



SUPREME COURT OF CANADA

CITATION: R. v. Poulin, 2019 SCC 47

APPEAL HEARD: March 25, 2019

JUDGMENT RENDERED: October 11, 2019

DOCKET: 37994

BETWEEN:

Her Majesty The Queen
Appellant

and

Rosaire Poulin
Respondent

- and -

**Attorney General of Ontario,
Association québécoise des avocats et avocates de la défense and
Criminal Lawyers' Association**
Interveners

OFFICIAL ENGLISH TRANSLATION: Reasons of Karakatsanis J.

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown and Martin JJ.

REASONS FOR JUDGMENT: Martin J. (Wagner C.J. and Moldaver and Côté JJ. concurring)
(paras. 1 to 121)

DISSENTING REASONS: Karakatsanis J. (Abella and Brown JJ. concurring)
(paras. 122 to 156)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

R. v. POULIN

Her Majesty The Queen

Appellant

v.

Rosaire Poulin

Respondent

and

**Attorney General of Ontario,
Association québécoise des avocats et avocates de la défense and
Criminal Lawyers' Association**

Intervenors

Indexed as: R. v. Poulin

2019 SCC 47

File No.: 37994.

2019: March 25; 2019: October 11.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown and Martin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Constitutional law — Charter of Rights — Benefit of lesser punishment — Offender convicted of historical sexual offences — Offender asserting constitutional right to receive sentence not available in Criminal Code at time of commission of offences or time of sentencing, but only for discrete period between those two times — Whether offender has right to benefit only of punishment applicable at time of offence and time of sentencing or right to benefit of any punishment applicable during the interval between those two times — Canadian Charter of Rights and Freedoms, s. 11(i).

Criminal law — Appeals — Mootness — Death of respondent — Respondent passing away after leave to appeal granted but prior to hearing of appeal — Whether Court should exercise discretion to hear appeal.

P was found guilty in 2016 of historical sexual offences committed between 1979 and 1987 when the complainant was 7 to 15 years old and P was 44 to 51 years old. The sentencing judge sentenced P to a conditional sentence of two years less a day for two counts of gross indecency. A conditional sentence could not be imposed as a punishment when P committed his acts of gross indecency — it only became available as a form of sentence in 1996. Furthermore, the parties agreed that it was no longer applicable to the offence of gross indecency, according to the provisions in force, by the time P was charged, convicted and sentenced. In imposing a conditional sentence on P, the judge considered that s. 11(i) of the *Charter* entitled P to the benefit of a lesser sentence that was available in the interval between the

commission of the offences and P's sentencing. The Court of Appeal dismissed the Crown's appeal, holding that s. 11(i) gave P the right to a conditional sentence. Shortly before the hearing of the Crown's appeal before the Court, P passed away. The appeal proceeded nonetheless, accompanied by a Crown motion for the Court to adjudicate the appeal even though it had become factually moot.

Held (Abella, Karakatsanis and Brown JJ. dissenting): The motion to proceed with the appeal and the appeal should be allowed.

Per Wagner C.J. and Moldaver, Côté and **Martin JJ.**: This is one of those rare and exceptional cases in which the Court ought to exercise its discretion to adjudicate a moot criminal appeal. First, the Court has had the benefit of adversarial submissions in this case. Second, the Crown's appeal raises an important constitutional question that has not yet received comprehensive treatment in the jurisprudence. Third, the proper interpretation of s. 11(i) of the *Charter* is a legal issue of general public importance which transcends P's death. Fourth, the value of the Court's ruling on the proper interpretation of s. 11(i) clearly outweighs any concerns about limited judicial resources. It is much more efficient and fair for the Court to decide this question of national importance now, rather than cause future litigants and lower courts to expend further resources debating this question until, inevitably, it reaches the Court anew. Finally, it is for the courts, not Parliament, to define the scope of *Charter* rights. The Court would therefore not be intruding on the legislative role by answering the question put to it.

A purposive analysis of s. 11(*i*) of the *Charter* leads to the conclusion that an offender is not entitled to the benefit of a temporary reduction in punishment which occurred in the interval between the time of commission and the time of sentencing. Section 11(*i*) confers a binary right, not a global one. A binary right involves a comparison of the punishments under the laws in force at two set points in time (commission of the offence and sentencing) and the right to receive the lesser of these punishments. By contrast, a global right involves a review of all punishments that have existed for the offence between its commission and sentencing, and the right to receive the least severe punishment in that entire span of time. The language and origins of s. 11(*i*) both confirm the purposes of s. 11(*i*) — namely the rule of law and fairness — and indicate that s. 11(*i*) is intended to confer a binary right.

A *Charter* right must be interpreted purposively — that is, in a manner that is justified by its purposes. Purposive interpretation can be mistakenly conflated with generous interpretation. While *Charter* rights must be interpreted in a large and liberal manner, they are ultimately bounded by their purposes. Courts that have given s. 11(*i*) a global reading have fallen into the error of prioritizing generosity over purpose. Rather than identifying the principles or purposes underlying s. 11(*i*), they have simply concluded that s. 11(*i*) should be given the interpretation most generous to the accused. However, the principle that a provision bearing more than one plausible meaning must be read in a manner that favours the accused is not a principle of *Charter* interpretation. It is a principle of penal statutory interpretation. Reading s. 11(*i*) in a manner that would require the court to impose the most favourable

punishment identifiable in the interval between the offence and sentencing does not reflect the kind of generous interpretation that *Charter* rights should receive. Rather, it reflects an unduly generous interpretation, disconnected from the purposes of the right.

When conducting a purposive analysis of a *Charter* right, the starting point must be the language of the section. Section 11(*i*) was worded to confer a binary right. The origins of s. 11(*i*) corroborate this conclusion. While the origins of s. 11(*i*) are not determinative of the right's proper scope, they provide an instructive starting point. A review of s. 11(*i*)'s historical context reveals that there was nothing to inspire a global right at the time of its drafting and enactment. A global right was not part of the legal landscape; the common law certainly did not recognize one, and none of the enactments inspiring s. 11(*i*) embraced one either.

Section 11(*i*) balances, on the one hand, the principle of the rule of law and, on the other, the principle of fairness. It enshrines the common law rule that an offender should not be retrospectively subjected to a heavier punishment than the one applicable at the time the person committed the offence. The rationale for this rule is the rule of law and, more specifically, the principle of legality, which dictates that persons who rely on the state of the law in conducting themselves, or who risk the liability associated with a law in breaking it, should not subsequently be held to different laws, particularly more stringent ones. However, s. 11(*i*) constitutionalizes an additional protection. It stipulates that, where the law provides a more favourable

punishment at the time of the offender's sentencing than it did at the time of the offence, the offender is entitled to the benefit of this more favourable, current punishment. The rationale for this is fairness. It would not be fair to subject an offender to a punishment which, in choosing to reduce it, Parliament has expressly recognized as no longer appropriate. Further, a criminal sentence is an expression of society's collective voice; it is meant to reflect contemporary values.

A binary interpretation of s. 11(i) is not unfair or arbitrary for an offender who is punished according to the law in place at the time he committed his offence, or a more favourable law, if one is in place when he is sentenced. To the contrary, these two laws are linked to the offender and the proceedings against him; the first sets out the punishment he risked incurring at the time he acted, and the other likewise sets the contours for a sentence that reflects society's attitude about the gravity of the offence and the responsibility of the offender at the precise moment the sentence is imposed. It is, accordingly, fair and rational for the offender to have the benefit of one of these punishments. Conversely, there is no principled basis to grant an offender the benefit of a punishment which has no connection to his offending conduct or to society's view of his conduct at the time the court is called upon to pass sentence. Furthermore, countervailing fairness considerations militate against a global approach to s. 11(i). A global approach to s. 11(i) would disproportionately benefit those who are sentenced years, or even decades, after their offences. Sexual offences like P's often go long unreported. Survivors of sexual trauma commonly delay in disclosing abuse for reasons such as embarrassment, fear, guilt, or a lack of understanding and knowledge.

There should be no additional gain to an offender under s. 11(i) when a victim is traumatized to the point of requiring significant time to overcome any reluctance to report the offence.

Per Abella, **Karakatsanis** and Brown JJ. (dissenting): The motion to proceed with the appeal should be dismissed. This case is one of the overwhelming number of cases in which proceeding with the appeal would not be in the interests of justice. First, it is hard to conclude that a real adversarial context exists. Second, while it is true that any issue concerning the interpretation of a *Charter* provision is always of great importance, there are no special circumstances in this case that transcend the death of P. In light of 30 years of consistent case law on this issue, it cannot be said that there are conflicting lines of cases here or an issue that is ordinarily evasive of appellate review. Finally, the inequity of proceeding with an appeal against a deceased offender despite opposition from his family is obvious.

Furthermore, the appeal should be dismissed on the merits. For 30 years, the Canadian courts have interpreted s. 11(i) of the *Charter* consistently, holding that it guarantees any offender the benefit of the lesser sentence that applied between the time of commission of the offence and the time of sentencing. This approach finds ample support in the words of s. 11(i), which suggest a continuum between the time of commission and the time of sentencing. A technical construction such as the one proposed by the Crown is contrary to the Court's conclusion that a generous and purposive approach must be taken to the interpretation of *Charter* rights. The

interpretation adopted by other Canadian courts reflects two objects of s. 11(i) identified by the Court, namely the rule of law and ensuring fairness in criminal proceedings. There are several points in the course of a criminal investigation and prosecution — before the time of sentencing — at which an individual might be required to make choices in light of punishments then applicable. The protection of s. 11(i), which cannot be contingent on evidence that the accused relied on the existing law, is grounded in this very possibility. Here, the possibility that the interpretation of s. 11(i) adopted by the courts will complicate the analysis of the applicable punishments should not weigh against it. It seems imprudent to rule out an interpretation that provides offenders with more substantial protection where there is no evidence that there are difficulties, especially in light of the actual wording of the provision. Finally, the proposal that s. 11(i) has a third object, to ensure that the imposed punishment corresponds to the social stigma associated with the offence at the time of sentencing, seems to confuse the availability of a punishment with its fairness and appropriateness. In a case involving multiple incidents in which serious acts of sexual abuse were committed against a young relative, it may be that the conditional sentence was not a fair and appropriate punishment. But that is not the question before the Court.

Cases Cited

By Martin J.

Applied: *R. v. Smith*, 2004 SCC 14, [2004] 1 S.C.R. 385; **referred to:** *R. v. Belzil*, [1989] R.J.Q. 1117; *R. v. McLellan*, 2019 NSCA 2; *Forget v. Quebec (Attorney General)*, [1988] 2 S.C.R. 90; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342; *R. v. Beaton*, 2018 ONCA 924; *R. v. Wigglesworth*, [1987] 2 S.C.R. 541; *R. v. Cadman*, 2018 BCCA 100, 359 C.C.C. (3d) 427; *R. v. Bent*, 2017 ONSC 3189, 383 C.R.R. (2d) 161; *R. v. Yusuf*, 2011 BCSC 626; *R. v. Mehanmal*, 2012 ONCJ 681, 270 C.R.R. (2d) 271; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906; *Liang v. Canada (Attorney General)*, 2014 BCCA 190, 355 B.C.A.C. 238; *R. v. S. (R.)*, 2015 ONCA 291, 333 C.R.R. (2d) 160; *R. v. Simmonds*, 2018 BCCA 205, 362 C.C.C. (3d) 215; *R. v. Wilson*, 2011 ONSC 89, 225 C.R.R. (2d) 234; *R. v. Wiles*, 2005 SCC 84, [2005] 3 S.C.R. 895; *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554; *R. v. Cross*, 2006 NSCA 30, 241 N.S.R. (2d) 349; *R. v. Boudreault*, 2018 SCC 58; *R. v. Johnson*, 2003 SCC 46, [2003] 2 S.C.R. 357; *Tran v. Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50, [2017] 1 S.C.R. 289; *R. v. R.A.R.*, 2000 SCC 8, [2000] 1 S.C.R. 163; *Canada (Attorney General) v. Lewis*, 2015 ONCA 379, 126 O.R. (3d) 289; *Nucci v. Canada (Attorney General)*, 2015 MBCA 122, 333 C.C.C. (3d) 222; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; *R. v. Sinclair*, 2010 SCC 35, [2010] 2 S.C.R. 310; *R. v. Holt*, 2017 ONCJ 51; *R. v. McIntosh*, [1995] 1 S.C.R. 686; *R. v. Dunn*, [1995] 1 S.C.R. 226; *Carter v. The Queen*, [1986] 1 S.C.R. 981; *R. v. Kalanj*, [1989] 1 S.C.R. 1594; *R. v. Potvin*, [1993] 2 S.C.R. 880; *R. v. Kelly*, [1992] 2 S.C.R. 170; *R. v. Hooyer*, 2016 ONCA 44, 129 O.R. (3d) 81; *R. v. Dineley*, 2012 SCC 58, [2012] 3 S.C.R. 272; *Brosseau v. Alberta Securities Commission*, [1989] 1

S.C.R. 301; *R. v. Bengy*, 2015 ONCA 397, 325 C.C.C. (3d) 22; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *Canada (Attorney General) v. Whaling*, 2014 SCC 20, [2014] 1 S.C.R. 392; *R. v. Daoust*, 2004 SCC 6, [2004] 1 S.C.R. 217; *Montréal (City) v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2008 SCC 48, [2008] 2 S.C.R. 698; *R. v. Stillman*, 2019 SCC 40; *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483; *R. v. S.A.C.*, 2008 SCC 47, [2008] 2 S.C.R. 675; *R. v. Docherty*, [2016] UKSC 62, [2017] 4 All E.R. 263; *X v. Federal Republic of Germany*, Application No. 7900/77, March 6, 1978, D.R. 13, p. 70; *Scoppola v. Italy (No. 2)*, [2009] ECHR 1297, 51 E.H.R.R. 12; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500; *R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163; *R. v. Klemenz*, 2015 SKCA 89, 465 Sask. R. 134; *R. v. D.D.*, 2000 SCC 43, [2000] 2 S.C.R. 275; *R. v. Dubois*, Que. Sup. Ct., December 8, 1982; *R. v. R.N.S.*, 2000 SCC 7, [2000] 1 S.C.R. 149.

