Federal Court  Cour fédérale

Date: 20201119

Docket: T-455-16

Citation: 2020 FC 1074

Ottawa, Ontario, November 19, 2020

PRESENT: The Honourable Mr. Justice Barnes

PROPOSED CLASS PROCEEDINGS
AND PROPOSED SIMPLIFIED ACTION

BETWEEN:

KRISTEN MARIE WHALING
(FORMERLY KNOWN AS CHRISTOPHER JOHN WHALING)

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

ORDER AND REASONS

[1] This matter was heard together with *Liang v AGC*, docket T-456-16. The issues arising on these motions are identical and these Reasons will apply to both proceedings. The Plaintiffs in these two proceedings seek Orders under Federal Court Rule 334.12(2) certifying their actions as class proceedings and appointing them as representative plaintiffs on behalf of all proposed class members.

[2] The claims advanced on behalf of the proposed classes pertain to the passage and implementation of certain provisions of the *Abolition of Early Parole Act*, SC 2011, c 11 [*AEPA*]. The impugned provisions were those that retrospectively removed access to accelerated parole review [APR] for first-time, non-violent Federal penitentiary inmates who were, but for the *AEPA*, held in custody beyond their APR release dates. Those provisions were subsequently declared to be unconstitutional in *Liang v Canada*, 2014 BCCA 190, [2014] BCJ No 962 (QL) and *Canada v Whaling*, 2014 SCC 20, [2014] 1 SCR 392 [*Whaling*]. In *Whaling*, the Court stated that the retrospective removal of APR amounted to double punishment and a clear violation of s 11(h) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*] – indeed, it was described as one of the "clearest cases": see paras 63 and 72.

[3] The claims now advanced by the Plaintiffs are made on behalf of approximately 3252 past inmates seeking damages payable under s 24(1) of the *Charter*: see affidavit of Renée Marshall sworn September 3, 2020.

[4] The Plaintiffs have filed several affidavits from persons whose access to APR was curtailed by the passage of the *AEPA* describing the resulting prejudice they suffered. Ms. Whaling asserts that, among other things, she was held in custody for more than two years beyond her APR eligibility date. For Mr. Liang, the additional period of incarceration was six months during which time he alleges a loss of income of more than $50,000.

[5] These cases have been actively managed in the course of which the parties have substantially narrowed the scope of their disagreements about the content of appropriate certification Orders and the associated litigation plans. What remains in dispute is the scope of certain preliminary legal questions that the parties seek to have resolved ahead of a trial and the scope of the common issues of fact and law to be resolved at trial. The Defendant does not oppose the certification of these actions provided that the Orders and litigation plans are approved in conformity with its proposed language. All other matters necessary to satisfy Rule 334.16(1) and the terms of the certification Orders and litigation plans have been negotiated and resolved.

[6] The Plaintiffs propose four common questions of fact and law – the answers to which, they say, are necessary to resolve the liability issues between the parties. They are the following:

> (1) Did the *AEPA* breach the s. 11(h) *Charter* rights of the class members?
>
> (2) If so, was the s. 11(h) breach justified under s. 1 of the *Charter*?
>
> (3) If the s. 11(h) breach was not justified under s. 1 of the *Charter*, are damages pursuant to s. 24(1) a just and appropriate remedy for:
>
> i. Category One subclass members?
>
> ii. Category Two subclass members?
>
> (4) Is the claim statute-barred under section 39(1) of the *Federal Courts Act* and does section 39(2) apply?

[7] The Defendant does not take issue with these questions and, indeed, they generally conform to the four-part framework described in *Vancouver v Ward*, 2010 SCC 27, [2010] SCR

28 [*Ward*] for establishing a claim to damages under s 24(1) of the *Charter*. The Defendant does, however, assert that a fifth "critical" question is required, the answer to which could be dispositive. That question is the following:

> a. On the facts of this case, can the Crown, in its executive capacity, be held liable for government officials and Ministers implementing s. 10(1) of the *AEPA*, a legislative provision which was subsequently declared invalid by a court pursuant to s. 52(1) of the *Constitution Act, 1982*?

