

# The Refined Approach to Punishment in Section 11 of the Charter

Stacey D. Young

*Crown Law Office – Criminal, Ministry of the Attorney General*

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# ***R. v. K.R.J.*: The Refined Approach to Punishment in Section 11 of the Charter**

**Stacey D. Young\***

## **Abstract**

In *R. v. K.R.J.*<sup>1</sup> (“*K.R.J.*”) the Supreme Court acknowledged what is intuitive but was not explicit in section 11(i) *Canadian Charter of Rights and Freedoms*<sup>2</sup> (“Charter”) jurisprudence: determining if something is punishment requires consideration of the impact it has on an offender. The critical question in *K.R.J.* was whether a section 161 *Criminal Code*<sup>3</sup> (“Code”) prohibition order constituted punishment within the meaning of section 11(i) of the Charter. Section 161(1) orders restrict the liberty interest of convicted sexual offenders who pose an ongoing risk of committing a sexual offence against a child. These orders restrict the ability of offenders to attend places where children are present, or have unsupervised contact with children, in person or through electronic means. The provisions are intended to protect children from abuse by repeat offenders. In *K.R.J.* the Supreme Court of Canada found the consequences of a sanction on the offender need to be considered in order to give a purposive interpretation to the Charter protection when determining whether a sanction amounts to punishment. In other words, it is not just the reason why a sanction is imposed that matters, its impact is also important. Both purpose and effect must be considered. This modified the previous test. In carving out “a clearer and more meaningful role for the consideration of the impact of a sanction” the court continued the trend towards greater acknowledgement of the consequences on an

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\* Deputy Director, Crown Law Office – Criminal, Ministry of the Attorney General. The views expressed are solely those of the author and do not reflect the position of the ministry.

<sup>1</sup> [2016] S.C.J. No. 31, 2016 SCC 31 (S.C.C.) [hereinafter “*K.R.J.*”].

<sup>2</sup> The *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “Charter”].

<sup>3</sup> R.S.C. 1985, c. C-46 [hereinafter the “Code”].

offender. The reformulation of the test invites further litigation and has the potential to affect all manner of ancillary orders. For example, while orders for forfeiture or fine in lieu of forfeiture for proceeds of crime are not likely to be affected, forfeiture of offence-related property may now qualify as punishment.

## I. INTRODUCTION

Part XXIII of the Code<sup>4</sup> outlines the purposes and principles of sentencing, and the basis of punishment.<sup>5</sup> The fundamental purpose of sentencing is to “protect society and to contribute ... to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions...” that have one of the enumerated objectives.<sup>6</sup> The imposition of sanctions post-conviction is intended to protect the public and promote respect for the law by redressing the harm done to society by the offence. While the majority of available sanctions are set out in this Part of the Code, there has been a proliferation of ancillary orders that appear elsewhere in the Code that are imposed following a finding of guilt, and that may constitute “punishment”. This includes sections 109 and 110 weapon prohibitions; section 161(1) prohibition orders for child sexual offenders; section 259 driving prohibitions; section 380.2(1) prohibition orders dealing with certain types of property; section 446(5) prohibition orders involving custody or control of an animal; DNA orders under sections 487.04 and 487.051; orders under the *Sex Offender Information Registration Act* pursuant to section 490.012; prohibition orders under Part XX.1 (mental disorder dispositions); forfeiture or fine in lieu of forfeiture for proceeds of crime (sections 462.37(1) or 462.37(3)) or forfeiture of offence-related property (section 490.1(1)). These orders impact an offender but if they do not constitute “punishment” they do not attract the protections set out in subsections 11(i) or (h) of the Charter.<sup>7</sup>

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<sup>4</sup> R.S.C. 1985, c. C-46, as amended.

<sup>5</sup> Bill C-41, *An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*, S.C., 1995, c. 22 came into effect in 1996.

<sup>6</sup> The objectives of sentencing include denunciation, deterrence, separation from society (when necessary), rehabilitation, providing reparations, and promoting responsibility. See subss. 718(a-f). See also ss. 718.01, 718.1, 718.2 and related case law on the principles of sentencing.

<sup>7</sup> Section 12 is broader and protects against cruel and unusual treatment or punishment. Provisions that do not constitute punishment may be captured under s. 12 as treatment, see *R. v. Rodgers, infra*, note 8, at para. 63. The Court of Appeal for Ontario recently declined to determine whether the test for punishment under s. 11(i) of the Charter also applies in the s. 12 context: *R. v. Tinker*, [2017] O.J. No. 3435, 2017 ONCA 552, at para. 125 (Ont. C.A.).

*K.R.J.* refined the test for determining what constitutes punishment in a Charter context. The explicit acknowledgement of the need to consider the effect of a sanction will serve as a check on the retrospective application of legislation and increase the protection of the rights of an accused. To appreciate the impact of the decision, it is first necessary to understand the constitutional context and development of the case law.

## II. SECTION 11 OF THE CHARTER: PUNISHMENT RELATED PROTECTIONS

Section 11(i) of the Charter provides that any person charged with an offence has the right, “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”. This section expresses society’s repudiation of retrospective punishment. This is an aspect of the Rule of Law.<sup>8</sup> Citizens should know prior to committing an offence that the act is contrary to the law, and the possible punishment for breaking the law, so that knowledge guides their behaviour.<sup>9</sup>

Section 11(h) provides that any person charged with an offence has the right, “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”. This is directed at preventing the State from making repeated attempts to convict an individual.<sup>10</sup> This provision often involves consideration of criminal proceedings, and subsequent regulatory or quasi-criminal proceedings, and whether those proceedings amount to a trial for the same offence.

