

CANADA / JUDGMENT

Whaling v. Canada (Attorney General)

2012 BCCA 435

COURT

British Columbia Court of Appeal

DECIDED

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2012 BCCA 435 Whaling v. Canada (Attorney General) COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Whaling v. Canada (Attorney General), 2012 BCCA 435 Date: 20121102 Dockets: CA040061, CA040063, CA040059 Docket: CA040061 Between: Christopher John Whaling Respondent (Plaintiff) And Attorney General of Canada Appellant (Defendant) And British Columbia Civil Liberties Association Intervenor And Canadian Prison Law Association Intervenor

- and - Docket: CA040063 Between: Judith Lynne Slobbe Respondent (Plaintiff) And Attorney General of Canada Appellant (Defendant) And British Columbia Civil Liberties Association Intervenor And Canadian Prison Law Association Intervenor
- and - Docket: CA040059 Between: Cesar Maidana Respondent (Plaintiff) And Attorney General of Canada Appellant (Defendant) And British Columbia Civil Liberties Association Intervenor And Canadian Prison Law Association Intervenor Before: The Honourable Madam Justice Levine The Honourable Madam Justice D. Smith The Honourable Mr. Justice Groberman On Appeal from the Supreme Court of British Columbia, June 26, 2012 (Whaling v. Canada (Attorney General), Vancouver Registry, Docket Numbers S112998, S113784, S113785) Counsel for the Appellant Attorney General of Canada: C.D. Mitchell J. Dagsvik Counsel for the Respondents C.J. Whaling, J.L. Slobbe, C. Maidana: E. Purtzki Counsel for the Intervenor British Columbia Civil Liberties Association M. Jackson, Q.C. Counsel for the Intervenor Canadian Prison Law Association J.W. Conroy, Q.C. Place and Date of Hearing: Vancouver, British Columbia October 5, 2012 Place and Date of Judgment: Vancouver, British Columbia November 2, 2012 Written Reasons by: The Honourable Madam Justice Levine Concluded in by: The Honourable Madam Justice D. Smith The Honourable Mr. Justice Groberman Reasons for Judgment of the Honourable Madam Justice Levine:

Introduction

- [1] The question raised on these appeals is whether retrospective legislative changes to an inmate's eligibility for accelerated parole are contrary to that person's right under 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, not to be "punished again" after having been "finally punished" for an offence.
- [2] The respondents are offenders serving federal penitentiary sentences. Under the accelerated parole review ("APR") provisions of the Corrections and Conditional Release Act, S.C. 1992, c. 20 ("CCRA") in force when they were sentenced, they would have been eligible for accelerated day parole after having served one-sixth of their sentences, under a test that required the National Parole Board (now the Parole Board of Canada: Safe Streets and Communities Act, S.C. 2012, c. 1, s. 73) to release them if the Board was satisfied there were no reasonable grounds to believe that, if released, it was likely they would commit an offence involving violence.
- [3] The APR provisions were repealed by the Abolition of Early Parole Act, S.C. 2011, c. 11 ("AEPA"), effective March 28, 2011. Under s. 10 of the AEPA, the repeal of APR was made applicable to offenders who were serving their sentences, including the respondents. Under the remaining "normal" parole review provisions of the CCRA, the respondents were not eligible for day parole until six months before they served one-third of their sentences, and the Board may deny parole if there is any perceived risk of the offender committing an offence of any type.
- [4] The effect of the repeal of APR on each of the respondents was that the date of eligibility for release on day parole was delayed and the test for release on parole was made more onerous.
- [5] The summary trial judge held that the retrospective repeal of the APR violated the rights of the respondents under s. 11(h) of the Charter not to be punished again for the offence for which they were found guilty and sentenced, and the violation was not a reasonable limit on their rights under s. 1 of the Charter. She declared the retrospective provisions of the AEPA to be invalid and struck them down, refusing to suspend the declaration of invalidity.
- [6] The respondents also claimed that the retrospective repeal of APR violated their rights under s. 7 of the Charter. Having found a violation of s. 11(h), the trial judge did not find it necessary to deal with s. 7.
- [7] The Attorney General of Canada appealed the declaration of invalidity and applied for a stay of its effect. Madam Justice Saunders granted a stay pending the hearing of the appeal. This division dismissed the application by the Attorney General for a further stay pending the judgment of this Court.