By Karakatsanis J. (dissenting)

R. v. L. (J.-J.), [1998] R.J.Q. 971; *R. v. Belzil*, [1989] R.J.Q. 1117; *R. v. Smith*, 2004 SCC 14, [2004] 1 S.C.R. 385; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342; *R. v. Cadman*, 2018 BCCA 100, 359 C.C.C. (3d) 427; *R. v. A.E.S.*, 2018 BCCA 478, 369 C.C.C. (3d) 92; *R. v. Yusuf*, 2011 BCSC 626; *R. v. G.C.D.*, 2011 MBQB 235, 271 Man. R. (2d) 41; *R. v. Mehanmal*, 2012 ONCJ 681, 270 C.R.R. (2d) 271; *R. v. Leroux*, 2015 SKCA 48, 460 Sask. R. 1; *R. v. E.H.*, 2009 NLTD 62, 285 Nfld. & P.E.I.R. 78; *R. v. Palacios*, 2012 ONCJ 195; *R. v.*

Simmonds, 2018 BCCA 205, 415 C.R.R. (2d) 88; *R. v. F.C.*, 2018 ONSC 561; *R. v. Boudreau*, 2012 ONCJ 322; *R. v. D.P.*, 2014 ONSC 386; *R. v. Bent*, 2017 ONSC 3189, 383 C.R.R. (2d) 161; *R. v. Docherty*, [2016] UKSC 62, [2017] 4 All E.R. 263; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110; *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906; *Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.*, [1975] A.C. 591; *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089.

Statutes and Regulations Cited

Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act, S.C. 2005, c. 32, s. 3.

Canadian Bill of Rights, S.C. 1960, c. 44.

Canadian Charter of Rights and Freedoms, ss. 7, 8, 10(b) 11, 12.

Criminal Code, R.S.C. 1970, c. C-34, ss. 157 [rep. & sub. c. 19 (3rd Supp.), s. 4], 246.1(1)(a).

Criminal Code, R.S.C. 1985, c. C-46, ss. 151, 161(1)(c), 271, 718.1, 718.2(b), (d), (e), 742.1 [ad. S.C. 1995, c. 22, s. 6; sub. S.C. 2012, c. 1, s. 34].

Interpretation Act, R.S.C. 1985, c. I-21, ss. 43, 44(e) [previously *Interpretation Act*, S.C. 1967-1968, c. 7, s. 37(e)].

Supreme Court Act, R.S.C. 1985, c. S-26, ss. 40(1), 76.

Treaties and Other International Instruments

Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221 [the *European Convention on Human Rights*], art. 7.

International Covenant on Civil and Political Rights, Can. T.S. 1976 No. 47, art. 15(1).

Authors Cited

Canada. Meeting of Officials on the Constitution. *Canadian Charter of Rights and Freedoms (Draft for Discussion Purposes Only)*, div. III. Ottawa, 1979.

Canada. Senate and House of Commons. *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, No. 47, 1st Sess., 32nd Parl., January 28, 1981, pp. 65-69.

Canada. *The Canadian Constitution 1980: Proposed Resolution respecting the Constitution of Canada*. Ottawa: Government of Canada, 1980.

Canada. The Right Honourable Pierre Elliott Trudeau. *The Constitution and the People of Canada: An Approach to the Objectives of Confederation, the Rights of People and the Institutions of Government*. Ottawa: Queen's Printer, 1969.

Canadian Oxford Dictionary, 2nd ed. by Katherine Barber, ed. Don Mills, Ont.: Oxford University Press, 2004, "lesser".

Chevrette, François, Hugo Cyr and François Tanguay-Renaud. "La protection lors de l'arrestation, la détention et la protection contre l'incrimination rétroactive", in Gérald-A. Beaudoin and Errol Mendes, eds., *Canadian Charter of Rights and Freedoms*, 4th ed. Marham, Ont.: LexisNexis Butterworths, 2005.

Collins Canadian Dictionary, 1st ed. Toronto: HarperCollins, 2010, "lesser".

Hogg, Peter W. *Constitutional Law of Canada*, vol. 2, 5th ed. Supp. Scarborough, Ont.: Thomson/Carswell, 2007 (updated 2018, release 1).

McLeod, Roderick M., et al. *The Canadian Charter of Rights: The Prosecution and Defence of Criminal and Other Statutory Offences*, vol. 4. Toronto: Carswell, 1983 (loose-leaf updated 2019, release 5).

Petit Robert: dictionnaire alphabétique et analogique de la langue française, nouvelle éd. Paris: Le Robert, 2012, "le moins".

Vauclair, Martin and Tristan Desjardins. *Traité général de preuve et de procédure pénales*, 26^e éd. Montréal: Yvon Blais, 2019.

Westen, Peter. “*Lex Mitior*: Converse of *Ex Post Facto* and Window into Criminal Desert” (2015), 18 *New Crim. L. Rev.* 167.

MOTION to proceed with the appeal despite the respondent’s death.

Motion allowed, Abella, Karakatsanis and Brown JJ. dissenting.

APPEAL from a judgment of the Quebec Court of Appeal (Dutil, St-Pierre and Mainville JJ.A.), 2018 QCCA 21, 43 C.R. (7th) 216, [2018] AZ-51456758, [2018] J.Q. n° 73 (QL), 2018 CarswellQue 55 (WL Can.), affirming the sentencing decision of Vanchestein J., 2017 QCCQ 7015, [2017] AZ-51400728, [2017] J.Q. n° 8287 (QL), 2017 CarswellQue 6146 (WL Can.). Appeal allowed, Abella, Karakatsanis and Brown JJ. dissenting.

Maxime Hébrard and Sylvie Villeneuve, for the appellant.

Nicolas Lemyre-Cossette and Lida Sara Nouraie, for the respondent.

Michael Perlin and Kathleen Farrell, for the intervener the Attorney General of Ontario.

Gabriel Babineau and Vincent Paquet, for the intervener Association québécoise des avocats et avocates de la défense.

Breana Vandebek and *Marianne Salih*, for the intervener the Criminal Lawyers' Association.

The judgment of Wagner C.J. and Moldaver, Côté and Martin JJ. was delivered by

MARTIN J. —

I. Overview

[1] Every person charged with an offence in Canada enjoys certain basic rights. One such right is contained in s. 11(i) of the *Canadian Charter of Rights and Freedoms* (“*Charter*”), which grants a person found guilty of an offence the right “to the benefit of the lesser punishment” “if the punishment . . . has been varied between the time of commission [of the offence] and the time of sentencing”. Relying on s. 11(i), the respondent Rosaire Poulin asserts the constitutional right to receive a conditional sentence. This punishment was not applicable under the laws in force when he committed his sexual offences between 1979 and 1987 or, according to the parties, when he was sentenced for those offences in 2017. However, it was applicable for a discrete period between those two times. In essence, Mr. Poulin argues that s. 11(i) entitles him not only to the lesser of the punishments under the laws in force at the time of his offences and the time of his sentencing but, further, to an *even lesser* punishment that was temporarily applicable to his offences during the decades that elapsed before he was held accountable for his crimes. Mr. Poulin claims

the right to this punishment even though it bears no temporal connection to his offending conduct or to his sentencing, and even though the record does not show he took steps in reliance on this punishment in his interactions with the criminal justice system. Mr. Poulin did not, for instance, confess or enter a plea when a conditional sentence was applicable to his offences.

[2] This appeal therefore asks to what an offender is entitled under s. 11(*i*) of the *Charter*. Based on the nature and purposes of this particular constitutional right, which punishments are to be considered when determining the “lesser” one to which the accused is entitled? Does s. 11(*i*) confer:

- a “binary” right — which involves a comparison of the punishments under the laws in force at two set points in time (commission of the offence and sentencing) and the right to receive the lesser of these punishments; or
- a “global” right — which involves a review of *all* punishments that have existed for the offence between its commission and sentencing, and the right to receive the *least severe* punishment in that entire span of time?

[3] I conclude that, properly interpreted, s. 11(*i*) confers a binary right, not a global one. Section 11(*i*) entitles an offender to the lesser of (1) the punishment under the laws in force when the offender committed the offence, and (2) the punishment under the laws in force when the offender is sentenced, as these punishments are tethered to two meaningful points in time. The former reflects the jeopardy or legal

risk the offender took by offending. That punishment established, in advance of the offender's conduct, the legal consequences that would flow from that chosen conduct. The latter is the punishment that society considers just at the precise moment the court is called upon to pass a sentence. It provides the contours for a sentence that reflects society's most up-to-date view of the gravity of the offence and the degree of responsibility of the offender. As these two punishments are clearly connected to the offender's conduct and criminality, there is a strong and principled basis for the offender to have the constitutional right to receive the lesser of the punishments at these two points in time.

[4] By contrast, there is no principled basis for offenders to enjoy the automatic constitutional right to a previous punishment which is lower than *both* the one to which they exposed themselves when they committed the offence and the one that reflects society's current sense of the gravity of the offence and the responsibility of the offenders. Reading s. 11(i) in a manner that would grant an offender the right to the most lenient punishment that existed for the offence at any point between its commission and sentencing would both exceed and distort the purposes of s. 11(i). As I will explain, these purposes are the rule of law and fairness. Far from supporting a global reading of s. 11(i), these purposes strongly militate towards reading s. 11(i) in a manner that sets the applicable punishment at the time of the offence as *the ceiling*, and entitles the offender to a more clement punishment under the laws in force at the time of sentencing, if one exists.

[5] As a result, I conclude that s. 11(i) does not resurrect any temporary reductions in punishment which came after the offence and which bear no connection whatsoever to the offender's conduct or to contemporary sentencing standards. By granting the offender specific retrospective access to the applicable punishment at the time of the offence, s. 11(i) need not and does not open the door to the lowest identifiable punishment that has ever applied to the offence since the offender committed it. Section 11(i) did not constitutionalize the right to past punishments that Parliament has since discarded or amended. The legal rights reflected in our *Charter* represent the core tenets of fairness in our criminal justice system. The right to comb the past for the most favourable punishment does not belong among these rights.

[6] I would therefore allow the Crown's appeal. Mr. Poulin was not eligible for the conditional sentence imposed on him as it was not applicable to his offences under the sentencing provisions in force either at the time of commission or, according to the parties, of his sentencing. However, given Mr. Poulin's recent death, I decline to pass a different sentence or remit the matter for sentencing.

II. Facts and Judicial History

[7] In 2016, Mr. Poulin was found guilty of historical sexual offences: two counts of gross indecency and one count of sexual assault, contrary to ss. 157 and 246.1(1)(a) of the *Criminal Code*, R.S.C. 1970, c. C-34. Mr. Poulin committed the offences of gross indecency between 1979 and 1983 and the offence of sexual assault

between 1983 and 1987 when the complainant was 7 to 15 years old and Mr. Poulin was 44 to 51 years old.

[8] By the time of his sentencing, Mr. Poulin was 82 years old and suffering from a number of significant health problems. At his sentencing hearing, Mr. Poulin conceded that a prison sentence of three and a half years would be appropriate for his crimes. However, he argued that, exceptionally, he should receive a conditional sentence — i.e. a sentence of less than two years, to be served in the community — because of his health problems.

[9] The sentencing judge accepted Mr. Poulin's position and sentenced him to a conditional sentence of two years less a day for the two counts of gross indecency. This is the sentence at issue in this appeal. The sentence imposed for the count of sexual assault — a suspended sentence with two years' probation, together with ancillary orders — is not at issue.

[10] Conditional sentences did not exist when Mr. Poulin committed his acts of gross indecency. The conditional sentence entered into force as a form of sentence in 1996 (*An Act to amend the criminal code (sentencing) and other Acts in consequence thereof*, S.C. 1995, c. 22, s. 6). The parties agree that a conditional sentence was no longer applicable to the offence of gross indecency, according to the provisions in force, by the time Mr. Poulin was charged, convicted and sentenced (2014 to 2017). Their view is that, when gross indecency was repealed from the *Criminal Code*, R.S.C. 1985, c. C-46, in 1988 (R.S.C. 1985, c. 19 (3rd Supp.), s. 4,

which came into force in 1988), some conduct that had amounted to gross indecency, including Mr. Poulin's, was now captured under other sexual offence provisions, such as ss. 151 and 271 of the *Criminal Code*. Since conditional sentences have been made statutorily unavailable for such sexual offences (see *Criminal Code*, ss. 742.1(b), 151 and 271), the parties consider the conditional sentence to have equally been made unavailable for the indictable acts of gross indecency that are now criminalized under these modern sexual offences. Put differently, the parties agree that the current restriction on conditional sentences for sexual offences extends to Mr. Poulin's offences of gross indecency. I do not comment on this interpretation as it is not an issue that has been raised before this Court.

[11] The sentencing judge did not analyze the threshold question of whether a conditional sentence was actually available for Mr. Poulin's gross indecencies. Rather, the judge considered that s. 11(i) entitled Mr. Poulin to the benefit of a lesser sentence that was applicable to his offences in the interval between their commission and sentencing (2017 QCCQ 7015, at paras. 26-27 (CanLII)).

[12] The Crown appealed, arguing, among other things, that a conditional sentence was not available to Mr. Poulin under s. 11(i) of the *Charter*. The Court of Appeal rejected the Crown's argument. It applied its earlier decision in *R. v. Belzil*, [1989] R.J.Q. 1117 (C.A.), which took for granted that s. 11(i) confers a global right (2018 QCCA 21, 43 C.R. (7th) 216, at paras. 32-33; *Belzil*, at p. 1139). Thus, the Court of Appeal held that s. 11(i) gave Mr. Poulin the right to a sentence that was not

on the books at the time of his offences, and that had been expressly repealed for his offences by the time of his sentencing.

[13] The Crown now appeals to this Court by leave.

[14] On February 22, 2019, shortly before the hearing of this appeal, Mr. Poulin passed away. The appeal proceeded nonetheless, accompanied by a Crown motion for the Court to adjudicate the appeal even though it had become factually moot.

III. Issues

[15] This appeal raises two issues:

- A. Should this Court exercise its discretion to decide this moot appeal?
- B. Does s. 11(i) of the *Charter* constitutionalize a binary or a global right?

IV. Analysis

- A. *Should this Court Exercise its Discretion to Decide this Moot Appeal?*

[16] As outlined above, Mr. Poulin passed away, a few weeks before the hearing of this appeal. Mr. Poulin's death occurred after the appellant Crown had filed its factum and after this Court had granted leave to intervene to the interveners.

[17] Upon learning of Mr. Poulin's death, the Crown filed a motion to proceed with its appeal, in accordance with s. 76 of the *Supreme Court Act*, R.S.C. 1985, c. S-26. Mr. Poulin's counsel wrote to the Crown saying that he would proceed to file the respondent's appeal materials by the deadline applicable to Mr. Poulin, which he ultimately did. Mr. Poulin's counsel later provided affidavit evidence confirming that Mr. Poulin's executor had instructed Mr. Poulin's counsel to continue representing Mr. Poulin's position on this appeal should this Court decide to hear it. The Crown's motion to proceed with the appeal was heard alongside the appeal. Mr. Poulin's counsel did not take a position on the motion to proceed.

[18] The Crown appropriately concedes that this appeal is moot in light of Mr. Poulin's death. However, the Crown argues that this Court should exercise its discretion to adjudicate this appeal despite its mootness. I agree.