Although these provisions are aimed at different rights, fairness in punishment informs both these provisions and supports a harmonious approach.<sup>11</sup>

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<sup>8</sup> Ben Juratowitch, *Retroactivity and the Common Law* (Portland, OR: Hart Publishing, 2008), at 27-42.

<sup>9</sup> Charles Sampford, *Retrospectivity and the Rule of Law* (Oxford: Oxford University Press, 2006), at 77-101.

<sup>10</sup> *R. v. Shubley*, [1990] S.C.J. No. 1, [1990] 1 S.C.R. 3 (S.C.C.).

<sup>11</sup> *K.R.J.*, *supra*, note 1, at para. 39.

### III. THE TEST FOR PUNISHMENT IN *R. v. RODGERS*<sup>12</sup>

Prior to *K.R.J., R. v. Rodgers* was the governing authority for determining whether a discrete sanction or consequence of conviction amounted to “punishment” for the purpose of section 11(i) of the Charter. *Rodgers* dealt with DNA databank orders. The *Code* set out a process that permitted judicial authorization to seize DNA samples for the data bank. Taking samples was authorized for offenders who committed a designated offence after the *DNA Identification Act* came into force; those who committed an offence before the Act was proclaimed but were still before the Court; and, for three classes of offenders who were convicted and sentenced prior to the Act being proclaimed. *Rodgers* was a challenge to the latter. Section 487.055 permitted a provincial court judge on an *ex parte* application to authorize the collection of DNA samples for dangerous offenders; offenders convicted of more than one murder; and persons convicted of “more than one sexual offence” and who, on the date of the application, were still serving a sentence of imprisonment of at least two years for one or more of those offences. Mr. Rodgers was a repeat sexual offender caught by this provision.<sup>13</sup>

This case was ultimately considered by the Supreme Court and the Court dismissed constitutional challenges on the basis of sections 7, 8, 11(h) and 11(i). In finding there was no violation of section 11(i) of the Charter, the Court examined what constituted punishment.

Speaking for the majority, Charron J. explained that “punishment” refers to the arsenal of sanctions that may be imposed upon conviction and that the word “sentence” and “sanction” can be used interchangeably. However, for the purpose of section 11 of the Charter, punishment does not necessarily encompass every potential consequence of being convicted of an offence. A “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”. The first branch of the test focuses on whether the sanction shares the characteristics of punitive sanctions common to the traditional forms of punishment provided for in the Code. The second branch of the test focuses on whether the sanction furthers the traditional purpose and principles of sentencing (*i.e.*, the reason the sanction was imposed).

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<sup>12</sup> *R. v. Rodgers*, [2006] S.C.J. No. 15, 2006 SCC 15 (S.C.C.) [hereinafter “*Rodgers*”].

<sup>13</sup> *Rodgers, id.*, at para. 2.

There was no mention of the effect of a sanction on an offender in the framework set out in *Rodgers*. In that context, it was unnecessary to develop the test further as the DNA sampling was not part of the “arsenal of sanctions to which an accused may be liable in respect of a particular offence”. Nonetheless this omission was notable given the traditional consideration of both the purpose and effect in Charter analysis.

#### IV. FORESHADOWING OF A NEW TEST: *WHALING* AND SECTION 11(H)

The Supreme Court’s next substantive consideration of punishment in the context of section 11 of the Charter occurred in *Canada (Attorney General) v. Whaling*<sup>14</sup> (“*Whaling*”). This case involved three challenges to the *Abolition of Early Parole Act*,<sup>15</sup> the abolishment of accelerated parole review (“APR”) and whether that constituted double punishment contrary to the Charter. The Act eliminated accelerated parole review and applied retrospectively. The effect of this legislation was to change the parole eligibility dates from those in place at the time eligible offenders were sentenced. Where some offenders were formerly eligible after serving one-sixth of the sentence or six months, they were now only eligible for parole six months before the full parole eligibility date. The loss of APR was neither a second proceeding nor a “sanction” in the sense contemplated by *Rodgers*, and therefore the analytical framework set out in *Rodgers* could not be applied.

To assess whether retrospective changes to the conditions of an original sanction constitute punishment, the court looked at: (1) whether the purpose of the law was to retrospectively prolong punishment, and (2) whether the effect of the law thwarted a settled expectation of liberty under the former law. In *Whaling*, abolishing the APR had the effect of extending an offender’s term of imprisonment, contrary to their “settled expectation” when they were sentenced.

Articulated as thwarting “an offender’s settled expectation of liberty”, the practical impact of the Act was to extend an offender’s term of incarceration.<sup>16</sup> *Whaling* signalled an acknowledgement by the Court that

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<sup>14</sup> *Canada (Attorney General) v. Whaling*, [2014] S.C.J. No. 20, 2014 SCC 20, at paras. 50-53 (S.C.C.) [hereinafter “*Whaling*”].

<sup>15</sup> S.C. 2011, c. 11.