- [8] I agree with the result of the trial judge's analysis, though I differ in some respects with her reasons for judgment. In my opinion, the retrospective application of the repeal of APR to offenders who were serving their sentences at the time of repeal 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.
- [9] Like the trial judge, I do not find it necessary to deal with s. 7 of the Charter.
- [10] It follows that I would dismiss the appeal. Statutory Provisions Accelerated Parole Review
- [11] APR was introduced with the coming into force of the CCRA on November 1, 1992. As explained by the Attorney General in his factum, APR differed from the normal parole process in three ways:
- (a) automatic and simplified procedure: the Service referred APR-eligible cases to the National Parole Board (the "Board"), so offenders did not need to apply, and review was generally on paper instead of a hearing in person;
 - (b) lower and presumptive standard for release: accelerated parole was assessed on a lower, presumptive standard ("no reasonable grounds to believe that the offender, if released, is likely to commit an offence involving violence") than normal parole ("the offender will not, by reoffending, present an undue risk to society" and "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"), and if the offender met the lower APR standard, the Board had no discretion but to direct release on parole; and
 - (c) earlier day parole eligibility: starting in 1997 as the result of a legislative amendment, the APR process for day parole was triggered earlier than the normal day parole process: after one-sixth of a sentence instead of six months before the full parole eligibility date.
- [12] The statutory framework for these provisions was in ss. 119.1, 125, 126, and 126.1 of the CCRA, the relevant portions of which read: When eligible for day parole – offenders eligible for accelerated parole review 119.1 The portion of the sentence of an offender who is eligible for accelerated parole review under sections 125 and 126 that must be served before the offender may be released on day parole is six months, or one sixth of the sentence, whichever is longer. Application 125(1) This section and section 126 apply to an offender sentenced, committed or transferred to penitentiary for the first time, otherwise than pursuant to an agreement entered into under paragraph 16(1)(b), other than an offender . . . Idem (1.1) For greater certainty, this section and section 126
- (a) apply to an offender referred to in subsection (1) who, after being sentenced, committed or transferred to penitentiary for the first time, is sentenced in respect of an offence, other than an offence referred to in paragraph (1)(a), that was committed before the offender was sentenced, committed or transferred to penitentiary for the first time; and

- (b) do not apply to an offender referred to in subsection (1) who, after being sentenced, committed or transferred to penitentiary for the first time, commits an offence under an Act of Parliament for which the offender receives an additional sentence. Review of cases by Service
- (2) The Service shall, at the time prescribed by the regulations, review the case of an offender to whom this section applies for the purpose of referral of the case to the Board for a determination under section 126. . . . Review by Board 126(1) The Board shall review without a hearing, at or before the time prescribed by the regulations, the case of an offender referred to it pursuant to section 125. Release on full parole
- (2) Notwithstanding section 102, if the Board is satisfied that there are no reasonable grounds to believe that the offender, if released, is likely to commit an offence involving violence before the expiration of the offender's sentence according to law, it shall direct that the offender be released on full parole. . . . Release on day parole 126.1 Sections 125 and 126 apply, with such modifications as the circumstances require, to a review to determine if an offender referred to in subsection 119.1 should be released on day parole. . . . Abolition of Early Parole
- [13] Sections 3 and 5 of the AEPA repealed ss. 119.1, 125, 126 and 126.1 of the CCRA. Section 10(1) of the AEPA, the transitional provision, provided that APR no longer applied to offenders who were sentenced, committed or transferred to penitentiary before, on or after the day of the coming into force of the repeal: 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. 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.
- [14] These transitional provisions, which repeal APR with respect to offenders like the respondents who were sentenced and incarcerated before the effective date of the repeal, are the subject of this appeal. Normal Parole Provisions
- [15] As a result of the repeal of APR, the normal parole provisions applied to all offenders then in custody. The timing of eligibility for day parole, the review process for both day and full parole, and the test for granting parole, were affected by the repeal of APR.

