S.C.C. File No.: 37994

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF QUÉBEC)

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant
(Appellant)

-and-

ROSAIRE POULIN

Respondent
(Respondent)

-and-

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. The s. 11(*i*) right "to the benefit of the lesser punishment" is a right to the "lesser" of two "evils", not the least of many. Its purpose is to manage the conflict between two interests:

   a. The general rule that conduct should be judged in accordance with the law in force when it occurred, which points toward imposing the punishment in force at "the time of commission" of an offence; and

   b. The societal interest in imposing fit, proportionate sentences, determined by current standards, which points toward imposing the punishment in force "at the time of sentencing" – *i.e.* the day the sentence is imposed.

2. Where these two interests point toward different punishments, s. 11(*i*) gives effect to the interest that results in the "lesser" deprivation of the individual's liberty and security of the person. Granting offenders access to the least onerous punishment in force at any point between the offence and sentencing would clearly be more generous to individual liberty. However, when this Court interprets *Charter* rights, "generosity is … subordinate to and constrained by" the true purpose of the right at issue. The broad interpretation of s. 11(*i*) advanced by the respondent overshoots s. 11(*i*)'s purpose. There is no compelling *Charter*-protected interest favouring punishments that are not in force at either the time of the offence or the time of sentencing.

PART II – POINTS IN ISSUE

3. In Ontario's submission, s. 11(*i*) grants "the benefit of the lesser punishment" selected between (1) the law in force at the time of the offence, and (2) the law in force when sentence is imposed (the "two-laws interpretation"). It does not grant the benefit of a punishment that existed only temporarily between those two points (the "lowest-punishment interpretation"). The lowest-punishment interpretation does not accord with the language of s. 11(*i*), and wrongly subordinates a purposive interpretation to one focused solely on generosity.

PART III – STATEMENT OF ARGUMENT

A. <u>The proper approach to interpretation: generosity constrained by purpose</u>

4. The starting point for interpreting *Charter* rights is the language of the section. While generosity, purpose and context are all relevant when questions of interpretation arise,

"generosity of interpretation is subordinate to and constrained by … purpose". The Court must generously advance the right's purpose without "expanding its protection beyond" and overshooting what it is actually meant to protect.[1]

B. Linguistic analysis suggests s. 11(*i*) provides access to only two versions of the law

5. The appellant is correct: the English text of s. 11(*i*) suggests that the section provides access to a single "lesser punishment" selected between two options, not the lowest among many. "Lesser" means the smaller of two things. When we refer to "the lesser evil" we invoke the concept of "the least unpleasant or harmful of two undesirable options", not many (emphasis added). Consistent with this linguistic choice, s. 11(*i*) identifies only two relevant points in time ("the time of commission" and "the time of sentencing"). If s. 11(*i*) were meant to confer access to more options, it would not employ language referable to a choice between two.[2]

C. Purposive analysis favours the two-laws interpretation of s. 11(*i*)

1. Two competing interests: conduct should be assessed under laws in force when it occurs; and punishment should be fit and not exceed "what is just and appropriate"

6. Properly situating s. 11(*i*) in its context highlights the importance of identifying a specific, fundamental norm that justifies each way the right is alleged to operate. The "Legal Rights" in ss. 7 to 14 of the *Charter* do not protect liberty and personal security *per se*. Each Legal Right – including s. 11(*i*) – is an illustration of s. 7, barring a specific deprivation of individual interests "in breach of the principles of fundamental justice". To qualify as such a principle, which is then capable of restraining state conduct, a rule must be recognized as "fundamental to the way in which the legal system ought fairly to operate". Two such fundamental rules come into conflict when punishment has changed between the date the offence was committed and the date sentence is imposed. Section 11(*i*) manages that conflict and chooses which interest should prevail.[3]

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[1] *R. v. Big M Drug Mart Ltd*, [1985] 1 S.C.R. 295, at p. 344; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at paras. 15-18; *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460, at para. 24; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, at paras. 178-185.

