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Punitive in Effect: Reflections on *Canada v. Whaling*

Hamish Stewart[*]

I. INTRODUCTION

In 2014, the Supreme Court of Canada decided only one case concerning the constitutional aspects of punishment. In *Canada (Attorney General) v. Whaling*,[1] the Court held that the retrospective application of the abolition of accelerated parole review offended the *Canadian Charter of Rights and Freedoms*[2] right against double punishment. The decision did not touch on the constitutional merits of the abolition of accelerated parole review itself and in that sense concerned a merely transitional issue in sentencing and the administration of parole. It is nevertheless potentially significant because it is the first time that the Supreme Court of Canada has characterized a consequence of the commission of an offence as "punishment" based solely on its effect rather than on its purpose. It may therefore open up to Charter scrutiny a wide range of policy changes concerning the treatment of offenders.

II. CHARTER RIGHTS RELATING TO PUNISHMENT

The Charter provides (at least) four rights relating to punishment. First, section 12 provides that "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment." The Supreme Court of Canada has consistently held that to demonstrate a violation of section 12 with respect to "punishment", a Charter applicant must show that the punishment for the offence is "grossly disproportionate" in the sense that

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[1] [2014] S.C.J. No. 20, 2014 SCC 20, [2014] 1 S.C.R 392 (S.C.C.) [hereinafter "*Whaling*"].

[2] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

it is "...so excessive as to outrage standards of decency".[3] That is a high standard and is difficult for a Charter applicant to show.

Section 11 contains two rights concerning punishment. Section 11(h) provides, as part of the more general guarantee against double jeopardy, that a person charged with an offence has the right "...if finally found guilty and punished for the offence, not to be … punished for it again". Section 11(i) provides that where the penalty for an offence has been varied between the time the offence was committed and the time of sentencing, the offender has the right "to the benefit of the lesser punishment".

Finally, since an offender's liberty under section 7 of the Charter is at stake in sentencing proceedings and in the conditions under which his or her sentence is served, he or she is entitled to the protection of the principles of fundamental justice throughout the process of being sentenced and of serving his or her sentence. Substantive principles of fundamental justice relevant to punishment, not expressly stated elsewhere in the Charter, arguably include a partial constitutionalization of the *Kienapple* rule[4] against multiple convictions for the same wrong[5] and the requirement that in the sentencing hearing the Crown prove contested aggravating factors beyond a reasonable doubt.[6]

The section 11 rights concerning punishment are only triggered if an offender is "punished". If the state does something to an offender that is not "punishment", then they do not apply. The section 12 guarantee against cruel and unusual "treatment" would apply, as would the section 7 principles of fundamental justice, to the extent that the state's action affected the offender's interest in liberty or security of the person. But the two punishment-related rights in section 11 do not apply unless the consequence of a finding of guilt is "punishment" for Charter purposes.

In *R. v. Wigglesworth*,[7] which concerned the relationship between a criminal charge and a police service offence, the Court defined "punishment" as follows: A consequence for an individual was "punishment" if it was imposed in proceedings of a criminal or *quasi*-criminal nature, or, regardless of the nature of the proceedings, if it was "a true penal consequence" such as "imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the

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[3] *R. v. Smith*, [1987] S.C.J. No. 36, [1987] 1 S.C.R. 1045, at 1072 (S.C.C.).

[4] *R. v. Kienapple*, [1974] S.C.J. No. 76, [1975] 1 S.C.R. 729 (S.C.C.).

[5] On this possibility, see most recently, *R. v. Meszaros*, [2013] O.J. No. 5113, 2013 ONCA 682, at paras. 62-68 (Ont. C.A.).

[6] *R. v. D.B.*, [2008] S.C.J. No. 25, 2008 SCC 25, at para. 78 (S.C.C.).

