COURT OF APPEAL

Court of Appeal File No. CA040061

BETWEEN

CHRISTOPHER JOHN WHALING

Respondent (Plaintiff)

AND:

ATTORNEY GENERAL OF CANADA

Appellant (Defendant)

Court of Appeal File No. CA040063

BETWEEN

JUDITH LYNN SLOBBE

Respondent (Plaintiff)

AND:

ATTORNEY GENERAL OF CANADA

Appellant (Defendant)

Court of Appeal File No. CA040059

BETWEEN

CESAR MAIDANA

Respondent (Plaintiff)

AND:

ATTORNEY GENERAL OF CANADA

Appellant (Defendant)

FACTUM OF THE INTERVENER BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

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CHRONOLOGY OF RELEVANT DATES IN THE LITIGATION

The British Columbia Civil Liberties Association ("BCCLA") adopts the chronology included in the factum of the appellant.

OPENING STATEMENT

1. This appeal is about whether legislative changes restricting parole for prisoners should be permitted to have retrospective effect. The BCCLA submits that the government's attempt to retrospectively increase the period of parole ineligibility for federally incarcerated individuals clearly violates the principles of law found in s.11(*h*) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") that protect individuals from being subjected to punishment beyond that which was prescribed at the time of the offence and imposed at the time of sentencing. Parole ineligibility falls within the "arsenal of sanctions to which an accused may be liable in respect of a particular offence". As a consequence, the *Charter* precludes retrospective changes that work adversely to the interests of the persons affected thereby.

2. The *Charter* guarantees protection of rights for all Canadians. The protection of those rights is of particular and immediate importance for those who are caught up in the criminal justice system, from when they are investigated, arrested and charged, through the criminal trial process and then, if convicted of an offence, through the duration of their sentence. Prisoners experience significant restrictions on their rights and freedoms as a result of their incarceration. Prisoners are particularly vulnerable to arbitrary exercises of state power. It is of the utmost importance to Canadian society that the law be applied and interpreted to ensure that convicted prisoners, in spite of their imprisonment, retain all civil rights and liberties save those which are of necessity expressly taken away upon conviction.

3. These appeals presents this Court with the opportunity to ensure that the rights and freedoms of federally convicted prisoners are guaranteed to the extent demanded by the *Charter* and by the general principles underlying a constitutional democracy founded upon the principles of the rule of law.

PART 1 - STATEMENT OF FACTS

4. The Attorney General of Canada has appealed to this Honourable Court from the judgment of Madam Justice Holmes (the "Trial Judge"), finding s.10(1) of the *Abolition of Early Parole Act* ("*AEPA*") unconstitutional to the extent that it applies to offenders who were sentenced prior to the *AEPA* coming into force.

Whaling v. Canada (Attorney General), 2012 BCSC 944 [Reasons of Holmes J.]

5. The British Columbia Civil Liberties Association (the "BCCLA") intervenes to assist this Court in its analysis of the *Charter* interests engaged by the Transitional Provision of the *AEPA*.

6. The BCCLA accepts the Trial Judge's factual findings. To the extent necessary, the BCCLA will refer to those factual findings below.

PART II – ISSUES ON APPEAL

7. This factum will focus on two issues which arise within these appeals: (1) the nature of the principles underlying s.11(*h*) of the *Charter*, and (2) the liberty interests engaged by post-sentence amendments to parole eligibility in light of the experience of other common law jurisdictions.

PART III - ARGUMENT

The Interests s.11(h) Seeks to Protect

8. The BCCLA submits that s.11(*h*) of the *Charter* must be given a broad and purposive interpretation based on the fundamental principles in law which underlie this provision.

9. In one of the first major cases involving the interpretation of the *Charter*, the Supreme Court of Canada ("S.C.C.") clearly stated that the proper approach to defining the rights and freedoms guaranteed by the *Charter* is a purposive one. In essence, the meaning of the right or freedom guaranteed by a particular section of the *Charter* is to be ascertained in light of the interests it was meant to protect.

