

**IN THE SUPREME COURT OF CANADA  
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)**

BETWEEN:

**ATTORNEY GENERAL OF CANADA**

Appellant  
(Appellant)

and

**CHRISTOPHER JOHN WHALING, JUDITH LYNN SLOBBE and CESAR MAIDANA**

Respondents  
(Respondents)

and

**ATTORNEY GENERAL OF ONTARIO**

Intervener

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**FACTUM OF THE INTERVENER, THE BRITISH COLUMBIA  
CIVIL LIBERTIES ASSOCIATION**

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## PART I: OVERVIEW

1. This appeal is about whether legislative changes in the *Abolition of Early Parole Act*<sup>1</sup> restricting parole eligibility may be permitted to have retrospective effect. The British Columbia Civil Liberties Association (the “BCCLA”) submits that the Appellant’s attempt to retrospectively increase the period of parole ineligibility violates s. 11(h) of the *Charter*<sup>2</sup>.
2. Parole ineligibility falls within the “arsenal of sanctions to which an accused may be liable in respect of a particular offence”.<sup>3</sup> For both the prisoner and the society that uses imprisonment as part of its arsenal of sanctions, the conditions under which the sentence of imprisonment is served, including the regime for conditional release, should be viewed as part of the continuum of the criminal justice system. On that continuum, the *Charter*, and in this case s.11(h), have a vital role to play, both to ensure certainty and fairness, and to protect the most vulnerable and vilified citizens against the arbitrary exercise of governmental power.
3. The BCCLA makes two submissions in this appeal. First, the interests protected by s.11(h) of the *Charter* must be given a broad and purposive interpretation that respects the rule of law, including the requirements of fair notice and legal certainty. Second, a comparative law approach supports the conclusion that post-sentence amendments to parole regimes that increase the duration of imprisonment before parole eligibility constitute punishment and violate s. 11(h).
4. The BCCLA adopts the statement of facts in the Respondents’ factum.<sup>4</sup>

## PART II: QUESTIONS IN ISSUE

5. The BCCLA’s submissions focus on whether the *AEPA* infringes s. 11(h) of the *Charter*.

## PART III: ARGUMENT

### a) Section 11(h) Must be Given a Broad and Purposive Interpretation

6. Section 11(h) must be given a broad, purposive interpretation that takes account of its objects, the rights and freedoms with which it is associated, and the larger objectives of the *Charter* itself.<sup>5</sup>

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<sup>1</sup> The *Abolition of Early Parole Act*, S.C. 2011, c. 11 [the “*AEPA*”].

<sup>2</sup> *Canadian Charter of Rights and Freedoms* (“*Charter*”), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>3</sup> *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554 [“*Rodgers*”], at para. 63.

<sup>4</sup> Respondents’ Factum, at paras. 8-48.

<sup>5</sup> *Hunter et al. v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 157.

7. Read in this way, s. 11(*h*) serves the following purposes: (1) to ensure certainty and fairness in sentencing; (2) to protect individuals from 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.

8. These protections are reflected in the *Charter*'s Preamble, which recognizes that Canada is founded on the principles of the rule of law, of which fair notice and legal certainty are central requirements.<sup>6</sup> They are also reflected in s. 7 of the *Charter*, which forms part of the context in which s. 11 must be read. The protections guaranteed by s. 7 do not cease once an individual is charged with or convicted of an offence. Rather, s. 11(*h*) is an expression of some of the liberty and security of the person guarantees, which, if not protected, would violate the principles of fundamental justice.

**b) A Comparative Law Approach Supports the Rulings of the Court Below**

9. The experience of other common law jurisdictions is instructive in interpreting and applying s. 11(*h*). Like Canada, other common law jurisdictions consider both the purpose and effect of legislation as relevant to determining its constitutionality. Furthermore in determining whether a particular measure amounts to punishment, other common law jurisdictions have turned to the same interests as those protected by s. 11(*h*), including fair notice, legal certainty, and protection from arbitrary exercises of government power. In this context, other common law jurisdictions have found that legislation that has the effect of lengthening a prisoner's incarceration by delaying parole eligibility is legislation that imposes additional punishment.

**i) United States Case Law**

10. The decisions of the US Supreme Court (the "USSC") regarding the constitutional prohibition of "*ex post facto* laws"<sup>7</sup> are relevant to this appeal in that the principles that underlie the prohibition are similar to those that underscore the protection afforded by s. 11(*h*). The prohibition against *ex post facto* laws is aimed at laws that retroactively alter the definition of crimes or increase the punishment for criminal acts, including any enactment "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes

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<sup>6</sup> Brian Z. Tamahaha, *On the Rule of Law: History, Politics, Theory* (Cambridge, UK: Cambridge University Press, 2004), at p. 66.

<sup>7</sup> Article 1 s. 9, cl. 3, Art 1, s. 9 c 1.1; Article 1, s. 9 of the US Constitution forbids Congress and the States from passing any "*ex post facto* law".

additional punishment to that then prescribed”.<sup>8</sup> The USSC jurisprudence in this area is informed by the fundamental concern with providing individuals with fair warning of legislative changes, and protection against arbitrary changes in the law, which the BCCLA submits ought to similarly inform this Court’s interpretation of s. 11(h). Two decisions of the USSC, *Weaver v. Graham*<sup>9</sup>, and *Lynce v. Mathis*<sup>10</sup>, are particularly instructive in this regard.

