that the immediate declaration of invalidity was in effect:

> With respect to the stay, we will not extend the stay. Having heard the whole of the appeal today, we are all of the view that the circumstances are different from what was before Madam Justice Saunders in the summer and we view the balance of convenience differently as time passes. So the stay that was granted earlier this year is not extended.
>
> BCCA Hearing, Respondents' Record, p. 78

Decision of the BC Court of Appeal

43. On November 2, 2012, the B.C. Court of Appeal unanimously dismissed the appeal.

44. Levine J.A., writing for the Court, began her analysis by stating that the effect of the repeal of APR in the *AEPA* on each of the Respondents was to delay their day parole eligibility dates and make the test for release more onerous. [BCCA Reasons, A.R, Vol.I, p.101, at para.4]

45. There was no dispute on the appeal that section 11(h) of the *Charter* applied to protect individuals from being tried or punished for an offence for which the offender had already been found guilty and punished. The determinative question was how to interpret "punishment" in this context. [BCCA Reasons, A.R., Vol.I, p.114, at para.45]

46. In addressing this question, Levine J.A. examined both the purpose and effect of the legislation in accordance with the analytical framework set out in *R. v. Big M Drug Mart,* [1985] 1 SCR 295. In so doing, she held that the existence of a punitive element in the *AEPA* was not determinative of whether it amounted to "punishment". Following *Big M Drug Mart,* she found the answer was in considering the effects on the Respondents. [BCCA Reasons, A.R., Vol.I, p.117, at para.56]

47. Levine J.A. held that the effect of the *AEPA* was "no different than that of parole ineligibility imposed by a judge" as there was "clear and consistent" jurisprudence, which established that delayed parole ineligibility is "punishment". She then turned to the definition of "punishment" articulated by Charron J. in *Rogers* and concluded as follows:

> Further, the effect of *AEPA* on the respondents clearly falls within the definition of "punishment" articulated in *Rodgers*: it is one of the sanctions to which the respondents are liable, imposed in furtherance of the principles and purposes of sentencing: rehabilitation, reintegration into the community, protection of society, confidence in the administration of justice, denunciation and deterrence.
>
> I agree with the trial judge that the retrospective application of the *AEPA* to the respondents violates their right not to be punished again under s. 11(h) of the *Charter.*
>
> BCCA Reasons, A.R., Vol.I, p.117, at paras.58, 59

48. The Appellant sought to justify the infringement on section 1 grounds, but on this occasion asserted that the retrospective abolition of APR contributed to uniform parole rules for all offenders. Levine J.A. found this argument not persuasive:

> Sentence management objectives in general, and the objectives of the *AEPA* in particular, are recognizably important, but they do not rise to such significance that justifies implementing them in a manner that deprives the respondents of their constitutional rights. The corrections authorities have for twenty years administered different parole regimes for different offenders, including APR. The trial judge found that the Attorney General did not demonstrate that changing the parole rules retrospectively was necessary to achieving the objectives of *AEPA*, and thus did not impair the respondents' rights as little as possible.
>
> BCCA Reasons, A.R., Vol.I, p.119, at para.65

49. Similar to the trial judge, the Court of Appeal did not address the alleged infringement to section 7 of the *Charter* because of the established violation to section 11(h) of the *Charter*. [BCCA Reasons, A.R. Vol.I, p.119, at para.67]

50. The Court of Appeal refused to stay or suspend the declaration of invalidity imposed at trial. [BCCA Reasons, A.R., Vol.I, pp.119-120]

Before this Court

51. Following the Court of Appeal's interlocutory decision not to extend the stay, the Appellant sought leave to appeal against that decision and applied for stays pending leave and appeal. It also sought a stay of the declaration of invalidity pending the decision on those stays. On October 12, 2012, Moldaver J. denied the stay applications. The Appellant thereafter did not perfect its leave application against the interlocutory decision. [Order of Moldaver J., A.R., Vol.II, at p.152]

52. On December 13, 2012, the Appellant sought leave to appeal against the B.C. Court of Appeal's decision to dismiss its appeal. The Appellant also sought to stay the effect of the declaration pending the leave decision and the appeal itself, if leave were to be granted. On April 11, 2013, leave was granted, but the stay applications were again denied. [Order Fish, Rothstein, Moldaver JJ., A.R. Vol.II, at p.158]

53. On June 4, 2013, Abella J. made an order stating the following Constitutional Questions arising in this appeal:

a. Does s. 10(1) of the *Abolition of Early Parole Act*, S.C. 2011, c. 11, to the extent that it applies to offenders sentenced before the Abolition of Early Parole Act came into force on March 28, 2011, infringe s. 11(h) of the Canadian Charter of Rights and Freedoms?

b. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

c. Does s. 10(1) of the *Abolition of Early Parole Act*, S.C. 2011, c. 11, to the extent that it applies to offenders sentenced before the Abolition of Early Parole Act came into force on March 28, 2011, infringe to the extent it applies to offenders sentenced before the *Abolition of Early Parole Act* came into force on March 28, 2011, infringe s. 7 of the *Canadian Charter of Rights and Freedoms*?

d. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Order of Abella J., A.R., Vol.II, p.162

PART II - POINTS IN ISSUE

54. In addressing the Constitutional Questions, the Respondents prefer to reorganize the issues and provides its position as follows:

a. The abolition of APR under the *AEPA* amounts to "punishment" under section 11(h) of the *Charter of Rights and Freedoms*;

b. The retrospective abolition of APR under the *AEPA* infringes section 7 of the *Charter of Rights and Freedoms*;

c. The Appellant has not met its onus in establishing that the infringements are demonstrably justified under section 1 of the *Charter*; and

d. There was no error in the declaration granted in the court below.

PART III - ARGUMENT

ISSUE #1 - The abolition of APR under the *AEPA* amounts to "punishment" under section 11(h) of the *Charter*

55. The central question on this appeal is whether the abolition of APR under the *AEPA* amounts to "punishment" under section 11(h) of the *Charter*. The Respondents say that the B.C. Court of Appeal was correct in finding that the abolition of APR was "punishment" and it could therefore not be retrospectively abolished for offenders already sentenced without infringing section 11(h) of the *Charter*.

56. The Respondents first wish to address the Appellant's argument on the scope and interpretation of section 11(h) of the *Charter*. That argument now lies at the forefront of the Appellant's attempt to uphold the retrospective abolition of APR.

A "second proceeding" is not required to invoke the section 11(h) guarantee against being punished again

57. The Appellant argues the guarantee in section 11(h) against being punished again for an offence requires a "second proceeding" against the person. That is incorrect. The Appellant's argument is inconsistent with the wording of section 11(h) and it is inconsistent with the very purpose of protecting persons from being punished again.

58. This suggested interpretation would allow Parliament, by imposing the punishment itself without creating a "second proceeding", to do an end run around the guarantee in section 11(h) of the *Charter* against being punished again. Such an obviously unjust result cannot be what was intended for section 11(h). And it is inconsistent with previous jurisprudence from this Court, namely, *R. v. Johnson*, 2003 SCC 46, [2003] 2 SCR 357.

59. Section 11(h) of the *Charter* provides as follows:

> **11**. Any person charged with an offence has the right ...
>
> **(*h*)** if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again;

60. Nowhere in section 11(h) is a "second proceeding" made a requirement to invoke its guarantee against being punished again. Once finally found guilty and punished for the offence, the guarantees are against being tried "or" punished for the offence again. The Respondents agree the application of section 11(h) must be determined by considering the wording of section 11(h). The Respondents also agree with the Appellant that its specific language should not be ignored, which includes the disjunctive "or". [*R. v. Van Rassel*, [1990] 1 SCR 225 at 233, Appellant's Book of Authorities ("ABOA"), Vol.II, Tab 53]

61. The cases cited by the Appellant in support of its "second proceeding" argument involved the right not to be tried again. The right not to be punished again, however, must be considered on its own terms.

62. The Appellant's argument is based on the fundamentally erroneous premise that punishment for the purposes of section 11 of the *Charter* can only be imposed in a "proceeding". As demonstrated below, once a person is found guilty of an offence, Parliament is free to: (1) delegate the imposition of punishment to trial judges, with or without discretion; (2) impose the punishment itself; or (3) delegate part of the punishment to trial judges and impose another part itself. For the purpose of section 11(h) to be met, it must apply to all three contexts.

63. Moreover, where Parliament imposes punishment itself, it is free to do so in the *Criminal Code* or in another *Act*. The application of section 11(h) does not depend on which statutory vehicle Parliament chooses to impose that punishment. What matters is that the person cannot be punished again – whether in a proceeding or by Parliament itself.

64. The Appellant accepts that periods of parole ineligibility imposed by trial judges in sentencing proceedings are "punishment" for the purposes of section 11 of the *Charter*, as has repeatedly been found by the Courts.[5] That would include the mandatory minimum periods of parole ineligibility for murder imposed ("pronounced") under section 745(a)-(c) of the *Criminal Code*.[6] Even though the trial judge pronounces the minimum mandatory sentence for first-degree murder, this Court in *R. v. Swietlinski,* considered that parole ineligibility to be "imposed by law". [*R. v. Swietlinski,* [1994] 3 SCR 481, at para.14, Respondent's Book of Authorities ("RBOA"), Vol.I, Tab 15]

65. The parole ineligibility for murder was, however, not always imposed by trial judges or even set out in the *Criminal Code*. Parole eligibility for murder was originally ten years and was imposed by the Governor General in Council under the *Parole Regulations* [7] passed pursuant to the *Parole Act*, SC 1958, c 38.[8]

66. Should Parliament again choose to impose periods of parole ineligibility itself for some or all murders, and in the *CCRA* or its *Regulations* instead of the *Criminal Code*, it would be absurd to suggest that those periods of parole ineligibility would magically lose their status as "punishment" under section 11 of the *Charter*. And if Parliament, in a transitional provision, applied those periods to persons already punished, it would be absurd to suggest that section 11(h) would not apply as there had been no "second proceeding".

