Federal Court  Cour fédérale

Date: 20240509

Docket: T-455-16

Citation: 2024 FC 712

Ottawa, Ontario, May 9, 2024

PRESENT: The Honourable Mr. Justice Pamel

CERTIFIED CLASS PROCEEDING

BETWEEN:

KRISTEN MARIE WHALING
(FORMERLY KNOWN AS CHRISTOPHER JOHN WHALING)

Plaintiff

and

HIS MAJESTY THE KING

Defendant

JUDGMENT AND REASONS

I. Overview

[1] The *Corrections and Conditional Release Act*, SC 1992, c 20 [CCRA] was proclaimed in force in 1992, ushering in what was thought at the time to be a modern, comprehensive framework for corrections and conditional release of offenders. The CCRA completely replaced the old *Penitentiary Act* and *Parole Act*, and introduced the concept of Accelerated Parole Review [APR], a more streamlined process for parole review by the Parole Board as compared

with regular parole review, for first-time offenders who qualified pursuant to the criteria set out in the CCRA. APR was automatic, meaning that there was no need for the offender to apply for it; conducted on paper, meaning that it took place without a hearing; and based upon less stringent criteria for granting parole (the "no reasonable grounds to believe" test), with no discretion on the part of the Parole Board to decide against releasing the offender. Initially, the APR regime was only available for those eligible for full parole [APR full parole]; however, in July 1997, amendments to the CCRA [1997 Amendments] expanded the regime to include those offenders who were eligible for day parole [APR day parole], with an earlier parole eligibility date—one sixth of the sentence or six months, whichever was longer.

[2] The underlying action relates to the passage and implementation in 2011 of certain provisions of the *Abolition of Early Parole Act*, SC 2011, c 11 [AEPA], which retrospectively removed access to APR for first-time, non-violent federal penitentiary inmates who were, because of those provisions of the AEPA, held in custody beyond their APR release dates. The Supreme Court subsequently declared the provisions of the AEPA in question to be unconstitutional on the grounds that the retrospective removal of APR amounted to double punishment and a violation of paragraph 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] (*Canada (Attorney General) v Whaling*, 2014 SCC 20, [2014] 1 SCR 392 [*Whaling SCC*] and *Liang v Canada*, 2014 BCCA 190, [2014] BCJ No 962 (QL)). The claim now advanced by the plaintiff, Kristen Marie Whaling [Ms. Whaling], formerly known as Christopher John Whaling, against His Majesty the King [His Majesty], as responsible for, *inter alia*, the operation of the Correctional Service of Canada [CSC] and the Parole Board of Canada [Parole

Board], is on behalf of approximately 3,252 past inmates seeking damages payable under subsection 24(1) of the Charter as a result of such violations.

[3] On November 19, 2020, Mr. Justice Barnes certified the underlying action as class proceeding (*Whaling v Her Majesty the Queen*, 2020 FC 1074; aff'd 2022 FCA 37) [Certification Order], at which time he also certified a series of common issues; with respect to three of these issues, Ms. Whaling now brings a motion pursuant to Rule 220 of the *Federal Courts Rules*, SOR/98-106, for the determination of preliminary questions of law [PQOLs]. Two weeks prior to the hearing of this matter, the parties wrote to the Court to confirm their agreement that PQOL #2 need not be determined at this preliminary stage, as such would not advance or simplify the class proceedings. Consequently, the remaining questions to be determined as part of the present motion are the following:

> [PQOL #1:] Did s. 28 of the ITOA [*International Transfer of Offenders Act*, SC 2004, c 21] 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?
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> …
>
> [PQOL #3:] (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 estate statutes providing for an "*alive as of*" date prohibit or limit recovery of those *Charter* damages?

[4] For the reasons that follow, I would answer "yes" to both PQOL #1 and to both elements of PQOL #3.

II. Facts

[5] The parties proceeded by way of an agreed statement of facts. In short, having been convicted under the *Criminal Code*, RSC, 1985, c C-46, for weapons trafficking, possession of unauthorized firearms and possession of prohibited/restricted firearms with ammunition—offences committed in British Columbia in April 2006—Ms. Whaling was sentenced on September 29, 2010 to four years and six months in prison, after receiving credit for a period of pre-trial custody. At the start of her sentence, her eligibility date for unescorted temporary absences was June 29, 2011, on which day Ms. Whaling would also be eligible for APR day parole, having served by then one sixth (nine months) of her sentence.

[6] By letter dated April 4, 2011, the Parole Board informed Ms. Whaling that it would not be reviewing her case for APR day or full parole on account of recent amendments made to the CCRA by subsection 10(1) of the AEPA which, as stated, retrospectively repealed the APR process; this repeal had become effective some six days earlier, on March 28, 2011. After APR was abolished in her case, Ms. Whaling became eligible for day parole review under the regular (i.e. non-APR) review process on September 29, 2011, which was three months later than the date on which she would have become eligible under the APR process. Her full parole eligibility date remained March 29, 2012, her statutory release date remained September 27, 2013, and the warrant expiry date for her sentence remained March 28, 2015 (four years and six months from her sentencing). After Ms. Whaling was transferred to another institution so as to be closer to her family, on October 11, 2011, the Parole Board denied Ms. Whaling's day parole and full parole through the regular (non-APR) review process.

[7] On November 9, 2011, Ms. Whaling was released on bail by order of the British Columbia Court of Appeal pending the appeal of her conviction, and remained lawfully at large for 540 days before returning to the penitentiary to continue serving her sentence (around May 3, 2013). To account for the interruption in her sentence while her appeal was being heard, Ms. Whaling's full parole eligibility date was amended to September 20, 2013 (from March 29, 2012), her statutory release date was amended to March 21, 2015 (from September 27, 2013) and her new warrant expiry date for her sentence became September 18, 2016 (from March 28, 2015). There was no change at the time to her eligibility for day parole under regular parole review since that date (September 29, 2011) had already passed by the time Ms. Whaling had returned to prison. In any event, as stated, the Parole Board had denied Ms. Whaling's request for day parole on October 11, 2011.

[8] In the meantime, on or around May 6, 2011, Ms. Whaling and two other inmates commenced a constitutional challenge in the British Columbia Supreme Court, seeking to have subsection 10(1) of the AEPA declared to be of no force and effect on the basis that the provision violated their paragraph 11(h) rights pursuant to the Charter. On June 26, 2012, and while Ms. Whaling was out on bail pending the appeal of her conviction, the British Columbia Supreme Court held that subsection 10(1) of the AEPA indeed violated paragraph 11(h) of the Charter (*Whaling v Canada (Attorney General)*, 2012 BCSC 944). This decision was unanimously upheld at the British Columbia Court of Appeal on November 2, 2012 (*Whaling v Canada (Attorney General)*, 2012 BCCA 435) and eventually, as stated, by the Supreme Court of Canada on March 20, 2014 in *Whaling SCC*.

[9] Subsequent to the issuance of the British Columbia Supreme Court decision, the Parole Board conducted an in-office review and considered whether to direct that Ms. Whaling be released on parole pursuant to APR. On July 3, 2013, on initial review without a hearing, the Parole Board rendered a negative decision, stating that it was satisfied that there were reasonable grounds for believing that Ms. Whaling was likely to commit an offence involving violence before the expiration of her sentence (CCRA subsections 126(1) and (2)). The Parole Board referred her case to a new panel for an oral hearing pursuant to subsections 126(3) and (4) of the CCRA. On July 25, 2013, at the oral hearing, the Parole Board interviewed Ms. Whaling and concluded that it was satisfied that there were no reasonable grounds to believe that, if released, Ms. Whaling was likely to commit an offence involving violence before the expiration of her sentence; thus, the Parole Board directed her release on APR day parole, and the following day, Ms. Whaling was released.

[10] On September 20, 2013, CSC issued Ms. Whaling a full parole certificate, which reflected a release date of September 20, 2013 and a warrant expiry date of September 18, 2016. On March 15, 2016, Ms. Whaling filed the underlying statement of claim for this class proceeding, in which Ms. Whaling seeks damages pursuant to subsection 24(1) of the Charter on behalf of herself and all Class Members for the breach of their paragraph 11(h) Charter rights. It has been admitted by the parties that at all material times, Ms. Whaling and the Class Members were “offenders who [were] eligible for accelerated parole review under sections 125 and 126” for the purposes of section 119.1 of the CCRA.

III. Legislative Framework

[11] I have included the relevant legislative provisions as they existed at the time in the Annex to my decision. Without getting into specifics or exceptions, prior to July 1997, the relevant sections of the CCRA were grouped as follows:

A. Eligibility for Parole – sections 119 to 121 provided for the portion of sentences that must be served before an offender is eligible for day or full parole.

B. Parole Reviews – sections 122 to 124 provided for the process and timelines for regular parole review leading up to an offender's possible release on day and full parole.

C. Accelerated Parole Reviews – sections 125 and 126 provided for the process and timelines for APR leading up to an offender's possible release on APR full parole. As stated, day parole was not initially reviewable under the APR scheme.

[12] As it read prior to March 28, 2011, section 125 of the CCRA set out the qualification criteria for offenders under APR full parole, based on the offence committed, and required CSC to review the cases of such offenders for the purpose of referral to the Parole Board for a determination under section 126 of the CCRA for possible release. The process for APR was set out in section 126, which read, also prior to March 28, 2011, as follows:

Review by Board	**Examen par la Commission**
126 (1) The Board shall review without a hearing, at or before the time prescribed by the regulations, the case of an	126 (1) La Commission procède sans audience, au cours de la période prévue par règlement ou antérieurement, à l'examen des dossiers

offender referred to it pursuant to section 125.

transmis par le Service ou les autorités correctionnelles d'une province.

Release on full parole

(2) Notwithstanding section 102, if the Board is satisfied that there are no reasonable grounds to believe that the offender, if released, is likely to commit an offence involving violence before the expiration of the offender's sentence according to law, it shall direct that the offender be released on full parole.

Libération conditionnelle totale

(2) Par dérogation à l'article 102, quand elle est convaincue qu'il n'existe aucun motif raisonnable de croire que le délinquant commettra une infraction accompagnée de violence s'il est remis en liberté avant l'expiration légale de sa peine, la Commission ordonne sa libération conditionnelle totale.

Report to offender

(3) If the Board does not direct, pursuant to subsection (2), that the offender be released on full parole, it shall report its refusal to so direct, and its reasons, to the offender.

Rapport au délinquant

(3) Si elle est convaincue du contraire, la Commission communique au délinquant ses conclusions et motifs.

Reference to panel

(4) The Board shall refer any refusal and reasons reported to the offender pursuant to subsection (3) to a panel of members other than those who reviewed the case under subsection (1), and the panel shall review the case at the time prescribed by the regulations.

Réexamen

(4) La Commission transmet ses conclusions et motifs à un comité constitué de commissaires n'ayant pas déjà examiné le cas et chargé, au cours de la période prévue par règlement, du réexamen du dossier.

[Emphasis added.]

[Je souligne.]

[13] In conjunction with the enactment of the CCRA in 1992, and under the authority of subsection 156(1) thereof, the Governor in Council made the *Corrections and Conditional Release Regulations*, SOR/92-620 [CCRR]. At the time, the CCRR included section 159, which provided for the applicable time periods within which the review and referral under the APR regime set out in the CCRA were to take place:

159(1) The Service shall review the case of an offender to whom section 125 of the Act applies within one month after the offender's admission to a penitentiary, or to a provincial correctional facility where the sentence is to be served in such a facility.	159 (1) Le Service doit examiner le cas du délinquant visé à l'article 125 de la Loi dans le mois qui suit son admission dans un pénitencier ou dans un établissement correctionnel provincial lorsqu'il doit purger sa peine dans cet établissement.
(2) The Service shall refer the case of an offender to the Board pursuant to subsection 125(4) of the Act not later than three months before the offender's eligibility date for full parole.	(2) Le Service doit, conformément au paragraphe 125(4) de la Loi, transmettre à la Commission le cas du délinquant au plus tard trois mois avant la date de son admissibilité à la libération conditionnelle totale.
(3) The Board shall, pursuant to subsection 126(1) of the Act, review the case of an offender not later than seven weeks before the offender's eligibility date for full parole.	(3) La Commission doit, conformément au paragraphe 126(1) de la Loi, examiner le cas du délinquant au plus tard sept semaines avant la date de son admissibilité à la libération conditionnelle totale.
(4) A panel shall, pursuant to subsection 126(4) of the Act, review the case of an offender before the offender's eligibility date for full parole.	(4) Le comité doit, conformément au paragraphe 126(4) de la Loi, réexaminer le cas du délinquant avant la date de son admissibilité à la

	libération conditionnelle totale.
[Emphasis added.]	[Je souligne.]

[14] Nearly five years later, the 1997 Amendments came into effect, which, as stated, expanded APR to include day parole. The new amendments were limited to the addition of section 119.1 (within the "Eligibility for Parole" provisions) and section 126.1 (within the "Accelerated Parole Reviews" provisions) to the CCRA; sections 125 and 126 of the CCRA were not amended, nor were any changes made to the CCRR. Sections 119.1 and 126.1 of the CCRA read:

When eligible for day parole — offenders eligible for accelerated parole review	**Temps d'épreuve pour la semi-liberté — délinquants admissibles à la procédure d'examen expéditif**
119.1 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.	119.1 Le temps d'épreuve pour l'admissibilité à la semi-liberté est, dans le cas d'un délinquant admissible à la procédure d'examen expéditif en vertu des articles 125 et 126, six mois ou, si elle est supérieure, la période qui équivaut au sixième de la peine.
…	[…]
Release on day parole	**Application**
126.1 Sections 125 and 126 apply, with such modifications as the circumstances require, to a review to determine if an offender referred to in	126.1 Les articles 125 et 126 s'appliquent, avec les adaptations nécessaires, à la procédure d'examen expéditif visant à déterminer si la semi-liberté sera accordée au

subsection 119.1 should be released on day parole.	délinquant visé à l'article 119.1.
[Emphasis added.]	[Je souligne.]

I should mention that the definition of "sentence" as it read in the CCRA included "a sentence imposed by a foreign entity on a Canadian offender who has been transferred to Canada under the [ITOA]" (CCRA at section 2).

[15] Pursuant to section 119.1 of the CCRA, offenders must have served at least six months, or one sixth of the sentence, whichever is longer, before being eligible for APR day parole—this would include any portion of a sentence imposed abroad on a Canadian offender who has been transferred to Canada under the ITOA. In addition, so as to incorporate the allowance for APR day parole into the existing APR scheme, which only covered, up to that point, APR full parole, section 126.1 of the CCRA simply provided that sections 125 and 126 of the CCRA were to apply "with such modifications as the circumstances require".

[16] I should mention that the parties are at odds as to whether there exists a statutory or regulatory deadline by which the Parole Board was required to review an individual for APR day parole release; that is the issue under PQOL #2, which I need not address. Suffice it to say that the parties seem to be in agreement that it was CSC's policy that inmates eligible for APR day parole be released on their APR day parole eligibility day; His Majesty accepts that the absence of a statutory or regulatory deadline for releasing offenders on day parole would not authorize CSC to arbitrarily detain an offender beyond their APR day parole eligibility date, in line with its Charter obligations and the principles outlined in section 4 of the CCRA.

[17] Finally, under the heading “Sentence Calculation”, the relevant provisions of the ITOA are sections 27 and 28, which state the following:

If eligible for parole, etc., before transfer	**Admissibilité antérieure à la date du transfèrement**
27 If, under the *Corrections and Conditional Release Act* or the *Criminal Code*, the day on which a Canadian offender is eligible for a temporary absence, day parole or full parole is before the day of their transfer, the day of their transfer is deemed to be their day of eligibility.	27 Si, en raison de l’application de la *Loi sur le système correctionnel et la mise en liberté sous condition* ou du *Code criminel*, la date à laquelle le délinquant canadien devient admissible à la permission de sortir, à la semi-liberté ou à la libération conditionnelle totale est antérieure à la date de son transfèrement au Canada, cette dernière date est réputée être la date d’admissibilité.
Review by Board	**Examen**
28 Despite sections 122 and 123 of the *Corrections and Conditional Release Act*, the Parole Board of Canada is not required to review the case of a Canadian offender until six months after the day of their transfer.	28 Par dérogation aux articles 122 et 123 de la *Loi sur le système correctionnel et la mise en liberté sous condition*, la Commission des libérations conditionnelles du Canada n’est pas tenue d’examiner le dossier du délinquant canadien avant l’expiration d’un délai de six mois suivant la date de son transfèrement au Canada.
[Emphasis added.]	[Je souligne.]

[18] Keeping in mind that the ITOA was enacted in 2004, seven years after the coming into force of the 1997 Amendments, and aside from any reference to a temporary absence, section 27 of the ITOA, which deals with the date of parole eligibility, provides that where an offender’s

date of eligibility for parole pursuant to sections 119 to 121 of the CCRA—the eligibility requirements—is prior to their transfer to Canada, upon transfer, their date of eligibility for parole—whether day parole or full parole—is deemed to be the date of their transfer. Ms. Whaling takes no issue with this deeming provision for international offenders transferred pursuant to the ITOA (going forward, I will refer to such offenders as "ITOA transferees").

[19] Section 28 of the ITOA (which, going forward, I will refer to simply as "section 28") does not provide for a process or timelines for parole review. Rather, the provision triggers the suspension of any otherwise applicable timelines for parole review by the Parole Board for the first six months following the transfer of a Canadian offender to Canada. Ms. Whaling asserts that such suspension would apply only to regular parole review—contemplated under sections 122 and 123 of the CCRA—and not to the timelines for APR, whatever those timelines may be; she argues that the "express wording of [section 28] indicates the provision does not apply to APR parole". Although the context of PQOL #1 is limited to APR day parole, it seems clear that the submission on this issue by Ms. Whaling is broader, and would in any event apply to all APR, including APR full parole.

[20] I should also mention that no issue is made of the fact that any parole review in respect of ITOA transferees would ostensibly take place after their eligibility date for parole (being the date of their transfer to Canada), rather than prior to their parole eligibility date as reflective of parole review under the CCRA. Ms. Whaling accepts that section 28 creates a hiatus period for regular parole review during the first six months of the transfer to Canada of ITOA transferees, what His Majesty calls a "buffer" of up to six months, for the Parole Board to conduct its review of any

particular case. Where the parties disagree is whether this suspension period, or hiatus, also captures ITOA transferees eligible for APR, or more particularly in this case, for APR day parole. Consequently, from a practical perspective, the issue of the application of section 28 under PQOL #1 only becomes relevant for ITOA transferees who otherwise qualify for APR day parole either prior to, or less than six months after, their day of transfer, i.e., the Category C and Category D subclasses.

