S.C.C. File No. 37994

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal for British Columbia)

B E T W E E N :

HER MAJESTY THE QUEEN

Appellant
(Appellant)

– and –

RP

Respondent
(Respondent)

– and –

ATTORNEY GENERAL OF ONTARIO,
ASSOCIATION QUÉBÉCOISE DES AVOCATS ET AVOCATES DE LA DÉFENCE,
and CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO

Interveners

FACTUM OF THE INTERVENER, CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO

(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The Quebec Court of Appeal correctly interpreted s.11(i) of the *Canadian Charter of Rights and Freedoms* ("*Charter*") as guaranteeing the "benefit of the lesser punishment" available at any time "between the commission of the offence and the time of sentencing." This broad interpretation provides optimal protection to the liberty interests of all accused persons, consistent with the overall philosophy of the *Charter*, and accords with settled principles of statutory interpretation.

2. The interpretation urged by the Appellant – that s.11(i) limits the obtainable sanctions to those available at the time of the commission of the offence and those available at the time of sentencing - creates arbitrary limitations on the liberty interests protected by s.11(i). It deprives the accused of the benefit of a lesser punishment available between the date of the commission of the offence and the date of sentencing based on factors beyond the accused's control. These include: the length of an investigation, the timing and frequency of legislative changes to the sentencing regime, and the myriad of factors that affect the length of a criminal proceeding.

3. The interpretation advanced by the Appellant also creates unfairness to accused persons caught in a "three-regime" sentencing scenario. This arises when accused persons undergoing criminal prosecution are subject to an increase in the punishment they face after having already made decisions regarding the conduct of their defence. The only plausible interpretation that prevents this unfairness is the liberal interpretation adopted by the Quebec Court of Appeal.

B. Statement of Facts

4. The CLA takes no position with respect to the facts as advanced by the parties and defers to the parties on the factual record.

PART II – QUESTIONS IN ISSUE

5. The Appellant raises one issue on appeal: did the Quebec Court of Appeal err in law in finding that s.11(i) of the *Charter* protects the right of an offender to the benefit of the least severe sentence in place at any time between the time of the commission of the offence and the time of sentencing? The CLA submits that the Quebec Court of Appeal did not err in this regard.

PART III – ARGUMENT

A. A Broad Purposive Interpretation of s.11(i)

6. Liberty is the most precious right we possess. The *Charter* bears witness to this fact: most of our *Charter* rights seek to protect our liberty, whether it is to worship, assemble, associate, work, travel, or reside in a chosen place. In the criminal sphere, where the right to liberty is at stake, our *Charter* rights protect us against unreasonable limits on our liberty. Defining those limits is often difficult, but one thing is clear: the need to protect against arbitrary limitations on liberty.

7. The concern with the arbitrary restriction of liberty pervades criminal-related *Charter* jurisprudence:

- Under section 7, it is a principle of fundamental justice that limitations on liberty not be arbitrary;

- Under section 8, unreasonable searches and seizures are necessarily arbitrary because they lack lawful grounds;
- Under section 9, arbitrary detention and imprisonment is prohibited;
- Under section 10(c), the right to *habeas corpus* preserves the right to review an unlawful (i.e. arbitrary) detention;
- Under section 11(e), the right not to be denied reasonable bail without just cause protects against arbitrary detention;[1] and
- Under section 12, the right not to be subject to cruel and unusual punishment protects against arbitrary punishment.[2]

8. Further, Canadian sentencing law is guided by notions of proportionality and restraint. These fundamental principles of sentencing, set out in ss.718 to 718.2 of the *Criminal Code*, focus on tailoring restrictions on individual liberty to the specific circumstances of a given case, even after an accused has been convicted of an offence. In particular, s.718.2(d) provides that "an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances" and s.718.2(e) provides that "all available sanctions, other than imprisonment, that are reasonable in the circumstances…should be considered."[3] These principles demonstrate societal values that cherish liberty and abhor excessive and arbitrary restrictions on liberty.

