

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

BETWEEN:

K.R.J.

APPELLANT

AND

HER MAJESTY THE QUEEN

RESPONDENT

AND

**ATTORNEY GENERAL OF CANADA
ATTORNEY GENERAL OF ONTARIO
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION
CRIMINAL LAWYERS' ASSOCIATION
L'ASSOCIATION DES AVOCATS DE LA DÉFENSE DE MONTRÉAL (AADM)
THE DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS**

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FACTUM OF THE INTERVENER

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PART I: STATEMENT OF FACTS

1. The David Asper Centre for Constitutional Rights (the “Centre”) accepts the facts as set out in the parties’ facts. The Centre takes no position on disputed facts.

PART II: THE CENTRE’S POSITION ON THE QUESTION IN ISSUE

2. The Centre respectfully submits that the existing analytical framework for determining which consequences constitute punishment under section 11 of the *Charter* requires refinement.

3. There is no doubt that s. 11 of the *Charter* applies to the Appellant’s trial and sentencing proceeding. The question raised in this appeal is whether the right to the benefit of the lesser punishment guaranteed by s. 11(i) of the *Charter* prevents the imposition of an order under s. 161(1) of the *Criminal Code* as it read at the time of sentencing as opposed to how it read at the time of the offences. It does so only if an order under s. 161(1) is part of “the punishment for the offence” of which the Appellant was convicted.

4. An order under s. 161(1) is a consequence of the Appellant’s criminal convictions but this does not necessarily make it part of the “punishment” for the offences. This Honourable Court held in *Rodgers* that “punishment” under s. 11(i) does not necessarily encompass “every potential consequence for being convicted of a criminal offence, whether the consequence occurs at the time of sentencing or not.”¹ That is to say, some consequences of being convicted of a criminal offence may not constitute “punishment” under s. 11(i). As a result, it is necessary to establish criteria for distinguishing those consequences that constitute punishment from those that do not in order to determine whether a change in the power to bring about a given consequence engages s. 11(i) of the *Charter* or not.

5. The Centre suggests the following analytical approach to determining whether a consequence of a criminal conviction is punishment for the purpose of s. 11 of the *Charter*:

- (a) What impact does the consequence have for the liberty or security of the person of the offender? If the impact is significant, then it constitutes punishment. If the

¹ *R v Rodgers*, [2006] 1 SCR 554 at para 63.

impact is insignificant or trivial, then the consequence does not constitute punishment.

- (b) Was the consequence imposed in furtherance of the purposes and principles of sentencing? If so, then the consequence constitutes punishment.
- (c) If the consequence was imposed for a reason which is extraneous to the purposes and principles of sentencing, is the impact of the measure on the offender proportionate to the end it is said to serve? If the impact is not proportionate, then the consequence constitutes punishment.

6. This framework, if adopted, will sort punitive from non-punitive consequences in a principled way which is consistent with the jurisprudence.

PART III: STATEMENT OF ARGUMENT

The Current Framework for Determining “Punishment”

7. Section 11 of the *Charter* contains two distinct rights concerning punishment. Section 11(h) provides a guarantee against double jeopardy, and s. 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 lesser punishment.” The s. 11 rights concerning punishment are only triggered if an offender is “charged with an offence.” In *Wigglesworth*, this Honourable Court held that a matter will fall under s. 11 either because by its very nature it is a criminal proceeding or because a conviction in respect of the offence may lead to a true penal consequence.² Thus, for one to benefit from the protection of s. 11(i), first, one must be “charged with an offence” and, second, the consequence of the offence must constitute “punishment.”

8. The early case law suggested that a consequence would be characterized as punishment for *Charter* purposes if it has a punitive purpose. Traditional consequences such as imprisonment, probation or a fine were characterized as “punishment” under s. 11, but non-traditional consequences would not be characterized as such unless they could be shown to have a punitive purpose. This is consistent with the notion of a “true penal consequence” discussed in

² *R v Wigglesworth*, [1987] 2 SCR 541 at 559-562.

