Federal Court  Cour fédérale

Date: 20200319

Docket: T-1378-18

Citation: 2020 FC 393

Ottawa, Ontario, March 19, 2020

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

P.H.

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The *Criminal Records Act*, RSC 1985, c C-47 [CRA] provides for and governs the suspension of records of persons who have been convicted of offences and have subsequently rehabilitated themselves.

[2] In 2010 and 2012, Parliament enacted the *Limiting Pardons for Serious Crimes Act*, SC 2010, c 5 [LPSCA] and the *Safe Streets and Communities Act*, SC 2012, c 1 [SSCA], which amended certain provisions of the CRA. One of the amendments increased the waiting period before offenders can apply for a record suspension. Another changed the criteria the Parole Board of Canada applies to assess whether to grant a record suspension.

[3] Pursuant to section 10 of the LPSCA and section 161 of the SSCA [collectively, the "Transitional Provisions"], the amendments apply to all new applications for record suspensions regardless of when the offence was committed or when the offender was sentenced.

[4] The Applicant, P.H., was convicted in December 2010 of one count of sexual assault, contrary to section 271.1 of the *Criminal Code*, RSC 1985, c C-46. The offence in question was committed in June 2009. This is the Applicant's only conviction. Prior to the adoption of the Transitional Provisions, P.H. would have been eligible to apply for a record suspension in January 2018. Now, he remains ineligible to apply until January 2023.

[5] In April 2017, Madam Justice MacNaughton of the Supreme Court of British Columbia [SCBC] declared the Transitional Provisions to be of no force and effect in *Chu v Canada (Attorney General)*, 2017 BCSC 630 [*Chu*]. She found that they infringe sections 11(*h*) and 11(*i*) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. The Respondent, the Attorney General of Canada [AGC], did not appeal the decision.

[6] A few months later, in *Charron v the Queen*, OSCJ File No. 16-67821 [*Charron*] and *Rajab v The Queen*, OSCJ File No. 16-67822 [*Rajab*], Madam Justice Bell of the Ontario Superior Court of Justice [OSCJ] affirmed the findings of the SCBC in *Chu* and declared the Transitional Provisions to be of no force and effect. The AGC consented to the applications.

[7] Since the British Columbia and Ontario decisions, the Parole Board of Canada has been applying the old CRA provisions to individuals residing in British Columbia and Ontario. In all other provinces and territories, the Parole Board of Canada applies the new CRA provisions, as amended.

[8] P.H. is a resident of Quebec. He seeks an order from this Court declaring the Transitional Provisions constitutionally invalid on the basis that they infringe sections 11(*h*) and 11(*i*) of the *Charter* in a manner that cannot be saved under section 1 of the *Charter*. He also seeks an order directing the Parole Board of Canada to consider his application for a record suspension based on the CRA as it read at the time he committed the offence in June 2009. P.H. does not challenge the constitutional validity of the amendments themselves. Rather, he challenges the constitutional validity of the Transitional Provisions that give the amendments their retrospective application.

[9] The AGC consents to P.H.'s application.

[10] For the reasons that follow, I have concluded that the Transitional Provisions infringe sections 11(*h*) and 11(*i*) of the *Charter* in a manner that cannot be saved under section 1 of the

Charter. Consequently, section 10 of the LPSCA and section 161 of the SSCA are declared to be constitutionally invalid and of no force or effect pursuant to subsection 52(1) of the *Constitution Act, 1982*.

II. History of the Proceedings in This Court

[11] On July 19, 2018, P.H. and a co-applicant filed a notice of application pursuant to subsection 18(1) of the *Federal Courts Act*, RSC 1985, c F-7 [the Act], seeking a declaration that they were eligible to apply for a record suspension under subparagraph 4(*a*)(i) of the CRA as it read at the time they committed their offence. They also requested an order requiring the Parole Board of Canada to accept record suspension applications under the rules in force before the adoption of the Transitional Provisions. The same day, P.H. requested an order to keep his name and other personally identifiable information confidential. After hearing from the parties, Prothonotary Alexandra Steele granted the confidentiality order on August 2, 2018.

[12] In August 2018, P.H. and his co-applicant filed an amended notice of application to include additional relief. They requested that the Court declare the Transitional Provisions unconstitutional. While the original and the amended notice of application also included relief against section 162 of the SSCA, which applied to pending applications for record suspensions, the parties have since abandoned this aspect of their application.

[13] In December 2018, the co-applicant withdrew from the application.

[14] On January 23, 2019, P.H. and the AGC filed a joint motion record under section 359 of the *Federal Courts Rules*, SOR/98-106 [Rules], seeking: (1) an order declaring that the Transitional Provisions infringe sections 11(*h*) and 11(*i*) of the *Charter* in a manner that cannot be saved under section 1 of the *Charter* and are therefore of no force or effect; and (2) an order directing the Parole Board of Canada to consider P.H.'s record suspension application pursuant to the CRA as it read at the time he committed the offence in June 2009. The motion was returnable on January 29, 2019 at the General Sittings of this Court in Montréal, Quebec.

[15] After reviewing the joint motion record and noting the AGC's consent, I issued a direction advising the parties that I would not hear the motion on its merits as scheduled, but that counsel should appear nevertheless to discuss process and scheduling. When counsel appeared before me on January 29, 2019, I raised a number of concerns regarding their joint motion.

[16] My first concern regarded the process followed. It was not clear to me why the parties were proceeding by way of a notice of motion given that sections 18 and 18.1 of the Act and Part 5 of the Rules govern the underlying application. P.H. had not perfected his application record under section 309 of the Rules, and there appeared to be minimal evidence on the record to support the constitutional challenge. I queried whether the record was complete and, if so, whether the parties had brought this motion at the Court's General Sittings in an attempt to obtain an expedited hearing on the underlying application.

[17] My second concern related to the AGC's consent to the declaration of invalidity and the absence of an adversarial process. I reminded counsel that legislation is presumptively valid and

that it is generally the AGC's role to argue why federal law should be upheld. I asked the AGC whether it was not Parliament's responsibility to amend the Transitional Provisions in response to the AGC's view that (a) it could no longer defend the constitutional validity of the Transitional Provisions and (b) that it was in the public interest to ensure a consistent application of the record suspension eligibility provisions across Canada.

[18] My third concern related to the principles of judicial comity. In their joint written submissions, the parties essentially ask this Court to rely on the decision of the SCBC in *Chu* to grant the relief sought. I informed them of my reluctance to do so in the absence of a similarly extensive evidentiary record and without the benefit of any adversarial context. I also questioned whether, by virtue of the principles of judicial comity, this Court was bound by the findings of the SCBC, a court of coordinate jurisdiction.

[19] Finally, since the parties instituted these proceedings to achieve a consistent application of the amendments across Canada, I asked them to address whether this Court has the jurisdiction to grant general declarations of constitutional invalidity. I did so in light of the comments of the Supreme Court of Canada in *Windsor (City) v Canadian Transit Co*, 2016 SCC 54 [*Windsor*], discussed below.

