Court File No. 36200

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

K.R.J.

APPELLANT
(Respondent)

and

HER MAJESTY THE QUEEN

RESPONDENT
(Appellant)

FACTUM OF THE INTERVENER BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

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

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PART I – OVERVIEW

1. This case is about the proper interpretation of "punishment" in *Charter* s. 11(*i*) and the resultant extent of s. 11(*i*)'s protection against retrospectivity in sentencing.

2. A majority of the Court of Appeal for British Columbia interpreted "punishment" narrowly, holding that *Criminal Code* s. 161(1) prohibition orders—which permit judges to prohibit Internet access, among other things—are not punitive because their purpose is to protect the public. The Court of Appeal reached this conclusion even though protecting the public is a purpose of sentencing and even though prohibition orders carry prejudicial effects.

3. The British Columbia Civil Liberties Association (the "BCCLA") submits that this Court should reject the Court of Appeal's approach and affirm a broad interpretation of "punishment", consistent with the generous and liberal interpretation that must be given to all *Charter* rights.

4. This Court's decision in *R. v. Rodgers* holds that "punishment" under *Charter* s. 11(*i*) captures any consequence for the commission of an offence imposed by the state in furtherance of the purpose and principles of sentencing.[1] No law that *seeks* to impose a "punishment" retrospectively, and which therefore infringes s. 11(*i*) *in its very purpose*, can be justified under s. 1: as has been clear since *R. v. Big M Drug Mart*, a law that is *intended* to infringe a *Charter* right can never be justified.[2] Furthermore, *Rodgers*' test for "punishment" admits of no exception for consequences imposed to protect the public, as public protection is itself a purpose and principle of sentencing.

5. Alternatively, if this Court decides to abandon *Rodgers*, "punishment" should be given its ordinary meaning: a consequence imposed on an offender that is prejudicial in either purpose or effect. On this view, where a consequence with a *prejudicial effect* is retrospectively imposed *for a non-prejudicial purpose—e.g.*, protection of the public or the investigation of crime—the state may seek to justify the imposition under s. 1.

6. Altering the consequence for an offence after its commission threatens the rule of law. In its s. 11(*i*) analysis, the Court of Appeal failed to recognize that retrospective sanctions seriously infringe civil liberties even when imposed for the public good. This Court should intercede.

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[1] *R. v. Rodgers*, 2006 SCC 15.
[2] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295.

PART II –POSITION ON THE APPELLANT'S QUESTIONS

7. A prohibition order under *Criminal Code* s. 161(1) is a "punishment" under *Charter* s. 11(*i*). A law that imposes prohibition orders retrospectively infringes *Charter* s. 11(*i*) and is not saved by s. 1.

PART III – STATEMENT OF ARGUMENT

8. Retrospective punishment is an exception to the rule of law.[3] Thomas Hobbes warned against it in 1651.[4] William Blackstone warned against it in 1765.[5] Today, the *International Covenant on Civil and Political Rights* prohibits it.[6]

9. *Charter* s. 11(*i*) protects against retrospective punishment, too. But the *Charter*'s protection is hollowed by a narrow definition of "punishment", such as that proposed by the Court of Appeal.

A. *Rodgers* created a broad, purpose-based test for "punishment" that leaves no room for s. 1 and that admits of no exceptions for public protection measures

10. In *Rodgers*, this Court held that "punishment" means any consequence for the commission of an offence intended to be imposed in furtherance of the purpose and principles of sentencing. This broad, purpose-based test was created to "accord with the liberal and purposive approach that must be taken in interpreting *Charter* rights".[7] But in applying the *Rodgers* test, lower courts have eroded the promise it held.

11. This Court should take this opportunity to reiterate the purpose-based *Rodgers* test, which leaves no room for a s. 1 analysis, and which admits of no exception for consequences imposed to protect the public.