Wigglesworth (albeit in connection with the threshold issue of whether s. 11 was engaged at all). A “true penal consequence” is “imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within [a] limited sphere of activity.”³

9. Charron J. suggested in *Rodgers* that, as a general rule, “the consequence will constitute a punishment when it forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence and the sanction is one imposed in furtherance of the purpose and principles of sentencing.”⁴ This Honourable Court held there that forensic DNA sampling and analysis “is no more part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence than the taking of a photograph or fingerprints.”⁵

10. The test for punishment under s. 11 was broadened in *Whaling v Canada (Attorney General)*, where this Honourable Court held that the retrospective effect of a law eliminating “accelerated parole review” amounted to “punishment” for the purposes of s. 11, despite the fact that the abolition of early parole eligibility was “neither a second proceeding nor a ‘sanction’ in the sense contemplated in *Rodgers*.”⁶ The conception of “punishment” was expanded to include retrospective changes to the conditions of the original sanction which have the effect of adding to the offender’s punishment. In other words, a law that has a sufficiently significant impact “on an offender’s settled expectation of liberty” would constitute fresh punishment and violate the protection against double jeopardy under s. 11(h).⁷ This Court found that although the retrospective changes did not have a punitive purpose, they were punitive in effect and therefore, constituted “punishment” under s. 11.

11. Recently, in *Guindon* this Honourable Court discussed the issue of monetary penalties, and held that “if the amount at issue is out of proportion to the amount required to achieve regulatory purposes, this consideration suggests that it will constitute a true penal consequence and that the provision will attract the protection of s. 11 of the *Charter*.”⁸ In *Guindon*, the penalty

³ *R v Wigglesworth*, [1987] 2 SCR 541 at 561.

⁴ *Rodgers*, *supra* note 1 at para 63.

⁵ *Ibid* at para 65.

⁶ *Whaling v Canada (Attorney General)*, 2014 SCC 20 at para 49.

⁷ *Ibid* at para 60.

⁸ *Guindon v Canada*, 2015 SCC 41 at para 77.

was intended to encourage compliance within an administrative scheme as opposed to redressing a wrong done to society at large, and as such it did not constitute a true penal consequence.

The Difficulty in Applying the Current Framework

12. The divergent approaches to s. 161(1) of the *Criminal Code* in the Court of Appeal below indicate that further refinement of the test for “punishment” under s. 11(i) is required to address new types of consequences of criminal convictions.

13. Writing for the majority, Newbury J.A. (Kirkpatrick J.A., concurring) states: “I view the prohibitions as designed to protect the public, and in particular, children, from sexual offences and offenders.”⁹ She goes on to examine the degree of impact that the prohibitions have on the offender, and to weigh this against the government’s objective in implementing them, finding that the restrictions are well-tailored to achieve the government’s objective. As a result, Newbury J.A. holds that section 161(1) does not impose restrictions “in furtherance of punishment, and that although they impose consequences that may be felt to be ‘unpleasant’, they are not punitive in effect.”¹⁰

14. Writing in dissent on this point, Groberman J.A. finds that s. 161(1) prohibitions fall neatly under one of the objectives of sentencing listed in section 718 of the *Criminal Code*, noting that “they are designed to ‘separate offenders from society, where necessary’.”¹¹ On that basis, he concludes that section 161(1) furthers the purposes and principles of sentencing and that orders made thereunder are punishment under s. 11(i) of the *Charter*.

15. There is no clear consensus in the jurisprudence on whether s. 11(i) of the *Charter* applies to s. 161 prohibition orders. Unlike the Court below, in *R v Farler*, the Nova Scotia Court of Appeal noted in *obiter* that “it seems that a prohibition order under s. 161 fits the definition of “punishment”....”¹² The Court based this conclusion on the fact that s. 161 itself says that a prohibition order may be imposed “in addition to any **other punishment** that may be imposed for that offence...” (emphasis added) Moreover, the Court noted that the characteristics of

⁹ *R v KRJ*, [2014] BCCA 382 at para 96.

