SCC Court File No. 39346

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

HER MAJESTY THE QUEEN

Applicant

- and -

CHEYENNE SHARMA

Respondent

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. The David Asper Centre for Constitutional Rights ("Asper Centre") intervenes in this appeal to address the effect of ss 742.1(c) and 742.1(e)(ii) of the *Criminal Code* (the "impugned provisions") on the right of Indigenous people to substantive equality in the operation of the criminal law. The Asper Centre makes three submissions:

a) The criminal law and criminal justice system are causally connected to the disadvantage and marginalization of Indigenous people. Accordingly, the state has a constitutional obligation to take affirmative measures to address the discriminatory effects of law, and cannot undermine or abandon those efforts without infringing s 15 of the *Charter*.

b) The impugned provisions impair the *Gladue* framework: the measures adopted by Parliament in response to its obligation to redress systemic discrimination and foster substantive equality in the criminal justice system. They therefore violate s 15, and cannot be justified under s 1.

c) Subjecting to *Charter* scrutiny legislation that impairs Parliament's chosen remedial measures does not constitutionalize those measures themselves. Parliament retains discretion to amend the sentencing provisions of the *Criminal Code*; it is simply required to do so in accordance with *Charter* rights, including the right to substantive equality.

PART II – QUESTIONS IN ISSUE

2. The Asper Centre intervenes to address whether the impugned provisions infringe s 15.

PART III – STATEMENT OF ARGUMENT

A. Substantive equality rights and correlative obligations in relation to criminal law

3. Section 15 guarantees the right of every individual to substantive equality in the formulation and application of the law.[1] This includes the right of every Indigenous person to substantive equality in both the substance and administration of the law governing the imposition and carrying out of criminal sanctions. It is painfully apparent that that right has not been realized. Instead, the equality deficit faced by Indigenous people within the criminal justice system continues to grow.

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[1] *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at p 171.

4. Contrary to the Appellant's assertion, the Canadian criminal justice system does not simply "exist within social circumstances of disadvantage" of Indigenous people.[2] Rather, the criminal law is profoundly and actively implicated in Indigenous people's historical and continuing marginalization. There is no question that Indigenous people experience "staggering injustice"[3] and "systemic discrimination"[4] in the administration of criminal justice. As this Court recently observed, "[n]umerous government commissions and reports, as well as decisions of this Court, have recognized that discrimination experienced by Indigenous persons, whether as a result of overtly racist attitudes or culturally inappropriate practices, extends to all parts of the criminal justice system".[5] That discrimination takes many forms, including the overwhelming and persistent overrepresentation of Indigenous people in custody.

5. Overincarceration is, however, "only the tip of the iceberg insofar as the estrangement of aboriginal people from the Canadian criminal justice system is concerned".[6] Indigenous people's subjection to the criminal justice system has been not only a consequence but a mechanism of colonialism and cultural genocide. For example, the overincarceration of Indigenous people is deeply rooted in the intergenerational trauma of residential schools; at the same time, the criminal law reinforced and sustained the residential school system through police surveillance of Indigenous families and communities, the prosecution of those who resisted surrendering their children, and the investigation of runaways.[7] A variety of other laws and policies "designed to control, assimilate, or eliminate Indigenous peoples" have also been enacted and enforced through the criminal justice system.[8]

6. The administration of criminal justice continues to inflict distinct, disproportionate and intergenerational harms on Indigenous families and communities, including through the

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2 Appellant's Factum, para 62.

3 *R v Gladue*, [1999] 1 SCR 688 at para 88.

4 *R v Williams*, [1998] 1 SCR 1128 at para 58.

5 *Ewert v Canada*, 2018 SCC 30 at para 57, citations omitted.

6 *Gladue*, *supra* at para 61.

7 Truth and Reconciliation Commission, *Final Report*, Vol 5 (2015), pp 7, 185-186.

8 *Reclaiming Power and Place: Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol 1a, (2019) [*Reclaiming Power and Place*] at p 717.

imposition of custodial sentences where non-custodial alternatives would be consistent with community safety and the fundamental purpose and principles of sentencing. The over-incarceration of Indigenous women in particular contributes to the profound overrepresentation of Indigenous children in foster care, another "institutionalized colonial system."[9] As the majority of the Court of Appeal recognized, the overincarceration of Indigenous women perpetuates the effects of intergenerational trauma and the disruption of Indigenous families and communities.[10]

7. Overincarceration is thus not merely an effect but a further instance of and a significant contributor to systemic discrimination against Indigenous people. The social circumstances of Indigenous people's marginalization and disadvantage are not caused solely by the operation of the criminal justice and correctional systems, but neither are they independent of those systems. Rather, state conduct in the administration of criminal justice generally, and in the imposition and carrying out of sentences specifically, augments and exacerbates the pre-existing disadvantage of Indigenous people. This interaction between the operation of the criminal justice system and the marginalization of Indigenous people has important implications under s 15.[11]

8. Section 15 does not impose "a freestanding positive obligation on the state to redress social inequalities".[12] It does, however, obligate the state to ensure that the operation of law neither creates inequalities nor exacerbates existing ones. Given the staggering and shameful overincarceration of Indigenous people, s 15 requires that Parliament implement measures to remedy this discrimination and protect and promote the equality rights of Indigenous people in the imposition and carrying out of sentences.