[2] Appellant's factum, at paras. 36-39; *R. v. Bent*, 2017 ONSC 3189, at para. 79; *Oxford English Dictionary*, 3rd ed. (oed.com) *sub verbo* "lesser"; *Canadian Oxford Dictionary*, 2nd. ed. *sub verbo* "lesser"; *Oxford Dictionary of English*, 2nd. ed., revised, *sub verbo* "lesser"; *Cambridge International Dictionary of English*, *sub verbo* "lesser".

[3] *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at pp. 502-03; *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3, at para. 46.

7. The first interest protected by s. 11(*i*) is well known in Canadian law. The s. 11(*i*) rule granting the lesser punishment in force at the time of the offence if the penalty has increased by the time of sentencing expresses a societal aversion to retrospective punishment. The law must "avoid taking people by surprise, ambushing them" with consequences that they could not have anticipated when they engaged in the criminalized conduct. It follows that generally "persons accused of criminal conduct are to be charged and sentenced under the criminal law provisions in place at the time that the offence allegedly was committed". If punishment has increased by the time of sentencing, s. 11(*i*) prevents the imposition of the current, harsher punishment, since doing so would violate the offender's right to be informed of the extent of his or her potential liability when choosing whether to break the law. This rule of fairness promotes certainty and clarity in the law and advances the rule of law.[4]

8. The second interest is expressed in the s. 11(*i*) rule granting the lesser punishment where the punishment has decreased after the offence. The rationale for this rule has attracted little discussion in Canada, but should be understood as a societal interest in the imposition of just sanctions, determined by current standards. The importance of imposing fit sentences cannot be overstated: "[t]he credibility of the criminal justice system in the eyes of the public depends on the fitness of sentences imposed on offenders." To be fit, a sentence must be proportionate to the gravity of the offence, the offender's moral culpability, and the circumstances of the offender. Statutory changes in punishment reflect changes in the societal understanding of the appropriate punishment. Imposing the punishment currently in force is just, whereas imposing a repealed punishment that society has since deemed unfit – as either too lenient or too harsh – will fail to achieve valid sentencing objectives or punish more than necessary to achieve them. Granting a reduced punishment available at the time of sentencing ensures that offenders are not punished more than necessary to achieve valid societal goals.[5]

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[4] *R. v. Johnson*, 2003 SCC 46, [2003] 2 S.C.R. 357, at para. 41; *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, at paras. 20-27; *Tran v. Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50, [2017] 2 S.C.R. 289, at paras. 43-45; *R. v. Dineley*, 2012 SCC 58, [2012] 3 S.C.R. 272, at para. 10; *R. v. Hooyer*, 2016 ONCA 44, at para. 42; *R. v. Docherty*, [2016] UKSC 62, at paras. 17, 29, 31, 42-46; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, at p. 1152; Ben Juratowitch, *Retroactivity and the Common Law* (Portland: Hart Publishing, 2008), pp. 54-56.

[5] *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at paras. 1-3, 7, 12, 58, 143; *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at paras. 42-44; *Criminal Code*, R.S.C. 1985, c.

2. Section 11(*i*) gives effect to the interest most consistent with individual liberty

9. When punishment has changed after the offence, the two interests – (1) upholding the law in force when the conduct occurred and (2) imposing the fit, current punishment – push in different directions. In this situation, s. 11(*i*) gives effect to the interest, rule and corresponding punishment that most preserves individual liberty – *i.e.* the "lesser punishment" of the two.

10. The result is just. First, when the punishment has increased, s. 11(*i*) requires the court to impose the statutory punishment in force at the time of the offence. The resulting punishment may be too lenient by current standards. However, that unfit sentence is tolerable, because imposing the current punishment would wrongly limit the offender's liberty more than the offender could have anticipated at the time of the offence, defeating settled expectations. Second, where the punishment has decreased, s. 11(*i*) requires the court to impose the statutory punishment in force at the time of sentencing. While this may result in a lower sentence, inconsistent with the offender's expectations at the time of the offence, applying the former law would cruelly limit the offender's liberty more than needed to achieve valid sentencing objectives. Giving an offender access to the statutory punishment in force either at the time of the offence or the time of sentencing is linked to and advances the interests underlying s. 11(*i*). This interpretation properly maintains focus on a single question: should today's law apply retrospectively, displacing the law at the time of the offence?