¹⁰ *Ibid* at para 99.

¹¹ *Ibid* at para 81.

¹² *R v Farler*, 2013 NSCA 13 at para 128.

punishment generally include some deprivation of liberty, unpleasant consequences and public condemnation. A prohibition order under s. 161 satisfies this since, “by its very nature, it restricts an offender’s liberty because it prevents him or her from going to certain places, and it has consequences for an offender who might otherwise want to visit parks, work with children, etc.”¹³ As was recently noted in *R v Hayes*, “based on the conflicting jurisprudence that currently exists, there is no definitive answer with respect to whether s. 11(i) *Charter* applies to s. 161 C.C.”¹⁴

The Proposed Analytical Approach to “Punishment”

16. The Asper Centre suggests the following analytical approach to determining whether a consequence of a criminal conviction is punishment for the purpose of s. 11 of the *Charter*.

17. To determine whether a consequence constitutes punishment, a court ought to consider:

1. What impact does the consequence have for the liberty or security of the person of the offender? If the impact is significant, then it constitutes punishment. If the impact is insignificant or trivial, then the consequence does not constitute punishment.
2. Was the consequence imposed in furtherance of the purposes and principles of sentencing? If so, then the consequence constitutes punishment.
3. If the consequence was imposed for a reason which is extraneous to the purposes and principles of sentencing, is the impact of the measure on the offender proportionate to the end it is said to serve? If the impact is not proportionate, then the consequence constitutes punishment.

i. The Consequence’s Impact on Liberty and Security of the Offender

18. This step of the analysis focuses on the effect of a consequence on an offender. Some impacts – for example, the loss of liberty through imprisonment – are without question punishments. Other impacts – for example, restrictions on one’s right to move about freely in the community – can also be punitive by virtue of their effect on the individual offender. For

¹³ *Ibid.*

¹⁴ *R v Hayes*, 2015 ABPC 59 at para 30.

example, orders such as those prohibiting vagrancy – restricting the right to move freely in the community – may effectively be punitive in that they limit an offender’s liberty.¹⁵ If a consequence has a significant impact on the liberty and security of the offender, that is sufficient for the consequence to constitute punishment.

19. On the other hand, some consequences may have so little impact on the liberty or security of the offender as not to be punishment in any meaningful sense. The *Charter* does not protect against insignificant or “trivial” limitations of rights – the impact must be significant enough to warrant constitutional protection.¹⁶ For instance, *Sexual Offender Information Registration Act (SOIRA)* registration and reporting requirements are considered to be relatively minimal in terms of their intrusion and effect on the privacy and liberty of the offender.¹⁷ Similarly, DNA databank orders are so minimally intrusive on the offender’s liberty and security of the person that they are not considered punitive in effect.¹⁸

20. The assessment should consider the extent to which the consequence stigmatizes the offender over and above the stigma flowing from the conviction itself. In *R v Dyck*, the Court of Appeal for Ontario held that to the extent that there is any stigma associated with the *SOIRA* registration, this stigma flows directly from the conviction for the underlying offence rather than from *SOIRA* registration and the requirement to report.¹⁹ As such, these registration and reporting requirements are not punishment within the meaning of s. 11 of the *Charter*. Conversely, stigma that flows from a consequence of sentencing rather than from the underlying offence may be considered punitive in effect.

21. Consistent with this Court’s holding in *Whaling*, the assessment at this stage should also consider whether the measure changes the manner in which an existing sanction is to be carried out.²⁰ Not every effect on an existing sentence will constitute punishment for the purposes of s. 11 of the *Charter*. The dominant consideration in each case will be the extent to which an offender’s “settled expectation of liberty” has been thwarted by legislative action.²¹

¹⁵ *R v Heywood*, [1994] 3 SCR 761 at para 57.

¹⁶ *Cunningham v Canada*, [1993] 2 SCR 143 at para 15.

¹⁷ *R v Dyck*, 2008 ONCA 209 at para 86.

¹⁸ *Rodgers*, *supra* note 1 at para 64.