<sup>16</sup> Consideration of the effect of a measure on an offender may also be seen outside the Charter context, for example as seen in the Court’s consideration of collateral consequences at sentence. In *R. v. Pham*, [2013] S.C.J. No. 100, 2013 SCC 15 (S.C.C.), the Court reduced the

determining what constitutes punishment requires consideration of the impact on the offender.

### V. THE NEW TEST FOR PUNISHMENT IN *K.R.J.*

*K.R.J.* presented the Supreme Court with an opportunity to refine the test set out in *Rodgers*. Given the decision in *Whaling*, it is not surprising that the court expanded the considerations for determining what is punishment, and harmonized the approach in sections 11(i) and (h) of the Charter.

The accused in *K.R.J.* entered a guilty plea to charges of incest and making child pornography. Most of these offences were committed against his biological daughter between 2008 and 2011. The investigation originated with an anonymous informant providing a computer that allegedly belonged to the accused. When the RCMP arrested the accused they discovered electronic equipment, pornographic DVDs and journals. Thirteen disks of child pornography were found hidden in the ceiling of his kitchen. At the time of arrest the accused had sole custody of the children.<sup>17</sup> *K.R.J.* was sentenced to six years for incest and three years consecutive for making child pornography (minus credit for pre-sentence custody). At sentencing the Crown sought a section 161(1) prohibition order.

The scope of section 161(1) prohibition orders was enlarged in 2012 by the *Safe Streets and Communities Act*.<sup>18</sup> This Act came into force post offence in *K.R.J.*, but pre-sentence. The Act was intended to be applied retrospectively. The new provisions provided:

161. (1) When an offender is convicted, or is discharged on the conditions prescribed in a probation order under s. 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

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sentence of an offender from two years' imprisonment for production of marijuana and possession for the purposes of trafficking to two years less a day. This avoided the loss of a right to appeal a removal order under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 64. Although this was a collateral consequence arising outside of the sentencing context, a sentencing judge may take this impact into account when exercising his or her discretion in imposing an appropriate sentence, as long as "the sentence that is ultimately imposed is proportionate to the gravity of the offence and the degree of responsibility of the offender". See also *R. v. Wong*, [2016] B.C.J. No. 2215, 2016 BCCA 416 (B.C.C.A.); leave granted [2016] S.C.C.A. No. 557 (S.C.C.).

<sup>17</sup> Shortly after the accused and his wife separated, his wife moved to Ontario with the children, but within a week the children were removed from her care. The accused ultimately made an application for custody, becoming the sole caregiver for the victim and her brother.

<sup>18</sup> S.C. 2012, c. 1.

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 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.

(emphasis added)

Prior to the 2012 amendments, section 161(1)(c) only prohibited “using a computer system within the meaning of subsection 342.1(2) for the purpose of communicating with a person under the age of 16 years” and there was no general prohibition against using the Internet. In light of the change in the provision, the sentencing judge declined to impose a section 161(1) order under the new provisions, but imposed restrictions based on the version of section 161(1) that was in force at the time of the offence.

The appellant appealed his sentence to the British Columbia Court of Appeal, and the Crown cross-appealed the finding that the amendments to section 161 did not apply retrospectively. The appellant/respondent on the cross-appeal argued that the retrospective application of the provision offended section 11(i) of the Charter. The Court of Appeal upheld the sentence (although it adjusted pre-custody credit), and also allowed the Crown appeal. The amendments to section 161(1) of the Code were intended to apply retrospectively. Further, the majority of the Court of

Appeal found that the subsections did not constitute ‘punishment’ and accordingly their retrospective application did not offend section 11(i) of the Charter.

A different conclusion had been reached by the Court of Appeal for Nova Scotia.<sup>19</sup> It is therefore unsurprising that the Supreme Court granted leave to appeal in *K.R.J.* and stated two constitutional questions: Does the retrospective operation of subsections 161(1)(c) and (d) of the Code, as enacted by section 16 of the *Safe Streets and Communities Act*, infringe section 11(i) of the Charter? If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under section 1 of the Charter?

A unanimous court found that the test under section 11(i) had to be clarified: yet the Court split on the application of the new test to the provisions. The framework in *Rodgers* did not provide sufficient guidance to determine what constitutes punishment. The purpose of enhancing public protection underlines all aspects of criminal law, while punishment has the effect of restricting an offender’s liberty. Both purpose and effect must be considered to determine what amounts to punishment. Accordingly, the Court added a third component to the *Rodgers* test:

[41] ... I would restate the test for punishment as follows in order to carve out a clearer and more meaningful role for the consideration of the impact of a sanction: a measure constitutes punishment if (1) it is a consequence of conviction that forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence, and either (2) it is imposed in furtherance of the purpose and principles of sentencing, or (3) it has a significant impact on an offender’s liberty or security interests.

The requirement of a “significant impact” in the third prong of the test necessarily involves a qualitative assessment of the impact on an offender. This was in keeping with the comment of the Court in *Rodgers* that not every potential consequence of conviction will constitute punishment.<sup>20</sup> Some weighty interference with a liberty interest is required, otherwise even the most minor consequence would amount to punishment.<sup>21</sup> This prong of the test requires a significant constraint on a person’s ability to engage in

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<sup>19</sup> *R. v. Farler*, [2013] N.S.J. No. 41, 2013 NSCA 13 (N.S.C.A.).

<sup>20</sup> *Rodgers*, *supra*, note 16, at para. 63.