D. Granting access to intervening punishments would serve no pressing interest

11. The respondent's interpretation would grant access to repealed versions of the law in addition to the law at the time of the offence. This interpretation gratuitously favours liberty at the expense of the two interests actually underlying s. 11(*i*). The respondent has failed to identify any principle – beyond an interest in liberty – that would support extending s. 11(*i*) to permit

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C-46, ss. 718.1, 718.2(*a*) and (*b*); *R. v. Safarzadeh-Markhali*, 2016 SCC 14, [2016] 1 SCR 180, at paras. 70-71; *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433, at para. 37; *R. v. Gejdos*, 2017 ABCA 227, at para. 38; *R. v. Docherty*, [2016] UKSC 62, at paras. 29-46; *In re Estrada*, 63 Cal.2d 740 at 744-46, 748; *People v. Oliver*, 1 N.Y.2d 152 (1956), at pp. 159-60; Ryan E. Brungard, "Finally, Crack Sentencing Reform: Why It Should Be Retroactive" (2012) 47 Tulsa L. Rev. 745, at pp. 762-63; S. David Mitchell, "In With the New, Out With the Old: Expanding the Scope of Retroactive Amelioration" (2009) 37 Am. J. Crim. L. 1, at p. 16; Ben Juratowitch, *Retroactivity and the Common Law* (Portland: Hart Publishing, 2008), pp. 54-56, 115-18; *R. v. C.A.M.*, [1996] 1 S.C.R. 500, at para. 81.

access to punishments enacted after the offence and repealed before sentencing. The individual interest in liberty, disconnected from any fundamental notion of how the justice system ought to operate, is an insufficient reason to limit Parliament's power to set the parameters of punishment.

12. In *R. v. Docherty*, the U.K. Supreme Court found no principled basis to grant access to punishments reduced only temporarily between the offence and sentencing. The Court noted that English practice "does not … attempt to examine all intervening rules or practices … with a view to finding whether at any time there has been a more favourable practice." The Court noted that granting an offender access to the two punishments in force at the time of the offence and the time of sentencing advances the interests in judging conduct by the standards at the time of the offence and in imposing current, fit punishments. The Court identified no further principle to justify granting access to repealed post-offence punishments:

> Sentencing legislation and practice may well go up and down as public policy is held by legislators to change, or current responsible views on particular offending are perceived by courts to develop. But there is no injustice to a defendant to be sentenced according either to the law as it existed at the time of his offence or, if more lenient, according to the law as it exists when he is convicted and sentenced. To insist that a defendant should not be sentenced on a basis now authoritatively regarded as excessive is one thing. It is quite another to say that he should be sentenced according to a practice which did not obtain when he committed the offence and does not obtain now, merely because for some time in the interim, however short, a different practice was adopted which has now been abandoned as wrong.[6] [Emphasis added.]

13. The B.C. Court of Appeal's decision in *R. v. Cadman* does not identify any principled basis to extend s. 11(*i*). That court rejected the two-laws interpretation of s. 11(*i*) in favour of the lowest-punishment interpretation on the basis that s. 11(*i*) is specifically designed to give the offender the benefit of penalties that are lower than current standards. However, the Court did not address whether this expansive interpretation would be consistent with the right's purposes.[7] The reason s. 11(*i*) revives the repealed law in force at the time of the offence – and the unfit sentence it entails – is the general rule against retrospective punishment, and the interest in assessing conduct using the laws in force at the time the conduct occurred. That rationale does

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[6] *R. v. Docherty*, [2016] UKSC 62, at paras. 29-49; *c.f. Scoppola v. Italy (No. 2)*, [2010] EHRR 12, at paras. 103-09.

[7] *R. v. Cadman*, 2018 BCCA 100, at paras. 30-46; see also *R. c. R.P.*, 2018 QCCA 21, at paras. 31-34; *Belzil c. R.*, 1989 CanLII 525 (QC CA); *R. v. Bent*, 2017 ONSC 3189, at paras. 79-81.

not support the revival of any law other than the law in force at the time of the offence.