¹⁹ *Dyck*, *supra* note 16 at para 81.

²⁰ *Whaling*, *supra* note 5 at para 60.

²¹ *Ibid.*

ii. Whether the Consequence was Imposed in Furtherance of the Purposes and Principles of Sentencing

22. The second element of the proposed framework reflects the second aspect of the *Rodgers* framework. Here, judges must consider whether the consequence is imposed in order to further the purposes and principles of sentencing. The focus here is on the purpose of the consequence, which may be imposed as part of the sentencing hearing or as a result of some other proceeding.²² If a consequence is imposed in furtherance of the purposes and principles of sentencing, that is sufficient for the consequence to qualify as punishment.

23. As a matter of common law and as codified in Part XXIII of the *Criminal Code*, these purposes and principles include retributive and utilitarian justifications for punishment.²³ The relative importance of these purposes and principles will vary according to the nature of the crime and the circumstances of the offender.²⁴ Although Part XXIII of the *Criminal Code* (especially ss. 718, 718.01, 718.02, 718.1, and 718.2) is a helpful guide to the purposes and principles of sentencing, a large and liberal interpretation of the *Charter* requires that the question of whether a consequence furthers the purposes and principles of sentencing in criminal law not be limited to the statutory provisions alone. It is essential that judges consider the broader question of the functions of criminal law, and not limit the examination of “punishment” under s. 11(i) of the *Charter* to a mere exercise in statutory interpretation.

24. To illustrate this element of the framework, *SOIRA* registration and reporting requirements do not align with the purposes and principles of sentencing because their purpose is to facilitate the investigation of crime rather than to deter, rehabilitate, denounce, or punish an offender.²⁵ Similarly, a DNA order does not satisfy these purposes and principles of sentencing because its purpose is not to punish an offender but to further the legitimate state interest in investigating and solving crimes.²⁶

²² In *Rodgers, supra*, this Honourable Court left open the possibility that s. 11 (i) can encompass both consequences imposed at the time of sentencing and consequences imposed at some other time: see para 63.

²³ *R v M. (C.A.)*, [1996] 1 SCR 500 at para 78.

²⁴ *R v Lyons*, [1987] 2 SCR 309 at para 27.

²⁵ *R v Cross*, 2006 NSCA 30 at para 86.

²⁶ *R v Murrins*, 2002 NSCA 12 at paras 96, 102.

25. This element in the proposed framework also distinguishes legal sanctions, which are imposed to further one or more of the purposes and principles of sentencing, from measures that have the same effect but are not punishments. For example, driving prohibitions under the *Criminal Code* are sanctions which seek to facilitate the principles and objectives of sentencing in the criminal law.²⁷ This is contrasted with a RIDE spot-check program, which is not a sanction as it is not designed to further the purposes and principles of sentencing. Any deterrent effects of a RIDE spot-check program are incidental to their overall civil regulatory purpose.

iii. Weighing the Effects of the Consequence with Society's Interest

26. If the consequence was imposed for a reason which is extraneous to the purposes and principles of sentencing, this aspect of the test requires weighing society's interest in imposing the consequence against the adverse impacts of the consequence on the offender. If these impacts are disproportionate to the non-punitive function of the measure in question, this suggests that the consequence is being imposed for the purpose of redressing a wrong done to society at large as opposed to for some more limited purpose.²⁸ This is also sufficient for the sanction to qualify as punishment.

27. When engaging in this final balancing stage, judges should consider the extent to which consequences of an offence advance the broader objective of community safety. This is weighed against the adverse impacts of the consequence of the measure on the individual. The Court of Appeal for Ontario has held that *SOIRA* registration and reporting requirements are ordered pursuant to the legitimate state interest of community protection and solving crime, and that on balance the *Sexual Offender Information Registration Act's* modest adverse effects on offenders – which do not prohibit the offender from going anywhere, are not publicly known, and impose minimal stigma – are not disproportionate to this legitimate state interest.²⁹ In contrast, the contested vagrancy and recognizance orders in *Heywood* and *R v Budreo*,³⁰ respectively, involved significant restrictions on the offender's liberty, which could potentially outweigh the state's objective in protecting the public.