<sup>21</sup> The Charter protects against state action that is significant: *Cunningham v. Canada*, [1993] S.C.J. No. 47, [1993] 2 S.C.R. 143 (S.C.C.).

otherwise lawful conduct or impose significant burdens not imposed on other people.<sup>22</sup> The Court cited with approval the approach of Doherty J. in *R. v. Hooyer*,<sup>23</sup> in determining what constitutes a “significant impact”.<sup>24</sup>

... [A] prohibition that significantly limits the lawful activities in which an accused can engage, where an accused can go, or with whom an accused can communicate or associate, would sufficiently impair the liberty and security of the accused to warrant characterizing the prohibition as punishment.<sup>25</sup>

Both of the amendments in section 161(1)(c) and (d), could have a significant impact on the liberty and security of offenders. Living under restrictions in the community attracts stigma and the prohibitions have the potential to impact employment, as well as the ability to interact with people in both public and private spaces.

The 2012 amendments to section 161(1) constitute punishment. They (1) were a consequence of conviction that formed part of the arsenal of sanctions to which an accused may be liable in respect of an offence, (2) were imposed in furtherance of the purpose and principles of sentencing, and (3) had a significant impact on an offender’s liberty and security interests.<sup>26</sup>

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<sup>22</sup> *K.R.J., supra*, note 1, at para. 42.

<sup>23</sup> *R. v. Hooyer*, [2016] O.J. No. 280, 2016 ONCA 44 (Ont. C.A.) [hereinafter “*Hooyer*”].

<sup>24</sup> The appellant in *Hooyer* was convicted of one count of fraud contrary to s. 380 and one count of theft contrary to s. 331. An elderly man was in a long-care facility with dementia when his wife passed away. The appellant was like an adopted son and assumed power of attorney. Over the course of several years the appellant converted the bulk of the money he held in trust to his own use, neglecting the payment of the victim’s expenses and depleting the estate. He also diverted money for health expenses that was payable by Veterans Affairs to the nursing home to his own use. At sentencing, the trial judge made a s. 380.2(1) order prohibiting the appellant from ever seeking, obtaining or continuing any employment or becoming a volunteer in any capacity that would involve authority over the real property, money or valuable security of another person. On appeal Hooyer alleged a violation of s. 11(i) of the Charter but withdrew that argument when it became clear that proper notice had not been provided. Instead, counsel framed the issue as one of statutory interpretation. Counsel argued s. 380.2(1) came into force in November 2011 (S.C. 2011, c. 6, s. 4) several months after the fraud on Veterans Affairs. The s. 380.2(1) prohibition constituted punishment and under the prevailing rules of statutory interpretation should be applied prospectively only, absent a clear indication that Parliament intended it to be applied retrospectively. The Court agreed. The s. 380.2(1) order prohibited a “wide variety of otherwise lawful activities. These included many forms of employment. The prohibition could well significantly negatively affect the appellant’s ability to find and maintain employment and fully participate within his community”. This meaningfully restricted the liberty interest of the accused and amounted to punishment even though the purpose was to protect the public.

<sup>25</sup> *Hooyer, id.*, at para. 42.

<sup>26</sup> It would have been sufficient to satisfy either of the latter two criteria, but both were satisfied in this case.

## 1. Retrospective Application of Punishment is Allowable: Section 1 Analysis

Having found that the provisions in subsections 161(1)(c) and (d) constituted punishment, the Court went on to consider whether the provision could nonetheless be saved as a reasonable limit that was demonstrably justified in a free and democratic society under section 1 of the Charter.

The objective of the infringing measure was “to better protect children from the risks posed by offenders like the appellant who committed their offences before, but were sentenced after, the amendments came into force”.<sup>27</sup> There was no real debate that the legislative intent was pressing and substantial; the issue was whether the retrospective application satisfied the proportionality requirements.<sup>28</sup> The Court split on whether the deleterious effects of the violation outweighed the objective.<sup>29</sup>

According to the majority, the need for the retrospective application of the prohibitions in section 161(1)(d) was more compelling than for section 161(1)(c). Section 161(1)(d) was enacted to address an emerging threat and close a legislative gap.

The rate of technological change over the past decade has fundamentally altered the social context in which sexual crimes can occur. Social media websites (like Facebook and Twitter), dating applications (like Tinder), and photo-sharing services (like Instagram and Snapchat) were all founded after 2002, the last time prior to the 2012 amendments that substantial revisions to s. 161(1) were made. These new online services have given young people — who are often early adopters of new technologies — unprecedented access to digital communities. At the same time, sexual offenders have been given unprecedented access to potential victims and avenues to facilitate sexual offending.<sup>30</sup>

The previous provision was focused solely on using a computer system to communicate with a person under the age of 16. The new, broader provision expanded the means of communication so it covered all forms of technology

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<sup>27</sup> *K.R.J.*, *supra*, note 1, at para. 65. Conversely, Brown J. considered the amendments as a whole, as opposed to their retrospectively (para. 137). As Justice Brown was alone in his approach to this issue, it is unlikely that this will be adopted in other cases.

<sup>28</sup> *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.).

<sup>29</sup> Writing on behalf of seven members of the Court, Karakatsanis J. found s. 161(1)(d) was justified under s. 1, but s. 161(1)(c) was not. Justice Brown would have upheld the retrospective application of both subsections, and Abella J. would not have permitted either subsection to be applied retrospectively.