[21] Although section 28 dealt only with the suspension of any applicable timelines for parole review, I enquired of Ms. Whaling's counsel during the hearing what regime would be available to inform the process and timelines for APR-eligible ITOA transferees, given that parole review usually takes place prior to the offender's applicable parole eligibility date, whereas ITOA transferees whose parole eligibility date would have otherwise passed have a deemed eligibility date on the date of their transfer, meaning that any parole review would ostensibly take place after their parole eligibility date. Ms. Whaling describes the situation as a regulatory void, and asserts that the common law creates a public law duty upon CSC to refer, and upon the Parole Board to review, such cases within "a reasonable period" in the event that no timelines are otherwise provided by regulations. As no written submissions had been made by Ms. Whaling, I requested that the parties provide supplemental written submissions on this issue.

[22] In her supplemental submissions, Ms. Whaling expanded on her argument that in such an event, CSC, being under a statutory duty to review cases under APR eligibility, would be under a common law public duty to review and refer those cases to the Parole Board. Ms. Whaling stated that the Parole Board is also under a similar duty to make a decision with respect to those cases

"in a reasonable time" or, in the event that the Parole Board is not able to conduct its review before the inmate's APR eligibility date (which of course would be the case for all ITOA transferees), such review is to be done "as soon as practicable", subject to possible recourse by the inmates to the courts for the determination of what constitutes "a reasonable time" or "as soon as practicable", and compulsion remedies such as *mandamus*, so that the purpose of the statute in providing for APR is not thwarted (*Groupe Maison Candiac Inc v Canada (Attorney General)*, 2020 FCA 88 at para 74; *Wu v Vancouver (City)*, 2019 BCCA 23 (leave ref'd 2019 CanLII 55721 (SCC)) at paras 38–41; *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at paras 145–155; *Dass v Canada (Minister of Employment and Immigration)* (1996), 193 NR 309 (FCA) at para 17; *Ramsay v Toronto (City) Commissioners of Police (Div Ct)* (1988), 1988 CanLII 4706 (ON SC), 66 OR (2d) 99; *Austin v Canada (Minister of Consumer and Corporate Affairs)* (1986), 10 FTR 86 (FCTD) at para 6).

[23] His Majesty argued in his supplemental submissions that Ms. Whaling went too far in her supplemental submissions in trying to assess what "a reasonable time" would be in the circumstances of this case. I agree; that issue is not before me as that is the issue under PQOL #2. I disagree, however, with His Majesty when he states in his supplemental submissions, quite categorically, that his "position that [section 28] applies provides a full answer as to why PQOL #1 must be answered in the affirmative, and no further analysis is required." From my perspective, it is not that simple, and such an approach simply fails to address the arguments of Ms. Whaling as regards the reference within section 28 only to the regular parole provisions of the CCRA, and not to the APR provisions. In any event, what I gather from His Majesty's supplemental submissions is that he does not dispute certain

conceptual portions of Ms. Whaling's submissions, and does not take issue with the proposition that, in the context of the Parole Board's statutory duty to conduct APR in cases involving ITOA transferees, the common law can fill the gap where no such time period is otherwise prescribed by regulations, and create a duty upon the Parole Board to review such cases within a reasonable period of time.

IV. Analysis

A. *PQOL #1: Did section 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?*

(1) The principles to be applied

[24] It should be kept in mind that we are dealing here with not only a question of statutory interpretation, but also a question of possible conflict between statutes; the rules that apply in each situation are somewhat different and should not be conflated.

[25] We start with the principles of statutory interpretation, most recently reaffirmed by the Supreme Court in *R v McColman*, 2023 SCC 8 [*McColman*]:

> [35] Under the modern approach to statutory interpretation, "the words of a statute must be read 'in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament'": *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at para. 117, citing *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at para. 21, and *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, both quoting E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; see also *Canada v. Alta Energy Luxembourg S.A.R.L.*, 2021 SCC 49, at para. 37. In determining the meaning of the text, a court cannot

> read a statutory provision in isolation, but must read the provision in light of the broader statutory scheme: *Rizzo*, at para. 21.
>
> [36] In its written submissions and during oral argument, the Crown placed great weight on the broader purposes underlying the *HTA*. But a purposive analysis does not grant the interpreter licence to disregard the clear meaning of the statute: see *R. v. D.A.I.*, 2012 SCC 5, [2012] 1 S.C.R. 149, at para. 26.
>
> [Emphasis added.] (See also *Michel v Graydon*, 2020 SCC 24 at para 21.)

[26] Although a purposive analysis cannot grant licence to disregard the clear meaning of the statute, "statutory interpretation cannot be founded on the wording of the legislation alone" (*Rizzo* at para 21; see also *McColman* at para 35). Rather, as indicated by the Supreme Court of Canada in *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, 2022 SCC 30, per Justice Karakatsanis at paragraph 140:

> Context and consequences remain essential (see, e.g., *Uber Technologies Inc. v. Heller*, 2020 SCC 16). A purely textual reading is inconsistent with a broad and remedial approach to statutory interpretation. And, as Abella J. and I have noted elsewhere, "words matter, policy objectives matter, and consequences matter" (*TELUS Communications Inc. v. Wellman*, 2019 SCC 19, [2019] 2 S.C.R. 144, at para. 108).
>
> [Emphasis added.]

[27] As regards the issue of possible conflicting statutes, the Supreme Court in *Lévis (City) v Fraternité des policiers de Lévis Inc*, 2007 SCC 14, set out the principle of the presumption of legislative coherence:

> [47] The starting point in any analysis of legislative conflict is that legislative coherence is presumed, and an interpretation which results in conflict should be eschewed unless it is unavoidable. The test for determining whether an unavoidable conflict exists is well stated by Professor Côté in his treatise on statutory interpretation:

> According to case law, two statutes are not repugnant simply because they deal with the same subject: application of one must implicitly or explicitly preclude application of the other.
>
> (P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 350)

Thus, a law which provides for the expulsion of a train passenger who fails to pay the fare is not in conflict with another law that only provides for a fine because the application of one law did not exclude the application of the other (*Toronto Railway Co. v. Paget* (1909), 1909 CanLII 10 (SCC), 42 S.C.R. 488). Unavoidable conflicts, on the other hand, occur when two pieces of legislation are directly contradictory or where their concurrent application would lead to unreasonable or absurd results. A law, for example, which allows for the extension of a time limit for filing an appeal only before it expires is in direct conflict with another law which allows for an extension to be granted after the time limit has expired (*Massicotte v. Boutin*, 1969 CanLII 97 (CSC), [1969] S.C.R. 818).

[Emphasis added.]

[28] The Supreme Court continued a few paragraphs further:

> [58] When a conflict does exist and it cannot be resolved by adopting an interpretation which would remove the inconsistency, the question that must be answered is which provision should prevail. The objective is to determine the legislature's intent. Where there is no express indication of which law should prevail, two presumptions have developed in the jurisprudence to aid in this task. These are that the more recent law prevails over the earlier law and that the special law prevails over the general (Côté, at pp. 358-62). The first presumes that the legislature was fully cognizant of the existing laws when a new law was enacted. If a new law conflicts with an existing law, it can only be presumed that the new one is to take precedence. The second presumes that the legislature intended a special law to apply over a general one since to hold otherwise would in effect render the special law obsolete. Neither presumption is, however, absolute. Both are only indices of legislative intent and may be rebutted if other considerations show a different legislative intent (Côté, at pp. 358-59).

[Emphasis added.]

(2) The definition of the subclasses at issue

[29] As regards the constitution of the two subclasses at issue, pursuant to the Certification Order, Class Members are defined, in essence, as past or present offenders as described in the AEPA, the CCRA and the ITOA who were sentenced before March 28, 2011—in other words, before the coming into force of subsection 10(1) of the AEPA—and who, as a result of that provision removing their access to APR, were released from prison after their eligibility date under APR day parole—in other words, with reference to section 119.1 of the CCRA, after the expiry of the mandatory period of the sentence which had to be served under the circumstances, being six months or one sixth of their sentence, whichever was longer. In addition, the certified class contains subclass members who were 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 to Canada. The Category C and D subclasses were certified as follows:

> 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.
>
> [Emphasis added.]

(3) Determination of the issue

[30] To be clear, the issue before me is not to determine what timelines would apply in this context to APR day parole for ITOA transferees. On that issue, as mentioned earlier, the parties are at odds as to whether there exists a statutory or regulatory deadline by which the Parole Board was required to review ITOA transferees for APR day parole release at all. The issue before me is limited to determining whether the six-month suspension period or hiatus of such review set out in section 28, whatever the timeline for such review may ultimately be, is applicable to APR day parole for ITOA transferees.

[31] Ms. Whaling submits that the six-month hiatus for parole review set out in section 28 does not apply to APR day parole for the Category C and D subclasses, or to APR generally, when considering the plain language of the provision in conjunction with the principle of implied exclusion; she argues that by its very words, section 28 references only sections 122 and 123, i.e., the regular parole review provisions of the CCRA, in a "precise and unequivocal" manner, and to the exclusion of sections 125 to 126.1 of the CCRA which deal with APR; thus, the ordinary meaning of section 28 must play a dominant role in its interpretation (*Canada v Loblaw Financial Holdings Inc*, 2021 SCC 51 [*Loblaw*] at para 41). Ms. Whaling adds that section 27 of the ITOA—which addresses eligibility—specifically addresses both full parole and day parole, making no distinction in the process of parole review, whether regular parole review or APR. Consequently, if Parliament had intended for section 28—which addresses the nature or process of parole review—to apply broadly to both regular parole review and APR, it could have tracked similar language in specifically mentioning that it applied to both regular parole review and APR. Rather, Parliament has contextualized the application of section 28 only to the regular

parole review process of sections 122 and 123 of the CCRA, thus seemingly excluding its application from the APR process.

[32] In addition, Ms. Whaling invokes the implied exclusion principle, which provides that when a statutory provision explicitly mentions one or more items but is silent with respect to comparable items, it is presumed that such silence is deliberate and reflects the intention to exclude the items that are not mentioned; in this case, the application of section 28 to the APR process of the CCRA (*Canada (Canadian Private Copying Collective) v Canadian Storage Media Alliance*, [2004] FCJ No 2115 (FCA) at para 96). Ms. Whaling argues that by making no mention of the APR scheme (sections 119.1, 125, 126 and 126.1 of the CCRA), Parliament must be presumed to have intended for the hiatus set out in section 28 not to apply to APR, but only to regular parole review. She asserts that this interpretation is consistent with the general scheme and purpose of APR, which is to provide eligible prisoners, for the most part first-time non-violent offenders, earlier release by way of a process that is simplified and accelerated as compared with regular parole review on the basis of a single question: are there no reasonable grounds to believe that the offender, if released, is likely to commit a violent offence? This formulated purpose for APR is largely drawn from *Whaling SCC* and the lower-level decisions leading up to the Supreme Court's decision, and is not contested by His Majesty in this case.

[33] In so doing, Ms. Whaling asks that I not follow the Supreme Court of British Columbia's decision in *Misko v National Parole Board*, September 30, 2011, Vancouver Registry, Docket No 25841 [*Misko*], seemingly the only case where the interplay between section 28 and the APR scheme of the CCRA was at issue. The decision in *Misko* was made approximately six

months after APR was abolished (and well before subsection 10(1) of the AEPA was successfully challenged). In that case, Mr. Misko, a self-represented prisoner, had reached his APR as well as his regular parole eligibility dates prior to his transfer to Canada on December 15, 2010; pursuant to section 27 of the ITOA, he became eligible for APR day and full parole as well as regular day and full parole upon the date of his transfer. CSC referred Mr. Misko's case to the National Parole Board [NPB], the name of the Parole Board at the time, on February 23, 2011; however, the NPB did not complete the processing of the referral prior to APR being repealed by the AEPA on March 28, 2011. Mr. Misko applied for *mandamus* and a writ of *habeas corpus*, on the argument that the NPB's unreasonable delay in processing his APR referral had unlawfully deprived him of the opportunity to obtain APR before it was repealed; all parties accepted that Mr. Misko would have been granted parole under the APR criteria had the NPB completed the processing of the referral before March 28, 2011.

[34] While Justice Sewell, as he then was, expressed a "great deal of sympathy" for Mr. Misko and noted that his referral for APR appeared to have been delayed by "unwarranted bureaucratic rigidity", he nonetheless dismissed Mr. Misko's application for a *mandamus* primarily on jurisdictional grounds which have no relevance to the underlying class proceeding, and he also dismissed the application for a writ of *habeas corpus* because firstly, Mr. Misko had no absolute right to be released from custody given that the term of his lawfully imposed sentence had not yet expired, and secondly, because Mr. Misko had not established that he had been denied any lawful right to a parole review. In support of the second reason, Justice Sewell relied on section 28 of the ITOA for the proposition that the NPB was not required to review Mr. Misko's case (whether for regular parole or APR day or full parole) until six months after

the date of his transfer, i.e., not before June 15, 2011. The judge therefore concluded that Mr. Misko had not established that he had been denied a review for accelerated parole within any time that he was lawfully entitled to have one. In addressing whether a writ of *habeas corpus* should be issued, Justice Sewell noted:

> [15] I also am satisfied that, even before the repeal of ss. 125 and 126 of the *Corrections and Conditional Release Act*, Mr. Misko would not have been entitled to an accelerated parole review before the expiration of six months from the date of his transfer. In my view, s. 159 of the *Corrections and Conditional Release Regulation* must be read subject to s. 28 of the *International Transfer of Offenders Act*. Section 159 of the Regulations could have no application in circumstances involving inter-national offender (sic) over which Canada had no jurisdiction until the date of his transfer. It therefore could not have been applicable to Mr. Misko.
>
> [Emphasis added.]

Ms. Whaling points out that I am not bound by *Misko* and, in any event, should not consider that decision to have any persuasive value, as the arguments that she is making before me regarding the application of section 28 of the ITOA do not appear to have been raised before Justice Sewell, and were not addressed in his decision.

[35] His Majesty argues that although section 28 specifically mentions the regular parole review scheme of sections 122 and 123 of the CCRA, it does not specifically exclude the APR scheme of the legislation. According to His Majesty, section 28 contains a statement of broad application, namely that the Parole Board is not required to review the cases of ITOA transferees—whether eligible for APR or otherwise—until six months after they arrive; while section 28 states that it operates despite sections 122 and 123 of the CCRA, His Majesty argues that the provision need not mention the sections of the CCRA pertaining to APR in order to give

effect to that statement of broad application, but His Majesty does not make clear why. As regards Ms. Whaling's suggestion that the decision in *Misko* should not be taken as persuasive, His Majesty concedes that the decision is not binding on this Court; however, he argues that Justice Sewell nonetheless referred to the operative sections in the CCRA with respect to APR (sections 125 and 126) and raised no concerns over the absence of specific reference to these sections in section 28.

[36] For my part, I am not convinced by Ms. Whaling that the reference in section 28 to sections 122 and 123 of the CCRA is so "precise and unequivocal" that any ordinary meaning can readily be ascertained which may then play a dominant role in statutory interpretation; it seems to me that a textual analysis alone is insufficient to come to terms with the interplay between section 28 and the APR provisions of the CCRA. In addition, courts have more recently moved away from relying solely on the implied exclusion principle, and towards a more contextual and modern approach to statutory interpretation. As outlined by Chief Justice Wagner in *Green v Law Society of Manitoba*, [2017] 1 SCR 360 at para 37:

> [37] … An argument based on implied exclusion is purely textual in nature and cannot be the sole basis for interpreting a statute: R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at pp. 256-57. <u>The words of the statute must be considered in conjunction with its purpose and its scheme</u>. In my view, the purpose of the Act supplements the open-ended wording of the relevant provisions to indicate that the implied exclusion rule should not be applied in this case.
>
> [Emphasis added.]

[37] In addition, the situation here is different from the situation in *Loblaw* (cited by Ms. Whaling), where the Supreme Court was dealing with a clearly drafted legislative provision;

this is not the case here. In any event, the implied exclusion principle is not a general rule of application or interpretation (*Normandin v Canada* (FCA), 2005 FCA 345 (CanLII), [2006] 2 FCR 112 [*Normandin*] at para 28) and in this case would, in my view, create a situation discordant with the purpose of the CCRA and the ITOA; the implied exclusion rule "must be set aside when other statutory provisions relevant to the issue under review suggest that its consequences would go against the statute's purpose" (*Normandin* at para 31). In my view, the context and purpose of the ITOA militate against the restrictive interpretation postulated by Ms. Whaling. The context in this case involves Canadian offenders sentenced outside of Canada upon whom Canada does not have jurisdiction, who are transferred to Canada to facilitate, in accordance with the purpose of the ITOA, "their reintegration into the community by enabling [them] to serve their sentences in the country of which they are citizens or nationals" (ITOA at section 3). ITOA offenders to which section 28 applies have at least one thing in common: regardless of the nature of parole review—whether regular or APR—to which they may have been entitled immediately preceding their transfer, if they arrive in Canada having already reached the day on which they are eligible for either day parole or full parole, their date of eligibility is the day of their transfer. No serious argument was made by Ms. Whaling that effective parole review can effectively take place prior to their transfer; effective parole review would therefore necessarily have to take place after such transfer, thus after their parole eligibility dates. In light of the purpose of the ITOA, no convincing policy reason has been put to me which would justify a distinction being made between the application of section 28 to ITOA offenders who are eligible for regular parole review and its application to those offenders who benefit from APR.

[38] On the other hand, it seems to me that the purpose of section 28 in particular is more practical than policy-driven. As argued by His Majesty, in her statutory interpretation submissions, Ms. Whaling does not address the question of context, in particular the impact that her interpretation of section 28 would have in practical terms. In fairness, Ms. Whaling made it clear before me that it is not her position that ITOA offenders should be released without the necessary assessments being made, in particular as regards public safety concerns; however, she says that CSC and the Parole Board can easily conduct their review in under six months. Asserting it, however, does not make it so. His Majesty argues that processing APR day parole cases on an accelerated timeline has significant operational impacts on CSC's ability to prepare the necessary paperwork for offenders in custody. The reports, assessments and documents required in order to safely manage an inmate in custody and to safely release an offender into the community on APR day parole are significant, and prior to March 28, 2011—the day that APR was repealed—these elements were set out in a series of CSC policy directives. It seems clear from the record that a significant amount of information to support a proper assessment is required prior to a decision being made by CSC to refer an offender to the Parole Board, and for the latter to review the case and render a decision on release, even under the more streamlined process of APR.