[7] [1987] S.C.J. No. 71, 37 C.C.C. (3d) 385 (S.C.C.) [hereinafter "*Wigglesworth*"].

wrong done to society at large rather than for the maintenance of internal discipline" within a regulated area of conduct.[8] On that test, a sanction imposed on an RCMP officer for a service offence did not preclude criminal punishment following a subsequent prosecution based on the same conduct. The first sanction was not "punishment" in the Charter sense. In *R. v. Rodgers*, where the issue was the nature of the consequence rather than the nature of the proceedings, the Court held that a consequence amounted to "punishment" if it satisfied this two-part test: "…the consequence will constitute a punishment when [1] it forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence and [2] the sanction is one imposed in furtherance of the purpose and principles of sentencing".[9] The Court held that the requirement that a convicted offender provide a bodily sample for forensic DNA analysis was not part of the "arsenal of sanctions"; it was more akin to taking fingerprints or photographs of a suspect.[10] The law authorizing the taking of such samples from previously convicted offenders therefore did not violate section 11(h) of the Charter.

The picture that emerges from these early cases is that a consequence is likely to be characterized as punishment for Charter purposes if it has a punitive purpose, that is, a purpose of "redressing wrongs done to society at large".[11] A traditional consequence such as imprisonment, probation, or a fine will almost certainly be so characterized, but non-traditional consequences will not be unless they can be shown to have a punitive purpose.

III. *WHALING* AND THE MEANING OF "PUNISHMENT"

In 2011, Parliament enacted the *Abolition of Early Parole Act* ("AEPA"),[12] amending the *Corrections and Conditional Release Act*,[13] to eliminate the possibility of "accelerated parole review". The application of the AEPA was expressly retrospective: section 10(2) provided that offenders who had already been sentenced would not be eligible for

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8 *Id.*, at 400-402.

9 [2006] S.C.J. No. 15, 2006 SCC 15 at para. 63 (S.C.C.) [numbering added; hereinafter "*Rodgers*"].

10 *Id.*, at para. 65.

11 *R. v. Shubley*, [1990] S.C.J. No. 1, [1990] 1 S.C.R. 3, at 32 (S.C.C.) [hereinafter "*Shubley*"], and compare at 20.

12 S.C. 2011, c. 11.

13 S.C. 1992, c. 20.

accelerated parole review. The applicants in *Whaling* were three offenders who were already serving federal sentences when the AEPA came into force and whose eligibility for parole had as a result been delayed: in the case of the applicant Maidana, by 21 months. They argued that the retroactive application of AEPA violated their section 11(h) right not to be punished again for their offences. But that right would apply only if delaying their eligibility for parole was a form of "punishment" for Charter purposes.

The claim that variations in parole eligibility are forms of "punishment" is not an easy one to make. An offender who is on parole is still serving the sentence originally imposed following conviction. He or she is liable to have parole revoked on various grounds. So it might be argued that changing the timing of or conditions for parole eligibility is not additional "punishment" (though it would be subject to scrutiny under section 7 since it would affect the offender's liberty interest[14]). It is merely a change in the way the sentence is served.

The Government's argument that the abolition of accelerated parole was not "punishment" was not quite so straightforward as that. The Government argued, first, that because the delay in parole ineligibility was not imposed following a new proceeding, it did not count as "punishment" on the *Wigglesworth* approach.[15] The Court rightly rejected this submission. As Wagner J. points out, it would be very odd indeed if it was constitutionally easier for the state "to punish someone without a proceeding than to punish him or her with a proceeding".[16] If

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[14] A change in the parole regime was subject to Charter challenge in *Cunningham v. Canada*, [1993] S.C.J. No. 47, [1993] 2 S.C.R. 143 (S.C.C.). The Court recognized that the change implicated an offender's liberty interest, but dismissed the challenge on other grounds. In *Whaling*, the Court found it unnecessary to decide the applicants' s. 7 claim: *Whaling*, *supra*, note 1, at paras. 75-76. A change in parole regimes would also be subject to scrutiny under the Charter requirement that detention not be arbitrary (s. 9) and the common law requirement that detention be lawful (*Mission Institution v. Khela*, [2014] S.C.J. No. 24, 2014 SCC 24 (S.C.C.); *May v. Ferndale Institution*, [2005] S.C.J. No. 84, 2005 SCC 82 (S.C.C.)). State action in compliance with the statute would satisfy the common law requirement; the question whether the statute itself was "arbitrary" for s. 9 purposes would overlap with the s. 7 question of whether it complied with the principles of fundamental justice.