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[3] *Taylor v. R.* (1876), 1 S.C.R. 65 at 87, *per* Ritchie J; Elizabeth Edinger, "Retrospectivity in Law" (1995) 29 U.B.C.L.Rev. 5 at 16.
[4] Thomas Hobbes, *Leviathan* (New York: Oxford University Press, 1996) at 207.
[5] William Blackstone, *Commentaries on the Laws of England*, 15th ed., vol. 1 (London: Strahan, 1809) at 46.
[6] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, art. 15 (entered into force 23 March 1976, accession by Canada 19 May 1976).
[7] *R. v. Rodgers*, 2006 SCC 15 at para. 61.

I. The *Rodgers* test captures all measures imposed as a sentence

12. In *Rodgers*, this Court held that "punishment" under s. 11(*i*) captures all consequences for the commission of an offence imposed in furtherance of the purpose and principles of sentencing.[8] This Court recently reiterated that test:

> [A]n additional sanction or consequence … 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.[9]

13. This is a broad, purpose-based test. It captures *any* measure imposed as a sentence.

14. Some courts have misunderstood the breadth of this test and asked whether the "real object of the legislation is to punish"[10] or looked for the legislation's "pith and substance".[11] Other courts, however, have recognized the reach of the *Rodgers* test and imposed a "functional" approach.[12]

15. A clear statement about the breadth of the *Rodgers* test is needed from this Court.

II. There is no exception for public protection laws

16. The *Rodgers* test admits of no exception for consequences imposed to protect the public. Protection of the public is itself a purpose and principle of sentencing.[13] Furthermore, many consequences are both highly protective and highly punitive—*e.g.*, imprisonment.

17. The Court of Appeal erred by conflating the common law presumption against retrospectivity, which contains an exception for protective measures, with the *Rodgers* test, which does not. The common law exception assists in determining Parliament's intent. If Parliament's purpose was to protect the public, the presumption does not operate. The exception is a statutory interpretation tool. By contrast, s. 11(*i*) applies only if a statute has already been interpreted to operate retrospectively. It protects against the retrospective imposition of any consequence for the commission of an offence imposed in furtherance of the purpose and principles of sentencing, including public protection.

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[8] *R. v. Rodgers*, 2006 SCC 15 at para. 63.
[9] *Canada (Attorney General) v. Whaling*, 2014 SCC 20 at para. 54.
[10] *R. v. C.L.B.* 2010 ABCA 134 at para. 9.
[11] *R. v. Dyck*, 2008 ONCA 309 at paras. 80-82.
[12] *Liang v. Canada (A.G.)*, 2014 BCCA 190 at para. 43.
[13] See Appellant's Factum at paras. 96-104. See also *Criminal Code*, R.S.C. 1985, c. C-46, s. 718; *R. v. Johnson*, [2003] 2 S.C.R. 357 at para. 29; *R. v. Lyons*, [1987] 2 S.C.R. 309 at para. 26.

18. In any event, the Court of Appeal's carve-out for protective measures rests on a false dichotomy between punishment and protection. Many consequences of conviction can be characterized as *both* punitive *and* protective. Whether they fall within s. 11(*i*) should not depend on which of the two characterizations a judge chooses—especially given the "liberal and purposive approach" endorsed in *Rodgers*.[14]

19. Consider imprisonment. It is "the most obvious example of punishment".[15] But it is also regularly imposed to protect the public:

> [A] significant period of incarceration is required. It is required, in my view, to adequately address the principles of deterrence and denunciation, as well as to ensure the protection of the public.[16]

20. Consider also the dangerous offender designations. This Court has found that the sentences available under *Criminal Code* Part XXIV, which includes both dangerous and long-term offender provisions, "serve the purposes of both prevention and punishment".[17] Indeed, the *Code* itself states that incarceration—the archetypal punishment—is the primary method of protecting the public from dangerous offenders.[18]