[8] The Plaintiffs oppose the addition of this question on the basis that it misconstrues and unduly limits their theory of Crown liability for damages payable under s 24(1) of the *Charter*. They maintain that their claims are not restricted to allegations against the executive and legislative branches of the government (or their members or agents) acting in common or independently. Rather, the claims to damages are based on the responsibility of the state as a whole for the infliction of harm arising from the "wrongful" implementation of unconstitutional legislation. The Plaintiffs' revised Reply Memoranda puts their opposition as follows at paras 20-22:

> 20. The Defendant misconceives the nature of *Charter* damages. *Charter* damages are public law damages for which the State "writ large" is directly (not vicariously) liable. When *Charter* damages are at issue, it is a conceptual error to attempt to attribute liability to individual state actors or some branch of the state (e.g. the executive). The SCC makes this point very clearly, in *Ward*:
>
> "*[22] The term "damages" conveniently describes the remedy sought in this case. However, it should always be borne in mind that these are not private law damages, but the distinct remedy of constitutional damages. As Thomas J. notes in Dunlea v. Attorney-General, [2000] NZCA 84, [2000] 3 N.Z.L.R. 136, at para. 81, a case dealing with New Zealand's Bill of Rights Act 1990, an*

> *action for public law damages "is not a private law action in the nature of a tort claim for which the state is vicariously liable but [a distinct] public law action directly against the state for which the state is primarily liable". In accordance with s. 32 of the Charter, this is equally so in the Canadian constitutional context. The nature of the remedy is to require the state (or society writ large) to compensate an individual for breaches of the individual's constitutional rights. An action for public law damages — including constitutional damages — lies against the state and not against individual actors. Actions against individual actors should be pursued in accordance with existing causes of action*."
>
> [Emphasis added]
>
> 21. Consequently, it is an error to ask whether the "*Crown, in its executive capacity*", can be liable for *Charter* damages.
>
> 22. Further, it is an error to distinguish between the executive and Parliament when considering where liability lies – the remedy of *Charter* damages lies against the state, or society, writ large.

[9] To certify a class proceeding, it is essential that the members' claims share a substantial common ingredient. This requires the identification of a common question or questions, the resolution of which is necessary to the outcome of each class member's claim. This requires a purposive analysis with a view to avoiding the duplication of fact finding or legal analysis: see *Wenham v Canada*, 2018 FCA 199 at para 72, [2018] FCJ No 1088 (FCA). Purely hypothetical questions should not be approved.

[10] I agree with the Plaintiffs that the Defendant's proposed common question would not be determinative of these cases nor would the answer to it advance the cases in any significant way.

There is undoubtedly an argument to be made that the Plaintiffs' theory of liability cannot be made out. Nevertheless, given the uncertainty that surrounds the threshold boundaries for the payment of *Charter* damages in this context, the Plaintiffs are entitled to make their cases as they have pleaded them: see *Desjardins Financial Services Firm Inc v Asselin*, 2020 SCC 30, [2020] SCJ No 30 (QL).

[11] It seems to me that if there is one issue of law in this area that amounts to settled doctrine it is that the state, in whatever capacity or capacities it acts, does not enjoy an absolute immunity from the payment of *Charter* damages when it causes injury to a person's *Charter*-protected rights by implementing unconstitutional legislation. While the legal threshold may be high, it is decidedly not insurmountable. This point is made quite clearly in *Ward* at paras 39-40 where the Court recognized the possibility of an award of *Charter* damages arising from state conduct that is "clearly wrong, in bad faith or an abuse of power" (ie. threshold misconduct):

> [39] In some situations, however, the state may establish that an award of *Charter* damages would interfere with good governance such that damages should not be awarded unless the state conduct meets a minimum threshold of gravity. This was the situation in *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405, where the claimant sought damages for state conduct pursuant to a valid statute. The Court held that the action must be struck on the ground that duly enacted laws should be enforced until declared invalid, unless the state conduct under the law was "clearly wrong, in bad faith or an abuse of power": para. 78. The rule of law would be undermined if governments were deterred from enforcing the law by the possibility of future damage awards in the event the law was, at some future date, to be declared invalid. Thus, absent threshold misconduct, an action for damages under s. 24(1) of the *Charter* cannot be combined with an action for invalidity based on s. 52 of the *Constitution Act, 1982*: *Mackin*, at para. 81.
>
> [40] The *Mackin* principle recognizes that the state must be afforded some immunity from liability in damages resulting from the conduct of certain functions that only the state can perform.

> Legislative and policy-making functions are one such area of state activity. The immunity is justified because the law does not wish to chill the exercise of policy-making discretion. As Gonthier J. explained:
>
> > The limited immunity given to government is specifically a means of creating a balance between the protection of constitutional rights and the need for effective government. In other words, this doctrine makes it possible to determine whether a remedy is appropriate and just in the circumstances. Consequently, the reasons that inform the general principle of public law are also relevant in a *Charter* context. [para. 79]