- [16] Instead of being eligible for day parole after having served the greater of one-sixth or six months of their sentence (CCRA, repealed s. 119.1), offenders are eligible for day parole at the later of the date that is six months before having served one-third of their sentence and when they have served six months of their sentence (CCRA, ss. 119, 120). (Six months will be the later date only for offenders whose sentences are less than three years. All of the respondents are serving sentences of three years or more.)
- [17] Instead of a referral by the Corrections Service to the Board (CCRA, repealed ss. 126(2) and (4), 126.1), the normal review process requires offenders to apply for day parole (CCRA, s. 122). The review by the Board of applications for both day and full parole generally includes a hearing and personal appearance by the applicant (CCRA, s. 140), instead of a review on paper without a hearing (CCRA, repealed s. 126(1)).
- [18] The test for granting parole under APR was whether the Board was "satisfied that there are no reasonable grounds to believe that the offender, if released is likely to commit an offence involving violence" (CCRA, repealed s. 126(2)). If that test was satisfied, s. 126(2) provided that the Board "shall direct the offender be released on ... parole". It had no discretion to refuse to grant parole.
- [19] Under the normal parole provisions, the test is more onerous. As the trial judge put it (at para. 20): ... any perceived risk of the offender committing an offence of any type may cause the application to fail. Also, the Board appears to have a discretion ("may grant parole") to deny parole even where the Board concludes that the statutory criteria are satisfied.
- [20] Section 102 of the CCRA provides: Criteria for granting parole
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. Charter Subsection 11(h), Section 1
- [21] The respondents claimed, and the trial judge found, that s. 10(1) of the AEPA violated s. 11(h) of the Charter to the extent that it applied retrospectively to offenders sentenced before March 28, 2011.
- [22] Section 11(h) of the Charter provides:
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;

- [23] The trial judge also found that the violation was not a reasonable limit within the meaning of s. 1 of the Charter:
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. Effect of Repeal of APR on the Respondents
- [24] In his factum, the Attorney General summarized the respondents' convictions and sentences, and the effect of the repeal of APR on their eligibility dates for day and full parole: Offences Sentence length Sentence date APR DP Normal DP Full parole Whaling · Weapons trafficking · Possession of firearms offences 4 years, 6 months Sept. 29, 2010 July 29, 2011 Sept. 29, 2011 March 29, 2012 Slobbe · Fraud, 7 counts · Fraud over \$5,000, 4 counts · Theft · Perjury · Forgery 7 years, 7 months April 22, 2010 July 27, 2011 April 30, 2012 Oct. 31, 2012 Maidana · Possession for purpose of trafficking 20kg cocaine · Trafficking 15kg cocaine 13 years, 6 months Sept. 30, 2010 Dec. 29, 2012 Sept. 30, 2014 March 31, 2015 Parties' Positions
- [25] The parties' positions at trial are mostly repeated on appeal. The issue is whether the retrospective repeal of APR was "punishment" within the meaning of s. 11(h) of the Charter.
- [26] The Attorney General emphasizes a purposive interpretation of s. 11(h) of the Charter and the repeal of APR. He argues that post-sentence changes to parole eligibility enacted in the CCRA are not additional punishment that engages the purpose of s. 11(h), which is to protect an offender against double jeopardy. He says that the CCRA deals with the management of sentences, and the purpose of the repeal of APR was not punitive but to better achieve correctional goals of rehabilitation, reintegration into the community, public safety and public confidence in the administration of justice. While the Attorney General acknowledges that delayed parole eligibility may constitute punishment when imposed by trial judges under the provisions of the Criminal Code, he says that it is not punishment when it is a consequence of changes in sentence management that do not have a punitive purpose.
- [27] The respondents say that both the purpose and effect of the repeal of APR must be considered in determining whether s. 11(h) is violated. They say that the meaning of punishment for the purpose of s. 11(h) is not as narrow as argued by the Attorney General, and the effect of delayed parole eligibility, resulting in increased deprivation of liberty, is additional punishment, whether imposed under the Criminal Code or the CCRA. They note that the trial judge found the purposes of the retrospective repeal of APR to include denunciation, deterrence and punishment. Trial Judge's Reasons for Judgment
- [28] The trial judge began her analysis by considering the meaning of "punishment" in the jurisprudence of the Supreme Court of Canada and adopting the meaning given in *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554 at paras. 62-63 (quoted by the trial judge at para. 52):

