
CANADA / JUDGMENT

Liang v. Canada (Attorney General)

2013 BCSC 1859

COURT

Supreme Court of British Columbia

DECIDED

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2013 BCSC 1859 Liang v. Canada (Attorney General)

N THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Liang v. Canada (Attorney General),

2013 BCSC 1859

Date: 20131010

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 N. Smith

Reasons for Judgment

Counsel for the Petitioners:

E. Purtzki

Counsel for the Respondents:

J. Dagsvik

C. Mitchell

Place and Date of Hearing:

Vancouver, B.C.

September 12 and 13, 2013

Place and Date of Judgment:

Vancouver, B.C.

October 10, 2013

- [1] In 2011, Parliament enacted changes to the parole system that required some offenders serving penitentiary sentences to wait longer before becoming eligible for day parole and to meet a more onerous eligibility requirement. The Court of Appeal has ruled that the change cannot apply to offenders who were sentenced before the new legislation came into effect on March 29, 2011. The issue on this application is whether it can apply to offenders sentenced after that date, but for offences committed before it.
- [2] The petitioners William Liang and Leslie John McCulloch are currently serving federal penitentiary sentences for drug offences. Mr. Liang was sentenced on May 28, 2012, to a term of five years and five months for offences committed on June 30, 2010. Mr. McCulloch was sentenced on January 28, 2013, to a term of four and half years for an offence committed on August 26, 2009.
- [3] As first time federal offenders serving sentences for non-violent offences, they would previously have been eligible for accelerated parole review ("APR"), which would have allowed them to be released on day parole after serving one sixth of their sentences. That differs from the normal parole system, under which offenders must wait until six months before they have served one third of their sentence.

- [4] APR differed from the normal parole system in two other significant respects. Offenders were entitled to release under APR if the Parole Board of Canada was satisfied they were unlikely to commit an offence involving violence before the expiry of their sentence. In the normal system, the test is whether there is a risk of a new offence of any kind. An offender's eligibility for day parole under APR was considered automatically, without the need for an application, and usually on the basis of a paper review without the need for an oral hearing.
- [5] The APR system was abolished by the Abolition of Early Parole Act, S.C. 2011 c. 11, [AEPA] which came into force on March 28, 2011. As a result, Mr. Liang did not become eligible for day parole until September 18, 2013, instead of April 22, 2013. Instead of becoming eligible on October 28, 2013, Mr. McCulloch must now wait until January 29, 2014. In both cases, their release on day parole will be discretionary and subject to the more stringent test under s. 102 of the Corrections and Conditional Release Act, S.C. 1992, c. 20 [CCRA].
102. The Board or a provincial parole board may grant parole to an offender if, in its opinion,
- (a) the offender will not, by reoffending, present an undue risk to society before the expiration according to law of the sentence the offender is serving; and
 - (b) the release of the offender will contribute to the protection of society by facilitating the reintegration of the offender into society as a law-abiding citizen.
- [6] When enacted, the AEPA was stated to apply to offenders sentenced before or after its coming into force. In *Whaling v. Canada (Attorney General)*, 2012 BCCA 435, the Court of Appeal held that retrospective application to offenders already serving sentences was a violation of s. 11(h) of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, which reads:
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;
- [7] The court said in *Whaling* at para. 71:
- [71] The retrospective legislative lengthening of the time spent in jail by the respondents by delaying their eligibility for parole violates their rights not to be "punished again" for their offences, contrary to s. 11(h) of the Charter, and the violation is not a reasonable limit for the purpose of s. 1.
- An appeal from that decision is scheduled to be heard by the Supreme Court of Canada on October 15, 2013.
- [8] The petitioners in this case cannot rely directly on the result in *Whaling* or on s. 11(h) because they were sentenced after the AEPA came into force. However, they rely on s. 11(i) which reads:

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

The petitioners seek orders in the nature of habeus corpus that they are entitled to the benefit of the former APR procedures.

- [9] The petitioners argue that the period during which they are not eligible for parole is part of their "punishment" within the meaning of s. 11(i) and this "punishment" was varied after the date of their offences. The Attorney General submits that the punishment addressed by s. 11(i) must be one that could have formed part of the sentence of imprisonment itself. Parole eligibility in this case was governed by the CCRA, as amended by the AEPA. It was not governed by the Criminal Code, R.S.C., 1985, c. C-46, and therefore was neither part of the sentence nor a relevant consideration on sentencing.
- [10] The definition of punishment was considered by the Supreme Court of Canada in *R. v. Rodgers*, 2006 SCC 15:
62. In its ordinary sense, "punishment" refers to the arsenal of sanctions to which an accused may be liable upon conviction for a particular offence. The Criminal Code uses the words "punishment" or "punishable" to describe the range of sanctions available on sentencing...
63. This does not mean, however, that "punishment" under ss. 11(h) and 11(i) necessarily encompasses every potential consequence of being convicted of a criminal offence, whether that consequence occurs at the time of sentencing or not. A number of orders can be made by a sentencing court, for example an order for forfeiture, a firearm prohibition, a driving prohibition, or an order for restitution. It is beyond the purview of this appeal to determine whether or not any of these consequences constitutes a punishment. As a general rule, it seems to me that the consequence will constitute a punishment when it forms 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.