[12] Of course, if the Plaintiffs are able to establish a functional justification for an award of damages, it will be open to the Defendant to raise its own case to show why damages are not an appropriate or just remedy for reasons of public policy, good governance and separation of powers. It is not open, however, to the Defendant to recast the Plaintiffs' legal theory of their cases into something much narrower. As noted above, answering the Defendant's question will not be dispositive of the larger case the Plaintiffs already assert in the form of the broader common questions the parties have put forward by agreement. What the Defendant appears to be advancing indirectly is a motion to strike these actions on the basis that they do not disclose a legally tenable cause of action. The Court has already dismissed two previous defence motions to strike based on a finding that the state of the law in these factual contexts is uncertain and evolving. The current situation is no better than it was when those motions were dismissed. These remain issues for trial that can and should be answered on a full evidentiary record in response to the agreed common questions. The need for an evidentiary record in the determination of *Charter* damages in cases like these was clearly recognized in *Doucet-Boudreau v Nova Scotia (Minister of Education),* 2003 SCC 62 at paras 55-59, [2003] 3 SCR 3:

55 First, an appropriate and just remedy in the circumstances of a *Charter* claim is one that meaningfully vindicates the rights and freedoms of the claimants. Naturally, this will take account of the nature of the right that has been violated and the situation of the claimant. A meaningful remedy must be relevant to the experience of the claimant and must address the circumstances in which the right was infringed or denied. An ineffective remedy, or one which was "smothered in procedural delays and difficulties", is not a meaningful vindication of the right and therefore not appropriate and just (see *Dunedin*, *supra*, at para. 20, McLachlin C.J. citing *Mills*, *supra*, at p. 882, per Lamer J. (as he then was)).

56 Second, an appropriate and just remedy must employ means that are legitimate within the framework of our constitutional democracy. As discussed above, a court ordering a *Charter* remedy must strive to respect the relationships with and separation of functions among the legislature, the executive and the judiciary. This is not to say that there is a bright line separating these functions in all cases. A remedy may be appropriate and just notwithstanding that it might touch on functions that are principally assigned to the executive. The essential point is that the courts must not, in making orders under s. 24(1), depart unduly or unnecessarily from their role of adjudicating disputes and granting remedies that address the matter of those disputes.

57 Third, an appropriate and just remedy is a judicial one which vindicates the right while invoking the function and powers of a court. It will not be appropriate for a court to leap into the kinds of decisions and functions for which its design and expertise are manifestly unsuited. The capacities and competence of courts can be inferred, in part, from the tasks with which they are normally charged and for which they have developed procedures and precedent.

58 Fourth, an appropriate and just remedy is one that, after ensuring that the right of the claimant is fully vindicated, is also fair to the party against whom the order is made. The remedy should not impose substantial hardships that are unrelated to securing the right.

59 Finally, it must be remembered that s. 24 is part of a constitutional scheme for the vindication of fundamental rights and freedoms enshrined in the *Charter*. As such, s. 24, because of its broad language and the myriad of roles it may play in cases, should be allowed to evolve to meet the challenges and circumstances of those cases. That evolution may require novel and creative features when compared to traditional and historical remedial practice

> because tradition and history cannot be barriers to what reasoned and compelling notions of appropriate and just remedies demand. In short, the judicial approach to remedies must remain flexible and responsive to the needs of a given case.

Also see *Ward*, above, at paras 34-40 and *Brazeau v Canada (Attorney General)*, 2019 ONSC 1888, [2019] OJ No 1451 (QL), 2020 ONCA 184, [2020] OJ No 1062 (QL).

[13] I would add that, at this stage, the Court is not entitled to assess the strength of the case: see *Wenham*, above.

[14] In the result, I do not approve the Defendant's proposed common question for inclusion in the certification Orders.

[15] The parties also partially disagree about certain preliminary questions of law that could be answered in advance of trial. They each say that answering their respective preliminary questions has the potential to narrow the issues left for trial.

[16] In principle the resolution of preliminary questions of law can simplify a class proceeding: see for example *Manuge v Canada*, 2012 FC 499, [2013] 4 FCR 647. That said, there is no requirement that a party's proposed preliminary question be included within a certification Order, particularly where there is a strong disagreement about its benefits. If the resolution of a preliminary question is unlikely to make the proceeding simpler or more efficient, there is no value in approving it for resolution in advance of trial.

[17] The Plaintiffs' proposed preliminary question of law is the following:

a) Can the Crown be held liable in damages for the enactment or implementation of a law that is subsequently declared to be unconstitutional?

[18] The Defendant proposes the following alternatives:

a) Can the Crown, in its executive capacity, be held liable in damages for government officials and Ministers preparing and drafting a proposed Bill that was later enacted by Parliament, and subsequently declared invalid by a court pursuant to s 52(1) of the *Constitution Act, 1982*?

b) Can the Crown, in its executive capacity, be held liable in damages for Parliament enacting a Bill into law, which legislation was later declared invalid by a court pursuant to s 52(1) of the *Constitution Act, 1982*?

