35024

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

B E T W E E N:

ATTORNEY GENERAL OF CANADA

Appellant

- and -

CHRISTOPHER JOHN WHALING

Respondent

A N D B E T W E E N:

ATTORNEY GENERAL OF CANADA

Appellant

- and -

JUDITH LYNN SLOBBE

Respondent

A N D B E T W E E N:

ATTORNEY GENERAL OF CANADA

Appellant

- and -

CESAR MAIDANA

Respondent

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1. Ontario intervenes to propose constitutional principles to apply here. Ontario makes no submissions on the facts, points in issue, or *Charter* s. 1.

PART III – ARGUMENT

1. Scope of This Appeal's Constitutional Issues

2. This Court should only consider the constitutionality of the impugned transition provision as they apply to the date of an offender's eligibility for day parole, because:

a) The core thrust of the respondents' constitutional attack in the courts below and the focus of the reasons, particularly in the BC Supreme Court, mainly if not totally, targeted the transition provision as it applied to day parole, not full parole. The trial judge recognized this at para. 26. The trial judge also noted that the parties compendiously dealt with day and full parole without differentiation.

Whaling v. Canada (A.G.), 2012 BCSC 944 ("BCSC Reasons") at para. 26

b) Narrowing even more, both courts below directed their primary focus on one aspect of changes to day parole, namely the date for becoming eligible for day parole, not the criteria for, application process for, and adjudication process for getting day parole. The BC Supreme Court held at para. 23: "It is, in the main, the repeal of this earlier eligibility date coupled with its retrospective application to offenders already convicted and sentenced that the plaintiffs allege constitutes additional "punishment" in violation of s. 11(h) of the *Charter*."

BCSC Reasons, *supra* at para. 23

c) The respondents' factum's substantive *Charter* analysis targets the impugned transition provision as it applies to the date of eligibility for day parole.

d) A context-specific analysis of a constitutional challenge can differ as applied to day parole, as distinguished from full parole.

3. This Court should not consider the constitutionality of the impugned transition provision in the abstract. This Court should instead individually assess the impugned transition provision's

proven impact on an individual *Charter* claimant.

2. *Charter* Section 11(h) Claim

4. Ontario submits that the impugned transition provision does not violate the respondents' *Charter* s. 11(h) rights.

a) Failing to Take a Purposive Approach to Section 11(h)

5. The BC Supreme Court and Court of Appeal fundamentally went astray. Both asked the wrong legal question. Each asked in the abstract if the abolition of accelerated parole fits within the word "punishment." Each court thereby erroneously wrenched the word "punished" from s. 11(h) and sequestered it in an inappropriate interpretive silo. Each then erroneously engaged in a Platonic exercise of trying to figure out what the word "punishment" means, as a de-contextualized, isolated term. The respondents' factum makes the same fundamental error. It urges this Court to do the same.

a) The BC Supreme Court identified its task at para. 47:

> The dispute concerning s. 11(h) boils down to whether the *AEPA*'s abolition of APR amounts to "punishment" (within the meaning of s. 11(h)) or, rather, relates merely to the manner in which the sentences imposed by the court will be administered.

BCSC Reasons, *supra* at para. 47

b) The Court of Appeal similarly identified its mission at para. 40 as follows:

"In this case, the question is whether the imposition of delayed parole eligibility post-sentence is "punishment" for the purpose of s. 11(h)."

Whaling v. Canada (A.G.), 2012 BCCA 435 ("BCCA Reasons") at para. 40

6. When interpreting an enactment, and especially one as fundamental as Canada's Constitution, a judge should not treat a provision as a collection of disconnected words to be separately ripped from their context, each individually interpreted as a disembodied word floating in the air, and then shoved back into the sentence or provision. To do so risks distorting the provision.