²⁷ *R v Fernandes*, 2013 ONCA 436 at para 100.

²⁸ *Guindon*, *supra* note 7, at para 46.

²⁹ *Dyck*, *supra* note 16 at paras 93 and 105.

³⁰ *R v Budreo*, [2000] OJ No 72 at para 23.

28. This third element of the proposed analytical framework captures measures which a sentencing judge in a criminal proceeding may impose independently of the purposes and principles of sentencing. It also captures “true penal consequences” imposed in proceedings which are not criminal or quasi-criminal in nature (i.e. those which meet only the second branch of the *Wigglesworth* test). In *Guindon*, this Honourable Court held that the appellant’s penalty was intended to encourage compliance within an administrative scheme, as opposed to redressing a wrong done to society at large, and accordingly the monetary penalty was not punishment for the purposes of the *Charter*. If a consequence is of a magnitude that is larger than *necessary* in order to secure the offender’s compliance within a regulatory or criminal framework, then the consequence is imposed in order to redress wrongs done to society and is thus punishment under s. 11 of the *Charter*.

Comparing the Proposed Framework with the Current Approach

29. The divergent approaches taken with respect to the retrospective application of s. 161(1) of the *Criminal Code* in the Court of Appeal below indicate a lack of clarity in the *Rodgers* framework for identifying “punishment” under s. 11 of the *Charter*.

30. The proposed analytical framework is consistent with the jurisprudence post-*Rodgers*. It allows judges to consider the purposes and the effects of consequences, as well as the purposes and principles of sentencing, to sort consequences and ancillary orders in a principled way. The framework establishes criteria for distinguishing those consequences that constitute punishment from those that do not, in order to determine whether a given consequence engages s. 11 of the *Charter*.

This Framework Fosters Reviewability, Consistency and Clarity

31. The above-described framework for the definition of “punishment” under s. 11 of the *Charter* fosters reviewability of sentencing decisions, and promotes consistency in the treatment of consequences of an offence. An analysis of the consequence’s effect on an offender’s liberty or security of the person, the consequence’s alignment with the purposes and principles of sentencing, and the proportionality of the consequence’s impact compared with the end it is said to serve, provides a comprehensive framework for defining “punishment.” This will enhance

analytical clarity, consistency, and reviewability of sentencing decisions, especially those that involve non-traditional consequences on an offender.

PART IV: SUBMISSIONS ON COSTS

32. The Centre does not seek costs and respectfully requests that none be awarded against it.

PART V: NATURE OF THE ORDER REQUESTED

33. The Asper Centre requests that it be allowed 10 minutes to provide oral argument at the hearing of the appeal. The Centre takes no position on the outcome of the appeal but asks that it be determined in accordance with the foregoing submissions.

All of which is respectfully submitted this 18th day of November 2015.

Per John Norris, Hamish Stewart and Cheryl
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PART VI: TABLE OF AUTHORITIES

Case Law	Paragraph(s)
<i>R v Budreo</i> , [2000] OJ No 72.	23
<i>R v Cross</i> , 2006 NSCA 30.	86
<i>Cunningham v Canada</i> , [1993] 2 SCR 143.	15
<i>R v Dyck</i> , 2008 ONCA 209.	86, 93, 105
<i>R v Farler</i> , 2013 NSCA 13.	128
<i>R v Fernandes</i> , 2013 ONCA 436.	100
<i>Guindon v Canada</i> , 2015 SCC 41.	46
<i>R v Hayes</i> , 2015 ABPC 59.	30
<i>R v Heywood</i> , [1994] 3 SCR 761.	57
<i>R v KRJ</i> , [2014] BCCA 382.	81, 96, 99
<i>R v Lyons</i> , [1987] 2 SCR 309.	27
<i>R v M. (C.A.)</i> , [1996] 1 SCR 500.	78
<i>R v Murrins</i> , 2002 NSCA 12.	96, 102
<i>R v Rodgers</i> , [2006] 1 SCR 554.	63, 64, 81, 99
<i>Whaling v Canada (Attorney General)</i> , 2014 SCC 20.	60
<i>R v Wigglesworth</i> , [1987] 2 SCR 541.	559