[19] I am not satisfied that any of the above questions should be answered in advance of trial. As discussed above, in the absence of an evidentiary record, the proposed questions are all hypothetical and answering them would not be of assistance in determining the Defendant's potential liability. It would still remain to be decided what factual circumstances would be sufficient to trigger *Charter* damages. These are matters of mixed fact and law that will require proof. I would add that the Defendant's proposed questions are subsumed within the agreed common questions of fact and law and are unnecessary for the resolution of the cases.

[20] Inasmuch as these cases remain under case management, these or related matters can continue to be discussed with a view to finding common ground. However, for the purposes of

these motions, the Court rejects for inclusion in the certification Orders all of the disputed preliminary questions.

[21] The parties have jointly submitted a form of Orders and attached litigation plans leaving out only the provisions dealing with the issues arising on these motions. I am satisfied that all of the requirements for certifying these two proceedings as class actions under Rule 334.16(1) have been met and the Order will be issued as presented and in accordance with these Reasons.

ORDER IN T-455-16

THIS COURT ORDERS that:

1. This action is hereby certified as a class proceeding against Her Majesty the Queen;

2. The Class is defined as follows:

    a. Class Members: are *"individuals* who were sentenced before March 28, 2011 and, as a result of s. 10(1) of the Abolition of Early Parole Act, SC 2011, c. 11 ("AEPA") removing their access to accelerated parole review ("APR"), were released from prison after their APR day parole eligibility date**."*

        **The term "individuals" is defined to mean persons who were, or are, offenders as described in the AEPA, the Corrections and Conditional Release Act, SC 1992 c. 20 ("CCRA") and the International Transfer of Offenders Act, SC 2004 c. 21 ("ITOA").*

        *** The term "APR day parole eligibility date" is to be understood with reference to s. 119.1 of the CCRA, which provides, "The portion of the sentence of an offender who is eligible for accelerated parole review under sections 125 and 126 that must be served before the offender may be released on day parole is six months, or one sixth of the sentence, whichever is longer."*

    This definition excludes the following two groups:

i. individuals who subsequently were reviewed under the APR scheme but received a "not directed" decision from a panel of the Parole Board on the APR criteria; and

ii. individuals who had their access to the APR scheme removed by s. 10(1) of the AEPA but were released on, or prior to, their APR day parole eligibility date.

b. "Subclass members" are any Class Members broken down into subclass categories, as follows:

i. Category A subclass – individuals who were reviewed and released on APR parole or regular parole, excluding individuals who were internationally transferred to Canada under the ITOA with APR day parole eligibility dates that were either prior to, or less than six months after, their day of transfer;

ii. Category B subclass – individuals who were denied regular parole solely due to grounds which would not have been applicable had the APR criteria been applied, excluding individuals who were internationally transferred to Canada under the ITOA with APR day parole eligibility dates that were either prior to, or less than six months after, their day of transfer;

iii. Category C subclass – individuals who were internationally transferred to Canada under the ITOA with APR day parole eligibility dates that were either prior to, or less than six months

after, their day of transfer, who were reviewed and released on APR parole or regular parole; and

iv. Category D subclass – individuals who were internationally transferred to Canada under the ITOA with APR day parole eligibility dates that were either prior to, or less than six months after, their day of transfer, who subsequently were denied regular parole solely due to grounds which would not have been applicable had the APR criteria been applied.

3. The representative Plaintiff hereby appointed is Kristen Marie Whaling.

4. The proceeding is certified on the basis of the following common issues, the first 3 of which shall be determined first as preliminary questions of law:

a. Did s. 28 of the ITOA apply to Category C and D subclass members such that the Parole Board was not required to review them for APR day parole until six months after their date of transfer?

b. Under the APR regime,

i. by statute or regulation, was there a date by which the Parole Board was required to review an individual for APR day parole release?;

ii. if so, what was that date?;

iii. by statute or regulation, was there a date by which an individual directed for APR day parole release by the Parole Board was entitled to be released?;

iv. if so, what was that date?

c. (1) Can the estate of a deceased class member in this action claim *Canadian Charter of Rights and Freedoms* forming part of the *Constitution Act, 1982* ("*Charter*") damages for violation of a s. 11(h) *Charter* right?; and (2) if the answer to (1) is yes, then do provincial estates statutes providing for an "*alive as of*" date prohibit or limit recovery of those *Charter* damages?

d. Did the AEPA breach the s. 11(h) *Charter* rights of the class members?

e. If so, was the s. 11(h) breach justified under s. 1 of the *Charter*?

f. If the s. 11(h) breach was not justified under s. 1 of the *Charter*, are damages pursuant to s. 24(1) a just and appropriate remedy for:

i. Category A subclass members?

ii. Category B subclass members?

iii. Category C subclass members?

iv. Category D subclass members?

g. Is the claim statute-barred under section 39(1) of the *Federal Courts Act* and does s. 39(2) apply?