Bourne v. Norwich Crematorium Ltd., [1967] 2 All E.R. 576, 578. cited in R. Graham "In Defence of Maxims" (2001) 22:1 Statute Law Review 45 at pp. 47-49
Sullivan on the Construction of Statutes, 5th ed. (Markham: Carswell, 2008) at p. 353
P-A Côté, The Interpretation of Legislation in Canada, 4th ed. (Toronto: Carswell, 2011) at pp. 23-24, 532

7. Instead, *Charter* Section 11(h) should be construed as a compendious phrase, drawing its meaning from the confluence of all its words, harmoniously read together. A purposive interpretation first asks what s. 11(h) seeks to achieve. The entire provision is then holistically interpreted, in a manner that focuses on and best achieves that purpose. Of equal importance, the provision must not be over-inflated so as to overshoot its purpose.

R. v. Big M Drug Mart, [1985] 1 S.C.R. 295 at p. 344 *per* Dickson, C.J.C.
R. v. Grant, [2009] 2 S.C.R. 353 at para. 17

8. This Court and appellate courts have repeatedly reaffirmed that s. 11(h) aims at preventing double jeopardy. This is often expressed in terms of the time-tested principles of *autrefois acquit* and *autrefois convict*. The respondents do not show that s. 11(h) aims at some other purpose:

a) *R. v. Morgentaler, Smoling and Scott* (Ont. C.A.) held at p. 405:

> It is apparent that the principles of double jeopardy to which the pleas of autrefois acquit and autrefois convict give effect are encompassed by s. 11(h) of the Charter. The constitutional guarantee contained in s. 11(h) is, however, narrowly limited and on a literal reading does not cover the entire ambit of those pleas at common law and under the Code. [Citations omitted.]

b) In *R. v. Shubley*, McLachlin, J. as she then was, for the Court, held at para. 24:

> Section 11(h) of the Charter is directed at preventing the State from making repeated attempts to convict an individual. It forbids the prosecution of an accused twice for the same offence. In order for it to be operative, there must be two proceedings or trials for the same offence. It is clear that the criminal proceedings here in issue constitute a trial for an offence -- the offence of assault causing bodily harm.

R. v. Morgentaler, Smoling and Scott (1985), 22 C.C.C. (3d) 353 (Ont. C.A.) at p. 405
R. v. Shubley, [1990] 1 S.C.R. 3 at para. 24
R. v. Wigglesworth, [1987] 2 S.C.R. 541 at pp. 554-561
R. v. Mahalingan, [2008] 3 S.C.R. 63 at paras. 106-107

9. The paradigmatic scenario to which s. 11(h)'s purpose speaks is where this sequence of events occurs:

a) The state charges a person with an offence arising out of an incident ("the first charge").

b) The first charge goes to trial. The trial results in either an acquittal or a conviction.

c) If the accused is convicted on the first charge, the judge then exercises his or her discretion to impose a sentence for that first charge from among the menu of sanctions that the law authorizes for that charge.

d) After the acquittal or the sentencing on the first charge, the offender is later charged with, or otherwise re-prosecuted for, a second charge that arises out of the same incident, and that is in substance the same offence. If the person is then convicted of this second charge, this could result in a court imposing an additional sentence for the same conduct that was the subject of the first charge.

10. The constitutional wrong which *Charter* s. 11(h) aims to prevent is the second prosecution of the person in this paradigmatic scenario, for the same conduct and offence that was the subject of the first charge. If a *Charter* claimant doesn't show that their case fits this paradigm, their s. 11(h) rights were not violated.

11. Neither the BC Supreme Court nor the Court of Appeal, nor the respondents' factum, shows how their disembodied explication of the de-contextualized word "punishment" serves s. 11(h)'s purpose or fits the respondents' situation into that paradigm. The respondents' complaints about the impugned transition provision fall miles away from the paradigmatic s. 11(h) complaint. No law enforcement officials have charged any of the respondents with a second charge or otherwise conducted the functional equivalent of a re-prosecution arising out of the same incident that gave rise to their convictions.