<sup>30</sup> *K.R.J.*, *supra*, note 1, at para. 102.

that were being used to access children including email, smartphones, the Internet and any other digital network.<sup>31</sup> It also encompassed a broader range of behaviour that presented a risk to children.<sup>32</sup>

This was a “compelling temporal reason”, and the need to respond to an emerging threat did not undermine the fairness of the legal system or offend the rule of law to the same degree, since Parliament was closing a legislative gap.<sup>33</sup> The deleterious effects of the retrospective application of this subsection were attenuated by this rapidly changing social context.

Conversely, there was no such temporal justification for the addition of a prohibition against having any contact, including communicating by any means, with a person who is under 16 years of age, as prohibited by section 161(1)(c). Previously an offender could be prohibited from attending specified places where children are present, such as a playground or daycare centre, or could reasonably be expected to be present, like a public park or swimming area. The prohibition was expanded by the addition of this subsection to include both public and private spaces, potentially including an offender’s own home if they have children or younger family members. There was no evidence to show the previous sentencing regime was insufficient and therefore no compelling basis to explain why the new provisions had to be applied retrospectively.

## VI. IMPLICATIONS

In contrast to the original test established in *Rodgers*, the refined test from *K.R.J.* represents a less deferential approach to Parliament. It is not sufficient for the government to retrospectively impose a sanction in the name of public protection; it must do so in a manner that does not significantly impact an offender’s liberty or security interests. If it does, it will be considered punishment and retrospective application will violate section 11(i) of the Charter.

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<sup>31</sup> See comments of Ms. Carole Morency, Standing Committee on Justice and Human Rights Evidence 40th parl., 3rd session, number 45, February 2, 2011, at p. 14; and number 50, February 28, 2011, at p. 4.

<sup>32</sup> This includes preventing: access to child pornography; access to like-minded peers who might encourage offending or normalize sexual interest in a child; and, access to children through a third party who might participate or facilitate sexual abuse of children (see for example, *Safe Streets and Communities Act*, S.C. 2012, c. 1, s. 23, which created s. 172.2 of the Code: the offence of using telecommunication to agree or arrange to commit a number of sexual offences against a child).

<sup>33</sup> *K.R.J.*, *supra*, note 1, at para. 110. In contrast, Brown J. considered the temporal issue a factor to be considered when assessing the pressing and substantial nature of the objective, rather than the proportionality analysis.

Explicit acknowledgement of the effect of a sanction on an offender in the analysis of *K.R.J.* was both intuitive and predictable following *Whaling*. The types of sanctions that are imposed following conviction have expanded beyond the traditional penal consequences of imprisonment and fines of a certain magnitude.<sup>34</sup> The purpose of these measures alone should not be determinative of whether they amount to punishment. This is consistent with the general approach to Charter analysis and will provide accused persons with increased protection against the retrospective application of measures that significantly constrain their liberty. While it was unknown exactly how the court would incorporate effect into the section 11(i) analysis, it was clear post-*Whaling* that the Court's willingness to consider effect could have implications for numerous sanctions that have emerged over the last two decades. The expansion of ancillary orders, such as section 161(1) prohibition orders, made this issue ripe for section 11(i) constitutional consideration.<sup>35</sup>

The decision in *K.R.J.* will undoubtedly usher in more litigation. If a sanction now amounts to punishment in the context of a section 11 constitutional analysis because of the effect on an offender, some may try to argue that the sanction should be considered when assessing the totality and proportionality of the sentence, despite being imposed for a different purpose. However, this is contrary to developing case law. In the context of Charter challenges, new and existing ancillary orders will now be assessed using the *K.R.J.* framework. The requirement for a "significant" impact on an offender's liberty and security interests provides fertile ground for litigation. It is likely that some orders will now qualify as 'punishment' that would not have satisfied the test in *Rodgers*, and those boundaries will no doubt be tested. For example, one area that has not traditionally been considered punishment is forfeiture or fine in lieu of forfeiture for proceeds of crime, and the analogous

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<sup>34</sup> *R. v. Wigglesworth*, [1987] S.C.J. No. 71, [1987] 2 S.C.R. 541 (S.C.C.).

<sup>35</sup> Hamish Stewart, in "Punitive in Effect: Reflections on *Canada v. Whaling*" (2015), 71 S.C.L.R. (2d) 263 correctly noted that *Whaling* could have implications on a number of consequences of convictions, such as a victim fine surcharge under s. 737 of the Code, or registration requirements for sexual offenders. He suggested there is now a strong case to suggest the registration requirements under the *Sex Offender Information Registration Act* (S.C. 2004, c. 10) s. 2(1) amount to punishment. This Act imposes an obligation to report annually or upon certain events. This includes providing: name, date of birth, address, employment details, education program details, telephone number, physical description, vehicle information, licence number, and passport number. However, it is unlikely that this will amount to punishment. The reporting requirement will likely not amount to a 'significant burden' as defined by *K.R.J.* It does not significantly limit the offender's lawful activities, movement or communication; it only requires the offender to provide information about himself and his activities. *K.R.J.*, *supra*, note 1, at para. 42.

forfeiture order for offence-related property. Under the *K.R.J.* analysis, forfeiture of offence related property may now qualify as punishment. It constrains lawful conduct by removing a person's existing rights to use and dispose of their property. This can be distinguished from forfeiture of proceeds of crime which seeks to remove the benefit of an illegal activity and does not constrain lawful conduct.