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[1] *R v Pearson*, [1992] 3 SCR 665 (SCC) at paras 32, 45-46, 58-59.

[2] *R v Smith*, [1987] 1 SCR 1045 (SCC) at paras 43-44, 62. Note that Lamer J. finds that arbitrariness is a "minimal factor in the determination of whether a punishment or treatment is cruel and unusual" at para 62.

[3] *Criminal Code*, RSC, 1985, c C-46.

9. It is clear that s.11(i) protects liberty. It seeks to limit the punishment to which an offender may be subject upon conviction. When the punishment "has been varied between the time of commission and the time of sentencing," the offender is entitled to the "lesser punishment." Like all of the legal rights listed above, s.11(i) should aim to protect against arbitrary limitations on liberty. The CLA submits that this Honourable Court should interpret s. 11(i) with this purpose in mind.

10. The Appellant cites two purposes underlying the protection guaranteed by s.11(i):

(1) the rule of law that prohibits the state from increasing a sentence after an accused has decided to commit the crime; and

(2) the rule of equity that entitles the accused to a lesser punishment available at the time of sentencing.

11. The Appellant submits that neither of these purposes are advanced by an interpretation that allows the accused to benefit from a temporary reduction of the sentence between the time of the commission of the offence and the time of sentencing. This is true; but the CLA submits that there is a third purpose animating s.11(i) – that is, a recognition that the arbitrariness inherent in the question of which sentencing regime exists at the time the accused is sentenced should, to the extent possible, be resolved in favour of the accused.

12. This arbitrariness can be explained as follows. While an individual can theoretically be said to make a conscious decision to commit an offence at a particular time with knowledge of the available sanctions, the sanctions available at the time an accused is ultimately sentenced for that crime will depend upon countless factors outside of the accused's control, such as: when the crime

or the accused is detected by authorities, the length of the investigation, the time at which the authorities decide to lay charges,[4] and how long the case takes to conclude.

13. The last factor – how long the case takes to conclude – is itself a function of numerous other factors, such as: the resolution position available to the accused, the election of the Crown to proceed summarily or by indictment and the corresponding election by the accused of his mode of trial, as well as the possibility of exceptional circumstances that may delay the conclusion of a trial, such as complexity, medical emergencies, and mistrials.[5]

14. In addition to these factors, the available sanctions at the time of sentencing will, of course, also be a function of the timing of new legislation, which itself is influenced by the public's interest in penal changes as well as the length of time a bill takes to receive Royal Assent.

15. While these factors may result in a sentencing regime different from the one in place when the accused committed the offence coming into force by the time he is sentenced, many of the factors related to the accused's background and involvement in the offence never change. For example, the accused's background, *mens rea*, and degree of participation in the offence remains the same regardless of the time it takes for the proceedings to reach the sentencing stage. To the extent that external factors outside of the accused's control dictate the sentencing regime that will be in place at the time of sentencing, the ultimate sentence the accused faces will always be arbitrary.

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[4] For example, in *R v Ward*, [2002] OJ No 5398 (Sup Ct Jus) at paras 3, 14, 17 and *R v Slatter*, 2018 ONCA 962, at paras 4-10, the complainant reported the accused's sexual assaults decades (in the case of *Ward*) and years (in the case of *Slatter*) before the police decided to lay charges.

[5] *R v Jordan*, 2016 SCC 27, at paras 71-73, 77.

16. Consider, for example, two co-accused separately tried for the same offence. One is convicted and sentenced to the mandatory minimum (which was in place at the time he committed the offence and continues in place at the time he is sentenced). The other accused's trial ends in a mistrial and he is retried, only to be convicted and sentenced one year later. By that time, the mandatory minimum has been abolished – whether by the judiciary or the legislature. Section 11(i) guarantees the lesser punishment to the latter accused but not the former. This example highlights the inherent arbitrariness in sentencing offenders for the same offence across time. In situations akin to the case at bar (where a lesser sanction is available at a point between the time of the commission of the offence and the time of sentencing), it is submitted that s.11(i) ought to be interpreted in a way to reduce the arbitrariness in the sentence imposed and allow an accused to benefit from the lesser available sanction.