[39] The practical aspect of section 28 does not, it seems to me, thwart the purpose of APR, but is in fact in line with the general purpose of conditional release. The Purpose and Principles section found within Part II – Conditional Release, Detention and Long-term Supervision of the CCRA states:

Purpose and Principles **Objet et principes**

Purpose of conditional release

100 The purpose of conditional release is to contribute to the maintenance of a just, peaceful and safe society by means of decisions on the timing and conditions of release that will best facilitate the rehabilitation of offenders and their reintegration into the community as law-abiding citizens.

Objet

100 La mise en liberté sous condition vise à contribuer au maintien d'une société juste, paisible et sûre en favorisant, par la prise de décisions appropriées quant au moment et aux conditions de leur mise en liberté, la réadaptation et la réinsertion sociale des délinquants en tant que citoyens respectueux des lois.

Principles guiding parole boards

101 The principles that shall guide the Board and the provincial parole boards in achieving the purpose of conditional release are

(a) that the protection of society be the paramount consideration in the determination of any case;

(b) that parole boards take into consideration all available information that is relevant to a case, including the stated reasons and recommendations of the sentencing judge, any other information from the trial or the sentencing hearing, information and assessments provided by correctional authorities, and information obtained from victims and the offender;

Principes

101 La Commission et les commissions provinciales sont guidées dans l'exécution de leur mandat par les principes suivants :

a) la protection de la société est le critère déterminant dans tous les cas;

b) elles doivent tenir compte de toute l'information pertinente disponible, notamment les motifs et les recommandations du juge qui a infligé la peine, les renseignements disponibles lors du procès ou de la détermination de la peine, ceux qui ont été obtenus des victimes et des délinquants, ainsi que les renseignements et évaluations fournis par les autorités correctionnelles;

(c) that parole boards enhance their effectiveness and openness through the timely exchange of relevant information with other components of the criminal justice system and through communication of their policies and programs to offenders, victims and the general public;	c) elles accroissent leur efficacité et leur transparence par l'échange de renseignements utiles au moment opportun avec les autres éléments du système de justice pénale d'une part, et par la communication de leurs directives d'orientation générale et programmes tant aux délinquants et aux victimes qu'au public, d'autre part;
(d) that parole boards make the least restrictive determination consistent with the protection of society;	d) le règlement des cas doit, compte tenu de la protection de la société, être le moins restrictif possible;
(e) that parole boards adopt and be guided by appropriate policies and that their members be provided with the training necessary to implement those policies; and	e) elles s'inspirent des directives d'orientation générale qui leur sont remises et leurs membres doivent recevoir la formation nécessaire à la mise en œuvre de ces directives;
(f) that offenders be provided with relevant information, reasons for decisions and access to the review of decisions in order to ensure a fair and understandable conditional release process.	f) de manière à assurer l'équité et la clarté du processus, les autorités doivent donner aux délinquants les motifs des décisions, ainsi que tous autres renseignements pertinents, et la possibilité de les faire réviser.
[Emphasis added.]	[Je souligne.]

[40] There is no doubt that parole review of any kind must be effective; parole review for the simple sake of parole review is not. For parole review to be effective, the authorities must have

all the relevant information regarding the offender before them when they make their referrals, recommendations and decisions, not only to best facilitate the rehabilitation of offenders and their reintegration into the community, but also in order for the decision-makers to properly evaluate the circumstances in line with their statutory obligations so that the purpose of conditional release, in particular as it relates to the maintenance of a "peaceful and safe society", remains paramount (paragraph 101(a) of the CCRA).

[41] From the record before me, upon arrival of the inmates to the institution, assessments, evaluations and reports must be undertaken and prepared—a significant level of preparatory work—to allow CSC, in the case of APR, to review the case of the ITOA offender for the purpose of referral to the Parole Board for review and determination; the objective of this is to render eventual review by the Parole Board effective. We must keep in mind that section 28 creates a hiatus for Parole Board review, not for CSC review and referral to the Parole Board. There is a certain on-the-ground reality that must be factored in to any analysis regarding the application of section 28; from the time an offender arrives at an institution, directives require, for example, that CSC staff prepare, for each offender, a Criminal Profile and Correctional Plan within 70 to 90 days of the offender's arrival, depending on the length of their sentence. The assessments of the offender that go into the preparation of such a plan are detailed, and the offender is expected to participate in the process. In addition, a community strategy is to be formulated for offenders eligible for APR, so as to develop a supervision plan that will be implemented when the offender is released and so as to identify the means by which the risk can be safely managed in the community. From what I can tell, it seems that neither CSC nor the Parole Board could be in a position to determine if an eligible offender was to be released

pursuant to APR until CSC actually had the opportunity to properly gather and effectively assess the information. Indeed, the necessity for effective parole review applies not only to the process of regular parole, but also to APR, whether APR day parole or APR full parole.

[42] Alternatively, and in the event that I find, as I did, that the language of section 28 is not precise and unequivocal as to whether that provision applies only to regular parole review, Ms. Whaling cites the Supreme Court decision of *Marcotte v Deputy Attorney General (Canada) et al*, 1974 CanLII 1 (SCC), [1976] 1 SCR 108 [*Marcotte*] (a case dealing with the interpretation of the *Penitentiary Act* and the *Parole Act*, which were replaced by the CCRA) at page 115, for the proposition that "if real ambiguities are found, or doubts of substance arise, in the construction and application of a statute affecting the liberty of a subject, then the statute should be applied in such a manner as to favour the person against whom it is sought to be enforced"; what Ms. Whaling refers to as the liberty principle (see also *R v SAC*, 2008 SCC 47 at paras 30–32).

[43] I have no issue with the proposition set forth in *Marcotte*, which I should add is not always determinative and must be considered in conjunction with the other possibly competing rules of interpretation; however, I fail to see how such a proposition assists Ms. Whaling in this case. In short, I have not been convinced that not applying section 28 to international offenders who are eligible for APR day parole would place the Category C and Category D subclass members in an earlier position for release than if section 28 were to apply. What is clear is that parole review for such offenders cannot take place prior to their transfer to a Canadian institution, unlike parole review under the CCRA (whether regular parole review or APR) where

the ITOA does not apply. What Ms. Whaling is proposing is that there exists no statutory suspension of parole review for offenders whose APR parole eligibility is on the same day as the day that they arrive at an institution to allow for the preparatory work to be undertaken in order to ensure effective parole review; rather such the timeline for their parole review under such circumstances is to be determined in accordance with an uncertain "reasonable" timeline pursuant the common law public duty of CSC and the Parole Board. From my perspective, unless it can be shown that such "reasonable time" would fall well inside the six-month window afforded by section 28, with completion and fulfilment of the directives to prepare for what must be an effective parole review, I cannot see how the proposition for which *Marcotte* stands applies to the issue before me.

[44] Ms. Whaling argues that by underscoring the provisions of regular parole review, and thus omitting any reference to the CCRA provisions of APR, section 28 actually enforces Parliament's intention and the purpose of APR as set out earlier. However, I have not been convinced that a six-month administrative hiatus in parole review for ITOA offenders thwarts that purpose or objective, just as I do not consider that such a hiatus thwarts the objectives of parole in general in the case of ITOA offenders. Given the amount of time needed for such lead-up work, assessments, evaluations and reviews that must be undertaken and prepared to ensure effective parole review, including referral by CSC to the Parole Board in the context of APR, I have not been convinced by Ms. Whaling that interpreting section 28 so as not to interrupt the timelines for APR day parole ―whatever those timeline may be in the context of ITOA transferees―would be an application of the statute in a "manner as to favour the person against whom it is sought to be enforced"; again, simply asserting that the assessments and

planning required to allow for effective parole review can be done within six months, and assuming that a more narrow interpretation of section 28 favours ITOA offenders, does not make it so.

[45] In addition, I find there to be an inconsistency in Ms. Whaling's arguments. Although it is often unclear in the submissions of both parties, it must be remembered that section 28 does not, by itself, create an alternative process or timeline with respect to parole review under the CCRA; all it does is seek to suspend whatever parole review process or timelines may apply to ITOA transferees. Parole review under the CCRA is geared towards a process which takes place prior to the offender's parole eligibility date. By sheer circumstance, parole review for ITOA transferees ostensibly takes place after their deemed eligibility date. Why would section 28 even have to "take precedence" over sections 122 and 123 of the CCRA? If in fact, as Ms. Whaling suggests, section 28 takes precedence over sections 122 and 123 of the CCRA and that in such circumstances, the common law creates a public law duty upon CSC to refer, and upon the Parole Board to review, ITOA transferees "as soon as practicable" following their transfer to Canada, thus filling a purported regulatory void, why would there need to be any reference at all to sections 122 and 123 of the CCRA if there is a filling of the regulatory void by the common law? We are outside the scope of the timelines set out within the CCRA for any parole review altogether, whether as set out in sections 122 and 123 of the CCRA or otherwise. It seems to me that Ms. Whaling cannot have it both ways; she cannot, on the one hand, argue that because section 28 mentions only sections 122 and 123 of the CCRA and not the corresponding provisions for APR, section 28 only acts to interrupt the process of regular parole review—supposedly, parole review otherwise governed by sections 122 and 123 of the

CCRA—and does not apply to interrupt APR, yet also argue that the timelines for parole review for ITOA transferees are determined by the common law. Either section 28 applies to parole review otherwise governed by the CCRA or it does not. If it does not, then the reference to sections 122 and 123 of the CCRA in section 28 is superfluous. For my part, if I accept Ms. Whaling's argument that, in this supposed regulatory void, the common law determines the timelines for parole review for ITOA transferees who are eligible for APR, I see no reason why such a period—whatever it may end up being in any particular case and whether or not we are dealing with regular parole review or APR—cannot be overridden or limited by statute; we are not then dealing with an issue of conflicting statutes, but rather with legislation displacing the common law.

[46] That said, it is not for me to rewrite legislation, which brings me to what His Majesty has referred to as the nub of the issue, being why Parliament only included in section 28 a reference to the regular parole review provisions of the CCRA and not to those relating to APR. Counsel for His Majesty did not venture to take a stab as to why, and counsel for Ms. Whaling simply argued that it is because section 28 was not supposed to apply to APR. Both Ms. Whaling and His Majesty confirm that there seems to be no notice, report, document or information to which they can point to ascertain why section 28 was drafted as it was, leaving me to come to grips with the issue; I must confess that I too have grappled with this question. In the end, the only possible explanation, it seems to me, is that given that the purpose of section 28 was to provide the Parole Board with a buffer period of six months following the transfer of the ITOA offender before being required to undertake parole review, a specific reference to sections 122 and 123 was needed to override the automatic triggering of regular parole review by the Parole Board by

the mere application by the offender or within a period prescribed by regulation, depending upon the case (see sections 122 and 123). This concern does not exist with APR because APR includes the insertion into the parole review process of CSC which, prior to the triggering of the Parole Board's statutory obligation to conduct parole review, is required to first refer the matter to the Parole Board (see subsection 123(2) and (4), and section 126). Keep in mind that section 28 suspends the obligation of the Parole Board to review cases, not the obligation of CSC to refer cases to the Parole Board. As such, if section 28 was meant to apply the six-month hiatus to all Parole Board reviews, including under APR, a specific override provision was necessary only under the process of regular parole review, and not under APR; in short, specifically referencing sections 125 and 126 was simply not necessary to deal with APR because of the different process involved in getting to the point where the Parole Board would otherwise be obliged to conduct a review of an offender's case, i.e., referral by CSC. That seems to be the only way to make sense of the inclusion of sections 122 and 123 of the CCRA in section 28.

[47] Consequently, and notwithstanding the reference to sections 122 and 123 of the CCRA, I must agree with His Majesty that section 28 must be interpreted broadly to apply to all processes of parole review, and not just to regular parole review, so as to better reflect the intention of Parliament and the purpose of the governing legislation in relation to giving CSC and the Parole Board the time needed to prepare for effective parole review.

[48] Finally, I wish to deal quickly with the issue of a possible conflict between section 28 of the ITOA and the APR provisions and timelines of the CCRA, as it was addressed by the parties in their submissions. Both parties argue that there is no conflict between section 28 of the ITOA

and the APR provisions of the CCRA; for Ms. Whaling, because section 28 is simply not meant to cover APR, and for His Majesty, because the timelines for review of APR cases by the Parole Board were not directly set out in the CCRA, but rather in the CCRR, and that if there is a conflict, argues His Majesty, the conflict is between a provision of a statute (section 28) and a provision of a regulation (subsection 159(3) of the CCRR) so that the ITOA should take precedence over the CCRR (*Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 38).

[49] Addressing this issue would require me to come to terms with the timelines applicable to APR and address the issue of whether there is a date by which the Parole Board was required to review an individual for APR day parole release, thus coming eerily close to addressing PQOL #2, something the parties have requested I not do. In any event, given my determination thus far, I do not believe I need to address the conflict issue.

[50] Under the circumstances, I would answer PQOL #1 in the affirmative.

B. *PQOL #3:*

> *(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 paragraph 11(h) Charter right?; and*
>
> *(2) If the answer to (1) is yes, then do provincial estate statutes providing for an "alive as of" date prohibit or limit recovery of those Charter damages?*

[51] Paragraph 11(h) of the Charter states:

Proceedings in criminal and penal matters	**Affaires criminelles et pénales**

11 Any person charged with an offence has the right	11. Tout inculpé a le droit :
…	[…]
(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again;	h) d'une part de ne pas être jugé de nouveau pour une infraction dont il a été définitivement acquitté, d'autre part de ne pas être jugé ni puni de nouveau pour une infraction dont il a été définitivement déclaré coupable et puni;
…	[…]

[52] I should first mention, as I understand it, that the certified class may include members who are now deceased; there is of course also the possibility that other members will pass away prior to the close of arguments at the hearing on the merits.

[53] I should also make clear that there is no dispute between the parties that, as asserted by His Majesty, at common law, *actio personalis moritur cum persona* (*Allan Estate (Executors of) v Co-Operators Life Insurance Co*, 1999 BCCA 35 at paras 32 to 48; *Canadian Imperial Bank of Commerce v Green*, 2015 SCC 60 [*Green*] at para 86), and that estates in their own right have no Charter rights to speak of that may be violated. The main issue here is to decide whether the rule at common law that personal rights die with the individual, and the exceptions to that rule, as outlined by the Supreme Court decision in *Canada (Attorney General) v Hislop*, 2007 SCC 10 (CanLII), [2007] 1 SCR 429 [*Hislop*], provide a complete analytical framework for estates to gain standing to pursue Charter claims, regardless of whether applicable provincial or territorial survival legislation may otherwise allow for it.

[54] In addition, PQOL #3 has two parts; it was urged upon me by His Majesty that each part has its own separate criteria and that both sets of criteria must be satisfied by an estate to advance a Charter claim and seek a subsection 24(1) Charter remedy on behalf of a deceased individual. According to His Majesty, the Supreme Court decision in *Hislop* is dispositive of whether an estate can bring a Charter claim on behalf of a deceased individual; standing to seek subsection 24(1) relief, being personal, extends only to the person who experienced the Charter violation, and not to the estate of that individual or to any other third party. Consequently, His Majesty urges me to answer part (1) of PQOL #3 in the negative, which would then put an end to the debate. If I decide, on the other hand and as urged by Ms. Whaling, that the answer to part (1) of PQOL #3 is "yes", then His Majesty agrees with Ms. Whaling that the answer to part (2) of PQOL #3 must also be "yes". In fact, the record includes a chart prepared by His Majesty [the Chart] outlining the various provincial and territorial estate/survival legislation and prevailing limitation periods, as well as a summary as to the nature of Charter damages that can be claimed by an estate pursuant to such legislation in each jurisdiction; for the most part, the nature of such damages is limited to pecuniary damages, and His Majesty concedes that such limitation would apply to any claim by an estate for Charter damages.

(1) Can the estate in this action claim Charter damages?

[55] Best we begin with *Hislop*, where one of the issues was whether estates of deceased survivors should be entitled to claim Charter relief to which the survivors would have been entitled prior to their death. Under the *Canada Pension Plan*, RSC 1985, c C-8 [CPP], the spouse of a contributor is entitled to apply for a survivor's pension after the death of the contributor, and if the pension is approved, it is payable to the survivor for each month following the death of the

contributor. Where a survivor entitled to such a pension dies without applying for that pension, the survivor's estate may apply for and obtain the pension benefit to which the survivor would have been entitled, provided that, as per subsection 60(2) of the CPP, the estate makes the application within 12 months after the death of the survivor.

[56] In 2000, amendments to the CPP came into effect that extended survivor benefits to same sex partners by changing the definition of "spouse" to make it consistent with the equality rights provisions of subsection 15(1) of the Charter. However, pursuant to subsection 44(1.1) of the CPP, eligibility was limited to same sex partners whose spouse had died on or after January 1, 1998, as opposed to being retroactive to the coming into force of subsection 15(1) of the Charter (April 17, 1985) or to the death of the spouse, whichever occurred later. In addition, pursuant to subsection 72(2), payments to same sex survivors were precluded for any month before July 2000, the month of the coming into force of the relevant provision of the CPP; the preclusion of subsection 72(2) came to an end as of June 2001, at which time same sex and opposite sex survivors benefited from the application of the general rule in subsection 72(1), which limited those benefits to not more than 12 months prior to the month in which the application is received. Ultimately, subsections 44(1.1) and 72(2) where declared unconstitutional; however, subsections 60(2) and 72(1) of the CPP survived the Charter challenge, as they were found to apply to all claimants without discrimination and not simply to same sex survivors.

[57] On the threshold issue of whether the estates of those survivors who died prior to any Charter rights being infringed, i.e. more than 12 months before the coming into force of the 2000

amendments to the CPP, may have standing to claim a subsection 15(1) Charter right on behalf of the deceased survivor, the Supreme Court determined in *Hislop* that they do not because such rights are personal to the individual; the Supreme Court found that the use of the term "individual" in subsection 15(1) of the Charter was intentional and indicates that subsection 15(1) applies to natural persons only, and that in the context of those particular claims—i.e. the claims being made by estates of individuals who had already died prior to the Charter breach taking place—the estate is just a collection of assets and liabilities of a person who has died, is not an individual and has no dignity that may be infringed.

