**R. v. Poulin[1]: The Rule of Law as a Sword by N** Zandsalimi,

Mr. Poulin was found guilty of two counts of gross indecency against a minor family member. The sexual offences which he was found guilty of occurred between 1979 and 1987. He was sentenced to a conditional sentence of 2 years less a day due to health issues. A conditional sentence was not available for sexual offences at either the time that Poulin committed the offences or at the time he was sentenced. However, for a short period of time, conditional sentences were available to those convicted of these crimes. The crown appealed the decision.

Mr. Poulin had passed away before the Supreme Court of Canada heard the appeal. Thus, the appeal had become factually moot. The court exercised its discretion and decided to continue with the appeal pursuant to the factors laid out in *R v. Smith.* [2] The second issue before the court was whether s.11(i) of the Charter constitutionalizes a global or binary right.[3] Under s.11(i), any person charged with an offence has the right to the benefit of a lesser punishment if found guilty of an offence for which the punishment for the offence has been varied between the time of the commission and the time of the sentencing. Mr. Poulin argued that the provision entitles the offender to receive the least onerous punishment that has existed for the offence since it was committed.[4] This was the approach of Canadian Courts had been the general consensus by Canadian Courts till this decision. The majority did not agree with Mr. Poulin. They held that a purposive analysis leads to the conclusion that s.11(i) provides a binary right. [5] Their purposive interpretation of the provision focused on the origins and language of s.11(i), specifically with respect to the word 'between' and 'lesser'. [6] They also considered the purposes and effect of the provision as well as the negative implications of adopting a global approach. They applied the rule established in *R v. K.R.J* that says the underlying purposes of s.11(i) are the rule of law and fairness. [7] The emphasis was that *Charter* rights 'must be interpreted liberally within the limits that their purposes allow.' [8] They found that adopting a global interpretation was overly generous and beyond the intentions of the *Charter.* [9] These considerations led them to allow the appeal and find that s.11(i) conferred a binary right that entitles the offender to the lesser of punishments between those under the laws in force at the time the offence was committed and at the time the offender is sentenced.[10]

The dissent disagreed with the majority on both issues. First, Karakatsanis J held that the appeal should not have proceeded in light of the death of the offender. He found that it was not in the interest of justice to proceed[11] and further, there was little uncertainty with respect to the second issue. Courts have been consistently applying a global right approach with respect to s.11(i).[12] On the

[1] *R v Poulin,* 2019 SCC 47.
[2] *Ibid* at para 19.
[3] *Ibid* at para 28.
[4] *Ibid* at para 30.
[5] *Ibid* at para 117.
[6] *Ibid* at para 67.
[7] *Ibid* at para 33.
[8] *Ibid* at para 54.
[9] *Ibid* at para 53.
[10] *Ibid* at para 2.
[11] *Ibid* at para 139.
[12] *Ibid* at para 142.

issue of interpreting s.11(i), he held in favour of Mr. Poulin and a global right approach to s.11(i). in doing so, he considered the French meaning and definition of 'lesser' that does not necessarily invoke a dual comparison.[13] He suggests that there is a continuum *between* the time of commission and the time of sentencing.[14] I believe this functionalist approach to be much more useful and applicable, especially since it is the approach courts have had no issues with for the past 30 years.

The majority decision appears to be treating the process as one that is frozen. Those who are charged with offences may spend years or decades in the criminal justice system. While it may be more practical and less cumbersome for the court to only consider the available punishments at two points in time, this approach freezes the offender's rights and options to two particular moments in time. Someone may choose to plead guilty based on a sentence that is available at the time they plead, and by the time it comes around to sentencing, that sentence may no longer be available. The dissent made note of this point and referenced the various instances that accused persons are required to make choices and their choices are often informed by the sentences available.[15] The majority largely ignored this consideration and instead pointed to the fact that there was no evidence that Poulin relied on the sentence of a conditional sentence.[16] Whether or not those those who can show that they relied on a particular sentence when pleading guilty or formulating a defense will be able to rely on the lesser sentences was left by the court to be answered in a later case. However, they have opened the doors to an additional hurdle for offenders to have to provide evidence of relying on a sentence. This seems to be unrealistic considering decisions that relate to imprisonment may not be made with blatant evidence.

Under s.606 of the Criminal Code, the court cannot accept a plea of guilty if it is not satisfied that the plea is being given voluntarily and without pressure. It is quite likely that individuals will feel pressured to plead guilty if there is a possibility that a lesser sentence may no longer be available, say in the case of a bill being proposed that would change the sentences. The rule of law combined with the purposive analysis that was conducted is being used a sword with respect to s.11(i). The binary approach creates an assumption that all offenders are in essence trying to take advantage of the fact that a lesser punishment existed at some point. This is not the case. A global right simply increases the discretion of the judge to impose such sentence that was at some time available. The court here did not consider that perhaps judges should have the discretion to impose a lower sentence in light of circumstances on a case-by-case basis. Future cases that arise from the door that has opened will determine to what extent the rule of law as a sword.

[13] *Ibid* at para 149.
[14] *Ibid* at para 148.
[15] *Ibid* at para 153.
[16] *Ibid* at para 102.