b) Disregarding Section 11's Opening Words

12. The foregoing, standing alone, is sufficient to show that there is no s. 11(h) violation here. Yet further exacerbating that error, the approach in the courts below also erroneously

purged any meaning from s. 11's opening words: "Any person charged with an offence." Ontario submits that to invoke s. 11, the respondents must show that they are now "charged with an offence":

a) A majority of this Court held in *R. v. Lyons*, *infra* that a convicted person facing a Dangerous Offender proceeding is no longer "charged with an offence" within the meaning of s. 11, and cannot invoke s. 11 rights at their Dangerous Offender proceeding. See also *R. v. Casey* (Ont. C.A.), *infra* holding that an offender serving a conditional sentence, facing proceedings for allegedly breaching the sentence condition, was not "charged with an offence" within the meaning of s. 11, holding "that persons facing a breach application are not 'charged with an offence'. Rather, the breach hearing is part of the sentencing process and, as such, s. 11 of the Charter has no application."

R. v. Lyons, [1987] 2 S.C.R. 309 at p. 353 *per* La Forest, J.
R. v. Casey (2000), 141 C.C.C. (3d) 506 (Ont. C.A.)

See also *R. v. Potvin*, [1993] 2 S.C.R. 880, applied in *R. v. Darwish* (2010), 252 C.C.C. (3d) 1 (Ont. C.A.) – s. 11(b) does not apply to post-conviction delay; *R. v. Pearson*, [1992] 3 S.C.R. 665, applied in *R. v. Hill*, [2012] O.J. No. 4266 (S.C.) – s. 11(d) does not apply to sentencing hearings; *R. v. Farinacci* (1993), 86 C.C.C. (3d) 32 (Ont. C.A.) – s. 11(e) does not apply to bail pending appeal.

b) To the extent that this Court's later remarks in *R. v. Rodgers* at para. 58 suggest a contrary view, Ontario submits that *R. v. Lyons* should be followed. First, it was unnecessary in *R. v. Rodgers* to decide this issue, since this Court there held on other grounds that there was no s. 11(h) violation. Second, *R. v. Rodgers* does not appear to address and explicitly reverse *R. v. Lyons* on this point. Third, *R. v. Lyons* is the opinion of five justices. *R. v. Rodgers* was the judgment of four justices.

R. v. Rodgers, [2006] 1 S.C.R. 554 at para. 58

c) A court should never ignore plain words in the *Charter*. Constitutional protection against double jeopardy under s. 11(h) occurs not because the Court ignores s. 11's words, "Any person charged with an offence". It arises because once the offender faces a second charge, they have fresh s. 11(h) rights, triggered by being again charged with an offence. These include protection against double jeopardy *vis-à-vis* the earlier first charge.

13. This purposive approach to s. 11's opening words fits perfectly within the s. 11(h) paradigm described in para. 9, *supra*. The respondents don't meet this precondition. They have already been convicted and sentenced. They are facing no second set of charges or the functional equivalent of a new prosecution.

a) On the charges that sent them to prison, they are already tried, convicted and sentenced.

b) No public official, Crown or police, has subsequently charged them with a second charge or otherwise, in effect, re-prosecuted them.

c) Parliament's enacting the impugned transition provision does not charge them with any offence or otherwise constitute a re-prosecution of them.

14. In this regard, the trial judge erroneously held at para. 46:

> It appears to be common ground that in appropriate circumstances an offender serving a sentence may invoke s. 11(h) to protect against additional punishment even though no longer "charged" with an offence. Section 11(h)'s protections carry on past trial, conviction (or acquittal), and sentence, to prevent any additional trial or punishment for the offence with which the person was once charged: R. v. Rodgers, 2006 SCC 15, [2006] 1 S.C.R. 554 at para. 58.
>
> BCSC Reasons, *supra* at para. 46

15. Even if this Court does not share Ontario's approach to s. 11's opening words, the failure of both courts below to use a purposive approach to s. 11(h) as demonstrated in paras. 5-11, *supra*, standing alone, is sufficient to demonstrate fundamental error.

c) Misinterpreting "Punishment" or "Punished" in Section 11(h)

16. Their erroneous approach landed both courts below in the quagmire of trying to come up with an objective and practically-workable abstract definition of "punishment" or "punished" that yields a predictable outcome when applied to specific facts. There is a serious risk of circular definitions that just use synonyms.

