CITATION: John Howard Society of Canada v. Her Majesty the Queen, 2021 ONSC 380
COURT FILE NO.: CV-20-00000007-0000
DATE: January 15, 2021

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
JOHN HOWARD SOCIETY OF CANADA	)	
Applicant	)	Paul Quick, for the Applicant
– and –	)	
HER MAJESTY THE QUEEN as represented by the ATTORNEY GENERAL OF CANADA	)	
Respondent	)	Korinda McLaine and Jennifer Bond, for the Respondent
	)	**HEARD:** November 20, 2020

REASONS FOR DECISION

MUSZYNSKI J.

[1] The applicant, John Howard Society of Canada ("JHSC"), seeks a declaration that s. 163(3) of the *Corrections and Conditional Release Regulations*, SOR/92-620 (the "Regulations") is invalid as it violates the *Canadian Charter of Rights and Freedoms* s. 7 protected right to life, liberty, and security of the person in a manner that is not in accordance with the principles of fundamental justice and is not demonstrably justified in a free and democratic society under s. 1.

ISSUES

[2] The issues on this application are:

1. Does JHSC have public interest standing to bring this application?

2. Is s. 163(3) of the Regulations unconstitutional?

3. What is the appropriate remedy?

RESULT

[3] I find that JHSC has public interest standing to bring this application. Section 163(3) of the Regulations is invalid as it violates s. 7 of the *Charter* in a way that is not saved by s. 1. The appropriate remedy is to read in language to the impugned section of the Regulations that ameliorates the *Charter* infringement while keeping the remainder of the regulatory objectives intact.

THE POSITION OF THE PARTIES

[4] JHSC and the respondent, Her Majesty the Queen as represented by the Attorney General of Canada ("Canada"), agree that s. 163(3) of the Regulations infringes the liberty interests protected by s. 7 of the *Charter*. In these circumstances, however, Canada submits that the infringement is not contrary to the principles of fundamental justice and that s. 163(3) of the Regulation should not be declared unconstitutional.

[5] The impugned section of the Regulations affects offenders who are serving the remaining portion of their sentence in the community on statutory release. If an offender breaches a condition of their statutory release, their statutory release is suspended and they are recommitted into custody.

[6] The *Corrections and Conditional Release Act,* S.C. 1992, c.20 (the "Act"), together with the Regulations, set out the procedure to be followed after the suspension of an offender's statutory release and recommitment into custody. The Act provides two options following the suspension of an offender's statutory release: (1) the Correctional Service of Canada ("CSC") can cancel the suspension and the offender will return to the community to serve the remainder of their sentence; or (2) CSC can refer the matter to the Parole Board of Canada (the "Parole Board") for a decision.

[7] If the matter is referred to the Parole Board, the Parole Board can either cancel the suspension of the offender's statutory release or terminate/revoke the offender's statutory release. While in practice, revoking and terminating an offender's statutory release can yield different outcomes, in the context of this application, the parties agree that the words "revoke" and "terminate" have the same effect. Section 163(3) of the Regulations sets out the timeframe in which the Parole Board must render this post-suspension decision.

[8] If the Parole Board decides that the suspension of an offender's statutory release should be cancelled, the offender is released back into the community. If the Parole Board decides to terminate/revoke an offender's statutory release, a new statutory release date is calculated. Under the legislation, the new statutory release date becomes the day on which the offender will have served two thirds of their remaining sentence and becomes entitled to serve the remaining portion of their sentence in the community.

[9] For a certain cohort of offenders who are serving the last six-months of their sentence, the timeframe set out in the Regulations for the Parole Board to render a post-suspension decision can result in continued imprisonment *after* the offender's new statutory release date.

ANALYSIS

ISSUE 1: Does JHSC have public interest standing to bring this application?

[10] The parties agree that JHSC meets the test for public interest standing for the purposes of this application. While I find Canada's concession on this point to be influential, the court must ultimately determine whether a party has standing. The court maintains an important gatekeeper function in determining public interest standing: *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 S.C.R. 524, at paras. 22-23.