[19] In *R. v. Smith*, 2004 SCC 14, [2004] 1 S.C.R. 385, this Court set out five (non-exhaustive) factors for determining whether there are exceptional circumstances warranting the adjudication of an appeal rendered moot by the accused's death. These factors are:

1. whether the appeal will proceed in a proper adversarial context;

2. the strength of the grounds of the appeal;
3. whether there are special circumstances that transcend the death of the individual appellant/respondent, including:
 - (a) a legal issue of general public importance, particularly if it is otherwise evasive of appellate review;
 - (b) a systemic issue related to the administration of justice;
 - (c) collateral consequences to the family of the deceased or to other interested persons or to the public;
4. whether the nature of the order which could be made by the appellate court justifies the expenditure of limited judicial (or court) resources to resolve a moot appeal;
5. whether continuing the appeal would go beyond the judicial function of resolving concrete disputes and involve the Court in free-standing, legislative-type pronouncements more properly left to the legislature itself.
[para. 50]

[20] Overall, these factors militate towards adjudicating the Crown's appeal.

[21] First, despite Mr. Poulin's death, Mr. Poulin's counsel submitted a full-length factum advancing Mr. Poulin's position and advocated for that position at the hearing of this appeal. The interveners the Criminal Lawyers' Association ("CLA") and the Association québécoise des avocats et avocates de la défense ("AQAAD") also provided the Court with perspectives aligned with Mr. Poulin's. Thus, this Court has had the benefit of adversarial submissions in this case.

[22] Second, the appellant's case is clearly more than "arguable" (see *R. v. McLellan*, 2019 NSCA 2, at para. 96 (CanLII)). The Crown's appeal raises an

important constitutional question that has not yet received comprehensive treatment in the jurisprudence. Indeed, the Crown points out that the existing s. 11(i) decisions addressing the binary/global question, while consistent, do not engage with, let alone identify, the underlying purposes of the right. This is a critical shortcoming because, as discussed below, the interpretation of a *Charter* right hinges on the right's purposes. There is, accordingly, “real substance” to the Crown’s appeal and the Crown raises a serious issue (*McLellan*, at para. 96).

[23] Third, the proper interpretation of s. 11(i) is “a legal issue of general public importance” which “transcend[s] the death” of Mr. Poulin. The binary/global question is the sole question on appeal in this case. By granting leave to appeal, this Court signalled that it considers the binary/global question to be of public importance and to merit closer analysis (see *Supreme Court Act*, s. 40(1)). Further, and unlike in *Smith*, the question in this appeal is not restricted to the facts of the case. To the contrary, the proper interpretation of this *Charter* provision engages a systemic issue related to the administration of justice, since s. 11(i) applies to all sentencing proceedings. As a result, the Crown, acting on behalf of the public, has a strong interest in seeing the question resolved (see *Forget v. Quebec (Attorney General)*, [1988] 2 S.C.R. 90, at p. 97). Moreover, this appeal has meaningful collateral consequences; the proper interpretation of s. 11(i) touches not only all persons found guilty of offences and their families, but also all persons interested in the sentencing of those offenders — which extends beyond victims and their loved ones to society at

large. As such, it is “in the public interest to address the merits to settle the state of the law” (*Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, at p. 364).

[24] Fourth, the value of this Court’s ruling on the proper interpretation of s. 11(i) clearly outweighs any concerns about limited judicial resources. At this stage and in these circumstances, the option most respectful of all participants’ resources is to decide the appeal. While a decision not to adjudicate this appeal might save *this* Court some resources in the short term, it would undoubtedly cost *other* courts and justice system participants additional resources in the longer term. It is much more efficient and fair for this Court to decide this question of national importance now, rather than cause future litigants and lower courts to expend further resources debating this question until, inevitably, it reaches this Court anew. There is a clear “social cost in leaving the matter undecided” which outweighs any small cost to this Court associated with deciding the appeal (*Borowski*, at pp. 361-62).

[25] Fifth, and finally, it is for the courts, not Parliament, to define the scope of *Charter* rights. Unlike in *Borowski*, this Court would not be intruding on the legislative role by answering the question put to it.

[26] Based on these five factors, I am satisfied that there is “a continuing controversy which, notwithstanding the death of the individual most directly affected by the appeal, requires resolution in the interests of justice” (*Smith*, at para. 4; see also para. 50). The Crown’s factum, filed prior to Mr. Poulin’s death, is exclusively concerned with the proper interpretation of s. 11(i), and not the sentencing of Mr.

Poulin *per se*. This demonstrates that this appeal raises a pure question of law that stands on its own, independent of the now moot factual context that initially gave rise to it. Indeed, it bears almost all of the hallmarks of an appeal warranting adjudication despite its mootness: it is of “importance to the administration of criminal justice”; has “a constitutional dimension”; requires “the interpretation of a statutory provision . . . of frequent application”; and involves a matter “in the daily business of our trial courts” (*R. v. Beaton*, 2018 ONCA 924, at para. 14 (CanLII)). This is therefore one of those “rare and exceptional” cases in which the Court ought to exercise its discretion to adjudicate a moot criminal appeal (*Smith*, at para. 10(2)). I would grant the motion to proceed with the appeal.

[27] In these reasons, I refer to the position advanced on behalf of Mr. Poulin as “Mr. Poulin’s position”, despite his death.

B. *Does Section 11(i) of the Charter Constitutionalize a Binary or a Global Right?*

[28] Section 11(i) of the *Charter* sits within a larger provision that protects “crucial fundamental rights” of the accused (*R. v. Wigglesworth*, [1987] 2 S.C.R. 541, at p. 558, per Wilson J.). Among the rights enshrined in s. 11 are the right to be presumed innocent (s. 11(d)); the right to a trial within a reasonable time (s. 11(b)); the right to trial by jury for certain serious offences (s. 11(f)); the right not to be compelled to be a witness against oneself (s. 11(c)); and the right not to be denied reasonable bail without just cause (s. 11(e)).

[29] Section 11(i) of the *Charter* states:

11. Any person charged with an offence has the right

...

(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

11. Tout inculpé a le droit :

...

i) de bénéficier de la peine la moins sévère, lorsque la peine qui sanctionne l'infraction dont il est déclaré coupable est modifiée entre le moment de la perpétration de l'infraction et celui de la sentence.

[30] The appellant Crown and the intervener the Attorney General of Ontario argue that s. 11(i) confers a binary right. In their view, the provision entitles the offender to the lesser of the punishments under the laws in force at two key points in time: commission of the offence and sentencing. The respondent Mr. Poulin and the interveners the CLA and the AQAAD claim that s. 11(i) confers a global right. On their view, the provision entitles the offender to receive the least onerous punishment that has existed for the offence since it was committed.

[31] Thus far, Canadian courts have favoured Mr. Poulin's approach. Courts across this country, including the Quebec Court of Appeal in this case, have consistently read s. 11(i) as conferring a global right (see, for instance, *Belzil*; *R. v. Cadman*, 2018 BCCA 100, 359 C.C.C. (3d) 427; *R. v. Bent*, 2017 ONSC 3189, 383 C.R.R. (2d) 161; *R. v. Yusuf*, 2011 BCSC 626; *R. v. Mehanmal*, 2012 ONCJ 681, 270

C.R.R. (2d) 271). Generally speaking, and as further detailed below, two factors have led these courts to conclude that s. 11(i) entitles an offender to receive a lesser punishment that was not applicable at the time of the offence's commission or of the offender's sentencing, but was applicable for a period at some point in between the two. The first factor is s. 11(i)'s use of the word "between". In their view, "between" indicates that the s. 11(i) right is concerned with the entire interval of time that elapses between the offence and sentencing. The second factor is the principle of liberal interpretation of *Charter* rights. According to them, this principle dictates that s. 11(i) should receive the interpretation most favourable to the offender.

[32] Absent from these decisions, however, is an analysis rooted in the purposes of s. 11(i). Indeed, these decisions do not examine the purposes of s. 11(i). Yet, the interpretation of a *Charter* right is a *purposive* endeavour (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344). A *Charter* right must be interpreted in light of the purpose or purposes driving it. In *Big M*, this Court explained that the purpose of a right or freedom is to be determined "by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*" (p. 344). Accordingly, a proper determination of whether s. 11(i) confers a binary or global right cannot be made without examining the purposes of the right by reference to these considerations.

[33] In *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, this Court stated that the underlying purposes of s. 11(i) are the rule of law and fairness. I begin my analysis by explaining how s. 11(i) reflects these two purposes. Building on this foundation, and in accordance with the methodology articulated in *Big M*, I examine the linguistic and historical context of s. 11(i). In my view, the text and history of this provision lend support to the binary interpretation. Furthermore, unlike the global interpretation, the binary interpretation is consistent with the purposes animating s. 11(i). Far from advancing the rule of law and fairness, a global interpretation of s. 11(i) would undermine them. Therefore, a purposive analysis of s. 11(i) leads to the conclusion that it confers a binary right.

[34] In order to engage in a purposive analysis of s. 11(i), it is necessary to understand how the provision would operate, both in general as well as under each of the binary and global approaches. We cannot appreciate the implications of the two competing approaches to s. 11(i), and whether these accord with the purposes of s. 11(i), without first understanding the basic mechanics of the provision and what each approach to the provision entails. I therefore begin by reviewing these mechanics. As will be seen, four questions arise when applying s. 11(i). The fact that s. 11(i) raises these questions is not in dispute. The questions naturally follow from the language of s. 11(i) and feature in the case law applying the right. As will be seen, what differs between the binary and global approaches to s. 11(i) is what they require to answer each of the four questions.

(1) Context: How Section 11(i) Operates

(a) *Question One: What Are the Applicable Sentencing Provisions?*

[35] It is clear from its wording that s. 11(i) involves a comparison between multiple “punishments” and an entitlement to the lesser of these. Thus, the first question that arises when applying s. 11(i) is “What are the various sentencing provisions attached to the offence at the relevant points in time?” The sentencing provisions needed to apply s. 11(i) in a binary manner are the ones in force at the time of the offence and the ones in force at the time of sentencing. By contrast, a global approach to s. 11(i) would require an exhaustive legislative history of all sentencing provisions associated with the offence since its commission. To respect Mr. Poulin’s s. 11(i) right under a global approach, all of the sentencing provisions bearing on gross indecency over the decades between Mr. Poulin’s offences and his sentencing would need to be identified. Otherwise, the least onerous punishment available in that interval might inadvertently be overlooked.

[36] As set out above, the crime of which Mr. Poulin was found guilty — gross indecency — was repealed in 1988, after he committed it. However, the parties agree that the sentencing provisions applicable to Mr. Poulin’s offences of gross indecency after that date are the ones applicable to the indictable sexual offences in the *Criminal Code*. Then, because amendments to the *Criminal Code* made the conditional sentence unavailable for these sexual offences, the parties agree that this sentence was similarly statutorily unavailable for Mr. Poulin’s counts of gross

indecenty at the time he was sentenced in 2017. Without the parties' agreement that the sentencing provisions applicable to the modern sexual offences apply to Mr. Poulin's acts of gross indecenty, it would have been necessary for the court to determine which crime(s) and associated provisions corresponded to Mr. Poulin's acts of gross indecenty after this crime was repealed.

(b) *Question Two: Which Measures Contained in These Sentencing Provisions Constitute "Punishments"?*

[37] Once the relevant sentencing provisions have been identified, the question becomes which of the measures or sanctions contained within these provisions constitute "punishments" in the sense contemplated by s. 11(i). In *K.R.J.*, at para. 41, this Court held that a measure will constitute punishment under s. 11(i) when:

(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. [Footnote omitted, para. 41.]

Notably, *K.R.J.* expanded the s. 11(i) concept of "punishment" beyond what it had been before. Specifically, *K.R.J.* added factor (3) to the test for punishment "to carve out a clearer and more meaningful role for the consideration of the impact of a sanction" (para. 41; see also paras. 28 and 36).

[38] Numerous measures and sanctions have been assessed against the s. 11(i) concept of “punishment”. The following measures have been found to qualify as punishment: the timing of eligibility for parole (*Liang v. Canada (Attorney General)*, 2014 BCCA 190, 355 B.C.A.C. 238, at paras. 27 and 43); pre-sentence custody (*R. v. S. (R.)*, 2015 ONCA 291, 333 C.R.R. (2d) 160, at para. 32); the conditions governing the “faint hope” regime (*R. v. Simmonds*, 2018 BCCA 205, 362 C.C.C. (3d) 215, at paras. 88-89); *Criminal Code* driving prohibition orders (*R. v. Wilson*, 2011 ONSC 89, 225 C.R.R. (2d) 234, at para. 37); and weapons prohibition orders (*Bent*, at para. 71; see also *R. v. Wiles*, 2005 SCC 84, [2005] 3 S.C.R. 895, at para. 3 (although not a s. 11(i) case)). By contrast, the following sanctions have been found *not* to constitute s. 11(i) “punishment”: post-conviction DNA databank orders (*R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554, at paras. 64-65); sex offender registration (or “SOIRA”) orders (see, for instance, *R. v. Cross*, 2006 NSCA 30, 241 N.S.R. (2d) 349, at para. 84); and provincial driving suspensions imposed in response to criminal convictions (*Wilson*, at para. 34). However, without commenting on their merits, I observe that these latter decisions were rendered prior to *K.R.J.*

[39] In this case, the parties accept that a conditional sentence is a “punishment” for the purposes of s. 11(i). Given my ultimate conclusion that s. 11(i) confers a binary right and therefore does not entitle Mr. Poulin to *any* “punishments” temporarily available in the interval between his offence and sentencing, I need not determine whether a conditional sentence constitutes a “punishment” to which Mr. Poulin could be entitled under s. 11(i).

[40] As the cases outlined above reveal, “punishment” is a broad concept. It captures not only traditional prison sentences, but also ancillary orders and other statutory measures. The consequence of this is significant: in light of the meaning of “punishment”, s. 11(i) does not involve the simple comparison of two or more *whole* sentencing provisions. Rather, s. 11(i) requires that the applicable sentencing provisions be parsed into their various measures. Each type of measure must then be evaluated under the *K.R.J.* test for “punishment”. In this evaluation, attention must also be paid to whether the measure at issue has been found to constitute “punishment” under ss. 11(h) or 12 of the *Charter*, as “punishment should be defined consistently across ss. 11 and 12 of the *Charter*” (*R. v. Boudreault*, 2018 SCC 58, at para. 38).

[41] It is only once the evaluation of all of the measures is complete that the court will have before it the various “punishments” that must be compared to identify the “lesser” punishment or punishments to which the offender is entitled under s. 11(i). A binary approach to s. 11(i) would only require the evaluation of the measures applicable at the two relevant points in time (offence and sentencing). In contrast, a global approach to s. 11(i) would require the evaluation of each and every type of measure that was applicable at some point during the entire interval between the offence and sentencing, no matter the length of that interval.