17. Compounding these errors, both courts below applied in an erroneous way the

"punishment" definition that four Justices of this Court approved in *R. v. Rodgers* at para. 63:

a) *R. v. Rodgers* includes, as "punishment," measures that form "…part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence and the sanction is one imposed in furtherance of the purpose and principles of sentencing."

Rodgers, supra at para. 63

b) *R. v. Rodgers* holds that "punishment" under s. 11(h) doesn't necessarily encompass "every potential consequence of being convicted of a criminal offence, whether that consequence occurs at the time of sentencing or not."

Rodgers, supra at para. 63

c) According to *R. v. Rodgers*, *supra* at para. 64, the fact that a measure may have a deterrent effect on an offender or may cause stigma doesn't *ipso facto* make it "punishment."

Rodgers, supra at para. 64

d) Requiring an offender to submit a DNA sample is not punishment: see *R. v. Rodgers*, *supra* at paras. 64-65. If an offender later re-offends, and the judge sentencing him or her for the later offence takes the prior record into account as an aggravating sentencing factor, the increased sentence for the later offence, if proportionate and proper under settled sentencing principles, does not constitute re-punishment contrary to s. 11(h): see *R. v. Angelillo, infra* at para. 28. For other examples, see the appellant's factum at para. 83.

Rodgers, supra at paras. 64-65
R. v. Angelillo, [2006] 2 S.C.R. 728 at para. 28

18. Applying *Rodgers*' "punishment" definition, none of the legislative changes in the impugned transition provision trigger s. 11(h). It is the sentencing judge who, by definition, imposes a sanction at the time of sentencing. No one suggests that the judges who sentenced the respondents for the offences for which they are now serving time, did or could impose as part of their sentences, terms fixing:

a) how far into the sentence a respondent would be eligible to apply for day parole;

b) whether the respondent had to fill out an application form to apply for day parole, or

whether the parole authorities would automatically do this for him or her;

c) whether the day parole application would involve an in-person oral hearing, or just a paper hearing; and/or

d) which legal criteria the Parole Board will use for deciding a day parole application.

d) Wrongly Conflating Section 11(h) with Sections 11(g), 11(i) and 12

19. Here, a sentencing judge only sets the period of the respondents' imprisonment. This is not one of those few statutorily-designated situations where a sentencing judge can, as part of a sentence, choose the period of full parole ineligibility (e.g. for second-degree murder). Even in those few circumstances, the judge has no authority to fix, as part of the sentence for an offence, the period of ineligibility for day parole, nor the application process for day parole or full parole, nor the Parole Board's hearing procedure or legal test for deciding on applications for day parole or full parole. The parole authorities, not the sentencing judge, determine whether the inmate will be relieved of their obligation to serve the entire sentence in prison.

20. It was incorrect for the courts below to conflate the judge's and parole authorities' two distinctive roles, as if the judge were in substance sentencing the accused to less time than he or she is in fact ordering, and is directing what the parole eligibility criteria shall be. Put another way, whether any of respondents gets day parole or full parole, their actual sentence for their offences remains the same. That sentence is the period of imprisonment that the sentencing judge imposed.

21. The courts below in effect also erred by conflating s. 11(h) on the one hand, with ss. 11(g) and (i), and s. 12 on the other. Each constitutional provision was crafted to serve discrete purposes.

a) Section 11 provides in material part:

> 11. Any person charged with an offence has the right...
>
> (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.

b) Section 12 provides: "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment."

22. Section 11(g) addresses legislation that retroactively criminalizes hitherto lawful conduct. Section 11(i) addresses legislation that retrospectively raises the punishment for a crime. Section 12 addresses more generally disproportionate and excessive sentences that cross the constitutional line. In sharp contrast, s. 11(h) is designed to deal with individualized prosecutorial conduct that exposes an accused or offender to double jeopardy.