[20] At the hearing, the parties offered their views on these concerns. They argued that the AGC does not control Parliament's legislative agenda and that the AGC cannot defend legislation once a Court declares it unconstitutional in a decision that the AGC does not challenge on appeal. Moreover, they were of the view that all of the evidence required to

adjudicate the issues was before the Court and that this Court had jurisdiction to grant the requested declaration.

[21] Following the hearing, the AGC sent a letter to the Court on February 6, 2019 indicating that its decision to consent to a declaration of invalidity was exceptional and not taken lightly. The AGC has the overarching responsibility of promoting respect for the law and representing the public interest, including in the conduct of litigation. However, the AGC also has the obligation to ensure, in the public interest, the consistent application of federal law across Canada. The AGC contends that the issues before this Court were the subject of a final decision in *Chu*, where the AGC defended the constitutionality of the Transitional Provisions. After a detailed analysis, the SCBC found that the impugned provisions infringe both sections 11(*h*) and 11(*i*) of the *Charter* in a manner not justified by section 1 of the *Charter*. Following this decision, the AGC reassessed its position and decided not to appeal. When the same issue arose before the OSCJ, the AGC determined that it could not meaningfully distinguish the constitutional analysis in the *Charron* and *Rajab* cases from the SCBC's decision in *Chu*. Guided by the principle that federal laws should apply consistently across the country, the AGC consented to the applications in *Charron* and *Rajab*.

[22] In the same letter, the AGC adds that while the decision not to defend a law is unusual, it is not unprecedented. For example, the AGC refers the Court to the same-sex marriage litigation in the early 2000s, where the AGC initially defended the federal legislation but ultimately decided that it was no longer in the public interest to continue. The Courts of Appeal for British Columbia and Ontario and the Superior Court of Quebec all found that the opposite-sex marriage

requirement was contrary to section 15 of the *Charter* and could not be saved under section 1 of the *Charter*. The AGC decided not to appeal the judgments of the Courts of Appeal and discontinued its appeal of the Superior Court of Quebec judgment. This resulted in different constitutional rights for same-sex partners from one province to another. To remedy this inconsistent application, proceedings for declaratory relief to permit same-sex marriages were instituted in other provinces and territories. Courts in those jurisdictions adopted the reasoning and conclusions of the British Columbia and Ontario Courts of Appeal and issued declarations of invalidity.

[23] The AGC submits that, as with the same-sex marriage litigation, the current state of the law on record suspensions suffers from an uneven application of *Charter* rights for offenders seeking a record suspension. A ruling by this Court invalidating the impugned provisions would allow for a declaration of unconstitutionality with national effect and would ensure a consistent application of record suspensions across Canada. By supporting the relief sought by P.H., the AGC is discharging its duty to act in the public interest, maintaining a coherent litigation approach and demonstrating its commitment to respect constitutional and *Charter* rights.

[24] Regarding the issue of this Court's jurisdiction, the AGC argues that the Federal Court does indeed have the authority to grant declarations of invalidity where there is a direct challenge to federal legislation.

[25] Finally, the AGC writes that this Court has the inherent power to appoint *amicus curiae* in order to provide an adversarial debate to ensure an informed decision rendered in light of all

relevant arguments and evidence. However, the AGC does not consider it necessary in this case because the constitutionality of the Transitional Provisions has already been litigated in an adversarial context in *Chu*. A notice of constitutional question was served on all of the provincial attorneys general, and none chose to intervene.

[26] After examining the material submitted by the AGC and considering the same-sex marriage decisions, I held a telephone conference with the parties on February 20, 2019 during which I highlighted the distinction between the case before me and the same-sex marriage cases. I noted that, in those cases, three (3) superior courts and two (2) appeal courts had examined the same constitutional issues. The Supreme Court of Canada also considered similar issues in *Reference re Same-Sex Marriage*, 2004 SCC 79. Relying on the decision of the Federal Court of Appeal in *Advantage Products Inc v Excalibre Oil Tools Ltd*, 2019 FCA 22, I reminded the parties of this Court's obligation to act judicially and not as a "rubber stamp". In other words, I informed them that I had to be satisfied on the facts and the law that I should make the requested declaration. Noting that this Court lacks the evidence available in *Chu*, I asked the parties to provide additional submissions on the following subjects:

a) The Court's jurisdiction to grant the requested relief;

b) Whether the Court had enough evidence to issue a general declaration of invalidity, and whether it could rely on the evidence presented in *Chu*, particularly regarding the expert evidence;

c) Updated representations on the applicable law since *Chu*; and

d) Whether this Court should make a distinction between the *Chu* case and this case, given the nature of the crimes for which Mr. Chu and P.H. were convicted.

[27] The parties agreed to file written representations by March 20, 2019. After considering all of their submissions, I agreed to hear the matter on April 1, 2019.

III. Relevant Provisions

[28] When P.H. committed his offence in 2009, section 4 of the CRA read as follows:

4 Before an application for a pardon may be considered, the following period must have elapsed after the expiration according to law of any sentence, including a sentence of imprisonment, a period of probation and the payment of any fine, imposed for an offence, namely,	**4** La période consécutive à l'expiration légale de la peine, notamment une peine d'emprisonnement, une période de probation ou le paiement d'une amende, pendant laquelle la demande de réhabilitation ne peut être examinée est de :
(a) five years, in the case of	**a)** cinq ans pour les infractions punissables par voie de mise en accusation […]
(i) an offence prosecuted by indictment, …	

[My emphasis.]

[29] On June 29, 2010, the LPSCA amended section 4 of the CRA. The amendment extended the ineligibility period from five (5) to ten (10) years for a series of offences, namely: serious

personal injury offences within the meaning of section 752 of the *Criminal Code*, including manslaughter, for which the applicant was sentenced to imprisonment for two (2) years or more; or an offence referred to in Schedule 1 that was prosecuted by indictment (Schedule 1 offences generally relate to sexual offences involving young victims).

[30] The LPSCA also imposed additional substantive criteria for the Parole Board of Canada to consider in assessing whether to grant a record suspension for offences prosecuted by indictment. In addition to being satisfied that "the applicant, during the applicable period referred to in section 4, has been of good conduct and has not been convicted of an offence under an Act of Parliament", the Parole Board of Canada had to be satisfied that:

4.1 (1) …	**4.1 (1)** […]
(*b*) in the case of an offence referred to in paragraph 4(*a*), granting the pardon at that time would provide a measurable benefit to the applicant, would sustain his or her rehabilitation in society as a law-abiding citizen and would not bring the administration of justice into disrepute.	*b*) dans le cas d'une infraction visée à l'alinéa 4*a*), que le fait d'octroyer à ce moment la réhabilitation apporterait au demandeur un bénéfice mesurable, soutiendrait sa réadaptation en tant que citoyen respectueux des lois au sein de de la société et ne serait pas susceptible de déconsidérer l'administration de la justice.