67. The context of life sentences as a maximum sentence also demonstrates that the specific *Act* under which parole ineligibility is imposed does not determine if it is punishment or if section 11(h) applies. Where a life sentence is imposed as a

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[5] See *infra,* paras. 86, 87

[6] While section 745 of the *Code* refers to "parole", that is a reference to full parole. See: *Criminal Code,* s 746.1

[7] *Parole Regulations*, SOR/60-216, s 2(1)(c), as amended by SOR/64-475, SOR/68-21, SOR/69-306, SOR/74-97.

[8] They were first moved into the *Criminal Code* by the *Criminal Law Amendment (Capital Punishment) Act*, SC 1973-74, c 8, s 3.

maximum (ie. other than for murder or high treason), section 745(d) of the *Code* provides for the following sentence:

> Subject to section 745.1[9], the sentence to be pronounced against a person who is to be sentenced to imprisonment for life shall be ...
>
> (d) in respect of a person who has been convicted of any other offence, that the person be sentenced to imprisonment for life with normal eligibility for parole.

68. The sentencing judge does not set or even "pronounce" the period of parole ineligibility under section 745(d) of the *Code* (unless s.745.6 is invoked to raise the period of parole ineligibility to ten years). The period of parole ineligibility is instead set by Parliament at seven years under section 120(2) of the *CCRA*. As with offenders sentenced to life imprisonment as a minimum for murder and high treason,[10] Parliament has included in the calculation of that seven years any time spent in custody between the day on which the offender was arrested and taken into custody and the day on which the sentence was imposed.[11]

69. There is no principled basis to distinguish parole ineligibility for offenders based on whether the life sentence was imposed as a minimum punishment or a maximum punishment. In both cases, the period of parole ineligibility is meant and suffered as punishment, even though for some offenders the sentencing judge imposes the period under the *Criminal Code* and for others Parliament itself imposes the period under the *CCRA*.

70. If the Respondent's "second proceeding" argument is accepted, then Parliament could amend section 120(2) of the *CCRA* by increasing the period of parole ineligibility – or even eliminate eligibility entirely – and then, in a transitional provision, apply that amendment to lifers who were sentenced before the

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[9] Section 745.1 applies to murders under the age of 18 sentenced as adults.
[10] *Criminal Code*, s 746.
[11] *CCRA*, s 120(2)

amendment came into force. Because there would be no "second proceeding" against the offender, the offender would have no recourse to section 11(h) of the *Charter*. It is respectfully submitted that such a result would be totally unjust and exactly what the guarantee against being "punished again" in section 11(h) of the *Charter* was meant to prevent.

71. This Court's decision in *R. v. Johnson* finally demonstrates the absurdity of the Appellant's argument that for section 11(h) of the *Charter* to apply, there must be a "second proceeding". In *Johnson,* this Court reviewed the statutory scheme for the punishment of dangerous offenders, where the trial judge only imposed the indeterminate sentence; the period of parole ineligibility was imposed by Parliament itself.

72. As introduced by the *Criminal Law Amendment Act, 1977*, SC 1976-77, c 53, s 14, section 695.1(1) of the *Criminal Code* provided for parole three years after the day on which the dangerous offender serving an indeterminate sentence was taken into custody for the offence.

73. Section 695.1(1) was re-enacted unchanged as s 761(1) in the *Criminal Code*, RSC 1985, c C-46. Section 761 was amended by the *Corrections and Conditional Release Act*, SC 1992, c 20, s 215, to change the references to the repealed "*Parole Act*" to the newly passed "Part II of the *Corrections and Conditional Release Act*".

74. Parliament further amended section 761(1) in SC 1997, c 17, s 8 by increasing the period of parole ineligibility for dangerous offenders from three years to seven years.[12] In *R. v. Johnson*, this Court had no trouble whatsoever finding that increasing the period of parole ineligibility imposed in section 761(1) was "punishment". This Court held that section 11(i) of the *Charter* operated to provide offenders who committed their offences before the amendments came

[12] While s 761(1) refers to "parole", that is a reference to full parole. See: *CCRA*, s 119

into force with the "benefit of the lesser punishment" of three years of parole ineligibility, even though that punishment was not imposed in any "proceeding". *R. v. Johnson,* 2003 SCC 46, [2003] 2 SCR 357 at para 2, 4-5, 46; aff'd, 2001 BCCA 456, Ryan JA for the majority, at paras 100, 104, RBOA, Vol.I, Tab 5]

75. Again, if the Respondent's argument is accepted, then Parliament could amend section 761(1) by doubling the period of parole ineligibility to 14 years or even eliminate eligibility for parole entirely. Then, in a transitional provision, Parliament could apply that amendment to dangerous offenders who were sentenced before the amendment came into force, including those to whom section 11(i) had already applied. Because there would be no "second proceeding" against the offender, the offender would have no recourse to section 11(h) of the *Charter* – even though this Court in *Johnson* found that period to be "punishment". Such an obviously unjust result demonstrates the absurdity of the Appellant's argument that section 11(h) requires a "second proceeding" to protect against being punished again.

76. And tellingly, in making this argument – now at the forefront of its argument in this Court – the Appellant failed to even mention the only case in which this Court has applied section 11 of the *Charter* to parole ineligibility. The failure to even mention *R. v. Johnson* is especially glaring when it is remembered that this Court in *R. v. Rodgers* defined "punishment" under paragraphs 11(h) and (i) in identical terms. [*R. v. Rodgers,* 2006 SCC 16, [2006] 1 SCR 544 at paras 61-65, ABOA, Vol.II, Tab 46]

77. Section 11(h) of the *Charter* is not so anaemic as to be avoided by an invocation of the mantra "second proceeding", a phrase which is not found in section 11(h) of the *Charter.* The Respondents submit that the real issue in this case is whether the parole scheme for <u>determinate</u> sentences under the *CCRA* is punishment, as it is for life and indeterminate sentences under both the *Criminal Code* and the *CCRA*. If it is, then amending the scheme in a manner that further

punishes the offender is a violation of the right not to be punished again guaranteed by section 11(h) of the *Charter.*

Legislative purpose is one relevant factor in determining whether something is "punishment" under section 11 of the Charter

78. In *Rodgers,* this Court found that a measure amounts to "punishment" under section 11(h) and (i) of the *Charter* when it forms part of the "arsenal of sanctions to which an accused may be liable upon conviction" and was imposed "in furtherance of the purpose and principles of sentencing". [*Rodgers* at para 62]

79. The B.C. Court of Appeal correctly found that the retrospective alteration of parole ineligibility under the *AEPA* clearly fell within the definition of "punishment" articulated in *Rodgers.*

80. In so doing, the Court of Appeal found that section 11(h) of the *Charter* was infringed by focussing on the effects of the legislation. The legislative purpose of the *AEPA* was held to be not determinative in determining if the abolition of APR was "punishment". The Court of Appeal decided the constitutionality of the transitional provision in the *AEPA* based on its effects. And it had no difficulty determining that the effects of those offenders subject to the retrospective repeal of APR was "punishment" for section 11 purposes. [BCCA Reasons, A.R. Vol.I, pp.116-117, at paras.53-60]

81. The Respondents submit that there was no error in the Court of Appeal's decision. Whether a measure amounts to "punishment", for purposes of section 11 of the *Charter*, should be chiefly determined by its effects on the offender. This is not to say, however, that legislative purpose is irrelevant in determining whether a measure is "punishment" under section 11.

82. While not determinative, legislative purpose is one factor to be considered in a larger contextual analysis. In this case, the Respondents submit that the punitive purpose of the *AEPA* reinforces the conclusion that the abolition of APR is "punishment" for section 11 purposes. The Appellant instead anchors its section

11 submissions on the idea that purpose alone is determinative and the "measure must be punitive in purpose in order to constitute punishment". This is an incorrect and oversimplified reading of the jurisprudence.

83. In interpreting the meaning of "punishment" under section 11, the purpose of the impugned legislative measure must be evaluated together with its effect on the individual in a contextual assessment. [*R. v. Cross,* 2006 NSCA 91, 205 CCC (3d) 289 at para 45; ABOA, Vol.I, Tab 32; *P.S.C. v. British Columbia (A.G.),* 2007 BCSC 895 222 CCC (3d) 329 at para 112; ABOA, Vol.I, Tab 25; *R. v. Murrins,* 2002 NSCA 12, 162 CCC (3d) 412 at paras 102, 107, RBOA, Vol.I, Tab 9]

84. A measure may reveal its punitive character for section 11 purposes when it occasions a deprivation of liberty that it is more than "minimal" or "trivial". For example, in *R. v. Cross*, the Nova Scotia Court of Appeal held that the requirement to register under the *Sex Offender Information Registry Act* ("*SOIRA*") was found not to amount to "punishment" under section 11 of the *Charter* because, in part, it involved only a minimal deprivation of liberty given that the *SOIRA* order required the offender to report to a local registration centre and provide his or her current contact information. In *R. v. Rodgers,* the requirement of an offender to submit to a DNA sample was similarly found to only engage a "trivial" liberty interest. [*P.S.C* at paras 107-109; *Cross* at paras 66, 84; *Murrins* at para 107]

85. In *Rodgers, Murrins* and *Cross,* it was determined that both measures were not punitive in their effects because they only involved "trivial" or "minimal" deprivations of liberty and carried a limited degree of stigmatization. Within their larger section 11 analysis, the various courts found that the legislative purpose behind the enactment of DNA sampling (*Rodgers, Murrins*) and *SOIRA* reporting requirements (*Cross, P.S.C.*) were to assist law enforcement in the detection of crime. Because both impugned measures were not punitive in their effects, they aligned with the non-punitive legislative purpose. In other words, these measures

were not merely "dressed up" as investigatory aids. [*P.S.C.* at para 118, aff'd *R. v. S.S.C.*, 2008 BCCA 262, 234 CCC (3d) 365 at para 62, ABOA, Vol.II, Tab 47]

86. The impugned DNA and *SOIRA* measures were neither meant as "punishment", nor where they suffered as "punishment". But this is not the case with the abolition of APR under the *AEPA*. [*Cross* at para 45; *P.S.C.* at paras 118, 119]

Parole ineligibility periods are punitive in their purpose because they serve the interests of denunciation and deterrence

87. The Appellant's focus on the legislative purpose of the APR abolition and the conditional release regime in the *CCRA* does not advance the Appellant's case. This is because the Appellant rests its position on the flawed and incorrect assumption that parole ineligibility under the *CCRA* is not punitive in its purpose.