23. Here, the respondents were only prosecuted once for their criminal conduct. They were only sentenced once for that conduct. Their sentence was set by their trial judge. The only period of imprisonment to which they are exposed is the term which their trial judge imposed, and no longer.

e) Answering The Respondent's Other Arguments

24. The respondents' claim over-inflates *Charter* s. 11(h) and overshoots its purpose. At bottom, they claim that their s. 11(h) rights are violated, even if they face no re-prosecution and have not been charged with a second charge arising out of the incident giving rise to the charges for which they are now in prison. They claim that their s. 11(h) rights are violated if, after the sentencing judge imposes a period of prison time for their crime, the state does anything to make their prison term harsher, such as doing anything that makes it harder to get day parole or full parole than it was on the date when the judge imposed that sentence. By their over-inflated approach, it would violate s. 11(h) if:

a) after the offender was sentenced, the Parole Board adopts a new procedural rule or refines

its test for deciding on parole applications, if they have the effect of reducing the respondents' chance for getting parole;

b) after the offender was sentenced, the Government appoints new Parole Board members who were disposed to be tougher on parole applicants than those in place on the date when the respondent was sentenced;

c) an offender is reclassified from medium security to maximum security, or from minimum security to medium or maximum security;

d) a government closes a minimum security institution or institutions;

e) after the offender is sentenced, the government adopts new and more onerous rules or criteria for reducing an inmate's classification from medium security to minimum security, or adopts less exacting rules for being reclassified from medium security to maximum security;

f) an offender is sent to segregation while in prison;

g) after the offender is sentenced, the prison administration where the offender is housed decides to triple-bunk inmates rather than double-bunking them, or double-bunking them instead of single-bunking them, in a single cell;

h) after the offender is sentenced, a prison administration in the prison where that offender is housed reduces the amount of time per day that inmates may spend in the prison yard;

i) a government closes the prison where an offender is housed, and moves that offender to another prison further away from the offender's family.

25. Applying the respondents' approach, the Parole Board violates an offender's s. 11(h) rights if it refuses to grant that offender's application for parole. That decision makes the offender serve time behind bars instead of in the community. That would be "punishment," especially if the Parole Board's decision is driven by concern about sentencing principles such as protecting the public, and addressing the offender's rehabilitation.

26. The respondents' factum paras. 57-77 takes an overly-simplistic approach to the status of parole and parole ineligibility periods and s. 11(h). They erroneously suggest that any increase in the period of parole ineligibility is *ipso facto* "punishment" under s. 11(h). They argue, in effect, that because in a limited number of statutorily-defined situations a sentencing judge has discretion over the period of full parole ineligibility, it follows automatically that any legislative provisions on parole ineligibility are *ipso facto* "punishment" under s. 11(h):

a) Where, as here, a sentencing judge has no discretion over a period of day parole ineligibility, or full parole ineligibility, then it is simply not one of the sentencing sanctions that form part of punishment, within *Rodgers*, as argued at paras. 16-18, *supra*.

b) Contrary to the respondents' factum paras. 63-69, it is thus not a question of whether the provision in issue is situated in the *Criminal Code* or if it is found instead in the *CCRA*. What is important is whether it is a sentencing judge who is setting the period of parole ineligibility, giving rise to the risk of double jeopardy if another sentencing judge later lengthens it, or whether it is Parliament doing so across-the-board via legislation.

27. Ontario disputes the claim at respondents' factum para. 81, like the BC Supreme Court at paras. 111 and 113, and the BC Court of Appeal at para. 56, that in deciding whether a measure is punishment under s. 11(h), regard should be had "chiefly" to the effect on the offender:

a) Their claim disregards the *Rodgers* "punishment" definition which made the measure's *purpose* an indispensable constituent element. *Rodgers* requires *inter alia* that "… the sanction is imposed *in furtherance of the purpose and principles of sentencing*" (emphasis added).

b) Their approach could well make a measure "punishment" if the offender subjectively doesn't like it.

c) Either there must be a purpose to punish, or there need not be. To make the effect the chief consideration is to muddle the analysis with an amorphous, ambiguous and unpredictable test.