14. This Court's decision in *R. v. K.R.J.* does not suggest any rationale for extending s. 11(*i*) as the respondent requests. The *K.R.J.* majority's comments about the unfairness of someone being "ambushed" by an increased penalty after choosing to proceed to trial must be read in context. Multiple repealed versions of the punishment were not at issue in *K.R.J.* The "ambush" the majority warned against must be understood based on the earlier reference to an ambush by new retrospective law replacing the "establish[ed] rules" on which the individual relied at the time of the offence.[8] The two-laws interpretation of s. 11(*i*) protects against that unfairness.

15. Moreover, it is not fundamental in our justice system that, whenever a law changes, the accused should retain rights under the former law. Some changes take immediate effect, perhaps even during a trial. First, presumptions regarding the temporal application of legislative changes turn on a new law's substantive or procedural nature, not whether the new law assists the accused. Harmful procedural laws apply immediately whether enacted pre-offence, post-offence, post-charge, or even post-appeal at a retrial. Second, common-law changes, including those affecting punishment, take immediate effect; for example, s. 11(*i*) does not provide a right to the common-law sentencing ranges in existence at the time of the offence.[9]

E. <u>The two-laws interpretation is fair</u>

16. When the two-laws interpretation is applied in circumstances where the punishment at the time of the offence is temporarily reduced and then restored to the original level, it leads to the following outcomes: (1) an offender who commits an offence before the temporary reduction, is charged during the reduction, and is sentenced after it must receive the higher punishment in force at the time of sentencing; and (2) where two offenders commit the same offence on the same date, but are sentenced at different times, one who is sentenced under the reduced punishment will receive a lower punishment than one sentenced under the restored punishment.

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[8] Appellant's factum, at paras. 51-53; *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, at paras. 23, 25; John Gardner, "Introduction", in H.L.A. Hart, *Punishment and Responsibility*, 2nd ed. (Oxford University Press, 2008), xiii, at pp. xxxvi-xxxvii.

[9] *R. v. Dineley*, 2012 SCC 58, [2012] 3 S.C.R. 272, at para. 10; *R. v. Bengy*, 2015 ONCA 397, at paras. 39-56; *R. v. Bickford* (1989), 51 C.C.C. (3d) 181 (Ont. C.A.); *Wildman v. The Queen*, [1984] 2 S.C.R. 311, at pp.330-32; *R. v. D. (R.)* (1996), 48 C.R. (4th) 90 (Sask. C.A.), at para. 11.

17. Neither outcome is unfair. With respect to the first outcome – the loss of access to a lower punishment that existed at the time charges were laid – the chance of any "ambush" by the increased penalty is greatly reduced by the slow pace of legislative change. For example, more than 12 months elapsed between the first reading and coming into force of the law that made a conditional sentence illegal for the respondent's sexual interference conviction. At most, an impending legislative increase in punishment puts pressure on an accused to plead guilty. Defence counsel, faced with this situation, should have no difficulty advising clients: the top-end of the client's legal jeopardy is defined by the maximum punishment in force at the time of the offence; and access to a more-lenient punishment that will soon be repealed may require quick action. There is nothing wrong with incentivizing pleas that would take advantage of law that is about to be made harsher. Time-limited opportunities for lenience are common in our criminal justice system: proposed plea bargains expire; more mitigation flows from a guilty plea entered well before trial than one entered after the Crown has closed its case.[10]

18. In any event, there is nothing inherently unfair in giving someone the punishment they expected at the time they chose to break the law.[11] The offender committed the offence knowing the "price". In fact, the presumption against retrospectivity contained in s. 11(*i*) and the reliance-based interests it protects actually dictate that the offender should receive the sentence in force at the time of his offence, even if it is subsequently decreased. The right to a post-offence decrease in punishment at the time of sentencing is a mercy-based benefit flowing from current, not former, societal norms; it is not a benefit based on reliance or required as a matter of fairness.