88. The Respondents instead submit that parole ineligibility for determinate sentences in general, and the abolition of APR in the *AEPA* in particular, are imposed by Parliament for the very purpose of furthering traditionally recognized sentencing goals. These principles of sentencing are, predominately, denunciation and deterrence. These are hallmarks of "punishment". [*Rodgers* at para 61]

89. A finding as to a punitive purpose of the *AEPA* is, again, not the end of the analysis. It is a factor to be considered together with its punitive effects on the offender. This supports the conclusion that the extension of parole ineligibility occasioned by the retrospective enactment of the *AEPA* is "punishment" for the purposes of section 11 of the *Charter*. As such, it cannot be retrospectively altered after the sentence is imposed.

90. There is no dispute on this appeal that parole ineligibility for life sentences serves the principles of denunciation and deterrence and, for that reason, has been determined to amount to "punishment". For example, in *R. v. Shropshire* this Court determined that the period of parole ineligibility imposed by a sentencing judge for second-degree murder was "punishment" as it met the sentencing goals

of denunciation and deterrence. [*R. v. Shropshire,* [1995] 4 SCR 227 at para 21, RBOA, Vol.I, Tab 13]

91. Because it is so well established that parole ineligibility periods for life sentences are "punishment", this Court and other provincial appellate courts have consistently held that they cannot be retrospectively altered under both section 11 and 7 of the *Charter*. [*R. v. Gamble*, [1988] 2 SCR 595, at 646-648, ABOA, Vol.II, Tab 36] (section 7 of the *Charter*), ABOA, Vol.II, Tab 36; *R. v. Logan,* (1986), 14 OAC 382, 51 CR 226 (CA) (section 11(i) of the *Charter*), RBOA. Vol.I, Tab 7; *R. v. Olah,* (1997) 33 OR (3d), 115 CCC (3d) 389 (CA) (section 11(i) of the *Charter*), RBOA, Vol.I, Tab 10].

92. There is also no dispute on this appeal that delayed parole orders imposed by a sentencing judge under section 743.6 of the *Criminal Code* are "punishment", and thus cannot be retrospectively imposed under section 11 of the *Charter*. [see, *R. v. Lambert,* (1994) 93 CCC (3d) 88, 1994 CanLII 453 (Nfld CA), RBOA, Vol.1, Tab 6]

93. Parole ineligibility periods for determinate sentences imposed by Parliament under the *CCRA* – like the APR provisions at issue in this appeal – are no different. The very purpose and objective behind parole ineligibility for determinate sentences is also to serve the interests of both denunciation and deterrence. This has been consistently recognized by all three branches of government over the past thirty years.

(a) By Parliament

94. In paragraphs 743.6(1) and (1.1) of the *Criminal Code,* Parliament provided trial judges with the discretion ("may") to order that the portion of the sentence to be served before the offender may be released on full parole is one half of the sentence, or ten years, whichever is less. In the *Anti-terrorism Act,* SC 2001, c 41, section 21 added paragraph (1.2), where Parliament required judges ("shall") to similarly delay parole:

> ...unless the Court is satisfied, having regard to the circumstances of the commission of the offence and the character and circumstances of the offender, that the expression of society's denunciation of the offences and the objectives of specific and general deterrence would be adequately served by a period of parole ineligibility determined in accordance with the *Corrections and Conditional Release Act.*

95. This is a recent statement by Parliament that the periods of parole ineligibility in the *CCRA* are imposed in furtherance of the purpose and principles of sentencing. While the Appellant relied on section 743.6 as an example of parole ineligibility as being punishment, the Appellant failed to see Parliament's express statement of purpose for parole ineligibility in the *CCRA.* [*Rodgers* at para 62]

(b) By the Judiciary

96. In *R. v. M. (C.A.),* this Court also found that by fixing initial periods of parole ineligibility under the *CCRA,* Parliament intended to "advance the causes of general deterrence and denunciation":

> While Parliament was undoubtedly animated by the full range of sentencing principles in setting such threshold periods, it appears to have been principally motivated by the sentencing goals of deterrence and denunciation. By establishing a fixed formula for a minimum period of parole ineligibility under s. 120(1) of the *Corrections Act* (i.e., the lesser of 1/3 of the sentence or seven years), Parliament seems to have concluded that a minimum period of physical confinement was necessary to advance the causes of general deterrence and denunciation even if the offender was completely rehabilitated and posed absolutely no threat to society at the time of sentence. [Emphasis Added]
>
> *R. v. M. (C.A.),* [1996] 1 SCR 500 at para 64, ABOA, Vol.11, Tab 40

97. The denunciatory and deterrent purpose behind initial periods of parole ineligibility in the *CCRA* is further reinforced by the rationale behind the abolition of APR under the *AEPA* itself.

(c) By the Executive

98. In his testimony before the Senate Committee of Legal and Constitutional Affairs, the Minister of Public Safety explained the purpose behind the abolition of the earlier period of parole ineligibility within the APR regime. The Minister explained that parole ineligibility was required to make "stiffer sentences" and to ensure that an offender stayed in jail for a necessary period of time regardless of their personal circumstances. His words echo those of Chief Justice Lamer in *M.(C.A.)*:

> We have heard from Canadians across the country that the sentences given to so-called white-collar criminals need to be stiffer and that serious crime should get serious jail time. That is what Bill C-59 is all about. The legislation our government is proposing will put an end to any kind of special treatment for white-collar offenders who commit fraud or other so-called nonviolent crimes. What we are saying is that these crimes are just as serious and just as devastating to victims as violent crimes....
>
> ....
>
> I want to repeat, Madam Chair, that our government believes that being granted parole is a privilege that should be earned, rather than a right granted to any offender, regardless of the nature of the offence or whether he or she is rehabilitated.
>
> Testimony, A.R., Vol.IV, pp.28-29, 30

99. Over thirty years ago, the Executive Branch of the Federal Government reached the same conclusion when it also determined that periods of parole ineligibility under the previous *Parole Regulations* (now the *CCRA*) served the purposes of denunciation and deterrence and, going even further, were both meant and suffered as punishment.

100. The Solicitor General of Canada's own 1981 *Solicitor General's Study on Conditional Release* ("*Study*"), approved by The Honourable Bob Kaplan, Solicitor General of Canada, described the *Study* as "the most comprehensive study of the subject ever carried out in this country." Despite the importance of that *Study* to the Federal Executive, the Appellant failed to include any reference

to that *Study* in his own review of the Executive or Legislative-produced secondary sources. [*Solicitor General's Study on Conditional Release* (1981), Solicitor General of Canada, RBOA, Vol.II, Tab 39]

101. Under the section headed "Punishment", the authors of the *Study* said at pp.14-16:

> Though other considerations may be of more importance in making parole decisions, there is no question that concern for denunciation can affect parole. Most obviously, the legal requirement that one-third of the sentence be served prior to the full parole eligibility and one-sixth prior to day parole[13] and most temporary absences is a largely denunciatory provision. The statutory eligibility date serves as a kind of barometer of the minimum punishment required from the sentence. ...
>
> Some NPB personnel question whether day paroles, which legally can be granted after one-sixth, should occur before the full-parole eligibility date, for denunciatory reasons. Parole authorities in general may support the continuation of mandatory periods to be served prior to parole eligibility, to give them (among other things) a punishment standard to work against. ...
>
> Despite the difficulty of defining appropriate levels of punishment, there is little question that punishment is a key purpose of imprisonment, and that regulation pertaining to release reflect concern for maintaining a minimum level of punishment prior to release eligibility. ...
>
> Release both reflects punishment within statutory constraints, and mitigates punishment by early release of inmates not considered an undue risk. [emphasis added]
>
> ....
>
> Release reflects deterrent philosophies in the same sense as it reflects punishment, in setting the minimum time which must be served prior to release eligibility and in determining the actual time served. [emphasis added]

102. This inter-relatedness between the purposes of sentencing and the parole scheme was also found in the Fauteux Report (1956), the Ouimet Report (1969) and the Goldberg Report (1974). [*Parole in Canada: Report of the Standing*

[13] SRO/78-428, ss 5,9, as amended by 79-88

Senate Committee on Legal and Constitutional Affairs (1974) at pp.35, 37 ("Goldberg Report")]

103. This was, in part, why the trial judge in this case rejected the bright line distinction between the *Criminal Code* and the *CCRA* for the purposes of section 11 of the *Charter*. She held that both the *CCRA* and the *Code* were part of "a single scheme reflecting Parliament's conclusions about the necessary minimum periods of physical confinement" and that this reinforced her conclusion that the abolition of APR was "punishment". [BCSC Reasons, A.R., Vol.1, p.84]

104. Parliament's most recent amendments to the *CCRA* under the *Safe Streets and Communities Act* [14] further demonstrate the existence of this single or interconnected scheme. These new amendments allowed the Parole Board of Canada to take into account new factors in deciding whether to release an offender. These new factors, for example, include "the nature and seriousness of the offence", which are typically sentencing goals reserved for sentencing judges under section 718.1 of the *Criminal Code*:

> **101.** The principles that guide the Board and the provincial parole boards in achieving the purpose of conditional release are as follows:
>
> (*a*) parole boards take into consideration all relevant available information, including the stated reasons and recommendations of the sentencing judge, the nature and gravity of the offence, the degree of responsibility of the offender, information from the trial or sentencing process and information obtained from victims, offenders and other components of the criminal justice system, including assessments provided by correctional authorities.[15]

105. In short, the purpose behind parole ineligibility for determinate sentences is to further the interests of punishment under the principles of denunciation and deterrence. By altering the parole ineligibility for affected offenders under the *AEPA*, Parliament specifically intended to advance those same purposes.