5. Grace, Snowdon & Terepocki LLP are appointed as Class Counsel;

6. The Class Members claim the following relief:

a. Such remedy as the Court considers appropriate and just in the circumstances pursuant to s. 24(1) of the *Charter* for the infringement or denial of their Constitutional rights or freedoms as guaranteed by s. 11(h) of the *Charter*;

b. Prejudgment interest; and

c. Costs on a full or substantial indemnity basis.

7. The Litigation Plan in the form attached to this Order as Schedule “A” is approved;

8. No costs are payable on this motion for certification in accordance with Rule 334.39 of the *Federal Courts Rules*.

"R.L. Barnes"
Judge

Schedule "A"

KRISTEN MARIE WHALING
(FORMERLY KNOWN AS CHRISTOPHER JOHN WHALING)
v. HER MAJESTY THE QUEEN

LITIGATION PLAN
[date]

DEFINITIONS

1. The following defined terms apply:

   a. "**Action**" means this proposed class proceeding, court file No. T-455-16, commenced in the Court;

   b. "**APR**" means accelerated parole review;

   c. "**Class Counsel**" means the law firms of Grace, Snowdon & Terepocki LLP, Thliveris Law Corporation and Conroy & Company;

   d. "**Class Counsel Fees**" means the fees, disbursements and taxes approved by the Court;

   e. "**Class Counsel's Website**" means the website of the law firm Grace, Snowdon & Terepocki LLP;

   f. "**Class**" and "**Class members**" means "*individuals* who were sentenced before March 28, 2011 and, as a result of s.10(1) of the Abolition of Early Parole Act ("AEPA") removing their access to accelerated parole review ("APR"), were released from prison after their APR day parole eligibility date***."

      **The term "individuals" is defined to mean persons who were, or are, offenders as described in the Abolition of Early Parole Act, the Correctional and Conditional Release*

Act, and the International Transfer of Offenders Act.

*** The term "APR day parole eligibility date" is to be understood with reference to s.119.1 of the Corrections and Conditional Release Act SC 1997 c.17, which provides, "The portion of the sentence of an offender who is eligible for accelerated parole review under sections 125 and 126 that must be served before the offender may be released on day parole is six months, or one sixth of the sentence, whichever is longer."*

This definition excludes the following two groups:

i. individuals who subsequently were reviewed under the APR scheme but received a "not directed" decision from a panel of the Parole Board on the APR criteria; and

ii. individuals who had their access to the APR scheme removed by s.10(1) of the AEPA but were released on, or prior to, their APR day parole eligibility date.

g. "**Court**" means the Federal Court;

h. "**Notice Program**" means the method of distributing the Notice described in paragraphs 21-23 herein;

i. "**Notice**" means the notice to the Class of the certification of the Action as a class proceeding;

j. "**Plaintiff**" means Kristen Marie Whaling (formerly known as Christopher John Whaling), the proposed representative for all Class Members and Subclass Members; and

k. "**Subclass**" and "**Subclass members**" means any Class Member broken down into subclass categories, such as the following:

i. Category A subclass: individuals who were reviewed and released on APR parole or regular parole, excluding individuals

who were internationally transferred to Canada under the International Transfer of Offenders Act ("ITOA)" with APR day parole eligibility dates that were either prior to, or less than six months after, their day of transfer;

ii. Category B subclass – individuals who were denied regular parole solely due to grounds which would not have been applicable had the APR criteria been applied, excluding individuals who were internationally transferred to Canada under the International Transfer of Offenders Act ("ITOA") with APR day parole eligibility dates that were either prior to, or less than six months after, their day of transfer;

iii. Category C subclass – individuals who were internationally transferred to Canada under the International Transfer of Offenders Act ("ITOA") with APR day parole eligibility dates that were either prior to, or less than six months after, their day of transfer, who were reviewed and released on APR parole or regular parole; and

iv. Category D subclass – individuals who were internationally transferred to Canada under the International Transfer of Offenders Act ("ITOA") with APR day parole eligibility dates that were either prior to, or less than six months after, their day of transfer, who subsequently were denied regular parole solely due to grounds which would not have been applicable had the APR criteria been applied.

CLASS COUNSEL

2. Class Counsel is comprised of the law firms of Grace, Snowdon & Terepocki LLP, Thliveris Law Corporation and Conroy & Company.

3. Class Counsel may add other lawyers or other professionals to their complement if the majority of the Class Counsel decides that they are necessary.