[My emphasis.]

[31] In addition to these amendments, section 10 of the LPSCA provided for the retrospective application of the amendments:

10. Subject to section 11, an application for a pardon under the *Criminal Records Act* in respect of an offence that is	**10.** Sous réserve de l'article 11, la demande de réhabilitation présentée en vertu de la *Loi sur le casier*

referred to in paragraph 4(*a*) of that Act, as it read immediately before the day on which this Act comes into force, and that is committed before that day shall be dealt with and disposed of in accordance with the *Criminal Records Act*, as amended by this Act.	*judiciaire* à l'égard d'une infraction visée à l'alinéa 4*a*) de cette loi, dans sa version antérieure à la date d'entrée en vigueur de la présente loi, et perpétrée avant cette date est traitée en conformité avec la *Loi sur le casier judiciaire*, dans sa version modifiée par la présente loi.

[32] On March 13, 2012, the SSCA amended section 4 of the CRA to read as follows:

4 (1) A person is ineligible to apply for a record suspension until the following period has elapsed after the expiration according to law of any sentence, including a sentence of imprisonment, a period of probation and the payment of any fine, imposed for an offence:	**4 (1)** Nul n'est admissible à présenter une demande de suspension du casier avant que la période consécutive à l'expiration légale de la peine, notamment une peine d'emprisonnement, une période de probation ou le paiement d'une amende, énoncée ci-après ne soit écoulée :
(a) 10 years, in the case of an offence that is prosecuted by indictment …	**a)** dix ans pour l'infraction qui a fait l'objet d'une poursuite par voie de mise en accusation […];

[My emphasis.]

[33] In addition to changing the term pardon to "record suspension" and extending the application of the ten (10) year ineligibility period to all offences prosecuted by indictment, the SSCA also provided for the retrospective application of the section 4 amendment, as follows:

161. Subject to section 162, an application for a pardon under the *Criminal Records Act* in respect of an offence	**161.** Sous réserve de l'article 162, la demande de réhabilitation présentée en vertu de la *Loi sur le casier*

that is referred to in paragraph 4(*a*) or (*b*) of that Act, as it read immediately before the day on which this section comes into force, and that is committed before that day shall be dealt with and disposed of in accordance with the *Criminal Records Act*, as amended by this Part, as though it were an application for a record suspension.	*judiciaire* à l'égard d'une infraction visée à l'alinéa 4*a*) ou *b*) de cette loi, dans sa version antérieure à la date d'entrée en vigueur du présent article, et perpétrée avant cette date est traitée en conformité avec la *Loi sur le casier judiciaire*, dans sa version modifiée par la présente partie, comme s'il s'agissait d'une demande de suspension du casier.

[34] Finally, sections 11(*h*) and 11(*i*) of the *Charter* provide :

11. Any person charged with an offence has the right	**11.** Tout inculpé a le droit :
…	[…]
(*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	*h*) d'une part de ne pas être jugé de nouveau pour une infraction dont il a été définitivement acquitté, d'autre part de ne pas être jugé ni puni de nouveau pour une infraction dont il a été définitivement déclaré coupable et puni;
(*i*) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.	*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.

IV. Analysis

A. *Jurisdiction to Grant the Declaratory Relief Sought*

[35] In *ITO-International Terminal Operators Ltd v Miida Electronics Inc*, [1986] 1 SCR 752 [*ITO*], the Supreme Court of Canada set out a three-part test to support a finding that the Federal Court has jurisdiction to deal with a given claim:

1. There must be a statutory grant of jurisdiction by Parliament.
2. There must be an existing body of federal law, essential to the disposition of the case, which nourishes the statutory grant of jurisdiction.
3. The law on which the case is based must be "a law of Canada" as the phrase is used in section 101 of the *Constitution Act, 1867*.

[36] More recently, the Supreme Court of Canada reiterated the *ITO* three-part test in *Windsor*. It also pointed out that in order to decide whether the Federal Court has jurisdiction over a claim, it is necessary to determine the essential nature or character of the claim. It further added that the essential nature of the claim must be determined based on "a realistic appreciation of the practical result sought by the claimant" (*Windsor* at paras 25-26, citing *Canada v Domtar Inc*, 2009 FCA 218 at para 28).

[37] Here, the pith and substance of these proceedings concern the legality of the authority granted to the Parole Board of Canada to retrospectively apply the statutory ten-year ineligibility period and the criteria for granting a record suspension. The purpose of the application is to require the Parole Board of Canada to consider P.H.'s application for a record suspension under

the CRA provisions as they read at the time he committed the offence in June 2009. P.H.'s injunctive remedy is predicated on a finding that the Transitional Provisions are constitutionally invalid on the basis that they infringe sections 11(*h*) and 11(*i*) of the *Charter*.

[38] Turning to the first prong of the tripartite *ITO* test, I agree with the parties that there is a statutory grant of jurisdiction by Parliament. Sections 18 and 18.1 of the Act grant this Court exclusive jurisdiction (subject to section 28 of the Act) to issue an injunction and grant declaratory relief against any federal board, which includes the Parole Board of Canada. There is also an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction. The CRA, the LPSCA and the SSCA are federal laws essential to the disposition of this case, since a declaration that the Transitional Provisions are constitutionally invalid is the only remedy available to put an end to the inconsistent retrospective application of eligibility conditions for criminal record suspensions across Canada. Finally, the relevant statutes in this case are undoubtedly laws of Canada as per section 101 of the *Constitution Act, 1867*. They are federal statutes dealing with matters falling within the federal government's exclusive jurisdiction over criminal law.

[39] Based on the above, I am satisfied that the *ITO* three-part test is met.

[40] I am also of the view that this Court has the jurisdiction to issue general declarations of invalidity for the purpose of section 52 of the *Constitution Act, 1982*. In reaching this conclusion, I have considered the comments made by the Supreme Court of Canada in *Windsor*, which

appear to question the Federal Court's plenary power to issue formal general declarations of invalidity, as the parties seek in this case.

[41] Writing for the majority in *Windsor*, Madam Justice Karakatsanis indicated that it was not necessary to consider the Federal Court of Appeal's finding that this Court has the remedial power to declare legislation constitutionally invalid, inapplicable or inoperative. While declining to comment on the issue, she nevertheless noted "the important distinction between the power to make a constitutional finding which binds only the parties to the proceeding and the power to make a formal constitutional declaration which applies generally and which effectively removes a law from the statute books". She accepted that this Court has the power to make findings of constitutionality and to give no force or effect in a particular proceeding to a law found to be unconstitutional. However, she added that her "silence on this point should not be taken as tacit approval of the Federal Court of Appeal's analysis or conclusion" that this Court does indeed have the power to grant a general declaration of statutory invalidity under section 52 of the *Constitution Act, 1982* (*Windsor* at paras 70-71).