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[14] *Safe Streets Act*, SC 2012 c 1, s 71.

106. This, it is submitted, fatally undermines the Appellant's assertion that: (1) the purpose of the *CCRA* and the *AEPA* is strictly non-punitive, and, for that reason, can never amount to "punishment"; and (2) there is a bright line distinction between parole ineligibility provisions of the *Criminal Code* and the *CCRA*.

107. The punitive purpose behind the *AEPA* is one factor to be considered in light of its effects on the offender, which is the subject of the next section.

Delayed parole occasioned by the AEPA is also "punishment" based on its effects

108. The B.C. Court of Appeal held that the purpose was not determinative to the question of whether the *AEPA* amounted to "punishment" and therefore infringed section 11(h). It correctly held the ultimate answer to this question was in considering the effects on the Respondents. [BCCA Reasons, A.R., Vol.I, p.117, at paras.56-57]

109. The Court of Appeal found that the trial judge was correct in concluding that the retrospective repeal of APR increased the harshness of the sentences of the Respondents because it required them to serve more time in jail, and without the discretionary intervention by the Parole Board.

110. An unbroken line of jurisprudence has universally concluded that parole ineligibility imposed under the *Criminal Code* (whether delayed parole or in fixing parole ineligibility) is "punishment" because of its effects in keeping the offender behind bars without the right to apply for parole. For example, as this Court held in *R. v. Shropshire*:

> Parole eligibility informs the content of the "punishment" meted out to an offender: for example, <u>there is a very significant difference between being behind bars and functioning within society while on conditional release</u>. [Emphasis Added]
>
> *Shorpshire* at para 25

111. This statement is consistent with this Court's previous decision in *Gamble* where Wilson J. found that it was important to look at the deprivation of liberty occasioned by parole ineligibility from a "qualitative perspective". [*Gamble* at 644]

112. From such a perspective, the Respondents face parole ineligibility and longer periods of time in jail in the exact same way as offenders in custody as a result of the parole ineligibility under the provisions of the *Criminal Code*. This is the main distinguishing feature between the "trivial" deprivations of liberty experienced by the offenders in the context of the *SOIRA* and DNA sampling cases, which were not punitive in their effects.

113. For the purposes of section 11 of the *Charter,* it is submitted that there is a world of difference between spending longer in jail without being eligible for parole, as in this case, and having a photograph, fingerprint or a DNA sample taken. [*Rodgers* at para.65]

114. Overall, it is submitted that the punitive effects behind the extension of parole ineligibility in the *AEPA* aligns with its legislative purpose, that is, to impose a "stiffer sentence" in the interests of denunciation and deterrence.

115. The Court of Appeal was correct in finding that the delayed parole occasioned by the *AEPA* clearly fit within the definition of "punishment", as articulated by this Court in *Rodgers.* The abolition of APR cannot be imposed retrospectively. The transitional provision in the *AEPA* therefore infringes section 11(h) of the *Charter.*

ISSUE #2 - The retrospective abolition of APR under the *AEPA* infringes section 7 of the *Charter of Rights and Freedoms* as "punishment"

116. The Respondents also submit that the retrospective extension of parole ineligibility occasioned by the *AEPA* also infringes section 7 because: (1) the extension of parole ineligibility is a deprivation of liberty captured by section 7; and (2) the retrospective extension of that ineligibility infringes a principle of

fundamental justice, namely the right to be tried and punished in accordance with the law in force at the time an offence was committed.

Deprivation of liberty through the extension of parole ineligibility

117. By being denied an opportunity to be considered for accelerated parole and remaining in jail as a result of the abolition of APR, the Respondents have suffered a continued deprivation of liberty. This Court has consistently held that parole ineligibility amounts to a deprivation of liberty under section 7 of the *Charter*. [*Gamble* at 644; *Dumas v. Leclerc Institution,* [1986] 2 SCR 459 at 464, RBOA, Vol.I, Tab 2]

118. In *Cunningham v. Canada,* this Court went further and held that post-sentence amendments to the release criteria of the *CCRA* constituted a deprivation of liberty under section 7 of the *Charter.* [*Cunningham v. Canada,* [1992] 2 SCR 143, ABOA, Vol.I, Tab 11]

119. The Appellant says that the Respondents have not even experienced a deprivation of liberty. It attempts to distinguish this case from the situation in *Cunningham*. This submission is ill-conceived. What happened in this case is far worse than in *Cunningham* and yet this Court still found that there was a deprivation of liberty under section 7 of the *Charter*.

120. In *Cunningham,* the offender was serving a fixed sentence for manslaughter and was entitled to be released on "mandatory supervision" at two-thirds of his sentence under the *Parole Act*. Four years after the sentence was imposed, the *Parole Act* was amended, allowing correctional officials to apply to have an offender detained within the mandatory supervision period by referring their case to the National Parole Board. After a hearing, if the National Parole Board was satisfied that the offender was likely to commit an offence of death or serious injury before the expiration of the sentence, they would be detained and subject to an annual review. This occurred to Mr. Cunningham and he alleged a breach of section 7 of the *Charter*. [*Cunningham* at 153]

121. Even though the offender's parole ineligibility date was not affected in *Cunningham,* this Court still found that the changes to the release criteria amounted to a deprivation of liberty under section 7. Unlike in *Cunningham,* in this case, there has been a wholesale abolition of the APR scheme by the *AEPA*. It has resulted in the automatic extension of parole ineligibility. If there is a spectrum of liberty interests, as the Appellant asserts, if anything, this case falls on the more serious side of the spectrum because parole ineligibility has been extended as in *Gamble.*

The deprivation of liberty is not in accordance with the principles of fundamental justice

122. The deprivation of liberty experienced by each of the Respondents is not in accordance with the principles of fundamental justice. It is a principle of fundamental justice that "an accused must be tried and punished under the law in force at the time the offence was committed". This principle of fundamental justice was breached in this case because the Respondents would have been eligible for APR at the time they committed their offences and even at the time of sentencing. [*Gamble* at 647]

123. In *R. v. Gamble,* this Court considered whether section 7 was infringed in the case of an offender who was convicted of one count of first degree murder. Under the law in force at the time Ms. Gamble committed the murder, she would have been eligible for parole for not more than 20 years but not less than 10. However, four months after she committed the murder and before her conviction, the parole ineligibility rules were increased to 25 years for all offenders sentenced to first-degree murder. Following her conviction, Ms. Gamble received 25 years of parole ineligibility and she alleged this period of parole ineligibility infringed her section 7 right under the *Charter.*

124. Writing for the majority, Wilson J. had no difficulty in concluding that it was a principle of fundamental justice that "an accused must be tried and punished under the law in force at the time of the offence" because under the old law Ms.

Gamble would have been eligible for parole from 10-20 years, whereas under the current law she was ineligible until 25 years. Wilson J. found that this principle was embedded in the rule of law as recognized in the Preamble of the *Charter*. [*Gamble* at 647]

125. "Punished" in this context meant the period of parole ineligibility in force at the time an offender committed the offence. This principle of fundamental justice under section 7 of the *Charter* is broader than the more specific illustrations of that same legal right in sections 11(i) and 11(h) of the *Charter*. The meaning of "punishment" in both section 7 and 11 contexts, however, remains the same. [*Re BC Motor Vehicle Act,* [1985] 2 SCR 486, RBOA, Vol.I, Tab 15; *R. v. Malmo-Levine,* 2003 SCC 74 [2003] 3 SCR 571 at para 260, RBOA, Vol.I, Tab 8]

126. Because the abolition of APR under the *AEPA* constitutes "punishment", as noted above, it cannot be retrospectively applied under section 7 because "an accused must be tried and punished under the law in force at the time of the offence". [*Gamble* at 647]

127. In *Cunningham,* the Supreme Court of Canada determined that while certain changes to the conditional release criteria for some offenders amounted to a deprivation of liberty under section 7 of the *Charter*, those changes were found to be in accordance with the principles of fundamental justice because the scheme as a whole struck "the right balance". [*Cunningham* at 153]

128. In contrast to *Cunningham,* in this case there has been a wholesale abolition of the APR scheme enacted retrospectively by the *AEPA*. The abolition of this scheme automatically results in longer periods of time behind bars, and even then, deprives affected offenders more favourable criteria in obtaining release.