(c) *Question Three: Which Punishment(s) Represent the “Lesser” Punishment(s)?*

[42] Once the various “punishments” for the offence have been identified, they must be compared and contrasted to determine which one — or ones — reflect the “lesser” punishment. Often, this determination is obvious; it selects the shorter period of incarceration over the longer one, and the absence of a weapons prohibition over the imposition of one. However, sometimes the determination of the lesser punishment is more nuanced. For instance, the sentencing court comparing two competing sentencing regimes must be alive to the possibility that each of the regimes contains some ‘lesser’ aspect of punishment. To this end, in *R. v. Johnson*, 2003 SCC 46, [2003] 2 S.C.R. 357, this Court observed that while the new sentencing regime was more favourable to Mr. Johnson if he qualified as a long-term offender, the former regime would be more favourable to him if he did not, as it provided him with the benefit of an earlier parole hearing (para. 46).

[43] Just as it would require an evaluation of all sentencing measures available between the offence and sentencing to answer “Question Two”, the global approach would require a comparison of all *punishments* identified between the offence and sentencing to answer “Question Three”. On the other hand, answering “Question Three” under a binary approach to s. 11(i) would involve only the comparison of those punishments applicable under the laws in force at the time of the offence and the time of sentencing.

- (d) *Question Four: What Punishment(s) Must Be Imposed to Honour the Offender’s Section 11(i) Right?*

[44] Finally, once the sentencing court has isolated the lesser punishment or punishments, it must then sentence the offender according to that punishment or those punishments. This is, after all, the right that s. 11(i) confers, regardless of whether the right is binary or global. What it looks like to receive “the benefit of the lesser punishment” depends on the nature of the punishment in question.

[45] Where the offender does not need to satisfy any statutory criteria to obtain the lesser punishment, receiving the benefit of the lesser punishment simply means having that punishment applied. Thus, if the punishments being compared are a maximum sentence of 7 years’ imprisonment and a maximum sentence of 14 years’ imprisonment, receiving the benefit of the lesser punishment means receiving, at most, a sentence of 7 years’ imprisonment (see *Tran v. Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50, [2017] 2 S.C.R. 289, at para. 37). In the same vein, s. 11(i) would entitle an offender to a fine of \$100 if, at the time of his offence, the law imposed a mandatory fine of \$500, but, by the time of his sentencing, the amount of the mandatory fine had dropped to \$100. Importantly, in such cases, the sentencing judge is bound under s. 11(i) to impose the lesser punishment, regardless of whether the judge considers a more onerous punishment to be fit and proportionate.

[46] Where the lesser punishment has built-in criteria that the offender must meet to qualify for the punishment, receiving the benefit of that punishment means, at a minimum, having the court consider the punishment. If the court finds that the

offender meets the criteria, the offender becomes entitled to that punishment. This was demonstrated in *Johnson*, in which this Court held that s. 11(i) obliged the sentencing judges to consider whether the offenders satisfied the criteria of the newer, more favourable long-term offender regime, before automatically applying the harsher dangerous offender regime already in place when the offenders committed their offences. If the offenders satisfied the criteria of the long-term offender regime, they were entitled to long-term supervision orders as long-term offenders following determinate periods of incarceration, instead of indeterminate detention as dangerous offenders (para. 45).

[47] Notably, the punishment sought by Mr. Poulin in this case, a conditional sentence, is a form of sentence with built-in prerequisites and criteria (see *Criminal Code*, s. 742.1, and, in particular, para. (a); see also *R. v. R.A.R.*, 2000 SCC 8, [2000] 1 S.C.R. 163, at paras. 14-16 and 25). Therefore, if this sentence were applicable to Mr. Poulin (which I find it is not), and if it were found to constitute the lesser punishment, Mr. Poulin would only be entitled to it if the sentencing judge found that Mr. Poulin met the relevant statutory criteria.

[48] Finally, where the punishments being compared are qualitatively different versions of a provision or sentencing regime, receiving the benefit of the lesser punishment means being sentenced under the more favourable provision or regime. Thus, in *K.R.J.*, the order prohibiting the offender from communicating with children had to conform with the version of s. 161(1)(c) of the *Criminal Code* in force at the

time of K.R.J's offence, not the version in force when he was sentenced, which was more restrictive of liberty (paras. 57 and 115). Similarly, in *Liang*, the Court of Appeal held that the offenders were entitled to access the automatic, accelerated parole review ("APR") process that was applicable to them and their offences when they committed those offences. By virtue of s. 11(i), the offenders could not be subjected to the more restrictive parole eligibility rules that had replaced the APR regime (see also *Canada (Attorney General) v. Lewis*, 2015 ONCA 379, 126 O.R. (3d) 289, and *Nucci v. Canada (Attorney General)*, 2015 MBCA 122, 333 C.C.C. (3d) 222, which follow *Liang*).

[49] Crucially, and as a number of these examples illustrate, granting the offender the benefit of the lesser punishment does not simply equate to providing the court with an additional sentencing option (or additional sentencing options) to consider. Rather, s. 11(i) redefines and delimits the scope of the court's options. It sets the parameters in which the sentencing court is permitted to operate. Those parameters are determined by the lesser punishment. Therefore, instead of lengthening the list of available punishments, a global approach to s. 11(i) would winnow down the sentencing court's options to those contained within the least onerous punishment on the books for the relevant offence since the offence's commission. Of course, if this "least" punishment involved criteria which the offender did not meet, a global approach to s. 11(i) would require the court to apply the "next least" punishment. In this sense, a global s. 11(i) right would also

sometimes require the sentencing court to create a kind of “ranking” of the lowest punishments.

[50] Having itemized the four questions that arise when applying s. 11(*i*), I acknowledge that, generally speaking, parties invoking a global s. 11(*i*) right have not systematically asked and answered them. Instead, the offender has typically requested and received a particular lesser punishment available at some time in the interval between the offence and sentencing. Indeed, this is what occurred in Mr. Poulin’s case. Rather than canvassing all of the sentencing measures available for his offence since he committed it, he proposed to the court a conditional sentence, presumably considering it to be the most favourable “lesser punishment”.

[51] However, this approach is not what the global interpretation of s. 11(*i*) contemplates. As the jurisprudence reviewed in this section reveals, under the global approach, the sentencing court cannot be satisfied that it has respected the offender’s constitutional right to receive “the benefit of the lesser punishment” unless it has canvassed and evaluated all of the relevant sentencing provisions and compared and contrasted all of the relevant “punishments”. The failure to do so may result in the offender being subjected to a harsher punishment than the one to which they are constitutionally entitled if a global approach to s. 11 (*i*) is taken.

[52] In essence, the global approach posits that these numerous historical punishments be considered as potentially applicable sentences even though they bear no temporal relationship to the offender’s unlawful actions or the legal proceedings

commenced against the offender in respect of those actions. If such an approach to s. 11(i) is to be adopted, it must be warranted by the right's purposes. I now turn to those purposes.

(2) Purposive Analysis

[53] As outlined above, a *Charter* right must be interpreted purposively — that is, in a manner that is justified by its purposes. This bears repeating because, as this Court has observed, “purposive” can be mistakenly conflated with “generous” (*R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at para. 17; see also P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.) vol. 2, at p. 36-30). This is despite this Court's instruction in *Big M* that, in applying a generous — rather than legalistic — lens, “it is important not to overshoot the actual purpose of the right or freedom in question” (p. 344). As was re-iterated in *Grant*, “[t]he purpose of a right must always be the dominant concern in its interpretation; generosity of interpretation is subordinate to and constrained by that purpose” (para. 17). This is because an overly generous reading of a right risks protecting “behaviour that is outside the purpose and unworthy of constitutional protection” (Hogg, at p. 36-30). Indeed, “[i]n the case of most rights . . . the widest possible reading of the right, which is the most generous interpretation, will ‘overshoot’ the purpose of the right . . .” (Hogg, at p. 36-30).

[54] Thus, while it has often been said that *Charter* rights must be interpreted in a “large and liberal” manner, they are ultimately bounded by their purposes. Put differently, *Charter* rights, including s. 11(i), must be interpreted liberally within the

limits that their purposes allow. This was acknowledged in *K.R.J.*, in which the Court held that s. 11(i) warranted a “liberal and purposive approach”. Indeed, in that case, the Court justified its liberal interpretation of the term “punishment” by linking it to the purposes of s. 11(i). The Court explained that the rule of law and fairness purposes of s. 11(i) would, in fact, be “compromised” if a liberal interpretation of “punishment” were not adopted (para. 37). Similarly, in *R. v. Sinclair*, 2010 SCC 35, [2010] 2 S.C.R. 310, a majority of this Court held that the right in s. 10(b) of the *Charter* “to retain and instruct counsel” upon arrest or detention does not grant detainees the right to suspend their police interrogations to consult counsel upon reasonable request. The majority rejected this generous interpretation of s. 10(b) as the purpose of the right did not warrant it (*Sinclair*, at paras. 36 and 56-57). Rather, the purpose of s. 10(b) was satisfied by a more measured reading of the right, which permits detainees under interrogation to consult counsel anew when a change of circumstances in the course of the investigation justifies consultation.

[55] In my respectful view, courts that have given s. 11(i) a global reading have fallen into the error identified in *Grant* of prioritizing generosity over purpose. Rather than identifying the principles or purposes underlying s. 11(i), they have simply concluded that s. 11(i) should be given the interpretation most generous to the accused, which they have called the liberal interpretation (see *Yusuf*, at para. 30 (CanLII); *Mehannal*, at paras. 75-76; *R. v. Holt*, 2017 ONCJ 51, at para. 17 (CanLII); *Bent*, at para. 79; see also *Cadman*, which relies on these paragraphs of *Yusuf* and *Bent*). However, the principle that a provision bearing more than one plausible

meaning must be read in a manner that favours the accused is not a principle of *Charter* interpretation. It is a principle of penal statutory interpretation (see *R. v. McIntosh*, [1995] 1 S.C.R. 686, at paras. 27, 29 and 38-39; *R. v. Dunn*, [1995] 1 S.C.R. 226, at para. 28). As just explained, *Charter* rights do not automatically receive the most generous interpretation that their language can bear (see *Sinclair*, at paras. 19-23 and 35-36); see also, for example: *Wigglesworth*, at pp. 553-54, in which this Court gave a “narrower interpretation” to the broad opening words of s. 11 (“[a]ny person charged with an offence”); *Carter v. The Queen*, [1986] 1 S.C.R. 981, per Lamer J.; *R. v. Kalanj*, [1989] 1 S.C.R. 1594, per McIntyre J.; *R. v. Potvin*, [1993] 2 S.C.R. 880, per Sopinka J., in which this Court held that the right “to be tried within a reasonable time” under s. 11(b) of the *Charter* does not protect against pre-charge delay or appellate delay).

[56] In light of the above, it is necessary to approach the determination of whether s. 11(i) confers a binary or a global right from an understanding of the purposes of s. 11(i) — and not simply from the perspective of the interested offender.

[57] Echoing this Court’s statement in *Big M*, Professor Hogg observes that guidance about a right’s purposes “can be obtained from the language in which the right is expressed, from the implications to be drawn from the context in which the right is to be found, including other parts of the *Charter*, from the pre-*Charter* history of the right and from the legislative history of the *Charter*” (p. 36-30). In this case, I find that the language and origins of s. 11(i), in particular, provide helpful indicia of

the provision's meaning. Therefore, after reviewing the purposes of s. 11(i) already identified in *K.R.J.*, I study the language and origins of s. 11(i). Then, with the purposes, language and origins of s. 11(i) in mind, I turn to the heart of the purposive analysis: deciding which interpretation of s. 11(i) is supported by the right's purposes.

(a) *The Recognized Purposes and Effect of Section 11(i)*

[58] At common law, the general rule is that an accused must be tried and punished under the substantive law in force at the time the offence was committed, rather than the law in force at any other time — such as at trial or sentencing (*R. v. Kelly*, [1992] 2 S.C.R. 170, at p. 203, per McLachlin J.; *Johnson*, at para. 41; *K.R.J.*, at para. 1; *R. v. Hooyer*, 2016 ONCA 44, 129 O.R. (3d) 81, at para. 42. I call this a “general rule” as it can sometimes be displaced by other interpretive rules or principles). Where the law changes after an offence is committed, the new criminal provisions are generally presumed not to apply retrospectively to the offence (*R. v. Dineley*, 2012 SCC 58, [2012] 3 S.C.R. 272, at paras. 10, 35 and 45-46; *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301; *Tran*, at para. 43; *R. v. Bengy*, 2015 ONCA 397, 325 C.C.C. (3d) 22). This explains why, in this case, the state was able to charge Mr. Poulin in 2014 for an offence that had been repealed from the *Criminal Code* in 1987. While the offence no longer existed when Mr. Poulin was charged, convicted and sentenced, it existed when he committed his offences of gross indecency between 1979 and 1983 (see also *Interpretation Act*, R.S.C. 1985, c. I-21, s. 43).

[59] The rationale for this common law rule is the rule of law and, more specifically, the principle of legality. The principle of legality dictates that persons who rely on the state of the law in conducting themselves, or who risk the liability associated with a law in breaking it, should not subsequently be held to different laws, particularly more stringent ones (*K.R.J.*, at paras. 22-25). This principle is a pillar of the criminal law. In *K.R.J.*, this Court recognized that it lies at the heart of s. 11(*i*) (paras. 2, 23-24, 27 and 37). Section 11(*i*) safeguards the principle of legality by “constitutionally enshrining the fundamental notion that criminal laws should generally not operate retrospectively” (*K.R.J.*, at para. 22). The principle of legality also finds expression, for instance, in s. 11(*g*) of the *Charter*, which protects a person against being convicted for an act which was not a crime when the person engaged in it. As explained in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, at p. 1152:

[T]here can be no crime or punishment unless it is in accordance with law that is certain, unambiguous and not retroactive. The rationale underlying this principle is clear. It is essential in a free and democratic society that citizens are able, as far as is possible, to foresee the consequences of their conduct in order that persons be given fair notice of what to avoid

[60] Section 11(*i*) of the *Charter* enshrines the common law rule that an offender should not be retrospectively subjected to a heavier punishment than the one applicable at the time the person committed the offence (*Canada (Attorney General) v. Whaling*, 2014 SCC 20, [2014] 1 S.C.R. 392, at para. 55; *K.R.J.*, at para. 22). However, it does not stop there. Section 11(*i*) constitutionalizes an additional

protection. It stipulates that, where the law provides a more favourable punishment at the time of the offender's sentencing than it did at the time of the offence, the offender is entitled to the benefit of this more favourable, current punishment. This is so even though the offender actively risked a greater punishment in committing the offence.