The court in *Rodgers* found that a requirement to provide a DNA sample did not constitute punishment within that definition.

- [11] However, the Court of Appeal in *Whaling* upheld the decision of the trial judge that, for purposes of s. 11(h), delayed parole eligibility constitutes punishment within the *Rodgers* definition. The trial judge in *Whaling v. Canada (Attorney General)*, 2012 BCSC 994, carefully reviewed the authorities and concluded at paras. 111 and 112:
- [111] What is clear is that when a sentencing judge delays parole eligibility as part of an offender's sentence, the restriction is "punishment" for the purposes of s. 11. In my view, such an order, overriding the Board's discretion to consider parole, is no different in its effect than delayed parole eligibility brought about by statute.

- [112] The sentencing and parole regimes have different functions and spheres of responsibility, but they do not exist in separate watertight compartments. Changes to the parole regime enacted through amendments to the CCRA are not for that reason alone incapable of imposing or increasing the "punishment" inherent in the sentences offenders serve.
- [12] On that point, the Court of Appeal in *Whaling* said from paras. 57-59:
- [57] The trial judge found that the retrospective repeal of APR increased the harshness of the sentences of the respondents by requiring them to serve more time in jail, and did so without the discretionary intervention of the Board. The effect of the legislation was no different from that of parole ineligibility imposed by a judge, and the jurisprudence is clear and consistent that delayed parole ineligibility is 'punishment': see *Shropshire* at para. 23: "parole ineligibility is part of the punishment"; *Chaisson* at 1125, quoting *R. v. Goulet* (1995), 22 O.R. (3d) 118 at 122 (C.A.): "... restricting eligibility for parole increases the punishment imposed by the sentence in a very real way"; *Zinck* at para. 24: "Delaying parole ... brings a new element of truth, but also of harshness, to sentencing".
- [58] 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.
- [59] 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.
- [13] The Attorney General seeks to distinguish *Whaling* on the basis that it dealt only with s. 11(h) and different considerations apply under s. 11(i). That submission is based on the different time periods to which ss. 11(h) and (i) relate. While s.11 (h) protects against further punishment after trial and sentencing, s. 11(i) applies only to the time between the offence and sentencing. The Attorney General says that since parole eligibility under the CCRA did not become relevant to the petitioners until after they were sentenced, the abolition of APR did not vary the petitioners' punishment between the their offenses and their sentencing.
- [14] I agree with the petitioners that this is an overly formalistic analysis inconsistent with the broad and purposive approach required in Charter cases. The effect of the AEPA on the petitioners was that, upon sentencing, they were required to spend more time in prison than they could reasonably have expected to do if they had been sentenced after their offences but before the AEPA came into force.
- [15] Although *Whaling* dealt only with s. 11(h), I find that the reasoning applies with equal force to s. 11(i) and is binding on me. Further, the applicability of its reasoning to s. 11(i) was specifically accepted by Ross J. of this court in *R. v. Vanalstine* (11 December 2012), Vancouver 25228 (B.C.S.C.), unreported. In that case, the defence sought an endorsement in the court's reasons for sentence confirming that parole eligibility was to be determined in

accordance with the law as it stood when the offences were committed. Ross J. said at para. 35:

- [35] Counsel submit that in addition to the clear language of the Charter, *R. v. Gamble*, [1988] 2 S.C.R. 595, establishes that an accused has the right to be tried and punished under the law in force at the time the offence was committed, and *Whaling v. Canada (Attorney General)*, 2012 BCSC 944, aff'd 2012 BCCA 435, stands for the proposition that the period of parole ineligibility is, for this purpose, part of punishment. The Attorney General agrees that the defence position is correct statement of law. I agree and conclude that in light of s. 11(i) of the Charter and the decision of this court affirmed on appeal in *Whaling*, the period of eligibility for parole in this case is to be determined on the basis of the law as it stood at the time that the offences were committed.
- [16] I consider that result to be binding upon me under the principle in *Hansard Spruce Mills Ltd. (Re)*, [1954] 4 D.L.R. 590, at p. 592. One judge of this court must follow the decision of another unless:
- (a) Subsequent decisions have affected the validity of the impugned judgment;
 - (b) it is demonstrated that some binding authority in case law, or some relevant statute was not considered;
 - (c) the judgment was unconsidered, a *nisi prius* judgment given in circumstances familiar to all trial Judges, where the exigencies of the trial require an immediate decision without opportunity to fully consult authority.
- [17] In my view, the fact that the Attorney General simply chose not to raise in *Vanalstine* the arguments now before me is not, in itself, sufficient to bring this case within those exceptions. In particular, I note that although the judgment was given orally, it was not given until three weeks after the sentence hearing. It cannot in any sense be described as "unconsidered."
- [18] I therefore find that the delay in parole eligibility created by the AEPA violates the s. 11(i) rights of these petitioners by subjecting them to greater punishment than what was in effect at the time of their offences. Having reached that conclusion, it is not necessary to consider s. 7 of the Charter.
- [19] The question then becomes whether the violation of the petitioners' charter rights can be justified under s. 1 of the Charter, which states:
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.