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. For example, an offence will be described as "punishable" on summary conviction and the offender will be "liable to a fine ... or [a term of] imprisonment" ... [examples omitted [by trial judge]].
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. [Emphasis added [by trial judge].]
- [29] In adopting this definition, the trial judge rejected the Attorney General's argument that "punishment" is limited to "true penal consequences", pointing out that in *Rodgers* the Supreme Court implicitly found that definition, derived from the earlier cases of *R. v. Wigglesworth*, [1987] 2 S.C.R. 541 and *R. v. Shubley*, [1990] 1 S.C.R. 3, was not exhaustive of the meaning of punishment for the purposes of s. 11(h).
- [30] She also noted (at para. 46) that the Supreme Court in *Rodgers* confirmed (at para. 58) that s. 11(h) of the Charter protects against additional punishment imposed after trial, conviction and sentence for an offence.
- [31] The trial judge examined the jurisprudence on the characterization of limitations on parole eligibility as "punishment". She concluded that in the context of sentencing, delayed parole eligibility was clearly "punishment", considering statements made by the Supreme Court of Canada in *R. v. Shropshire*, [1995] 4 S.C.R. 227, *R. v. Chaisson*, [1995] 2 S.C.R. 1118, and *R. v. Zinck*, 2003 SCC 6, [2003] 1 S.C.R. 41, and appellate decisions in *R. v. Logan* (1986), 14 O.A.C. 382, *R. v. Olah* (1997), 33 O.R. (3d) 385 (C.A.), and *R. v. Lambert* (1993), 123 Nfld. & P.E.I.R. 347 (Nfld. C.A.) (at paras. 61-68).
- [32] The trial judge then considered the characterization of parole ineligibility dictated by the CCRA. She reviewed conflicting trial court decisions on whether amendments to parole eligibility under the CCRA were "punishment". She agreed (at para. 75) with the conclusion in *Abel v. Edmonton Institute for Women (Director)* (2000), 275 A.R. 152 (Q.B.) "that retrospective abolition of early parole amounts to 'punishment' for the purposes of s. 11", but found none of these decisions helpful because in all of them the CCRA amendments were made before the offender was sentenced. In those cases, s. 11(i) of the Charter (which grants an accused person the benefit of lesser punishment where the punishment for the offence

has been varied between the commission of the offence and sentencing), not s. 11(h), was relevant (at para. 81).