[61] Why, then, should the offender enjoy access to a lower present-day punishment? The clear rationale is fairness (see *K.R.J.*, at paras. 2, 27, 37 and 39). It would not be fair to subject an offender to a punishment which, in choosing to reduce it, Parliament has expressly recognized as no longer appropriate. Further, a criminal sentence is an expression of society's collective voice; it is meant to reflect contemporary values. It would frustrate a fundamental principle of sentencing — proportionality (*Criminal Code*, s. 718.1) — to impose a disproportionately high, outdated punishment which no longer reflects the moral blameworthiness of the offence. Thus, an offender who committed an offence at a time when that offence attracted a life sentence should not be imprisoned for life if, at the moment of sentencing, the offence now attracts a lesser sentence of imprisonment. Instead of being unfairly subjected to a sentence which is out of step with current moral norms, this offender should receive the benefit of society's current, modernized view of the offender's conduct.

[62] By adopting this view and entitling the offender to lesser, current punishments, s. 11(i) involves an expansion of the offender's common law right to be

judged according to the law in force at the time of the offence. The additional protection that s. 11(i) confers is, therefore, access to a *decrease* in punishment which coincides with an important step in the proceedings — namely, sentencing. Instead of merely guaranteeing to the offender the punishment applicable at the time of the offence, s. 11(i) designates that punishment as *the ceiling*. An offender is entitled to the benefit of that punishment if it is favourable to the offender, and to the benefit of a lesser punishment if one has replaced the first punishment. The result is that, where the punishment at the time of the offence is lesser, the offender is entitled to it even though its imposition might mean that the offender receives a punishment which is now considered disproportionately low. Conversely, where the current punishment is lesser, the offender is entitled to it even though the offender might have risked a much higher punishment at the time the offender broke the law. In this way, s. 11(i) balances, on one hand, the principle of the rule of law (or legality) and, on the other, the principle of fairness (see F. Chevrette, H. Cyr and F. Tanguay-Renaud, “La protection lors de l’arrestation, la détention et la protection contre l’incrimination rétroactive”, in G.–A. Beaudoin and E. Mendes, eds., *Canadian Charter of Rights and Freedoms* (4th ed. 2005), at p. 781).

[63] The parties and interveners appear to agree that the rule of law and fairness are underlying purposes of s. 11(i). Their dispute centres on whether these purposes support a binary or a global interpretation of s. 11(i). For its part, and as further discussed below, the CLA asserts that an additional purpose of s. 11(i) is to counteract the randomness or arbitrariness of the timing of one’s sentencing. I see no

indication of such a purpose in the right's language or origins. To the contrary, I find that the language and origins of s. 11(i) lend support to a binary interpretation of the provision. I examine each of them next.

(b) *The Language of Section 11(i)*

[64] When conducting a purposive analysis of a *Charter* right, “the starting point must be the language of the section” (*Grant*, at para. 15). To reiterate, s. 11(i) reads:

11. Any person charged with an offence has the right

...

(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

11. Tout inculpé a le droit :

...

i) de bénéficier de la peine la moins sévère, lorsque la peine qui sanctionne l'infraction dont il est déclaré coupable est modifiée entre le moment de la perpétration de l'infraction et celui de la sentence.

[65] In support of a binary interpretation of this right, the Crown emphasizes the word “lesser” in “lesser punishment”, which denotes the lower of *two* options. It says that, had Parliament intended for s. 11(i) to confer a global right, it could have specified that the offender was entitled to the “least severe punishment” instead of the

“lesser punishment”. To the extent that the French version of s. 11(i) employs broader language evoking the least severe punishment (“*la peine la moins sévère*”), the Crown says that, in this case, the English wording must take precedence. This is because of the established principle of bilingual interpretation that the authoritative meaning is the common meaning between the two provisions (*R. v. Daoust*, 2004 SCC 6, [2004] 1 S.C.R. 217, at paras. 26 and 29; *Montréal (City) v. Québec (Commission des droits de la personne et des droits de la jeunesse)*, 2008 SCC 48, [2008] 2 S.C.R. 698, at para. 53). As “least” encompasses “lesser”, the latter is the common meaning between the two.

[66] For his part, Mr. Poulin emphasizes the word “between”, which he says demonstrates Parliament’s intent that s. 11(i) capture those punishments available *in the interval between* the offence and sentencing. As set out above, the courts in *Cadman*, at para. 44, *Bent*, at para. 79, and *Mehannal*, at para. 75, placed similar reliance on the term “between” in reading s. 11(i) globally.

[67] I do not find that the use of “between” favours a global reading of s. 11(i). In my view, this wording is consistent with both a binary and a global interpretation of s. 11(i). While it evokes an interval, an interval, in itself, does not suggest a global interpretation. This is because, for a different punishment to exist at the time of sentencing than existed at the time of the offence, the punishment must necessarily have changed *in the interval between* those two times. By its orientation toward change during that interval, s. 11(i) does not necessarily constitutionalize a right to

the most favourable of any multiple changes in that interval. Put simply, s. 11(i)'s use of "between" tells us nothing about whether the right it confers is binary or global; it only tells us that s. 11(i) concerns itself with the situation where the punishment has been "varied between" the time of the offence and the time of sentencing — whether only once or multiple times.

[68] Not only do I reject Mr. Poulin's reliance on "between", I agree with the Crown that "lesser" evokes the comparison of two options. Whereas comparative terms ending in "est" or "st" single out one thing from the others, comparative terms ending in "er" contrast one thing with another. For instance, we speak of the "better" of two options and the "best" of multiple, the "higher" of two heights and the "highest" of multiple, the "faster" of two speeds and "fastest" of multiple, to give only a few examples. Instead of employing the obviously global phrase "the least severe punishment" (or even "the lowest punishment"), s. 11(i) uses the binary language "the lesser punishment". "Lesser" further reflects the more specific, common meaning between the two articulations of s. 11(i) (*R. v. Stillman*, 2019 SCC 40, at para. 32; see also *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at paras. 85-87, per Bastarache J., concurring; *R. v. S.A.C.*, 2008 SCC 47, [2008] 2 S.C.R. 675, at para. 15). As such, I reject the view that the use of "between" overcomes, or even counterbalances, the use of "lesser".

[69] Further, I find that the origins and history of s. 11(i) corroborate the conclusion that s. 11(i) was worded to confer a binary right.

(c) *The Origins of Section 11(i)*

[70] Unlike those *Charter* rights that refer to evolving, open-ended standards — such as “reasonable” and “unreasonable” (ss. 8, 11(a), 11(b) and 11(e)), “fundamental justice” (s. 7), and “cruel and unusual” (s. 12) — s. 11(i) enunciates a rule with a particular application. In simple terms, s. 11(i) was enacted to confer a particular, constant protection. As explained above, the protection that s. 11(i) confers is something greater than the general common law entitlement to be judged according to the substantive law in force at the time of the offence. To understand what protection s. 11(i) is meant to confer, and in accordance with the direction in *Big M*, it is useful to review the origins of the right. While these are not determinative of the right’s proper scope, they provide an instructive starting point.

[71] As the following history reveals, there was nothing to inspire a global s. 11(i) right at the time of its drafting and enactment. A global right was not part of the legal landscape; the common law certainly did not recognize one, and none of the enactments inspiring s. 11(i) embraced one either.

[72] Published by the Government of Canada in 1969, possibly the earliest documented draft of what is now s. 11(i) (then s. 11(g)) read:

(g) the right of a person not to be held guilty of an offence on account of any act or omission which at the time of its commission or omission did not constitute an offence, and the right of a person on being found guilty of an offence not to be subjected to a penalty heavier than the one applicable at the time the offence was committed;

(Government of Canada, The Right Honourable P. E. Trudeau, *The Constitution and the People of Canada: An Approach to the Objectives of Confederation, the Rights of People and the Institutions of Government* (1969), at p.54 (Emphasis added))

As is apparent, this early draft of s. 11(i) simply enshrined the common law principle that an offender should only face as heavy a punishment as they risked at the time of their offence. This version did not entitle the offender to any decrease in punishment occurring after the offence.

[73] The 1969 publication introducing this provision notes that, unlike many of the other legal rights contained in the *Charter*, s. 11(i) did not have an existing counterpart in the *Canadian Bill of Rights*, S.C. 1960, c. 44 (Government of Canada, at p. 54). However, the policy paper does not explain the origin of the right.

[74] Nonetheless, it is reasonable to assume that this first articulation of s. 11(i) was inspired by two similar provisions. The first is s. 37(e) of the *Interpretation Act*, S.C. 1967-1968, c. 7 — a form of which has existed since 1886 (*Dunn*, at paras. 17 and 41), and which is now expressed in s. 44(e) of the *Interpretation Act*, R.S.C. 1985, c. I-21. Section 37(e) stated (and s. 44(e) continues to state, with minor changes):

37. Where an enactment (in this section called the “former enactment”) is repealed and another enactment (in this section called the “new enactment”) is substituted therefor,

...

(e) when any penalty, forfeiture or punishment is reduced or mitigated by the new enactment, the penalty, forfeiture or punishment if imposed or adjudged after the repeal shall be reduced or mitigated accordingly;

Mr. Poulin agrees that s. 11(i) was inspired by what is now s. 44(e) (R.F., at para. 55). Indeed, s. 11(i) has been characterized as the constitutional entrenchment of s. 44(e) of the *Interpretation Act* (Chevrette, Cyr and Tanguay-Renaud, at pp. 780-81; see also the comments of L'Heureux-Dubé J. in *Dunn*, at paras. 49-50, although dissenting, she was not contradicted by the majority).

[75] The second provision which can be credited for inspiring the first draft of s. 11(i) is art. 7(1) of the *European Convention on Human Rights*, 213 U.N.T.S. 221 (“*ECHR*”), which came into force on September 3, 1953. While Canada is not a party to the *ECHR*, the first draft of s. 11(i) bears strong resemblance to art. 7(1), which stated (and continues to state):

(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

[76] In 1976, Canada acceded to the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47 (“*ICCPR*”). Article 15(1) of the *ICCPR* said (and continues to say):

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

Notably, the first two sentences of art. 15(1) practically duplicate the entirety of art. 7(1) of the *ECHR*. It is only the last sentence of art. 15(1) — which codifies the equivalent of “the benefit of the lesser punishment” — which is distinct. The *ICCPR* appears to have been among the first international instruments to codify the “relatively modern” principle that an offender should benefit from a post-offence decrease in punishment — which is sometimes called the “*lex mitior*” principle (P. Westen, “*Lex Mitior: Converse of Ex Post Facto and Window into Criminal Desert*” (2015), 18 *New Crim. L. Rev.* 167, at pp. 169-70; *R. v. Docherty*, [2016] UKSC 62, [2017] 4 All E.R. 263, at para. 32).

[77] After Canada acceded to the *ICCPR*, the draft language of s. 11(i) changed. By 1979, it reflected the right to a decrease in punishment, saying:

(g) the right to the benefit of the lesser punishment where the punishment for an offence of which he or she has been convicted has been varied between the time of commission and the time of conviction;

(Meeting of Officials on the Constitution, *Canadian Charter of Rights and Freedoms (Draft for Discussion Purposes Only)*, (1979), div. III, at p. 4)

With the exception of “the time of conviction” as the relevant end point, this is effectively the same language now enshrined in s. 11(i), albeit structured differently. By 1980, the words “time of sentencing” had replaced the words “time of conviction” (“Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada” in *The Canadian Constitution 1980: Proposed Resolution respecting the Constitution of Canada* (1980), at p. 18).

[78] As stated in the explanatory notes to the 1980 draft, s. 11(i), among other rights, was drawn from similar provisions in the *ICCPR*, including art. 15(1) (*Proposed Resolution*, at p. 18). However, the drafters did not give s. 11(i) identical scope to art. 15(1). Whereas the language of art. 15(1) grants an offender the seemingly more expansive and indefinite right to a lesser punishment enacted “subsequent to the commission of the offence”, the text of s. 11(i) limits the offender’s entitlement to “the time of sentencing”. This important difference was deliberate (see Senate and House of Commons, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, No. 47, 1st Sess., 32nd Parl., January 28, 1981 (“Committee”), at pp. 65-69).

[79] The Committee’s discussion about cutting off s. 11(i) at “the time of sentencing” was its only discussion about s. 11(i) over its 56 sitting days. The Committee did not expressly consider whether s. 11(i) confers a binary or global

right. The House of Commons debates from 1980 to 1983 similarly do not reflect any consideration of this question.

[80] Nonetheless, there is good reason to believe that s. 11(*i*) was intended to confer no more than the binary right reflected in its language; none of the three provisions inspiring s. 11(*i*) endorsed a global right.

[81] As Mr. Poulin acknowledges in his factum, s. 44(e) of the *Interpretation Act* is binary in nature. This provision entitles an offender to a reduced punishment in the “new enactment” if that enactment is in force by the time punishment is “imposed or adjudged”. This merely confers on an offender the benefit of any *current* lesser punishment. This provision therefore cannot have inspired a global s. 11(*i*) right. To the contrary, it seems to have planted the seed of a binary right.

[82] Likewise, the *ECHR* could not have inspired a global s. 11(*i*) right. From 1978 until 2009, the second sentence of art. 7(1) of the *ECHR* was understood as merely codifying the principle that an offender cannot be subjected to a heavier penalty than the one applicable when the offence was committed (*X. v. Federal Republic of Germany*, Application No. 7900/77, March 6, 1978, D.R. 13 (E.C.H.R.) p. 70; *Scoppola v. Italy (No. 2)*, [2009] ECHR 1297, 51 E.H.R.R. 12, at paras. 103-9). Indeed, there is no language whatsoever in art. 7(1) reflecting the principle that an offender should benefit from a decrease in punishment — let alone a *global* version of that principle. In fact, as the Supreme Court of the United Kingdom observed in *Docherty*, at para. 32, “An additional sentence containing [the] *lex mitior* principle

(benefit of a more lenient penalty) was considered and rejected when art. 7 ECHR was adopted in 1950” (see para. 55, and the partly dissenting reasons of Judge Nicolaou in *Scoppola*, at pp. 364-65). I acknowledge that in 2009, in *Scoppola*, a majority of a divided Grand Chamber of the European Court of Human Rights departed from its own precedent and superimposed a global right onto art. 7(1). (I address the merits of this decision below.) Nonetheless, it remains the case that, at the time of the *Charter*’s enactment, art. 7(1) was not understood as conferring a global right.