21. The Court of Appeal's public protection exemption would decide *Charter* protection on the basis of semantics. A legal test must offer some certainty, particularly if its effect is to exclude a provision from *Charter* scrutiny.[19] As this Court has said when evaluating legal tests governing the application of human rights law, "it seems perverse to have a threshold classification that is so malleable, indeed "chimerical'":

> Given the vague boundaries of the categories [of the legal test], an adjudicator may unconsciously tend to classify the impugned standard in a way that fits the remedy he or she is contemplating, be that striking down the standard itself or requiring only that the claimant's differences be accommodated. If so, form

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[14] *R. v. Rodgers*, 2006 SCC 15 at para. 61.
[15] *Canada (Attorney General) v. Whaling*, 2014 SCC 20 at para. 51.
[16] *R. v. Isaac*, 2006 BCSC 1529 at para. 10. See *e.g. R. v. Kuly*, 2010 ABCA 276; *R. v. Nana-Effah*, [2009] O.J. No. 2900 (Ont. S.C.J.); *R. v. Kendi*, 2011 YKTC 37 at para. 14; *R. v. Webber*, 2008 BCCA 371; *R. v. Johnny*, 2011 BCCA 25 at para. 25.
[17] *R. v. Steele*, 2014 SCC 61 at paras. 34-35; *R. v. Lyons*, [1987] 2 S.C.R. 309 at para. 27.
[18] *Criminal Code*, R.S.C. 1985, c. C-46, s. 753(4.1).
[19] See *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 at paras. 27-31.

> triumphs over substance and the broad purpose of the human rights statutes is left unfulfilled.[20]

III. No law that meets the *Rodgers* test and infringes s. 11(*i*) can be saved by s. 1

22. The *Rodgers* test leaves no room for a s. 1 analysis. As has been clear since *R. v. Big M Drug Mart*, legislation that is *intended* to infringe a *Charter* right can never be justified. Accordingly, a law that meets the *Rodgers* test and infringes s. 11(*i*)—that is, a law imposing a consequence intended both to further the purpose and principles of sentencing and to do so retrospectively—cannot be saved by s. 1.

23. In *Big M*, Dickson J. (as he then was) held that an attempt to justify a law that infringes the *Charter* in its purpose would be "fundamentally repugnant because it would justify the law [under *Charter* s. 1] upon the very basis" for the infringement.[21]

24. This case offers a clear example. The Respondent argues that s. 161(1)

> is intended to eliminate, or significantly reduce, opportunities for contact between the offender and persons under the age of 16 years. It is clearly aimed at separating individuals who pose a risk to children from their targets in an effort to prevent future criminal conduct and avoid harm.[22]

25. Accordingly, s. 161(1) meets the *Rodgers* test because it is imposed for two of the enumerated purposes and principles of sentencing: (1) "to separate offenders from society, where necessary" (s. 718(*c*)) and (2) "to deter the offender and other persons from committing offences" (s. 718(*b*)). As in *Big M*, the Crown cannot rely on the same purposes that drive an infringement of s. 11(*i*) to justify the law under s. 1.

B. Alternatively, s. 11(*i*) is infringed by a retrospective consequence imposed on an offender that is prejudicial in purpose or effect

26. *Rodgers* protects against any measure retrospectively imposed as a sentence. Should this Court wish to depart from *Rodgers*, however, the BCCLA proposes the following alternative

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[20] *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 at para. 28.
[21] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 352.
[22] Respondents' Memorandum of Argument on Motion to Adduce New Evidence and Submissions on Section 1 of the *Charter* at para. 27.

approach: *Charter* s. 11(*i*) prohibits retrospectively imposing consequences on offenders that are prejudicial to them in either their purpose or effect.

27. This test is easy to apply, easy to understand, and "accord[s] with the liberal and purposive approach that must be taken in interpreting *Charter* rights".[23] It also respects the serious infringement of civil liberties occasioned by retrospective sanctions.

I. "Punishment" should be given its ordinary meaning: a prejudice imposed on an offender by the state

28. Courts have struggled to define "punishment". The ordinary definition—a prejudicial consequence imposed by the state consequent on a finding of guilt—should be used.