- [33] The trial judge then turned to the question raised by the Attorney General: whether parole ineligibility imposed by a trial judge as part of a sentence under the Criminal Code is materially different from parole ineligibility resulting from the operation of the CCRA (at para. 83).
- [34] In this context, she discussed the distinction between the sentencing process and the parole regime, clearly drawn in cases such *Chaisson*, *Zinck*, and *R. v. M.*(C.A.), [1996] 1 S.C.R. 500. The Attorney General argued that where the Criminal Code expressly authorizes a trial judge to impose parole ineligibility as part of a sentence (ss. 743.6, 745.4) that is "punishment", but where the CCRA imposes parole ineligibility in the context of management of a sentence, that is not "punishment", but sentence administration. The trial judge rejected the argument that "the two regimes ... function within separate compartments (at para. 95), concluding that "the objectives and functions of the sentencing and parole regimes can and do overlap at times" (at para. 100).
- [35] In support of that conclusion, the trial judge analyzed the role of parole considerations in the sentencing process by reference to comments made by Justice Arbour in *R. v. Wust*, 2000 SCC 18, [2000] 1 S.C.R. 455. She concluded (at para. 105) that Arbour J.'s "understanding of the sentencing judge's role implies that the judge determines and imposes an offender's sentence in light, in part, of the statutory parole regime in force at the time". She found further support for this view in *Zinck* (at para. 18), concluding that although Justice LeBel stated that "Considerations relating to parole eligibility normally remained irrelevant to the determination of the fitness of the sentence", and that increasing "the length of a jail term to manipulate the term of parole ineligibility ... is quite improper", he did not intend "to contradict or qualify the conclusion in *Wust* that the determination of a fit sentence involves, in part, a consideration of the effects that the parole regime will have on the way in which the offender serves his or her sentence" (at paras. 106-107). (It is this part of the trial judge's reasoning with which I disagree, as explained further in these reasons for judgment.)
- [36] From this analysis, the trial judge stated her conclusions (at paras. 111, 113-114):
- [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. . . .

- [113] A liberal interpretation and application of the Charter will tend to consider the actual effect of the measure in issue, and not merely its label or position in the body of governing legislation. The Charter is not so easily evaded that an unconstitutional provision becomes constitutional when only its form is changed, and not its substance. Here, there can be no real doubt that the AEPA amendments will have significant actual effect on the way in which the two offenders who are still in prison will serve their sentences.
- [114] That is not to say that no change can be made to corrections and parole law and policy without distorting the sentence imposed. McLachlin J., in *Cunningham* [*Cunningham v. Canada*, [1993] 2 S.C.R. 143], explained that many changes for administrative and other reasons are inevitable and constitutionally unimpeachable: *Cunningham*, at 152. But, in my view, such changes do not include significant limitations, regardless of any exercise of the Board's discretion, to the parole eligibility of offenders who were sentenced before the legislated changes came into force. When such a change increases the harshness of the sentence, and does so after the judge has imposed it, the change surely occasions additional "punishment".
- [37] Having found that the retrospective application of the repeal of APR was a violation of s. 11(h) of the Charter, the trial judge then considered whether the violation was justified under s. 1 of the Charter. She accepted that the objectives of the AEPA were "pressing and substantial": "ensuring that sentences as administered respond properly to the sentences courts impose; by extension, the objective includes maintaining or restoring public confidence in the administration of justice". She found, however, that despite providing abundant evidence of the objectives of the AEPA, the Attorney General had not established that the retrospective application of the repeal of APR impaired the respondents' rights as little as possible to achieve the government's objective (at para. 121).
- [38] The trial judge refused to suspend the declaration of invalidity of the retrospective application of the AEPA for six months to allow the government to amend the legislation. She noted that the declaration of invalidity would not create a legislative gap, as the APR provisions would continue to apply to the respondents. She noted further that to allow the retrospective application of AEPA "to continue in effect would be to allow a continuing violation of the rights of at least two of the plaintiffs in a time-sensitive situation" and "would to a large degree render the declaration moot" (at para. 126). Section 11(h) of the Charter Purpose and Effect
- [39] I think it useful to set out at the outset of this discussion the relevant principles of Charter interpretation and the role in the analysis of reference to purpose and effect.
- [40] In this case, the question is whether the imposition of delayed parole eligibility post-sentence is "punishment" for the purpose of s. 11(h).
- [41] Both the purpose of the Charter right protected by s. 11(h), and the purpose and effect of the retrospective application of the AEPA, are relevant.