[58] The key passages of the Supreme Court decision in *Hislop* on this issue are the following:

> 70. Where a survivor entitled to a survivor's *CPP* pension dies without making application for that pension, the survivor's estate may apply and obtain the pension benefit to which the survivor would have been entitled, provided the estate makes application within 12 months after the death of the survivor. The Hislop class submits that, because some same-sex survivors had been deceased for over 12 months when the *MBOA* amendments to the *CPP* came into effect, their estates should be able to apply for the benefits to which the survivors would have been entitled and that the 12-month limitation in s. 60(2) should be suspended so as not to bar such estate claims.
>
> 71. The threshold issue is whether the estates of those survivors who died more than 12 months before the coming into force of the *MBOA* amendments to the *CPP* may have standing to claim a s. 15(1) *Charter* right on behalf of the deceased survivor. Only if they have such standing may the Court even entertain an argument that s. 60(2) should not apply to such estates. The Hislop class relies on *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295, at pp. 322-23. *Big M Drug Mart* dealt with s. 2 of the *Charter* which uses the term "[e]veryone". The term used in s. 15(1) is more precise and narrower, as it allows rights to "[e]very individual".
>
> 72. The government submits, on the basis of the British Columbia Court of Appeal judgment in *Stinson Estate v. British Columbia* (1999), 70 B.C.L.R. (3d) 233, 1999 BCCA 761, that

s. 15(1) rights cannot be enforced by an estate because those rights are personal and terminate with the death of the affected individual. The government also submits that estates are not individuals but artificial entities incapable of having their human dignity infringed. In addition, the government relies on the Special Joint Committee on the Constitution (see *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada* (1980-81), Issue No. 43, January 22, 1981, at pp. 43:39-43:44; see also Issue No. 44, January 23, 1981, at pp. 44:6-44:10; Issue No. 47, January 28, 1981, at p. 47:88; and Issue No. 48, January 29, 1981, at pp. 48:4-48:49), which substituted the words "every individual" for "everyone" in s. 15(1) in response to the Minister of Justice's desire "to make it clear that this right would apply to natural persons only" (p. 43:41). The government further argues that this Court has held that s. 15(1) rights could not be claimed by other entities such as corporations (see *Edmonton Journal v. Alberta (Attorney General)*, 1989 CanLII 20 (SCC), [1989] 2 S.C.R. 1326, at p. 1382, *per* La Forest J.).

73. In our opinion, the government's submissions have merit. In the context in which the claim is made here, an estate is just a collection of assets and liabilities of a person who has died. It is not an individual and it has no dignity that may be infringed. The use of the term "individual" in s. 15(1) was intentional. For these reasons, we conclude that estates do not have standing to commence s. 15(1) *Charter* claims. In this sense, it may be said that s. 15 rights die with the individual.

74. Mr. Hislop's individual situation, however, is different. Although he died between the time his notice of appeal was filed in this Court and the hearing of this appeal, he obtained judgment while he was still alive.

75. When a judgment is obtained, the cause of action upon which the judgment is based is merged in the judgment: *Lew v. Lee*, 1924 CanLII 19 (SCC), [1924] S.C.R. 612, aff'd on this point 1925 CanLII 337 (UK JCPC), [1925] A.C. 819 (P.C.); *Reid v. Batty*, [1933] O.W.N. 496 (H.C.J.), aff'd [1933] O.W.N. 817 (C.A.). In *Lew*, Anglin C.J. explained that, because of the doctrine of merger, the issue in an appeal is not the original cause of action but rather the legality and validity of the judgment. As such, where a party dies pending appeal, the appeal survives even if the original cause of action would not.

76. It should be noted that Anglin C.J. relied in part on a provision in the British Columbia *Supreme Court Rules* (currently

> r. 15(2)), which provided that whether a cause of action survives or not, the death of either party between verdict or finding of the issues of fact and judgment will not give rise to abatement and that judgment may be entered notwithstanding death. He reasoned that, *a fortiori*, the right to enforce a judgment or defend it on appeal must also survive. In our view, his analysis is applicable in the instant case irrespective of any legislative provision. Although s. 15(1) rights are personal, the constitutional issues raised here are issues of public importance. Given the public interest in ensuring that questions of law related to such rights be correctly decided, an appeal from a judgment raising such issues must be allowed to survive the party's death pending the appeal.
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> 77. Although the preceding comments are sufficient to dispose of the issue in relation to Mr. Hislop himself, because this is a class action, it is appropriate to clarify with more precision the time at which s. 15(1) rights crystallize. Merger, as we have explained, occurs when judgment is entered. Nevertheless, it is a long-standing principle of law that a litigant should not be prejudiced by an act of the court (*actus curiae neminem gravabit*): *Turner v. London and South-Western Railway Co.* (1874), L.R. 17 Eq. 561. Based on this principle, in cases where a plaintiff has died after the conclusion of argument but before judgment was entered, courts have entered judgment *nunc pro tunc* as of the date that argument concluded: see *Gunn v. Harper* (1902), 3 O.L.R. 693 (C.A.); *Hubert v. DeCamillis* (1963), 1963 CanLII 459 (BC SC), 41 D.L.R. (2d) 495 (B.C.S.C.); *Monahan v. Nelson* (2000), 186 D.L.R. (4th) 192, 2000 BCCA 297. We affirm the correctness of this approach and conclude that the estate of any class member who was alive on the date that argument concluded in the Ontario Superior Court, and who otherwise met the requirements under the *CPP*, is entitled to the benefit of this judgment.
>
> [Emphasis added.]

[59] As may be seen, after setting out the principle at common law, the Supreme Court dealt with the specific situation of Mr. Hislop, who was alive at the time that the Ontario Superior Court found that his Charter rights had been violated and awarded him damages under section 24 of the Charter; however, Mr. Hislop died during the appeal. The principle at common law expressed in *Hislop* and its exceptions were summarized by the Ontario Court of Appeal in

Giacomelli Estate v Canada (Attorney General), 2008 ONCA 346 [*Giacomelli Estate*], leave to appeal refused [2008] SCCA No 278, as follows:

> [16] In Hislop, the Supreme Court ruled that an estate cannot continue a claim based on s. 15(1) of the Charter. At para. 73 of Hislop, the court explained that rights guaranteed by s. 15(1) of the Charter cannot be asserted by an estate because those rights are personal and, therefore, end with the death of the affected individual:
>
> > In the context in which the claim is made here, an estate is just a collection of assets and liabilities of a person who has died. It is not an individual and it has no dignity that may be infringed. The use of the term "individual" in s. 15(1) was intentional. For these reasons, we conclude that estates do not have standing to commence s. 15(1) Charter claims. In this sense, it may be said that s. 15 rights die with the person. [page 672]
>
> [17] The Supreme Court identified two exceptions to this principle. First, an appeal from a judgment raising s. 15(1) issues "must be allowed to survive the party's death pending the appeal": para. 76. Second, where an individual dies after the conclusion of argument but before judgment is entered, judgment shall be entered as the person's estate is not to be prejudiced by the time required for a court to render judgment: para. 77.

I should mention that Ms. Whaling takes issue with the reference made by the court in *Giacomelli Estate* to "exceptions" to the common law principle set out in *Hislop*, arguing that such "exceptions" are, rather, well-established, stand-alone principles based on the law of merger. Be that as it may, nothing turns on that issue and I will, for the purposes of simplicity, continue to use the term "exceptions" in this context. I should also mention that a third exception to the common law rule expressed in *Hislop* was outlined by the Manitoba Court of Appeal in *Grant v Winnipeg Regional Health Authority*, 2015 MBCA 44 [*Grant*] at paragraph 44, *to wit*, where the Charter breach itself causes the individual's death, the estate may bring a claim on the deceased's behalf provided that it seeks and obtains public interest standing to do so. However,

Ms. Whaling concedes that none of the exceptions apply in the present case; a trial on the merits has not taken place in the context of the present action, no estate has applied for public interest standing and, unlike the situation in *Grant*, no argument is being made that, somehow, the breach of paragraph 11(h) of the Charter in this case was the cause of death of any class member. I should also add that in expressing the "exceptions" to the common law rule, the Supreme Court in *Hislop* made no distinction between the framework applying to Mr. Hislop's situation and that applying to the situation of other proposed deceased claimants who may have died before the claim was commenced or before they may have been aware that their rights were breached at all.

[60] According to His Majesty, as stated earlier, *Hislop* is dispositive of whether an estate can bring a Charter claim on behalf of a deceased individual and is therefore a complete answer to PQOL #3: he argues that we must go through a Charter analysis to see who gets the benefit of the Charter right, and thereafter deal with the question of whether estates can even claim damages under section 24 of the Charter. In short, His Majesty argues that the rights protected by section 11 of the Charter are personal and cannot be asserted by anyone other than the person whose rights have been violated, not even by that person's estate, leaving no room for survival legislation to inform the issue of standing even if such legislation provides for it. His Majesty cites a number of decisions, both pre- and post-*Hislop*, in support of the proposition that an estate is not an individual in a Charter context and consequently has no standing where the Charter right is one that applies to an "individual" or a "person" (*Augustus v Gosset*, [1996] 3 SCR 268; *Giacomelli Estate* at paras 16 to 22; *Oommen v Ramjohn*, 2015 ABCA 34 at para 3, leave to appeal refused [2015] SCCA No 137; *McKitty v Hayani*, 2019 ONCA 805 at paras 39 and 47; *Nova Scotia (Attorney General) v Lawen Estate*, 2021 NSCA 39 at paras 72–75). In fact, argues

His Majesty, linking the concepts of Charter breach and subsection 24(1), the British Columbia Court of Appeal in *Stinson Estate v British Columbia* (1999), 70 BCLR (3d) 233, 1999 BCCA 761 [*Stinson Estate*], found that an estate had standing to claim neither a section 7 nor section 15 breach, nor a subsection 24(1) remedy (*Stinson Estate* at paras 11, 13–15). Accordingly, argues His Majesty, one need only look to the nature of the right to determine that the very wording of sections 11 and 24 of the Charter precludes an estate or any other entity from making a claim on behalf of an individual whose rights were allegedly breached; therefore, provincial or territorial survival legislation has no place in the analysis and is thus not relevant to the determination of part (1) of PQOL #3.

[61] For her part, Ms. Whaling clarified before me that she is not arguing that estates can pursue Charter damages even if provincial or territorial survival legislation does not authorize it. She also concedes that she no longer relies, as she did in her initial written submissions, on the Ontario Superior Court decisions in *Brazeau v Attorney General (Canada)*, 2019 ONSC 1888 and *Reddock v Canada (Attorney General)*, 2019 ONSC 5053, as in neither case did the Ontario Superior Court substantially engage in any legal analysis on the issue of whether estates can advance or continue Charter claims. In addition, Ms. Whaling does not dispute that section 11 Charter rights are personal, and in that way are similar to the rights under section 15 of the Charter, that they are reserved only for a person charged with an offence, and that subsection 24(1) relief is a personal claim. Therefore, at common law, any claim for damages under subsection 24(1) of the Charter for a breach of section 11 Charter rights is extinguished with the death of the claimant (*Green* at para 86), subject only to any exceptions for which the common law may provide.

[62] Rather, the essence of Ms. Whaling's position is that it is only where the individual suffered the Charter breach while alive, thus crystallizing the Charter breach, that provincial or territorial survival legislation can supplant the common law rule within the federal sphere, and specifically in respect of claims under the Charter, thus allowing for such claims to be pursued after the individual has passed away, assuming of course that the applicable survival legislation specifically allows for it—each piece of legislation would have to be individually analyzed. Within the context of Ms. Whaling's position, there is therefore no issue as to whether the estate is pursuing a claim for damages not actually suffered by the deceased at the time that he or she was still alive, which is distinguishable from the situation in *Wilson Estate v Canada*, (1996) 25 BCLR (3d) 181 (SC), 1996 CanLII 2417 (BC SC) [*Wilson Estate*], *Stinson Estate* and *Hislop*.

[63] In addition, Ms. Whaling argues that there exists no support, whether at common law or in any legislation, for the broad categorical proposition argued by His Majesty that estates can never pursue Charter remedies, subject only to the exceptions laid out by the Supreme Court in *Hislop*, regardless of what provincial and territorial survival legislation might say. Ms. Whaling asserts that in *Hislop*, the estates of the survivors in question were pursuing remedies for Charter violations that the survivors, while they were still alive, never actually experienced; in other words, the survivors had already passed away at least 12 months prior to the coming into force of the legislation that breached their Charter rights. In that context, Ms. Whaling asserts that she can certainly understand the Supreme Court when it stated at paragraph 73 (page 672) that "[i]n the context in which the claim is made here", being concerned with the concept of estates being found to have Charter rights that could be violated. On the other hand, where the rights violation purportedly took place while the survivors were still alive, as is the case here, their estates are

simply continuing the pursuit of their claims after they have passed away; Ms. Whaling argues that His Majesty is citing *Hislop* out of context.

[64] If Ms. Whaling is correct in her assertion, then as long as individuals, while alive, are affected by federal legislation that ultimately is found to have violated their Charter rights, there are two paths to their estate gaining standing to pursue legal action for recovery of Charter damages: either the circumstances of the deceased fall within one of the exceptions to the common law rule, or applicable provincial or territorial survival legislation allows for it. Here, Ms. Whaling is not concerned with the application of the *Hislop* exceptions, but rather argues that regardless of the Supreme Court's decision in *Hislop*, which simply applies the common law rule on standing of estates in the context of relief for Charter violations, an estate is always able to pursue its claim where permitted by application of provincial or territorial survival legislation, an issue neither argued before nor addressed by the Supreme Court in that decision. In essence, Ms. Whaling is arguing that provincial and territorial survival legislation would supplant the common law rule as regards estates pursuing claims for subsection 24(1) relief for violations of the Charter—assuming of course that such legislation specifically allows for it, and only in situations where the individual was alive at the time of the commencement of the action.

[65] For my part, I do not read *Hislop*, nor the remaining cases cited by His Majesty, as creating a single path for estates to pursue Charter remedies. His Majesty was forced to concede before me that the "context" to which reference is made by the Supreme Court in paragraph 73 of *Hislop* was the situation of claims being made by estates for individuals who had died more than 12 months prior to the coming into force of the 2000 amendments to the CPP, i.e.,

individuals who had never experienced any Charter breach while alive. However, he argues that the context is of no consequence as the Supreme Court, when concluding at paragraph 73 that "estates do not have standing to commence s. 15(1) Charter claims", was categorically referring to "estates" writ large, and not simply to the plaintiff estates. I am not certain that I agree with His Majesty in such an interpretation of *Hislop*, given the very specific reference to the "context" of that paragraph as well as the fact that estates would have standing to make such claims, even at common law, if they fell within one of the *Hislop* exceptions. I do not read the statement of the Supreme Court at paragraph 73 to apply beyond the context of that action, and then only as a reflection of the rule at common law.

[66] His Majesty points to *Wilson Estate* and *Stinson Estate*, where the courts underscored the personal nature of any claim for Charter relief and determined that the plaintiff estates did not have standing to pursue such claims under the circumstances. However, neither *Wilson Estate* nor *Stinson Estate* involved situations where the claim had been initiated by the deceased in his or her lifetime, i.e., the individuals had passed away before the institution by their estates of the action that determined a breach of Charter rights. As did the Federal Court of Appeal [FCA] in *Canada (Attorney General) v Vincent Estate*, 2005 FCA 272 [*Vincent Estate*] at paragraphs 14 and 18, I think that the most that can be said for those cases is that they stand for the proposition that an estate cannot invoke personal rights under the Charter that the deceased did not invoke in his or her lifetime, thus limiting Charter remedies to the situation where they are invoked solely by the person whose rights have been infringed. In fact, argues His Majesty, both in *Wilson* and *Hislop*, the courts not only determined that Charter breaches are personal in nature, but also, in the context of those cases, treated the estates as a third party, tantamount to a corporation (*Wilson*

Estates at para 24; *Hislop* at para 72). However, I must agree with Ms. Whaling that such a finding is perfectly understandable in cases where the individual passed away prior to the violation of the Charter right and where the claim for a breach thereof was taken on by the estate—Ms. Whaling is not arguing otherwise.

[67] In fact, in *Martell v Canada (Attorney General)*, 2020 FC 943 [*Martell*], this Court followed *Grant*, which found that the Supreme Court's assertions in *Hislop* were not as categorical as His Majesty claims before me, and also noted that the question of whether provincial survival legislation might permit the estate to continue a judicial review commenced by the deceased was not argued in that case.

[68] Finally, His Majesty cites *Giacomelli Estate*, where the Court of Appeal for Ontario had to determine whether the estate of Mr. Giacomelli, who died after he commenced his Charter claim but before the claim was either adjudicated or argued, could continue to pursue the claim. The court found that Charter-based relief did not survive Mr. Giacomelli's death as the claim did not fall within one of the exceptions to the general principle set out in *Hislop*, and that the estate could only continue pursuing claims authorized under the provincial survival legislation then in effect which, clearly, did not include Charter claims. The court stated:

> [21] The appellant asks that this court recognize that the estate may use the Charter in a defensive manner -- as a "shield rather than a sword". I accept that the Order expressly directs that only claims for relief under the Charter are not continued. It follows that claims for relief based on something other than the Charter are permitted to continue. Indeed, Canada acknowledged that in response to questions from the panel. So, for example, claims under s. 38(1) of the Trustee Act [claims in tort] can continue, <u>provided those claims are not based on the Charter</u>.

> [Emphasis added; see also *Selkirk et al v Trillium Gift of Life Network et al*, 2021 ONSC 2355 at para 64].

I do not read the words "provided those claims are not based on the Charter" to signal that the court in *Giacomelli* was interpreting *Hislop* to also bar Charter claims that may otherwise be permitted under provincial or territorial survival legislation. Subsection 38(1) of the survival legislation at issue dealt with the continuation of actions in tort; it seems clear that subsection 24(1) Charter claims are "distinct legal avenues" and are not claims in tort that may otherwise be captured by subsection 38(1) (*Ward* at para 36; *Wilson Estate* at para 11; *Grant* at para 81).

[69] Nor is this a question, as argues His Majesty, of disregarding the Charter in favour of provincial legislation. There is no issue that the Charter rights are personal; a claim under section 24 of the Charter, as stated by Justice Karakatsanis in *R v Albashir*, 2021 SCC 48 [*Albashir*], "is an entirely personal remedy that can only be invoked by a claimant alleging a violation of their own constitutional rights", and the rights guaranteed by the Charter are also personal—section 15 speaks of "every individual" (*Stinson Estate* at para 11) and section 11 speaks of "every person"; not even Ms. Whaling is arguing that the rights of the deceased automatically transfer to the estate outside provincial or territorial survivor legislation. The issue, however, is whether legislation, in this case provincial and territorial survivor legislation, can supplant the clearly articulated common law rule in *Hislop* to give standing to estates to pursue otherwise personal rights of action that belonged to the deceased. I do not read *Hislop* as standing for the proposition that the common law rule cannot be derogated from by way of legislation; the question is whether provincial or territorial survivor legislation can do just that.