11. In *Weaver*, the USSC considered 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.<sup>11</sup> The reduction of good time credits would have extended Mr. Weaver’s time in prison by over two years. Justice Marshall articulated the purpose of the *ex post facto* prohibition as follows:

Through this prohibition the framers sought to ensure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed. ... The ban also restricts governmental power by restraining arbitrary and potentially vindictive legislation.

... 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.<sup>12</sup>

12. The Court found that the Florida statute violated the *ex post facto* clause to the extent that the law applied to an individual whose crime was committed prior to the enactment of the statute. This was because it “substantially alters the consequences attached to a crime already completed and therefore changes the quantum of punishment”.<sup>13</sup> For the same reason, this is precisely the effect of the legislative changes in the *AEPA*.

13. While the Appellant says *Weaver* is distinguishable because the effect of the statute was to lengthen the offender’s sentence, not to delay parole eligibility,<sup>14</sup> this argument is without merit. In both *Weaver* and *Whaling*, the critical effect is that the amount of time that the offender would be required to spend in prison as a result of the retrospective change in the law is lengthened, therefore increasing the “quantum of punishment”. The Appellant’s argument that *Weaver* is

<sup>8</sup> *Weaver v. Graham (Governor of Florida)*, 450 U.S. 24 (1981) [*“Weaver”*], at 28.

<sup>9</sup> *Weaver*, *supra*.

<sup>10</sup> *Lynce v. Mathis*, 519 U.S. 433 (1997) [*“Lynce”*].

<sup>11</sup> Florida, like other US States, has enacted statutes which reward convicted prisoners for good conduct by reducing the portion of the sentence that one must serve. In 1978 Florida 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, Florida applied it to all prisoners, including those who were sentenced prior to its enactment.

<sup>12</sup> *Weaver*, *supra*, at 28-30.

<sup>13</sup> *Weaver*, *supra*, at 33. The reasoning in *Weaver* has been followed by the US Court of Appeals in *Schwartz v. Muncy*, 834 F.2d 396 (1987) and *Fender v. Thompson*, 883 F.2d 303 (1989).

<sup>14</sup> Appellant’s Factum, at para. 120.

distinguishable because parole eligibility is relevant to plea bargaining and sentencing decisions in the US<sup>15</sup> should also be rejected. The relevance of plea-bargaining in the Canadian context cannot be summarily dismissed. While it may not be factored into a judge's sentence, there is little dispute that, prior to the *AEPA*, the advice of counsel regarding the offender's eligibility for accelerated parole review ("APR") was an important factor in understanding the quantum of punishment, measured in the years to be spent in prison, and in the entering of guilty pleas and sentencing submissions.

14. The USSC's decision in *Lynce* is also instructive. At issue was a Florida statute cancelling early release credits for certain classes of offenders after they had been awarded under an existing legislative scheme, which authorized the Department of Corrections to award credits when the population of the state prison exceeded predetermined levels. When Mr. Lynce's credits were cancelled, he was returned to custody with a new release date set five years later.<sup>16</sup>

15. Florida's principal argument was that the cancellation of credits did not violate the *ex post facto* clause because the credits had been issued as part of an administrative scheme to alleviate overcrowding and were not an integral part of an individual's punishment. In rejecting this argument, Justice Stevens stated that such a distinction "place[d] undue emphasis on the legislature's subjective intent in granting the credits rather than on the consequences of their revocation". Citing *Weaver*, Justice Stevens affirmed that the essential inquiry was whether the legislation "had the effect of lengthening petitioner's period of incarceration".<sup>17</sup> Justice Stevens also elegantly invoked the principles underlying the *ex post facto* clause, which the BCCLA submits should inform the interpretation of s.11(h):

The presumption against the retroactive application of new laws is an essential thread in the mantle of protection that the law affords the individual citizen. That presumption "is deeply rooted in our jurisprudence and embodies a legal doctrine centuries older than our Republic." ... This doctrine finds expression in several provisions of our Constitution. The specific prohibition on *ex post facto* laws is only one aspect of the broader constitutional protection against arbitrary changes in the law.<sup>18</sup>

16. In *Lynce*, the USSC concluded that the legislation had the effect of lengthening the duration of incarceration, because it "made ineligible for early release a class of prisoners who

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<sup>15</sup> Appellant's Factum, at para. 120.

<sup>16</sup> *Lynce*, *supra*.

<sup>17</sup> *Lynce*, *supra*, at 442-443.

<sup>18</sup> *Lynce*, *supra*, at 439-440.

were previously eligible”, and therefore violated the *ex post facto* clause.<sup>19</sup> The *AEPA* has precisely the same effect.