Hunter et al. v. Southam Inc., [1984] 2 S.C.R. 145 at 157

10. The purposive approach to *Charter* interpretation was further elaborated upon by the S.C.C. in *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 at paragraph 117 [*Big M Drug Mart*].

11. When the purpose of s.11(*h*) of the *Charter* is analyzed in light of its historical origins, the rights and freedoms with which it is associated within the *Charter*, and the larger objects of the *Charter* itself, it is clear that s.11(*h*) has the following purposes: (1) to ensure certainty and fairness in sentencing; (2) to protect individuals from any state action which has the purpose or effect of adding punishment of which a convicted individual has not been provided fair notice; and (3) to restrict the government from exercising its powers arbitrarily.

12. The BCCLA submits that s.11(*h*) must be read in light of the totality of the rights guaranteed under s.11 of the *Charter*. It must also be read in light of the Preamble and the rights and interests protected under s.7 of the *Charter*.

13. Section 11 of the *Charter* sets out a series of rights and protections to be afforded to individuals charged with or convicted of an offence. The term "offence" within s.11 has been interpreted such that the rights enumerated under that section become engaged when an individual is charged with or convicted of a criminal offence, a quasi-criminal offence, or any other offence which attracts true penal consequences.

R. v. Rodgers, [2006] 1 S.C.R. 554, paras. 60-61 [*Rodgers*]

14. As a whole, s.11 of the *Charter* serves the supremely important role in a constitutional democracy of ensuring that individuals accused by the state of committing an offence are provided with fair notice that a particular action or omission constitutes an offence and of the applicable sentence, and certainty in how one will be both tried and punished for the offence. This purpose of s.11 of the *Charter* becomes ever more evident when read in conjunction with both the Preamble and s.7 of the *Charter*.

15. The Preamble to the *Charter* recognizes that Canada is founded on the principles of the rule of law. One of the fundamental principles of the rule of law is the principle of legal certainty. This principle of law requires that those who are

subject to the law be able to predict reliably what legal rules will govern their conduct and how those rules will be interpreted and applied.

Brian Z. Tamahaha, *On the Rule of Law: History, Politics, Theory* (Cambridge, UK: Cambridge University Press, 2004) at 66

16. Section 7 of the *Charter* protects everyone's right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. The protections guaranteed by s.7 do not cease once an individual is subjected to a deprivation of liberty by virtue of being charged with or convicted of an offence. Section 11 of the *Charter* is an expression of some of the liberty and security of the person guarantees, which the framers of the *Charter* found would violate the principles of fundamental justice if not protected.

17. The BCCLA submits that principles of fundamental justice and the principle of legal certainty embodied in the *Charter* underlie the protections expressed in s.11(*h*) to protect individuals from being subjected to punishment beyond that which was prescribed at the time of the offence and imposed at the time of sentencing. The type of punishment s.11(*h*) provides protection from includes the "arsenal of sanctions to which an accused may be liable in respect of a particular offence".

Rodgers, *supra*, para. 63

The Applicability of Jurisprudence from Other Common Law Jurisdictions to the Interpretation and Application of s. 11(h) of the Charter

18. The Appellant submits that the purpose of legislation is key in considering whether a measure amounts to punishment within the meaning of s.11(*h*). The Appellant further submits that the role of purpose in the s.11(*h*) analysis distinguishes the Canadian experience from other common law jurisdictions.

Appellant's Factum, paras. 60 and 62

19. The BCCLA submits that the experience of other common law jurisdictions can be instructive in determining whether a particular measure amounts to punishment within the meaning of s.11(*h*) for two reasons:

(1) in determining the constitutionality of legislation, both purpose and effect are relevant, as they are in other common law jurisdictions; and

(2) the principles underlying s.11(*h*) outlined above are the same basic principles of law, which courts in other common law jurisdictions have turned to in resolving issues similar to those raised in these appeals.