CLASS DEFINITION

4. Class Members shall be defined as follows:

   a. **Class Members**: *"individuals* who were sentenced before March 28, 2011 and, as a result of s.10(1) of the Abolition of Early Parole Act ("AEPA") removing their access to accelerated parole review ("APR"), were released from prison after their APR day parole eligibility date**."*

      **The term "individuals" is defined to mean persons who were, or are, offenders as described in the Abolition of Early Parole Act, the Correctional and Conditional Release Act, and the International Transfer of Offenders Act.*

      ***The term "APR day parole eligibility date" is to be understood with reference to s.119.1 of the Corrections and Conditional Release Act SC 1997 c.17, which provides, "The portion of the sentence of an offender who is eligible for accelerated parole review under sections 125 and 126 that must be served before the offender may be released on day parole is six months, or one sixth of the sentence, whichever is longer."*

      This definition excludes the following two groups:

      i. individuals who subsequently were reviewed under the APR scheme but received a "not directed" decision from a panel of the Parole Board on the APR criteria; and

      ii. individuals who had their access to the APR scheme removed by s.10(1) of the AEPA but were released on, or prior to, their APR day parole eligibility date.

b. "**Subclass members**": Class Members broken down into subclass categories, namely the following:

   i. Category A subclass: individuals who were reviewed and released on APR parole or regular parole, excluding individuals who were internationally transferred to Canada under the International Transfer of Offenders Act ("*ITOA*)" with APR day parole eligibility dates that were either prior to, or less than six months after, their day of transfer;

   ii. Category B subclass – individuals who were denied regular parole solely due to grounds which would not have been applicable had the APR criteria been applied, excluding individuals who were internationally transferred to Canada under the International Transfer of Offenders Act ("*ITOA*") with APR day parole eligibility dates that were either prior to, or less than six months after, their day of transfer;

   iii. Category C subclass – individuals who were internationally transferred to Canada under the International Transfer of Offenders Act ("*ITOA*") with APR day parole eligibility dates that were either prior to, or less than six months after, their day of transfer, who were reviewed and released on APR parole or regular parole; and

   iv. Category D subclass – individuals who were internationally transferred to Canada under the International Transfer of Offenders Act ("*ITOA*") with APR day parole eligibility dates that were either prior to, or less than six months after, their day of transfer, who subsequently were denied regular parole solely due to grounds which would not have been applicable had the APR criteria been applied.

REPORTING TO AND COMMUNICATING WITH THE CLASS MEMBERS

5. The Defendant anticipates there may be in excess of 1000 Class Members across Canada.

6. Class Counsel will setup and maintain a link on Class Counsel's Website which will contain information about the status of the action and explanation on how a class action operates. Copies of court documents (with the exception of any items under seal), court decisions, notices and other information relating to the Action will be posted on and will be accessible from the Website. From time to time, Class Counsel may post Frequently Asked Questions ("FAQs") and answers on the Class Counsel Website.

7. In the event the Plaintiff receives from the Defendant information indicating one or more Class Members are federally incarcerated during any part of the proceeding (and will consequently not have access to the internet), these Class Members will be informed by letter from Class Counsel that they are able to contact the offices of Class Counsel to receive updates as to the progress of the proceeding. Class Members will be provided with Class Counsel's contact details. Legal assistants from an office of Class Counsel will deal with inquiries and provide information. Information and updates provided on Class Counsel's website will also benefit incarcerated Class Members by being available to their family/friends.

LITIGATION SCHEDULE

8. The Honourable Justice Barnes has been appointed as the Case Management Judge for this Action.

9. After this Action is certified as a class proceeding, the parties will ask Justice Barnes to set a litigation schedule for:

   a. completion of pleadings;

   b. hearing of the determination of the preliminary questions of law.

c. the documentary production and delivery of affidavits or lists of documents by the parties; and

d. the examinations for discovery.

10. The parties agree that it would be premature to set any schedule in relation to a trial of the common issues, until following the completion of document discovery.

11. Class Counsel and counsel for the Defendant may request that the litigation schedule be amended from time to time.

HEARING OF PRELIMINARY QUESTIONS OF LAW

12. Within two months of the close of pleadings, the parties will request the Court to schedule a hearing for the conclusive determination of a number of preliminary questions of law. The hearing may take the form of a summary trial, bifurcated trial or similar proceeding as agreed between the parties or otherwise determined by the Case Management Judge in the event the parties cannot reach agreement.

13. The questions of law to be determined at the hearing shall be the following:

    a. Did s.28 of the ITOA apply to Category C and D subclass members such that the Parole Board was not required to review them for APR day parole until six months after their date of transfer?

    b. Under the APR regime,

        i. by statute or regulation, was there a date by which the Parole Board was required to review an individual for APR day parole release?;

        ii. if so, what was that date?;

iii. by statute or regulation, was there a date by which an individual directed for APR day parole release by the Parole Board was entitled to be released?;

iv. if so, what was that date?

c. (1) Can the estate of a deceased class member in this action claim *Charter* damages for violation of a s.11(h) *Charter* right?; and (2) if the answer to (1) is yes, then do provincial estates statutes providing for an "*alive as of*" date prohibit or limit recovery of those *Charter* damages?