17. The Appellant attempts to characterize the *AEPA*, not as legislation that lengthens incarceration, but as administrative legislation that simply amends parole and sentencing procedures. Citing two USSC decisions – *Morales*<sup>20</sup> and *Garner*<sup>21</sup> – the Appellant argues that the *ex post facto* clause, and by extension s. 11(h), should not be employed to “micromanage” the administration of parole and sentencing regimes.<sup>22</sup> The BCCLA disagrees with this characterization of the *AEPA*; the legislation in *Morales* and *Garner* was qualitatively different in purpose and effect from the statutes in *Weaver*, *Lynce*, and this appeal. Most importantly, it did not increase the duration of incarceration and therefore did not increase the “quantum of punishment”, thereby violating the principles of fair notice and legal certainty.

18. In *Morales*, the issue before the USSC was an amendment to the availability of parole review hearings.<sup>23</sup> The USSC acknowledged that “the question of what legislative adjustments will be held to be of sufficient moment to transgress the constitutional prohibition must be a matter of degree”.<sup>24</sup> In evaluating the amendment before it, the USSC observed that the central question was, “whether it produces a sufficient risk of increasing the measure of punishment attached to the covered crimes”.<sup>25</sup> In contrast to *Weaver*, the USSC held that “a prisoner’s ultimate date of release would be entirely unaffected by the change in the timing of suitability hearings”,<sup>26</sup> and therefore there was no increase to the quantum of punishment.

19. Similarly in *Garner*, the USSC considered a change to Georgia law regarding the availability of parole review hearings. As in *Morales*, the Court upheld the amendment, finding that the amendment did not extend parole ineligibility, but granted the Parole Board “a more careful and accurate exercise of the discretion” to extend the period of time between parole

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<sup>19</sup> *Lynce, supra*, at 447.

<sup>20</sup> *California Department of Corrections v. Morales*, 514 U.S. 499 (1995) [“*Morales*”].

<sup>21</sup> *Garner v. Jones*, 529 U.S. 244 (2000) [“*Garner*”].

<sup>22</sup> Appellant’s Factum, at para. 121; *Morales, supra*, at 508.

<sup>23</sup> Previously, prisoners in California were reviewed for parole suitability once a year. Under a 1981 amendment, for offenders convicted of more than one offense involving the taking of a life, following the initial parole hearing (which remained unchanged), the Parole Board could determine that it is not reasonable to expect that parole would be granted at a hearing during the following years and could defer subsequent parole hearings for up to 3 years.

<sup>24</sup> *Morales, supra*, at 509.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*, at 513.

review hearings.<sup>27</sup> Such legislation is properly characterized as procedural or administrative in nature. Its effect was not to increase the duration of incarceration and is therefore distinguishable from the legislation at issue in this appeal.

**ii) United Kingdom Case Law**

20. Like the US, the UK case law on retrospective changes to parole eligibility demonstrates a focus on the substantive effect of the change, in particular whether it increases the duration of incarceration, and an underlying respect for the rule of law and fairness to the individual.

21. In *Pierson v. Secretary of State for the Home Department*,<sup>28</sup> the House of Lords addressed the issue of whether the Home Secretary had the general power to increase the period of parole ineligibility (the “tariff”) which his or her predecessor had previously fixed and communicated to a convicted prisoner.<sup>29</sup> The majority of the House of Lords held that the Home Secretary's authority to enact policies regarding parole ineligibility did not include such a power. Lord Steyn rejected the argument that the Home Secretary’s decision to set the earliest date for parole review of a mandatory life sentence was administrative, not penal, in nature:

Counsel for the Home Secretary argued that the fixing of the tariff cannot be a sentencing exercise because the judge pronounces the only sentence, ie one of life imprisonment. This is far too formalistic. In public law the emphasis should be on substance rather than form. This case should also not be decided on a semantic quibble about whether the Home Secretary’s function is strictly ‘a sentencing exercise’. The undeniable fact is that in fixing a tariff in an individual case the Home Secretary is making a decision about punishment of the convicted man.<sup>30</sup>

22. While the majority judgments in *Pierson* were not based on constitutional provisions, they nonetheless demonstrate the importance of constitutional theory and principles of common law, particularly the principles of legal certainty and fair notice, in resolving these issues. Thus, Lord Steyn stated that the narrowly worded statutory provision in the UK prohibiting a

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<sup>27</sup> *Garner, supra*, at 254.

<sup>28</sup> *Pierson v. Secretary of State for the Home Department*, [1977] 3 All E.R. 577 [“*Pierson*”].

<sup>29</sup> In the UK in the case of those convicted of murder, as in Canada, the judge must impose a mandatory life sentence. But whereas in Canada the minimum term that must be served before eligibility for parole is determined by legislation, in the UK the determination of what is referred to as “the tariff”, the period of imprisonment that must be served before any consideration can be given for release on parole is conferred on a cabinet minister who may take into account any recommendations made by the sentencing judge. This discretionary power of the Home Secretary has been exercised in light of policy statements that make it clear that the tariff is primarily determined by the minimum term deemed necessary to serve the purposes of punishment, primarily retribution and deterrence.