[42] With the greatest of respect to the Supreme Court of Canada, I do not consider myself bound by these *obiter* comments. The facts in this case differ from those in *Windsor*. That case dealt with the application of a municipal bylaw to a federal undertaking. The applicant was not seeking relief under an Act of Parliament and under a federal right, but was seeking relief under the *Constitution Act, 1867*. In this case, sections 18 and 18.1 of the Act grant this Court the jurisdiction to issue declaratory relief against the Parole Board of Canada. There is no need to interpret this Court's jurisdiction restrictively because this Court is a statutory court rather than a

court of inherent jurisdiction. Although it is not a "superior court" within the meaning of section 96 of the *Constitution Act, 1867*, this Court is nevertheless comparable to a superior court when it exercises its general supervisory jurisdiction over federal boards, such as the Parole Board of Canada. Sections 18 and 18.1 of the Act do not remove the jurisdiction of provincial superior courts to grant a constitutional declaration against a federal board. However, the Act does create concurrent jurisdiction in cases where the Federal Court has been granted jurisdiction by an Act of Parliament (ss 18 and 18.1 of the Act) and the *ITO* test is otherwise met, as is the case here.

[43] I do not intend to comment any further on the majority's *obiter* comments in *Windsor*. I accept and adopt as my own the reasoning of my colleagues who recently found that this Court does indeed have the jurisdiction to issue general declarations of invalidity for the purpose of section 52 of the *Constitution Act, 1982* (*Deegan v Canada (Attorney General)*, 2019 FC 960 at paras 212-240; *Fédération des francophones de la Colombie-Britannique v Canada (Employment and Social Development)*, 2018 FC 530 at paras 55-65; *Bilodeau-Massé v Canada (Attorney General)*, 2017 FC 604 at paras 38-88). I also rely on the statements made by the Federal Court of Appeal in *Lee v Canada (Correctional Service)*, 2017 FCA 228 regarding the plenary powers of the Federal Courts. As I do not find it useful to repeat their analysis in these reasons, I refer the parties and the reader to the cited portions of those decisions.

[44] Additionally, I find that P.H. has standing to challenge the constitutionality of the Transitional Provisions because he is directly affected by them. Since he committed the offence in June 2009, his ineligibility period to apply for a record suspension has been extended by five (5) years. In addition, he must meet the more onerous criteria to obtain a record suspension. As

the Court found in *Chu*, I am also of the view that P.H. has the requisite standing to challenge the retrospective application of the CRA amendments as they apply to all affected offenders (*Chu* at para 90). In reaching this conclusion, I rely on the decision of the Supreme Court of Canada in *R v Nur*, 2015 SCC 15 [*Nur*], a challenge to the mandatory minimum sentences found in paragraph 95(2)(*a*) of the *Criminal Code*. There, the Supreme Court of Canada confirmed that a claimant who otherwise has standing can seek a declaration of invalidity under section 52 of the *Constitution Act, 1982* on the basis that the law has unconstitutional effects, whether on the claimant or on third parties (*Nur* at paras 50-51, 63-65; *Chu* at paras 90-104).

B. *Evidence*

[45] The second issue I must address is whether the Court has sufficient evidence before it and whether it can rely on the evidence submitted in *Chu*.

[46] I agree with the parties that there is sufficient evidence before the Court to support a declaration of invalidity.

[47] The issue in this case is essentially one of law, namely whether the retrospective application of amendments to the CRA constitutes changes to the conditions of an offender's original "punishment" in a manner that is contrary to sections 11(*h*) and 11(*i*) of the *Charter*. As noted in *Chu*, to determine this issue, the Court must consider the following two (2) questions: (1) whether a criminal record constitutes punishment within the meaning of section 11 of the *Charter*; and (2) if so, whether the retrospective effect of the Transitional Provisions has the effect of adding to that punishment (*Chu* at para 110).

[48] To determine the first question, it is necessary to refer to the decision of the Supreme Court of Canada in *R v KRJ*, 2016 SCC 31 [*KRJ*], where the Court restated the test for punishment. A measure meets the test for punishment if it: (1) is a consequence of conviction that forms part of the arsenal of sanctions to which an accused might be liable in respect of a particular offence; and either (2) is imposed in furtherance of the purpose and principles of the sentence; or (3) has a significant impact on an offender's liberty or security interests (*KRJ* at para 41).

[49] In *Chu*, the SCBC concluded that the first and second branches of the *KRJ* test were met. It reached this conclusion by relying only on the jurisprudence and without discussing any of the evidence. It was only when examining the third branch of the *KRJ* test – whether criminal records significantly affect liberty and security interests – that the SCBC considered the evidence. The SCBC concluded that since the first and second branches of the *KRJ* test were met, it was not necessary to consider the alternative third branch (*Chu* at para 179). It nevertheless proceeded to do so on the basis that the case was one of first instance.

[50] I recognize that I do not have the benefit of the extensive evidence that was before the SCBC. In this case, P.H. has filed an affidavit regarding his personal circumstances in which he sets out the impact of having a criminal record. He has also filed a report from a psychologist that discusses albeit briefly, the psychological effect of having a criminal record. In contrast, Mr. Chu filed a number of expert reports in addition to his own personal evidence. To demonstrate the impacts of having a criminal record, Mr. Chu filed expert reports from Dr. Neil Boyd, a professor and Director of the School of Criminology at Simon Fraser University, and

from Dr. Anthony Doob, a professor emeritus at the Centre of Criminology at the University of Toronto. The AGC also filed an expert report from Dr. Alfred Blumstein, an emeritus professor of Urban Systems and Operations Research at Heinz College at Carnegie Mellon University (*Chu* at para 183). The three (3) experts were cross-examined and the transcripts of the cross-examinations were before the SCBC. The SCBC found the experts to be eminently qualified to give the evidence outlined in their reports (*Chu* at para 184). The parties did not object to the experts' qualifications or reports, and the parties made no submissions as to the weight to accord the expert evidence. The AGC's own expert acknowledged that a criminal record makes it more difficult for an offender to find employment, which, in turn, has further negative consequences on past offenders, especially in terms of marriage and family life (*Chu* at paras 193, 198).

[51] The reports in question are not before this Court. Nevertheless, I note that the Supreme Court of Canada stated in *Nur* that, when examining the issue of standing to seek a general declaration of invalidity, a "court may look not only at the offender's situation, but at other reasonably foreseeable situations where the impugned law may apply" (*Nur* at para 58; *Chu* at para 93). I agree with the parties that I may consider the *Chu* case as another "reasonably foreseeable situation".

[52] Given the recognition by the AGC's own expert in *Chu* that criminal records significantly affect liberty and security interests and given the uncontested findings of the SCBC, I am satisfied that I can rely on the SCBC's findings on this particular issue.