[15] A slightly different version of this argument had already been considered and rejected in *Rodgers*. A peace officer's application for an order requiring previously convicted offenders provide a bodily sample for forensic DNA analysis was not a proceeding in which the offender was, in the opening words of s. 11, "charged with an offence". The Court held the s. 11(h) guarantee against double punishment would nevertheless apply because the consequence flowed from the original conviction. *Rodgers*, *supra*, note 9, at para. 58. Any other reading would make the s. 11(h) guarantee virtually meaningless. (The Court went on to hold that the consequence was not "punishment".)

[16] *Whaling*, *supra*, note 1, at para. 38.

the Government's interpretation of section 11(h) was correct, not only would the retroactive application of AEPA not violate double jeopardy, neither would a statute that automatically added a year of imprisonment to the sentences of all previously convicted offenders or that gave the Commissioner of the Correctional Service of Canada a discretion to continue the detention of any offenders after the expiration of their sentences. Such a law would be subject to challenge under sections 7 and 12 of the Charter — but it would not be a form of double punishment. That would be a very implausible conclusion.

The Government's second argument was much stronger. It was, simply, that a delay in parole eligibility was not punishment on the *Rodgers* definition. The Court essentially accepted that argument. With some hesitation, the Court agreed with the Government's submission that the purpose of retroactively applying the AEPA was not to pursue the traditional sentencing objectives of denunciation and deterrence by punishing offenders who were already serving sentences but merely to achieve uniformity in the application of the legitimate policy objective of abolishing early parole.[17] Thus, the abolition of early parole eligibility was "neither a second proceeding nor a 'sanction' in the sense contemplated in *Rodgers*".[18]

One would expect the constitutional challenge to fail at this point. But the Court avoided that conclusion by expanding its conception of punishment. Evidently troubled by what was functionally an increase in the harshness of the sentences of previously convicted offenders, the Court held that the *Rodgers* test was concerned with the characterization of "a discrete sanction — one that does not modify the original sanction"; but the issue here was how to characterize a modification of an existing sanction.[19] Abolition of early parole eligibility created a situation where "from a functional rather than a formalistic perspective, the harshness of punishment has been increased".[20] As usual, it is not clear what the Court means by contrasting the formal (bad) with the functional (good), but the Court was evidently concerned to recognize the constitutional significance of the increase in the proportion of their sentence that previously convicted offenders would serve in the penitentiary rather than on parole. So, for the purposes of applying the section 11(h) right against double

[17] *Whaling*, *id*., at para. 68.
[18] *Id*., at para. 49.
[19] *Id*., at para. 52.
[20] *Id*., at para. 52.

punishment, "punishment" now means any of the following three "state actions in relation to the same offence":

> (a) a proceeding that is criminal or quasi-criminal in nature …;
>
> (b) an additional sanction or consequence that meets the two-part *Rodgers* test for punishment … in that it is similar in nature to the types of sanctions available under the *Criminal Code* and is imposed in furtherance of the purpose and principles of sentencing; and
>
> (c) retrospective changes to the conditions of the original sanction which have the effect of adding to the offender's punishment….[21]

Not every effect on an existing sentence will constitute "punishment" for this purpose. Though the Court was reluctant to define exactly what effect would count, the basic idea was that a law having a sufficiently significant impact on "an offender's settled expectation of liberty" would constitute fresh punishment and would therefore violate section 11(h).[22]

Applying this idea to the AEPA, the Court found that although Parliament's purpose in abolishing accelerated parole review was not punitive, the abolition was punitive in effect. It was "a lengthening of the minimum period of incarceration for persons … who would have qualified for early day parole under the APR system"; it was imposed "automatical[ly] and without regard to individual circumstances".[23] It was therefore "double punishment" and offended section 11(h) of the Charter.[24]

The Court found that the violation of section 11(h) was not justified under section 1. At the first stage of the *Oakes* test[25] for justifying a limit on a Charter right, the state must show that the limit has a pressing and substantial objective. The Court agreed with the trial judge's finding that that the objective of the AEPA in general, and of its retrospective application in particular,[26] was pressing and substantial: "ensuring that sentences as administered are consistent with the sentences courts impose, which, by extension, includes maintaining or restoring public

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21 *Id*., at para. 54.