- [42] The proper approach to determining the purpose of a Charter right was summarized in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353 at paras. 15-17:
- [15] As for any constitutional provision, the starting point must be the language of the section. Where questions of interpretation arise, a generous, purposive and contextual approach should be applied.
- [16] Constitutional guarantees such as ss. 9 and 10 should be interpreted in a "generous rather than . . . legalistic [way], aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection" (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344). Unduly narrow, technical approaches to Charter interpretation must be avoided, given their potential to "subvert the goal of ensuring that right holders enjoy the full benefit and protection of the Charter" (*Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 23).
- [17] While the twin principles of purposive and generous interpretation are related and sometimes conflated, they are not the same. The purpose of a right must always be the dominant concern in its interpretation; generosity of interpretation is subordinate to and constrained by that purpose (P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), vol. 2, at pp. 36-30 and 36-31). While a narrow approach risks impoverishing a Charter right, an overly generous approach risks expanding its protection beyond its intended purposes. In brief, we must construe the language of ss. 9 and 10 in a generous way that furthers, without overshooting, its purpose: *Big M Drug Mart*, at p. 344.
- [43] The relevance of the purpose and effect of impugned legislation was discussed in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 331-332, 334: ... In my view, both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through the impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and actual effects have often been looked to for guidance in assessing the legislation's object and thus, its validity. Moreover, consideration of the object of legislation is vital if rights are to be fully protected. The assessment by the courts of legislative purpose focuses scrutiny upon the aims and objectives of the legislature and ensures they are consonant with the guarantees enshrined in the Charter. The declaration that certain objects lie outside the legislature's power checks governmental action at the first stage of unconstitutional conduct. Further, it will provide more ready and more vigorous protection of constitutional rights by obviating the individual litigant's need to prove effects violative of Charter rights. It will also allow courts to dispose of cases where the object is clearly improper, without inquiring into the legislation's actual impact. . . . In short, I agree with the respondent that the legislation's purpose is the initial test of constitutional validity and its effects are to be considered when the law under review has passed or, at least, has purportedly passed the purpose test. If the legislation fails the purpose test, there is no need to consider further its

effects, since it has already been demonstrated to be invalid. Thus, if a law with a valid purpose interferes by its impact, with rights or freedoms, a litigant could still argue the effects of the legislation as a means to defeat its applicability and possibly its validity. In short, the effects test will only be necessary to defeat legislation with a valid purpose; effects can never be relied upon to save legislation with an invalid purpose.

- [44] Thus, in this case, the purpose of s. 11(h) and the purpose and effect of the retrospective application of the AEPA, are relevant. Purpose of Section 11(h) of the Charter
- [45] There is no disagreement that the purpose of s. 11(h) is to protect individuals against double jeopardy: from being tried or punished again for an offence for which the offender has already been found guilty and punished. The dispute in this case is how to interpret "punishment" in this context.
- [46] The Attorney General advances a restrictive interpretation of s. 11(h). He relies on court decisions that he says support giving it a limited scope: *Johnston v. British Columbia (Superintendent of Motor Vehicles)* (1987), 27 C.R.R. 206 (B.C.S.C.), where it was decided that civil consequences that may flow from a conviction for a criminal offence were not "punishment" for the purpose of s. 11(h), and *Wigglesworth and Shubley*, which held that s. 11(h) applied where the punishment involved "true penal consequences".
- [47] The trial judge found, and I agree, that this restrictive approach to the application of s. 11(h) is contrary to the analysis in *Rodgers*. In that case, the Supreme Court of Canada gave an expanded meaning to "punishment" for the purpose of s. 11(h) (at para. 63): 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.
- [48] The question is whether a particular sanction falls within this definition. It is clear from cases cited by both parties that not every consequence of being convicted of a criminal offence is "punishment". In *Rodgers*, the Supreme Court of Canada found that being required to provide a sample for the DNA data bank under the DNA Identification Act, S.C. 1998, c. 37 and the Criminal Code was not punishment for the purpose of s. 11(h), and this Court found in *R. v. S.S.C.*, 2008 BCCA 262, that being required to register under the Sex Offender Registration Act, S.C. 2004, c. 10, was not punitive and therefore did not engage a fundamental principle of justice for the purpose of s. 7 of the Charter.
- [49] As the trial judge found, however, courts have consistently found delayed parole eligibility to be "punishment" in the context of sentencing. In my opinion, a consideration of the purpose of s. 11(h) does not exclude delayed parole eligibility arising after sentencing from also being characterized as "punishment". Indeed, by its terms, s. 11(h) applies only to sanctions imposed after sentencing. It is the purpose and effect of the sanction that must be considered. Purpose and Effect of Retrospective Application of the AEPA