[53] I am also of the view that I may take judicial notice of the impact of a criminal record in general as well as that of a record suspension, particularly as provided in the CRA and other laws such as the *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA], which protects against discrimination based on a "conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered" (CHRA, s 3(1)).

C. *Judicial Comity*

[54] The principle of judicial comity is well recognized by the judiciary in Canada. In the Federal Court, the principle is to the effect that a substantially similar decision rendered by a judge of this Court should be followed in the interest of advancing certainty in the law (*Almrei v Canada (Citizenship and Immigration),* 2007 FC 1025 at para 61 [*Almrei*]). There are a number of exceptions to the principle: (1) the existence of a different factual matrix or evidentiary basis between the two (2) cases; (2) the issue to be decided is different; (3) the previous decision failed to consider legislation or binding authorities that would have produced a different result; and (4) the decision followed would create an injustice (*Almrei* at para 62).

[55] The parties rely on *Morguard Investments Ltd v De Savoye,* [1990] 3 SCR 1077 [*Morguard*] to argue that the rules of judicial comity apply in this case and militate in favour of recognizing the *Chu* decision. They submit that the SCBC's reasoning in *Chu* is complete and compelling, and they urge me to rely on that reasoning in the particular circumstances of this case to declare the Transitional Provisions constitutionally invalid.

[56] In *Morguard*, the Supreme Court of Canada considered whether the courts of British Columbia ought to recognize a judgment rendered by the courts of Alberta at a time when the defendant in a personal action did not live in Alberta. In discussing the need for recognition and enforcement of judgments within Canada, the Supreme Court of Canada emphasized that the considerations underlying the rules of comity applied with much greater force between the units of a federal state (*Morguard* at 1098). After noting that the creation of a single country presupposed a basic goal of stability and unity, the Court went on to find that the Canadian judicial structure was arranged in such a manner that any concerns about differential quality of justice among the provinces had no real foundation. It particularly noted that all superior court judges are appointed and paid by the federal authorities and subject to final review by the Supreme Court of Canada (*Morguard* at 1099-1100). The Supreme Court of Canada found that, in relation to the recognition and enforcement of judgments within Canada, the courts in one province should give full faith and credit to the judgments given by a court in another province or territory, so long as that court has properly, or appropriately, exercised jurisdiction in that action.

[57] It is unnecessary for me to decide whether the principles of judicial comity apply in this instance since I am of the view that the considerations that underlie judicial comity – deference and respect, order and fairness, stability and unity – nevertheless apply in this case. The constitutional issue to be decided in this case is the same as that decided in *Chu*. Despite the CRA being a federal statute, the current state of the law in Canada is such that different versions of section 4 of the CRA are being applied in the provinces and territories, resulting in record suspensions being more difficult to obtain for certain individuals outside British Columbia and

Ontario. It is in the interests of justice that the amendments to section 4 of the CRA be applied consistently across Canada. In addition, as the Supreme Court of Canada noted in *Morguard*, I also consider that judges of the Federal Courts, like judges of provincial superior courts, are appointed and paid by the federal authorities, and they are subject to final review by the Supreme Court of Canada. I can think of no reason why the decision of the SCBC should not have persuasive value in this case, especially considering there is nothing in the record demonstrating that the SCBC failed to consider legislation or binding authorities that would have yielded a different result.

[58] For all of these reasons, I am satisfied that I may take notice of the judgment in *Chu* and its reasoning in conducting my own legal analysis to answer the constitutional questions at issue in this case.

D. *Constitutional Challenge*

[59] Before determining the merits of the constitutional challenge, I must address an issue that arose at the end of my deliberations. I became aware that the notice of constitutional question was not served on the attorneys general of the territories. Subsections 57(1) and 57(2) of the Act require notice to the AGC and the attorney general of "each province" at least ten (10) days before the hearing of a constitutional question. While these provisions do not refer to the attorneys general of the territories, subsection 35(1) of the *Interpretation Act*, RSC 1985, c I-21 stipulates that the word "province" in federal enactments "includes Yukon, the Northwest Territories and Nunavut". The attorneys general of the territories were therefore entitled to notice.

[60] In an attempt to rectify the defective service, the AGC served the notice of constitutional question on the attorneys general of the territories by fax on December 20, 2019 and January 2, 2020. Then, on January 21, 2020, the AGC wrote to the attorneys general of the territories advising and assuring them that, if they wished to intervene, it would ask the Court to allow them to participate by adducing evidence and offering written and oral arguments. The AGC also indicated that it would appreciate a response at their earliest convenience, as it was required to follow up with the Court on the issue of the defective service by January 31, 2020. With its letter, the AGC also included the relevant proceedings and pleadings filed with the Court, and it informed the attorneys general of the territories that they could obtain the recording of the April 1, 2019 hearing from the Court.

[61] The Attorney General of Yukon and the Attorney General of the Northwest Territories have since replied to confirm that they do not intend to intervene. The Attorney General of Nunavut has yet to reply, but I am satisfied sufficient time was provided for a response. Given the assurances provided by the AGC in its January 21, 2020 letter, I am confident that if the Attorney General of Nunavut intended to participate in this matter, there would have been some communication with either the parties or the Court by now.

[62] I must now decide whether to give effect to these late notices by exercising my discretion under subsection 57(2) of the Act.

[63] Notice requirements ensure that laws are “not declared unconstitutional unless the fullest opportunity has been given to the government to support the law’s validity” (*Kreishan v Canada*

(Citizenship and Immigration), 2019 FCA 223 at para 54 [*Kreishan*]; *Guindon v Canada*, 2015 SCC 41 at paras 19, 113). In *Kreishan*, the Federal Court of Appeal gave effect to notices served eight (8) days before the hearing, rather than the required ten (10). It noted responses from all thirteen (13) provincial and territorial attorneys general: none expressed an intention to intervene, and none objected to the request for an abridgement of the time for service of the notice. Based on these responses, the Federal Court of Appeal agreed to abridge the time for service, but it cautioned that its decision "was not lightly made and similar results should not be expected in future cases", as the notice requirement "is not a mere formality" (*Kreishan* at para 53).

[64] In this case, the attorneys general of the territories were notified late, but, as in *Kreishan*, they have not expressed an intention to intervene. In fact, none of the provincial attorneys general have chosen to participate. This choice is perhaps not surprising given that the AGC has conceded that the Transitional Provisions are constitutionally invalid and the two (2) provisions have already been declared to be of no force and effect in British Columbia and in Ontario. I consider that it is in the interests of justice that this matter be determined given the inconsistent application of the Transitional Provisions across Canada. As a result, I am extending the time for service, and I accept the notice as if it had been properly served before the hearing.