[11] The test for public interest standing is set out in *Downtown Eastside*, at para. 37:

> In exercising the discretion to grant public interest standing, the court must consider three factors: (1) whether there is a serious justiciable issue raised; (2) whether the plaintiff has a real stake or a genuine interest in it; and (3) whether, in all the circumstances, the proposed suit is a reasonable and

> effective way to bring the issue before the courts: *Borowski*, at p. 598; *Finlay*, at p. 626; *Canadian Council of Churches*, at p. 253; *Hy and Zel's*, at p. 690; *Chaoulli*, at paras. 35 and 188. The plaintiff seeking public interest standing must persuade the court that these factors, applied purposively and flexibly, favour granting standing. All of the other relevant considerations being equal, a plaintiff withstanding as of right will generally be preferred.

I now apply the three factors in *Downtown Eastside* to this case.

Is there a serious justiciable issue raised?

[12] It is not in dispute that the impugned section of the Regulations offends the liberty interests of certain offenders. This raises serious questions of constitutionality. For this reason, I find that this application raises a serious justiciable issue.

Does the applicant have a real stake or genuine interest in the issue?

[13] An affidavit of Catherine Latimer, Executive Director of JHSC, was filed in support of this application. Ms. Latimer's affidavit evidence was unchallenged. Ms. Latimer gave evidence about JHSC's interest in the subject issue. Specifically, she states: "JHSC has a national presence and has a documented and longstanding role as an advocate for prisoner-rights".

[14] I accept Ms. Latimer's evidence that JHSC is an established not-for-profit prisoner advocacy organization and find that JHSC has a genuine interest in the outcome of this application.

Is the application, in all the circumstances, a reasonable and effective means to bring this issue before the court?

[15] Ms. Latimer's evidence is that JHSC, through the support of the Queen's Prison Law Clinic, has the means to bring this application unlike most of the individual offenders that are affected by the impugned section of the Regulations. Further, it is Ms. Latimer's evidence that, by the time an affected offender brought an individual application, they would likely have already been released, rendering their application moot and unable to be determined by the court.

[16] In addition to Ms. Latimer's evidence, JHSC relies on the affidavit of a former federal offender, Abubakar Sharif. Mr. Sharif's affidavit evidence was unchallenged. Mr. Sharif is one of the individual offenders that has been affected by the impugned section of the Regulations. He

was incarcerated for 23 days beyond his new statutory release date while waiting for the Parole Board to make a post-suspension decision. Mr. Sharif's evidence is that he lacked the resources to initiate his own proceeding, but that he is willing to give evidence in support of JHSC's application.

[17] Unlike Mr. Sharif and most other affected individual offenders, JHSC has the expertise and resources to bring this application and an interest in resolving this issue beyond the time frame of mootness that would apply to any individual offender.

[18] In all the circumstances of this case, I find that this application is a reasonable and effective means of bringing this issue before the court. Accordingly, I grant JHSC public interest standing to bring this application.

ISSUE 2: Is s. 163(3) of the Regulation unconstitutional?

Legislative Background

[19] Section 127 of the Act is the starting point for legislative review. It states that the statutory release date of an offender is typically the date on which an offender has served two thirds of their sentence:

> 127(1) Subject to any provision of this Act, an offender sentenced, committed or transferred to penitentiary is entitled to be released on the date determined in accordance with this section and to remain at large until the expiration of the sentence according to law.
>
> …
>
> (3) Subject to this section, the statutory release date of an offender sentenced on or after November 1, 1992 to imprisonment for one or more offences is the day on which the offender completes two thirds of the sentence.

[20] Under the Act, statutory release is considered a form of conditional release. The purpose of conditional release is as follows:

> 100. The purpose of conditional release is to contribute to the maintenance of a just, peaceful and safe society by means of decisions on the timing and conditions of release that will best facilitate the rehabilitation of offenders

> and their reintegration into the community as law-abiding citizens.

At s. 100.1, the Act goes on to state that "[t]he protection of society is the paramount consideration for the Board and the provincial parole boards in the determination of all cases."