[70] Within the framework of survival legislation, estates, although conceptually distinct from the deceased (the "person" under paragraph 11(h) of the Charter), are not distinct in the same way that corporations or artificial entities incapable of being charged with an offence are distinct (see for example *Edmonton Journal v Alberta (Attorney General)*, 1989 CanLII 20 (SCC), [1989] 2 SCR 1326 at 1382; *Quebec (Attorney General) v 9147-0732 Québec inc*, 2020 SCC 32 (CanLII), [2020] 3 SCR 426 at para 15; *Irwin Toy Ltd v Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 SCR 927 at 1002–1004; *Hislop* at para 72). His Majesty is arguing that because of the personal nature of the Charter right, the right can never transfer to the estate. If that were true, then no claims relating to personal rights would be able to benefit from survival legislation, including, for example, personal injury claims; such an assertion cannot be right. Although estates, in the context in which *Hislop* was decided, are but "a collection of assets and liabilities of a person who has died", they are nonetheless empowered by survival legislation to step into the shoes of those individuals in order to pursue already existing or crystallized claims of the nature specifically permitted in such legislation. Neither the case of *Albashir* (relied upon by His Majesty), nor the case of *R v Ferguson*, 2008 SCC 6, [2008] 1 SCR 96, to which reference was made at paragraph 33 of *Albashir*, involved the issue of the transmission to estates of the personal right of the deceased to pursue section 24 Charter claims; I would add that nor is the decision in *R v Edwards*, [1996] 1 SCR 128 helpful on this issue.

[71] Finally, I find His Majesty's position to be inconsistent in two respects. First, as stated earlier, His Majesty urges that I answer "no" to part (1) of PQOL #3, but he concedes that an estate of a deceased class member in this action may nonetheless pursue a claim for damages for violation of a paragraph 11(h) Charter right if the estate falls within one of the exceptions to the

common law rule set out in *Hislop*. His Majesty argues in his supplemental written submissions that what is determinative is when that right of the deceased was sufficiently crystallized in the context of active litigation so as to allow the claim to be continued by the individual's estate notwithstanding the individual's death; the only date or event the court need look to, argues His Majesty, as per the decision in *Hislop*, so as to determine whether a deceased individual's claim has survived his or her death, is (1) when the overall hearing of the matter was closed, or (2) when the appeal of the initial hearing was commenced.

[72] However, the manner in which part (1) of PQOL #3 is posed calls for a binary answer, a "no" or a "yes". That said, under the principles articulated in *Hislop*, an estate can pursue a Charter claim under one of the exceptions set out in that decision. Consequently, even if the analysis were to stop there, answering part (1) of PQOL #3 with a "no", as urged by His Majesty, would be incomplete; at best, the answer would be "no" unless the estate were to come within one of the exceptions set out in *Hislop* (and arguably in *Grant*).

[73] Second, as stated, the record includes the Chart prepared by His Majesty whereby he outlines the various provincial and territorial survival legislation and provides a summary as to the nature of Charter damages that can be claimed by an estate pursuant to such legislation in each jurisdiction. I appreciate that the legislation speaks in terms of limiting the claims, i.e., allowing only claims for pecuniary damages; however, it seems to me that His Majesty is in fact conceding that if I do not accept that *Hislop* is dispositive of PQOL #3, then provincial or territorial survival legislation can supplant the common law and inform the issue of standing for estates to pursue subsection 24(1) Charter damages. Those two positions are inconsistent if His

Majesty is not also claiming, as part of his argument in relation to part (1) of PQOL #3, that such provincial or territorial legislation is unconstitutional or otherwise inapplicable to claims under the Charter; either such legislation is applicable or it is not, and I cannot see how His Majesty can assert the position that he is taking regarding part (1) of PQOL #3 without challenging the application of provincial survival legislation on the issue of legal capacity to claim Charter relief. Otherwise, as argues Ms. Whaling, His Majesty runs up against the principle of legislative or parliamentary supremacy where, absent a constitutional challenge, a court must apply the legislation according to its terms (*JP Morgan Asset Management (Canada) Inc v Canada (National Revenue)*, 2013 FCA 250 [*JP Morgan*] at para 35; *Prairies Tubulars (2015) Inc v Canada (Border Services Agency)*, 2018 FC 991 [*Prairies Tubulars*] at para 48; *Wilson v Atomic Energy of Canada Limited*, 2015 FCA 17 at para 51). That is, only if the constitutionality of the survival legislation was challenged and it was found to be unconstitutional (i.e. *ultra vires* or inconsistent with the Charter) could a court not apply the legislation according to its terms so as to supplant the common law; absent a constitutional challenge to the legislation, courts are bound to apply the law (*JP Morgan* at para 35; *Prairies Tubulars* at para 48).

[74] I accept that neither *JP Morgan* nor *Prairies Tubulars* involved the context of federal/provincial jurisdiction; however, His Majesty has already conceded that if I disagree with his interpretation of *Hislop*, then provincial and territorial legislation may well have a role to play in determining the issue of standing or legal capacity of estates to pursue Charter relief. This would not be the first time that a court is called upon to apply what some may consider an archaic, unduly harsh and outdated exclusionary rule of the common law within the federal jurisdiction, when validly enacted provincial legislation may have otherwise been available to

arrive at a more palatable outcome. In *Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding Ltd*, 1997 CanLII 307 (SCC), [1997] 3 SCR 1210 [*Bow Valley*], the Supreme Court was called upon to determine whether Canadian non statutory maritime law—what I would see as an application of federal common law—as defined in *ITO-Int'l Terminal Operators v Miida Electronics*, 1986 CanLII 91 (SCC), [1986] 1 SCR 752, in particular the common law rule of contributory negligence being a complete bar to recovery, precluded one party from recovering its share of damages from the other party where both were found to be contributorily negligent in a fire that broke out on an oil drilling rig off the coast of Newfoundland and Labrador [N&L]. The Supreme Court held that the N&L contributory negligence legislation (legislation enacted, similarly to survival legislation, to address the otherwise harsh consequences of a common law principle of contributory negligence being a complete bar to recovery) was not applicable within the ambit of Canadian maritime law, and there being no federal contributory negligence legislation, the admittedly harsh common law rule applied.

[75] However, the Supreme Court in *Bow Valley* went further and held that although contributory negligence barred recovery at common law, the issue was whether it was time to change the rule, and whether the proposal for such change "falls within the test for judicial reform of the law which has been developed by this Court" (*Bow Valley* at para 93). In the end, the Supreme Court concluded that "this is an appropriate case for this Court to make an incremental change to the common law in compliance with the requirements of justice and fairness" (*Bow Valley* at para 102). Although the relevant passages—including the statement that going forward, "[c]ontributory negligence may reduce recovery but does not bar the plaintiff's claim" (*Bow Valley* at para 102)—were written by Justice McLachlin, who was dissenting in

part, the majority, under the pen of Justice Iacobucci, did not dispute the need for reform. The decision in *Bow Valley* prompted change at the federal level, and shortly thereafter, federal contributory negligence legislation in the maritime law sphere came into effect: the *Marine Liability Act*, SC 2001, c 6, was enacted.

[76] It was with this in mind, and considering that neither party fully canvassed in their written arguments the possibility of provincial and territorial survival legislation supplanting the common law rule within federal jurisdiction, that I requested that the parties provide supplemental written submissions to address that issue, as well as whether, to the extent that the areas of estates, succession and legal capacity to institute suits are matters of property and civil rights, the Court must perform a division of powers analysis to determine the extent of the application of provincial or territorial survival legislation to the assessment of the legal capacity or standing of estates to seek relief under section 24 of the Charter.

[77] In their supplemental written submissions, both parties submitted that a division of powers analysis is not required for resolution of PQOL #3, but for different reasons. For his part, His Majesty repeats the same arguments made before me, namely, that it is the Constitution—the supreme law of Canada which overarches all legislation and binds all governments, both provincial and federal—that provides the final answer on who may claim Charter rights and remedies, and that the text of subsection 24(1) of the Charter, which defines its own qualifications and parameters, clearly establishes who may and who may not claim a remedy under that provision. Consequently, provincial and territorial survivor legislation does not and cannot provide standing (1) to advance a Charter claim or remedy, as such standing is proscribed

by the Charter and its attendant jurisprudence, nor (2) for estates to claim personal Charter rights or seek personal Charter remedies on behalf of deceased persons. Although His Majesty accepts that legal capacity to institute a civil suit, including suits from which estates may benefit under governing survival legislation, is an issue within provincial jurisdiction as it is a matter of property and civil rights, he asserts that a Charter claim is not a civil suit as is, for example, a claim in negligence or another civil claim under private law. Consequently, as there is no issue of a competing provincial or territorial statute that may apply within the federal sphere, there is no need for a division of powers analysis to be undertaken.

[78] I should mention that His Majesty suggests in his supplemental written submissions that provincial and territorial survival legislation may in fact be relevant to the issue of standing, and that an estate must have standing both under the Charter to advance a claim and remedy and under provincial or territorial legislation as long as such legislation would not bar a Charter claim—that is the portion of His Majesty's argument that I find inconsistent. What is clear, however, is that as regards part (1) of PQOL #3, His Majesty's position is that provincial and territorial survivor legislation has no application in determining the standing of estates to seek remedial rights under the Charter as provincial and territorial survivor legislation cannot expand the scope of a remedial right established by the Charter.

[79] Under the circumstances, I agree with Ms. Whaling that *Hislop* cannot be, as asserted by His Majesty, a complete answer to PQOL #3; *Hislop* did not create a general rule that Charter claims always end upon death. I have not been convinced by His Majesty either (1) that the wording itself of the Charter excludes the application of legitimately enacted provincial and

territorial survivor legislation so as to inform the issue of the legal capacity of estates to pursue Charter claims in situations where the Charter breach has been crystallized during the life of the individual and where such legislation otherwise allows for such claims, or (2) that the Supreme Court decision in *Hislop* stands for such a proposition.

[80] I now turn to the arguments of Ms. Whaling. As stated, I must agree with Ms. Whaling that *Hislop* does not stand for the proposition that estates cannot, save for in situations covered by the exceptions set out therein, claim Charter damages regardless of any provincial and territorial survival legislation allowing for it. However, put that way, Ms. Whaling's assertion is based on an untested premise; it assumes that provincial and territorial survival legislation may have a role to play in determining civil and legal capacity within matters of federal jurisdiction. There is no doubt that the Supreme Court in *Hislop* applied the common law rule relating to legal capacity, and thus standing, of estates to pursue claims of the deceased; there is no federal survival legislation and in fact, it is this very common law rule—and some would say the injustice that results therefrom—which provinces and territories have sought to correct within their bailiwick of property and civil rights with the enactment of survival legislation.

[81] Ms. Whaling points to *Wilson Estate* and *Stinson Estate* as examples of courts first looking to provincial survival legislation to determine whether estates have standing to pursue Charter relief and then, only after determining that the specific survival legislation in question did not authorize Charter claims, moving on to consider the issue of standing at common law, outside the application of such legislation. That may be so, however, no argument was made regarding the ability of provincial legislation to inform the issue of legal capacity in Charter

claims; none had to be because it was clear from the legislation itself that, on account of the nature of Charter claims, the relevant legislation did not authorize estates to pursue them. In fact, *Stinson Estate* did not involve a claim for loss or damage as was permitted by the governing survival legislation; it was a claim for declaratory relief under section 52 of the Charter, and the governing survival legislation was simply found by the British Columbia Court of Appeal to have no application. Consequently, I do not find *Wilson Estate* and *Stinson Estate* necessarily instructive on the issue raised by Ms. Whaling in this case.

[82] In essence, Ms. Whaling is raising before me the same *quaeres* expressed by the FCA in *Vincent Estate*, where the issue was whether an estate of a deceased claimant can continue an outstanding claim under the CPP when the deceased's claim rests on the allegation that a provision of that statute violated his or her equality rights under section 15 of the Charter; in short, whether constitutional rights can be crystallized during a person's lifetime so that they can be pursued after that person's death. After commenting on the notion of standing, and after reviewing *Wilson Estate* and *Stinson Estate*, and in particular the manner in which the issue of the applicable survival legislation was considered, the FCA in *Vincent Estate* at paragraph 23, raised the following *quaere*:

> [23] This raises the question as to whether an estate's right to initiate proceedings in respect of constitutional rights is a matter of the survival of actions legislation in a province. In other words, would the court have come to a different conclusion if the language of the *Estate Administration Act* had been broad enough to include constitutional rights? Perhaps not, given the Court's conclusion about the extinction of those rights upon death:
>
> > [13] The personal nature of the s. 15 equality rights, *and their termination upon death of the affected individual* was effectively recognized by the learned chambers judge in *Grigg*, when he held that his order would apply only to those who were alive on

> 16 March, 1995. The personal nature of *Charter* rights was also recognized, in somewhat different circumstances, by Mr. Justice Shabbits in *Wilson Estate v. Canada* (1996), 25 B.C.L.R. (3d) 181 at 186-187, with which I respectfully agree. The remedy sought in Wilson invoked the provisions of s. 24 of the *Charter*. That is not so in this case where the plaintiff relied only on s. 52, and seeks only declaratory relief. Nevertheless, the result is in my view the same.
>
> [Underlining emphasis added; italics emphasis added in *Vincent Estate*.]

[83] The FCA then rhetorically asked, again in relation to *Wilson Estate* and *Stinson Estate*, the following question at paragraph 24:

> [24] Is the Court saying that equality rights die with the person because, in British Columbia, the *Estate Administration Act*, does not apply to the remedies created by sections 24 and 52 of the *Charter*? Or, is it indicating that constitutional rights are so inherently personal that they exist outside the framework of survival of actions legislation? In the first case, whether constitutional rights survive the death of an individual will vary according to the survival of actions legislation in the province. In the second case, constitutional rights are extinguished upon death and cannot come within the scope of provincial legislation dealing with survival of actions.
>
> [Emphasis added.]

[84] Neither does *Hislop* answer the question that Ms. Whaling is seeking to address, *to wit*, whether provincial and territorial legislation may be called upon to allow for the continuation of the Charter claim commenced by the deceased while alive, assuming such legislation specifically provides for it. In any event, in the end, the FCA in *Vincent Estate* declined to definitively deal with that issue, as it concluded that the parties had not sufficiently dealt in their written pleadings or before the court with an area of the law which was uncertain; however, the FCA added that if

"one concludes that such a possibility [the crystallization of Charter claims during the lifetime of the person] exists, the question of whether the required type of action was present in this case would have to be examined" (*Vincent Estate* at para 28). The FCA therefore dismissed the appeal, preferring to remit the matter back to the administrative tribunal to deal with those issues. I appreciate that *Vincent Estate* predates *Hislop*; however, as stated, I cannot see how *Hislop*, which relied on *Wilson Estate* and *Stinson Estate* as well, answered any of the questions raised by the FCA, or by Ms. Whaling before me.

[85] Ms. Whaling then turns to *Grant*; as stated, the court in *Grant* recognized a third exception to the common law rule applied by the Supreme Court in *Hislop, to wit*, where the Charter breach itself causes the individual's death and an estate brings a claim on the deceased's behalf on the basis of public interest standing (a case relied upon by the Supreme Court of Nova Scotia in *Lawen Estate v Nova Scotia (Attorney General)*, 2018 NSSC 188). Putting aside for the moment the issue of possible inconsistency between the notion of public interest standing and a claim for damages under subsection 24(1) of the Charter, after reviewing various provincial survival legislation and determining that the language therein was not broad enough to allow for Charter relief to estates—a point highlighted by Ms. Whaling as being the first step in determining standing of estates in Charter claims—the Manitoba Court of Appeal in *Grant* stated:

> [54] The concept of a cause of action for a breach of a *Charter* right leading to a remedy pursuant to s. 24(1) of the *Charter* is a "new endeavour" where the law is still maturing ([*Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28] at paras. 21, 33). The Manitoba legislature has not re-examined the survival legislation in Manitoba in light of developments in the law, like the coming into force of the *Charter*, the *Ward* decision and the different approaches taken in other jurisdictions in the modern era

> regarding which causes of action survive death. It is not for the judiciary to say whether the legislature should engage in law reform on this issue or not. What can be said, however, is that the law in Manitoba currently is that, unless a personal representative meets the common law criteria of public interest standing, no *Charter* claim can be brought on behalf of a deceased for the benefit of his or her estate.
>
> [Emphasis added.]

[86] Moving beyond the issue of the application of survival legislation and on to the issue of public interest standing, and after discussing *Hislop* and *Giacomelli*, the Manitoba Court of Appeal in *Grant* stated:

> [76] Again, as was the case in *Hislop*, the Ontario Court of Appeal in *Giacomelli* used language carefully tailored to the dispute before it and went no further. The court was not asked by the parties, and did not undertake, a broad discussion of the question of the standing of a personal representative to bring a *Charter* claim in circumstances analogous to the ones here.

Ms. Whaling argues that the same principle applies in this case; I agree, but that is not very helpful to Ms. Whaling. Neither *Hislop*, *Grant*, *Giacomelli*, *Martell*, nor any other decision cited to me entertained a broad discussion on the extent to which, if at all, provincial or territorial survival legislation can inform the issue of standing by estates to seek Charter relief where the individual was alive at the time of the breach and where such legislation specifically provides for it.

[87] Ms. Whaling then cites *FRN v Alberta*, 2014 ABQB 375 [*FRN*] at paragraphs 37 to 47 and 120, for the proposition that the estate could only bring Charter claims if such claims were permitted under the relevant survival legislation which, in that case, they were not. I do not read the decision in *FRN*, in particular paragraphs 37 to 47, the way Ms. Whaling would like me to. In

fact, after citing *Hislop*, the Court of King's Bench of Alberta seems clearly to have stated, in relation to the estate's Charter claims, that "I can see no reason why claims under s. 7 or 9 [of the Charter] should survive when the Supreme Court has ruled that claims under s. 15 do not" (*FRN* at para 46). In any event, I must admit that no significant discussion took place on the possible application of provincial survival legislation, likely because it was clear that such legislation only authorized claims for "actual financial loss" (*FRN* at para 42) and not section 24 Charter relief—similarly to *Wilson Estate* and *Stinson Estate*.