### 1. Forfeiture — Proceeds of Crime and Offence-Related Property

Part XX.2 of the Code deals with proceeds of crime and authorizes its forfeiture or a fine in lieu of forfeiture in certain circumstances.<sup>36</sup> While orders under this section are considered part of the sentence for the purposes of an appeal,<sup>37</sup> the Court of Appeal for Ontario has said these orders do not constitute punishment.<sup>38</sup> Although these cases did not arise in a constitutional context, the approach of the courts was consistent with the approach in *Rodgers*.

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<sup>36</sup> Section 462.37 provides in part:

(1) Subject to this section and sections 462.39 to 462.41, where an offender is convicted, or discharged under section 730, of a designated offence and the court imposing sentence on the offender, on application of the Attorney General, is satisfied, on a balance of probabilities, that any property is proceeds of crime and that the designated offence was committed in relation to that property, the court shall order that the property be forfeited to Her Majesty to be disposed of as the Attorney General directs or otherwise dealt with in accordance with the law.

...

(3) If a court is satisfied that an order of forfeiture under subsection (1) or (2.01) should be made in respect of any property of an offender but that the property or any part of or interest in the property cannot be made subject to an order, the court may, instead of ordering the property or any part of or interest in the property to be forfeited, order the offender to pay a fine in an amount equal to the value of the property or the part of or interest in the property. In particular, a court may order the offender to pay a fine if the property or any part of or interest in the property

- (a) cannot, on the exercise of due diligence, be located;
- (b) has been transferred to a third party;
- (c) is located outside Canada;
- (d) has been substantially diminished in value or rendered worthless; or
- (e) has been commingled with other property that cannot be divided without difficulty.

(emphasis added)

<sup>37</sup> Section 673 of the Code.

<sup>38</sup> The possibility of incarceration that may result from non-payment of a fine in lieu of forfeiture pursuant to s. 743.7 of the Code does not change the nature of the order. Section 743.7 is an enforcement provision and is not punishment: *R. v. Wu*, [2003] S.C.J. No. 78, [2003] 3 S.C.R. 530 (S.C.C.); *R. v. Bourque*, [2005] O.J. No. 591, at para. 20 (Ont. C.A.).

While the intention of the general sentencing provisions is to “punish an offender for committing a particular offence”, the purpose of forfeiture in Part XII.2 is to “deprive the offender and the criminal organization of the proceeds of their crime and to deter them from committing crimes in the future”.<sup>39</sup> Such an order is part of the sentence, but it is nevertheless distinguished by the fact that its purpose is to remove the proceeds of crime. It is not punishment specifically for the designated offence, but in addition to the sentence imposed for the offence.<sup>40</sup>

In *R. v. Lavigne*, Deschamps J. writing for the Court, considered whether the ability of an offender to pay is relevant when imposing a fine in lieu of forfeiture.<sup>41</sup> The offender was part of a cannabis trafficking ring. He entered a guilty plea to conspiring to produce and traffic in cannabis, possess cannabis for the purposes of trafficking and possess property derived from trafficking in cannabis, and committing indictable offences for the benefit of a criminal organization (sections 465 and 467.12 of the Code respectively). In addition to a custodial period, the Crown sought an order for a fine in lieu of forfeiture pursuant to section 462.37(3). The trial judge determined that the offender had received at least \$150,000 from his offences, but by the time of sentence he had disposed of the money. The trial judge imposed a sentence equivalent to 50 months’ imprisonment, and a fine in lieu of forfeiture of \$20,000. This was less than the amount of the proceeds, but what the trial judge felt was appropriate in light of the inability of the offender to pay the full amount. Ultimately, the Supreme Court was called upon to consider whether the ability to pay is a proper consideration for a fine in lieu of forfeiture, as it would be for a fine imposed under section 734(2) of the Code.

The Court found that ability to pay had no place in consideration of the quantum of the fine in lieu of forfeiture, but it was relevant to the amount of time the offender should be given to pay. This decision was based on the reason the order was imposed — removing the benefit of the crime.

The *amicus curiae* argues that the effect of imposing a fine without regard to the general principles of sentencing is to punish the offender twice. What that argument fails to consider is that those principles are not all disregarded and that a fine instead of forfeiture is seen as a separate component of the sentence. While such an order

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<sup>39</sup> *R. v. Lavigne*, [2006] S.C.J. No. 10, 2006 SCC 10, at paras. 9, 16, 30 (S.C.C.).

<sup>40</sup> *Lavigne*, *supra*, note 43, at paras. 25, 33.

<sup>41</sup> The offender did not participate in the appeal and *amicus curiae* was appointed to assist the court.

is technically part of the sentence, it is nevertheless distinguished by the fact that its purpose is to replace the proceeds of crime. It is not regarded as punishment specifically for the designated offence.<sup>42</sup>

Although *Lavigne* was released prior to *Rodgers*, it was heard while *Rodgers* was on reserve and reflects the focus on the purpose for imposing an order. A forfeiture order is imposed to remove the financial benefit to the offender or criminal organization. Although it has a deterrent effect, not all sanctions with a deterrent effect are punishment: the measure must be imposed in furtherance of the purpose and principles of sentencing.

