No. T-455-16

FEDERAL COURT

BETWEEN:

KRISTEN MARIE WHALING

(FORMERLY KNOWN AS CHRISTOPHER JOHN WHALING)

PLAINTIFF

AND:

HER MAJESTY THE QUEEN

DEFENDANT

PROPOSED CLASS PROCEEDINGS

AND PROPOSED SIMPLIFIED ACTION

SECOND FURTHER AMENDED STATEMENT OF CLAIM

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiffs. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a solicitor acting for you are required to prepare a statement of defence in Form 171B prescribed by the Federal Courts Rules serve it on the plaintiff's solicitor or, where the plaintiff does not have a solicitor, serve it on the plaintiff, and file it, with proof of service, at a local office of this Court, WITHIN 30 DAYS after this statement of claim is served on you, if you are served within Canada.

If you are served in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period for serving and filing your statement of defence is sixty days.

Copies of the Federal Court Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO DEFEND THIS PROCEEDING, judgment may be given against you in your absence and without further notice to you.

Original issued March 15, 2016
Amended version issued June 14, 2016
Further Amended version issued March 27, 2017

Issued by:

_____
(Registry Officer)

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TO: The Attorney General of Canada
Attention: Mr. William F. Pentney, Deputy Attorney General of Canada

THE CLAIM

1. The Plaintiff claims on her own behalf and on behalf of all class members:

    a. Such remedy as the Court considers appropriate and just in the circumstances pursuant to s.24(1) of the *Canadian Charter of Rights and Freedoms* for the infringement or denial of their Constitutional rights or freedoms as guaranteed by s.11(h) of the *Canadian Charter of Rights and Freedoms*

forming part of the *Constitution Act*, 1982 (the "*Charter*"), as determined by the Supreme Court of Canada on March 20, 2014 in the case of *Canada (Attorney General) v. Whaling* (2014) SCC 20, docket number 35024;

b. The Plaintiff says on her own behalf and on behalf of all class members, that the appropriate and just remedy for the infringement or denial of their Constitutional rights in the circumstances is damages pursuant to section 24(1) of the *Charter* and costs on a full or substantial indemnity basis are also warranted.

c. Such further relief as This Honourable Court may deem just in all of the circumstances.

THE PARTIES

2. The Plaintiff, Kristen Marie Whaling (formerly known as Christopher John Whaling) is and was, at all material times, a federal inmate serving a sentence of imprisonment under the jurisdiction of the Correctional Service of Canada ("CSC") and subject to the jurisdiction of the Parole Board of Canada ("PBC") as are or were all members of the class. CSC and PBC are federal organizations operated by the Crown.

3. The Defendant, Her Majesty the Queen ("the Crown") is named in these proceedings by virtue of section 2 and section 48(1) of the *Federal Courts Act* R.S.C.1985, as amended to date, and Schedule 1 thereto.

4. The Crown is responsible and liable under section 24(1) of the *Charter* for the introduction, passage and/or implementation of legislation which the Crown or its servants, agents or employees knew or ought to have known would be found to have violated the Plaintiff's constitutional rights as well as the constitutional rights of all members of the class and is vicariously liable for the acts and/or omissions

of its servants, agents or employees that were involved in some manner in causing or contributing to the constitutional violations in issue.

THE RELEVANT EVENTS

5. The Plaintiff and all other members of the class were all serving Federal penitentiary sentences and as first time, non-violent offenders, they were all eligible for "Accelerated Parole Review" ("APR") under s.125(1) of the *Corrections and Conditional Release Act,* namely the system in place at the time of their sentencing.

6. In November 1992, the Crown enacted the *Corrections and Conditional Release Act,* S.C. 1992, c.20 ("*CCRA")* and by s.125 thereof "Accelerated Parole Review" (APR) was established as a simplified process that allowed first time Federal non-violent offenders to be considered for parole on the basis of a single question: are there no reasonable grounds to believe that the offender, if released, is likely to commit a violent offence?

7. In 1997, the APR process was expanded by the Crown to include earlier eligibility for APR at day parole eligibility after serving a minimum of 6 months, or at 1/6 of the sentence, whichever was longer, instead of at 6 months before eligibility for full parole for all others serving fixed term sentences (S.C. 1997 c.17, s. 21(1)).

8. Purporting to respond to criticisms of this regime from various sources the Crown introduced in Parliament the *Abolition of Early Parole Act,* S.C. 2011, c.11 ("*AEPA"*), the relevant part of which came into force on March 28, 2011, eliminating APR and with it, the eligibility for such earlier release on day parole at one sixth or full parole at one third and according to the non-violent criteria.