22 *Id*., at para. 60.

23 *Id*., at paras. 70-71.

24 *Id*., at para. 72.

25 *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.).

26 Thus, the Court avoided the frequent error of considering the objective of the legislation in general, rather than the objective of the limit on the Charter right, to be pressing and substantial. It happens in this case that these two objectives are the same, but while the former provides essential context for determining the latter, they are not always identical, and it is the limit on the right, not the legislation in general, that must be justified under s. 1.

confidence in the administration of justice".[27] However, the Court found that the retrospective application of the AEPA was not proportional because it was not minimally impairing: the Government had not shown that prospective application only "would have significantly undermined [Parliament's] objectives".[28] In other words, Parliament had open to it the less rights-impairing alternative of not violating the section 11(h) right at all. Although expressed as a lack of minimal impairment, this amounts to saying that the rights infringement was not necessary to Parliament's objective and so not proportional because not rationally connected.

IV. IMPLICATIONS

Whaling is the first case where the Supreme Court of Canada has found that a consequence of conviction amounts to "punishment" for Charter purposes solely because of its effects rather than because of its purposes. While the Court has on occasion considered the magnitude of a consequence, and thus its effect on the offender, as a factor in determining the legislature's purpose,[29] it has never previously held that a consequence, though not punitive in its purpose, was punishment because it was punitive in its effect. While the reasoning in *Whaling* is specifically limited to the context of a new consequence imposed on offenders already serving their sentences, and moreover to section 11(h), this new willingness to consider effect as well as purpose could have a number of implications for constitutional review of newly invented consequences of conviction.

Consider, for example, the question whether a victim surcharge imposed under section 737 of the *Criminal Code*[30] is "punishment" for the purpose of section 7, 11, or 12 of the Charter. Section 737(1) provides that a person who is convicted or discharged "shall pay a victim surcharge, in addition to any other punishments imposed". Section 737(2)(a) provides that the surcharge is 30 per cent of any fine imposed; if no fine is imposed, section 737(2)(b) provides that the surcharge is $100 for a

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[27] *Whaling*, *supra*, note 1, at para. 78.

[28] *Id*., at para. 80.

[29] In *Shubley*, *supra*, note 11, at 23, for example, the Court commented that the penalties imposed in a prison discipline proceeding were "entirely commensurate with the goal of fostering internal prison discipline and … not of a magnitude or consequence that would be expected for redressing wrongs done to society at large".

[30] R.S.C. 1985, c. C-46 [hereinafter "*Criminal Code*"].

summary conviction offence and $200 for an offence punishable by indictment. Courts in Ontario have reached different conclusions on the question whether this surcharge is "punishment". In his impressively reasoned and sensitively written decision in *Michael*,[31] Paciocco J. of the Ontario Court of Justice concluded that a victim surcharge was not only punishment but was cruel and unusual punishment under section 12.[32] Justice Paciocco's reasoning on the first point was straightforward: the victim surcharge satisfied both elements of the *Rodgers* test. The victim surcharge was, in essence, a fine and therefore part of the traditional arsenal of sanctions. Section 737(1) referred to it as being imposed "in addition to any other punishment", suggesting that it is indeed a punishment. Moreover, Paciocco J. noted that "only offenders pay the victim surcharge and they do so as part of the sentencing process" and that the victim surcharge fell within the definition of a "fine" in section 716, that is "a pecuniary penalty or other sum of money, but … not … restitution."[33] As for the Crown's submission that the victim surcharge was indeed a type of restitution and therefore not a fine, he noted that the surcharge did not appear in the Code sections concerning restitution. The surcharge went into a fund which was used "for the purposes of providing … assistance to the victims of offences" (section 737(7)), not restitution to particular victims, let alone the offender's victims; moreover, it was unrelated to the loss caused.[34] Rather, it was imposed "to make offenders pay for their crimes", not to the specific victim, but to society in general.[35] He then went on to hold that the surcharge was cruel and unusual because it was grossly disproportionate on the facts of a reasonable hypothetical: the facts of the very case before him, slightly adjusted.[36] The offender was liable to a victim surcharge of $900. He was

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[31] *R. v. Michael*, [2014] O.J. No. 3609, 2014 ONCJ 360, 314 C.C.C. (3d) 180 (Ont. C.J.) [hereinafter "*Michael*"].