<sup>30</sup> *Pierson, supra*, at 601.

retrospective increase of a lawfully imposed sentence was simply an expression of the general principle in common law, founded on 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.<sup>31</sup>

Lord Hope similarly emphasized that the minimum standard of fairness does not “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”.<sup>32</sup>

23. Similarly, in *R (Anderson) v. Home Secretary*, the House of Lords affirmed that the setting of the tariff which determined eligibility for a life sentence was, as a matter of reality, an exercise in establishing the penalty to be imposed. In rejecting the argument that it was merely the administration of a sentence, Lord Steyn stated:

A decision fixing the tariff in an individual case is unquestionably a decision about the level of punishment which is appropriate. Mellifluous words cannot hide this reality.<sup>33</sup>

The language expressed in the parliamentary debates on the repeal of APR may have been far from mellifluous but a consideration of both purpose and effect of the legislation demonstrates that the change in parole eligibility, as a matter of reality rather than form, constituted further punishment of the Respondents and violates the principles of legal certainty and fair notice.<sup>34</sup>

24. In contrast to *Pierson*, the House of Lords’ decision in *Findlay v. Secretary of State for the Home Department and others*,<sup>35</sup> relied on by the Appellant,<sup>36</sup> is distinguishable because it did not concern the power of the Home Secretary to increase in absolute terms the period of parole ineligibility. Rather, the issue was the lawfulness of the Home Secretary’s new policy that he

<sup>31</sup> *Pierson, supra*, at 602-603 and 606.

<sup>32</sup> *Pierson, supra*, at 618.

<sup>33</sup> *R (Anderson) v. Home Secretary* [2003] 1 AC.837 (HL), at p. 892 (Emphasis added).

<sup>34</sup> As set out in Appendix “A” of *Whaling v. Canada*, 2012 BCSC 944 [A.R. Vol. 1, pp. 40-44]; Respondents’ Factum, at pp. 4-5 and 26; Testimony, AR, vol. IV, pp. 28-30; vol. VII, at p. 62.

<sup>35</sup> *Findlay v. Secretary of State for the Home Department and others*, [1984] 3 All E.R. 801 HL, aff’g [1984] 3 All E.R. 801 (CA) [“*Findlay*”].

<sup>36</sup> Appellant’s Factum, at paras. 116-117.

would generally not exercise his discretion to grant parole to offenders serving sentences for certain offences of violence or drug trafficking. The new policy, however, was not absolute; there remained a discretion to release such prisoners on parole where justified. Thus, the principles of legal certainty and fair notice were not engaged. Importantly, Lord Griffiths found that “If the Home Secretary had gone so far as to say that in no circumstances would he grant parole for a particular class of offender, his policy might be unlawful.”<sup>37</sup> By contrast, the *AEPA* does go so far as to remove any discretion to grant early release to a class of offenders who were previously eligible, and thus engages the principles of legal certainty and fair notice.

25. Finally, while the New Zealand Supreme Court considered the impact of a retrospective increase in parole ineligibility in the *Morgan* case,<sup>38</sup> the majority decision is of limited use as it was decided under statutory provisions similar to s. 11(i) of the *Charter*,<sup>39</sup> which is not in issue in this appeal. In *Morgan*, between the defendant’s arrest and trial, the relevant legislation was amended so that those sentenced to imprisonment for terms longer than 2 years were no longer entitled to release until the full terms of the sentence expired, amounting to an additional year of detention for Mr. Morgan. The majority of the Supreme Court dismissed the case on the basis that the maximum sentence for the offence had not been changed.

26. Notably, in her dissenting judgment, Elias C.J., based on her review of the US, UK 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”.<sup>40</sup> It cannot matter that one is imposed at sentencing by the judge at the direction of the legislature and the other arises by operation of law under the statute. Regardless, the principles of legal certainty and fair notice are violated. This is the interpretation adopted by the Court of Appeal. It is the right and principled interpretation in light of the purposes of s. 11(h) and the interests that it protects.

**c) The International Case Law Does Not Support a Narrow Reading of s. 11**

27. The Appellant relies on international case law to support its argument that the principle of double jeopardy, which it says defines the scope of s. 11(h), must be understood narrowly, and

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<sup>37</sup> *Findlay, supra*, at 817.

<sup>38</sup> *Morgan v. Superintendent, Rimutaka Prison*, [2005] NZSC 26 [“*Morgan*”], cited by the Appellant.

<sup>39</sup> In New Zealand, both s. 6 of the Sentencing Act and s. 25 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.” As such, it is similar to s. 11(i) of the *Charter*.

<sup>40</sup> *Morgan, supra*, at para. 5.

only applies where there has been a duplication of criminal proceedings.<sup>41</sup> The BCCLA disagrees, and submits that these cases do not support the Appellant’s reading of s. 11(h), or its narrow interpretation of the protection against double jeopardy.

28. With one exception,<sup>42</sup> the central question in each of these cases is whether a subsequent proceeding amounted to the duplication of criminal proceedings.<sup>43</sup> Accordingly, these cases are distinguishable on the basis that they address the narrow issue of the protection against double jeopardy in the context of multiple proceedings against the same defendant.