9. As set out by the Record of Proceedings in Parliament, this repeal was initially intended to be prospective affecting only those subsequently convicted or

sentenced and thereby respecting s.11(h) and (i) of the *Charter* insofar as those already sentenced or about to be sentenced were concerned. However, shortly before the Federal election because of the specific case of Earl Jones in Quebec, a large white collar criminal fraudster and the extensive media notoriety his case engendered, and/or other considerations, the legislation introduced was changed and now provided by virtue of s.10(1) that the repeal of APR eligibility be applied retrospectively or retroactively in order to ensure that this particular individual and inevitably others already eligible for APR would have it taken away retroactively, in furtherance of the Conservative Party of Canada's "*Tough on Crime"* election campaign and government policy agenda. The Crown acted deliberately and/or recklessly, and/or in a grossly negligent manner, and/or in bad faith and/or in abuse of its power by proposing, pursuing and passing a bill into law that it knew or ought to have known was unconstitutional and would infringe the constitutional rights of those to whom it applied, and did so motivated by political self-interest in maintaining the Conservative Party optics of appearing "*tough on crime*", without any or adequate concern for the constitutionality of the proposed legislation and the unlawful and unconstitutional violation of the rights of those individuals impacted by its retroactive application, namely affecting their liberty and the security of their persons in a manner contrary to the principles of fundamental justice contrary to s.7 of the *Charter* and, more specifically, those already sentenced and their right not to be punished again (s.11(h) of the *Charter*), and those awaiting sentencing, to the benefit of the punishment in existence at the time of their offence (s.11(i)) of the *Charter*).

10. The Crown, and its employees, servants and/or agents, are responsible for carrying out their duties in accordance with all the applicable laws of Canada, including in particular the Canadian Constitution, including the *Charter* – this responsibility includes ensuring, or at the very least taking reasonable, good faith, steps to ensure, that legislation they pass, and legislation they implement, is consistent with the *Charter*, including section 11(h) of the *Charter*, which enshrines

an offender's right not to be punished further after having already been sentenced upon being convicted of violation(s) of the criminal laws of Canada.

11. Those Crown employees, servants and/or agents, who proposed and pursued the AEPA, including the Minister of Public Safety, and other state actors in their control, knew or ought to have known that the retroactive or retrospective application of the AEPA was unconstitutional, including being a clear and direct infringement of the Plaintiff's section 11(h) *Charter* right and that of all others similarly situated.

12. The said Crown employees, servants and/or agents and state actors were warned by participants at the Senate Standing Committee on Legal and Constitutional Affairs to study Bill C-59 (the "Standing Committee on Bill C-59") on March 21, 2011, that the enactment of the AEPA, insofar as it purported to apply retroactively or retrospectively, was unconstitutional.

13. During the proceedings of the Standing Committee on Bill C-59 on March 21, 2011, the Minister of Public Safety, amongst others, was reminded that retrospective or retroactive legislation had previously been struck down by the Supreme Court of Canada, and that, in fact, the Minister of Public Safety himself had argued one of the very first cases in that regard and had lost.

14. Despite having been warned of the unconstitutionality of the proposed legislation, the said Crown employees, servants and/or agents and state actors in their control continued to push the legislation forward. They did so despite the fact they knew or ought to have known that the AEPA was unconstitutional, recklessly, and without regard to the *Charter* rights of those to whom to AEPA applied.

15. The said Crown employees, servants and/or agents and state actors in their control were also advised by others within the Attorney General's office (the names

of which are known to the Defendant but currently unknown to the Plaintiff) of the unconstitutional nature of the retroactive application of the AEPA legislation.

16. The said Crown employees, servants and/or agents and state actors in their control acted in bad faith, including:

    a. acting recklessly;

    b. acting in a grossly negligent manner;

    c. acting in a manner that was clearly wrong;

    d. displaying willful blindness;

    e. acting with an unreasonable attitude or for ulterior motives;

    f. failing to respect the established and indisputable laws that define the constitutional rights of individuals; and/or

    g. acting in abuse of their power;

    in proposing, advocating for and pursuing a bill which they had been warned was unconstitutional, and which they knew (or ought to have known) was unconstitutional and would infringe the rights of those to whom it retroactively or retrospectively applied.

17. The aforesaid actions of the said Crown employees, servants and/or agents and state actors in their control in proposing, advocating for and pursuing the AEPA were directly responsible for the AEPA being passed into law by Parliament on March 28, 2011 resulting in the violation of the Plaintiff's constitutional rights and the constitutional rights of all other members of the class.