[21] Section 135 of the Act provides the authority to suspend an offender's statutory release in cases where an offender breaches a release condition or when it is determined that a suspension is necessary and reasonable to protect society:

> 135(1) A member of the Board or a person, designated by name or by position, by the Chairperson of the Board or by the Commissioner, when an offender breaches a condition of parole or statutory release or when the member or person is satisfied that it is necessary and reasonable to suspend the parole or statutory release in order to prevent a breach of any condition thereof or to protect society, may, by warrant,
>
> (a) Suspend the parole or statutory release;
> (b) Authorize the apprehension of the offender; and
> (c) Authorize the recommitment of the offender to custody until the suspension is cancelled, the parole or statutory release is terminated or revoked or the sentence of the offender has expired according to law.

[22] Section 135(3)(d) of the Act provides that the offender's case is subject to preliminary review within 30 days of an offender's statutory release being suspended and the offender being recommitted to custody (or a shorter period if requested by the Parole Board). At this preliminary review stage, CSC must decide whether the suspension should be cancelled or whether the case should be referred to the Parole Board. Section 135(3)(d) states:

> Subject to subsection (3.1), the person who signs a warrant under subsection (1) or any other person designated under that subsection shall, immediately after the recommitment of the offender, review the offender's case and…
>
> (d) In any other case [than where the offender is serving a sentence of less than two years], within thirty days after the recommitment or such shorter period of time as the Board directs, cancel the suspension or refer the case to the Board together with an assessment of the case stating the conditions, if any, under which the offender could in that person's opinion reasonably be returned to parole or statutory release.

[23] If the case is referred to the Parole Board, s. 135(5) of the Act sets out the requirement to review the case within a "period prescribed by the regulations". Section 135(5) then provides that the options available to the Parole Board are to terminate/revoke the offender's statutory release or to cancel the suspension of the offender's statutory release:

> (5) The Board shall, on the referral to it of the case of an offender who is serving a sentence of two years or more, review the case and – within the period prescribed by the regulations unless, at the offender's request, the review is adjourned by the Board or is postponed by a member of the Board or by a person designated by the Chairperson by name or position –
>
> (a) if the Board is satisfied that the offender will, by reoffending before the expiration of their sentence according to law, present an undue risk to society,
>
> (i) terminate the parole or statutory release if the undue risk is due to circumstances beyond the offender's control, and
>
> (ii) revoke it in any other case;
>
> (b) if the Board is not satisfied as in paragraph (a), cancel the suspension; and
>
> (c) if the offender is no longer eligible for parole or entitled to be released on statutory release, cancel the suspension or terminate or revoke the parole or statutory release.

[24] The "period prescribed by the regulation" referred to in s. 135(5) of the Act is the subject of this application. Specifically, s. 163 of the Regulations states:

> 163(3) Where the case of an offender has been referred to the Board pursuant to subsection 135(4)or (5) of the Act, and unless an adjournment of the review is granted by the Board at the offender's request, the Board shall render its decision within 90 days after the date of the referral, or the date of admission of the offender to a penitentiary or to a provincial correctional facility where the sentence is to be served in such a facility, whichever date is the later.

[25] If the Parole Board decides to terminate/revoke an offender's statutory release, a new statutory release date is calculated in accordance with s.127(5)(a) of the Act:

> 127(5) Subject to subsections 130(4) and (6), the statutory release date of an offender whose parole or statutory release is revoked is,

> (a) The day on which they have served two thirds of the unexpired portion of the sentence after being recommitted to custody as a result of a suspension or revocation under section 135,
>
> …

Effect of Legislative Scheme on Certain Offenders

[26] When an offender, who was serving the remaining portion of their sentence in the community on statutory release, is recommitted into custody following a breach of a release condition, CSC has 30 days in which to decide whether to cancel the suspension of the offender's statutory release or to refer the case to the Parole Board for determination.

[27] The Regulations then provide that the Parole Board has a further 90 days to review the case and to make a decision. The options available to the Parole Board upon reviewing the case are either to cancel the suspension of the offender's statutory release or to terminate/revoke the offender's statutory release.

[28] The combined total timeframe for CSC to refer the matter to the Parole Board, and the Parole Board to make a subsequent post-suspension decision, is 120 days.

[29] When an offender's statutory release is terminated/revoked by the decision of the Parole Board, a new statutory release date is calculated as being two thirds of the offender's remaining sentence from the time they are recommitted to custody to their warrant expiry date (i.e. the end of the offender's total sentence).