14. These preliminary questions of law are to be included as certified common questions of law.

15. All other steps in the action shall be held in abeyance until the preliminary questions of law have been finally determined, including any appeals.

16. Following final determination of the preliminary questions of law, including any appeals, the parties will appear at a Case Management Conference to determine a suitable process for the determination of the remaining common issues of fact and law at the common issues trial, including whether by summary trial or other process for trial by way of affidavit.

FILING AND SERVICE OF STATEMENT OF DEFENCE AND REPLY

17. The Defendant will file and serve its Statement of Defence within 50 days of the date that the certification order is granted.

18. The Plaintiff will file and serve her Reply, if any, within 20 days of the Defendant serving its Statement of Defence.

NOTICE OF CERTIFICATION OF THE ACTION AS A CLASS PROCEEDING

19. Within 90 days of the final determination of the preliminary questions of law (including the disposition of any appeals) or as otherwise agreed between the parties or as directed at a Case Management Conference to

be held following the final determination of the preliminary questions of law (including the disposition of any appeals), if the Action remains ongoing, the Defendant will provide Class Counsel with the following information:

a. A complete list of all Class Members;

b. Where a Class Member is incarcerated in a federal institution, the name of the institution at which he or she is currently placed and the date of his or her warrant expiry;

c. Where a Class Member has been released in the community to serve the remainder of his or her sentence (i.e. warrant expiry has not been reached), then his or her last known contact address and telephone number;

d. Where a Class Member is no longer under federal sentence, the last known contact address and telephone number of the Class Member.

20. At a Case Management Conference to be held following the determination of the preliminary questions of law (including any appeals), the Court will be asked to:

a. Settle the form and content of the Notice;

b. Settle the particulars of the Notice Program; and

c. Settle the particulars of the opt out process.

21. It is premature to settle the content of the Notice at the certification stage and before the determination of the preliminary questions of law (including any appeals), as certain key issues are in dispute. At this time, the parties propose that the form and content of the Notice include:

a. The certified class definitions;

b. The names of the representative parties;

c. The name and contact information of Class Counsel, and confirmation that any inquiries regarding the notice or the class proceeding may be directed to them at a specified address;

d. A description of the causes of action asserted and the relief sought;

e. A description of the defences asserted by the Defendant;

f. The certified common issues;

g. A description of the possible financial expense, if any, of the proceeding to class members;

h. An explanation of the opt-out process, including what steps are required by the class member to exclude themselves and the timeframe for doing so;

i. A statement that judgment on the common issues will be binding on all class members who do not opt out of the proceeding, whether favorable or not;

j. A summary of any agreements between the representative parties and their lawyers respecting fees and disbursements, including a summary of the terms of any contingency fee arrangement; and

k. An explanation of any right for class members to participate in the proceeding.

22. The parties propose particulars of the Notice Program to be as follows:

a. Class Counsel will post the Notice on the Class Counsel Website within 28 days of it being settled by the parties pursuant to paragraph 20 herein;

b. Class Counsel will mail the Notice to the last known addresses of all Class Members within 21 days either following receipt of such information from the Defendant as set out in paragraph 19 herein or the Case Management Conference described in paragraph 20, whichever is later.

23. At this time, the parties propose the particulars of the opt out process to be as follows:

    a. The opt out program period shall run for 120 days, given the wide-ranging locations and circumstances of the Class Members. Notice service period shall last 60 days and begin 21 days after either the receipt of the information described in paragraph 19 herein or the Case Management Conference described in paragraph 20, whichever is later. The opt out deadline will begin upon the conclusion of the service period and last for 60 days.

    b. Class Members may opt out of this Action by sending written election to the office of Grace, Snowdon & Terepocki LLP before the expiration of the opt-out period, or through such other means as determined following the Case Management Conference described in paragraph 20.

    c. No Class Member may opt out of this Action after the expiration of the opt-out period.

    d. Within 30 days after the expiration of the opt-out period, the office of Grace, Snowdon & Terepocki LLP will deliver to the Court and the counsel for the Defendant an affidavit listing, under seal, the names and addresses of all Class Members who have opted out of this Action.

ACTION TO PROCEED USING THE FEDERAL COURTS RULES

24. Although the SFASOC is pleaded as a Simplified Action, the Defendant has not consented to it proceeding as a Simplified Action nor has a Court ordered it.

25. The parties are in agreement that the starting point be that the standard *Federal Courts Rules* apply to this action, subject to any modifications agreed to by the parties or ordered by the Court through the case management process as the action develops.