[83] Article 15(1) of the *ICCPR* is admittedly more ambiguous. Like s. 11(*i*), it employs binary language (“the lighter penalty”), but, as stated above, the rest of its language is quite expansive. The parties have not identified, nor am I aware of, any decisions or General Comments of the United Nations Human Rights Committee grappling with the binary/global question in relation to art. 15(1). It therefore appears to remain undecided whether art. 15(1) confers a binary or a global right. As such, I do not see how art. 15(1) could have caused the drafters of the *Charter* to deviate from a binary approach to s. 11(*i*) built upon s. 37(e) of the *Interpretation Act* and art. 7(1) of the *ECHR*.

[84] From this review of the origins of s. 11(*i*), I see no indication that s. 11(*i*) enshrined a right broader than the binary one suggested in its wording. While a binary right was already expressly recognized in the *Interpretation Act* at the time of the *Charter*’s enactment, a global right was nowhere to be found.

[85] What remains to be seen is whether the purposes of s. 11(i) support a global interpretation of s. 11(i), or whether there is any purposive basis to read s. 11(i) globally. While the origins of s. 11(i) do not support a global interpretation, s. 11(i) could still receive that interpretation if its purposes justified it (see *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, per Lamer J.). However, I find that the purposes of s. 11(i) do not support a global right. I now conduct this central analysis.

(d) *The Purposes of Section 11(i) Give Rise to a Binary Right*

[86] To reiterate, the purposes animating s. 11(i) are the rule of law and fairness. Of these purposes, Mr. Poulin and the CLA argue primarily that it is the fairness principle that demands a global interpretation of the right.

[87] In particular, Mr. Poulin and the CLA submit that a binary interpretation of s. 11(i) would result in unfairness where, for instance, two offenders who committed the same crime at the same time are sentenced at different times, when different sentencing regimes are in force. They argue that, under a binary s. 11(i) right, these two offenders would have constitutional rights to different punishments. The AQAAD also claims that this result would be arbitrary as offenders do not control the timing of their investigations, prosecutions and sentencings, nor the timing of legislative changes to sentencing provisions.

[88] I offer the following hypothetical to illustrate the kind of situation contemplated by these parties:

- “A” and “B” commit the same offence at the same time. The punishment for the offence is at “Level 3”.
- The punishment for the offence temporarily drops to “Level 1”.
- A is sentenced and receives a “Level 1” sentence.
- The punishment for the offence rises to “Level 2”.
- B is sentenced and receives a “Level 2” sentence.

[89] There are, in my view, three crucial flaws with the argument that fairness (and, in particular, concerns about arbitrariness) mandate a global interpretation of s. 11(i).

[90] First, it is not unfair or arbitrary for an offender like B to be punished according to the laws in force at the time he committed his offence, or a more favourable law, if one is in force when he is sentenced. To the contrary, these two laws are *linked* to the offender and the proceedings against him; the first sets out the punishment he risked incurring at the time he acted, and the other likewise sets the contours for a sentence that reflects society’s attitude about the gravity of the offence and the responsibility of the offender at the precise moment that the sentence is imposed. These punishments are therefore tethered to two points in time that bear a deep connection to the offender’s conduct and criminality. It is, accordingly, fair and rational for the offender to have the benefit of one of these punishments. Conversely, there is no principled basis to grant an offender like B the benefit of a punishment

which has no connection to his offending conduct or to society's view of his conduct at the time the court is called upon to pass sentence.

[91] The fact that one of the two hypothetical offenders described above, A, receives a more lenient punishment than the other, B, is justified by society's changed sense of the gravity of the offence as between the dates of A and B's sentencings. This is not arbitrary; this is the reality of legislative change. One offender is not treated unfairly, or arbitrarily, by the other being sentenced at a time when society looks more forgivingly upon the offence.

[92] Without using its name, Mr. Poulin, the CLA and the AQAAD essentially resort to the sentencing principle of "parity" in arguing that s. 11(i) must be read in a manner that treats like offenders alike at sentencing. This principle, set out in s. 718.2(b) of the *Criminal Code*, instructs that "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances". Yet this principle has never guaranteed similar offenders equivalent sentences across different sentencing regimes. Indeed, it has never guaranteed like offenders equivalent sentences within the *same* regime (*R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 92). As stated in *R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163, at para. 36:

Owing to the very nature of an individualized sentencing process, sentences imposed for offences of the same type will not always be identical. The principle of parity does not preclude disparity *where warranted by the circumstances*, because of the principle of proportionality (see *Dadour*, at p. 18). As this Court noted in *M. (C.A.)*, at

para. 92, “there is no such thing as a uniform sentence for a particular crime”. [Emphasis in original.]

A different sentencing regime is clearly a circumstance that warrants a different sentence. To put it in terms of the hypothetical above, the difference in punishments for A and B “can be rationally explained” by the change in legislation (*R. v. Klemenz*, 2015 SKCA 89, 465 Sask. R. 134, at para. 46).

[93] By insisting that the two offenders in the hypothetical ought to be entitled to the same, lowest punishment, Mr. Poulin, the CLA and the AQAAD elevate their misplaced concern about unfairness or arbitrariness *as between these two offenders* above the settled principles of s. 11(i) — namely that an offender should not be “ambushed” by a subsequent aggravation of the applicable punishment and that an offender should not be subjected to an outdated harsher punishment. Proportionality looks in part to “the gravity of the offence” (*Criminal Code*, s. 718.1). Apart from the time of commission, it does not look to Parliament’s former sense of the gravity of the offence, merely because it had once been more favourable to the offender.

[94] It is worth noting that, in the above hypothetical, both offenders receive a benefit. Both receive a punishment lower than the one in place at the time they committed the offence: A receives a Level 1, and B receives a Level 2, when the punishment they risked at the time of the offence was a Level 3. While s. 11(i) provides them with different lesser punishments from each other, they both receive

the protection of a binary s. 11(i) right at their time of sentencing. They both face, as a *maximum* punishment, the punishment applicable at the time of their offence.

[95] Second, and more fatally to the logic of their position, a global approach to s. 11(i) would not, in fact, ensure identical results for two offenders who committed their offences at the same time. This is illustrated by the following hypothetical, which, incidentally, was raised by the CLA:

- “A” and “B” commit an offence together. The punishment is a mandatory minimum sentence.
- A and B are tried separately.
- A is found guilty and sentenced to the mandatory minimum.
- B’s trial ends in a mistrial. B undergoes a second trial.
- The mandatory minimum is abolished.
- B is found guilty and sentenced, without the mandatory minimum.

Notably, a global approach to s. 11(i) would not assist A here. Unlike in our previous hypothetical, this offender did not lose out on a lesser, intermediary sentence because of the timing of his sentencing. Rather, it just so happened that B’s proceedings took longer, and lasted until a more favourable punishment was enacted. In essence, all that the CLA’s hypothetical serves to illustrate is that individual offenders’ proceedings can, inevitably, progress at different paces. As this hypothetical reveals,

a global approach to s. 11(i) cannot prevent or counteract differences in treatment that flow from different proceedings progressing at their own paces.

[96] I offer a second hypothetical to demonstrate that a global interpretation of s. 11(i) could not succeed in ensuring that like offenders receive the same punishment:

- “A” commits an offence. The punishment for the offence is at “Level 2”.
- The punishment for the offence temporarily drops to “Level 1”.
- The punishment for the offence is quickly restored to “Level 2”.
- “B” commits the same offence.
- The punishment for the offence is increased to “Level 3”.
- A and B are both found guilty of the offence and are sentenced on the same day.

Under a global approach to s. 11(i), A would receive the benefit of a Level 1 punishment, as it was in place — albeit temporarily — between A’s offence and sentencing. Meanwhile, B would only receive the benefit of a Level 2 sentence, even though the offenders both offended when the applicable punishment was at Level 2 and were both sentenced when the applicable punishment was at Level 3. Despite their identical positions, a global interpretation of s. 11(i) arbitrarily bestows a greater benefit upon A. I therefore do not see how a global approach to s. 11(i) can be

championed on the basis that it meaningfully counteracts a certain inherent arbitrariness in the timing of one offender's sentencing as compared to another's. To the contrary, and as this hypothetical illustrates, a global approach to s. 11(i) can confer arbitrary benefits. While a binary approach to s. 11(i) will not ensure that like offenders receive *the same result*, it will ensure that like offenders are treated *fairly*; they each receive protections which are connected to them and their proceedings.

[97] Third, there are countervailing fairness considerations that militate against a global approach to s. 11(i). Recall that those offenders who stand to benefit most from a global approach to s. 11(i) are those who have gone unprosecuted or unsentenced long enough for the punishments in place for their offences to have changed multiple times. In my view, any perceived unfairness or arbitrariness flowing from a binary approach to s. 11(i) is outweighed by the unfairness or arbitrariness that would result from according greater constitutional protections to those offenders who are sentenced long after their offences, compared to those offenders who are promptly brought to justice. In simpler terms, a global approach to s. 11(i) would disproportionately benefit those who are sentenced years, or even decades, after their offences, such as Mr. Poulin himself. It bears repeating that Mr. Poulin went over three decades before being held to account for his sexual offences. As this Court has observed, sexual offences like Mr. Poulin's often go long unreported. Survivors of sexual trauma commonly delay in disclosing abuse for reasons such as "embarrassment, fear, guilt, or a lack of understanding and knowledge" (*R. v. D.D.*, 2000 SCC 43, [2000] 2 S.C.R. 275, at para. 65). There should be no additional gain to

an offender under s. 11(i) when a victim is traumatized to the point of requiring significant time to overcome any reluctance to report the offence. Offenders whose crimes go long unreported should not have access to a greater number of possible punishments under s. 11(i) by virtue of their own offending conduct.

[98] For these reasons, I reject the contention that the principle of fairness animating s. 11(i) supports a global interpretation of that provision. To the contrary, a global interpretation of s. 11(i) would unfairly and arbitrarily benefit certain offenders by granting them the right to a punishment which is utterly disconnected from their conduct or proceedings. It is sufficiently and amply fair for s. 11(i) to guarantee to the offender the lesser of the punishments under the laws in force at the time of commission and the time of sentencing.

[99] In addition, I find that a global interpretation of s. 11(i) would have at least two other unwarranted consequences.

[100] First, a global s. 11(i) right would have the effect of resurrecting punishments which Parliament has, by repealing or amending them, expressly rejected — even where such a result is not justified by the principle of legality. As set out above, s. 11(i) does not merely provide the sentencing court with additional options; it entitles the offender to the lesser punishment. I see no reason why the *Charter* would enshrine the constitutional right to access, in all cases, an array of punishments which Parliament has since deemed unsuitable. It is one thing for s. 11(i) to resurrect for the offender the lesser punishment under the laws in force when the

offender committed the offence. It is quite another thing for s. 11(i) to resurrect any temporary reductions in punishment which came after the offence and bear no connection whatsoever to the offender's conduct or to contemporary sentencing norms (see *Docherty*, at para. 45). An interpretation of s. 11(i) that entitles an offender to the most favourable punishment in the array of past punishments would not only overshoot the purposes of this constitutional right, it would unduly undermine Parliament's general and exclusive authority to enact and amend the criminal law.

[101] Moreover, as the Supreme Court of the United Kingdom observed in *Docherty*, there remains the possibility of legislative oversight or error. A global s. 11(i) right would entitle offenders to the benefit of any intervening oversights or errors in past sentencing provisions, even those not in force during the commission of the offence or at sentencing. But in my view, there is no principled basis to grant an offender the right to that benefit. As that Supreme Court held:

Sentencing legislation and practice may well go up and down as public policy is held by legislators to change, or current responsible views on particular offending are perceived by courts to develop. But there is no injustice to a defendant to be sentenced according either to the law as it existed at the time of his offence or, if more lenient, according to the law as it exists when he is convicted and sentenced. To insist that a defendant should not be sentenced on a basis now authoritatively regarded as excessive is one thing. It is quite another to say that he should be sentenced according to a practice which did not obtain when he committed the offence and does not obtain now, merely because for some time in the interim, however short, a different practice was adopted which has now been abandoned as wrong.

(*Docherty*, at para. 45)

[102] Second, and on a more practical level, I have difficulty accepting that the vision for s. 11(*i*) was for counsel and the court to have to identify and then compare and contrast *every* sentencing provision that has applied to the offence since the offender committed it. As set out above (under the heading “Context: How Section 11(*i*) Operates”), a global approach to s. 11(*i*) would require just this. I fail to see what would justify this exercise. An offender does not suffer any injustice by not having access to *all* punishments that have come and gone through valid legislative change, especially those punishments that are completely disconnected from any step taken by the state against the offender or any step taken by the offender in reliance on the contemporaneous punishment. By claiming the right to a conditional sentence, Mr. Poulin asks for the benefit of a punishment which had no bearing on his conduct, case or sentencing. There is no unfairness in not having access to a sentencing regime which was unknown at the time of the offence and not relied upon when it was in force.

[103] In closing — and in response to Mr. Poulin’s position that s. 11(*i*) should be read in a manner that provides sentencing courts with enhanced sentencing options — I reiterate that it is inaccurate to say that a global s. 11(*i*) would normally increase options and discretion in sentencing. As explained above, the effect of s. 11(*i*) is to confine the sentencing court to sentencing the offender according to the lesser punishment. It is appropriate for s. 11(*i*) to confine the court to the lesser of the two sentencing regimes mentioned in s. 11(*i*). For the reasons given, it is *not* appropriate for s. 11(*i*) to require the court to impose what is, from the offender’s perspective, a

random baseline punishment plucked from the past. I agree wholeheartedly with Mr. Poulin that discretion in sentencing enhances justice in sentencing. I part company with Mr. Poulin in his view that a global approach to s. 11(i) generally serves discretion; it demonstrably does not.

[104] For these reasons, I conclude that the principled interpretation of s. 11(i) is a binary one. Reading s. 11(i) in a manner that would require the court to impose the most favourable punishment identifiable in the interval between the offence and sentencing does not reflect the kind of generous interpretation that *Charter* rights should receive. Rather, it reflects an unduly generous interpretation, disconnected from the purposes of the right.

(e) *Addressing the Contrary Jurisprudence*

[105] In coming to the conclusion that s. 11(i) confers a binary right, I am cognizant that Canadian courts have consistently assumed that s. 11(i) confers a global right (with perhaps one exception: see *R. v. Dubois*, Que. Sup. Ct., December 8, 1982), cited in R. M. McLeod, J. D. Takach, H. F. Morton, and M. D. Segal, *The Canadian Charter of Rights: The Prosecution and Defence of Criminal and Other Statutory Offences* (2019 (loose-leaf)), vol. 4, at p. 20-10.12). However, as stated above, I do not find these authorities to be based upon a complete or compelling purposive analysis of s. 11(i). Had they properly examined and weighed the functioning of s. 11(i), its language and origins, and the implications of a global right, they should, in my view, have concluded that there is no purposive basis to interpret

s. 11(i) in a global manner. The purposes of s. 11(i) — including fairness — do not support a global s. 11(i) right; to the contrary, they reject it.