29. Moreover, these cases are not, as the Appellant suggests, authority for the principle that double jeopardy is *only* engaged where there is a duplication of criminal proceedings. In fact, several of these cases expressly contemplate the extension of the protection against double jeopardy to other elements or stages of the criminal justice system.<sup>44</sup> In *Pearce*, for example, the High Court of Australia cautioned against a narrow reading of double jeopardy:

[9] The expression “double jeopardy” is not always used with a single meaning. Sometimes it is used to refer to the pleas in bar of *autrefois acquit* and *autrefois convict*; sometimes it is used to encompass what is said to be a wider principle that no one should be “punished again for the same matter.” Further, “double jeopardy” is an expression that is employed in relation to several different stages of the criminal justice system: prosecution, conviction and punishment.<sup>45</sup>

30. Notably, none of the international cases cited by the Appellant consider the question of whether the protection against double jeopardy prohibits the *ex post facto* addition of punishment absent a subsequent proceeding, or whether a delay in parole eligibility constitutes such

<sup>41</sup> Appellant’s Factum, at paras. 65-70.

<sup>42</sup> That being *Director of Public Prosecutions v. Humphrys*, [1997] A.C. 1 [“*Humphreys*”], in which the House of Lords found that issue estoppel did not exist in English criminal law.

<sup>43</sup> *Daniels v. Thompson*, [1998] HCA 57, [1998] 3 N.Z.L.R. 22 [“*Daniels*”] (the issue was whether exemplary damages in a civil proceeding are barred as a result of criminal proceedings in respect of the same conduct); *Humphrys* (whether issue estoppel precludes a trial for perjury of the accused where the accused was previously acquitted of the offence in respect of which he or she was said to have committed perjury); *R. (on the application of Redgrave) v. Metropolitan Police Commissioner*, [2003] EWCA Civ 04; *Ruotsalainen v. Finland*, [2009] ECHR 13079/03; *Müller-Hartburg v. Austria*, [2013] ECHR 47195/06; and *Zolotukhin v. Russia* [GC], [2009] ECHR 14939/03 (whether disciplinary or administrative proceedings duplicated criminal proceedings arising out of the same or essentially similar offences); *Pearce v. R.*, [1998] HCA 57, 156 A.L.R. 684 [“*Pearce*”] (whether an accused could be charged with separate criminal offences arising out of a single event); *Schiro v. Farley*, 510 U.S. 222 (1994) and *Monge v. California*, 524 U.S. 721 (1998) (whether a sentencing proceeding or a noncapital sentencing proceeding, respectively, that follows a conviction constitutes “being twice tried or punished for the same offence”); *Green v. United States*, 355 U.S. 184 (1957) (whether a trial on remand for a charge for which the accused was acquitted at first instance, and which had not been at issue in the appeal, constituted “being twice tried or punished for the same offence”).

<sup>44</sup> *Humphrys*, *supra*, at 52; *Pearce*, *supra*, at paras. 9-14; *Daniels*, *supra*, at 32.

<sup>45</sup> *Pearce*, *supra*, at para. 9.

punishment. Rather, as in *Rodgers*,<sup>46</sup> these important questions have been left open. The authorities relied on by the BCCLA provide the necessary answers to these questions: legislative amendments that increase the duration of imprisonment before parole eligibility constitute punishment, and when imposed retrospectively they violate the essential values and principles that s. 11(h) embodies and protects.

31. Section 11(h), like the prohibition on *ex post facto* laws in the US Constitution, is “an essential thread in the mantle of protection that the law affords the individual citizen” and is “only one aspect of the broader constitutional protection against arbitrary changes in the law”.<sup>47</sup> The crucial role of the courts at common law, now constitutionally enshrined in the *Charter*, to protect against the arbitrary exercise of authority, is particularly important in the case of those serving a sentence of imprisonment.<sup>48</sup> Prisons hold people who have little claim over the attention or compassion of the general community. The vilification of prisoners may itself be part of the political arsenal through which governments, by enlarging the arsenal of punitive sanctions, seek popular approval, with the real danger that penal populism replaces principled public policy. Indeed the record in this case, where the original bill for the abolition of APR, which had no retrospective effect, was only made retrospective following public and political pressure regarding the impending release of specific named fraudsters, illustrates just such a danger of subordination of principle to populism.<sup>49</sup>

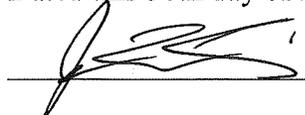
**PART IV & V: COSTS AND ORAL SUBMISSION**

32. The BCCLA does not seek costs, and requests that no costs be awarded against it.

33. The BCCLA seeks leave to make oral submissions not exceeding 10 minutes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated this 30th day of September, 2013



for

MICHAEL JACKSON, Q.C.      MEGAN VIS-DUNBAR      JOANA THACKERAY  
Vancouver, British Columbia  
Counsel for the Intervener, BCCLA

<sup>46</sup> *Supra*, at para. 58; *Whaling v. Canada*, 2012 BCSC 944, at para. 46 [A.R. vol. I, pp. 13-14].

<sup>47</sup> *Lynce, supra*, at 439-440.

<sup>48</sup> In commenting on the necessary restrictions on the arbitrary exercise of legislative power in a constitutional democracy, American commentators have identified the particular risks from retroactive laws to prisoners in the current climates of being tough on crime. 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.

<sup>49</sup> AR, vol. 1, p. 37 at para. 121, and pp. 40-44; Respondent’s Factum, at p. 5; AR vol. VII, p. 6.