[30] By way of example, if an offender had 180 days (6 months) left in their sentence when a decision is made to terminate/revoke their statutory release, a new statutory release date would be calculated as being two thirds of the remaining sentence, or 120 days after the offender was recommitted into custody. Importantly, due to the 120-day regulatory timeframe, offenders who have 6 months or less remaining in their sentence can remain incarcerated beyond the newly calculated statutory release date while waiting for the Parole Board to render a post-suspension decision.

[31] Mr. Sharif is one of the affected offenders. In his affidavit, Mr. Sharif provides evidence as follows as to how the 120-day regulatory timeframe caused him to be incarcerated for 23 days beyond his new statutory release date:

(a) March 25, 2019: Mr. Sharif's warrant expiry date;

(b) November 22, 2018: Mr. Sharif was recommitted into custody after breaching conditions of his statutory release;

(c) November 30, 2018: Mr. Sharif was admitted to a penitentiary;

(d) December 14, 2018: Mr. Sharif's case was referred by CSC to the Parole Board for review;

(e) February 12, 2019: Mr. Sharif's new statutory release date;

(f) March 6, 2019: the date of Mr. Sharif's actual release from custody;

(g) March 14, 2019: the end of 90-day timeframe for the Parole Board to review Mr. Sharif's case.

[32] Mr. Sharif's case was processed in adherence with the timeframe set out in the Act and the Regulations. Despite that, Mr. Sharif remained in custody for weeks beyond his new statutory release date waiting for the Parole Board to make a post-suspension decision.

[33] Regardless of whether the Parole Board decides to cancel the suspension of the offender's statutory release or terminate/revoke the offender's statutory release, after an offender's new statutory release date passes the only possible outcome is that the offender is released into the community to serve the remainder of their sentence.

[34] Ms. Latimer's evidence is that being imprisoned beyond an offender's statutory release date is "likely to foster a sense of bitterness and resentment towards authority among affected offenders, which is counter-productive to their rehabilitation and social reintegration." Indeed, in relation to his time in custody beyond February 12, 2019, Mr. Sharif's evidence is that "[t]he unfairness and senselessness of this time in prison absorbed my thoughts and I grew upset and angry. It no longer seemed like I was being punished or held accountable for something I had done – instead it was like I had just been forgotten, that I didn't matter and my liberty wasn't worth the time it would take for a decision-maker to look at my file."

Section 7

[35] Section 7 of the *Charter* states that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

[36] A two-step approach is required to determine whether a law violates s. 7 of the *Charter*: (1) it must be shown that the law interferes with life, liberty or security of the person; and (2) if there is interference, whether the interference is contrary to the principles of fundamental justice: *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015 1 S.C.R. 331 at para. 55. I now apply the two-step approach set out in *Carter* to this case.

Liberty Interests

[37] In this case, certain offenders remain in custody beyond the date they are entitled to serve the remainder of their sentence in the community by way of statutory release. The length of the sentence does not change, just the location of where the sentence is served. The Supreme Court of Canada has confirmed that a change in the manner in which a sentence is served meets the first step of the s. 7 analysis: *Cunningham v. Canada*, [1993] 2 S.C.R. 143. McLachlin J. wrote, "[t]here is a significant difference between life inside a prison versus the greater liberty enjoyed on the outside under mandatory supervision."

[38] Canada acknowledges that the impugned section of the Regulations interferes with the liberty interests of certain offenders who, by virtue of the timeframe set out in the Regulations, remain in custody beyond their new statutory release date. I agree.

[39] The timeframe set out in s. 163(3) of the Regulations results in certain offenders remaining incarcerated beyond their new statutory release date. I find that this interferes with the liberty interests of those offenders. The first step of the s.7 analysis is satisfied.

Principles of Fundamental Justice

[40] With respect to the second step, Canada takes the position that the impugned section of the Regulations accords with the principles of fundamental justice and therefore remains valid.

[41] JHSC and Canada focused exclusively on the concepts of arbitrariness, overbreadth, and gross disproportionality when addressing the principles of fundamental justice.