[106] Similarly, I find that the European Court of Human Rights’ majority decision in *Scoppola* does not provide a persuasive basis for reading s. 11 (i) in a global manner. As the U.K. Supreme Court noted, the majority reasons in *Scoppola* do not appear to recognize the crucial distinction between the binary and global versions of the right to a decrease in punishment. In fact, the majority relied on the justification for a *binary* right in concluding that art. 7(1) of the *ECHR* should be *global*; it stated that art. 7(1) should not allow the imposition of a punishment “which the state — and the community it represents — now consider excessive” (para. 108 (emphasis added)). I echo the Supreme Court of the United Kingdom’s statement in *Docherty* that:

There is a very clear difference between (1) a principle which prevents a court from imposing a penalty above and outside the range currently provided for by the state as appropriate to the crime and (2) a principle which requires the court to seek out and apply the most favourable rule which has existed at any intervening time since the offence was committed, even if it has since been abandoned. The first would fall within the rationale of confining the court to a range currently considered appropriate for the offence; the latter would not. The difference between the two is not adverted to, still less explored, in the judgment in *Scoppola*. It is, accordingly, by no means clear that the court intended to expand its incorporation of *lex mitior* into art. 7 by including the latter proposition. [para. 40]

[107] I further agree with the Supreme Court that the majority decision in *Scoppola* must be read in context. First, it is crucial to note that *Scoppola*’s treatment

of art. 7(1) was informed by a provision of Italy's criminal legislation that appeared to confer a global right:

Article 2 of the 1930 Criminal Code, entitled Succession of criminal laws, reads as follows:

...

3. If the law in force at the time when the offence was committed and later [laws] differ, the law to be applied is the one whose provisions are most favourable to the defendant, except where a final sentence has already been imposed. [Emphasis added]

(*Scoppola*, at para. 32; see also paras. 106 and 108)

Second, the facts of *Scoppola* were such that a global interpretation of art. 7(1) entitled Mr. Scoppola to a lesser punishment on which he had expressly *relied* in conducting his defence. At the time he committed his offences, the offences were punishable by life imprisonment and were not eligible for trial by summary procedure. A few months after Mr. Scoppola's offences (in January 2000), a legislative change made the summary procedure available for Mr. Scoppola's offences and stipulated that a person convicted of such offences through the summary procedure would be liable to face 30 years' imprisonment, not life. The summary procedure represented a trade-off for the accused who elected it; it entailed a reduction in sentence upon conviction, but came at the expense of important procedural safeguards — such as the ability to present evidence in response to the prosecution's case (para. 134). In reliance on that change, Mr. Scoppola elected to be

tried by summary procedure. But a few months after that, on the very day he was convicted and sentenced, yet another legislative amendment entered into force, reverting the punishment for Mr. Scoppola's offences back to life imprisonment. It was in these circumstances that the European Court of Human Rights agreed that Mr. Scoppola's sentence of life imprisonment breached Article 7.

[108] In my view, it is significant that the European Court of Human Rights appeared to endorse a global right on such facts. The Court did not adopt a global approach in order to give an offender access to a punishment bearing no connection to the offender's conduct or proceedings. It adopted a global approach in response to a situation in which the offender had reasonably and detrimentally relied on an intervening provision.

[109] Given the legal and factual context in which *Scoppola* was decided, and the absence of any treatment of the distinction between a binary and a global interpretation in the majority's reasons, I do not find that the majority decision lends support to a global interpretation of s. 11(i).

(f) *Beyond the Section 11(i) Binary*

[110] While *Scoppola* does not justify recognizing a global right under s. 11(i) of the *Charter*, it does illustrate a potentially attractive feature of the global approach to s. 11(i): the global approach ensures that the offender will have access to lesser, past punishments on which the offender relied in making decisions implicating their

liberty. On a strict binary approach to s. 11(i), an offender is only entitled to the lesser of the punishments under the laws in force at the time of commission and the time of sentencing. Such an approach prevents the offender from accessing a lesser punishment that was applicable when the offender cooperated with the police or entered a plea, for example.

[111] Concerned with this prospect, the Crown in this case is prepared to accept that, in addition to being entitled to the lesser of the two punishments mentioned in s. 11(i), an offender should also be entitled to benefit from any lesser punishment in place from the time of charge to the time of sentencing. In the Crown's view, it would prejudice offenders not to have access to lesser sentences on which they (detrimentally) relied in conducting their defences. While the Crown is only prepared to extend "time of sentencing" to "time of charge", it seems to me that, on the Crown's logic, offenders should also be entitled to benefit from any lesser punishment in place when they turned themselves in to the police, confessed, or otherwise detrimentally relied on the law in inculcating themselves — even pre-charge.

[112] Whether there is, or ought to be, a rule that offenders are entitled to the benefit of lesser sentences on which they *relied* in conducting their defences or inculcating themselves — either as a matter of s. 11(i), another section of the *Charter*, or common law principles — is a question best left for another case. The question does not arise in this case; there is no indication from the record, nor did the

parties suggest, that during the time a conditional sentence was applicable to his offences, Mr. Poulin made decisions engaging his liberty in reliance on that sentence. As the facts of this case do not raise this question, the parties have not made the submissions required for this Court to address it judiciously.

[113] What is clear is that s. 11(*i*) does not guarantee to every offender the benefit of *every* change in punishment in the interval between the commission of the offence and sentencing. An offender is not entitled to lesser punishments which are wholly unconnected to significant legal events in the proceedings against them. A legitimate concern for granting the offender access to a punishment on which the offender relied does not justify a global interpretation of s. 11(*i*). As explained throughout these reasons, a global s. 11(*i*) would vastly overshoot the purposes of s. 11(*i*). Every single offender should not enjoy the constitutional right to the lowest punishment that has ever applied to their offence since they committed it so that those few offenders who relied on particular lesser punishments can gain access to those punishments. To read s. 11(*i*) globally for the benefit of those few offenders would be to use a cleaver where a scalpel suffices. The situation of those few offenders may, in a subsequent case, require a tailored response. It does not, in this case, call for an unjustified and non-purposive interpretation of s. 11(*i*).

[114] I therefore leave for another, more suitable, case the question of whether an offender has any legal entitlement to the benefit of a lesser punishment on which

the offender actually relied. The rule of law and fairness considerations of such a case may give rise to a right and remedy under this, or another, section of the *Charter*.

[115] In leaving this question for another case, I am aware that, in *K.R.J.*, a majority of the Court made the following statement:

Relatedly, retrospective laws implicate fairness. “It is unfair to establish rules, invite people to rely on them, then change them in mid-stream, especially if the change results in negative consequences” (R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 754). For example, an accused who declines to consider a plea and is prepared to take the risk of going to trial should not be subsequently ambushed by an increase in the minimum or maximum penalty for the offence. A retrospective law such as this could not only cause unfairness in specific cases, but could also undermine public confidence in the criminal justice system. Instead, fairness in criminal punishment requires rules that are clear and certain. . . . [Emphasis added; para. 25]

[116] I do not take this statement to have said anything conclusive about the binary/global debate, or about whether offenders are entitled to the benefit of punishments on which they relied. This is for two reasons. First, *K.R.J.* was not contemplating intermediary punishments under the laws in force in the interval between the offence and sentencing. The Court was merely comparing consecutive sentencing provisions (see paras. 9-11). The Court in *K.R.J.* was therefore not addressing the binary/global debate, or the question of reliance. Second, and most tellingly, the Court made this statement in the context of explaining why s. 11(i) entitles offenders to the lower punishment applicable when they committed their offence. The statement envisages the situation in which the punishment remains the same from the time of the offence through to the time of the offender’s plea, but

increases thereafter. As such, the statement does not speak to changes in punishment between the time of commission and sentencing, and whether offenders ought to have access to any of these.

(g) *Summary of Purposive Analysis*

[117] A purposive analysis of s. 11(i) leads me to conclude that it confers a binary right, not a global one. In particular, I find that the language and origins of s. 11(i) both confirm the purposes set out in *K.R.J.* — namely the rule of law and fairness — and indicate that s. 11(i) is intended to confer a binary right consistent with these purposes. It would not respect the purposes of s. 11(i) to read the right globally. Nor would it respect Parliament’s role in adapting sentencing provisions, or the courts’ role in crafting proportionate sentences under those provisions. While s. 11(i) embraces a degree of retrospectivity (in allowing the lesser current punishment to replace the harsher punishment at the time of the offence), this principled, purposive retrospectivity does not support an interpretation of s. 11(i) that embraces retrospectivity writ large.

(3) Application of Section 11(i) to the Respondent, Mr. Poulin

[118] In light of the parties’ agreement that a conditional sentence was not applicable under the sentencing provisions in force either at the time of Mr. Poulin’s acts of gross indecency (1979 to 1983) or at the time of his sentencing (May 2017),

Mr. Poulin did not have the right to this sentence under s. 11(i) of the *Charter*. The courts below therefore erred in imposing it.

[119] The sentencing court was required to impose a sentence in accordance with the lesser punishment as between the punishment applicable at the time of the offence and the punishment applicable at the time of sentencing. In this regard, I note that the sentencing provision in force at the time of Mr. Poulin's gross indecencies would have offered the sentencing judge significant discretion to impose a sentence that would achieve the same objectives as the conditional sentence he ordered. At the time of Mr. Poulin's offences, the sentence for gross indecency was a maximum of five years' imprisonment (*Criminal Code*, R.S.C. 1970, c. C-34, s. 157).

[120] Given that he is now deceased, it is no longer necessary to sentence Mr. Poulin anew. There is no utility in passing a new sentence which the offender cannot serve (see, likewise, *R. v. R.N.S.*, 2000 SCC 7, [2000] 1 S.C.R. 149, at para. 22; *R.A.R.*, at para. 34).

V. Conclusion

[121] An offender is not entitled to the benefit of a temporary reduction in punishment which occurred in the interval between the time of commission and the time of sentencing. Both the sentencing judge and the Court of Appeal erred in sentencing Mr. Poulin to a punishment applicable under the laws in force only in that interval and upon which Mr. Poulin placed no reliance. I would therefore allow the

appeal. However, given Mr. Poulin’s recent death, I would decline to remit the matter to the sentencing court or to pass a different sentence. The parties do not seek costs and I would not order any.

English version of the reasons of Abella, Karakatsanis and Brown JJ. delivered by

KARAKATSANIS J. —

[122] Section 11(i) of the *Canadian Charter of Rights and Freedoms* guarantees that any person found guilty of an offence has the right, 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.

[123] The conditional sentence did not exist at the time when the respondent committed the criminal acts in this case. This type of punishment was introduced by Parliament almost a decade after the last of the impugned acts. It continued to be available for crimes of this nature for some time, but was revoked before he was charged. Did the respondent accordingly have a right to the benefit of this type of punishment? Canadian courts have consistently answered this question in the affirmative. Unlike my colleagues, I see no reason to authorize the continuation of the appeal despite the fact that it is now moot given the respondent’s death, or to depart from this consistent line of authority. I explain this below.

I. Facts and Proceedings

[124] Between 1979 and 1987, the respondent committed acts of a sexual nature against a young relative. These acts, which began with touching the young child's genitals, escalated to sodomy when the child reached adolescence. The respondent was charged for the acts in 2014 and was convicted for them only in 2016, before being sentenced in 2017. During the almost 40 years that passed between the commission of the first offence and his sentencing, the legal framework for this type of crime underwent significant changes.

[125] At the time of commission, the respondent's criminal acts fell under the offence of gross indecency: *Criminal Code*, R.S.C. 1970, c. C-34, s. 157. That offence did not entail a minimum sentence. The conditional sentence (also known as the "community sentence") did not exist.

[126] In the late 1980s, the offence of gross indecency was abolished, and it was eventually replaced with equivalent present-day offences, such as sexual assault and sexual interference: *An Act to amend the Criminal Code and the Canada Evidence Act*, R.S.C. 1985, c. 19 (3rd Supp.), s. 4; see also *R. v. L. (J.-J.)*, [1998] R.J.Q. 971 (Que. C.A.).

[127] In 1996, Parliament introduced the conditional sentence: *An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*, S.C. 1995, c. 22, s. 6. The new s. 742.1 of the *Criminal Code*, R.S.C. 1985, c. C-46, which

governed the conditional sentence, provided that this type of sentence could be imposed for any offence that was not punishable by a minimum term of imprisonment, which at that time included the offences of sexual assault and sexual interference.

[128] In 2005, Parliament imposed, for the first time, a minimum term of imprisonment for the offence of sexual interference: *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, S.C. 2005, c. 32, s. 3. Seven years later, Parliament amended s. 742.1 such that it would no longer apply to the offence of sexual assault: *Safe Streets and Communities Act*, S.C. 2012, c. 1, s. 34. When the respondent was charged in 2014, therefore, and when he was convicted in 2016 and sentenced in 2017, the conditional sentence was no longer available as a punishment for the offences corresponding to the ones he had committed.

[129] At the sentencing hearing in 2017, Crown counsel suggested that the appropriate sentence would be a term of imprisonment for three and a half to five years. Defence counsel agreed that a sentence of three and a half years would be appropriate. Because the respondent was in poor health, however, he asked, on an exceptional basis, for a community sentence. In support of this request, he filed a medical report to the effect that he had a variety of physical ailments as well as a degenerative neurological disorder. The judge found that the respondent, who was no

longer really autonomous, faced the cessation of treatment and death in either the short- or the medium-term future.

[130] While acknowledging that an offender's poor health is not in itself a decisive sentencing factor, the judge noted that in this case, the respondent would represent a very heavy burden for the penitentiary system. Although prison officials said that they would be able to assume that responsibility, the judge pointed out that the respondent's situation would be [TRANSLATION] "exactly the same" in a penitentiary hospital as in the extended care facility where he was then living.

[131] The judge recognized that the conditional sentence had not existed at the time when the offences were committed. At the hearing, he asked counsel questions about the possibility of imposing such a sentence, which, everyone agreed, is not one that could be imposed without the protection of s. 11(*i*). In their submissions, both counsel avoided the question of the temporal aspect of the application of s. 11(*i*), focusing instead on the various forms taken by the offences and by s. 742.1 itself.

[132] In the end, the judge ruled in the respondent's favour. He found that any offender has a right to the benefit of the lesser punishment that applied between the time of commission of the offence and the time of sentencing, which meant that the conditional sentence was one of the sentences that could be imposed. Being of the view that the exceptional case before him called for an exceptional solution, the judge sentenced the respondent to a term of two years less a day to be served in the community.

