Federal Courts Reports
Recueil des décisions des Cours fédérales

EDITOR'S NOTE: This document is subject to editorial revision before its reproduction in final form in the *Federal Courts Reports*.

PAROLE

Related subjects: Constitutional Law; Practice

Motion pursuant to *Federal Courts Rules*, SOR/98-106, r. 220 for determination of preliminary questions of law in class action proceeding — Plaintiff's claim against defendant, as responsible for, *inter alia*, operation of Correctional Service of Canada (CSC), Parole Board of Canada, is on behalf of approximately 3,252 past inmates seeking damages payable under C*anadian Charter of Rights and Freedoms*, s. 24(1) as result of Charter violations — *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (CCRA) was proclaimed in force in 1992; introduced concept of Accelerated Parole Review (APR), more streamlined process for parole review by Parole Board as compared with regular parole review, for first-time offenders who qualified pursuant to criteria set out in CCRA — APR was automatic, no need for offender to apply for it — Initially, APR regime was only available for those eligible for full parole; however, in July 1997, amendments to CCRA expanded regime to include those offenders who were eligible for day parole, with earlier parole eligibility date being one sixth of sentence or six months, whichever was longer — Underlying action related to passage, implementation in 2011 of certain provisions of *Abolition of Early Parole Act*, S.C. 2011, c. 11 (AEPA), which retrospectively removed access to APR for first-time, non-violent federal penitentiary inmates who were, because of AEPA provisions, held in custody beyond their APR release dates — Supreme Court in *Canada (Attorney General) v. Whaling*, 2014 SCC 20, [2014] 1 S.C.R. 392 subsequently declared provisions of AEPA in question to be unconstitutional on grounds that retrospective removal of APR amounted to double punishment, violation of Charter, s. 11(h) — In 2013, plaintiff eventually released on day, full parole — Plaintiff previously convicted under *Criminal Code*, R.S.C., 1985, c. C-46, for weapons trafficking, possession of unauthorized firearms, etc. in April 2006 — Was sentenced on September 29, 2010 to four years and six months in prison — Eligibility date for unescorted temporary absences was June 29, 2011, on which day plaintiff would also be eligible for APR day parole, having served by then one sixth (nine months) of her sentence — In April 2011, plaintiff informed by Parole Board that it would not be reviewing her case for APR day or full parole on account of recent amendments made to CCRA by AEPA, which retrospectively repealed APR process; thus, plaintiff became eligible for day parole review under regular (non-APR) review process on September 29, 2011 — After plaintiff transferred to another institution, on October 11, 2011, Parole Board denied plaintiff's day parole, full parole through regular (non-APR) review process — In May 2011, plaintiff, two other inmates commenced constitutional challenge in British Columbia Supreme Court, seeking to have AEPA, s. 10(1) declared to be of no force, effect on basis that provision violated their Charter, s. 11(h) rights — British Columbia Supreme Court held that AEPA, s. 10(1) indeed violated Charter, s. 11(h), which decision upheld at British Columbia Court of Appeal, eventually by Supreme Court of Canada — All members of class action were offenders who were eligible for ACR under CCRA, ss. 125, 126 for purposes of s. 119.1 — Issues were whether *International Transfer of Offenders Act*, S.C. 2004, c. 21 (ITOA), s. 28 applied to Category C, D subclass members such that Parole Board was not required to review them for APR day parole until six months after their date of transfer; whether estate of deceased class member in action can claim Charter damages for violation of Charter, s. 11(h) right; and (2) if answer to (1) is yes, then whether provincial estate statutes providing for "alive as of" date prohibit or limit recovery of those Charter damages — Definition of subclasses at issue examined — Court having to determine whether six-month suspension period of review set out in ITOA, s. 28, whatever timeline for such review may

ultimately be, is applicable to APR day parole for ITOA transferees — Plaintiff submitted in particular that six-month hiatus for parole review set out in s. 28 not applying to APR day parole for Category C, D subclasses or to APR generally, when considering plain language of provision in conjunction with principle of implied exclusion, that APR scheme provisions (CCRA, ss.119.1, 125, 126, 126.1) not mentioned in s. 28 — Context, purpose of ITOA militated against restrictive interpretation postulated by plaintiff — In light of purpose of ITOA, no convincing policy reason submitted justifying distinction being made between application of ITOA, s. 28 to offenders who are eligible for regular parole review, its application to offenders who benefit from APR — Practical aspect of s. 28 not thwarting purpose of APR, but is in line with general purpose of conditional release — S. 28 not, by itself, creating alternative process or timeline with respect to parole review under CCRA; only seeks to suspend whatever parole review process or timelines may apply to ITOA transferees — Given that purpose of s. 28 was to provide Parole Board with buffer period of six months following transfer of ITOA offender before being required to undertake parole review, specific reference to ss. 122, 123 was needed to override automatic triggering of regular parole review by Parole Board — Such concern not existing with APR because APR includes insertion into parole review process of CSC which, prior to triggering of Parole Board's statutory obligation to conduct parole review, is required to first refer matter to Parole Board — Consequently, notwithstanding reference to CCRA, ss. 122, 123, ITOA, s. 28 must be interpreted broadly to apply to all processes of parole review, not just to regular parole review, so as to better reflect intention of Parliament, purpose of governing legislation in relation to giving CSC, Parole Board time needed to prepare for effective parole review —Thus, first question answered affirmatively — Regarding second question on estate of deceased class members in present action, *Canada (Attorney General) v. Hislop*, 2007 SCC 10, [2007] 1 S.C.R. 429 discussed, outlining rule at common law that personal rights die with individual, that exceptions existing to that rule — Was no issue that Charter rights are personal; that claim under s. 24 is personal remedy — Having to determine whether legislation, here provincial, territorial survivor legislation, can supplant clearly articulated common law rule in *Hislop* to give standing to estates to pursue otherwise personal rights of action that belonged to deceased — *Hislop* not standing for proposition that common law rule cannot be derogated from by way of legislation [69] — *Hislop* not complete answer to third question; not crafting general rule that Charter claims end upon death — Part (1) of third question to be answered in affirmative provided that situation of estate falling within one of exceptions set out by Supreme Court in *Hislop* or provided that it is established that validly enacted provincial or territorial survival legislation is available to supplant common law rule that actions die with individual — Second part of third question not needing to be addressed; since first part answered in affirmative, second part of third question to be answered in affirmative as well.

WHALING V. CANADA (T-455-16, 2024 FC 712, Pamel J., reasons for judgment dated May 9, 2024, 64 pp. + 35 pp.)