[32] Section 737(5), which provided for an exemption on the application of the offender if the victim surcharge would cause "undue hardship" to the offender or his/her dependants, was repealed in 2013. If this discretion was still available, it would likely be a complete answer to the claim that the victim surcharge was cruel and unusual.

[33] *Id*., at paras. 8 and 11.

[34] *Id*., at para. 13.

[35] *Id*., at para. 8.

[36] On the facts of the case, Paciocco J. could have avoided imposing the victim surcharge of $900 by imposing a nominal fine (*e.g.*, $1.00) for each offence; according to s. 737(2)(a), the surcharge would be 15 per cent of that fine, for a total of $10.35. It is questionable whether this device is consistent with the policy behind the repeal of s. 737(5). But it is in any event not available where the offender cannot be fined: in those cases, the offender must pay the minimum victim surcharge of $50 or $100, as the case may be, laid out in s. 737(2)(b). For example, an offender

a drug- and alcohol-addicted repeat offender who had no prospect of ever paying it. The impact on his life of the lingering effect of an unpaid victim surcharge was grossly disproportionate to the relatively minor offence of which he had been convicted.[37]

In contrast, in *R. v. Tinker*, Glass J. of the Superior Court of Justice of Ontario held, for section 7 purposes, that the victim surcharge was not a fine:

> I do not read a surcharge to be a fine. It is not in the form of a penalty. It flows from a conviction for a crime, but it is not a sanction in its own right. Rather, it is … a sum of money established to be a consequence of breaking the law. That is different from a sanction because is it not in the same category as a fine, a tax, or a penalty. Rather, the surcharge is a sum of money that goes into a pool of resources to help victims of crime.[38]

Both of these interpretations of the victim surcharge are possible; neither depends on any assessment of the effects of the victim surcharge on the offender. Justice Paciocco's is preferable, because of the wording of section 737(1), the close analogy between the surcharge and a fine, and the weak link between the surcharge and any restitutionary purpose. But if, in light of *Whaling*, it is permissible to consider the effect of a consequence as well as its purpose in determining whether the consequence is "punishment" for Charter purposes, then the case for characterizing the victim surcharge as a punishment is even stronger. In *Michael*, the offender was extremely impoverished and had no hope of ever paying the $900 victim surcharge to which he was liable. The prospect of harassment by collection agencies and imprisonment for non-payment would hang over him indefinitely and he would never be able to apply for a record suspension; he would, in effect, never be able to repay his debt to society for the relatively minor offences of which he had been found guilty.[39] Justice Paciocco made these observations in assessing whether the victim surcharge was cruel and unusual for Charter

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cannot be fined where he or she is discharged rather than convicted because only a convicted offender can be fined (ss. 731, 734); and an offender cannot be fined where he or she is sentenced to imprisonment followed by probation (at least, that is how the predecessor of s. 731(1)(b) has been interpreted in Ontario and Quebec: *R. v. Blacquierre*, [1975] O.J. No. 443, 24 C.C.C. (2d) 168 (Ont. C.A.); *R. c. St. James*, [1981] J.Q. no 163, 20 C.R. (3d) 389 (Que. C.A.)). So, the reasonable hypothetical consisted of the facts of *Michael's* case on the assumption that he was an offender who could not be fined.

[37] *Michael*, *supra*, note 31, at paras. 58-81.

[38] [2015] O.J. No. 1758, 2015 ONSC 2284, at para. 29 (Ont. S.C.J.).

[39] *Michael*, *supra*, note 31, at paras. 70-88.

purposes; but after *Whaling*, they may be equally relevant to the question whether the surcharge is punishment in the first place. Moreover, as he says at the outset of his reasons for judgment:

> [*Whaling* holds that] a provision that increases the period of incarceration to be served is necessarily a punishment. The same holds true … for a provision like s. 737, which enhances the amount of any fine that must be paid. How can a fine be a paradigmatic example of a punishment, yet a provision adding 30% to the amount of a fine, not be a punishment?[40]

While Paciocco J. may have overstated the *ratio* of *Whaling*, his analogy between the effective length of the period of imprisonment and the effective size of the fine is nevertheless compelling.