18. After the passage of the AEPA, the said Crown employees, servants and/or agents and state actors in their control acted in bad faith, including:

    a. acting recklessly;

    b. acting in a grossly negligent manner;

c. acting in a manner that was clearly wrong;

d. displaying willful blindness;

e. acting with an unreasonable attitude or for ulterior motives;

f. failing to respect the established and indisputable laws that define the constitutional rights of individuals; and/or

g. acting in abuse of their power;

in implementing a bill which they had been warned was unconstitutional, and which they knew (or ought to have known) was unconstitutional and would infringe the rights of those to whom it retroactively or retrospectively applied.

19. All members of the class are persons convicted of serious but non-violent crimes (determined according to Schedules appended to the *CCRA*) at the time when initially APR existed for full parole and when it was expanded in 1997 to include eligibility for day parole. Each of them would have been eligible for early day parole or later full parole under the repealed provisions.

Ms. Whaling and Section11(h) of the *Charter*

20. The Plaintiff and others took proceedings in the Province of British Columbia declaring this repeal of APR to be a violation of their Constitutional rights pursuant to s.11(h) of the *Charter.* The British Columbia Supreme Court *(2012 BCSC 944)* and British Columbia Court of Appeal *(2014 BCCA 435)* found in their favour. On March 20, 2014, Mr. Justice Wagner on behalf of a unanimous Supreme Court of Canada held that the retrospective application of delayed day parole eligibility violated the Plaintiff's 11(h) right not to be "*punished… again*" and that that violation was not justified under s.1 of the Charter.

21. The Plaintiff's case was funded by legal services society. As a term of the Plaintiff's legal services certificate, her action was limited to only pursuing a

declaration that the impugned provisions of the AEPA were unconstitutional as this was the most expedient process and funding is not available for actions for damages. In any event, pursuing a declaration alone to determine if a constitutional right has been violated, absent a damages claim, is a more expedient process so that a damage claim is only brought if the violation is found. Ms. Whaling as Plaintiff in this class action represents all members of the class who were not specific parties to the constitutional challenge although affected by it, namely all those persons already serving federal penitentiary sentences for their first time for certain scheduled deemed to be non-violent offences at the date of the retroactive repeal on March 28,2011 who were then 'punished again'.

Particulars of Ms. Whaling's circumstances

22. The Plaintiff was convicted in Vancouver, British Columbia by a judge of the British Columbia Supreme Court on August 30, 2010, for non-violent offences. On September 29, 2010, she was given in British Columbia a sentence of 4 years and 6 months, after being credited for a period of pre-trial custody.

23. The Plaintiff's entire sentence of 4 years and 6 months was served in British Columbia.

24. The Plaintiff's eligibility for unescorted temporary absences was June 29, 2011. Her eligibility for day parole under APR would have been June 29, 2011. After APR was abolished effective March 28. 2011, her eligibility for day parole under regular review was September 29, 2011. Her full parole dale remained March 29, 2012. Her statutory release date was September 27, 2013 and the warrant expiry date for her sentence was March 28, 2015.

25. On April 4, 2011, a letter from the office of the Parole Board of Canada in Abbotsford, British Columbia was sent to the Plaintiff at William Head Institution, a minimum-security facility located on Vancouver Island in British Columbia. The letter informed her that, as a result of the Corrections and Conditional Release Act having

been amended to abolish APR effective March 28, 2011, the Parole Board would now not be reviewing her case for the purpose of accelerated day and full parole.

26. On May 10, 2011, the Plaintiff was approved for voluntary transfer from William Head to Ferndale Institution in British Columbia to enable her to have contact with her family. The transfer warrant was issued on May 10, 2011 and executed on May 19, 2011.

27. On October 11, 2011, the Parole Board of Canada denied her day parole and full parole through the normal review process.

28. On November 9, 2011, the Plaintiff was released on bail by Madam Justice Bennett of the British Columbia Court of Appeal pending her appeal from conviction. This interrupted her sentence.

29. The Plaintiff remained 540 days lawfully at large on bail before returning to penitentiary to continue serving the sentence. On return to custody the eligibility dates for release and the expiration of sentence were amended to account for the interruption in the sentence. The statutory release became March 21, 2015. Her full parole eligibility date became September 20, 2013. The new warrant expiry date for her sentence became September 18, 2016.

30. Subsequent to the British Columbia Supreme Court issuing the Plaintiff a declaration of constitutional invalidity regarding a retrospective abolition of accelerated parole review, the Parole Board of Canada conducted an in-office review and considered whether to grant her day parole pursuant to accelerated parole review. On an initial review, without a hearing, dated July 3, 2013, the Parole Board refused to grant parole, stating it was satisfied that there were reasonable grounds for believing that the Plaintiff was likely to commit an offence involving violence before the expiration of her sentence. The Board therefore directed that the Plaintiff not be released and as required, referred her case to a new panel for hearing.