Another similar forfeiture order exists for offence-related property,<sup>43</sup> and there is mounting tension between purpose and effect for this sanction, albeit not in a Charter context.<sup>44</sup> In *R. v. Craig*<sup>45</sup> the offender entered a guilty plea to producing marijuana contrary to section 7(1) of the *Controlled Drugs and Substances Act* (“CDSA”).<sup>46</sup> This production occurred in the offender’s home and the Crown brought an application for forfeiture of offence-related real property — the offender’s home — under the CDSA. Justice Abella for the majority made it clear that the considerations at play for a forfeiture order were distinct from the principles of sentencing.<sup>47</sup> While the majority acknowledged forfeiture orders for offence-related property may have a punitive impact on an offender<sup>48</sup> that was not the purpose of the order. “The sentencing inquiry focuses on the individualized circumstances of the offender; the main focus of forfeiture orders, on the other hand, is on the property itself and its role in past and future crime”.<sup>49</sup>

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<sup>42</sup> *Lavigne, supra*, note 43, at paras. 10, 16, 25.

<sup>43</sup> Offence-related property includes any property that is used in connection with or intended to be used in connection with the commission of an indictable offence under the Code or a designated offence under the *Controlled Drugs and Substances Act*.

<sup>44</sup> There is a distinction between establishing that something is punishment for the purposes of a s. 11 Charter analysis, and determining whether the sentencing principles set out in ss. 718.1 and 718.2 of the Code are engaged. For example, a court may impose an ancillary order but not factor the order into a totality assessment if the purpose of the order is not to punish the offender.

<sup>45</sup> [2009] S.C.J. No. 23, 2009 SCC 23 (S.C.C.).

<sup>46</sup> S.C. 1996, c. 19.

<sup>47</sup> *Craig, supra*, note 49, at para. 13. Note that Justice Abella specifically commented that the appeal was not based on a constitutional challenge to the forfeiture provisions.

<sup>48</sup> *Craig, id.*, at paras. 22 and 34.

<sup>49</sup> *Craig, id.*, at para. 40.

In contrast, LeBel and Fish JJ. found that forfeiture of offence-related property may have a punitive effect on an offender and should be taken into account when considering the global sentence.<sup>50</sup> Justice Fish focused on how the offender legally obtained the property but the assets were subsequently caught by the forfeiture provisions.<sup>51</sup> In that context forfeiture would be “unmistakably punitive in effect”.<sup>52</sup>

Since the release of *K.R.J.* the Supreme Court has not directly dealt with the issue of whether a proceeds of crime forfeiture order, or order for a fine in lieu of forfeiture, amount to punishment. Shortly after *K.R.J.* the Court of Appeal for Ontario commented that these orders do not constitute punishment, but again, these comments were not made in a Charter context, and the Court did not consider the impact on an offender.

In *R. v. Angelis*<sup>53</sup> the Crown appealed the failure of a trial judge to impose a fine in lieu of forfeiture. The offender was an account manager who committed a five-year fraud against Dayco Canada Corp, his employer. While on bail he committed three additional book-keeping and accounting frauds. The offender was sentenced to the equivalent of four years and three months imprisonment. Restitution orders were made for the frauds committed while on bail, but no restitution order was made in favour of Dayco, which had insurance coverage for the loss. The offender had dissipated his assets and the Crown sought a fine in lieu of forfeiture for the losses suffered.

On appeal to the Court of Appeal for Ontario, the relevance of the general sentencing principles was again raised. The court looked to the purpose of the two Parts of the Code. Part XXIII focuses on punishment of the offender for the crime they committed. Part XII.2 is focused on the proceeds of crime acquired through the commission of the offence. The purpose of Part XII.2 is not punishment and the court of appeal noted this explicitly.<sup>54</sup> Accordingly, the purpose and principles of sentencing do not

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<sup>50</sup> *Craig, id.*, at paras. 89, 93.

<sup>51</sup> *Craig, id.*, at para. 96.

<sup>52</sup> *Craig, id.*, at paras. 93 and 100.

<sup>53</sup> [2016] O.J. No. 4735, 2016 ONCA 675 (Ont. C.A.); leave refused [2016] S.C.C.A. No. 484 (S.C.C.).

<sup>54</sup> *Angelis, id.*, at paras. 39 and 50; and *R. v. Khatchatourov*, [2014] O.J. No. 2847, 2014 ONCA 464, at para. 55 (Ont. C.A.). In *Khatchatourov*, two offenders were convicted of committing various mortgage financing frauds that preyed upon recent immigrants from Russia and Ukraine using the newcomers' identities to fraudulently obtain mortgage financing. The offenders were both sentenced to four years' imprisonment and fines in lieu of forfeiture were made pursuant to s. 462.37 of the Code. Restitution orders were also issued to CMHC. The offenders challenged the orders on a number of grounds, including the imposition of concurrent restitution and fine in lieu of forfeiture orders.

generally apply to forfeiture orders.<sup>55</sup> The trial judge erred in considering rehabilitation and the general principles of sentencing when determining whether to grant a fine in lieu of forfeiture. The Court of Appeal imposed a fine in lieu of forfeiture in the amount of \$1,036,750.<sup>56</sup>

The conclusion that a fine in lieu of forfeiture is not punishment is consistent with the test in *Rodgers*, but would it pass the refined test in *K.R.J.*?