20. In the decision of *Big M Drug Mart, supra*, the S.C.C. emphasized the importance of considering both the purpose and effect of legislation when considering the constitutionality of legislation. These remarks were not distinct to any particular section of the *Charter*, but rather were made in reference to a determination of constitutionality generally.

Big M. Drug Mart, *supra*, paras. 80-81

21. It is only where the purpose of the legislation is determinative of the issue, because the purpose clearly offends the *Charter*, that it may be unnecessary to consider the effect of the impugned legislation.

Big M Drug Mart, *supra*, para. 85

22. The BCCLA submits that it is significant in the present case that the Respondents' claims related to the effect of s.10 of the *AEPA* on their *Charter* rights and it was the effect of the impugned legislation that the Trial Judge considered and found to violate s.11(*h*) of the *Charter*.

Reasons of Holmes J., para. 113

23. As the decision in *Big M Drug Mart* demonstrates, the Canadian approach of considering both the purpose and effect of legislation is an approach that is shared with the U.S.

Big M Drug Mart, *supra*, para. 82

24. As the following review of appellate level decisions from other common law jurisdictions will demonstrate, the decisions were resolved with reference to the principles of fair notice, legal certainty and the need to restrain arbitrary exercises of governmental powers. These are the same principles which the BCCLA says underlie s.11(*h*) of the *Charter*. For this reason and for the reasons outlined

above, the BCCLA submits that the following decisions concerning the validity of retrospective parole ineligibility schemes are instructive in the present appeals.

The Experience of Other Common Law Jurisdictions

25. As noted by the Trial Judge there is no Canadian precedent dealing with the issue of whether the retrospective abolition of early parole under the *Corrections and Conditional Release Act* has the effect of imposing additional punishment post-sentence. However, other common law jurisdictions have considered changes to parole and early release schemes that have increased the duration of an offender's incarceration post-sentence. When this issue has arisen, appellate courts in both the U.S. and the U.K. have found such measures to constitute additional punishment and to be invalid.

Reasons of Holmes J., paras. 108-110

26. In 1981 the U.S. Supreme Court was called upon to consider the constitutionality of a Florida statute which had the effect of reducing the amount of time deducted from a prisoner's sentence for good conduct. The court found that the statute was unconstitutional to the extent the law applied to an individual whose crime was committed prior to the enactment of the statute.

Weaver v. Graham (Governor of Florida) (1981), 450 U.S. 24 [*Weaver*]

27. Florida, like other U.S. States, has enacted statutes which reward convicted prisoners for good conduct by reducing the portion of the sentence one must serve. In 1978 the Florida Legislature enacted a new statute, repealing the earlier one and changing the formula for calculating the amount of time gained for good conduct. Upon the coming into force of the new statute, the State of Florida applied it to all prisoners, including those whose offences were committed prior to the enactment of the statute.

Weaver at 450 U.S. 25-27

28. The U.S. Constitution includes an *ex post facto* clause, which enshrines rights similar to those guaranteed in sections 11(*g*) and (*h*) of the *Charter*. The *ex post facto* clause prevents the enactment of any law which imposes punishment for an

act which was not punishable at the time it was committed or which imposes additional punishment to what was then prescribed.

Weaver at 450 U.S. 28
See also Bryan R. Diederich, "Risking Retroactive Punishment: Modifications of the Supervised Release Statute and the Ex Post Facto Prohibition", (1999) 99 *Columbia Law Review* 1551, at p.1564 [Diederich]

29. In interpreting the *ex post facto* clause, the U.S. Supreme Court found that the prohibition served a dual purpose: (1) to ensure that legislative acts give fair warning of their effect and permit individuals to rely on the their meaning; and (2) to restrict governmental power by restraining arbitrary legislation:

> The presence or absence of an affirmative, enforceable right is not relevant, however, to the *ex post facto* prohibition, which forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred. Critical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.
>
> *Weaver* at 450 U.S. 28-30

30. The U.S. Supreme Court proceeded to find that the Florida statute violated the *ex post facto* clause as it had the effect of substantially altering the consequences attached to a crime already committed and thereby changed the quantum of punishment.

