***R v. KRJ –***

**The Supreme Court Revises the Definition of Punishment under s.11 of the *Charter***

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Introduction

The case of *R v KRJ*[2] centered on amendments to s. 161(1) of the *Criminal Code* expanding the discretionary powers of sentencing judges to impose additional restrictions on certain activities against offenders convicted of sexual offences against minors. The amended s.161(1)(c) prohibits contact with minors in public or in private settings, while the amended s.161(1)(d) prohibits use of the Internet or other online networks. At issue was the retroactive application of the amendments, and whether this constituted an increase in punishment under s.11(i) of the *Charter*.

In their decision, the Supreme Court introduced a refinement to the existing s.11(i) *Charter* test developed in *R v Rodgers*.[3] Karakatsanis J, writing for the majority found that the second branch of the *Rodgers* test suffers from two key ambiguities: whether a law aimed at public protection furthers the purposes and principles of sentencing, and the role played by the impact of a sanction on an offender's liberty and security interests in a s.11(i) analysis. The Court preserved the *Rodgers* test and added a third branch, so that the revised analysis now proceeds as follows:

1) Is the measure a consequence of conviction that forms part of the arsenal of sanctions to which an accused may be liable with respect to a particular offence?
2) Is it imposed in furtherance of the purposes and principles of sentencing?
3) Does it have a significant impact on the offender's liberty or security interests?

In adding the third element to the revised s.11(i) test, Karakatsanis J cited the David Asper Centre (and other intervenors) for the proposition that "fairness and predictability are enhanced when there is a pragmatic consideration of the impact of an impugned sanction."[4]

The Supreme Court and David Asper tests compared

In their intervention before the Supreme Court, the David Asper Centre proposed the following revised s.11 analysis:

1) What impact does the consequence have for the liberty or security of person of the offender?
2) Was the consequence imposed in furtherance of the purposes and principles of sentencing?
3) If the consequence was imposed for a reason 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?

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[2] 2016 SCC 31 [*KRJ*]
[3] 2006 SCC 15 [*Rodgers*].
[4] *KRJ* at para 37.

The second and third branches of the Supreme Court's test are essentially identical to the first and second branches of the test proposed by the David Asper Centre. The third branch of the Asper Centre framework would have asked judges to "consider the extent to which consequences of an offence advance the broader objective of community safety."[5] While community protection interests are not explicitly stated in the Supreme Court's framework, Karakatsanis found that sanctions aimed at community protection may be in furtherance of the purposes and principles of sentencing, thus satisfying the second stage of the Court's test.[6]

The Asper Centre's third inquiry finds its articulation in the Supreme Court's *Oakes* analysis, where the Court engages in weighing of individual against societal interests. The Supreme Court finding that sanctions aimed at public protection can further the purposes and principles of sentencing would likely not catch as many sanctions as the Asper Centre test requiring 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."[7]

In practice it seems unlikely that this difference would work a significant difference in outcome between the two tests. Both the Supreme Court and the Asper Centre frameworks emphasize the importance of the impact of a sanction on an offender's liberty and security interests. Both frameworks consider that a sanction imposed as a consequence of conviction will be punishment where it has a significant impact on the liberty or security of the offender, whether or not it is imposed in furtherance of sentencing principles. Where a significant impact exists, the analysis will proceed to an *Oakes* analysis, including the proportionality analysis. A sanction with only insignificant or trivial impacts on the liberty or security of the offender will not be qualified as punishment under s.11(i) under either of the frameworks.

<u>The Supreme Court framework as applied in *R v KRJ*</u>

With regard to the impugned provisions, the Court answered all three questions of the revised framework in the affirmative. With respect to the new third stage of the test, the impact on the accused's liberty interest was found to be 'significant' with the potential to endure for the rest of the life of the accused.[8]

Moving to a s.1 *Oakes* analysis, the Court defined the objective of the provisions as being the protection of children from sexual exploitation. Both provisions were found to be rationally connected to the objective, and were found to be minimally impairing as a result of their discretionary quality and the availability of conditions and exemptions.[9]

s.161(1)(c) failed at the proportionality stage, largely due to the fact that its retrospective application was not undertaken with respect to a specific emerging threat or evolving context, and that the Crown

[5] Asper Centre Factum, at para 27.
[6] *KRJ* at para 34.
[7] Asper Centre Factum at para 23.
[8] *KRJ* at para 54.
[9] *Ibid* at paras 67-73.

had not proven the "*degree* of *enhanced* protection…in comparison to the previous version of the prohibition."[10]

s.161(1)(d) was saved at the proportionality stage due to the fact that, with respect to Internet and computer technology, the "…evolving context has changed both the *degree* and the *nature* of risk of sexual violence facing young persons."[11] The result of this evolving context was a legislative gap incapable of preventing offenders who present a continuing risk to children from engaging in some kinds of new and harmful behaviour. This was an important factor, as the fact that the amendment served to close that gap was not only considered to be a salutary effect, but also mitigated the considerable deleterious effects of the provision.[12]

Abella J (dissenting in part)

Justice Abella would have found that neither provision was saved by s.1 of the *Charter*. She held that the precedents of *R v Whaling*[13] and *Liang v Canada (Attorney General)*[14] demonstrate the Crown's 'onerous' evidentiary burden when attempting to justify a violation under s.1.[15] Because of this, the reasoning that the Crown failed to show what the degree of *enhanced* protection was relative to the previous provisions should have been fatal to the retrospective application of both amendments.[16]

Brown J (dissenting in part)

Justice Brown would have saved both provisions under s.1 of the *Charter*. He finds that s.11 is not concerned with punishment itself but the means by which it is being imposed.[17] This quality of s.11(i) means that the relevant objective to be considered is not the retrospectivity of the amendments, but the objective of the amendments as a whole.[18] Brown felt that the majority had imposed an 'impossible' evidentiary burden, overstated the deleterious effects of the provisions (by not adequately considering the availability of conditions and exemptions) and understated their salutary effects (protecting children in light of known rates of recidivism of sexual offenders).[19] Brown J held that while the impugned provisions worked a "not trivial" increase in punishment against the offender, neither was a "drastic increase in the punishment imposed."[20]

[10] *Ibid* at para 89 (emphasis in original).
[11] *Ibid* at para 101.
[12] *Ibid* at para 110.
[13] 2014 SCC 20.
[14] 2014 BCCA 190.
[15] *KRJ* at para 126.
[16] *Ibid,* at paras 128-129.
[17] *Ibid* at para 134.
[18] *Ibid* at para 137.
[19] *Ibid* at para 141.
[20] *Ibid* at para 161.