129. In any event, the principle of fundamental justice applied in *Cunningham* – striking the right balance – has been questioned and superseded by subsequent jurisprudence from this Court. In *Malmo-Levine,* this Court rejected

the notion that "achieving the right balance is itself an overarching principle of fundamental justice". The balancing of societal interests and its effects on the offender as a result of the retrospective abolition of APR are thus properly reserved for the section 1 justification stage. [*R. v. Malmo-Levine* at para 95; *Charkaoui v. Canada,* 2007 SCC 9, [2007] 1 SCR 350 at para 21]

The right not to be subject to retrospective punishment is a core value of the legal system

130. It is a venerated principle of the rule of law that punitive legislation cannot have retrospective effect on an offender. Such a retrospective effect does not lend itself to the predictability of the law due to the presumed reliance placed on that law by citizens. [*Re ss* 193 *and* 195.1(1)(c) *of the Criminal Code (Man.),* [1990] 1 SCR 123, ABOA, Vol.II, Tab 59]

131. Legislation should not change the punishment available for a certain crime without providing advance notice so that individuals can conduct themselves accordingly. Wilson J.'s brief reasons on this subject in *Gamble* show that this is a principle which is founded on an intuitive and instinctual sense of justice.

132. One Parliamentarian leading up to the enactment of the *AEPA* captured this important principle when he stated that once "fraudsters and schemers" knew that APR was no longer available they would "think twice" before committing such crimes.

133. Constitutional guarantees against retrospective punishment in a democracy ensure that Parliament does not enact "arbitrary" or "vindictive" legislation which would adversely affect minority interests for political gain. Such a concern is particularly germane in situations where, as here, retrospective legislation affects already sentenced offenders. [see, Bryan R. Deitrich, "Risking Retroactive Punishment: Modifications of the Supervised Release Statute and the Ex Post Facto Prohibition", (1999) 99 *Columbia Law Review* 11551 at 1577-1580, RBOA, Vol. II, Tab 35]

134. Retrospective laws, in particular penal laws, have for centuries been viewed by scholars and judges as unfair and unjust. This is a concern articulated by a wide array of legal scholars and philosophers ranging from Jeremy Bentham to Glanville Williams.[16] [see, Elizabeth Edinger, "Retrospectivity in Law" (1995), 29 UBCLR 5 at 12, RBOA, Vol.II, Tab 36; *R. v. Serdyuk,* 2012 ABCA 205, 2012 CarswellAlta 1111, RBOA, Vol.I, Tab 14]

135. The Alberta Court of Appeal recently reviewed these foundational principles and emphasized that these historical pronouncements against retrospective penal laws were not merely "musty musings from the 18th century". They were instead relevant principles to be applied and reaffirmed in the modern Canadian context of criminal and sentencing law. [*Serdyuk* at para 4, (Watson JA dissenting, but not on this issue, writing in the context of sections 719(3) and (3.1) of the *Criminal Code*]

136. The retrospective abolition of APR enacted through the *AEPA* has deprived the Respondents of an opportunity to be released into the community and has extended their respective periods of parole ineligibility. This retrospective application is not in accordance with the principles of fundamental justice which includes the fundamental right not to be subject to a "punishment" that was not in force when the offence was committed.

137. The Respondents therefore submit that the retrospective application of the *AEPA* has also infringed section 7 of the *Charter*.

ISSUE #3 - The Appellant has not met its onus in establishing that the infringements are demonstrably justified under section 1 of the *Charter*

138. The Appellant is required to demonstrate that the retrospective application of the *AEPA* is itself sufficiently important to justify an infringement to the Respondents' rights not to be punished again under sections 11(h) and 7 of the

[16] *The Works of Jeremy Bentham*, (Edinburgh, William Tait, 1843), vol IV at p. 315; Glanville Williams *Criminal Law: The General Part*, 2nd ed, (London: Stevens & Sons Ltd. 1961) at p. 575 cited in *R. v. Serdyuk*.

Charter. It is submitted that the Appellant's attempt to justify the *Charter* infringements should ultimately fail on the minimum impairment branch of the *Oakes* test. [see, *RJR-MacDonald v. Canada, (A.G.)*, [1995] 3 SCR 199 at 335, ABOA, Vol.III, Tab 60]

139. There is no evidence that the repeal of the APR in general could not have been achieved without an unconstitutional retrospective transitional provision. A previous attempt to abolish the APR regime in 2010 was not retrospective in its application. [Bill C-53, *Protecting Canadians by Ending Early Release for Criminals Act,* LS-699E, January 29, 2010, BCSC Reasons, A.R. Vol.I, p.37]

140. The B.C. Court of Appeal correctly held the Appellant has not established that the retrospective transitional provision impairs the Respondents' right not to be punished again as little as possible. While recognizing that the uniformity in sentence management under the *AEPA* was "pressing and substantial", the B.C. Court of Appeal held that this did not justify retrospective application, in part, because corrections officials have always administered different parole eligibility dates for different offenders. [BCCA Reasons, A.R., Vol.I, p.119, at para.65]

141. In fact, corrections officials administer different parole eligibility dates for a number of offenders in order to comply with constitutional standards against retrospective punishment. For example, following this Court's decision in *R. v. Johnson,* all dangerous offenders committing their offences before August 1, 1997 but sentenced after this date, are entitled to a lower and different period of parole ineligibility (three years as opposed to seven years). Both in this context for other life sentences, corrections authorities are required to administer a number of different eligibility dates based on when people committed their offences.

142. The present case represents an application of section 11 of the *Charter* that is more limited in its scope. It only concerns a small group of offenders who are

serving determinate sentences. And even then the declaration of unconstitutionality only affects those offenders subject to a certain portion of the transitional provision (those sentenced before March 28, 2011). There is no constitutional reason to uphold the constitutional violation for these offenders – a finite group that will no longer be detained in the relatively short passage of time. [See, Affidavit of Lisa Manson-Shillington, A.S.R., p.7, para.4]

143. The right not to be subjected to further "punishment" after the sentence is imposed lies at the heart of the Rule of Law and the attendant *Charter* protections against altering expectations of punishment enshrined in both section 11(h) and 7 of the *Charter*. Any infringements to these constitutional guarantees are themselves inconsistent with, and not justifiable, in a free and democratic society. [*BC Motor Vehicle Act,* Wilson J concurring, at 531, RBOA, Vol.I, Tab 16; *R. v. D.B.*, 2008 SCC 25, [2008] 2 SCR 3 at para 89, RBOA, Vol.I, Tab 2]

144. While section 7 infringements are "seldom salvageable" under section 1, infringements to section 11 of the *Charter* are generally only justified where it would be virtually "impossible" for the specific objective to be achieved without the unconstitutional provision. This is not the case here. While Parliament is perfectly entitled to abolish the APR regime prospectively, it cannot do so retrospectively without violating the *Charter.* [see, *R. v. Chaulk,* [1990] 3 SCR 1303 at 1342, RBOA, Vol.I, Tab 4; *D.B.* at para 93]

145. In these circumstances, it is submitted that the infringement to both section 11(h) and 7 cannot be saved under section 1 of the *Charter.*

ISSUE #4 - There was no error in the declaration granted in the courts below

Issue never raised in the courts below

146. The Appellant says that the B.C. Court of Appeal erred in failing to grant a limited declaration of constitutional invalidity which would only invalidate the transitional provision to the extent that it retrospectively altered the offender's parole eligibility dates. The short answer is that the B.C. Court of Appeal was never asked to make such a remedy. The Appellant never requested this "limited" constitutional remedy at trial nor on appeal. It is instead being raised for the first time in this Court. It is incorrect and unfair to characterize this as an error. [see, *R. v. Potvin,* [1993] 2 SCR 880 at 916, RBOA, Vol.I, Tab12]

Criteria and parole ineligibility are intertwined under the APR scheme

147. In any event, the limited declaration now requested should be rejected, as its effect would be to tear apart a comprehensive statutory scheme Parliament devised to grant parole opportunities to non-violent offenders in federal custody under the APR regime. This regime includes the earlier day parole eligibility date of one-sixth for offenders serving sentences in excess of 36 months in addition to the eligibility criteria itself to be applied within the APR review process under section 126.2 of the *CCRA*.

148. These two features of the APR regime are "inextricably bound up". They should not, and cannot, be readily severed from each other under a limited constitutional declaration. The Appellant does not suggest that the declaration should be suspended in order to allow Parliament to redraft the legislative provisions that have been struck out. This, in and of itself, is fatal to the Appellant's request for a limited declaration. [*Schachter v. Canada,* [1992] 2 SCR 679 at 697, ABOA, Vol.11, Tab 63]

Release criteria is itself "punishment" and is part of the APR scheme as a whole

149. More significantly, the "limited" declaration would allow only certain APR offenders to retain their one-sixth eligibility date, but would deprive all APR offenders of the more favourable criteria for release applied on a non-discretionary basis.