17. Indeed, this arbitrariness is underscored by the fact that the two purposes of s.11(i) identified by the Appellant – the rule of law and the rule of equity - contradict one another. The rule of law is premised upon an aversion to retroactive laws, yet this is what the rule of equity prescribes where a lesser sentence was available during the period between the commission of the offence and the sentencing date. At the same time, the rule of equity demands that the accused be sentenced according to the moral blameworthiness attached to the crime at the time of sentencing, yet the rule of law condemns this approach when the sentence has increased at the time of sentencing.

18. The CLA, therefore, asks this Court to recognize this third purpose animating s.11(i) – to mitigate the arbitrariness of what sentencing regime exists at the time the accused is sentenced. When this purpose is properly considered, it is clear that the appropriate interpretation of s.11(i) mandates that an accused be entitled to the benefit of the most favourable sentencing regime available between the time of the commission of the offence and the time of sentence.

B. The Appellant's Interpretation is Unfair

19. The Appellant's interpretation of section 11(i) - which disentitles an accused from the benefit of a more favourable sentencing regime temporarily in existence between the offence date and the sentencing date - is unfair.

20. As a starting point, in crafting a fit sentence a sentencing judge's purpose is to impose a sentence that will contribute to "the maintenance of a just, peaceful and safe society."[6] This requires not only that the sentence be proportionate to the gravity of the offence and the antecedents of the offender, but also that the sentencing judge exercise restraint in the sanctions that are imposed. Imposing a sanction more severe than necessary in the circumstances is an unnecessary infringement on liberty. Importantly, it must be kept in mind that the offender has little to no control over the time period between the commission of the offence and the completion of the proceeding and no control over the available sentencing options. In this regard, in cases like the one at bar, where a lesser sanction was available following the commission of the offence but prior to sentencing and that sanction is what is appropriate to promote a "just, peaceful, and safe society" there is no reasonable basis not to permit an offender the benefit of that lesser sentencing option.

21. The unfairness is also palpable to accused persons caught in a "three-regime" sentencing scenario. Consider accused persons who, at the time of being charged, are facing a less severe sanction than what was available at the time they committed the offence. A restrictive interpretation of s.11(i) would continually force such accused persons who are making decisions about the conduct of their defence to first consider the impact of possible or anticipated changes in penal law. This is a factor that should be entirely irrelevant to one's criminal defence.

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[6] *Criminal Code, supra*, s. 718.

22. Requiring an accused to be continually mindful of potential legislative changes that could increase the sanction he is facing upon conviction would impose an impossible burden. No one can predict the frequency and timing of legislative amendments. With every electoral cycle, the prospect of a new government ushers in with it the prospect of penal changes. With every shift in the public opinion on sentencing issues, calls for reform ring out.

23. Accused persons undergoing criminal prosecution should not be required to constantly evaluate the conduct of their defence against these variables. Yet an interpretation that limits the scope of s.11(i) would require just this scenario by creating a punitive impact on accused persons caught in such a "three-regime" sentencing scenario. The reality is, when making decisions in criminal cases, the greatest concern for defence lawyers and their clients, besides the strength of the Crown's case, is the penal sanction available upon conviction. These concerns affect fundamental decisions, such as resolution and mode of election of trial.