[42] It is well accepted that a law cannot be in accordance with the principles of fundamental justice when it is arbitrary, overly broad, or grossly disproportionate. In *Canada (Attorney General) v. Bedford,* 2013 SCC 72, [2013] 3 S.C.R. 1101, the Supreme Court of Canada, referring to the *Motor Vehicle Reference,* stated at para. 96:

> The s. 7 analysis is concerned with capturing inherently bad laws: that is, laws that take away life, liberty, or security of the person in a way that runs afoul of our basic values. The principles of fundamental justice are an attempt to capture those values. Over the years, the jurisprudence has given shape to the content of these basic values. In this case, we are concerned with the basic values against arbitrariness, overbreadth, and gross disproportionality.

[43] JHSC submits that the impugned section of the Regulations is overly broad or, alternatively, has grossly disproportionate effects on certain offenders and is therefore contrary to the principles of fundamental justice.

i. Overbreadth

[44] In considering whether s. 163(3) of the Regulations is overly broad, it is necessary to examine whether there is any rational connection between its objective and its impacts. A law will be considered overly broad where there is no rational connection between the purpose of the law and *all* of its consequences: *Bedford* at para. 112.

[45] The impact of the Regulations, on certain offenders, is that they remain incarcerated beyond their new statutory release date. The question for consideration is whether this consequence has any rational connection to the objectives of the legislation or regulatory regime relating to conditional release.

[46] Section 163(3) of the Regulations sets out the 90-day timeframe for the Parole Board to make a post-suspension decision. More broadly, I agree with the parties that the objectives of the conditional release regime and the Parole Board include maintaining a just, peaceful and safe society by "means of decisions on the timing and conditions of release that will best facilitate the

rehabilitation of offenders and their reintegration into the community as law-abiding citizens", as well as the protection of society in the determination of all cases: The Act, ss. 100 and 100.1.

[47] JHSC accepts that the Parole Board requires sufficient time to determine whether the suspension of the offender's statutory release should be cancelled or whether statutory release should be revoked. In most cases, the 90-day time period is rationally connected to the objectives of the conditional release scheme. However, JHSC submits that, after an offender's new statutory release date passes, there is no longer a rational connection between the objective and the consequences, as the only possible outcome of the Parole Board's review is release of the offender into the community.

[48] Canada takes the position that JHSC has over-simplified the role of the Parole Board in making post-suspension decisions. While it is accurate that after the passage of an offender's new statutory release date they are entitled to be released into the community to serve the remainder of their sentence, Canada submits that the Parole Board is also tasked with crafting appropriate release conditions to ensure that the objectives of the conditional release scheme are fulfilled.

[49] If the Parole Board's *only* role in making post-suspension decisions were to decide whether to cancel the suspension of an offender's statutory release or to terminate/revoke statutory release, the continued incarceration of offenders beyond their new statutory release date would not have a sufficient rational connection to the objectives of the conditional release regime.

[50] However, I accept Canada's submission that the Parole Board's review of an offender's case includes more than a binary choice between cancelling the suspension or terminating/revoking an offender's statutory release. The Parole Board is also tasked with reviewing and oftentimes re-drafting release conditions to encourage the offender's successful reintegration into the community and to protect the broader society. The 90-day timeframe set out in s. 163(3) of the Regulations is at least somewhat rationally connected to the objectives of the conditional release scheme as a whole and, I find, is therefore not overly broad.

ii. Gross Disproportionality

[51] In *Carter,* at para. 89, the Supreme Court of Canada stated that the principle of gross proportionality "is infringed if the impact of the restriction on the individual's life, liberty or security of the person is grossly disproportionate to the object of the measure."

[52] The potential impact of s. 163(3) of the Regulations is that certain offenders will remain in custody beyond their statutory release date. I find that the continued incarceration of offenders beyond their statutory release date is a severe infringement of the liberty interests of those offenders.

[53] I have found that there is some rational connection between the consequence of the impugned section of the Regulations and the objective of reintegrating offenders into the community in a way that protects the public. Nonetheless, the objective cannot be viewed as proportionate to the severe impact on this cohort of offenders. This is particularly so given the simple solution put forward by JHSC; namely, that the Parole Board prioritize reviews so that post-suspension decisions be made *before* an offender's new statutory release date.