150. It is the APR scheme as a whole that significantly moderates the sanction of imprisonment by eliminating the opportunity to be considered under that scheme. This is what further "punishes" the offender. The elimination of the criteria in section 126(2) of the *CCRA* and its non-discretionary application are themselves "punishment" under the *Charter* in that they adversely impact the offender's opportunity for release after serving the threshold period of parole ineligibility. [see, *M. (C.A.)* at para 64]

151. In fact, the repeal of the APR criteria and the lack of discretion where the offender met the criteria were themselves intended to make "stiffer" the sentence because of the seriousness of the offending. As the Minister of Public Safety stated:

> I want to repeat, Madam Chair, that our government believes that being granted parole is a privilege that should be earned, rather than a right granted to any offender, regardless of the nature of the offence or whether he or she is rehabilitated.
>
> Testimony, A.R., Vol.IV, p. 30

152. This case is unlike *Cunningham* where this Court considered whether the retrospective changes to the detention regime at two-thirds of the sentence in the *Parole Act* infringed section 7 of the *Charter*. In reviewing that scheme as a whole, this Court in *Cunningham* determined that the post-sentence changes affecting the potential release of violent offenders at the end of their sentence due to an ongoing risk of serious violence exhibited during the currency of the prison term "struck the right balance" and so did not infringe section 7 of the *Charter*. This aspect of *Cunningham* has been questioned and superseded by

later jurisprudence from this Court (*Malmo-Levine,* at para 95), but in any event, the changes involved in that case were qualitatively different than the retrospective changes to the APR regime. [*Cunningham* at 153]

153. While the criteria, the non-discretionary test, and the parole ineligibility under the APR regime all amount to "punishment" in their own right, the APR scheme must be considered as a whole. When this is done, the Respondents submit that the abolition of the regime – with all of its substantive constituent elements – collectively amount to "punishment". As a result, the APR regime as a whole cannot be retrospectively abolished nor can parts of the regime be "hived off" under a limited constitutional declaration.

154. The trial judge's decision to sever portions of the transitional provision demonstrates that the remedy granted was limited and carefully tailored to only address the particular *Charter* violation that occurred in this case. There was no error in granting this remedy.

PART IV - SUBMISSIONS ON COSTS

155. The Respondents do not seek any order as to costs and suggest that costs not be awarded against the Respondents in this public interest, constitutional case.

PART V - ORDER SOUGHT

156. The Respondents request that this appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Eric Purtzki
Counsel for the Respondents

September 26th, 2013
Vancouver, BC

PART VI - LIST OF AUTHORITIES

Paragraph(s)

PART VII - STATUTES DIRECTLY AT ISSUE

Abolition of Early Parole Act, SC 2011, c 11, s 10.

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982*, (UK) 1982, c 11, ss 1, 17, 11, 52.

Corrections and Conditional Release Act, SC 1992, c 20, ss 119.1, 125, 126, 126.1.

CHAPTER 11

ABOLITION OF EARLY PAROLE ACT

SUMMARY

This enactment amends the *Corrections and Conditional Release Act* to eliminate accelerated parole review and makes consequential amendments to other Acts.

CHAPITRE 11

LOI SUR L'ABOLITION DE LA LIBÉRATION ANTICIPÉE DES CRIMINELS

SOMMAIRE

Le texte modifie la *Loi sur le système correctionnel et la mise en liberté sous condition* pour supprimer la procédure d'examen expéditif et apporte des modifications corrélatives à d'autres lois.

Cancellation of parole

(3) If an offender has been granted parole under section 122 or 123, the Board may, after a review of the case based on information that could not reasonably have been provided to it at the time parole was granted, cancel the parole if the offender has not been released or terminate the parole if the offender has been released.

1995, c. 42, ss. 39 and 40; 1997, c. 17, ss. 24(1)(E) and (2) and 25; 1999, c. 5, ss. 50 and 53; 2001, c. 41, s. 90

5. The heading before section 125 and sections 125 to 126.1 of the Act are repealed.

1995, c. 42, s. 55(1)(E)

6. Paragraph 140(1)(*b*) of the Act is replaced by the following:

(*b*) the first review for full parole pursuant to subsection 123(1) and subsequent reviews pursuant to subsection 123(5);

7. Subsection 225(2) of the Act is repealed.

8. Schedule I to the Act is amended by replacing the references after the heading "SCHEDULE I" with the following:

(Subsections 107(1), 129(1) and (2), 130(3) and (4), 133(4.1) and 156(3))

9. Schedule II to the Act is amended by replacing the references after the heading "SCHEDULE II" with the following:

(Subsections 107(1), 129(1), (2) and (9), 130(3) and (4) and 156(3))

TRANSITIONAL PROVISIONS

Application

10. (1) Subject to subsection (2), the accelerated parole review process set out in sections 125 to 126.1 of the *Corrections and Conditional Release Act*, as those sections read on the day before the day on which section 5 comes into force, does not apply, as of that day, to offenders who were sentenced, committed or transferred to penitentiary, whether the sentencing, committal or transfer occurs before, on or after the day of that coming into force.

Cancellation of parole

(3) If an offender has been granted parole under section 122 or 123, the Board may, after a review of the case based on information that could not reasonably have been provided to it at the time parole was granted, cancel the parole if the offender has not been released or terminate the parole if the offender has been released.

1995, ch. 42, art. 39 et 40; 1997, ch. 17, par. 24(1)(A) et (2) et art. 25; 1999, ch. 5, art. 50 et 53; 2001, ch. 41, art. 90

5. L'intertitre précédant l'article 125 et les articles 125 à 126.1 de la même loi sont abrogés.

1995, ch. 42, par. 55(1)(A)

6. L'alinéa 140(1)*b*) de la même loi est remplacé par ce qui suit :

b) l'examen prévu au paragraphe 123(1) et chaque réexamen prévu en vertu du paragraphe 123(5);

7. Le paragraphe 225(2) de la même loi est abrogé.

8. Les renvois qui suivent le titre « ANNEXE I », à l'annexe I de la même loi, sont remplacés par ce qui suit :

(paragraphes 107(1), 129(1) et (2), 130(3) et (4), 133(4.1) et (4.3) et 156(3))

9. Les renvois qui suivent le titre « ANNEXE II », à l'annexe II de la même loi, sont remplacés par ce qui suit :

(paragraphes 107(1), 129(1), (2) et (9), 130(3) et (4) et 156(3))

DISPOSITIONS TRANSITOIRES

Application

10. (1) Sous réserve du paragraphe (2), la procédure d'examen expéditif prévue par les articles 125 à 126.1 de la *Loi sur le système correctionnel et la mise en liberté sous condition*, dans leur version antérieure à la date d'entrée en vigueur de l'article 5, cesse de s'appliquer, à compter de cette date, à l'égard de tous les délinquants condamnés ou transférés au pénitencier, que la condamnation ou le transfert ait eu lieu à cette date ou avant ou après celle-ci.

Restriction

(2) For greater certainty, the repeal of sections 125 to 126.1 of the *Corrections and Conditional Release Act* does not affect the validity of a direction made under those sections before the day on which section 5 comes into force.

Réserve

(2) Il demeure entendu que l'abrogation des articles 125 à 126.1 de la *Loi sur le système correctionnel et la mise en liberté sous condition* n'a aucun effet sur la validité des ordonnances rendues sous le régime de ces articles avant la date d'entrée en vigueur de l'article 5.

CONSEQUENTIAL AMENDMENTS

MODIFICATIONS CORRÉLATIVES

1995, c. 42

AN ACT TO AMEND THE CORRECTIONS AND CONDITIONAL RELEASE ACT, THE CRIMINAL CODE, THE CRIMINAL RECORDS ACT, THE PRISONS AND REFORMATORIES ACT AND THE TRANSFER OF OFFENDERS ACT

1995, ch. 42

LOI MODIFIANT LA LOI SUR LE SYSTÈME CORRECTIONNEL ET LA MISE EN LIBERTÉ SOUS CONDITION, LE CODE CRIMINEL, LA LOI SUR LE CASIER JUDICIAIRE, LA LOI SUR LES PRISONS ET LES MAISONS DE CORRECTION ET LA LOI SUR LE TRANSFÈREMENT DES DÉLINQUANTS

11. Section 89 of *An Act to amend the Corrections and Conditional Release Act, the Criminal Code, the Criminal Records Act, the Prisons and Reformatories Act and the Transfer of Offenders Act* is repealed.

11. L'article 89 de la *Loi modifiant la Loi sur le système correctionnel et la mise en liberté sous condition, le Code criminel, la Loi sur le casier judiciaire, la Loi sur les prisons et les maisons de correction et la Loi sur le transfèrement des délinquants* est abrogé.

1997, c. 17

AN ACT TO AMEND THE CRIMINAL CODE (HIGH RISK OFFENDERS), THE CORRECTIONS AND CONDITIONAL RELEASE ACT, THE CRIMINAL RECORDS ACT, THE PRISONS AND REFORMATORIES ACT AND THE DEPARTMENT OF THE SOLICITOR GENERAL ACT

1997, ch. 17

LOI MODIFIANT LE CODE CRIMINEL (DÉLINQUANTS PRÉSENTANT UN RISQUE ÉLEVÉ DE RÉCIDIVE), LA LOI SUR LE SYSTÈME CORRECTIONNEL ET LA MISE EN LIBERTÉ SOUS CONDITION, LA LOI SUR LE CASIER JUDICIAIRE, LA LOI SUR LES PRISONS ET LES MAISONS DE CORRECTION ET LA LOI SUR LE MINISTÈRE DU SOLLICITEUR GÉNÉRAL

12. Subsection 21(2) of *An Act to amend the Criminal Code (high risk offenders), the Corrections and Conditional Release Act, the Criminal Records Act, the Prisons and Reformatories Act and the Department of the Solicitor General Act* is repealed.

12. Le paragraphe 21(2) de la *Loi modifiant le Code criminel (délinquants présentant un risque élevé de récidive), la Loi sur le système correctionnel et la mise en liberté sous condition, la Loi sur le casier judiciaire, la Loi sur les prisons et les maisons de correction et la Loi sur le ministère du Solliciteur général* est abrogé.