Second, consider whether the registration requirement for sexual offenders is a form of punishment. Canadian courts have almost uniformly ruled that it is not. The purpose of the registration requirement is said to be facilitating the investigation of crime rather than punishing the offender.[41] That is probably right as far as it goes. But registration has a very significant effect on an offender's liberty: for a minimum of 10 years and in some cases for life, the offender must register annually, provide considerable personal information, report any change within seven days, and report every anticipated absence of more than seven days from his residence.[42] Failure to comply with these obligations is an offence punishable by imprisonment.[43] The impact of the registration requirement on liberty is relevant not only for the purpose of engaging section 7 of the Charter,[44] but also for the comparison with consequences that undoubtedly do constitute punishment: imprisonment and probation. Moreover, these registration obligations are imposed only on those who commit sexual offences and on no one else. To the extent that effect as well as purpose is

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[40] *Michael*, *id*., at para. 5. This thought is, however, not strictly speaking part of the *ratio* of the decision.

[41] See, for example, *R. v. B. (C.L.)* [*R. v. C.L.B.*], [2010] A.J. No. 451, 253 C.C.C. (3d) 486 (Alta. C.A.); *R. v. C. (S.S.)* [*R. v. S.S.C.*], [2008] B.C.J. No. 1148, 234 C.C.C. (3d) 365 (B.C.C.A.); *R. v. Cross*, [2006] N.S.J. No. 87, 205 C.C.C. (3d) 289 (N.S.C.A.).

[42] *Sex Offender Information Registration Act*, S.C. 2004, c. 10, ss. 4-6.

[43] *Criminal Code*, *supra*, note 30, at ss. 490.031, 490.0311, 490.0312.

[44] Any restriction on conduct punishable by imprisonment engages the s. 7 liberty interest: *Reference re Motor Vehicle Act (British Columbia) s. 94(2)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.). As for the registration requirements themselves — as opposed to punishment for failing to comply with them — it might be arguable that they touch on the basic liberty interest to move around Canada: compare *R. v. Heywood*, [1994] S.C.J. No. 101, [1994] 3 S.C.R. 761 (S.C.C.).

relevant to the characterization, the case for characterizing sexual offender registration as punishment is strong.

Third, consider the intriguing question raised in *Guindon v. Canada*.[45] In that case, pursuant to section 163.2 of the *Income Tax Act*,[46] the Canada Revenue Agency assessed a penalty of $565,000 against the taxpayer, a lawyer who had vouched for a fraudulent charitable scheme. In proceedings to challenge the assessment, the taxpayer argued that she was "charged with an offence" so as to engage her rights under section 11 of the Charter, in particular the presumption of innocence. The Tax Court of Canada held that she was indeed charged with an offence. The Federal Court of Appeal set this holding aside on procedural grounds. In the alternative, the Court of Appeal held that the taxpayer was not charged with an offence because (among other considerations) penalties imposed under the *Income Tax Act* were "not about condemning morally blameworthy conduct or inviting societal condemnation of the conduct … [but] about ensuring that this discrete regulatory and administrative field of endeavour works properly".[47] This reasoning relies on the pre-*Whaling* distinction between punishments and other consequences, but is applied here to help determine the nature of the proceedings faced by the taxpayer. To the extent that *Whaling* licenses courts to consider the effects as well as the purposes of state action in characterizing the nature of a consequence, it certainly seemed to strengthen the taxpayer's case. The more the $565,000 assessment looks like punishment in the form of a fine for the taxpayer's alleged wilful disregard for the requirements of the *Income Tax Act*, the more likely the proceedings that lead to its imposition would be subject to the procedural rights in section 11 of the Charter. In the end, the Supreme Court of Canada affirmed the Court of Appeal's decision in *Guindon* without reference to *Whaling*, but *Whaling* nevertheless strengthens any argument that seeks to characterize a consequence as penal based on its effect as well as its purpose.