[65] Turning now to the constitutional challenge itself, as stated above, the determination of whether the retrospective amendments to the CRA constitute changes to the conditions of an offender's "original punishment" in a manner that is contrary to sections 11(*h*) and 11(*i*) of the *Charter* requires consideration of two (2) questions. The first is whether a criminal record

constitutes “punishment” under sections 11(*h*) and 11(*i*) of the *Charter*. If the answer to the first question is yes, then the second question is whether the retrospective effect of the Transitional Provisions has the effect of adding to that punishment (*Chu* at para 110).

i. Section 11(*h*) of the *Charter*

[66] Section 11(*h*) of the *Charter* protects against double jeopardy. It enshrines the right not to be tried or punished twice for the same offence. While it is normally triggered where there is a duplication of proceedings, the Supreme Court of Canada held in *Canada (Attorney General) v Whaling*, 2014 SCC 20 [*Whaling*] that section 11(*h*) of the *Charter* also extends to additional punishment that does not involve an additional proceeding (*Whaling* at paras 36, 42). The Court also held that the scope of “punishment” in the context of section 11(*h*) of the *Charter* applied to the “retrospective changes to the conditions of the original sanction which have the effect of adding to the offender’s punishment (being ‘punished . . . again’)” (*Whaling* at para 54).

[67] In examining the issue of what retrospective changes to the conditions of a sentence constitute double punishment, the Supreme Court of Canada noted that the “dominant consideration in each case will … be the extent to which an offender’s settled expectation of liberty has been thwarted by retrospective action. It is the retrospective frustration of an expectation of liberty that constitutes punishment” (*Whaling* at para 60). The Court ultimately found that the retrospective repeal of the accelerated parole review provisions had the effect of lengthening the minimum period of incarceration for a person who would have qualified for early day parole under the accelerated parole review system, an expectation they had at the time of sentencing. This amounted to punishing the person again (*Whaling* at paras 70-72).

ii. Section 11(*i*) of the *Charter*

[68] Section 11(*i*) of the *Charter* guarantees the right to the benefit of the lesser punishment where the punishment for an offence is changed after a person commits the offence, but before the time of sentencing. In *KRJ*, the Supreme Court of Canada explained that section 11(*i*) of the *Charter* constitutionally enshrines the fundamental notion that criminal laws should generally not operate retrospectively. This notion is predicated on the constitutional principle that a citizen should be able to know in advance the legal consequences of his actions before committing them (*KRJ* at paras 22-24). The issue in *KRJ* was whether the retrospective application of new community supervision orders under subsection 161(1) of the *Criminal Code*, which prohibit sexual offenders from having any contact with persons under the age of sixteen (16) and from using the internet, violated section 11(*i*) of the *Charter*. In determining the issue, as noted above, the Court reformulated the test for determining the meaning of punishment under section 11(*i*) of the *Charter* as follows:

> [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 (*KRJ* at para 41).

[69] After applying the reformulated test, the Supreme Court of Canada held that the amendments constituted punishment because: (1) the orders under subsection 161(1) of the *Criminal Code* were a consequence of conviction and formed part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence; (2) the sanctions were imposed in furtherance of the purpose and principles of sentencing and could have a significant impact on

the offender's *Charter*-protected interests, including protecting children, assisting in rehabilitation and deterring sexual violence; and (3) the amendments could have a significant impact on the liberty and security of offenders. On this last point, the Supreme Court of Canada noted in particular that living in a community under restrictions could attract a considerable degree of stigma and that a prohibition on having any contact with persons under the age of sixteen (16) could potentially curtail the types of employment an offender can pursue and the ability to interact with people. The Court also noted that depriving a person of access to the internet was tantamount to severing that person from an increasingly indispensable component of everyday life (*KRJ* at paras 49-54; *Chu* at paras 139-140). The Court concluded that the prohibitions contained in subsection 161(1) of the *Criminal Code* constitute punishment for the purposes of section 11(*i*) of the *Charter* (*KRJ* at para 57).

[70] The test for punishment articulated in *KRJ* was reaffirmed by the Supreme Court of Canada in *R v Boudreault*, 2018 SCC 58 [*Boudreault*] at paragraphs 38-39 and 125 of the decision.

iii. Is a criminal record part of an offender's original punishment?

[71] In determining whether a criminal record is part of an offender's original punishment, the SCBC first considered the meaning and attributes of "punishment" under section 11 of the *Charter*. It reviewed the relevant jurisprudence of the Supreme Court of Canada, including the *Whaling* and *KRJ* decisions. In doing so, the SCBC particularly noted that the determination of what constitutes a "punishment" is an objective inquiry which is not dependent on the specific offender's subjective experience (*Chu* at para 130) and that punishment encompasses more than

the formal sentence imposed by a court and takes into account any related sanction or punitive treatment (*Chu* at para 132). The SCBC also found, relying on the decision of the Court of Appeal of British Columbia in *Liang v Canada (Attorney General)*, 2014 BCCA 190, that punishment is treated the same for the purposes of both sections 11(*h*) and 11(*i*) of the *Charter (Chu* at para 143).

[72] After determining the meaning of "punishment" under section 11 of the *Charter*, the SCBC went on to consider whether a criminal record is part of an offender's original punishment. The SCBC concluded that criminal records meet the first branch of the *KRJ* test for punishment. In reaching this conclusion, the SCBC noted that sentencing judges have a number of sanctions available to them: imprisonment, fines, or, where certain conditions are met, conditional or absolute discharges (*Chu* at para 157). It further noted that in determining whether to grant a discharge, sentencing judges effectively determine whether to impose a record of conviction since the effect of a discharge is to avoid the damaging consequences of a criminal record for offenders charged with relatively minor offences (*Chu* at para 159).

[73] The SCBC also concluded, after reviewing sections 718 and 718.1 of the *Criminal Code* as well as relevant case law, that the imposition of a criminal record also advances the purpose and principles of sentencing, namely denunciation and deterrence, given the stigma that society imposes on persons who have a criminal record. The SCBC noted in particular that in deciding whether to grant a discharge or otherwise in sentencing, judges often take into account the hardship of having a criminal record when deciding the appropriate sentence and the circumstances of a particular offender and of the offence (*Chu* at paras 166-178).

[74] I have reviewed and considered the reasoning adopted by the SCBC and I am likewise satisfied that criminal records meet the first and second branches of the *KRJ* test.

[75] While it is not necessary for me to consider the alternative third branch of the *KRJ* test, I will nevertheless consider, as the SCBC did in *Chu*, the impact of having a criminal record on an offender's liberty and security interests.