Weaver at 450 U.S. 33, 35-36

31. In *California Department of Corrections v. Morales* (1995), 514 U.S. 499 [*Morales*], the issue before the U.S Supreme Court was an amendment to the availability of parole review hearings. Previously, prisoners in California were reviewed for parole suitability once a year. That law was amended such that following the initial parole hearing, the Parole Board could determine that a finding of suitability would be unlikely in subsequent years and could defer subsequent parole hearings. In that case, the court found that the amendment did not in fact add punishment. It is notable that under the law challenged in *Morales* the date of a prisoner's initial parole hearing was unchanged.

32. In *Lynce v. Mathis* (1997), 519 U.S. 433 [*Lynce*], the U.S. Supreme Court again emphasized the dual purpose of the *ex post facto* clause as outlined in *Weaver, supra.* This case concerned a Florida statute which cancelled the early release credits that had been awarded to certain prisoners. In considering the historical roots and the purpose of the *ex post facto* clause, the U.S. Supreme Court stated the following:

> The specific prohibition on *ex post-facto* laws is only one aspect of the broader constitutional protection against arbitrary changes in the law. In both the civil and the criminal context, the Constitution places limits on the sovereign's ability to use its law making power to modify bargains it has made with its subjects. The basic principle is one that protects not only the rich and the powerful ..., but also the indigent defendant engaged in negotiations that may lead to an acknowledgment of guilt and a suitable punishment.
>
> *Lynce*, *supra*, at p.2

33. In *Lynce*, the court found that both the purpose and effect of the statute was to prevent the early release of certain convicted prisoners and held that if a prisoner was in fact properly eligible for parole under the previous statute, then the effect of the new statute was to increase the punishment.

Lynce, *supra*, at p.5

34. In the U.K., the Home Secretary is granted the statutory power to enact policies regarding the determination of parole ineligibility. This role is distinct from that of the sentencing judge in that the judge defines the term of imprisonment and the Home Secretary determines the first review date of the prisoner, which in turn determines the earliest date on which a prisoner can be released. In *Pierson v. Secretary of State for the Home Department* [1977] All E.R. 577 [*Pierson*], the House of Lords addressed the issue of whether the Home Secretary had the general power to increase the period of parole ineligibility which his or her predecessor had previously fixed and communicated to a convicted prisoner. In a 3-2 decision, the House of Lords held that the Home Secretary's power to enact policies regarding parole ineligibility did not include the power to retrospectively increase the period of parole ineligibility.

35. Lord Steyn in his reasons noted the importance of referring to constitutional theory in a case regarding private rights and public powers. In finding that the

Home Secretary did not have the power to increase the period of parole ineligibility retrospectively, he remarked that the statutory provision in the U.K. prohibiting a retrospective increase of a lawfully imposed sentence was simply an expression of the general principle in common law, founded in the rule of law, which enforces minimum standards of fairness, both substantive and procedural:

> The general principle of our law is therefore that a convicted criminal is entitled to know where he stands so far as his punishment is concerned. he is entitled to legal certainty about his punishment. His rights will be enforced by the courts. Under English law a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication.
>
> ...
>
> ... The correct analysis of this case is in terms of the rule of law. The rule of law in its wider sense has procedural and substantive effect.

Pierson, *supra* at p.25, 29

36. As Bryan Diederich points out, the concern with arbitrary exercises of government power which underlies the U.S. *ex post facto* clause also stem from the principle of the rule of law, a fundamental principle in a constitutional democracy.

Diederich, *supra*, at p.1574

37. The reasons of Lord Hope of Craighead in *Pierson* emphasize the principles of fairness in concluding that the retrospective increase in the period of parole ineligibility amounted to additional punishment:

> The minimum standard of fairness does not permit a person to be punished twice for the same offence. Nor does it permit a person, once he has been told what his punishment is to be, to be given in substitution for it a more severe punishment.