31. On July 25, 2013, the Parole Board of Canada interviewed the Plaintiff and rendered its accelerated review decision. The Board was satisfied that there were no reasonable grounds to believe that, if released, the Plaintiff was likely to commit an offence involving violence before the expiration of her sentence, and directed her release at her eligibility date. The Board imposed two special conditions on her day and full parole: (i) not to associate with any person she knew or had reason to believe was involved in criminal activity; and (2) to provide documented financial information to the satisfaction of her parole officer as per a schedule to be determined by her parole officer.

32. On July 26, 2013. the Plaintiff was released on day parole. Two special conditions were imposed on the day parole and were to remain in effective until September 20, 2013, namely, not to associate with anyone she knew, or had reason to believe, was involved in criminal activity and to provide documented financial disclosure to her parole supervisor as per a schedule to be determined by her parole supervisor. Other conditions of day parole were to reside at Vancouver's Harbour Light Community Residence Facility (CRF) and to limit her travel radius to the Vancouver area only, and to report to police as directed by her parole supervisor.

33. On April 4, 2016, the Plaintiff was issued a full parole certificate by Correctional Service Canada, which reflects a release date of September 20i 2013 and an expiry date of September 18, 2016. Upon release, she was directed to proceed directly to North Vancouver. The same two special conditions and travel radius that were in effect during day parole continued under full parole, except that the travel areas were expanded to include further cities in the Metropolitan Vancouver East District. The Plaintiff was to report as required to the North Vancouver RCMP during full parole and was no longer required to reside at a specific address within the travel radius.

34. While on day and full parole, the Plaintiff was also subject to conditions that were deemed imposed by the Parole Board of Canada, namely, to report to a parole

supervisor, obey the law and keep the peace, inform the parole officer immediately upon any arrest or questioning, carry her release certificate and identification, report to the police if and as instructed by her parole supervisor advising of any change in residence address or work, domestic or financial situations, and of any change that could reasonably be expected to affect her ability to comply with the conditions of parole (day or full), and not to possess ay weapon as defined in section 2 of the Criminal Code, except as authorized by her parole supervisor.

Accelerated Parole Review

35. The APR scheme differed from the regular parole scheme in three main ways:

a. The process was simplified so that an APR application was automatic and the eligible offenders are referred to the Parole Board of Canada (PBC) by the Correctional Service of Canada (CSC) without having to apply and the review is initially conducted on paper without a hearing, and only if that single Board member determined such grounds to exist would a hearing be directed to a panel of two other Board members who would review the matter applying the same test set out in s.125 of the CCRA;

b. The test for release was based on a presumptive standard that was lower than the standard applicable to regular parole and after finding “no reasonable grounds to believe that the offender, if released, is likely to commit an offence involving violence”, the Board had no discretion to decide against releasing the offender and as indicated these provisions were extended to day parole in addition to full parole;

c. Beginning in 1997, the APR process for day parole was triggered at an earlier date than the regular parole process, namely after the offender had served 1/6 of the sentence or 6 months (whichever was longer), instead of 6 months before full parole eligibility as provided for in non-APR cases.

36. With the coming into force of the *AEPA,* APR for both day and full parole were abolished and by s.10(1) of the *AEPA,* it was made retrospective to offenders already serving their sentences thereby clearly punishing them again contrary to s.11(h) of the *Charter*.

37. Consequently, those previously eligible for APR (having committed their offences and been sentenced before the *AEPA* came into force) were now no longer eligible for APR and the regular parole provisions would now apply to them. This changed the process for eligible offenders in the following ways:

- timing of their eligibility for day parole was delayed from 1/6 or 6 months (whichever was the longest) to 6 months before full parole eligibility (1/3 of sentence)

- the review process for day parole was no longer an automatic referral and required the offender to apply;

- the preliminary review on paper without a hearing was replaced with a hearing and personal appearance in a regular review or standard non-APR parole review process;

- the test for granting parole was changed from the lower presumptive standard of non-violent recidivism with no discretion to deny parole if the test was met to the more onerous provision of “undue risk to society” generally which left it to the discretion of the PBC to determine that the offender might re-offend in any way (violent or otherwise) prior to the expiry of his/her full warrant of committal;

38. The immediate effect of the repeal was an automatic increase in the length of time a person would be incarcerated due to the delay of the day parole eligibility dates of those already sentenced by varying amounts depending upon the date of sentencing, and the 6 months or 1/6 APR day parole eligibility date. Such persons

also lost the benefit of the less onerous APR test for those coming up for day parole or full parole that qualified for APR prior to the repeal."