[54] It is necessary to address an argument put forward by Canada on the issue of an offender's new statutory release date. Canada submits that by virtue of the current conditional release regime, an offender's new statutory release date does not crystallize until the Parole Board renders a decision to revoke an offender's statutory release. It is for this reason that Canada states that an offender's new statutory release date does not need to be considered when scheduling reviews of the cases because the new date has not yet been set it stone. I reject Canada's argument.

[55] Monica Irfan, the Manager, Policy and Legislative Initiatives section, at National Office of the Parole Board of Canada, swore an affidavit in response to the subject application. Ms. Irfan was cross-examined on her affidavit. The following admissions made by Ms. Irfan are notable:

(a) the Parole Board prioritizes scheduling of its hearings in accordance with legislative and regulatory timeframes;

(b) there is no reason that the Parole Board cannot calculate an offender's new statutory release date in advance of the case review other than it is "just not current practice";

(c) the reason that the Parole Board does not currently take into consideration an offender's new statutory release date when scheduling hearings is because it is not part of the current regulatory timeframe;

(d) if the regulatory timeframe required the Parole Board to take an offender's new statutory release date into consideration, it would do so;

(e) there are multiple cases where offenders are held in custody beyond their new statutory release date while waiting for a post-suspension decision; and

(f) other legislated timeframes require the Parole Board to hold hearings in timeframes as short as 3 days and the Parole Board complies with those timeframes.

[56] It is equally notable that there was no evidence put forward by Canada that requiring the Parole Board to make a post-suspension decision before an offender's new statutory release date would cause any undue hardship, difficulty in scheduling, or administrative issues, whatsoever. The best evidence on this application is that the Parole Board is able to comply with the timeframes required by the relevant legislation or regulations.

[57] I have found that continued incarceration beyond an offender's statutory release date results in a severe infringement of their liberty. Further, there is no evidence from Canada as to why 90 days is required to review every case and no evidence as to why affected offender's cases are not prioritized, particularly in relation to offenders that have less than 6 months to serve in their sentence. I find that s. 163(3) of the Regulations deprives certain offenders of their entitlement to statutory release for no compelling reason and is grossly disproportionate to its objectives.

Other Considerations within the Principles of Fundamental Justice Analysis

[58] The principles of fundamental justice have evolved over time. While the basic values against arbitrariness, overbreadth and gross disproportionality have emerged as central considerations at this stage of review, they are not exhaustive.

[59] In *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, Lamer J. provided an instructive analysis of the principles of fundamental justice in the context of s. 7.

> Thus, ss. 8 to 14 provide an invaluable key to the meaning of "principles of fundamental justice". Many have been developed over time as presumptions of the common law, others have found expression in the international conventions on human rights. All have been recognized as essential elements of a system for the administration of justice which is founded upon a belief in "the dignity and worth of the human person" (preamble to the *Canadian Bill of Rights*, R.S.C. 1970, App. III) and on "the rule of law" (preamble to the *Canadian Charter of Rights and Freedoms*).
>
> It is this common thread which, in my view, must guide us in determining the scope and content of "principles of fundamental justice". In other words, the principles of fundamental justice are to be found in the basic tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system. Such an approach to the interpretation of "principles of fundamental justice" is consistent with the wording and structure of s. 7 , the context of the section, *i.e.*, ss. 8 to 14, and the character and larger objects of the *Charter* itself. It provides meaningful content for the s. 7 guarantee all the while avoiding adjudication of policy matters.

[60] I have already found that s. 163(3) of the Regulations has grossly disproportionate consequences for a cohort of offenders. I further find that the impact of s. 163(3) of the Regulations results in a process that is manifestly unfair and contrary to the basic tenets of our legal system and the legal rights of individuals espoused in the *Charter*.

[61] That an offender, like Mr. Sharif, must remain incarcerated while waiting for the Parole Board to make a decision that results in a new statutory release date that has already passed offends the well-established principle of fundamental justice against arbitrary imprisonment.

[62] Accordingly, I find that s. 163(3) of the Regulations violates s. 7 of the *Charter* by infringing on the liberty interest of certain offenders in a way that is contrary to the principles of fundamental justice.