24. Accordingly, the CLA submits that, at minimum, fairness demands that an accused be entitled to rely upon the law in force (1) when the accused committed the offence, and (2) when the accused was *charged* with the offence, and was thereafter required to make decisions regarding the conduct of his defence. As Karakatsanis J. recognized in ***KRJ***,[7] "an accused who declines to consider a plea and is prepared to take the risk of going to trial should not be subsequently ambushed by an increase in the minimum or maximum penalty for the offence."[8]

25. Upon consideration of the language and purpose of the provision as well as settled principles of statutory interpretation, it is apparent that the only interpretation of s.11(i) is the one endorsed

[7] ***R v KRJ***, 2016 SCC 31.
[8] *Ibid* at para 25.

by the Quebec Court of Appeal – that the Appellant is entitled to the lesser of any punishments available between the time of the commission of the offence and sentencing. In *R v Cadman*, the British Columbia Court of Appeal came to the same conclusion on the interpretation of s.11(i) that the Quebec Court of Appeal did in this case. The Crown argued that the plain meaning of the word "time" connotes a "point-to-point comparison between two precise dates" – *i.e.* the date of the commission of the offence and the date of sentencing. The court rejected this interpretation finding that it had "no support in the authorities."[9]

26. While the CLA agrees with the Appellant that fairness in the "three-regime" sentencing scenario can be accomplished by interpreting the words "at the time of sentencing" in s.11(i) to include all the time that follows after the accused has been charged, and is therefore liable to punishment,[10] such an interpretation is contrary to the plain meaning of the phrase "time of sentencing." That is, it is not a legally permissible interpretation of the provision.

27. If Parliament intended the words "time of sentencing" to include the "time following the laying of the charge," they could have drafted the provision as such. They did not. Furthermore, the Appellant's position that the words "time of sentencing" be liberally interpreted is contrary to the Appellant's position that the rest of the provision be interpreted restrictively.

28. The correct approach, therefore, is to interpret s.11(i) as protecting the right of the accused "to the benefit of the lesser punishment" available at any time "between the commission of the offence and the time of sentencing." This interpretation is consistent with the plain meaning of

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[9] *R v Cadman,* 2018 BCCA 100, at paras 35-37. See for example also: *R v Yusuf*, 2011 BCSC 626, at para 30; *R v Bent*, 2017 ONSC 3189, at paras 79 – 81; *Liang v Canada,* 2014 BCCA 190, at para 59.

[10] See, for example, Appellant's factum at para 53.

s.11(i), and it is an interpretation that the Appellant itself admits is plausible.[11] Indeed, in Ontario, the Crown has previously conceded the correctness of this interpretation.[12]

29. This interpretation is further supported by s.33(2) of the *Interpretation Act,*[13] which states that words in the singular include the plural, and words in the plural include the singular. Effectively, therefore, "lesser punishment" would also mean "lesser punishments."[14]

30. Moreover, this interpretation prevents unfairness by ensuring that an accused will not be prejudiced by an increase in sentence after he is charged and has made decisions about the conduct of his defence. Finally, this interpretation is also the most liberal interpretation favourable to the accused, and one that mitigates the arbitrariness inherent in which sentencing regime exists at the time the accused is sentenced.

31. For all of these reasons, the CLA submits that the Quebec Court of Appeal did not err in its interpretation of s.11(i) of the *Charter.*

PART IV – COSTS

32. The CLA seeks no order as to costs.

PART V – ORDER SOUGHT

33. The CLA seeks permission to present oral argument at the hearing of the appeal. The CLA takes no position on the proper disposition of the appeal.

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[11] Appellant's Factum at para 7.
[12] *R v DP,* 2014 ONSC 386 at para 10, making reference to *R v Mehanmal,* 2012 ONCJ 681, see especially paras 74-77; *R v Boudreau,* 2012 ONCJ 322 at para 50.
[13] *Interpretation Act,* RSC, 1985 c l-21.
[14] See *R v Mehanmal, supra,* at para 77.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of March, 2019.

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PART VI – TABLE OF AUTHORITIES & LEGISLATION

Case law

Legislation Cited

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c 11, ss. 7, 8, 9 10(c), 11

Interpretation Act, RSC 1985, c l-21, s. 33(2)