19. With respect to the second outcome – disparity between sentences for two similar offenders who happen to be sentenced on different days under different laws – it is not unfair to impose different penalties on offenders in recognition of the fact that different punishments were in force at the time of each offender's sentencing. Disparity is appropriate where it reflects

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[10] *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, S.C. 2005, c. 32, s. 3, published in (2005) C. Gaz. III, c. 32, in force 1 November 2005 *per* SI/2005-104, (2005) C. Gaz. II., p. 2550; *R. v. Anthony-Cook*, 2016 SCC 43, [2016] 2 S.C.R. 204, at paras. 2, 25, 35-40; *R. v. Wong*, 2018 SCC 25, at paras. 3, 61; *R. v. Lalumiere*, 2011 ONCA 826, at paras. 28, 31-32, leave ref'd, 2014 CanLII 8255 (SCC); *R. c. Barrett*, 2013 QCCA 1351, at paras. 18-22.

[11] *R. v. Docherty*, [2016] UKSC 62,at paras. 31, 45; *R. v. McDonald* (1985), 21 C.C.C. (3d) 330 (Ont. C.A.), at p. 344; *R. v. Letiec*, 2015 ABCA 123, at para. 48.

differences involving the offence or the offender. The gravity of the offence is an important feature driving the assessment of the proportionate sentence. Gravity is informed by societal norms with respect to the offence expressed in legislation, including in the minimum and maximum punishments in the *Criminal Code*. A change in the legislative punishment means society's assessment of the gravity of the offence has changed. When a sentence has decreased, a court sentencing at the time of the reduced penalty is sentencing for a less serious offence. When the punishment is increased, the gravity of the offence is perceived to be greater. Giving these changes effect in sentences is exactly what the proportionality principle requires. The result does not offend the parity principle because the "disparity between sanctions … [is] justified".[12]

F. The lowest-punishment interpretation has negative implications

20. A two-laws interpretation of s. 11(*i*) revives a repealed law only when the offence was committed under that law, and only in service of a fundamental aversion to retrospective punishment. A lowest-punishment interpretation additionally revives repealed laws that existed only temporarily after the offence and before sentencing. For four reasons, the Court should be reluctant to permit more-frequent access to repealed laws.

21. First, an expanded interpretation gives rise to unjustified disparity in punishment for similar offenders. Under the lowest-punishment interpretation, if A commits an offence and the punishment then temporarily drops and is restored before B commits the same offence, but A and B are subsequently sentenced on the same day, A would benefit from the temporary reduction while B would not; A would receive a lesser punishment than B, even though they breached the same law and were sentenced on the same day. At both the time of the offence and of sentencing, society's assessment of the gravity of the offence was the same for both A and B. The disparity, and unfit lower sentence for A, would have nothing to do with the offence or the offender.

22. Second, giving access to temporarily reduced punishments offends both societal interests s. 11(*i*) is intended to protect, by resulting in (1) a post-offence punishment inconsistent with the offender's expectations at the time of the offence, and (2) an unfit sentence, determined in accordance with a repealed law reflecting society's previous, not current, views.

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[12] *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at paras. 36-37, 78-79; *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at paras. 7, 12; *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at paras. 41-42, 45; *R. v. Gejdos*, 2017 ABCA 227, at para. 38.

23. Third, reviving repealed laws now deemed to be wrong is undesirable, and should be accepted only when required by the rule against retrospective punishment. The prospect that repealed laws will be revived leads to a lack of certainty, clarity, predictability and uniformity in the law. While in most cases applying repealed laws will reflect a previous view of Parliament, it may also give effect to laws that perhaps did not even reflect societal values at the time they were in force: *e.g.* (1) legislative errors resulting in unanticipated effects on punishment; (2) temporary gaps in the law left after a court strikes a minimum sentence under s. 12 and before Parliament enacts a new *Charter*-compliant minimum; (3) failed legislative experiments regarding punishment that were "rapidly found to be unrealistic and wrong"; and (4) the products of corrupt legislatures that reduced penalties only to favour themselves or their compatriots.[13]

24. Fourth, by adding to the number of versions of the law a court must consider when applying s. 11(*i*), the lowest-punishment interpretation could add complexity and delay to criminal proceedings. To correctly apply s. 11(*i*), courts must "interpret both the old and the new provisions", apply those provisions to the facts of the case, and qualitatively assess the effect of each potentially applicable law on the offender's liberty and security of the person. This exercise, as this Court noted in *R. v. Johnson*, may require different "evidence and arguments" regarding each version of the law. The broad definition of "punishment" under s. 11(*i*) means courts may have to consider, under each version of the law, the applicable (1) dispositions (*e.g.* imprisonment vs. conditional sentence); (2) statutory range of sentence; (3) ancillary orders; (4) credits against sentence (*e.g.* credit for time spent in presentence custody); and (5) early-release mechanisms (*e.g.* parole eligibility). Each additional version of the law a court must consider adds legal complexity and the potential of further evidence, submissions, and undesirable delay.[14]