[76] As I indicated earlier, the expert evidence that was before the SCBC is not before me. However, one need only refer to the case law to confirm the significant consequences of having a criminal record. In *R v Malmo-Levine*, 2003 SCC 74, the Supreme Court of Canada described the stigmatizing and punitive effects of having a criminal record as follows:

> [172] … There is no doubt that having a criminal record has serious consequences. The legislative policy embodied in the [*Narcotic Control Act*, RSC 1985, c N-1] is that a conviction for the possession of marihuana *should* have serious consequences. Therein lies the deterrent effect of the prohibition. The wisdom of this policy is, as mentioned, under review by Parliament. It appears that this review has been prompted, in part, by a recognition of the significant effects of being involved in the criminal justice system. For instance, background information from Health Canada states:
>
> > [B]eing prosecuted and convicted in a criminal court bears a stigma that can have far-reaching consequences in an individual's life in such areas as job choices, travel and education. Participating in the criminal court process can also involve personal upheaval.
>
> Health Canada. Information: Cannabis Reform Bill, May 2003.
>
> (*R v Barinecutt*, 2015 BCPC 189 at paras 42, 71, 75; *R v Michael*, 2014 ONCJ 360 at para 77; *R v D (J)*, 1999 CarswellOnt 1551 (Ont Ct J) at para 19.)

[77] I also note that in its written submissions in *Chu*, the AGC acknowledged that having a criminal record does impact an offender's ability to secure employment, find housing and travel internationally. The AGC described the effect as follows:

> A criminal record is a permanent record of past crimes. Behaviour that leads to the commission of a crime and results in a criminal record is often stigmatized in our society, particularly in the area of employment and housing. Potential employers or landlords may be less inclined to employ or rent to past offenders, especially in fields which involve work with vulnerable individuals. These practices are often formally derived from organizations' policy relating to employment screening. It is also recognized that a criminal record may have impacts on limiting international travel.

[78] With respect to the evidence on the record, P.H. filed an affidavit containing information about his personal circumstances. P.H. is a former member of the Canadian military. He holds a Graduate and Masters diploma in management. In describing the impact of his criminal record, he states that he has suffered discrimination when applying for jobs and has been told outright at an interview that his record was a bar to being hired. A former employer denied him a promotion because the role involved travel to the United States. He has been denied regular property and vehicle insurance, and he claims he pays premiums five (5) times the typical rates. He has had to turn down an opportunity to compete in an academic event in the United States as well as employment opportunities in the United States when he worked for two (2) international companies. He has also turned down internship offers and volunteering opportunities so that he would not have to reveal his record.

[79] In terms of social exclusion, P.H. also states that he has been separated from and not been able to visit family relatives in the United States for the past nine (9) years, causing him to miss weddings, birthdays and other important family events. His self-confidence and self-worth have

also been severely affected by the stigma of his criminal record and the ongoing reporting conditions imposed by the *Sex Offender Information Registration Act*, SC 2004, c 10.

[80] P.H. also filed a psychological report. The report deals generally with the impact of the court proceedings on the Applicant and the risk of recidivism rather than dealing specifically with the impacts of a criminal record. Nevertheless, the report does confirm that P.H.'s criminal record has negatively affected his career opportunities and has been both humiliating and frustrating for him.

[81] Based on the uncontested evidence on the record, I am satisfied that the stigma associated with a criminal record has interfered with P.H.'s ability to earn a livelihood and travel for work-related reasons. I am also persuaded that this has had a serious impact on his financial situation, psychological health and sense of identity.

[82] Therefore, in light of the case law and the evidence adduced by P.H., I am persuaded that a criminal record meets the third branch of the *KRJ* test, as it can significantly restrict a person's ability to engage in otherwise lawful conduct, for example, in terms of employment, and it imposes significant burdens not imposed on other members of the public.

[83] For the above reasons, I conclude that a criminal record constitutes "punishment" within the meaning of sections 11(*h*) and 11(*i*) of the *Charter* and that it is a sanction imposed as part of an offender's original punishment.

iv. Do the Transitions Provisions have the effect of adding to an offender's original punishment in violation of sections 11(*h*) and 11(*i*) of the *Charter*?

[84] In *Whaling*, the Supreme Court of Canada held that where an offender has been finally found guilty and punished for an offence, section 11(*h*) of the *Charter* precludes retrospective changes to the conditions of an original sanction if the changes have the effect of adding to the offender's punishment (*Whaling* at para 54). The dominant consideration in each case will be the extent to which an offender's settled expectation of liberty has been thwarted by retrospective legislative action (*Whaling* at para 60). The Supreme Court found that the retrospective application provision had the effect of depriving the offenders of the possibility of being considered for early parole, an expectation they had had at the time of sentencing. This resulted in the lengthening of their minimum incarceration period, thus punishing the offenders again and triggering the protection against double punishment set out in section 11(*h*) of the *Charter* (*Whaling* at paras 70-71).

[85] In *Chu*, the SCBC examined each of the Transitional Provisions with this context in mind. The SCBC found that the impact of the lengthened ineligibility periods caused by section 161 of the SSCA was analogous to the retrospective change considered in *Whaling*. The increased duration of the criminal record applied automatically, without regard to the offender's personal circumstances, and foreseeably disrupted many offenders' settled expectations and plans, thus constituting additional punishment (*Chu* at paras 241-243). In considering the impact of the Transitional Provisions on settled expectations, the SCBC considered the following two (2) hypothetical offenders:

> [245] First, a young offender who pleaded guilty to the indictable offence of possession of cocaine and received a one year suspended sentence. She would have expected to be able to apply for a pardon five years after her sentence expired. She turned her life around and, while waiting for her ineligibility to expire, and with the assistance of student loans, obtained a CPA certification. As a result of the retrospective application of the amendments, her settled expectation that she would be able to commence her career and repay her student loans are thwarted as she has to wait another five years to be able to apply for a record suspension.
>
> [246] Second, a 19-year old who, before the Amendments, pleaded guilty to an assault in a bar fight which had proceeded by indictment. He was sentenced to three years' probation. He would have expected to be 27 when his ineligibility to apply for a pardon expired, but, as a result of the retrospective effect of the Amendments, must now wait until he is 32.
>
> (*Chu* at paras 245-246.)

[86] The SCBC concluded that the retrospective application of the CRA amendments, as prescribed by section 161 of the SSCA, had the effect of increasing punishment, thus violating both sections 11(*h*) and 11(*i*) of the *Charter* (*Chu* at paras 247-249).