BCSC Reasons, *supra* at paras. 111 and 113
BCCA Reasons, *supra* at para. 56

28. The respondents' other claims (on which they don't primarily focus before this Court, but for which they seem to seek remedial relief) trivialize the *Charter*:

a) Requiring an inmate who wants day parole to file a day parole application, rather than one automatically being filed for him or her by the corrections system, is not a significant burden. Inmates presumably have the time and motivation to fill out an application.

b) Ensuring an oral hearing, rather than a paper hearing for a day parole application is the antithesis of a *Charter* violation. Giving an offender an in-person hearing, rather than a paper hearing, to present their case for day parole, is not punishment. An oral hearing lets an offender make all arguments by an in-person appeal to the Parole Board. This is not an unconstitutional wrong. If no in-person hearing was provided, no doubt offenders would argue that they are entitled to an in-person hearing, as a constitutional right.

c) The simple fact of extending the time before which an offender can apply for day parole, without more, may not be consequential. If the offender has no hope of getting day parole on the earlier date that the pre-transition provision would allow, the extension makes no difference. If, due to the length of their sentence, the extension is only for a few days, it also would make no major difference. Ontario acknowledges that the impact on these respondents is longer than a few days, as identified in appellant's factum para. 6.

d) The change in day parole eligibility criteria only burdens offenders who may not pose a risk of violence if granted day parole, but who do pose a material risk of other criminal behaviour. Their complaint goes like this: "I should be let out, even though I may well again defraud innocent people, or sell crack to children, because I won't also be violent!"

e) The respondents have not shown that it makes a substantial difference for the Parole Board to have discretion to refuse day parole, even if the statutory criteria are met. They need to show that the Parole Board has a significant record of using that discretion to refuse parole.

f) Section 11(h) should not be contorted to, in effect, create an absolutely or qualified presumptive constitutional right to day parole or full parole for offenders during a transition period between an old and new administrative regime for their custodial sentence. The

respondents have no free-standing constitutional right to day parole or full parole. Parole is just a change in the condition for serving a custodial sentence. Parole is not a right. It is at most a privilege.

29. At bottom, the respondents urge this Court to find, as a matter of public policy, that it is "totally unjust" to change the day parole rules (respondents' factum para. 70). They then urge this Court to hunt for any *Charter* provision into which to force this claim, whether or not it fits that provision's wording and purposes. This is an incorrect approach to the *Charter*.

3. *Charter* Section 7 Claim

a) A Cautionary Approach to the Respondents' Section 7 Claim

30. This Court has jurisdiction to consider the respondents' *Charter* s. 7 challenge. Yet it may wish to proceed with caution on that claim since:

a) This Court lacks the important benefit of s. 7 reasons from either court below, to focus and enrich a thorough consideration of the respondents' *Charter* s. 7 claim. The respondents argued s. 7 in the courts below. Both courts below opted not to rule on, or offer any reasons on the s. 7 claim, even in *obiter*. They struck down the impugned transition provision based on s. 11(h).

b) It is, at the very least, very unusual for this Court to serve as a court of first instance on a *Charter* claim on which no lower court ruled, absent the exceptional procedure of a constitutional reference directly to this Court.

c) The usual sequence of oral argument in this Court on Canada's appeal, if not adjusted, may present practical challenges. The respondents have the burden in this Court to prove that the impugned transition provision violates their *Charter* s. 7 rights. There is no presumption in this Court that this legislation violates s. 7, simply because the courts below ruled that the impugned transition provision violates s. 11(h); yet Canada, as appellant, and Ontario, as an intervener supporting Canada, would ordinarily be called on in this Court to address s. 7 before the respondents make their oral argument. Canada is ordinarily limited to a short reply

after the respondents' oral submissions. Ontario, as an intervener, of course gets no reply in this Court.

d) If this Court opts to consider s. 7, it should separately examine any s. 7 attacks on timing of day parole eligibility, on the process for deciding on day parole applications, and on the criteria for deciding day parole applications. As well, if this Court opts to go beyond the attack on day parole to also consider an attack on full parole (contrary to Ontario's submissions at para. 2, *supra*), it should separately consider day parole, on the one hand, and full parole on the other. The balancing for each is influenced by differences between day parole on the one hand, and full parole on the other.