## PART VI – TABLE OF AUTHORITIES

### AUTHORITIES - CANADA

Cited at para

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*R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554 2, 30

**Appellant’s Book of Authorities, Vol. II, Tab 46**

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**Appellant’s Book of Authorities, Vol. IV, Tab 102**

*Daniels v. Thompson*, [1998] HCA 57, [1998] 3 N.Z.L.R. 22 28, 29  
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*Director of Public Prosecutions v. Humphrys*, [1997] A.C. 1 28, 29  
**Appellant’s Book of Authorities, Vol. IV, Tab 104**

*Fender v. Thompson*, 883 F.2d 303 (1989) 12

*Findlay v. Secretary of State for the Home Department and others*, [1984] 3 All E.R. 24  
 801 HL, aff’g [1984] 3 All E.R. 801 (CA)  
**Appellant’s Book of Authorities, Vol. IV, Tab 105**

*Garner v. Jones*, 529 U.S. 244 (2000) 17, 19  
**Appellant’s Book of Authorities, Vol. IV, Tab 107**

*Green v. United States*, 355 U.S. 184 (1957) 28  
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<i>Lynce v. Mathis</i> , 519 U.S. 433 (1997) <b>Appellant's Book of Authorities, Vol. V, Tab 113</b>	10, 14, 15, 16, 17, 31
<i>Monge v. California</i> , 524 U.S. 721 (1998) <b>Appellant's Book of Authorities, Vol. V, Tab 115</b>	28
<i>Morgan v. Superintendent, Rimutaka Prison</i> , [2005] NZSC 26	25, 26
<i>Müller-Hartburg v. Austria</i> , [2013] ECHR 47195/06 <b>Appellant's Book of Authorities, Vol. V, Tab 117</b>	28
<i>Pearce v. R.</i> , [1998] HCA 57, 156 A.L.R. 684 <b>Appellant's Book of Authorities, Vol. V, Tab 118</b>	28, 29
<i>Pierson v. Secretary of State for the Home Department</i> , [1977] 3 All E.R. 577 <b>Appellant's Book of Authorities, Vol. V, Tab 119</b>	21, 22, 24
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<i>Schiro v. Farley</i> , 510 U.S. 222 (1994) <b>Appellant's Book of Authorities, Vol. V, Tab 124</b>	28
<i>Schwartz v. Muncy</i> , 834 F.2d 396 (1987)	12
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<i>Zolotukhin v. Russia</i> [GC], [2009] ECHR 14939/03 <b>Appellant's Book of Authorities, Vol. V, Tab 127</b>	28

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Brian Z. Tamahaha, <i>On the Rule of Law: History, Politics, Theory</i> (Cambridge, UK: Cambridge University Press, 2004)	8
Bryan R. Diederich, "Risking Retroactive Punishment: Modifications of the Supervised Release Statute and the Ex Post Facto Prohibition", (1999) 99 <i>Columbia Law Review</i> 1551 <b>Respondents' Book of Authorities, Vol. 2, Tab 35</b>	31

## PART VII – LEGISLATION

### **Legislation**

### **Cited at para**

The *Abolition of Early Parole Act*, S.C. 2011, c. 11.

1, 5, 12, 13,  
16, 17, 24

*Canadian Charter of Rights and Freedoms* (“*Charter*”), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

1, 2, 3, 5, 6, 7,  
8, 9, 10, 15,  
17, 25, 26, 27,  
30, 31



**CHAPTER 11**

ABOLITION OF EARLY PAROLE ACT

**SUMMARY**

This enactment amends the *Corrections and Conditional Release Act* to eliminate accelerated parole review and makes consequential amendments to other Acts.

**CHAPITRE 11**LOI SUR L'ABOLITION DE LA LIBÉRATION ANTICIPÉE  
DES CRIMINELS**SOMMAIRE**

Le texte modifie la *Loi sur le système correctionnel et la mise en liberté sous condition* pour supprimer la procédure d'examen expéditif et apporte des modifications corrélatives à d'autres lois.

Cancellation of parole

(3) If an offender has been granted parole under section 122 or 123, the Board may, after a review of the case based on information that could not reasonably have been provided to it at the time parole was granted, cancel the parole if the offender has not been released or terminate the parole if the offender has been released.

1995, c. 42, ss. 39 and 40; 1997, c. 17, ss. 24(1)(E) and (2) and 25; 1999, c. 5, ss. 50 and 53; 2001, c. 41, s. 90

**5. The heading before section 125 and sections 125 to 126.1 of the Act are repealed.**

1995, c. 42, s. 55(1)(E)

**6. Paragraph 140(1)(b) of the Act is replaced by the following:**

(b) the first review for full parole pursuant to subsection 123(1) and subsequent reviews pursuant to subsection 123(5);

**7. Subsection 225(2) of the Act is repealed.**

**8. Schedule I to the Act is amended by replacing the references after the heading "SCHEDULE I" with the following:**

*(Subsections 107(1), 129(1) and (2), 130(3) and (4), 133(4.1) and 156(3))*

**9. Schedule II to the Act is amended by replacing the references after the heading "SCHEDULE II" with the following:**

*(Subsections 107(1), 129(1), (2) and (9), 130(3) and (4) and 156(3))*

#### 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.**

(3) If an offender has been granted parole under section 122 or 123, the Board may, after a review of the case based on information that could not reasonably have been provided to it at the time parole was granted, cancel the parole if the offender has not been released or terminate the parole if the offender has been released.