Pierson, *supra*, at p.41

38. The New Zealand Supreme Court, which has also considered the impact of a retrospective increase in parole ineligibility has not come to the conclusion that such amendments are unlawful under New Zealand law. In New Zealand, both the Sentencing Act and the Bill of Rights Act provide that anyone convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing has the right to the benefit of the lesser penalty.

The case of *Morgan v. Superintendent, Rimutaka Prison*, [2005] NZSC 26 [*Morgan*], the guarantee set out above was relied on to challenge the validity of a post-sentence amendement to the period of parole eligibility. In *Morgan* the majority of the Supreme Court held that the term "penalty" within these Acts refers to a maximum applicable penalty prescribed for an offence.

39. The BCCLA submits that right protected under the New Zealand Bill of Rights Act is analogous to the protection guaranteed under s.11(*i*) of the *Charter*. It is the position of the BCCLA that the majority decision in *Morgan* is not instructive in the present appeals which do not involve the interpretation of "the punishment for the offence" under s.11(*i*) but rather "punishment" as that term applies in a distinct manner under s.11(*h*) of the *Charter*.

40. In her dissenting judgment in *Morgan*, Elias C.J. in her review of the U.S., U.K. and Canadian jurisprudence concluded that "it is wrong to characterise release entitlements as matters of "administration" rather than "penalty". Both sentence and release are essential components in identifying the penalty to which an offender is subject". This is the interpretation adopted by Holmes J. It is the right and principled interpretation in light of the purposes and interests that s.11(*h*) of the *Charter* protects.

Morgan, *supra*, para. 5

41. In the submissions of the BCCLA, the laws in the U.K. and the U.S., which prohibit an increase in punishment once sentence has been lawfully imposed by a judge are based on the same basic principles as s.11(*h*) of the *Charter*, that is the principles of legal certainty and fair notice and the principle that government should be restricted in its ability to arbitrarily modify the bargains it has made with its subjects.

42. In commenting on the necessary restrictions on the arbitrary exercise of power by the legislature in a constitutional democracy, Diederich notes the particular risks from *ex post facto* laws to prisoners:

> Normally, the fact that a legislator chooses to respond to popular pressures by passing legislation would not be viewed as a defect in the

> constitutional process. However, the situation with ex post facto laws is somewhat different. ...
>
> Passing ex post facto increases in punishment for sentenced offenders may be the quintessential example of what the Founders were attempting to avoid. It cannot be denied that prisoners are a minority interest: They are an insulated group that lacks any meaningful political access; felons tend to be poor, lack social standing, and are often not even allowed to vote. As such they are the perfect target for ambitious legislators seeking to gain approval from their constituencies. It is just this sort of targeting that the Ex Post Facto Clauses were intended to prevent.
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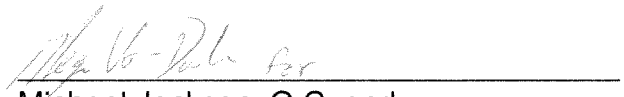
> Diederich, *supra*, at p.1579

43. The BCCLA submits that the Transitional Provision of the *AEPA*, which retrospectively increases the period of parole ineligibility for federally incarcerated individuals is a measure that forms part of the "arsenal of sanctions to which an accused may be liable in respect of a particular offence" and clearly violates the principle of law found in s.11(*h*) of the *Charter* that a lawfully imposed sentence cannot be increased retrospectively.

PART IV - NATURE OF ORDER SOUGHT

44. The Court should affirm the finding of Holmes J. that the Transitional Provision of the *AEPA* was "punishment" for the purposes of s.11(*h*) of the *Charter*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



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September 13, 2012

LIST OF AUTHORITIES

Jurisprudence

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Secondary Sources