- [50] The Attorney General's primary argument is that the purpose of the AEPA is to improve sentence management, not to further punish offenders. He says that purpose is a key consideration in determining whether a measure amounts to punishment, and because the purpose of the CCRA in general, and the AEPA specifically, is not punitive but addresses the implementation of punishment already imposed in the sentencing process, delayed parole eligibility imposed by the CCRA cannot be punishment. He argues that the trial judge wrongly based her decision at least in part on a conclusion that the parole regime is relevant when the courts decide on a fit sentence and thus the meaning of punishment in the sentencing process applies as well after sentencing.
- [51] I will deal with the last point first. It was not necessary to the decision of the trial judge to find that parole considerations are relevant to trial judges in imposing sentences (other than as expressly provided for in the Criminal Code). In my opinion, this part of her analysis resulted from an emphasis on the purpose of the AEPA as determinative of the question of whether delayed parole eligibility imposed after sentencing was punishment. As discussed in *Big M Drug Mart Ltd.*, it is clear that both purpose and effect of legislation are relevant to the constitutional analysis. In the end, the trial judge properly applied these principles in finding the retrospective application of the AEPA to be punitive both in its purpose (at para. 112) and effect (at paras. 111 and 113).
- [52] The jurisprudence of this Court is clear that in imposing a sentence a judge is not to consider how parole may affect it: see *R. v. Bernier*, 2003 BCCA 134 at paras. 45 (per Southin J.A.) and 85-86 (per Prowse J.A. concurring), and *R. v. Tao*, 2010 BCCA 2380 at paras. 12-13. Madam Justice Southin said this in *Bernier*: To put this another way, judges, in determining a fit sentence, are to put the powers conferred by the Corrections and Conditional Release Act on the National Parole Board out of their minds. Parliament has given certain powers to the judiciary and others to the Board and it is not for the one to trespass into the field of the other.
- [53] The separation of the roles of the sentencing judge and the corrections authorities and their different purposes does not, however, determine the question for decision in this case. The analytical framework set out in *Big M Drug Mart Ltd.* requires an examination of both the purpose and effect of the impugned legislation. Where the purpose is found to be valid, the effect is then considered to determine if "a law with a valid purpose interferes by its impact, with rights or freedoms ..." (*Big M Drug Mart Ltd.* at 334).
- [54] In this case, there is no serious dispute that the purpose of the AEPA is valid. The Attorney General points to evidence it provided at trial that supports repealing APR to enhance the purposes and principles of parole regimes: rehabilitating and successfully reintegrating offenders by shifting away from presumptive release to normal parole; maintaining public safety and reducing recidivism; shifting the focus of parole review from offence-based presumptive release to parole consideration based on the circumstances of the offender; and maintaining or restoring confidence in the administration of justice by ensuring sentences as administered reflect the sentences courts impose. These purposes are entirely

within the constitutional powers of the government, and the respondents take no issue with the AEPA on that basis.