**5. L'intertitre précédant l'article 125 et les articles 125 à 126.1 de la même loi sont abrogés.**

**6. L'alinéa 140(1)b) de la même loi est remplacé par ce qui suit:**

b) l'examen prévu au paragraphe 123(1) et chaque réexamen prévu en vertu du paragraphe 123(5);

**7. Le paragraphe 225(2) de la même loi est abrogé.**

**8. Les renvois qui suivent le titre « ANNEXE I », à l'annexe I de la même loi, sont remplacés par ce qui suit:**

*(paragraphe 107(1), 129(1) et (2), 130(3) et (4), 133(4.1) et (4.3) et 156(3))*

**9. Les renvois qui suivent le titre « ANNEXE II », à l'annexe II de la même loi, sont remplacés par ce qui suit:**

*(paragraphe 107(1), 129(1), (2) et (9), 130(3) et (4) et 156(3))*

#### DISPOSITIONS TRANSITOIRES

**10. (1) Sous réserve du paragraphe (2), la procédure d'examen expéditif prévue par les articles 125 à 126.1 de la *Loi sur le système correctionnel et la mise en liberté sous condition*, dans leur version antérieure à la date d'entrée en vigueur de l'article 5, cesse de s'appliquer, à compter de cette date, à l'égard de tous les délinquants condamnés ou transférés au pénitencier, que la condamnation ou le transfert ait eu lieu à cette date ou avant ou après celle-ci.**

Cancellation of parole

1995, ch. 42, art. 39 et 40; 1997, ch. 17, par. 24(1)(A) et (2) et art. 25; 1999, ch. 5, art. 50 et 53; 2001, ch. 41, art. 90

1995, ch. 42, par. 55(1)(A)

Application

2010-2011

Système correctionnel et mise en liberté sous condition (procédure d'examen expéditif) ch. 11

3

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.

(2) Il demeure entendu que l'abrogation des articles 125 à 126.1 de la *Loi sur le système correctionnel et la mise en liberté sous condition* n'a aucun effet sur la validité des ordonnances rendues sous le régime de ces articles avant la date d'entrée en vigueur de l'article 5.

Réserve

## CONSEQUENTIAL AMENDMENTS

## MODIFICATIONS CORRÉLATIVES

1995, c. 42

AN ACT TO AMEND THE CORRECTIONS AND CONDITIONAL RELEASE ACT, THE CRIMINAL CODE, THE CRIMINAL RECORDS ACT, THE PRISONS AND REFORMATORIES ACT AND THE TRANSFER OF OFFENDERS ACT

LOI MODIFIANT LA LOI SUR LE SYSTÈME CORRECTIONNEL ET LA MISE EN LIBERTÉ SOUS CONDITION, LE CODE CRIMINEL, LA LOI SUR LE CASIER JUDICIAIRE, LA LOI SUR LES PRISONS ET LES MAISONS DE CORRECTION ET LA LOI SUR LE TRANSFÈREMENT DES DÉLINQUANTS

1995, ch. 42

11. Section 89 of *An Act to amend the Corrections and Conditional Release Act, the Criminal Code, the Criminal Records Act, the Prisons and Reformatories Act and the Transfer of Offenders Act* is repealed.

11. L'article 89 de la *Loi modifiant la Loi sur le système correctionnel et la mise en liberté sous condition, le Code criminel, la Loi sur le casier judiciaire, la Loi sur les prisons et les maisons de correction et la Loi sur le transfèrement des délinquants* est abrogé.

1997, c. 17

AN ACT TO AMEND THE CRIMINAL CODE (HIGH RISK OFFENDERS), THE CORRECTIONS AND CONDITIONAL RELEASE ACT, THE CRIMINAL RECORDS ACT, THE PRISONS AND REFORMATORIES ACT AND THE DEPARTMENT OF THE SOLICITOR GENERAL ACT

LOI MODIFIANT LE CODE CRIMINEL (DÉLINQUANTS PRÉSENTANT UN RISQUE ÉLEVÉ DE RÉCIDIVE), LA LOI SUR LE SYSTÈME CORRECTIONNEL ET LA MISE EN LIBERTÉ SOUS CONDITION, LA LOI SUR LE CASIER JUDICIAIRE, LA LOI SUR LES PRISONS ET LES MAISONS DE CORRECTION ET LA LOI SUR LE MINISTÈRE DU SOLLICITEUR GÉNÉRAL

1997, ch. 17

12. Subsection 21(2) of *An Act to amend the Criminal Code (high risk offenders), the Corrections and Conditional Release Act, the Criminal Records Act, the Prisons and Reformatories Act and the Department of the Solicitor General Act* is repealed.

12. Le paragraphe 21(2) de la *Loi modifiant le Code criminel (délinquants présentant un risque élevé de récidive), la Loi sur le système correctionnel et la mise en liberté sous condition, la Loi sur le casier judiciaire, la Loi sur les prisons et les maisons de correction et la Loi sur le ministère du Solliciteur général* est abrogé.