26. If either party wishes that this action be conducted as a Simplified Action, that should be addressed through a separate motion pursuant to Rule 292(d) with submissions as to why such an order is appropriate in the circumstances.

DOCUMENT EXCHANGE AND MANAGEMENT

27. The parties propose that the *Federal Courts Rules* apply to the document discovery process, with the following modifications:
    a. Each party may serve a List of Documents in lieu of an Affidavit of Documents;
    b. the parties exchange Affidavits or Lists of Documents within 180 days following the determination of the preliminary questions of law (including the disposition of any appeals).
28. The appropriate scope of the document production obligations of the parties cannot be determined at this time as key issues are in dispute, and the pleadings have not yet closed.
29. Class Counsel will use data management systems to organize and manage all documents received from the Defendant. The same data management systems will be used to organize and manage all relevant documents in the possession of the Plaintiff and Class Members.
30. Class Counsel will set up individual files for the collection of any documents relevant only to that individual Class Member. The file of the Representative Plaintiff will be the managing file.

WITNESS EVIDENCE

31. In the event that the parties agree to have common issues of fact and law determined by way of summary trial or at trial by way of affidavit, deadline for the exchange of affidavits will be set through agreement or alternatively the case management process so as to permit cross

examination of the affiants. Relevant affiants/witnesses will be selected subsequent to the completion of the discovery process.

EXPERTS

32. The parties propose that the *Federal Courts Rules* apply to the exchange of expert reports.

DISPUTE RESOLUTION SERVICES

33. The parties may consider non-binding dispute resolution once this action has sufficiently evolved.

EXAMINATIONS FOR DISCOVERY

34. The parties propose that examinations for discovery be completed 180 days before the first day of trial of the common issues.

35. Examinations for discovery will be conducted according to the *Federal Courts Rules*.

COMMON ISSUES AND AGGREGATE DAMAGES

36. It is premature to discuss anticipated trial dates, length or mode of evidence until the Court has made a determination on the preliminary questions of law (including the disposition of any appeals).

37. The following common question of mixed fact and law will be included at a common issues trial:

    a. Did the AEPA breach the 11(h) *Charter* rights of the class members?

    b. If so, was the s.11(h) breach justified under s.1 of the *Charter*?

c. If the s.11(h) breach was not justified under s.1 of the *Charter*, are damages pursuant to s.24(1) a just and appropriate remedy for:

   i. Category A subclass members?

   ii. Category B subclass members?

   iii. Category C subclass members?

   iv. Category D subclass members?

d. Is the claim statute-barred under section 39(1) of the *Federal Courts Act* and does s.39(2) apply?

38. The parties agree that the question of whether or not aggregate damages are appropriate (and the related question of what an appropriate, workable methodology for determining aggregate damages would be) should be determined after all other common issues have been determined, in accordance with Rule 334.28(1).

INDIVIDUAL ISSUES

39. After determining the common issues, the trial judge will be asked to give directions in relation to any individual issues pursuant to Rule 334.26 of the Federal Courts Rules. However, at this time it is premature to set any parameters for the conduct of individual issues trials.

40. Rule 334.31 will govern any appeals arising from proceedings involving individual issues.

CLASS COUNSEL FEES AND ADMINISTRATION EXPENSES

41. At the conclusion of the common issues trial, the Court will be asked to approve the agreement between the Representative Plaintiff and Class Counsel and fix Class Counsel's Fees.

CASE MANAGEMENT CONFERENCES/INTERLOCUTORY MOTIONS

42. There will be a case management conference every 2 months, unless the parties and the Court agree that such hearings are not required.

43. Unless a particular motion is a matter of urgency, all interlocutory motions will be heard at these regular case management hearings. Any party bringing an interlocutory motion shall raise this at a Case Management Conference for the Court to determine a suitable timeline for the exchange of materials.

REVIEW OF THE LITIGATION PLAN

44. The Court may revise this Plan from time to time, as required.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-455-16
STYLE OF CAUSE:	KRISTEN MARIE WHALING (FORMERLY KNOWN AS CHRISTOPHER JOHN WHALING) v HER MAJESTY THE QUEEN
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE BETWEEN HALIFAX, NOVA SCOTIA OTTAWA, ONTARIO, AND VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	OCTOBER 2, 2020
ORDER AND REASONS:	BARNES J.
DATED:	NOVEMBER 19, 2020

APPEARANCES:

Tonia Grace David Honeyman	FOR THE APPLICANT
Cheryl Mitchell Matt Huculak Ryan Grist	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Grace, Snowdon & Terepocki LLP Barristers and Solicitors Abbotsford, BC	FOR THE APPLICANT
Attorney General of Canada Vancouver, BC	FOR THE RESPONDENT