Finally, *Whaling* has been invoked to support the submission that changes in the legislative treatment of pre-trial custody are punitive, once again because of their effect rather than because of their purpose. The *Truth in Sentencing Act*[48] imposed an upper limit of 1.5:1 on an offender's

[45] [2013] F.C.J. No. 673, 2013 FCA 153 (Fed. C.A.) [hereinafter "*Guindon*"], affd [2015] S.C.J. No. 41, 2015 SCC 41 (S.C.C.).

[46] R.S.C. 1985, c. 1 (5th Supp.).

[47] *Guindon*, *supra*, note 45, at para. 41, citing *Wigglesworth* in support of this point.

[48] S.C. 2009, c. 29.

credit for pre-trial custody. Prior to that Act, it was common for offenders to receive 2:1 credit, or sometimes even more depending on the conditions of their pre-trial detention. In *R.S.*, without any real consideration of the purpose of the *Truth in Sentencing Act*, the Ontario Court of Appeal held that it effectively imposed greater punishment on offenders.[49] Its application to offenders who committed their offences before it came into force was therefore inconsistent with the right to the "benefit of the lesser punishment" under section 11(i) of the Charter.[50]

V. Conclusion

The earliest Charter cases established, as a general rule, that Charter rights could be engaged either by state conduct that was intended to violate them or, much more commonly, by state conduct that affected the interests that they protected. The right to freedom of religion in section 2(a) of the Charter is engaged by legislation that affects the exercise of religion;[51] the right to freedom of expression in section 2(b) is engaged by legislation that affects expression;[52] the right to liberty in section 7 of the Charter is engaged by state conduct that results in detention.[53] In none of these scenarios is it necessary for the Charter applicant to show that the state intended to affect or to limit the relevant Charter rights (though that would be sufficient). But, for reasons that are unclear, the Court has been reluctant to take the same approach to the section 11 rights concerning punishment. Consequences of conviction that do not have a punitive purpose have generally been exempt from scrutiny under section 11(h) or (i) of the Charter.

This reluctance reached an illogical extreme in *Rodgers*. The issue there was whether the requirement that convicted or discharged offenders provide a bodily sample for forensic DNA analysis was a form of "punishment". It was not, apparently because it had a non-punitive

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[49] *R. v. S. (R.)*, [2015] O.J. No. 2183, at paras. 30-31 (Ont. C.A.).

[50] In *Liang v. Canada (Attorney General)*, [2014] B.C.J. No. 962, 2014 BCCA 190, 311 C.C.C. (3d) 159 (B.C.C.A.), leave to appeal refused, [2014] S.C.C.A. No. 298 (S.C.C.), the British Columbia Court of Appeal held that the AEPA offended s. 11(i). This result flows very straightforwardly from *Whaling*.

[51] *R. v. Big M Drug Mart*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295 (S.C.C.).

[52] *Irwin Toy Ltd. v. Québec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927 (S.C.C.).

[53] *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] S.C.J. No. 9, 2007 SCC 9 (S.C.C.).

purpose; and, Charron J. added, no one would say that other laws with deterrent effects or facilitating the investigation of crime, such as RIDE spot checks or the taking of photographs or fingerprints, were forms of punishment, even though, like imprisonment, they might well have a deterrent effect.[54] But the argument was not that every consequence flowing from a law that deters crime or facilitates the investigation of crime was punishment; the argument was rather that burdensome consequences of findings of guilt were punishment. And law enforcement measures such as RIDE spot checks and the taking of fingerprints are not consequences of findings of guilt, whereas the requirement to provide a bodily sample is a consequence of such a finding.

While the precise scope of *Whaling* is far from clear, the decision turns on a very welcome recognition that the consequences of a conviction can be construed as punishment not only because of their punitive purposes but also because of their burdensome effects. This does not, of course, mean that every newly invented consequence of conviction will be characterized as punishment. But it does mean that those consequences can be scrutinized for compliance with the basic principles of prospectivity and proportionality enshrined in sections 11 and 12 of the Charter.

[54] *Rodgers*, *supra*, note 9, at para. 64.