29. This Court proposed one definition in *Rodgers*. As noted above, the *Rodgers* test has not produced clarity. Some courts have applied the division of powers "pith and substance" test, or have looked for the legislation's "real object".[24] Other courts have required a broad, "functional" approach.[25] In *Canada (A.G.) v. Whaling*, this Court created an entirely new test to identify forms of "punishment" that fall outside the *Rodgers* test.[26]

30. A return to first principles is in order.

31. *Charter* s. 11 applies to criminal or quasi-criminal proceedings.[27] It also applies to proceedings that entail true penal consequences such as imprisonment or a significant fine.[28] Furthermore, s. 11(*i*) is engaged only once an individual is charged and found guilty of an offence.

32. Given these prerequisites, "punishment" need not be narrowed beyond its ordinary meaning: a prejudicial consequence imposed by the state consequent on a finding of guilt.

33. The *Oxford English Dictionary* supports this ordinary meaning. It defines "punishment", in part, as "the infliction of a penalty or sanction". "Penalty", in turn, is defined as "liability to be

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[23] *R. v. Rodgers*, 2006 SCC 15 at para. 61.
[24] *R. v. C.L.B.* 2010 ABCA 134 at para. 9; *R. v. Dyck*, 2008 ONCA 309 at paras. 80-82. See *supra* notes 10-12 and accompanying text.
[25] *Liang v. Canada (A.G.)*, 2014 BCCA 190 at para. 43.
[26] *Canada (Attorney General) v. Whaling*, 2014 SCC 20 at paras. 50-53.
[27] *R. v. Wigglesworth*, [1987] 2 S.C.R. 541 at 560.
[28] *Guindon v. Canada*, 2015 SCC 41. Of course, while those consequences will pull a non-criminal proceeding under the protection of s. 11, they are a *subset* of the consequences in true criminal proceedings that engage the protection of s. 11(*i*): *R. v. Rodgers*, 2006 SCC 15 at para. 61.

punished or penalized". And "sanction" is defined as "the specific penalty enacted in order to enforce obedience to a law".[29] All these definitions have in common the notion of a prejudicial impact imposed on an offender.

34. This definition is also consistent with the broader structure of s. 11. The criminal law comprises prohibitions and penalties. Sections 11(*g*) and (*i*) enshrine different rights concerning the retroactive or retrospective application of each.[30] The use of the word "punishment" in s. 11(*i*) was not meant to invite a characterization exercise to exclude a subset of consequences from s. 11's protection. It simply distinguishes the consequences of an offence, which get one *Charter* rule, from the offence itself, which gets another.

II. Section 11(*i*) can be infringed by a law's purpose or by its effect

35. A law may infringe the *Charter* in purpose or in effect. As this Court stated in *Big M*:

> [E]ither an unconstitutional purpose or an unconstitutional effect can invalidate legislation.[31]

36. A retrospective consequence will infringe s. 11(*i*) in its purpose if it is imposed on an offender *for prejudice's sake*. It will infringe s. 11(*i*) in its effect if it imposes a *prejudicial effect* but for a *non-prejudicial purpose*.

37. These are distinct analyses. The Court of Appeal, relying on *R. v. Cross*, erroneously collapsed them into one:

> I conclude that if the impact of the sanction aligns with its legislative purpose and is not of such magnitude that it reveals, instead, a punitive intent, it is not "punishment".[32]

38. The Court of Appeal thereby erased what *Big M* called the "effects test".[33] Contrary to the Court of Appeal's assertion, the effects test is not about revealing a law's punitive intent. Rather, the