[88] Although I agree with Ms. Whaling that *Hislop* cannot be, as asserted by His Majesty, a complete answer to PQOL #3, neither can it be said that Ms. Whaling has pointed to any case which does actually support her proposition. The cases cited by Ms. Whaling, which purport to review provincial survival legislation in the assessment of the issue of standing of estates to bring Charter claims, never get beyond the wording of the legislation itself which, in all cases, simply does not provide a basis for the estate to advance a Charter claim. What Ms. Whaling is asking me to do is assume, for the sake of my decision, that provincial or territorial survivor legislation not only is able to inform the issue of legal standing in Charter cases, but also in fact does provide the basis for the continuation of Charter claims; what then? The trouble for Ms. Whaling is that she has not addressed what must be the threshold issue of her argument, i.e., the jurisdiction of provinces and territories to pass legislation, which could inform the issue of standing in Charter claims. I accept the principle of legislative or parliamentary supremacy over the common law, but that does not answer the question of jurisdiction.

[89] Ms. Whaling points to the Chart to say that even His Majesty admits that provincial and territorial survival legislation is able to inform the issue of legal standing of estates in Charter claims. However, in reviewing the Chart, as stated, I note that the nature of the allowable claims relates, for the most part, to pecuniary rights. Subject to a very narrow exception, pecuniary relief is not an appropriate sanction when a court rules that a statute is constitutionally invalid or of no force or effect, including with regard to the Charter (*Mackin v New Brunswick (Minister of Finance)*; *Rice v New Brunswick*, 2002 SCC 13 (CanLII), [2002] 1 SCR 405 at para 78; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Communauté urbaine de Montréal*, 2004 SCC 30; *Organisation mondiale sikhe du Canada c Procureur général du Québec*, 2024 QCCA 254 at paras 375 and 376).

[90] As stated earlier, in her supplemental written submissions, Ms. Whaling too asserts that no division of powers analysis is necessary in this case; although she disagrees with His Majesty's interpretation of the Charter and of the Supreme Court's decision in *Hislop* on which it rests, Ms. Whaling nonetheless concedes, for the purposes of this case, that only if the Charter itself, as argued by His Majesty, contained a specific proscription on legal standing to pursue Charter claims, then provincial and territorial survivor legislation would have no bearing on the issue, and that part (1) of PQOL #3, which specifically refers to "this action", would have to be answered, as suggested by His Majesty, in the negative.

[91] That in itself should be sufficient to answer part (1) of PQOL #3 in the negative. However, Ms. Whaling asserts that she cannot agree with His Majesty that an all-encompassing proscription of this kind is made out either in the Charter or in the Supreme Court decision in

Hislop, and thus she does not accept that the categorical approach proposed by His Majesty can be generalizable such that it could be used in all cases in which estates pursue Charter claims; Ms. Whaling reasserts the arguments that were first made before me in that respect.

[92] On the whole, nor have I been convinced, beyond the scope of this case, that Ms. Whaling's proposition is sound, as it calls for me to make assumptions with no evidence in the record to guide me. In *Vincent Estate*, the FCA had the option of returning the matter to the administrative tribunal for a determination on the issues regarding which the court was not satisfied that fulsome arguments had been made before it. I do not have that luxury, and will therefore answer the questions put to me. Having considered the issues as set out above, I find that part (1) of PQOL #3 must be answered in the affirmative provided that the situation of the estate falls within one of the exceptions set out by the Supreme Court in *Hislop*, or provided that it is established that validly enacted provincial or territorial survival legislation is available to supplant the common law rule that actions die with the individual.

> *(2) Do provincial estate statutes providing for an "alive as of" date prohibit or limit recovery of those Charter damages?*

[93] I need not address the second part of PQOL #3; as stated, His Majesty agrees that if I am to answer the first question in the affirmative, as I did, part (2) of PQOL #3 is also to be answered in the affirmative.

JUDGMENT in T-455-16

THIS COURT'S JUDGMENT is that:

1. In answer to PQOL #1: Did section 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? Answer: Yes

2. In answer to PQOL #3:

   (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 paragraph 11(h) Charter right? Answer: Yes

   (2) If the answer to (1) is yes, then do provincial estate statutes providing for an "alive as of" date prohibit or limit recovery of those Charter damages? Answer: Yes

3. There shall be no order as to costs.

"Peter G. Pamel"
Judge

ANNEX

Abolition of Early Parole Act, SC 2011, c 11

10. (1) Subject to subsection (2), the accelerated parole review process set out in sections 125 to 126.1 of the *Corrections and Conditional Release Act*, as those sections read on the day before the day on which section 5 comes into force, does not apply, as of that day, to offenders who were sentenced, committed or transferred to penitentiary, whether the sentencing, committal or transfer occurs before, on or after the day of that coming into force.	10. (1) Sous réserve du paragraphe (2), la procédure d'examen expéditif prévue par les articles 125 à 126.1 de la *Loi sur le système correctionnel et la mise en liberté sous condition*, dans leur version antérieure à la date d'entrée en vigueur de l'article 5, cesse de s'appliquer, à compter de cette date, à l'égard de tous les délinquants condamnés ou transférés au pénitencier, que la condamnation ou le transfert ait eu lieu à cette date ou avant ou après celle-ci.

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

Life, liberty and security of person	**Vie, liberté et sécurité**
7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	7 Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.
…	[…]
Proceedings in criminal and penal matters	**Affaires criminelles et pénales**
11 Any person charged with an offence has the right	11 Tout inculpé a le droit :
(a) to be informed without unreasonable delay of the specific offence;	a) d'être informé sans délai anormale de l'infraction précise qu'on lui reproche;

(b) to be tried within a reasonable time;

b) d'être jugé dans un délai raisonnable;

(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;

c) de ne pas être contraint de témoigner contre lui-même dans toute poursuite intentée contre lui pour l'infraction qu'on lui reproche;

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

d) d'être présumé innocent tant qu'il n'est pas déclaré coupable, conformément à la loi, par un tribunal indépendant et impartial à l'issue d'un procès public et équitable;

(e) not to be denied reasonable bail without just cause;

e) de ne pas être privé sans juste cause d'une mise en liberté assortie d'un cautionnement raisonnable;

(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

f) sauf s'il s'agit d'une infraction relevant de la justice militaire, de bénéficier d'un procès avec jury lorsque la peine maximale prévue pour l'infraction dont il est accusé est un emprisonnement de cinq ans ou une peine plus grave;

(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

g) de ne pas être déclaré coupable en raison d'une action ou d'une omission qui, au moment où elle est survenue, ne constituait pas une infraction d'après le droit interne du Canada ou le droit international et n'avait pas de caractère criminel d'après les principes généraux de droit

reconnus par l'ensemble des nations;

(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and

h) d'une part de ne pas être jugé de nouveau pour une infraction dont il a été définitivement acquitté, d'autre part de ne pas être jugé ni puni de nouveau pour une infraction dont il a été définitivement déclaré coupable et puni;

(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

i) de bénéficier de la peine la moins sévère, lorsque la peine qui sanctionne l'infraction dont il est déclaré coupable est modifiée entre le moment de la perpétration de l'infraction et celui de la sentence.

Treatment or punishment

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

Cruauté

12 Chacun a droit à la protection contre tous traitements ou peines cruels et inusités.

…

[…]

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

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

Égalité devant la loi, égalité de bénéfice et protection égale de la loi

15 (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les

déficiences mentales ou physiques.

Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Programmes de promotion sociale

(2) Le paragraphe (1) n'a pas pour effet d'interdire les lois, programmes ou activités destinés à améliorer la situation d'individus ou de groupes défavorisés, notamment du fait de leur race, de leur origine nationale ou ethnique, de leur couleur, de leur religion, de leur sexe, de leur âge ou de leurs déficiences mentales ou physiques.

…

[…]

Enforcement of guaranteed rights and freedoms

24 (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Recours en cas d'atteinte aux droits et libertés

24 (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

Exclusion of evidence bringing administration of justice into dispute

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by

Irrecevabilité d'éléments de preuve qui risqueraient de déconsidérer l'administration de la justice

(2) Lorsque, dans une instance visée au paragraphe (1), le tribunal a conclu que des éléments de preuve ont été obtenus dans des conditions qui portent atteinte aux droits

this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

…

ou libertés garantis par la présente charte, ces éléments de preuve sont écartés s'il est établi, eu égard aux circonstances, que leur utilisation est susceptible de déconsidérer l'administration de la justice.

[…]

Constitution Act, 1982

PART VII

General

Primacy of Constitution of Canada

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

PARTIE VII

Dispositions générales

Primauté de la Constitution du Canada

52 (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

Corrections and Conditional Release Act, SC 1992, c 20
as at March 27, 2011

Purpose

Purpose of correctional system

3 The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by

Objet

But du système correctionnel

3 Le système correctionnel vise à contribuer au maintien d'une société juste, vivant en paix et en sécurité, d'une part, en assurant l'exécution des peines par des mesures de garde et de surveillance

(a) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and

(b) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community.

sécuritaires et humaines, et d'autre part, en aidant au moyen de programmes appropriés dans les pénitenciers ou dans la collectivité, à la réadaptation des délinquants et à leur réinsertion sociale à titre de citoyens respectueux des lois.

…

[…]

Purpose and Principles

Objet et principes

Purpose of conditional release

Objet

100 The purpose of conditional release is to contribute to the maintenance of a just, peaceful and safe society by means of decisions on the timing and conditions of release that will best facilitate the rehabilitation of offenders and their reintegration into the community as law-abiding citizens.

100 La mise en liberté sous condition vise à contribuer au maintien d'une société juste, paisible et sûre en favorisant, par la prise de décisions appropriées quant au moment et aux conditions de leur mise en liberté, la réadaptation et la réinsertion sociale des délinquants en tant que citoyens respectueux des lois.

Principles guiding parole boards

Principes

101 The principles that shall guide the Board and the provincial parole boards in achieving the purpose of conditional release are

(a) that the protection of society be the paramount

101 La Commission et les commissions provinciales sont guidées dans l'exécution de leur mandat par les principes qui suivent :

a) la protection de la société est le critère déterminant dans tous les cas;

consideration in the determination of any case;

(b) that parole boards take into consideration all available information that is relevant to a case, including the stated reasons and recommendations of the sentencing judge, any other information from the trial or the sentencing hearing, information and assessments provided by correctional authorities, and information obtained from victims and the offender;

b) elles doivent tenir compte de toute l'information pertinente disponible, notamment les motifs et les recommandations du juge qui a infligé la peine, les renseignements disponibles lors du procès ou de la détermination de la peine, ceux qui ont été obtenus des victimes et des délinquants, ainsi que les renseignements et évaluations fournis par les autorités correctionnelles;

(c) that parole boards enhance their effectiveness and openness through the timely exchange of relevant information with other components of the criminal justice system and through communication of their policies and programs to offenders, victims and the general public;

c) elles accroissent leur efficacité et leur transparence par l'échange de renseignements utiles au moment opportun avec les autres éléments du système de justice pénale d'une part, et par la communication de leurs directives d'orientation générale et programmes tant aux délinquants et aux victimes qu'au public, d'autre part;

(d) that parole boards make the least restrictive determination consistent with the protection of society;

d) le règlement des cas doit, compte tenu de la protection de la société, être le moins restrictif possible;

(e) that parole boards adopt and be guided by appropriate policies and that their members be provided with the training

e) elles s'inspirent des directives d'orientation générale qui leur sont remises et leurs membres doivent recevoir la formation nécessaire à la

necessary to implement those policies; and

(f) that offenders be provided with relevant information, reasons for decisions and access to the review of decisions in order to ensure a fair and understandable conditional release process.

mise en œuvre de ces directives;

f) de manière à assurer l'équité et la clarté du processus, les autorités doivent donner aux délinquants les motifs des décisions, ainsi que tous autres renseignements pertinents, et la possibilité de les faire réviser.

Criteria for granting parole

102 The Board or a provincial parole board may grant parole to an offender if, in its opinion,

(a) the offender will not, by reoffending, present an undue risk to society before the expiration according to law of the sentence the offender is serving; and

(b) the release of the offender will contribute to the protection of society by facilitating the reintegration of the offender into society as a law-abiding citizen.

Critères

102 La Commission et les commissions provinciales peuvent autoriser la libération conditionnelle si elles sont d'avis qu'une récidive du délinquant avant l'expiration légale de la peine qu'il purge ne présentera pas un risque inacceptable pour la société et que cette libération contribuera à la protection de celle-ci en favorisant sa réinsertion sociale en tant que citoyen respectueux des lois.

…

[…]

Eligibility for Parole

Admissibilité à la libération conditionnelle

Time when eligible for day parole

119 (1) Subject to section 746.1 of the *Criminal Code*, subsection 140.3(2) of the *National Defence Act* and subsection 15(2) of the *Crimes Against Humanity and War*

Temps d'épreuve pour la semi-liberté

119 (1) Sous réserve de l'article 746.1 du *Code criminel*, du paragraphe 140.3(2) de la *Loi sur la défense nationale* et du paragraphe 15(2) de la *Loi sur*

Crimes Act, the portion of a sentence that must be served before an offender may be released on day parole is

les crimes contre l'humanité et les crimes de guerre, le temps d'épreuve pour l'admissibilité à la semi-liberté est :

(a) one year, where the offender was, before October 15, 1977, sentenced to preventive detention;

a) un an, en cas de condamnation à la détention préventive avant le 15 octobre 1977;

(b) where the offender is an offender, other than an offender referred to in paragraph (b.1), who was sentenced to detention in a penitentiary for an indeterminate period, the longer of

b) dans le cas d'un délinquant — autre que celui visé à l'alinéa b.1) — condamné à une peine de détention dans un pénitencier pour une période indéterminée, la période qui se termine trois ans avant l'admissibilité à la libération conditionnelle totale déterminée conformément à l'article 761 du *Code criminel* ou, si elle est supérieure, la période qui se termine trois ans avant l'admissibilité à la libération conditionnelle totale déterminée conformément au paragraphe 120.2(2);

(i) the period required to be served by the offender to reach the offender's full parole eligibility date, determined in accordance with section 761 of the *Criminal Code*, less three years, and

(ii) the period required to be served by the offender to reach the offender's full parole eligibility date, determined in accordance with subsection 120.2(2), less three years;

(b.1) where the offender was sentenced to detention in a penitentiary for an indeterminate period as of the date on which this

b.1) dans le cas d'un délinquant condamné, avant la date d'entrée en vigueur du présent alinéa, à une peine de détention dans un

paragraph comes into force, the longer of

(i) three years, and

(ii) the period required to be served by the offender to reach the offender's full parole eligibility date, determined in accordance with subsection 120.2(2), less three years;

pénitencier pour une période indéterminée, trois ans ou, si elle est supérieure, la période qui se termine trois ans avant l'admissibilité à la libération conditionnelle totale déterminée conformément au paragraphe 120.2(2);

(c) where the offender is serving a sentence of two years or more, other than a sentence referred to in paragraph (a) or (b), the greater of

(i) the portion ending six months before the date on which full parole may be granted, and

(ii) six months; or

c) dans le cas du délinquant qui purge une peine d'emprisonnement égale ou supérieure à deux ans, à l'exclusion des peines visées aux alinéas a) et b), six mois ou, si elle est plus longue, la période qui se termine six mois avant la date d'admissibilité à la libération conditionnelle totale;

(d) one half of the portion of the sentence that must be served before full parole may be granted, where the offender is serving a sentence of less than two years.

d) dans le cas du délinquant qui purge une peine inférieure à deux ans, la moitié de la peine à purger avant cette même date.

Time when eligible for day parole

(1.1) Notwithstanding section 746.1 of the *Criminal Code*, subsection 140.3(2) of the *National Defence Act* and subsection 15(2) of the *Crimes Against Humanity and War Crimes Act*, an offender

Temps d'épreuve pour la semi-liberté

(1.1) Par dérogation à l'article 746.1 du *Code criminel*, au paragraphe 140.3(2) de la *Loi sur la défense nationale* et au paragraphe 15(2) de la *Loi sur les crimes contre*

described in subsection 746.1(1) or (2) of the *Criminal Code* or to whom those subsections apply pursuant to subsection 140.3(2) of the *National Defence Act* or subsection 15(2) of the *Crimes Against Humanity and War Crimes Act*, shall not, in the circumstances described in subsection 120.2(2) or (3), be released on day parole until three years before the day that is determined in accordance with subsection 120.2(2) or (3).

l'humanité et les crimes de guerre, dans les cas visés aux paragraphes 120.2(2) ou (3), le temps d'épreuve pour l'admissibilité à la semi-liberté est, dans le cas du délinquant visé aux paragraphes 746.1(1) ou (2) du *Code criminel* ou auquel l'une ou l'autre de ces dispositions s'appliquent aux termes du paragraphe 140.3(2) de la *Loi sur la défense nationale* ou du paragraphe 15(2) de la *Loi sur les crimes contre l'humanité et les crimes de guerre*, la période qui se termine trois ans avant la date déterminée conformément aux paragraphes 120.2(2) ou (3).

When eligible for day parole — young offender sentenced to life imprisonment

Temps d'épreuve pour la semi-liberté — personne âgée de moins de dix-huit ans

(1.2) Notwithstanding section 746.1 of the *Criminal Code*, subsection 140.3(2) of the *National Defence Act* and subsection 15(2) of the *Crimes Against Humanity and War Crimes Act*, in the circumstances described in subsection 120.2(2), the portion of the sentence of an offender described in subsection 746.1(3) of the *Criminal Code* or to whom that subsection applies pursuant to subsection 140.3(2) of the *National Defence Act* or subsection 15(2) of the

(1.2) Par dérogation à l'article 746.1 du *Code criminel*, au paragraphe 140.3(2) de la *Loi sur la défense nationale* et au paragraphe 15(2) de la *Loi sur les crimes contre l'humanité et les crimes de guerre*, dans les cas visés au paragraphe 120.2(2), le temps d'épreuve pour l'admissibilité à la semi-liberté est la période qui se termine, dans le cas d'un délinquant visé au paragraphe 746.1(3) du *Code criminel* ou auquel ce paragraphe s'applique aux termes du

Crimes Against Humanity and War Crimes Act that must be served before the offender may be released on day parole is the longer of

(a) the period that expires when all but one fifth of the period of imprisonment the offender is to serve without eligibility for parole has been served, and

(b) the portion of the sentence that must be served before full parole may be granted to the offender, determined in accordance with subsection 120.2(2), less three years.

paragraphe 140.3(2) de la *Loi sur la défense nationale* ou du paragraphe 15(2) de la *Loi sur les crimes contre l'humanité et les crimes de guerre*, au dernier cinquième du délai préalable à l'admissibilité à la libération conditionnelle ou, si elle est supérieure, la période qui se termine trois ans avant l'admissibilité à la libération conditionnelle totale déterminée conformément au paragraphe 120.2(2).

Short sentences

(2) The Board is not required to review the case of an offender who applies for day parole if the offender is serving a sentence of less than six months.