31. A fact-specific, case-by-case approach should be taken to these claims, comparable to that proposed at para. 3, *supra* for s. 11(h).

b) No Section 7 Violation

32. Ontario submits that the impugned transition provision do not violate the respondents' liberty, as guaranteed by *Charter* s. 7. For example, the right to liberty in *Charter* s. 7 does not confer on a convicted criminal, sentenced to prison, a constitutional right to day parole, much less a right to day parole at any constitutionally-dictated point in the offender's sentence. However, Ontario's submissions focus on the interpretation of the principles of fundamental justice.

33. The respondents, in effect, contend that the principles of fundamental justice constitutionally dictate how Parliament or a Legislature must design statutory transition provisions, whenever they enact a law that deprives one's liberty. This Court is wisely cautious before enshrining a requirement in the principles of fundamental justice. Once judicially embedded in s. 7, it remains constitutionally obligatory absent a reversal by this Court, a constitutional amendment, a s. 1 defence, or a s. 33 legislative override. It is quite infrequent that *Charter* s. 1 is successfully invoked to save a contravention of s. 7.

34. Ontario submits that "the principles of fundamental justice" in s. 7 should not be construed as the respondents claim, because:

a) This Court held in *British Columbia v. Imperial Tobacco Canada Ltd.*, *infra* at para. 69:

> Except for criminal law, the retrospectivity and retroactivity of which is limited by s. 11(g) of the Charter, there is no requirement of legislative prospectivity embodied in the rule of law or in any provision of our Constitution. Professor P. W. Hogg sets out the state of the law accurately (in Constitutional Law of Canada (loose-leaf ed.), vol. 1, at p. 48-29):
>
> > Apart from s. 11(g), Canadian constitutional law contains no prohibition of retroactive (or ex post facto laws). There is a presumption of statutory interpretation that a statute should not be given retroactive effect, but, if the retroactive effect is clearly expressed, then there is no room for interpretation and the statute is effective according to its terms. Retroactive statutes are in fact common.

British Columbia v. Imperial Tobacco Canada Ltd., [2005] 2 S.C.R. 473 at para. 69
R. v. Gamble, [1988] 2 S.C.R. 595 at para. 76, *per* Wilson, J.

b) This Court holds that the principles of fundamental justice do not lie in the realm of public policy. Beyond those situations where *Charter* ss. 11(g) or (i) apply, the question of how to design a fine-tuned transition provision when making changes to an existing legislative program is a typical public policy issue. It arises whenever legislation or a government program is created or changed. The question of how to sculpt a transition regime as changes to a law or program are phased in involves a complex balancing of nuanced, competing public policy factors, such as the urgency of protecting the public through the new regime, the impact on those relying on the old regime, the time needed to effect the transition, competing demands for scarce funding, the capacity of the program to quickly effect the changeover, the number of people affected by the change, and many more. This kind of fine line-drawing in the public policy arena does not lie within the expertise or the traditional role of the courts. Moreover, there is no single obligatory constitutionally "right" way to craft a transition scheme in a public policy law.

Reference re Motor Vehicle Act (B.C.), [1985] 2 S.C.R. 486 at pp. 499 and 503, *per* Lamer, J.
R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713 at para. 125, citing *Williamson v. Lee Optical of Oklahoma,* 348 U.S. 483 (1955) at p. 489
R. v. Morgentaler, [1988] 1 S.C.R. 30 at p. 53 *per* Dickson, C.J.C.

c) The principles of fundamental justice are not just concerned with the interest of those

individuals claiming to be adversely affected. They also balance the public interest including the protection of society.