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[29] *The Oxford English Dictionary*, online: www.oed.com, *s.v.* "penalty", "punishment", "sanction".
[30] *Charter* s. 11(*g*) prohibits all retrospective criminal offences, while *Charter* s. 11(*i*) only prohibits retrospective *increases* to punishments.
[31] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 331. See also Court of Appeal decision at para. 95.
[32] *R. v. Cross*, 2006 NSCA 30 at para. 45, quoted by the Court of Appeal at para. 95. *Cross* was released on March 9, 2006. *R. v. Rodgers*, 2006 SCC 15 was released on April 27, 2006.
[33] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 334.

effects test evaluates whether, given a *non-punitive* intent, the effects of the law are nevertheless punitive:

> Thus, if a law with a valid purpose interferes by its impact, with rights or freedoms, a litigant could still argue the effects of the legislation as a means to defeat its applicability and possibly its validity.[34]

39. The Crown similarly errs by arguing that "the effects or consequences of a sanction are not determinative".[35] This argument ignores the multitude of cases in which this Court has found a law to infringe the *Charter* based not on its purpose but instead its effects.[36]

III. There is still no exception for public protection laws

40. Where a law infringes s. 11(*i*) in its purpose, it cannot be justified under s. 1. On the other hand, where a law imposes a retrospective consequence with a *prejudicial effect* but for a *non-prejudicial purpose—e.g.*, protection of the public or the investigation of crime—it may be saved under s. 1. It falls to the state to justify that law's retrospective application:

> Under s. 1, the question is different — whether the negative impact of a law on the rights of individuals is proportionate to the pressing and substantial goal of the law in furthering the public interest.[37]

41. To protect fully against retrospective increases in punishments, the retrospective application of all criminal consequences that are prejudicial in either purpose or effect should be treated as *prima facie* infringements of *Charter* s. 11(*i*). If the infringements can be justified, it is the state that should bear the burden of doing so.

42. To hold otherwise—to exempt laws imposed for purposes such as public protection from the ambit of *Charter* s. 11(*i*)—would circumvent the s. 1 scrutiny and require individuals to bear the burden for the greater good without any evidence to justify imposing that burden.

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[34] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 334.
[35] Respondent's Factum at para. 28.
[36] See, *e.g.*, *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 (holding that the effect of Ontario *Child Welfare Act* is to infringe freedom of religion under s. 2(*a*) even though its purpose is to protect children); *Harper v. Canada (Attorney General)*, 2004 SCC 33 (holding that the *Canada Elections Act*'s advertising spending limits infringe freedom of expression under s. 2(*b*) even though their purpose is to promote electoral fairness).
[37] *R. v. Bedford*, 2013 SCC 72 at para. 125.

C. The circumstances of the appellant's offences are not germane

43. There is a final concern: the Crown has dedicated a page of its factum to detailing the disturbing—and entirely irrelevant—facts underlying the appellant's convictions.[38]

44. This case concerns the scope of *Charter* s. 11(*i*) and the constitutionality of the retrospective application of *Criminal Code* s. 161(1). It does not concern the propriety of a s. 161(1) order *against the appellant in particular*. What exactly the appellant did has no relevance here. The Crown's gratuitous description of his offences misconceives the nature of the issues to be resolved and cannot assist the Court. It also sits badly with the Crown's "quasi-judicial role".[39]

45. This Court will no doubt disregard the Crown's irrelevant and inflammatory description. It would be beneficial, however, to make clear that these sorts of submissions should not be made.

PART V – ORDER REQUESTED

46. The BCCLA asks that it be granted permission to make oral submissions not exceeding 10 minutes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 17th day of November, 2015.

MICHAEL A. FEDER **EMILY MACKINNON**

[38] Respondent's Factum at paras. 16-19.
[39] *R. v. Swietlinski*, [1994] 3 S.C.R. 481 at 494-95, quoting with approval *Boucher v. The Queen*, [1955] S.C.R. 16 at 21, *per* Taschereau J.