2001, c. 41

## ANTI-TERRORISM ACT

## LOI ANTITERRORISTE

2001, ch. 41

13. (1) Paragraph 94(1)(a) of the *Anti-terrorism Act* is repealed.

13. (1) L'alinéa 94(1)a) de la *Loi antiterroriste* est abrogé.

(2) Subsection 94(2) of the Act is repealed.

(2) Le paragraphe 94(2) de la même loi est abrogé.

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**CONSTITUTION ACT, 1982 <sup>(80)</sup>**

PART I

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

GUARANTEE OF RIGHTS AND FREEDOMS

Rights and freedoms in Canada

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.

FUNDAMENTAL FREEDOMS

Fundamental freedoms

2. Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (c) freedom of peaceful assembly; and
- (d) freedom of association.

**<sup>(80)</sup> Enacted as Schedule B to the *Canada Act 1982, 1982, c. 11 (U.K.)*, which came into force on April 17, 1982. The *Canada Act 1982*, other than Schedules A and B thereto, reads as follows:**

An Act to give effect to a request by the Senate and House of Commons of Canada

Whereas Canada has requested and consented to the enactment of an Act of the Parliament of the United Kingdom to give effect to the provisions hereinafter set forth and the Senate and the House of Commons of Canada in Parliament assembled have submitted an address to Her Majesty requesting that Her Majesty may graciously be pleased to cause a Bill to be laid before the Parliament of the United Kingdom for that purpose.

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. The *Constitution Act, 1982* set out in Schedule B to this Act is hereby enacted for and shall have the force of law in Canada and shall come into force as provided in that Act.
2. No Act of the Parliament of the United Kingdom passed after the *Constitution Act, 1982* comes into force shall extend to Canada as part of its law.
3. So far as it is not contained in Schedule B, the French version of this Act is set out in Schedule A to this Act and has the same authority in Canada as the English version thereof.
4. This Act may be cited as the *Canada Act 1982*.

## Limitation

- (3) The rights specified in subsection (2) are subject to
- (a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
  - (b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

## Affirmative action programs

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

## LEGAL RIGHTS

## Life, liberty and security of person

7. Everyone has the 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.

## Search or seizure

8. Everyone has the right to be secure against unreasonable search or seizure.

## Detention or imprisonment

9. Everyone has the right not to be arbitrarily detained or imprisoned.

## Arrest or detention

10. Everyone has the right on arrest or detention
- (a) to be informed promptly of the reasons therefor;
  - (b) to retain and instruct counsel without delay and to be informed of that right; and
  - (c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

## Proceedings in criminal and penal matters

11. Any person charged with an offence has the right
- (a) to be informed without unreasonable delay of the specific offence;
  - (b) to be tried within a reasonable time;

- (c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
- (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
- (e) not to be denied reasonable bail without just cause;
- (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;
- (g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;
- (h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and
- (i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

Treatment or punishment

**12.** Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Self-crimination

**13.** A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

Interpreter

**14.** A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

EQUALITY RIGHTS

Equality before and under law and equal protection and benefit of law

**15. (1)** Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

## Proceedings of Parliament

17. (1) Everyone has the right to use English or French in any debates and other proceedings of Parliament. <sup>(86)</sup>

## Proceedings of New Brunswick legislature

(2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick. <sup>(87)</sup>

## Parliamentary statutes and records

18. (1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative. <sup>(88)</sup>

## New Brunswick statutes and records

(2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative. <sup>(89)</sup>

## Proceedings in courts established by Parliament

19. (1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament. <sup>(90)</sup>

## Proceedings in New Brunswick courts

(2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick. <sup>(91)</sup>

## Communications by public with federal institutions

20. (1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where

<sup>(86)</sup> See section 133 of the *Constitution Act, 1867* and footnote (67).

<sup>(87)</sup> *Ibid.*

<sup>(88)</sup> *Ibid.*

<sup>(89)</sup> *Ibid.*

<sup>(90)</sup> *Ibid.*

<sup>(91)</sup> *Ibid.*

PART VI  
AMENDMENT TO THE CONSTITUTION ACT, 1867

50. <sup>(103)</sup>

51. <sup>(104)</sup>

PART VII  
GENERAL

Primacy of Constitution of Canada

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Constitution of Canada

(2) The Constitution of Canada includes

(a) the *Canada Act 1982*, including this Act;

(b) the Acts and orders referred to in the schedule; and

(c) any amendment to any Act or order referred to in paragraph (a) or (b).

Amendments to Constitution of Canada

(3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

Repeals and new names

53. (1) The enactments referred to in Column I of the schedule are hereby repealed or amended to the extent indicated in Column II thereof and, unless repealed, shall continue as law in Canada under the names set out in Column III thereof.

Consequential amendments

(2) Every enactment, except the *Canada Act 1982*, that refers to an enactment referred to in the schedule by the name in Column I thereof is hereby amended by substituting for that name the corresponding name in Column III thereof, and any British North America Act not referred to in the schedule may be cited as the *Constitution Act* followed by the year and number, if any, of its enactment.

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<sup>(103)</sup> The text of this amendment is set out in the *Constitution Act, 1867*, as section 92A.

<sup>(104)</sup> The text of this amendment is set out in the *Constitution Act, 1867*, as the Sixth Schedule.