39. Consequently, the class consists of all of those prisoners sentenced prior to March 28, 2011 to federal sentences of 2 years or more who were first time offenders convicted of non-violent offences and who as a result of the *AEPA* lost that status and the benefits as set out in paragraphs 37 herein.

40. All members of this class lost their APR status on March 28, 2011 until such time as it was restored as a result of the Judgment of the Supreme Court of Canada in *Canada (Attorney General) v. Whaling (supra)* on March 20, 2014, over 3 years later, and for varying amounts of time depending upon the length of their sentences and their eligibility dates as recalculated by the CSC.

41. In addition, in some cases after their APR was restored, they were directed to APR day parole or full parole and in some cases they were not directed to APR day parole or full parole and in the case of those not directed to APR day parole, the Defendant took the position that the prisoner's APR status was "spent" resulting in the application of the regular parole criteria of "undue risk to reoffend generally" to their full parole eligibility instead of the APR criteria. All of these prisoners were prisoners who had not been released on parole so their parole had not been terminated or revoked and while they were continuing to serve their sentences after the denial of APR day parole and thereby had an opportunity to continue to try further and establish that they were not likely to re-offend in a violent manner before warrant expiry, nevertheless the CSC and PBC took the position that their APR was "spent" and that therefore they were no longer eligible for the APR full parole criteria once denied APR day parole, notwithstanding their never having been released on parole.

42. In addition, some members of the class have suffered losses both financial and otherwise as a result of the retroactive removal of their APR status who would

likely have been directed to APR or granted APR by a panel had the APR test continued to be applied to them and suffered these further damages as a result of the violation of their Constitutional rights under s.11(h) of the *Charter.* They lost not only the right to an early review of their conditional liberty but in some cases, also further losses including financial as a result of the removal of the criteria under which they would likely have been released and which they relied upon and made plans around at the time of their sentencing or before the repeal.

CAUSES OF ACTION

43. Section 11(h) of the Charter states:

> *Any person charged with an offence has the right:*
> *…*
> *(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again;*

44. The retroactive application of delayed day parole eligibility violated the Plaintiff's 11(h) right, once found guilty on an offence, not to be punished for it again. That violation was not justified under s.1 of the Charter.

45. Pursuant to section 24(1) of the Charter, the Plaintiff seeks damages as the appropriate and just remedy for the conduct of the Defendant referred to herein which infringed or denied the Plaintiff's and the class members' section 11(h) Charter right. The Defendant acted in bad faith as particularized in paragraphs 16 and 18 herein. All three functions of an award for Charter damages (namely vindication, compensation and deterrence) are engaged.

46. A Charter damage award in this case in necessary to:

    a. express society's condemnation of the Defendant's conduct;

b. provide an incentive to the Defendant to respect and comply with the *Charter* in the future;

c. ensure fair treatment of incarcerated individuals in the future;

d. provide proper compensation;

e. encourage plaintiffs to act in the public interest by bringing claims concerning flagrant *Charter* violations;

f. achieve the goals of vindication, compensation and deterrence.

THE CLASS

47. This action is brought as a proposed class action by the Plaintiff pursuant to Rule 334.12 of the *Federal Court Rules* on behalf of all prisoners who were already sentenced and met the criterial for APR who then had that status taken away retroactively by the *AEPA* on March 28, 2011.

48. The number of prisoners under the control of the Correctional Service of Canada affected by that repeal is estimated to be in the thousands, the particulars of which are known to the Defendant and unknown to the Plaintiff.

49. There are questions of law and fact common to the proposed class. The claims of the Plaintiff are typical of the claims of the proposed class members and the Plaintiff herein will adequately represent and protect the interests of the said proposed class.

50. Separate actions by individual members of the proposed class would create a risk of inconsistent adjudications with respect to individual members of the class.

51. In addition, the Plaintiff proposes that this class action be proceeded with as a “Simplified Action” pursuant to *Federal Court rules* 294 through 299, with the

provision that any individual Plaintiffs claims for damages that exceed $50,000, exclusive of interest and costs be permitted to proceed through this procedure by either the agreement of the parties or on motion to the court in each individual plaintiffs circumstance, pursuant to rule 292 paragraphs (a),(c) and (d).

52. The Plaintiff also seeks costs and prejudgment interest, if applicable.

The Plaintiff proposes that this action be tried in the City of Vancouver, Province of British Columbia.

DATED this 10th day of April 2019 at the City of Abbotsford, in the Province of British Columbia.

Original dated March 15, 2016
Amended dated June 14, 2016
Further Amended dated March 27, 2017

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