PART VI – TABLE OF AUTHORITIES

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3.	*British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3	21
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22. *R. v. Webber*, 2008 BCCA 371 19

23. *R. v. Wigglesworth*, [1987] 2 S.C.R. 541 31

24. *Taylor v. R.* (1876), 1 S.C.R. 65 8

Constitutional and Statutory Authorities

25. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 11(*g*) 34

26. *Criminal Code*, R.S.C. 1985, c. C-46, s. 718 16

27. *Criminal Code*, R.S.C. 1985, c. C-46, s. 753(4.1) 20

Other Secondary Sources

28. *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, art. 15 (entered into force 23 March 1976, accession by Canada 19 May 1976) 8

29. *The Oxford English Dictionary*, online: www.oed.com, *s.v.* “penalty”, “punishment”, “sanction” 33

30. William Blackstone, *Commentaries on the Laws of England*, 15th ed., vol. 1 (London: Strahan, 1809) 8

31. Elizabeth Edinger, “Retrospectivity in Law” (1995) 29 U.B.C. L. Rev. 5 8

32. Thomas Hobbes, *Leviathan* (New York: Oxford University Press, 1996) 8

PART VII – PROVISIONS DIRECTLY AT ISSUE

***Criminal Code*, R.S.C. 1985, c. C-46, s. 161(1)**
(version in effect August 9, 2012-September 18, 2014)

161. (1) When an offender is convicted, or is discharged on the conditions prescribed in a probation order under section 730, of an offence referred to in subsection (1.1) in respect of a person who is under the age of 16 years, the court that sentences the offender or directs that the accused be discharged, as the case may be, in addition to any other punishment that may be imposed for that offence or any other condition prescribed in the order of discharge, shall consider making and may make, subject to the conditions or exemptions that the court directs, an order prohibiting the offender from

(a) attending a public park or public swimming area where persons under the age of 16 years are present or can reasonably be expected to be present, or a daycare centre, schoolground, playground or community centre;

(b) seeking, obtaining or continuing any employment, whether or not the employment is remunerated, or becoming or being a volunteer in a capacity, that involves being in a position of trust or authority towards persons under the age of 16 years;

(c) having any contact - including communicating by any means - with a person who is under the age of 16 years, unless the offender does so under the supervision of a person whom the court considers appropriate; or

(d) using the Internet or other digital network, unless the offender does so in accordance with conditions set by the court.

161. (1) Dans le cas où un contrevenant est déclaré coupable, ou absous en vertu de l'article 730 aux conditions prévues dans une ordonnance de probation, d'une infraction mentionnée au paragraphe (1.1) à l'égard d'une personne âgée de moins de seize ans, le tribunal qui lui inflige une peine ou ordonne son absolution, en plus de toute autre peine ou de toute autre condition de l'ordonnance d'absolution applicables en l'espèce, sous réserve des conditions ou exemptions qu'il indique, peut interdire au contrevenant :

a) de se trouver dans un parc public ou une zone publique où l'on peut se baigner s'il y a des personnes âgées de moins de seize ans ou s'il est raisonnable de s'attendre à ce qu'il y en ait, une garderie, un terrain d'école, un terrain de jeu ou un centre communautaire;

b) de chercher, d'accepter ou de garder un emploi — rémunéré ou non — ou un travail bénévole qui le placerait en relation de confiance ou d'autorité vis-à-vis de personnes âgées de moins de seize ans;

c) d'avoir des contacts — notamment communiquer par quelque moyen que ce soit — avec une personne âgée de moins de seize ans, à moins de le faire sous la supervision d'une personne que le tribunal estime convenir en l'occurrence;

d) d'utiliser Internet ou tout autre réseau numérique, à moins de le faire en conformité avec les conditions imposées par le tribunal.

Le tribunal doit dans tous les cas considérer l'opportunité de rendre une telle ordonnance.

Canadian Charter of Rights and Freedoms, Part I of the _Constitution Act, 1982_, being Schedule B to the _Canada Act 1982_ (U.K.), 1982, c. 11, s. 11(_i_)

11. Any person charged with an offence has the right

…

(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.

11. Tout inculpé a le droit :

…

(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.