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[13] *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, at paras. 24-25; *Ruban v. Ukraine*, No. 8927/11 (28 November 2016), at paras. 34-46; *R. v. Docherty*, [2016] UKSC 62, at para. 46; Francesco de Sanctis, "Reconciling Justice and Legality" (2014) 12 J. Int'l Crim. Justice 847, at p. 866; Ben Juratowitch, *Retroactivity and the Common Law* (Portland: Hart Publishing, 2008), at pp. 117-18.

[14] *R. v. Johnson*, 2003 SCC 46, [2003] 2 S.C.R. 357, at paras. 13, 44-46, 50-51; *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, at paras. 35-42; *R. v. Hooyer*, 2016 ONCA 44, at paras. 43-45; *R. v. Olah*, 1997 CanLII 3023 (Ont. C.A.), leave ref'd, [1997] S.C.C.A. No. 549; *R. v. Luke*, 1994 CanLII 823 (Ont. C.A.), leave ref'd, [1994] S.C.C.A. No. 299; *R. v Bent*, 2017 ONSC 3189; *R. v. R.S.*, 2015 ONCA 291; *Whaling v. Canada (Attorney General)*, 2014 SCC 20, [2014] 1 S.C.R. 392; *R. v. Dell*, 2018 ONCA 674, leave ref'd, 2019 CanLII 6092 (SCC).

G. The "time of sentencing" is the moment when sentence is imposed

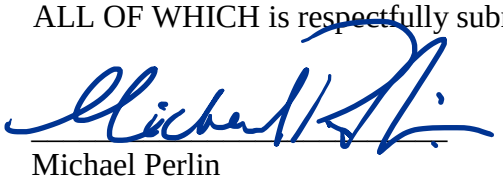
25. It is unnecessary in this case to decide whether the term "time of sentencing" should be interpreted broadly as a period of time, running from the laying of charges to the imposition of sentence. The issue does not arise in this case. The punishment the respondent sought existed only temporarily, after his offence and before he was charged.[15]

26. However, should the Court decide the question, interpreting "time of sentencing" as a broad range of dates conflicts with the text of the provision. A broad interpretation would confer the benefit of the lowest punishment within the time of sentencing. This interpretation conflicts with the fact that s. 11(*i*) deals with changes that occur "between the time of commission and the time of sentencing". It has no application to changes within those times. Moreover, the ordinary meaning of the phrase "time of sentencing" is the "point" or "moment" in time (not period in time) when sentence is imposed. The analogous phrase "time of commission" in s. 11(*i*) has been interpreted as the precise moment when the act and fault of the crime coincide so as to attach criminal liability.[16] Finally, a purposive two-laws interpretation of s. 11(*i*) leads to the conclusion that time of sentencing must mean the moment when the sentence is imposed. Imposing any repealed laws – other than the law in force at the time of the offence – is inconsistent with s. 11(*i*)'s purposes.

PARTS IV AND V – SUBMISSIONS AS TO COSTS AND ORDER SOUGHT

27. Not applicable.

ALL OF WHICH is respectfully submitted by:



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DATED at Toronto, Ontario, this 7th day of March, 2019.

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[15] Appellant's factum, at para. 53; Respondent's factum, at paras. 8-9, 12.

[16] *R. v. Wookey*, 2016 ONCA 611, at paras. 23-25, leave ref'd, 2017 CanLII 432 (SCC); *R. v. R.S.*, 2015 ONCA 291, at para. 21; *Lalonde v. Canada (AG)*, 2016 ONCA 923, at paras. 17, 24-25.

PART VI – SUBMISSIONS ON CASE SENSITIVITY

28. Not applicable.

PART VII – AUTHORITIES CITED

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