Courtes peines d'emprisonnement

(2) La Commission n'est pas tenue d'examiner les demandes de semi-liberté émanant des délinquants condamnés à une peine d'emprisonnement inférieure à six mois.

When eligible for day parole — offenders eligible for accelerated parole review

119.1 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

Temps d'épreuve pour la semi-liberté — délinquants admissibles à la procédure d'examen expéditif

119.1 Le temps d'épreuve pour l'admissibilité à la semi-liberté est, dans le cas d'un délinquant admissible à la procédure d'examen expéditif en vertu des articles 125 et 126, six mois ou, si elle est supérieure, la

one sixth of the sentence, whichever is longer.

Time when eligible for full parole

120 (1) Subject to sections 746.1 and 761 of the *Criminal Code* and to any order made under section 743.6 of that Act, to subsection 140.3(2) of the *National Defence Act* and to any order made under section 140.4 of that Act, and to subsection 15(2) of the *Crimes Against Humanity and War Crimes Act*, an offender is not eligible for full parole until the day on which the offender has served a period of ineligibility of the lesser of one third of the sentence and seven years.

Life sentence

(2) Subject to any order made under section 743.6 of the *Criminal Code* or section 140.4 of the *National Defence Act*, an offender who is serving a life sentence, imposed otherwise than as a minimum punishment, is not eligible for full parole until the day on which the offender has served a period of ineligibility of seven years less any time spent in custody between the day on which the offender was arrested and taken into custody, in respect of the offence for which the sentence was imposed, and the day on

période qui équivaut au sixième de la peine.

Temps d'épreuve pour la libération conditionnelle totale

120 (1) Sous réserve des articles 746.1 et 761 du *Code criminel* et de toute ordonnance rendue en vertu de l'article 743.6 de cette loi, du paragraphe 140.3(2) de la *Loi sur la défense nationale* et de toute ordonnance rendue en vertu de l'article 140.4 de cette loi, et du paragraphe 15(2) de la *Loi sur les crimes contre l'humanité et les crimes de guerre*, le temps d'épreuve pour l'admissibilité à la libération conditionnelle totale est d'un tiers de la peine à concurrence de sept ans.

Cas particulier : perpétuité

(2) Dans le cas d'une condamnation à l'emprisonnement à perpétuité et à condition que cette peine n'ait pas constitué un minimum en l'occurrence, le temps d'épreuve pour l'admissibilité à la libération conditionnelle totale est, sous réserve de toute ordonnance rendue en vertu de l'article 743.6 du *Code criminel* ou en vertu de l'article 140.4 de la *Loi sur la défense nationale*, de sept ans moins le temps de détention compris entre le jour de

which the sentence was imposed.

Additional consecutive sentence

120.1 (1) Where an offender who is serving a sentence receives an additional sentence that is to be served consecutively to the sentence the offender was serving when the additional sentence was imposed, the offender is not eligible for full parole until the day on which the offender has served, commencing on the day on which the additional sentence was imposed,

(a) any remaining period of ineligibility in relation to the sentence the offender was serving when the additional sentence was imposed; and

(b) the period of ineligibility in relation to the additional sentence.

Additional sentence to be served consecutively to a portion of the sentence

(2) Notwithstanding subsection (1), where an offender who is serving a sentence receives an additional sentence that is to be served consecutively to a portion of the sentence the offender was serving when the additional sentence was imposed, the offender is not

l'arrestation et celui de la condamnation à cette peine.

Peine supplémentaire consécutive

120.1 (1) Le délinquant dont la peine d'emprisonnement n'est pas expirée et qui est condamné à une peine d'emprisonnement supplémentaire à purger à la suite de l'autre n'est pas admissible à la libération conditionnelle totale avant d'avoir purgé, à la fois, depuis le jour où il s'est vu infliger cette peine supplémentaire :

a) le reste du temps d'épreuve relatif à la peine que le délinquant purgeait déjà lorsqu'il s'est vu imposer la peine supplémentaire;

b) le temps d'épreuve relatif à cette peine supplémentaire.

Peine supplémentaire à purger après une partie de la peine

(2) Par dérogation au paragraphe (1), le délinquant dont la peine d'emprisonnement n'est pas expirée et qui est condamné à une peine supplémentaire à purger après une partie de la peine en cours n'est admissible à la libération conditionnelle totale qu'à la

eligible for full parole until the day that is the latest of

(a) the day on which the offender has served the period of ineligibility for full parole in relation to the sentence the offender was serving when the additional sentence was imposed,

(b) the day on which the offender has served, commencing on the date on which the additional sentence was imposed, the period of ineligibility for full parole in relation to the additional sentence, and

(c) the day on which the offender has served the period of ineligibility for full parole in relation to the sentence that includes the additional sentence as provided by subsection 139(1).

plus éloignée des dates suivantes :

a) la date à laquelle il a accompli le temps d'épreuve sur la peine qu'il purge au moment de la condamnation à la peine supplémentaire;

b) la date à laquelle il a accompli le temps d'épreuve sur la peine supplémentaire, déterminé à compter de la date de la condamnation à celle-ci;

c) la date à laquelle il a accompli le temps d'épreuve requis par rapport à la peine d'emprisonnement déterminée conformément au paragraphe 139(1).

Additional concurrent sentence

120.2 (1) Subject to subsection (2), where an offender who is serving a sentence receives an additional sentence that is to be served concurrently with any portion of the sentence the offender was serving when the additional sentence was imposed, the offender is not eligible for full parole until the day that is the later of

(a) the day on which the offender has served the

Peine supplémentaire concurrente

120.2 (1) Sous réserve du paragraphe (2), le délinquant dont la peine d'emprisonnement n'est pas expirée et qui est condamné à une peine d'emprisonnement supplémentaire à purger en même temps qu'une partie de l'autre n'est admissible à la libération conditionnelle totale qu'à la plus éloignée des dates suivantes :

a) la date à laquelle il a accompli le temps

period of ineligibility in relation to the sentence the offender was serving when the additional sentence was imposed, and

(b) the day on which the offender has served

(i) the period of ineligibility in relation to any portion of the sentence that includes the additional sentence as provided by subsection 139(1) and that is subject to an order under section 743.6 of the *Criminal Code* or section 140.4 of the *National Defence Act*, and

(ii) the period of ineligibility in relation to any other portion of that sentence.

d'épreuve sur la peine qu'il purge au moment de la condamnation à la peine supplémentaire;

b) la date à laquelle il a accompli, d'une part, le temps d'épreuve requis par rapport à la partie de la période globale d'emprisonnement, déterminée conformément au paragraphe 139(1), qui est visée par une ordonnance rendue en vertu de l'article 743.6 du *Code criminel* ou de l'article 140.4 de la *Loi sur la défense nationale* et, d'autre part, le temps d'épreuve requis par rapport à toute autre partie de cette période globale d'emprisonnement.

Where sentence in addition to life sentence

(2) Where an offender who is sentenced to life imprisonment or for an indeterminate period receives an additional sentence for a determinate period, the offender is not eligible for full parole until the day on which the offender has served, commencing on the day on which the additional sentence was imposed,

Peine d'emprisonnement à perpétuité

(2) Le délinquant qui est condamné à une peine d'emprisonnement supplémentaire pour une période déterminée alors qu'il purge une peine d'emprisonnement à perpétuité ou pour une période indéterminée n'est admissible à la libération conditionnelle totale qu'à la date à laquelle il a accompli le temps d'épreuve auquel il est assujetti au moment de la condamnation ainsi que le

(a) any remaining period of ineligibility to which the offender is subject; and

(b) the period of ineligibility in relation to the additional sentence.

temps d’épreuve sur la peine supplémentaire.

Where reduction of period of ineligibility for parole

(3) Where, pursuant to section 745.6 of the *Criminal Code*, subsection 140.3(2) of the *National Defence Act* or subsection 15(2) of the *Crimes Against Humanity and War Crimes Act*, there has been a reduction in the number of years of imprisonment without eligibility for parole of an offender referred to in subsection (2), the offender is not eligible for full parole until the day on which the offender has served, commencing on the day on which the additional sentence was imposed,

(a) the remaining period of ineligibility to which the offender would have been subject, after taking into account the reduction; and

(b) the period of ineligibility in relation to the additional sentence.

Nouveau calcul en cas de réduction du temps d’épreuve

(3) En cas de réduction du temps d’épreuve sur la peine d’emprisonnement à perpétuité en vertu de l’article 745.6 du *Code criminel*, du paragraphe 140.3(2) de la *Loi sur la défense nationale* ou du paragraphe 15(2) de la *Loi sur les crimes contre l’humanité et les crimes de guerre*, le délinquant visé au paragraphe (2) n’est admissible à la libération conditionnelle totale qu’à la date à laquelle il a accompli le temps d’épreuve auquel il aurait été assujetti, compte tenu de la réduction, à la date de la condamnation à la peine supplémentaire ainsi que le temps d’épreuve sur la peine supplémentaire.

Maximum period

120.3 Subject to section 745 of the *Criminal Code*, subsection 140.3(1) of the

Maximum

120.3 Sous réserve de l’article 745 du *Code criminel*, du

National Defence Act and subsection 15(1) of the *Crimes Against Humanity and War Crimes Act*, where an offender who is serving a sentence receives an additional sentence, the day on which the offender is eligible for full parole shall not be later than the day on which the offender has served fifteen years from the day on which the last of the sentences was imposed.

paragraphe 140.3(1) de la *Loi sur la défense nationale* et du paragraphe 15(1) de la *Loi sur les crimes contre l'humanité et les crimes de guerre*, lorsqu'un délinquant qui purge une peine d'emprisonnement est condamné à une peine supplémentaire, la limite maximale du temps d'épreuve requis pour la libération conditionnelle totale est de quinze ans à compter de la condamnation à la dernière peine.

Exceptional cases

121 (1) Subject to section 102 and notwithstanding sections 119 to 120.3 or any order made under section 743.6 of the *Criminal Code* or section 140.4 of the *National Defence Act*, parole may be granted at any time to an offender

Cas exceptionnels

121 (1) Sous réserve de l'article 102 mais par dérogation aux articles 119 à 120.3 et même si le temps d'épreuve a été fixé par le tribunal en application de l'article 743.6 du *Code criminel* ou de l'article 140.4 de la *Loi sur la défense nationale*, le délinquant peut bénéficier de la libération conditionnelle dans les cas suivants :

(a) who is terminally ill;

a) il est malade en phase terminale;

(b) whose physical or mental health is likely to suffer serious damage if the offender continues to be held in confinement;

b) sa santé physique ou mentale risque d'être gravement compromise si la détention se poursuit;

(c) for whom continued confinement would constitute an excessive hardship that was not reasonably foreseeable at

c) l'incarcération constitue pour lui une contrainte excessive difficilement

the time the offender was sentenced; or

(d) who is the subject of an order of surrender under the *Extradition Act* and who is to be detained until surrendered.

prévisible au moment de sa condamnation;

d) il fait l'objet d'un arrêté d'extradition pris aux termes de la *Loi sur l'extradition* et est incarcéré jusqu'à son extradition.

Exceptions

(2) Subsection (1) does not apply to an offender who is

(a) serving a life sentence imposed as a minimum punishment or commuted from a sentence of death; or

(b) serving, in a penitentiary, a sentence for an indeterminate period.

Exceptions

(2) Le présent article ne s'applique pas aux délinquants qui purgent :

a) une peine d'emprisonnement à perpétuité infligée comme peine minimale;

b) une peine de mort commuée en emprisonnement à perpétuité;

c) une peine de détention dans un pénitencier pour une période indéterminée.

Parole Reviews

Examen des dossiers de libération conditionnelle

Day parole review

122 (1) Subject to subsection 119(2), the Board shall, on application, at the time prescribed by the regulations, review, for the purpose of day parole, the case of every offender other than an offender referred to in subsection (2).

Examen : semi-liberté

122 (1) Sur demande des intéressés, la Commission examine, au cours de la période prévue par règlement, les demandes de semi-liberté.

Special cases

Cas spéciaux

(2) The Board may, on application, at the time prescribed by the regulations, review, for the purpose of day parole, the case of an offender who is serving a sentence of two years or more in a provincial correctional facility in a province in which no program of day parole has been established for that category of offender.

(2) Elle peut également le faire dans les mêmes conditions, dans le cas des délinquants qui purgent une peine de deux ans ou plus dans un établissement correctionnel provincial dans une province où aucun programme de semi-liberté visant cette catégorie de délinquants n'a été mis sur pied.

Decision or adjournment

(3) With respect to a review commenced under this section, the Board shall decide whether to grant day parole, or may adjourn the review for a reason authorized by the regulations and for a reasonable period not exceeding the maximum period prescribed by the regulations.

Décision

(3) Lors de l'examen, la Commission accorde ou refuse la semi-liberté, ou diffère sa décision pour l'un des motifs prévus par règlement; la durée de l'ajournement doit être la plus courte possible compte tenu du délai réglementaire.

Renewal of application

(4) Where the Board decides not to grant day parole, no further application for day parole may be made until six months after the decision or until such earlier time as the regulations prescribe or the Board determines.

Nouvelle demande

(4) En cas de refus, le délinquant doit, pour présenter une nouvelle demande, attendre l'expiration d'un délai de six mois à compter de la date du refus ou du délai inférieur que fixent les règlements ou détermine la Commission.

Maximum duration

(5) Day parole may be granted to an offender for a period not exceeding six months, and may be continued for additional periods not exceeding six months each

Durée maximale

(5) La semi-liberté est accordée pour une période maximale de six mois; elle peut être prolongée pour des périodes additionnelles d'au

following reviews of the case by the Board.

plus six mois chacune après réexamen du dossier.

Withdrawal of application

(6) An offender may withdraw an application for day parole at any time before the commencement of the review under this section.

Retrait de la demande

(6) Le délinquant peut retirer sa demande tant que la Commission n'a pas commencé l'examen de son dossier.

Full parole review

123 (1) Subject to subsection (2), the Board shall, at the time prescribed by the regulations, review, for the purpose of full parole, the case of every offender who is serving a sentence of two years or more and who is not within the jurisdiction of a provincial parole board.

Examen : libération conditionnelle totale

123 (1) La Commission examine, aux fins de la libération conditionnelle totale et au cours de la période prévue par règlement, les dossiers des délinquants purgeant une peine d'emprisonnement de deux ans ou plus qui ne relèvent pas d'une commission provinciale.

Waiver of review

(2) The Board is not required under subsection (1) or (5) to review the case of an offender who has advised the Board in writing that the offender does not wish to be considered for full parole and who has not in writing revoked that advice.

Exceptions

(2) Malgré les paragraphes (1) et (5), la Commission n'est pas tenue d'examiner le cas du délinquant qui l'a avisée par écrit qu'il ne souhaite pas bénéficier de la libération conditionnelle totale et n'a pas révoqué cet avis par écrit.

Review by Board

(3) The Board shall, on application within the period prescribed by the regulations, review, for the purpose of full parole, the case of every offender who is serving a sentence of less than two years in a penitentiary or provincial correctional facility

Peines plus courtes

(3) À leur demande, la Commission examine, aux fins de la libération conditionnelle totale et au cours de la période prévue par règlement, les dossiers des délinquants qui purgent une peine d'emprisonnement de moins de deux ans dans un

in a province where no provincial parole board has been established.

pénitencier ou un établissement correctionnel provincial situé dans une province n’ayant pas institué de commission provinciale de libération conditionnelle.

Short sentences

(3.1) The Board is not required to review the case of an offender who applies for full parole if the offender is serving a sentence of less than six months.

Courtes peines

(3.1) La Commission n’est pas tenue d’examiner les demandes de libération conditionnelle totale émanant de délinquants condamnés à une peine d’emprisonnement inférieure à six mois.

Decision or adjournment

(4) With respect to a review commenced under this section, the Board shall decide whether to grant full parole, or may grant day parole, or may adjourn the review for a reason authorized by the regulations and for a reasonable period not exceeding the maximum period prescribed by the regulations.

Décision

(4) Lors de l’examen, la Commission soit accorde ou refuse la libération conditionnelle totale, soit accorde la semi-liberté, soit diffère sa décision pour l’un des motifs prévus par règlement; la durée de l’ajournement doit être la plus courte possible, compte tenu du délai réglementaire.

Further review

(5) Where the Board decides not to grant parole following a review pursuant to section 122 or subsection (1) or a review is not made by virtue of subsection (2), the Board shall conduct another review within two years after the later of

Réexamen

(5) En cas de refus de libération conditionnelle dans le cadre de l’examen visé à l’article 122 ou au paragraphe (1) ou encore en l’absence de tout examen pour les raisons exposées au paragraphe (2), la Commission procède au réexamen dans les deux ans qui suivent la date de la tenue du premier examen en application du présent article

ou de l’article 122, ou à celle fixée pour cet examen, selon la plus éloignée de ces dates, et ainsi de suite, dans les deux ans, jusqu’à la survenance du premier des événements suivants :

(a) the date on which the first review under this section took place or was scheduled to take place, and

a) la libération conditionnelle totale ou d’office;

(b) the date on which the first review under section 122 took place,

b) l’expiration de la peine;

and thereafter within two years after the date on which each preceding review under this section or section 122 took place or was scheduled to take place, until

(c) the offender is released on full parole or on statutory release;

c) le délinquant a moins de quatre mois à purger avant sa libération d’office.

(d) the sentence of the offender expires; or

(e) less than four months remains to be served before the offender’s statutory release date.

Renewal of application

(6) Where the Board decides not to grant full parole following a review pursuant to this section, no further application for full parole may be made until six months after the decision or until such earlier time as the regulations

Nouvelle demande

(6) En cas de refus de la libération conditionnelle totale au terme de tout examen prévu au présent article, le délinquant doit, pour présenter une nouvelle demande, attendre l’expiration d’un délai de six mois à compter de la date de refus ou du délai

prescribe or the Board determines.

inférieur que fixent les règlements ou détermine la Commission.

Withdrawal of application

(7) An offender may withdraw an application for full parole at any time before the commencement of the review under this section.

Retrait

(7) Le délinquant peut retirer sa demande tant que la Commission n'a pas commencé l'examen de son cas.

Offenders unlawfully at large

124 (1) The Board is not required to review the case of an offender who is unlawfully at large at the time prescribed for a review under section 122, 123 or 126, but shall do so as soon as possible after being informed of the offender's return to custody.

Délinquant illégalement en liberté

124 (1) La Commission n'est pas tenue d'examiner le cas du délinquant qui se trouve illégalement en liberté au moment prévu pour l'un des examens visés aux articles 122, 123 ou 126; elle doit cependant le faire dans les meilleurs délais possible après avoir été informée de sa réincarcération.