- [20] In order to establish justification under s. 1, the Attorney General must first show a pressing and substantial objective. It must then show that the that the impugned legislation is rationally connected to the objective, that the impairment of rights is no more than necessary to accomplish the objective and that the effect on those to whom the law applies is not disproportionately severe: *R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 138-140.
- [21] The objectives of the AEPA were accepted as valid by the Court of Appeal in *Whaling* and are not disputed by the present petitioners. Those objectives are stated by the Attorney General at para. 119 of its written submissions to include:
- (a) rehabilitating and successfully reintegrating offenders by shifting away from presumptive release to normal parole;
 - (b) maintaining public safety and reducing recidivism;
 - (c) shifting the focus of parole review from offence-based presumptive release to parole consideration based on the circumstances of the offender; and
 - (d) maintaining or restoring confidence in the administration of justice by ensuring sentences as administered reflect the sentences courts impose.
- [22] The petitioners do not challenge the constitutionality of the AEPA as such, only its application to those whose offences were committed before it came into effect. The Attorney General says that applying the AEPA to such offenders allows it to achieve its sentence management goals immediately and uniformly, ensures fairness, consistency and predictability of parole eligibility calculations and promotes confidence in the parole system. That appears to be the same argument that the Court rejected in *Whaling*:
- [65] The Attorney General's justification of the importance of the retrospective application of AEPA is essentially more efficient, uniform sentence management and administration for all offenders. 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. The arguments made by the Attorney General on appeal to the contrary are not persuasive.
- [23] However, the Attorney General raises a further issue that was not present, or at least not present to the same degree, in *Whaling*. The Attorney General says that retaining APR for some offenders based on the date of their offences would frustrate the objective of AEPA by creating severe logistical and administrative problems.

- [24] The Correctional Service of Canada ("CSC") generally calculates parole based on to the date of sentence, not the date of the offence. There is no direct relationship between those dates. Some offenders are sentenced many years after the offence. The date of the offence may itself span a long time period. Affidavits filed by the Attorney General suggest that in many cases it will be difficult for corrections staff to determine the date of the offence, either because that information is simply not provided or because a precise date of the offence is difficult to determine.
- [25] According to the Attorney General's evidence, some 1800 offenders in British Columbia, along with 12,300 across Canada, would have to be reviewed by CSC to determine their eligibility for APR. This contrasts to the situation in Whaling where, by the time the appeal was heard, the number of offenders affected in British Columbia had been reduced to 39.
- [26] The Attorney General says that the legislative scheme for parole eligibility has been completely replaced or modified at least eight times since the 1950s. Because of the time that may elapse between the offence and sentence, and because of the length of some sentences, corrections officials required to consider the date of the offence would have to become familiar with all of those different regimes and which ones applied at what times.
- [27] However, this case is concerned only with offenders who would have previously been eligible for APR. By definition, those are first time federal offenders sentenced for non-violent offences. In the context of the range of sentences being served in federal institutions, most such sentences are likely to be relatively short. Those sentenced before March 28, 2011 are already eligible for APR as a result of Whaling. In my view, it will be an extremely rare case that involves the difficult determination or lengthy historical analysis that the Attorney General fears. I find the Attorney General has failed to prove justification under s. 1.
- [28] The Attorney General also submits that any declaration of invalidity be suspended for one year to allow Parliament to legislate compliance with the Charter and/or the CSC to implement the necessary administrative changes. Such a suspension would deprive the present petitioners of all or most of the benefit of the declaration. Both will have become eligible for day parole under the normal system during the one-year that the declaration is suspended. The same will undoubtedly be true of many others affected.
- [29] In Whaling, the Court of Appeal said at para. 70 that for many of those affected "the declaration of invalidity would have no impact if its effectiveness was further postponed, rendering these proceedings moot." That consideration applies equally and perhaps with greater force in this case. If, as the Attorney General submits, a larger number of offenders might now be affected, that means there would be more individuals left with no effective remedy for a breach of their Charter rights.
- [30] I therefore conclude that the AEPA is not valid to the extent it applies to offenders sentenced for offences committed before March 28, 2011.

"N. Smith J."

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