- [55] There is some dispute about whether the purpose of the AEPA, and in particular its retrospective application, includes punishment. The Attorney General takes the position that none of the purposes is punitive, and the AEPA cannot therefore be characterized as punishment. The trial judge found, based on Hansard excerpts of comments made in Parliament by various members (to which she said she gave little weight), that the objectives of repealing APR included denunciation, deterrence and punishment (at para. 112). The Attorney General maintains that the concerns expressed by the members of Parliament underscored the need to abolish APR retrospectively, and are not determinative of the purpose of the AEPA.
- [56] I agree that whether the purposes of the AEPA include a punitive element is not determinative of its purpose, or of whether it is "punishment" and therefore violates s. 11(h). The answer, as the trial judge found, is in a consideration of its effect on the respondents.
- [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.
- [60] I would not accede to this ground of appeal. Section 1 of the Charter
- [61] The trial judge found that the retrospective transitional provision of the AEPA was not reasonably justified in accordance with s. 1 of the Charter. She accepted that the objectives of the AEPA, described by her as ensuring that sentences as administered respond to the sentences imposed and maintaining or restoring public confidence in the administration of justice, were pressing and substantial. She found, however, that the Attorney General had not established that its retrospective application minimally impaired the respondents' rights under s. 11(h).

- [62] The Attorney General argues that the trial judge failed to recognize the sentence management objectives of the AEPA as pressing and substantial, and thus did not properly apply the tests of rational connection, minimal impairment and proportionality to the retrospective transitional provision. He says that applying the same parole rules to all offenders was a rational means of achieving the objectives of the legislation and was within the reasonable range of alternatives available to Parliament while minimally impairing the rights of offenders already serving their sentences. He says further that putting all offenders "on a level playing field" in order to achieve the objectives of the legislation "outweighs the deleterious effects on offenders who might have hoped to benefit from conditional release earlier in their sentences under a test that is easier to meet".
- [63] The respondents say that the Attorney General's argument on appeal raises the sentence management objectives for the first time, and points out that the trial judge found that the evidence tendered at trial did not address the importance of the retrospective transitional provision.
- [64] The Attorney General's justification for the transitional provision continues his focus on the purpose and objectives of the AEPA generally, with which the respondents take no issue. The question in this case is whether the retrospective application of the AEPA is sufficiently important to justify the violation of the respondents' rights not to be punished again by harsher treatment in the administration of their sentence than they would have been had the repeal of APR not applied to them. As Justice McLachlin (as she then was) pointed out in *RJR-MacDonald Inc. v. Canada (A.G.)*, [1995] 3 S.C.R. 199 at para. 144: Care must be taken not to overstate the objective. The objective relevant to the s. 1 analysis is the objective of the infringing measure, since it is the infringing measure and nothing else which is sought to be justified. If the objective is stated too broadly, its importance may be exaggerated and the analysis compromised. [Emphasis in original.]
- [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.
- [66] I would not accede to this ground of appeal. Section 7 of the Charter

- [67] Having found the retrospective application of the AEPA violates the rights of the respondents under s. 11(h) of the Charter and are not justified under s. 1, it is not necessary to deal with their arguments that their rights under s. 7 of the Charter are violated. Stay of Declaration of Invalidity
- [68] At the conclusion of the hearing of the appeals, the Court ordered that the stay of the declaration of invalidity would not be extended.
- [69] The evidence before the Court was that two of the respondents were still in jail awaiting parole review under the normal parole provisions. Mr. Whaling had been released on bail pending his conviction appeal. Ms. Slobbe will be eligible for full parole on October 31, 2012. Mr. Maidana will be eligible for day parole under APR on December 29, 2012, while he would have to wait until September 30, 2014 under the AEPA. Thus, if the declaration was to have any impact on the respondents, it was only by making it effective immediately.
- [70] The evidence also showed that of 118 offenders in British Columbia affected by the declaration of invalidity on March 28, 2011, by September 24, 2012, the number was reduced to 39. For many of those, as for the respondents, the declaration of invalidity would have no impact if its effectiveness was further postponed, rendering these proceedings moot.
Summary and Conclusion
- [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.
- [72] It follows that I would dismiss the appeals. "The Honourable Madam Justice Levine" I Agree: "The Honourable Madam Justice D. Smith" I Agree: "The Honourable Mr. Justice Groberman"

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