

CANADA / JUDGMENT

Liang v. Canada (Attorney General)

2013 BCSC 1621

COURT

Supreme Court of British Columbia

DECIDED

28 August 2013

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2013 BCSC 1621 Liang v. Canada (Attorney General) IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Liang v. Canada (Attorney General), 2013 BCSC 1621 Date: 20130828 Docket: 26407 Registry: Vancouver Between: William Wei Lin Liang Petitioner And Attorney General of Canada and the Institutional Head of Ferndale Institution Respondents

- and - Docket: 26408 Registry: Vancouver Between: Leslie John McCulloch Petitioner And Attorney General of Canada and the Institutional Head of Ferndale Institution Respondents Before: The Honourable Mr. Justice Ehrcke Oral Reasons for Judgment Counsel for the Petitioners: J.W. Conroy, Q.C. Counsel for the Respondents: J.A.L. Dagsvik S. Norris Place and Date of Hearing: Vancouver, B.C. August 28, 2013 Place and Date of Judgment: Vancouver, B.C. August 28, 2013

- [1] THE COURT: The petitioners seek a declaration of constitutional invalidity of the transitional provision in s. 10(1) of the Abolition of Early Parole Act, S.C. 2011, c. 11 [AEPA], which abolished accelerated parole review ("APR") for all eligible federal inmates not already granted release on accelerated parole, and purported to do so retroactively. The petitioners submit that the impugned section violates their rights under ss. 7 and 11(i) of the Charter of Rights.
- [2] In this Province, the transitional section has already been found to violate s. 11(h) of the Charter and has been declared invalid to the extent that it makes the AEPA apply retrospectively to offenders sentenced before March 28, 2011, when the AEPA came into force; see the decision of Holmes J. in Whaling v. Canada (Attorney General), 2012 BCSC 944, affirmed by our Court of Appeal, 2012 BCCA 435. That decision has been appealed to the Supreme Court of Canada, and it is to be heard October 13, 2013.
- [3] The Attorney General of Canada seeks an adjournment of the hearing of these petitions on three bases. First, the matter was set down for one day of hearing and the time estimate is clearly inadequate. At least two days will be required to hear this matter. Second, the Attorney General of Canada wishes to file an affidavit of Daryl Churney, who is away and unable to swear the affidavit until September 3, 2013, although the petitioners have indicated they are willing to proceed on an unsworn copy of his affidavit. Third, the Attorney General of Canada submits that the hearing of this petition should not proceed until the Supreme

Court of Canada has rendered its decision in *Whaling* because that case, although decided on s. 11(h) of the Charter rather than ss. 7 and 11(i) which are in issue here, nevertheless deals with the meaning of the word "punishment," something that will be central to the decision in the present case.

- [4] I am satisfied the petition cannot proceed today and should be adjourned at least for a short time for the first two reasons set out above. The matter needs to be set for at least two days of hearing, and the Attorney General of Canada should have the opportunity of filing a properly sworn copy of Mr. Churney's affidavit.
- [5] The more difficult decision is whether the adjournment should be only for a few days to accommodate these concerns or whether it should be a longer adjournment to await the decision of the Supreme Court of Canada in *Whaling*. Although that case is being heard in October of this year, the likelihood is that a decision from the Supreme Court of Canada may not be forthcoming until sometime in 2014.
- [6] The Attorney General of Canada makes the valid point that there would be a significant benefit to the administration of justice by waiting for the Supreme Court of Canada to render its decision, since this would settle one of the important issues in the present case and would reduce the possibility of a judge rendering a decision in this case which ultimately turns out to be inconsistent with the Supreme Court of Canada decision.
- [7] On the other side of the equation is the fact that the present petitioners are asserting rights that they would like to have determined as soon as possible since it may affect the date on which they may be granted day parole. They submit that if their petitions are adjourned to await the decision of the Supreme Court of Canada, by that time a decision will likely be of little or no benefit to them.
- [8] Counsel for the Attorney General of Canada has referred me to a number of cases across Canada in which issues similar to this one have been raised and in which adjournments have been sought. In many of those cases, adjournments have been granted to await the Supreme Court of Canada decision. Counsel for the petitioners points out, however, that those cases from other provinces are distinguishable in that in British Columbia our Court of Appeal decision in *Whaling* is now the binding law unless and until the Supreme Court of Canada decides otherwise. Courts in other provinces are not bound by the court decisions in British Columbia.
- [9] Counsel for the Attorney General of Canada has also referred me to a recent decision of Master Muir of this Court who, I am told, granted an adjournment pending the Supreme Court of Canada decision in *Whaling* in the cases of *Kandola v. Canada (Attorney General)* and *Johal v. Canada (Attorney General)*. However, those cases are distinguishable in that the APR dates for those inmates have not yet arrived, and therefore, the delay pending the Supreme Court of Canada decision is unlikely to render their cases moot.

- [10] In the case of Mr. Liang, the date on which he could have been considered for day release APR but for the impugned legislation was April 22, 2013. In the case of Mr. McCulloch, it is October 28, 2013. They both submit, therefore, that a delay to await the decision of the Supreme Court of Canada in Whaling may result in an unnecessary restriction of their liberty and the decision which this Court renders in their cases may be of no practical benefit to them. They therefore ask that any adjournment be a short one and that the matter should proceed to hearing within the next few weeks.
- [11] I agree with counsel for the petitioners that Mr. Liang and Mr. McCulloch should not have to wait until the Supreme Court of Canada renders its decision before they have their cases heard.
- [12] I therefore order that the hearing of their petitions be adjourned until September 3, 2013, or so soon thereafter as the registry can provide at least two days of hearing time for this matter.
- [13] I am not seized of the petitions. The Honourable Mr. Justice W.F. Ehrcke

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