Cunningham v. Canada (A.G.), [1993] 2 S.C.R. 143 at p. 151, *per* McLachlin, J.
R. v. Corbett, [1988] 1 S.C.R. 670 at p. 745
R. v. Penno, [1990] 2 S.C.R. 865 at p. 894

d) Sections 8 to 14 of the *Charter* illustrate deprivations of the rights to life, liberty and security of the person in breach of the principles of fundamental justice. Ontario submits that *Charter* ss. 11(g) and (i) specify the extent to which the principles of fundamental justice aim to set mandatory constitutional standards for transition provisions in the criminal law context. *Morin v. R.* (Q.C.A.), *infra* denies that "….there is a sufficient consensus regarding the absolute need to prohibit the retrospective effect of an act." It also asserts that, "where a specific constitutional guarantee exists, the issue must be decided on the basis of this guarantee. Section 11(i) of the *Charter* already protects the accused from statutory amendments that increase the severity of the applicable sentence after the offence is committed. It is therefore this specific protection, and not s. 7, that must be taken into account" when considering the Appellants' challenge to the retrospective application of the *SOIRA* registration provisions.

Morin v. R., [2009] Q.J. No. 510 (C.A.) at paras. 40 and 43
Reference re Motor Vehicle Act (B.C.), *supra*, at p. 502

e) Ontario submits that this Court need not expound at length on s. 11(i) or its ambit on this appeal. The respondents did not and could not plausibly claim a contravention of either ss. 11(g) or (i). Other s. 11(i) cases are now working their way up the court system.

f) Statutory interpretation principles establish a carefully tailored, appropriately constrained way to address legislative transitions that balances the roles of the courts and legislatures. *Charter* s. 7 should not be construed to overinflate or distort that regime, displacing that delicate balance. "A mere common law rule does not suffice to constitute a principle of fundamental justice".

The Interpretation of Legislation in Canada, *supra* at p. 128
Rodriguez v. British Columbia (A.G.), [1993] 3 S.C.R. 519 at p. 590, *per* Sopinka, J.
R. v. Beare, [1988] 2 S.C.R. 387 at p. 406, *per* La Forest, J.

g) When a court establishes a new common law principle, or alters an existing one, or enunciates a new approach to the rules of evidence, or to the construction of a statute, even in the criminal law context, the court routinely applies that change to the case where it is judicially established. This is so, even though that case's facts occurred before the judicial innovation.

h) This case is concerns transitions *about transitions*. Day parole addresses the timing and manner of gradually transitioning incarcerated criminal offenders from prison into the community. This is a topic on which there is no societal consensus and much controversy. This shows *a fortiori* that there is no one constitutionally "right" way for such transitioning to occur, much less for how a society should transition to the new regime for transitioning incarcerated offenders.

i) When they apply for day parole or full parole, the respondents will enjoy access to in-person parole board hearings. They do not allege that in-person hearings before the Parole Board are inherently unfair or fundamentally unjust.

4. Remedy

35. If the respondents succeed in their attack on the changes to the eligibility date for day parole, their factum paras. 146-154 seeks the undeserved windfall of also striking down the changes to the parole application process, the requirement of an in-person hearing, and the day parole eligibility criteria. Yet to get these all struck out, the respondents must first show that those features are themselves unconstitutional.

PART IV - ORDER REQUESTED

36. Ontario makes no submissions on the order requested.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Toronto this 30th day of September, 2013.

David Lepofsky

Mabel Lai
of Counsel for the Intervener

PART V – TABLE OF AUTHORITIES

SECONDARY MATERIAL	CITED AT PARAGRAPH
P-A Côté, The Interpretation of Legislation in Canada, 4th ed. (Toronto: Carswell, 2011)	Paras. 6, 34
R. Graham "In Defence of Maxims" (2001) 22:1 Statute Law Review 45	Para. 6
Sullivan on the Construction of Statutes, 5th ed. (Markham: Carswell, 2008)	Para. 6