Section 1

[63] Section 1 of the *Charter* guarantees the rights and freedoms set out therein “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

[64] Canada's submissions focused on whether the impugned section of the Regulations was contrary to the principles of fundamental justice as opposed to engaging in a s. 1 analysis. However, I find that Canada's main objection is more appropriately considered in the context of s. 1.

[65] Canada's fundamental argument is that the Regulations provide for "a 90-day timeframe for the Parole Board to make its decision because that is the amount of time that Parliament has decided is required for the Parole Board to discharge its obligations under this framework."

[66] As noted above, I have accepted Canada's submission that the Parole Board's role in making post-suspension decisions involves more than a choice between whether to cancel the suspension of an offender's statutory release or to terminate/revoke an offender's statutory release. I accept that the Parole Board is required to review the information provided to it by CSC upon referral of the case. I accept that the Parole Board is required to consider new release conditions and to assess risk to the public. I accept that the Parole Board has disclosure obligations to the offender and any registered victims.

[67] However, I do not accept and specifically reject that 90 days is required to complete these tasks in all cases particularly in relation to a cohort of offenders that will be incarcerated beyond their new statutory release date as a result. Canada did not put forward any evidence that the Parole Board requires 90 days to make all post-suspension decisions. In fact, Canada's own evidence was to the contrary. Ms. Irfan's confirmed that the Parole Board's average time to render post-suspension decisions was 60 days. Further, Ms. Irfan's evidence was that the Parole Board is required by statute to render decisions in other matters in timeframes as short as 3 days.

[68] At the hearing of this application, counsel for Canada conceded that there was no evidence before the court that the prioritization of reviews for this cohort of offenders would result in any backlog or procedural hardship for the Parole Board. Neither was there evidence that such a change would result in any budgetary constraints. The only explanation provided as to why the Parole Board does not currently prioritize making post-suspension decisions for offenders within this cohort is because the current legislation does not require it to do so.

[69] In *Bedford*, at para. 126, the Supreme Court of Canada confirmed that, "[u]nder s. 1, the government bears the burden of showing that a law that breaches an individual's rights can be justified having regard to the government's goal". In reviewing the evidence available on this application, I find that Canada has not met its burden to show that the infringement of liberty interests caused by s. 163(3) of the Regulations is justified. There was simply no compelling evidence as to why the 90-day timeframe is required in all cases.

[70] In the result, I declare that s. 163(3) of the Regulations is inconsistent with s. 7 of the *Charter* and that it is not saved by s. 1. Section 163(3) is therefore void pursuant to s. 52 of the *Constitution Act, 1982*.

ISSUE 3: What is the appropriate remedy?

[71] As I have found s. 163(3) of the Regulations to be invalid, the next step involves determining the appropriate remedy.

[72] JHSC submits that language should be read into the existing section of the Regulations that will make the timeframe responsive to offenders whose new statutory release date would fall within the 90-day period currently prescribed. The proposed wording is as follows, with the underlined passage to be read into the Regulations:

> 163(3) Where the case of an offender has been referred to the Board pursuant to subsection 135(4) or (5) of the Act, and unless an adjournment of the review is granted by the Board at the offender's request, the Board shall render its decision within 90 days after the date of the referral, or the date of admission of the offender to a penitentiary or to a provincial correctional facility where the sentence is to be served in such a facility, whichever date is the later; <u>but unless an adjournment of the review is granted by the Board at the offender's request, the Board shall render its decision on or before the day on which the offender has served two thirds of the unexpired portion of the sentence after being recommitted to custody as a result of a suspension or revocation under section 135.</u>

[73] Canada submits that if s. 163(3) is declared invalid, I should decline to read in the wording suggested by JHSC and instead should strike down the provision in its entirety and suspend the declaration of invalidity for a period of time in order to allow Parliament to craft an appropriate

amendment. Canada submits that reading in could have unintended consequences that "would cause the work of the Parole Board to be more difficult, or even impossible." Canada's apparent concern, however, was not borne out in the evidence on this application. Indeed, there is no evidence of any complication arising from the prioritization of these reviews.