2001, c. 41

ANTI-TERRORISM ACT

2001, ch. 41

LOI ANTITERRORISTE

13. (1) Paragraph 94(1)(*a*) of the *Anti-terrorism Act* is repealed.

(2) Subsection 94(2) of the Act is repealed.

13. (1) L'alinéa 94(1)*a*) de la *Loi antiterroriste* est abrogé.

(2) Le paragraphe 94(2) de la même loi est abrogé.

CONSTITUTION ACT, 1982 [80]

PART I

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

GUARANTEE OF RIGHTS AND FREEDOMS

Rights and freedoms in Canada

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

FUNDAMENTAL FREEDOMS

Fundamental freedoms

2. Everyone has the following fundamental freedoms:

(*a*) freedom of conscience and religion;

(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(*c*) freedom of peaceful assembly; and

(*d*) freedom of association.

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[80] **Enacted as Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.), which came into force on April 17, 1982. The *Canada Act 1982*, other than Schedules A and B thereto, reads as follows:**

An Act to give effect to a request by the Senate and House of Commons of Canada

Whereas Canada has requested and consented to the enactment of an Act of the Parliament of the United Kingdom to give effect to the provisions hereinafter set forth and the Senate and the House of Commons of Canada in Parliament assembled have submitted an address to Her Majesty requesting that Her Majesty may graciously be pleased to cause a Bill to be laid before the Parliament of the United Kingdom for that purpose.

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. The *Constitution Act, 1982* set out in Schedule B to this Act is hereby enacted for and shall have the force of law in Canada and shall come into force as provided in that Act.

2. No Act of the Parliament of the United Kingdom passed after the *Constitution Act, 1982* comes into force shall extend to Canada as part of its law.

3. So far as it is not contained in Schedule B, the French version of this Act is set out in Schedule A to this Act and has the same authority in Canada as the English version thereof.

4. This Act may be cited as the *Canada Act 1982*.

Limitation

(3) The rights specified in subsection (2) are subject to

(*a*) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and

(*b*) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

Affirmative action programs

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

LEGAL RIGHTS

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Search or seizure

8. Everyone has the right to be secure against unreasonable search or seizure.

Detention or imprisonment

9. Everyone has the right not to be arbitrarily detained or imprisoned.

Arrest or detention

10. Everyone has the right on arrest or detention

(*a*) to be informed promptly of the reasons therefor;

(*b*) to retain and instruct counsel without delay and to be informed of that right; and

(*c*) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

Proceedings in criminal and penal matters

11. Any person charged with an offence has the right

(*a*) to be informed without unreasonable delay of the specific offence;

(*b*) to be tried within a reasonable time;

(*c*) not to be compelled to be a witness in proceedings against that person in respect of the offence;

(*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(*e*) not to be denied reasonable bail without just cause;

(*f*) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

(*g*) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

(*h*) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and

(*i*) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

Treatment or punishment

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Self-crimination

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

Interpreter

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Equality Rights

Equality before and under law and equal protection and benefit of law

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Proceedings of Parliament

17. (1) Everyone has the right to use English or French in any debates and other proceedings of Parliament. [86]

Proceedings of New Brunswick legislature

(2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick. [87]

Parliamentary statutes and records

18. (1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative. [88]

New Brunswick statutes and records

(2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative. [89]

Proceedings in courts established by Parliament

19. (1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament. [90]

Proceedings in New Brunswick courts

(2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick. [91]

Communications by public with federal institutions

20. (1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where

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[86] **See section 133 of the *Constitution Act, 1867* and footnote (67).**

[87] ***Ibid.***

[88] ***Ibid.***

[89] ***Ibid.***

[90] ***Ibid.***

[91] ***Ibid.***

PART VI

AMENDMENT TO THE CONSTITUTION ACT, 1867

50. [103]

51. [104]

PART VII

GENERAL

Primacy of Constitution of Canada

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Constitution of Canada

(2) The Constitution of Canada includes

(*a*) the *Canada Act 1982*, including this Act;

(*b*) the Acts and orders referred to in the schedule; and

(*c*) any amendment to any Act or order referred to in paragraph (*a*) or (*b*).

Amendments to Constitution of Canada

(3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

Repeals and new names

53. (1) The enactments referred to in Column I of the schedule are hereby repealed or amended to the extent indicated in Column II thereof and, unless repealed, shall continue as law in Canada under the names set out in Column III thereof.

Consequential amendments

(2) Every enactment, except the *Canada Act 1982*, that refers to an enactment referred to in the schedule by the name in Column I thereof is hereby amended by substituting for that name the corresponding name in Column III thereof, and any British North America Act not referred to in the schedule may be cited as the *Constitution Act* followed by the year and number, if any, of its enactment.

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[103] **The text of this amendment is set out in the *Constitution Act, 1867*, as section 92A.**

[104] **The text of this amendment is set out in the *Constitution Act, 1867*, as the Sixth Schedule.**

An Act respecting corrections and the conditional release and detention of offenders and to establish the office of Correctional Investigator

[*Assented to 18th June 1992*]

Loi régissant le système correctionnel, la mise en liberté sous condition et le maintien en incarcération, et portant création du bureau de l'enquêteur correctionnel

[*Sanctionnée le 18 juin 1992*]

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Sa Majesté, sur l'avis et avec le consentement du Sénat et de la Chambre des communes du Canada, édicte :

SHORT TITLE

Short title

1. This Act may be cited as the *Corrections and Conditional Release Act*.

TITRE ABRÉGÉ

Titre abrégé

1. *Loi sur le système correctionnel et la mise en liberté sous condition.*

PART I

INSTITUTIONAL AND COMMUNITY CORRECTIONS

PARTIE I

SYSTÈME CORRECTIONNEL

INTERPRETATION

Definitions

2. (1) In this Part,

"Commissioner" «*commissaire*»

"Commissioner" means the Commissioner of Corrections appointed pursuant to subsection 6(1);

"contraband" «*objets interdits*»

"contraband" means

(*a*) an intoxicant,

(*b*) a weapon or a component thereof, ammunition for a weapon, and anything that is designed to kill, injure or disable a person or that is altered so as to be capable of killing, injuring or disabling a person, when possessed without prior authorization,

(*c*) an explosive or a bomb or a component thereof,

(*d*) currency over any applicable prescribed limit, when possessed without prior authorization, and

DÉFINITIONS

Définitions

2. (1) Les définitions qui suivent s'appliquent à la présente partie.

«agent» Employé du Service. «agent» "*staff member*"

«commissaire» Le commissaire du Service nommé au titre du paragraphe 6(1). «commissaire» "*Commissioner*"

«commission provinciale» S'entend au sens de la partie II. «commission provinciale» "*provincial parole board*"

«délinquant» Détenu ou personne qui se trouve à l'extérieur du pénitencier par suite d'une libération conditionnelle ou d'office, ou en vertu d'une entente visée au paragraphe 81(1) ou d'une ordonnance du tribunal. «délinquant» "*offender*"

«détenu» Personne qui, selon le cas : «détenu» "*inmate*"

a) se trouve dans un pénitencier par suite d'une condamnation, d'un ordre d'incarcération, d'un transfèrement ou encore d'une

Definition of "sentence"

119.1 For the purposes of sections 119.2 to 120.3, and unless the context requires otherwise, "sentence" means a sentence that is not constituted under subsection 139(1).

1997, c. 17, s. 21; 2011, c. 11, s. 3; 2012, c. 1, s. 75.

Définition de «peine»

119.1 Pour l'application des articles 119.2 à 120.3, sauf indication contraire du contexte, «peine» s'entend de la peine qui n'est pas déterminée conformément au paragraphe 139(1).

1997, ch. 17, art. 21; 2011, ch. 11, art. 3; 2012, ch. 1, art. 75.

Youth sentence

119.2 For the purposes of sections 120 to 120.3, the eligibility for parole of a young person in respect of whom a youth sentence is imposed under paragraph 42(2)(*n*), (*o*), (*q*) or (*r*) of the *Youth Criminal Justice Act* and who is transferred to a provincial correctional facility for adults or a penitentiary under section 89, 92 or 93 of that Act shall be determined on the basis of the total of the custody and supervision periods of the youth sentence.

2012, c. 1, s. 75.

Peine spécifique

119.2 Pour l'application des articles 120 à 120.3, l'admissibilité à la libération conditionnelle de l'adolescent qui a reçu une des peines spécifiques prévues aux alinéas 42(2)*n*), *o*), *q*) ou *r*) de la *Loi sur le système de justice pénale pour les adolescents* et est transféré dans un établissement correctionnel provincial pour adultes ou dans un pénitencier au titre des articles 89, 92 ou 93 de cette loi est déterminée en fonction de la somme des périodes de garde et de surveillance de la peine spécifique.

2012, ch. 1, art. 75.

Time when eligible for full parole

120. (1) Subject to sections 746.1 and 761 of the *Criminal Code* and to any order made under section 743.6 of that Act, to subsection 140.3(2) of the *National Defence Act* and to any order made under section 140.4 of that Act, and to subsection 15(2) of the *Crimes Against Humanity and War Crimes Act*, an offender is not eligible for full parole until the day on which the offender has served a period of ineligibility of the lesser of one third of the sentence and seven years.

Temps d'épreuve pour la libération conditionnelle totale

120. (1) Sous réserve des articles 746.1 et 761 du *Code criminel* et de toute ordonnance rendue en vertu de l'article 743.6 de cette loi, du paragraphe 140.3(2) de la *Loi sur la défense nationale* et de toute ordonnance rendue en vertu de l'article 140.4 de cette loi, et du paragraphe 15(2) de la *Loi sur les crimes contre l'humanité et les crimes de guerre*, le temps d'épreuve pour l'admissibilité à la libération conditionnelle totale est d'un tiers de la peine à concurrence de sept ans.