PART VII: LEGISLATION CITED

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

11. Any person charged with an offence has the right:

a) to be informed without unreasonable delay of the specific offence;

b) to be tried within a reasonable time;

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

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

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

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;

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;

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

i) if found guilty of the offence and if the punishment for the offence has been

11. Tout inculpé a le droit:

a) d'être informé sans délai anormal de l'infraction précise qu'on lui reproche;

b) d'être jugé dans un délai raisonnable;

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

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) 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) d'une part de ne pas être jugé de nouveau pour une infraction dont il a été définitivement acquitté, d'autre part

varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

de ne pas être jugé ni puni de nouveau pour une infraction dont il a été définitivement déclaré coupable et puni;

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.

Criminal Code, R.S.C. 1985, c. C-46

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;

(a.1) being within two kilometres, or any other distance specified in the order, of any dwelling-house where the victim identified in the order ordinarily resides or of any other place specified in the order;

(b) seeking, obtaining or continuing any employment, whether or not the employment is remunerated, or becoming or

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;

a.1) de se trouver à moins de deux kilomètres — ou à moins de toute autre distance prévue dans l'ordonnance — de toute maison d'habitation où réside habituellement la victime identifiée dans l'ordonnance ou de tout autre lieu mentionné dans l'ordonnance;

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

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.

718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

(a) to denounce unlawful conduct;

(b) to deter the offender and other persons from committing offences;

(c) to separate offenders from society, where necessary;

(d) to assist in rehabilitating offenders;

(e) to provide reparations for harm done to victims or to the community; and

(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

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.

718. Le prononcé des peines a pour objectif essentiel de contribuer, parallèlement à d'autres initiatives de prévention du crime, au respect de la loi et au maintien d'une société juste, paisible et sûre par l'infliction de sanctions justes visant un ou plusieurs des objectifs suivants :

a) dénoncer le comportement illégal;

b) dissuader les délinquants, et quiconque, de commettre des infractions;

c) isoler, au besoin, les délinquants du reste de la société;

d) favoriser la réinsertion sociale des délinquants;

e) assurer la réparation des torts causés aux victimes ou à la collectivité;

f) susciter la conscience de leurs responsabilités chez les délinquants, notamment par la reconnaissance du tort qu'ils ont causé aux victimes et à la collectivité.

718.01 When a court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.

718.02 When a court imposes a sentence for an offence under subsection 270(1), section 270.01 or 270.02 or paragraph 423.1(1)(b), the court shall give primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence.

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

718.2 A court that imposes a sentence shall also take into consideration the following principles:

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

(i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor,

(ii) evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner,

(ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,

718.01 Le tribunal qui impose une peine pour une infraction qui constitue un mauvais traitement à l'égard d'une personne âgée de moins de dix-huit ans accorde une attention particulière aux objectifs de dénonciation et de dissuasion d'un tel comportement.

718.02 Le tribunal qui impose une peine pour l'une des infractions prévues au paragraphe 270(1), aux articles 270.01 ou 270.02 ou à l'alinéa 423.1(1)b accorde une attention particulière aux objectifs de dénonciation et de dissuasion de l'agissement à l'origine de l'infraction.