## 2. Forfeiture and Fines in Lieu for Proceeds of Crime is not Punishment

As canvassed above, applying the first two components of the test in *K.R.J.* to determine if forfeiture orders qualify as punishment can be dealt with in short order. First, an order for forfeiture or a fine in lieu of forfeiture under section 462.37(1) or 462.37(3) is a consequence of conviction that forms part of the arsenal of sanctions for which an offender may be liable for an offence.<sup>57</sup> Second, these orders are not imposed in furtherance of the purpose and principles of sentencing. These orders are imposed to remove the proceeds of crime from offenders and criminal organizations so they do not profit from their offences. While forfeiture of proceeds of crime has a deterrent effect, that is not the focus of these types of orders.<sup>58</sup> However, following *K.R.J.* a court conducting a section 11 Charter analysis must now go further to determine whether, regardless of the purpose, the order has a significant impact on the offender's liberty or security interests.

These orders do not restrict where an accused can go, or restrict the accused's movement in any way. Nor do they impact the ability of an accused to communicate or associate with anyone. However, an order for forfeiture or fine in lieu of forfeiture impacts the economic interests of an accused. Forfeiture interferes with the peaceful enjoyment of the specific property, and constrains the offender from disposing of the property. A fine in lieu of forfeiture is a slightly different matter. The accused's

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<sup>55</sup> *Angelis, id.*, at para. 56.

<sup>56</sup> See also *R. v. Saikaley*, [2017] O.J. No. 2377, 2017 ONCA 374, at para. 181 (Ont. C.A.) that recognizes that a forfeiture order should not be conflated with punishment for the offences committed and should not be considered when assessing the totality of a sentence.

<sup>57</sup> *Rodgers, supra*, note 16, at para. 63. Note that a court can also order forfeiture without a conviction pursuant to s. 462.37(2) but that provision is not part of this analysis.

<sup>58</sup> *Rodgers, supra*, note 16, at para. 64; *Lavigne, supra*, note 43, at para. 25, *Craig, supra*, note 44, at para. 40.

economic interests are still engaged, but there are no limitations on how an accused can deal with specific property. Rather, the accused is under a general obligation to pay an amount equal to the value of the assets that would otherwise be forfeited, if the assets were available. Despite these constraints and interference with economic interests, neither forfeiture nor a fine in lieu of forfeiture under section 462.37(1) or 462.37(3) should be considered punishment.

Proceeds of crime include property, and benefits or advantages obtained or derived directly or indirectly as a result of the commission of a designated offence. By definition, an offender is in possession of the assets as a result of criminal activity. The offender therefore has no pre-existing right to the property. It is illegal to possess property obtained by crime or launder the proceeds of crime.<sup>59</sup> Any limitation on the ability to use or dispose of the property therefore does not constrain *otherwise lawful conduct or lawful activities*.

### 3. Forfeiture of Offence-Related Property *may* be Punishment

The approach to offence-related property is not as straightforward. The comments of both Abella J. for the majority, and the minority judgments of LeBel and Fish JJ. in *Craig*, acknowledge that these types of orders impact an offender. Unlike proceeds of crime, it is not illegal to possess offence-related property.<sup>60</sup> It is the use of the property in the commission of an offence that taints the property and permits forfeiture. When forfeiture of offence-related property is ordered, the Court is removing the ability of an offender to deal with their legally-obtained property. This can have a significant impact on an offender's interest. It is also worth noting that an order of forfeiture for offence-related property engages a proportionality assessment under section 490.41(3). This permits the court to decline to impose a forfeiture order if the impact of the order would be disproportionate to "the nature and gravity of the offence, the circumstances surrounding the commission of the offence and the criminal record, if any, of the person charged with or convicted of the offence".<sup>61</sup> Thus, while an order for forfeiture of offence-related property is directed at the property, the provision itself

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<sup>59</sup> Sections 354(1) and 462.31 of the Code respectively.

<sup>60</sup> Where an item is illegal to possess — such as illicit drugs, credit card skimming devices or some weapons — those items may be otherwise forfeited.

<sup>61</sup> The tailored nature of the order and the built-in proportionality assessment is relevant in the context of a s. 1 assessment in a Charter challenge.

acknowledges that the order may have a significant impact on an offender. Under the *K.R.J.* framework, regardless of purpose, if a measure has a significant impact on an offender's liberty or security interests it will be punishment under section 11(i). Accordingly, the forfeiture of legally obtained property, such as a home, should be considered punishment under the third prong of the refined test in *K.R.J.* in a Charter analysis.

## VII. CONCLUSION

The Supreme Court in *K.R.J.* recognized that determining whether a sanction constitutes punishment under section 11(i) of the Charter requires consideration of the effect of a provision on an offender. This was a predictable result following *Whaling*, and brings harmony to the Court's overall approach to punishment in section 11 of the Charter. This acknowledgement of the need to consider the effect of a legislative measure when assessing punishment in a Charter context will provide greater protection to accused persons and focus attention on the constraints the legislation seeks to impose on the liberty and security of an accused. This additional consideration expands what ancillary orders may amount to punishment. For example, in a Charter context forfeiture of offence-related property may now be considered punishment. This is but one example of many ancillary orders available under the Code that will need to be re-examined through the lens of *K.R.J.* if applied retrospectively. We can anticipate further litigation as courts are called upon to apply this test.