Life sentence

(2) Subject to any order made under section 743.6 of the *Criminal Code* or section 140.4 of the *National Defence Act*, an offender who is serving a life sentence, imposed otherwise than as a minimum punishment, is not eligible for full parole until the day on which the offender has served a period of ineligibility of seven years less any time spent in custody between the day on which the offender was arrested and taken into custody, in respect of the offence for which the sentence was imposed, and the day on which the sentence was imposed.

Cas particulier : perpétuité

(2) Dans le cas d'une condamnation à l'emprisonnement à perpétuité et à condition que cette peine n'ait pas constitué un minimum en l'occurrence, le temps d'épreuve pour l'admissibilité à la libération conditionnelle totale est, sous réserve de toute ordonnance rendue en vertu de l'article 743.6 du *Code criminel*ou en vertu de l'article 140.4 de la *Loi sur la défense nationale*, de sept ans moins le temps de détention compris entre le jour de l'arrestation et celui de la condamnation à cette peine.

1992, c. 20, s. 120; 1995, c. 22, s. 13, c. 42, s. 34; 1998, c. 35, s. 112; 2000, c. 24, s. 38.

1992, ch. 20, art. 120; 1995, ch. 22, art. 13, ch. 42, art. 34; 1998, ch. 35, art. 112; 2000, ch. 24, art. 38.

Multiple sentences on same day

120.1 (1) A person who is not serving a sentence and who receives more than one sentence on the same day is not eligible for full parole until the day on which they have served a period equal to the total of

(*a*) the period of ineligibility in respect of any portion of the sentence constituted under subsection 139(1) that is subject to an order

Peines imposées le même jour

120.1 (1) La personne qui est condamnée le même jour à plusieurs peines d'emprisonnement alors qu'elle n'en purgeait aucune n'est admissible à la libération conditionnelle totale qu'après avoir accompli le temps d'épreuve égal à la somme des périodes suivantes :

a) le temps d'épreuve requis relativement à la partie de la peine, déterminée conformé-

(*c*) less than four months remain to be served before the offender's statutory release date.

c) le délinquant a moins de quatre mois à purger avant sa libération d'office.

No application for one year

(6) No application for full parole may be made until one year after the date of the Board's decision — or until any earlier time that the regulations prescribe or the Board determines — if, following a review, the Board does not grant full parole or cancels or terminates parole.

(6) Si, au terme de tout examen, la Commission soit refuse d'accorder la libération conditionnelle totale du délinquant, soit annule ou met fin à sa libération conditionnelle, celui-ci doit, pour présenter une demande de libération conditionnelle totale, attendre l'expiration d'un délai d'un an après la date de refus, d'annulation ou de cessation ou du délai inférieur que fixent les règlements ou détermine la Commission.

Demande : délai de présentation

Withdrawal of application

(7) An offender may not withdraw an application for full parole within 14 days before the commencement of the review unless the withdrawal is necessary and it was not possible to withdraw it earlier due to circumstances beyond their control.

(7) Le délinquant ne peut retirer sa demande dans les quatorze jours qui précèdent l'examen de son dossier, à moins qu'il ne soit nécessaire de la retirer et qu'il n'ait pas pu le faire avant en raison de circonstances indépendantes de sa volonté.

Retrait

1992, c. 20, s. 123; 1995, c. 42, ss. 37, 69(E); 2012, c. 1, s. 79.

1992, ch. 20, art. 123; 1995, ch. 42, art. 37 et 69(A); 2012, ch. 1, art. 79.

Offenders unlawfully at large

124. (1) The Board is not required to review the case of an offender who is unlawfully at large during the period prescribed by the regulations for a review under section 122 or 123 but it shall review the case as soon as possible after being informed of the offender's return to custody.

124. (1) La Commission n'est pas tenue d'examiner le dossier du délinquant qui se trouve illégalement en liberté au cours de la période prévue par les règlements pour l'un des examens visés aux articles 122 ou 123; elle doit cependant le faire dans les meilleurs délais possible après avoir été informée de sa réincarcération.

Délinquant illégalement en liberté

Timing of release

(2) Where an offender is granted parole but no date is fixed for the offender's release, the parole shall take effect, and the offender shall be released, forthwith after such period as is necessary to implement the decision to grant parole.

(2) Dans le cas où la Commission a accordé au délinquant une libération conditionnelle sans en fixer la date, celui-ci doit être mis en liberté dès l'expiration de la période nécessaire à la mise en oeuvre de la décision.

Moment de la libération

Cancellation of parole

(3) If an offender has been granted parole under section 122 or 123, the Board may, after a review of the case based on information that could not reasonably have been provided to it at the time parole was granted, cancel the parole if the offender has not been released or terminate the parole if the offender has been released.

(3) Après réexamen du dossier à la lumière de renseignements nouveaux qui ne pouvaient raisonnablement avoir été portés à sa connaissance au moment où elle a accordé la libération conditionnelle, la Commission peut annuler sa décision avant la mise en liberté ou mettre fin à la libération conditionnelle si le délinquant est déjà en liberté.

Annulation de la libération conditionnelle

Review

(4) If the Board exercises its power under subsection (3), it shall, within the period prescribed by the regulations, review its decision and either confirm or cancel it.

(4) Si elle exerce les pouvoirs que lui confère le paragraphe (3), la Commission doit, au cours de la période prévue par règlement, réviser sa décision et la confirmer ou l'annuler.

Révision

1992, c. 20, s. 124; 1995, c. 42, s. 38; 2011, c. 11, s. 4; 2012, c. 1, s. 80, c. 19, s. 526.

1992, ch. 20, art. 124; 1995, ch. 42, art. 38; 2011, ch. 11, art. 4; 2012, ch. 1, art. 80, ch. 19, art. 526.

125. [Repealed, 2011, c. 11, s. 5]

125. [Abrogé, 2011, ch. 11, art. 5]

126. [Repealed, 2011, c. 11, s. 5]

126.1 [Repealed, 2011, c. 11, s. 5]

STATUTORY RELEASE

Entitlement

127. (1) Subject to any provision of this Act, an offender sentenced, committed or transferred to penitentiary is entitled to be released on the date determined in accordance with this section and to remain at large until the expiration of the sentence according to law.

Sentence for past offences

(2) Subject to this section, the statutory release date of an offender sentenced before November 1, 1992 to imprisonment for one or more offences shall be determined by crediting against the sentence

(*a*) any remission, statutory or earned, standing to the offender's credit on that day; and

(*b*) the maximum remission that could have been earned on the balance of the sentence pursuant to the *Penitentiary Act* or the *Prisons and Reformatories Act*, as those Acts read immediately before that day.

Sentence for future offences

(3) Subject to this section, the statutory release date of an offender sentenced on or after November 1, 1992 to imprisonment for one or more offences is the day on which the offender completes two thirds of the sentence.

Sentences for past and future offences

(4) Subject to this section, the statutory release date of an offender sentenced before November 1, 1992 to imprisonment for one or more offences and sentenced on or after November 1, 1992 to imprisonment for one or more offences is the later of the dates determined in accordance with subsections (2) and (3).

If parole or statutory release revoked

(5) Subject to subsections 130(4) and (6), the statutory release date of an offender whose parole or statutory release is revoked is

(*a*) the day on which they have served two thirds of the unexpired portion of the sentence after being recommitted to custody as a result of a suspension or revocation under section 135; or

(*b*) if an additional sentence is imposed after the offender is recommitted to custody as a result of a suspension or revocation under

126. [Abrogé, 2011, ch. 11, art. 5]

126.1 [Abrogé, 2011, ch. 11, art. 5]

LIBÉRATION D'OFFICE

Droit du délinquant

127. (1) Sous réserve des autres dispositions de la présente loi, l'individu condamné ou transféré au pénitencier a le droit d'être mis en liberté à la date fixée conformément au présent article et de le demeurer jusqu'à l'expiration légale de sa peine.

Date de libération d'office

(2) Sous réserve des autres dispositions du présent article, la date de libération d'office d'un individu condamné à une peine d'emprisonnement avant le 1er novembre 1992 est déterminée par soustraction de cette peine du nombre de jours correspondant à :

a) la réduction de peine, légale ou méritée, dont il bénéficie à cette date;

b) la réduction maximale de peine à laquelle il aurait eu droit sur la partie de la peine qui lui restait à subir en vertu de la *Loi sur les pénitenciers* et de la *Loi sur les prisons et les maisons de correction*, dans leur version antérieure à cette date.

Idem

(3) La date de libération d'office d'un individu condamné à une peine d'emprisonnement le 1er novembre 1992 ou par la suite est, sous réserve des autres dispositions du présent article, celle où il a purgé les deux tiers de sa peine.

Idem

(4) Lorsque les condamnations sont survenues avant le 1er novembre 1992 et le 1er novembre 1992 ou par la suite, la libération d'office survient, sous réserve des autres dispositions du présent article, à la plus éloignée des dates respectivement prévues par les paragraphes (2) et (3).

Droit à la libération d'office après la révocation

(5) Sous réserve des paragraphes 130(4) et (6), la date de libération d'office du délinquant dont la libération conditionnelle ou d'office est révoquée est celle à laquelle il a purgé :

a) soit les deux tiers de la partie de la peine qu'il lui restait à purger au moment de la réincarcération qui a suivi la suspension ou la révocation prévue à l'article 135;

b) soit, en cas de condamnation à une peine d'emprisonnement supplémentaire à la suite de la réincarcération qui a suivi la suspension