718.1 La peine est proportionnelle à la gravité de l'infraction et au degré de responsabilité du délinquant.

718.2 Le tribunal détermine la peine à infliger compte tenu également des principes suivants :

(a) la peine devrait être adaptée aux circonstances aggravantes ou atténuantes liées à la perpétration de l'infraction ou à la situation du délinquant; sont notamment considérées comme des circonstances aggravantes des éléments de preuve établissant :

que l'infraction est motivée par des préjugés ou de la haine fondés sur des facteurs tels que la race, l'origine nationale ou ethnique, la langue, la couleur, la religion, le sexe, l'âge, la déficience mentale ou physique ou l'orientation sexuelle,

(ii) que l'infraction perpétrée par le délinquant constitue un mauvais traitement de son époux ou conjoint de fait,

(ii.1) que l'infraction perpétrée par le délinquant constitue un mauvais traitement à l'égard d'une personne âgée de moins de dix-

(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,

(iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation,

(iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization, or

(v) evidence that the offence was a terrorism offence shall be deemed to be aggravating circumstances;

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.
718.21 A court that imposes a sentence on an organization shall also take into consideration the following factors:

(a) any advantage realized by the organization as a result of the offence;

(b) the degree of planning involved in carrying out the offence and the duration and

huit ans,

(iii) que l'infraction perpétrée par le délinquant constitue un abus de la confiance de la victime ou un abus d'autorité à son égard,

(iii.1) que l'infraction a eu un effet important sur la victime en raison de son âge et de tout autre élément de sa situation personnelle, notamment sa santé et sa situation financière,

(iv) que l'infraction a été commise au profit ou sous la direction d'une organisation criminelle, ou en association avec elle,

(v) que l'infraction perpétrée par le délinquant est une infraction de terrorisme;

b) l'harmonisation des peines, c'est-à-dire l'infliction de peines semblables à celles infligées à des délinquants pour des infractions semblables commises dans des circonstances semblables;

c) l'obligation d'éviter l'excès de nature ou de durée dans l'infliction de peines consécutives;

d) l'obligation, avant d'envisager la privation de liberté, d'examiner la possibilité de sanctions moins contraignantes lorsque les circonstances le justifient;

e) l'examen de toutes les sanctions substitutives applicables qui sont justifiées dans les circonstances, plus particulièrement en ce qui concerne les délinquants autochtones.
718.21 Le tribunal détermine la peine à infliger à toute organisation en tenant compte également des facteurs suivants:

a) les avantages tirés par l'organisation du fait de la perpétration de l'infraction;

b) le degré de complexité des préparatifs reliés à l'infraction et de l'infraction elle-même

complexity of the offence;

(c) whether the organization has attempted to conceal its assets, or convert them, in order to show that it is not able to pay a fine or make restitution;

(d) the impact that the sentence would have on the economic viability of the organization and the continued employment of its employees;

(e) the cost to public authorities of the investigation and prosecution of the offence;

(f) any regulatory penalty imposed on the organization or one of its representatives in respect of the conduct that formed the basis of the offence;

(g) whether the organization was — or any of its representatives who were involved in the commission of the offence were — convicted of a similar offence or sanctioned by a regulatory body for similar conduct;

(h) any penalty imposed by the organization on a representative for their role in the commission of the offence;

(i) any restitution that the organization is ordered to make or any amount that the organization has paid to a victim of the offence; and

(j) any measures that the organization has taken to reduce the likelihood of it committing a subsequent offence.

et la période au cours de laquelle elle a été commise;

c) le fait que l'organisation a tenté de dissimuler des éléments d'actif, ou d'en convertir, afin de se montrer incapable de payer une amende ou d'effectuer une restitution;

d) l'effet qu'aurait la peine sur la viabilité économique de l'organisation et le maintien en poste de ses employés;

e) les frais supportés par les administrations publiques dans le cadre des enquêtes et des poursuites relatives à l'infraction;

f) l'imposition de pénalités à l'organisation ou à ses agents à l'égard des agissements à l'origine de l'infraction;

g) les déclarations de culpabilité ou pénalités dont l'organisation — ou tel de ses agents qui a participé à la perpétration de l'infraction — a fait l'objet pour des agissements similaires;

h) l'imposition par l'organisation de pénalités à ses agents pour leur rôle dans la perpétration de l'infraction;

i) toute restitution ou indemnisation imposée à l'organisation ou effectuée par elle au profit de la victime;

j) l'adoption par l'organisation de mesures en vue de réduire la probabilité qu'elle commette d'autres infractions.