[133] The Court of Appeal unanimously affirmed that decision. Dutil J.A. rightly pointed to the great deference shown by appellate courts to the decisions of sentencing judges. She acknowledged that the evidence did not justify the sentencing judge's conclusion regarding the respondent's health, but held that this was not an overriding error. Citing *R. v. Belzil*, [1989] R.J.Q. 1117 (Que. C.A.), Dutil J.A. rejected Crown counsel's argument that s. 11(i) guarantees the benefit only of the sentences that applied at two specific times, that of commission of the offence and that of sentencing — a position that had not been thoroughly argued at the sentencing hearing. In her view, *Belzil* instead confirms the interpretation to the effect that s. 11(i) guarantees that the accused has a right to the benefit of any sentence that applied *between* those two times, [TRANSLATION] “even if there has been only a temporary reduction of the sentence between the time of the offence and that of sentencing”: 2018 QCCA 21, 43 C.R. (7th) 216, at para. 33. This meant that it had been open to the sentencing judge to impose a conditional sentence.

[134] This Court granted the Crown's application for leave to appeal in October 2018. The respondent died on February 22, 2019 without having filed his factum. At that time, part of his sentence remained to be served, as a motion to suspend the sentence had been dismissed by Doyon J.A. in July 2017: 2017 QCCA 1137, at para. 12 (CanLII).

[135] A week later, Crown counsel filed a motion for authorization to proceed with the appeal despite the respondent's death. Although he recognized that this

Court has a discretion to refuse to hear the case, Crown counsel argued that proceeding with the appeal was in the interests of justice. In his opinion, the question of law in this case is one that is often evasive of appellate review and one that transcends the individual case of the respondent. He submitted that to decline to proceed with the appeal would just postpone this Court's inevitable consideration of the question and would at the same time waste the judicial resources that the Court had already expended on this appeal.

[136] A few days after that, counsel for the respondent filed their response to the appellant's motion. In it, they indicated that the executor of the deceased respondent, his daughter, did not wish to proceed with the appeal, but that she had nonetheless instructed them to defend the position the respondent had advanced while still alive should the Court decide to hear the case.

II. Issues

[137] There are two issues in this appeal. First, should the Court exercise its discretion and hear this appeal that has become moot as a result of the respondent's death? Second, should the Court overturn 30 years of consistent case law on the interpretation of s. 11(i) of the *Charter*? I would answer both these questions in the negative.

III. Mootness of the Appeal

[138] The Court noted in *Smith* that “cases in which it will be proper to exercise jurisdiction to hear a moot criminal appeal will be rare and exceptional”: *R. v. Smith*, 2004 SCC 14, [2004] 1 S.C.R. 385, at para. 10. In that case, it listed five “helpful rather than exhaustive” factors that can be considered in deciding whether there are special circumstances that make it in “the interests of justice” to proceed with an appeal that has been rendered moot: para. 50. These five factors are as follows:

1. whether the appeal will proceed in a proper adversarial context;
2. the strength of the grounds of the appeal;
3. whether there are special circumstances that transcend the death of the individual appellant/respondent, including:
 - (a) a legal issue of general public importance, particularly if it is otherwise evasive of appellate review;
 - (b) a systemic issue related to the administration of justice;
 - (c) collateral consequences to the family of the deceased or to other interested persons or to the public;
4. whether the nature of the order which could be made by the appellate court justifies the expenditure of limited judicial (or court) resources to resolve a moot appeal;
5. whether continuing the appeal would go beyond the judicial function of resolving concrete disputes and involve the court in free-standing, legislative-type pronouncements more properly left to the legislature itself. [para. 50]

[139] In my view, this case is one of the “overwhelming number of cases” in which proceeding with the appeal would not be in “the interests of justice”: *Smith*, at para. 46.

[140] First, I find it hard to conclude that a real adversarial context exists. Although the sentencing judge did raise the question of the application of s. 11(*i*), the temporal aspect of the application of this paragraph was not argued at the sentencing hearing. The judge's reasons on this point were particularly brief and cited no authorities. And although the Court of Appeal also touched on the question of the interpretation of this *Charter* right at the end of its reasons, it did not discuss this question in detail either.

[141] Moreover, this is hardly surprising given that there have since 1989 been some 15 judicial decisions — including 5 from courts of appeal — in which a single interpretation of s. 11(*i*) — the one adopted by the Quebec courts in the instant case — has been applied. Where the courts below have followed what is not just a majority but a unanimous line of cases, it seems to me that deference is in order on appeal. As I will explain below, the strength of Crown counsel's grounds of appeal is undermined by the solid reasoning that supports that jurisprudence.

[142] Second, while it is true that any issue concerning the interpretation of a *Charter* provision is always of great importance, there are no special circumstances in this case that transcend the death of the respondent. This Court has frequently exercised its discretion and agreed to hear a moot appeal on an issue that is ordinarily evasive of review by courts or on which there is uncertainty in the case law: see, e.g., *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, at pp. 360-61. But in light of 30 years of consistent case law on this issue, I cannot accept the argument

that we are facing conflicting lines of cases or the argument that the issue before us is one that is ordinarily evasive of appellate review. It became clear that there is no difference of opinion between courts when the only intervener who supports the appellant's interpretation — the only attorney general who saw fit to intervene — was unable to identify a single Canadian authority in support of that interpretation.

[143] Finally, the inequity of proceeding with an appeal against a deceased offender despite opposition from his family seems obvious to me. That doing so is excessive is clear from the conclusions being sought by the Crown in its motion. Rather than seeking a declaration with respect to the interpretation of s. 11(i), the Crown asks the Court to set aside a sentence imposed on a deceased man and to substitute for it the sentence the Court considers appropriate before simply staying the new sentence. This appeal should not have been heard.

[144] For the foregoing reasons, I would dismiss the motion to proceed with the appeal.

IV. Interpretation of s. 11(i) of the Charter

[145] The Crown submits that the Court of Appeal erred in interpreting s. 11(i). In the Crown's opinion, s. 11(i) provides that any offender has the right to the benefit of the lesser punishment, but *only* between two punishments: the one that applied at the time of commission and the one that applied at the time of sentencing. It argues that the interpretation adopted by the courts is contrary to the three objects of s. 11(i):

(1) protection from the retrospective imposition of a harsher punishment than the one that applied at the time of commission of the offence; (2) preservation of the principle of fairness that enables an accused to make decisions in relation to his or her criminal liability in light of the existing law, which the Crown limits to the times of commission of the offence, of the laying of charges and of sentencing; and (3) the principle that Canadian courts impose punishments that correspond to the stigma that contemporary society associates with the offence.

[146] The respondent contends that the interpretation adopted unanimously by the Canadian courts is the right one. In his opinion, the words of s. 11(i) are perfectly clear: an offender is guaranteed the mildest punishment that applied during the period *between* (“*entre*”) the time of commission and the time of sentencing. Its wording suggests no limit in the number of variations in punishments that there might be over that period, which could easily have been indicated by replacing the word “between” with “or”: the punishment available “at the time of commission of the offence or at the time of sentencing” (R.F., at para. 49 (emphasis in original)). The respondent argues that the interpretation proposed by the appellant, the effect of which would be to unjustifiably separate the various stages of the criminal process for the purpose of applying s. 11(i), is impractical.

[147] For 30 years, the Canadian courts have interpreted s. 11(i) consistently, holding that it guarantees any offender the benefit of the lesser sentence that applied between the time of commission of the offence and the time of sentencing. This

conclusion has been reached in five cases in which courts had directly addressed the question raised in this appeal, that is, the possibility of imposing a conditional sentence for what is described as a “historical” sexual assault: see *R. v. Cadman*, 2018 BCCA 100, 359 C.C.C. (3d) 427; *R. v. A.E.S.*, 2018 BCCA 478, 369 C.C.C. (3d) 92; *R. v. Yusuf*, 2011 BCSC 626; *R. v. G.C.D.*, 2011 MBQB 235, 271 Man. R. (2d) 41; *R. v. Mehanmal*, 2012 ONCJ 681, 270 C.R.R. (2d) 271. In some cases, the same reasoning has been adopted implicitly: *R. v. Leroux*, 2015 SKCA 48, 460 Sask. R. 1; *R. v. E. H.*, 2009 NLTD 62, 285 Nfld. & P.E.I.R. 78; *R. v. Palacios*, 2012 ONCJ 195. In other cases, the *same* interpretation has been applied in contexts as varied as eligibility for parole after being convicted of murder (*Belzil*), effect of new rules for “faint hope” applications (*R. v. Simmonds*, 2018 BCCA 205, 415 C.R.R. (2d) 88) and changes to the rules applicable to dangerous offenders (*R. v. F.C.*, 2018 ONSC 561). Not to mention, finally, that there have been a series of Ontario cases in which Crown counsel have *conceded* the opposite interpretation to the one the Crown is advancing here: *R. v. Boudreau*, 2012 ONCJ 322, at para. 50 (CanLII); *R. v. D.P.*, 2014 ONSC 386, at para. 10 (CanLII); *R. v. Bent*, 2017 ONSC 3189, 383 C.R.R. (2d) 161, at para. 47.

[148] The approach taken in the above decisions finds ample support in the words of s. 11(i), which suggest a continuum *between* the time of commission and the time of sentencing: see, e.g., *Cadman*, at paras. 31-46. See also: M. Vauclair and T. Desjardins, *Traité général de preuve et de procédure pénales* (26th ed. 2019), at

para. 2743. In my opinion, this interpretation is dictated by both the English and the French versions of s. 11(i):

11. Any person charged with an offence has the right

...

(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

11. Tout inculpé a le droit :

...

i) de bénéficier de la peine la moins sévère, lorsque la peine qui sanctionne l'infraction dont il est déclaré coupable est modifiée entre le moment de la perpétration de l'infraction et celui de la sentence.

[149] I am not convinced that the English word “lesser” dictates a “binary” interpretation: see, e.g., *Collins Canadian Dictionary* (1st ed. 2010), definition of “lesser”, “not as great in quantity, size, or worth”; *Canadian Oxford Dictionary* (2nd ed. 2004), definition of “lesser”, “not so great or much as the other or the rest” (emphasis added). A non-binary interpretation of “lesser” corresponds to the French version — “*la peine la moins sévère*” — which is in no way limited to a dual comparison: *Le Petit Robert* (new ed. 2012), definition of “*le moins*”, [TRANSLATION] “superlative of *peu* (little, not much)”.

[150] If the legislature had intended to codify the restrictive interpretation proposed by the appellant, a more precise wording would have been necessary. The appellant’s submissions clearly show that there was no shortage of examples of such wordings: see, e.g., *R. v. Docherty*, [2016] UKSC 62, [2017] 4 All E.R. 263, at paras. 29 et seq.

[151] A technical construction such as the one proposed by the appellant is contrary to this Court's conclusion that a generous *and* purposive approach must be taken to the interpretation of *Charter* rights: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 155-56; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at para. 17. Moreover, the Court has held that the meaning of a *Charter* provision cannot be limited to rights and freedoms that existed before the enactment of the *Charter*, whether by virtue of the common law, international law or otherwise: *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at p. 360; *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, at p. 123; *Big M Drug Mart Ltd.*

[152] The interpretation adopted by other Canadian courts reflects two objects of s. 11(i) identified by this Court, namely the rule of law and ensuring fairness in criminal proceedings (*R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, at para. 27). As Lord Diplock put it, "acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it" (*Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.*, [1975] A.C. 591 (H.L.), at p. 638). A change in the possible consequences of such a course of action could not only cause unfairness in certain cases, but could also undermine public confidence in the criminal justice system: *K.R.J.*, at paras. 23 and 25.

[153] The interpretation proposed by the appellant would limit the application of these objects to two steps in the criminal process. In my view, there is no principled argument that would justify such a limitation, which is undermined by, among other things, the appellant's concession that the time of sentencing includes — possibly — the period after the charge is laid. The example given in *K.R.J.* — of an accused who, on the strength of an existing punishment, declines to enter a guilty plea and is prepared to take the risk of going to trial — was in no way limiting. On the contrary, there are *several* points in the course of a criminal investigation and prosecution — before the time of sentencing — at which an individual might be required to make choices in light of punishments then applicable. Some choices might include, among others, the decision whether to cooperate in an investigation, whether to exercise the right to remain silent, whether to enter a plea or whether to submit a joint submission to the sentencing judge. With respect, it seems artificial to fix at only two specific points in time the moment when knowledge of the applicable rules would be more important for a person who has been or may be charged. In fact, this right is grounded in the very possibility that an accused will be required to make choices in light of the existing law at various points in the criminal process. The protection of s. 11(*i*) cannot be contingent on evidence that the accused relied on the existing law.

[154] Nor am I convinced that the possibility that the interpretation adopted by the courts will complicate the analysis of the applicable punishments should weigh against it. First, counsel for the intervener Attorney General of Ontario was unaware

of any problems arising from the law as it now stands with respect to the interpretation of s. 11(i), which has applied for at least 30 years. Second, Canadian courts habitually consider the possibility of less restrictive sanctions — indeed, they are required to by the *Criminal Code*: s. 718.2(d) and (e). All things considered, the time of commission of the offence and the time of sentencing will in most cases not be as far apart as in historical sexual assault cases. The possibility that a punishment will be varied several times in the intervening period is therefore also more remote. I think it would be imprudent to rule out an interpretation that provides offenders with more substantial protection where there is no evidence that there are real difficulties, especially in light of the actual wording of the provision.

[155] Finally, the appellant argues that s. 11(i) has a third object: to ensure that the imposed punishment corresponds to the social stigma associated with the offence at the time of sentencing. With respect, this proposal seems to confuse the *availability* of a punishment with its fairness and appropriateness. Crafting a fair and appropriate punishment is a highly individualized exercise that involves a variety of factors, including the gravity of the offence, the extent of the offender's responsibility and the specific circumstances of each case: *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at para. 58. But the fact that a punishment is available in no way means that it will, if imposed, be fair and appropriate in the case in question. In a case involving multiple incidents in which serious acts of sexual abuse were committed against a young relative, it may be that the conditional sentence was not a fair and appropriate punishment. But that is not the question before the Court.

[156] For these reasons, I would dismiss the appeal on the merits.

Appeal allowed, ABELLA, KARAKATSANIS and BROWN JJ. dissenting.

*Solicitor for the appellant: Director of Criminal and Penal Prosecutions,
Longueuil.*

*Solicitors for the respondent: Poitras, Fournier, Cossette, Granby;
Desrosiers, Joncas, Nouraie, Massicotte, Montréal.*

*Solicitor for the intervener the Attorney General of Ontario: Attorney
General of Ontario, Toronto.*

*Solicitors for the intervener Association québécoise des avocats et
avocates de la défense: Carette Desjardins, Montréal.*

*Solicitors for the intervener the Criminal Lawyers' Association: Rusonik,
O'Connor, Ross, Gorham & Angelini, Toronto; Edward Royle & Partners, Toronto.*