[87] With regards to section 10 of the LPSCA, which retrospectively changed the criteria the Parole Board of Canada considers before granting a record suspension, the SCBC made the following observations:

> [251] Prior to the *LPSCA* Amendments, a record suspension was granted if the applicant maintained a law-abiding lifestyle and was of good conduct during the ineligibility period. Meeting the application criteria was within the control of the applicant and the outcome of the application, while not automatic, was predictable. Applicants were not required to make arguments or submissions about the nature of their past offences.
>
> [252] Under the *LPSCA*, the Board must now also be satisfied that the record suspension will provide the applicant with a measurable benefit, will sustain their rehabilitation in society as a

> law-abiding citizen, and will not bring the administration of justice into disrepute.
>
> [253] In considering whether a record suspension will bring the administration of justice into disrepute, the Board may consider the gravity of the applicant's offences. Accordingly, even if an applicant has remained of good conduct and it is clear that a record suspension will sustain his rehabilitation, the Board may deny the application solely on the nature of the applicant's past offences. This is a more onerous criterion.
>
> [254] The retrospective changes to the substantive criteria for obtaining a record suspension go to the heart of the decision-making process and fundamentally change the nature of the Board's decision, such that the risk of being denied a pardon is increased for many offenders who would have otherwise obtained a record suspension under the old criteria. Instead of focusing solely on the applicant's rehabilitation, the Board now looks backward and re-assesses the gravity of the applicant's offence(s). The criteria are no longer within the control of the applicant and the outcome of the application is more uncertain. Applicants are now required to make arguments and submissions on the nature of their past offences.
>
> [255] As set out above, the Parliamentary debates and committee review support a Parliamentary intention to substantively change the decision to grant a pardon. Also as noted above, the purpose behind the *LPSCA* Amendments was to give the Board a new "quasi-judicial" role to ensure proportionality between the granting of a record suspension and the seriousness of the offences. Opposition members expressed concern that this essentially amounted to "re-trying" the individual.
>
> [256] In short, the effect of the retrospective application of the additional criteria is to make it more difficult than expected for offenders to obtain record suspensions, thus thwarting their settled expectations.
>
> (*Chu* at paras 251-256.)

[88] As a result of these considerations, the SCBC concluded that section 10 of the LPSCA has the effect of increasing punishment and, as a result, infringes sections 11(*h*) and 11(*i*) of the *Charter* (*Chu* at para 257).

[89] I have considered the reasoning of the SCBC, as well as the fact that the AGC did not appeal the findings of the SCBC and that it consented to the applications in the *Charron* and *Rajab* cases. I have also reviewed the relevant jurisprudence, including the update provided by the parties. I find the *Chu* decision to be both persuasive and authoritative. I am satisfied that there is no need to distinguish the *Chu* case from this one based on the nature of the crimes for which the offenders were convicted since it is the retrospective application of the amendments that is contested in both cases.

[90] For all of these reasons, I also find that the Transitional Provisions violate sections 11(*h*) and 11(*i*) of the *Charter*.

v. Section 1 of the *Charter*

[91] Generally, where a *Charter* breach is established, the AGC will seek to justify the infringement under section 1 of the *Charter*. To successfully do so in the present case, the AGC would have to demonstrate that the retrospective effects of the Transitional Provisions serve a pressing and substantial government objective and that the law is proportional to that objective. Proportionality requires that (1) the means adopted are rationally connected to the objective; (2) the law is minimally impairing of the right; and (3) the salutary effects outweigh the deleterious effects of the law (*Boudreault* at para 96; *Nur* at para 111).

[92] Unlike in the *Chu* case, where the SCBC found that the Transitional Provisions do not minimally impair the rights of the affected offenders, in this case the AGC did not put forward any argument or evidence to justify the retrospective application of the amendments to the CRA

caused by the adoption of the Transitional Provisions. In the absence of any evidence to justify the violation, I must conclude that the Transitional Provisions cannot be saved under section 1 of the *Charter* and are accordingly of no force and effect.

vi. Remedy

[93] At the hearing, I requested additional representations from the parties pertaining to the injunctive relief sought by P.H. I questioned whether it would be necessary to issue injunctive relief against the Parole Board of Canada if I concluded that the Transitional Provisions were constitutionally invalid and declared them to be of no force and effect pursuant to subsection 52(1) of the *Constitution Act, 1982*.

[94] While injunctive relief and constitutional declarations are similar in some respects, I agree with the parties that their origins and purpose differ. Injunctive relief flows from this Court's supervisory role over federal administrative action. In this case, an injunction would enforce P.H.'s legal interest in preventing an unlawful act by the Parole Board of Canada. The constitutional declaration of invalidity, on the other hand, is the result of the Constitution's supremacy over laws pursuant to subsection 52(1) of the *Constitution Act, 1982*. A declaration would ensure that the CRA and its amending legislation conform to the Constitution for the benefit of all affected offenders.

[95] Given the different purposes of both remedies, I am satisfied that it is appropriate to issue both declaratory and injunctive relief in the circumstances of this case.

E. *Conclusion*

[96] I have concluded that this Court has the jurisdiction to grant the declaratory and injunctive relief sought by the parties, namely because the *ITO* test is met and P.H. has established that he has standing. This Court has sufficient evidence to support a declaration of invalidity because the constitutional question is essentially a matter of law. Moreover, based on the principles underlying judicial comity, this Court considered the reasoning in *Chu* to conduct its own legal analysis.

[97] I conclude that the Transitional Provisions have the effect of increasing punishment, thus violating both sections 11(*h*) and 11(*i*) of the *Charter*. In the absence of any evidence to justify the violation, I also conclude that these provisions cannot be saved under section 1 of the *Charter*. Consequently, section 10 of the LPSCA and section 161 of the SSCA are declared to be constitutionally invalid and of no force or effect pursuant to subsection 52(1) of the *Constitution Act, 1982*.

[98] Finally, to remedy P.H.'s individual situation, I will issue injunctive relief to require the Parole Board of Canada to consider his application for a record suspension in accordance with the provisions of the CRA as they read at the time he committed the offence in June 2009.

[99] As for costs, the parties' joint submissions ask the Court to order costs in favour of P.H. Consequently, P.H. is entitled to costs in the amount of $3,300.00.

JUDGMENT in T-1378-18

THIS COURT HEREBY DECLARES AND ORDERS that:

1. The application is allowed;
2. Section 10 of the *Limiting Pardons for Serious Crimes Act*, SC 2010, c 5 infringes sections 11(*h*) and 11(*i*) of the *Canadian Charter of Rights and Freedoms* [*Charter*] in a manner that cannot be saved under section 1 of the *Charter* and is therefore, pursuant to section 52(1) of the *Constitution Act, 1982*, of no force and effect;
3. Section 161 of the *Safe Streets and Communities Act*, SC 2012, c 1 infringes sections 11(*h*) and 11(*i*) of the *Charter* in a manner that cannot be saved under section 1 of the *Charter* and is therefore, pursuant to subsection 52(1) of the *Constitution Act, 1982*, of no force and effect;
4. The Parole Board of Canada shall deal with and dispose of P.H.'s application for a record suspension in accordance with the provisions of the *Criminal Records Act*, RSC 1985, c C-47 as they read at the time he committed the offence in June 2009; and
5. The Respondent shall pay costs to P.H., assessed at $3,300.00.

"Sylvie E. Roussel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1378-18
STYLE OF CAUSE:	P.H. v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	APRIL 1, 2019
JUDGMENT AND REASONS:	ROUSSEL J.
DATED:	MARCH 19, 2020

APPEARANCES:.

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