Timing of release

(2) Where an offender is granted parole but no date is fixed for the offender's release, the parole shall take effect, and the offender shall be released, forthwith after such period as is necessary to implement the decision to grant parole.

Moment de la libération

(2) Dans le cas où la Commission a accordé au délinquant une libération conditionnelle sans en fixer la date, celui-ci doit être mis en liberté dès l'expiration de la période nécessaire à la mise en œuvre de la décision.

Cancellation of parole

(3) Where an offender has been granted parole under section 122, 123 or 126, the Board may, after a review of the case based on information that could not reasonably have

Annulation de la libération conditionnelle

(3) Après réexamen du dossier à la lumière de renseignements nouveaux qui ne pouvaient raisonnablement avoir été portés à sa connaissance au moment où

been provided to it at the time parole was granted, cancel the parole if the offender has not been released or terminate the parole if the offender has been released.

elle a accordé la libération conditionnelle, la Commission peut annuler sa décision avant la mise en liberté ou mettre fin à la libération conditionnelle si le délinquant est déjà en liberté.

Review

(4) Where the Board exercises its power under subsection (3) in the absence of a hearing, it shall, within the period prescribed by the regulations, review and either confirm or cancel its decision.

Révision

(4) En cas de révision d'une décision rendue sans audition, en vertu du paragraphe (3), la Commission doit, au cours de la période prévue par règlement, confirmer ou annuler la décision.

Accelerated Parole Reviews

Application

125 (1) This section and section 126 apply to an offender sentenced, committed or transferred to penitentiary for the first time, otherwise than pursuant to an agreement entered into under paragraph 16(1)(b), other than an offender

Procédure d'examen expéditif

Application

125 (1) Le présent article et l'article 126 s'appliquent aux délinquants condamnés ou transférés pour la première fois au pénitencier — autrement qu'en vertu de l'accord visé au paragraphe 16(1) — , à l'exception de ceux :

(a) serving a sentence for one of the following offences, namely,

a) qui y purgent une peine pour une des infractions suivantes :

(i) murder,

(i) le meurtre,

(ii) an offence set out in Schedule I or a conspiracy to commit such an offence,

(ii) une infraction mentionnée à l'annexe I ou un complot en vue d'en commettre une,

(ii.1) an offence under section 83.02 (providing or

(ii.1) une infraction mentionnée aux articles 83.02 (fournir

collecting property for certain activities), 83.03 (providing, making available, etc. property or services for terrorist purposes), 83.04 (using or possessing property for terrorist purposes), 83.18 (participation in activity of terrorist group), 83.19 (facilitating terrorist activity), 83.2 (to carry out activity for terrorist group), 83.21 (instructing to carry out activity for terrorist group), 83.22 (instructing to carry out terrorist activity) or 83.23 (harbouring or concealing) of the *Criminal Code* or a conspiracy to commit such an offence,

ou réunir des biens en vue de certains actes), 83.03 (fournir, rendre disponibles, etc. des biens ou services à des fins terroristes), 83.04 (utiliser ou avoir en sa possession des biens à des fins terroristes), 83.18 (participation à une activité d'un groupe terroriste), 83.19 (facilitation d'une activité terroriste), 83.2 (infraction au profit d'un groupe terroriste), 83.21 (charger une personne de se livrer à une activité pour un groupe terroriste), 83.22 (charger une personne de se livrer à une activité terroriste) ou 83.23 (héberger ou cacher) du *Code criminel*, ou un complot en vue d'en commettre une,

(iii) an offence under section 463 of the *Criminal Code* that was prosecuted by indictment in relation to an offence set out in Schedule I, other than the offence set out in paragraph (1)(q) of that Schedule,

(iii) l'infraction prévue à l'article 463 du *Code criminel* et relative à une infraction mentionnée à l'annexe I — sauf celle qui est prévue à l'alinéa (1)q) de celle-ci — et ayant fait l'objet d'une poursuite par mise en accusation,

(iv) an offence set out in Schedule II in respect of which an order has been made

(iv) une infraction mentionnée à l'annexe II et sanctionnée par une peine ayant fait l'objet

under section 743.6 of the *Criminal Code*,	d'une ordonnance rendue en vertu de l'article 743.6 du *Code criminel*,
(v) an offence contrary to section 130 of the *National Defence Act* where the offence is murder, an offence set out in Schedule I or an offence set out in Schedule II in respect of which an order has been made under section 140.4 of the *National Defence Act*, or	(v) le meurtre, lorsqu'il constitue une infraction à l'article 130 de la *Loi sur la défense nationale*, une infraction mentionnée à l'annexe I ou une infraction mentionnée à l'annexe II pour laquelle une ordonnance a été rendue en vertu de l'article 140.4 de la *Loi sur la défense nationale*,
(vi) a criminal organization offence within the meaning of section 2 of the *Criminal Code*, including an offence under subsection 82(2);	(vi) un acte de gangstérisme, au sens de l'article 2 du *Code criminel*, y compris l'infraction visée au paragraphe 82(2);
(a.1) convicted of an offence under section 240 of the *Criminal Code*;	a.1) qui ont été déclarés coupables de l'infraction visée à l'article 240 du *Code criminel*;
(b) serving a life sentence imposed otherwise than as a minimum punishment; or	b) qui purgent une peine d'emprisonnement à perpétuité à condition que cette peine n'ait pas constitué un minimum en l'occurrence;
(c) whose day parole has been revoked.	c) dont la semi-liberté a été révoquée.

Idem

(1.1) For greater certainty, this section and section 126

(a) apply to an offender referred to in subsection (1) who, after being sentenced, committed or transferred to penitentiary for the first time, is sentenced in respect of an offence, other than an offence referred to in paragraph (1)(a), that was committed before the offender was sentenced, committed or transferred to penitentiary for the first time; and

(b) do not apply to an offender referred to in subsection (1) who, after being sentenced, committed or transferred to penitentiary for the first time, commits an offence under an Act of Parliament for which the offender receives an additional sentence.

Idem

(1.1) Il est entendu que le présent article et l'article 126 :

a) s'appliquent aux délinquants visés au paragraphe (1) et qui, après leur condamnation ou leur transfèrement au pénitencier pour la première fois, sont condamnés pour une infraction — autre qu'une infraction visée à l'alinéa (1)a) — commise avant cette condamnation ou ce transfert;

b) ne s'appliquent pas aux délinquants visés au paragraphe (1) et qui, après leur condamnation ou leur transfèrement au pénitencier pour la première fois, commettent une infraction à une loi fédérale pour laquelle une peine d'emprisonnement supplémentaire est infligée.

Review of cases by Service

(2) The Service shall, at the time prescribed by the regulations, review the case of an offender to whom this section applies for the purpose of referral of the case to the Board for a determination under section 126.

Examen par le Service

(2) Le Service procède, au cours de la période prévue par règlement, à l'étude des dossiers des délinquants visés par le présent article en vue de leur transmission à la Commission pour décision conformément à l'article 126.

Evidence to be considered

(3) A review made pursuant to subsection (2) shall be based on all reasonably available information that is relevant, including

(a) the social and criminal history of the offender obtained pursuant to section 23;

(b) information relating to the performance and behaviour of the offender while under sentence; and

(c) any information that discloses a potential for violent behaviour by the offender.

Critères de l'examen

(3) L'étude du dossier se fonde sur tous les renseignements pertinents qui sont normalement disponibles, notamment :

a) les antécédents sociaux et criminels du délinquant obtenus en vertu de l'article 23;

b) l'information portant sur sa conduite pendant la détention;

c) tout autre renseignement révélant une propension à la violence de sa part.

Referral to Board

(4) On completion of a review pursuant to subsection (2), the Service shall, within such period as is prescribed by the regulations preceding the offender's eligibility date for full parole, refer the case to the Board together with all information that, in its opinion, is relevant to the case.

Transmission à la Commission

(4) Au terme de l'étude, le Service transmet à la Commission, dans les délais réglementaires impartis mais avant la date d'admissibilité du délinquant à la libération conditionnelle totale, les renseignements qu'il juge utiles.

Delegation to provincial authorities

(5) The Service may delegate to the correctional authorities of a province its powers under this section in relation to offenders who are serving their sentences in provincial

Délégation

(5) Le Service peut déléguer aux autorités correctionnelles d'une province les pouvoirs que lui confère le présent article en ce qui concerne les délinquants qui purgent leur

correctional facilities in that province.

peine dans un établissement correctionnel de la province.

Review by Board

126 (1) The Board shall review without a hearing, at or before the time prescribed by the regulations, the case of an offender referred to it pursuant to section 125.

Examen par la Commission

126 (1) La Commission procède sans audience, au cours de la période prévue par règlement ou antérieurement, à l'examen des dossiers transmis par le Service ou les autorités correctionnelles d'une province.

Release on full parole

(2) Notwithstanding section 102, if the Board is satisfied that there are no reasonable grounds to believe that the offender, if released, is likely to commit an offence involving violence before the expiration of the offender's sentence according to law, it shall direct that the offender be released on full parole.

Libération conditionnelle totale

(2) Par dérogation à l'article 102, quand elle est convaincue qu'il n'existe aucun motif raisonnable de croire que le délinquant commettra une infraction accompagnée de violence s'il est remis en liberté avant l'expiration légale de sa peine, la Commission ordonne sa libération conditionnelle totale.

Report to offender

(3) If the Board does not direct, pursuant to subsection (2), that the offender be released on full parole, it shall report its refusal to so direct, and its reasons, to the offender.

Rapport au délinquant

(3) Si elle est convaincue du contraire, la Commission communique au délinquant ses conclusions et motifs.

Reference to panel

(4) The Board shall refer any refusal and reasons reported to the offender pursuant to subsection (3) to a panel of members other than those who

Réexamen

(4) La Commission transmet ses conclusions et motifs à un comité constitué de commissaires n'ayant pas déjà examiné le cas et chargé,

reviewed the case under subsection (1), and the panel shall review the case at the time prescribed by the regulations.

au cours de la période prévue par règlement, du réexamen du dossier.

Release on full parole

(5) Notwithstanding section 102, if the panel reviewing a case pursuant to subsection (4) is satisfied as described in subsection (2), the panel shall direct that the offender be released on full parole.

Libération conditionnelle

(5) Si le réexamen lui apporte la conviction précisée au paragraphe (2), le comité ordonne la libération conditionnelle totale du délinquant.

Refusal of parole

(6) An offender who is not released on full parole pursuant to subsection (5) is entitled to subsequent reviews in accordance with subsection 123(5).

Refus

(6) Dans le cas contraire, la libération conditionnelle totale est refusée, le délinquant continuant toutefois d'avoir droit au réexamen de son dossier selon les modalités prévues au paragraphe 123(5).

Definition of "offence involving violence"

(7) In this section, ***offence involving violence*** means murder or any offence set out in Schedule I, but, in determining whether there are reasonable grounds to believe that an offender is likely to commit an offence involving violence, it is not necessary to determine whether the offender is likely to commit any particular offence.

Infractions accompagnées de violence

(7) Pour l'application du présent article, une infraction accompagnée de violence s'entend du meurtre ou de toute infraction mentionnée à l'annexe I; toutefois, il n'est pas nécessaire, en déterminant s'il existe des motifs raisonnables de croire que le délinquant en commettra une, de préciser laquelle.

Termination or revocation

Conséquences de la révocation

(8) Where the parole of an offender released pursuant to this section is terminated or revoked, the offender is not entitled to another review pursuant to this section.

(8) En cas de révocation ou de cessation de la libération conditionnelle, le délinquant perd le bénéfice de la procédure expéditive.

Release on day parole

126.1 Sections 125 and 126 apply, with such modifications as the circumstances require, to a review to determine if an offender referred to in subsection 119.1 should be released on day parole.

Application

126.1 Les articles 125 et 126 s'appliquent, avec les adaptations nécessaires, à la procédure d'examen expéditif visant à déterminer si la semi-liberté sera accordée au délinquant visé à l'article 119.1.

Corrections and Conditional Release Regulations, SOR/92-620
Version from 2006-03-22 to 2012-11-30

Accelerated Parole Reviews

159 (1) The Service shall review the case of an offender to whom section 125 of the Act applies within one month after the offender's admission to a penitentiary, or to a provincial correctional facility where the sentence is to be served in such a facility.

(2) The Service shall refer the case of an offender to the Board pursuant to subsection 125(4) of the Act not later than three months before the offender's eligibility date for full parole.

Procédure d'examen expéditif

159 (1) Le Service doit examiner le cas du délinquant visé à l'article 125 de la Loi dans le mois qui suit son admission dans un pénitencier ou dans un établissement correctionnel provincial lorsqu'il doit purger sa peine dans cet établissement.

(2) Le Service doit, conformément au paragraphe 125(4) de la Loi, transmettre à la Commission le cas du délinquant au plus tard trois mois avant la date de son admissibilité à la libération conditionnelle totale.

(3) The Board shall, pursuant to subsection 126(1) of the Act, review the case of an offender not later than seven weeks before the offender's eligibility date for full parole.

(3) La Commission doit, conformément au paragraphe 126(1) de la Loi, examiner le cas du délinquant au plus tard sept semaines avant la date de son admissibilité à la libération conditionnelle totale.

(4) A panel shall, pursuant to subsection 126(4) of the Act, review the case of an offender before the offender's eligibility date for full parole.

(4) Le comité doit, conformément au paragraphe 126(4) de la Loi, réexaminer le cas du délinquant avant la date de son admissibilité à la libération conditionnelle totale.

International Transfer of Offenders Act, SC 2004, c 21

Purpose

3. The purpose of this Act is to enhance public safety and to contribute to the administration of justice and the rehabilitation of offenders and their reintegration into the community by enabling offenders to serve their sentences in the country of which they are citizens or nationals.

Objet

3 La présente loi a pour objet de renforcer la sécurité publique et de faciliter l'administration de la justice et la réadaptation et la réinsertion sociale des délinquants en permettant à ceux-ci de purger leur peine dans le pays dont ils sont citoyens ou nationaux.

…

[…]

If eligible for parole, etc., before transfer

27. If, under the *Corrections and Conditional Release Act* or the *Criminal Code*, the day on which a Canadian offender is eligible for a temporary absence, day parole or full

Admissibilité antérieure à la date du transfèrement

27 Si, en raison de l'application de la *Loi sur le système correctionnel et la mise en liberté sous condition* ou du *Code criminel*, la date à laquelle le délinquant

parole is before the day of their transfer, the day of their transfer is deemed to be their day of eligibility.

canadien devient admissible à la permission de sortir, à la semi-liberté ou à la libération conditionnelle totale est antérieure à la date de son transfèrement au Canada, cette dernière date est réputée être la date d'admissibilité.

Review by Board

28. Despite sections 122 and 123 of the *Corrections and Conditional Release Act*, the Parole Board of Canada is not required to review the case of a Canadian offender until six months after the day of their transfer.

Examen

28 Par dérogation aux articles 122 et 123 de la *Loi sur le système correctionnel et la mise en liberté sous condition*, la Commission des libérations conditionnelles du Canada n'est pas tenue d'examiner le dossier du délinquant canadien avant l'expiration d'un délai de six mois suivant la date de son transfèrement au Canada.

Application

29 (1) Subject to this Act, a Canadian offender who is transferred to Canada is subject to the *Corrections and Conditional Release Act*, the *Prisons and Reformatories Act* and the *Youth Criminal Justice Act* as if they had been convicted and their sentence imposed by a court in Canada.

Lois applicables

29 (1) Sous réserve des autres dispositions de la présente loi, la *Loi sur le système correctionnel et la mise en liberté sous condition*, la *Loi sur les prisons et les maisons de correction* et la *Loi sur le système de justice pénale pour les adolescents* s'appliquent au délinquant canadien transféré comme si la condamnation et la peine avaient été prononcées au Canada.

…

[…]

Unemployment Insurance Benefit Entitlement Adjustments (Pension Payments) Act, SC 1987, c 17

Appeals	**Appels**
6 For greater certainty, a decision of the Commission under this Act may be appealed in the like manner as a decision of the Commission under the *Unemployment Insurance Act, 1971* and sections 94 to 105 of that Act apply, with such modifications as the circumstances require, to an appeal under this Act.	6 Il est entendu que le prestataire peut en appeler d'une décision rendue par la Commission aux termes de la présente loi selon les modalités prévues en cette matière par la *Loi de 1971 sur l'assurance-chômage*, les articles 94 à 105 de cette loi s'appliquant, compte tenu des adaptations de circonstance.

Federal Courts Rules, SOR/98-106

Preliminary determination of question of law or admissibility	**Décision préliminaire sur un point de droit ou d'admissibilité**
220 (1) A party may bring a motion before trial to request that the Court determine	220 (1) Une partie peut, par voie de requête présentée avant l'instruction, demander à la Cour de statuer sur :
(a) a question of law that may be relevant to an action;	a) tout point de droit qui peut être pertinent dans l'action;
(b) a question as to the admissibility of any document, exhibit or other evidence; or	b) tout point concernant l'admissibilité d'un document, d'une pièce ou de tout autre élément de preuve;
(c) questions stated by the parties in the form of a special case before, or in lieu of, the trial of the action.	c) les points litigieux que les parties ont exposés dans un mémoire spécial avant l'instruction de l'action ou en remplacement de celle-ci.

Contents of determination

(2) Where, on a motion under subsection (1), the Court orders that a question be determined, it shall

(a) give directions as to the case on which the question shall be argued;

(b) fix time limits for the filing and service of motion records by the parties; and

(c) fix a time and place for argument of the question.

Contenu de la décision

(2) Si la Cour ordonne qu'il soit statué sur l'un des points visés au paragraphe (1), elle :

a) donne des directives sur ce qui doit constituer le dossier à partir duquel le point sera débattu;

b) fixe les délais de dépôt et de signification du dossier de requête;

c) fixe les date, heure et lieu du débat.

Determination final

(3) A determination of a question referred to in subsection (1) is final and conclusive for the purposes of the action, subject to being varied on appeal.

Décision définitive

(3) La décision prise au sujet d'un point visé au paragraphe (1) est définitive aux fins de l'action, sous réserve de toute modification résultant d'un appel.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-455-16
STYLE OF CAUSE:	KRISTEN MARIE WHALING (FORMERLY KNOWN AS CHRISTOPHER JOHN WHALING) v HIS MAJESTY THE KING
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	MARCH 23, 2023
JUDGMENT AND REASONS:	PAMEL J.
DATED:	MAY 9, 2024

APPEARANCES:

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Susanne Pereira Ryan Grist	FOR THE DEFENDANT

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