[74] Section 163(3) of the Regulations provides a 90-day timeframe for the Parole Board to make post-suspension decisions. By striking down the whole of the impugned section immediately, it is possible that the problem will worsen for a broader group of offenders, in that there will be no timeframe by which the Parole Board is required to render post-suspension decisions. Similarly, if I were to accept Canada's proposal and delay the declaration of invalidity, a serious *Charter* violation would be allowed to continue, albeit for a discrete period of time.

[75] In *Schacter v. Canada*, [1992] 2 S.C.R. 679, the Supreme Court of Canada confirmed that reading in can be an appropriate technique "to fulfil the purposes of the *Charter* and at the same time minimize the interference of the court with the parts of the legislation that do not themselves violate the *Charter*": p. 702.

[76] With respect to the concept of a delayed declaration of invalidity, *Schacter* goes on to state, at p. 716-717:

> A delayed declaration is a serious matter from the point of view of the enforcement of the *Charter*. A delayed declaration allows a state of affairs which has been found to violate standards embodied in the *Charter* to persist for a time despite the violation. There may be good pragmatic reasons to allow this in particular cases. However, reading in is much preferable where it is appropriate, since it immediately reconciles the legislation in question with the requirements of the *Charter*.
>
> …
>
> Where reading in is appropriate, the legislature may consider the issue in its own good time and take whatever action it wishes. Thus delayed declarations of nullity should not be seen as preferable to reading in in cases where reading in is appropriate.

[77] The offending portion of s. 163(3) of the Regulations is the prescribed 90-day timeframe. While sound in most cases, the timeframe results in a serious *Charter* violation for a small cohort

of offenders. I am satisfied that reading in an exception to the 90-day timeframe contained in the Regulations for this discrete group would constitute a lesser interference than would striking down the provision entirely. I find that reading in this exception would not constitute an unacceptable intrusion into legislative domain nor intrude into budgetary decisions in a substantial way: *Schachter*, p. 718.

[78] I find that a slight modification in the language proposed by JHSC would result in greater clarity, while preserving the objectives of the section and protecting the liberty interests of the affected offenders. The wording to be read into s. 163(3) is underlined below:

> 163(3) Where the case of an offender has been referred to the Board pursuant to subsection 135(4) or (5) of the Act, and unless an adjournment of the review is granted by the Board at the offender's request, the Board shall render its decision, on the earlier of:
>
> (a) within 90 days after the date of the referral, or the date of admission of the offender to a penitentiary or to a provincial correctional facility where the sentence is to be served in such a facility, whichever date is the later; or
>
> (b) on or before the day on which the offender has served two thirds of the unexpired portion of the sentence after being recommitted to custody as a result of a suspension or revocation under section 135.

[79] A declaratory order shall issue to this effect.

CONCLUSION

[80] Section 163(3) of the Regulations has the effect of depriving certain offenders of their liberty rights which is contrary to the principles of fundamental justice. The impugned section is not saved by section 1 of the *Charter* and is therefore declared invalid.

[81] The remedy ordered is to read in the following language, which has been underlined, to s. 163(3) of the Regulations:

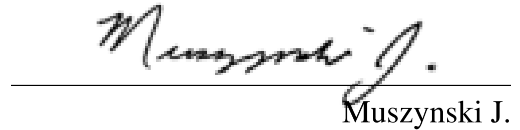
> 163(3) Where the case of an offender has been referred to the Board pursuant to subsection 135(4) or (5) of the Act, and unless an adjournment of the review is granted by the Board at the offender's request, the Board shall render its decision, on the earlier of:

(c) within 90 days after the date of the referral, or the date of admission of the offender to a penitentiary or to a provincial correctional facility where the sentence is to be served in such a facility, whichever date is the later; or

(d) on or before the day on which the offender has served two thirds of the unexpired portion of the sentence after being recommitted to custody as a result of a suspension or revocation under section 135.

COSTS

[82] JHSC has confirmed that, if successful, it would not seek costs with respect to this application. Accordingly, no costs are ordered.



Muszynski J.

Released: January 15, 2021

CITATION: John Howard Society of Canada v. Her Majesty the Queen, 2021 ONSC 380

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

JOHN HOWARD SOCIETY OF CANADA

-and-

HER MAJESTY THE QUEEN as represented by the ATTORNEY GENERAL OF CANADA

REASONS FOR DECISION

Muszynski J.

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