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[9] *Reclaiming Power and Place*, supra at p 637

[10] Court of Appeal Reasons at para 96.

[11] *Quebec (Attorney General) v A*, 2013 SCC 5 at para 332; *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at para 20; see also *Fraser v Canada*, 2020 SCC 28 at para 175 *per* Brown and Rowe JJ, dissenting.

[12] *Quebec v Alliance du personnel professional et technique de la santé et des service sociaux*, 2018 SCC 17 at para 42. See also *Thibaudeau v Canada*, [1995] 2 SCR 627 at para 38 *per* L'Heureux-Dubé J, dissenting but not on this point (s 15 "does not impose upon governments the obligation to take positive actions to remedy the symptoms of social inequality"); *Andrews*, *supra* at pp 163, 171 and 175; *Lovelace v Ontario*, 2000 SCC 37 at paras 90-92. Cf *Symes v Canada*, [1994] 4 SCR 695 at pp 764-765.

9. Such measures obviously have an ameliorative purpose and effect. They are nevertheless conceptually distinct from ameliorative programs government may choose to adopt to address systemic inequalities that arise from broader societal factors. Where historical disadvantage exists both prior to and independent of legislation, Parliament may but is not required to enact policies and provide benefits aimed at ameliorating that disadvantage. Where, in contrast, disadvantage is created or exacerbated by law, Parliament has a constitutional obligation to take affirmative remedial measures. In other words, where law or state action is implicated in creating or perpetuating discrimination – as in the operation of the sentencing provisions for Indigenous people – adopting measures to promote substantive equality is compulsory, not optional.

10. What is broadly characterized as "remedial legislation" therefore in fact consists of different types: *ameliorative* legislation intended to respond to pre-existing disadvantage that exists independent of the law; and *corrective* legislation intended to respond to disadvantage caused or exacerbated by law. This essential distinction is elided in the dissent below.[13] Parliament has *no* obligation to create ameliorative programs. The same cannot be said with respect to correcting the unconstitutional effects of its own action. As discussed below, Parliament is not required to adopt any *particular* statutory scheme to redress such inequalities – but neither can it allow systemic discrimination in the operation of law to persist unchecked.

11. It is equally important to distinguish between different kinds of "benefit" as it is between different types of remedial legislation. If Parliament chooses to confer benefits in the form of social programs it must do so in a non-discriminatory manner, but the decision whether to create those benefits is entirely within Parliament's discretion.[14] In contrast, the provision of a "benefit" in the form of an accommodation to redress the otherwise discriminatory impacts of law flows from the constitutional imperative of substantive equality. Again, Parliament has discretion with respect to the precise nature of the accommodation, but this legislative discretion is underpinned by a constitutional obligation. The "benefit" – *i.e.*, the accommodation – conferred by the *Gladue*

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[13] Court of Appeal Reasons at para 188.

[14] *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, 2004 SCC 78 at para 41.

framework is thus of a very different nature than the benefits conferred by social programs. [15]

12. These distinctions have potentially significant implications for the s 15 analysis of the impugned provisions. The Asper Centre shares the Respondent's view that Parliament cannot dismantle or undermine ameliorative programs in a manner that exacerbates historical disadvantage unless such action can be justified under s 1. But even if it is open to Parliament to "ratchet down" the protections available under those more general ameliorative programs, Parliament is not permitted to abdicate or resile from its obligation to remedy inequalities arising from the operation of its own laws.[16] Thus – whatever the *Charter* implications of dismantling legislative programs that address broader societal inequalities may be – provisions that impair or detract from efforts to address the discriminatory impacts *of law itself* clearly violate s 15.

B. The impugned provisions unjustifiably impair the operation of the *Gladue* framework

13. The *Gladue* framework – the directive to consider non-custodial sentences for Indigenous offenders coupled with the availability of alternatives – is the cornerstone of Parliament's chosen means of giving effect to the constitutional mandate to protect and promote substantive equality in the operation of the criminal law. This statutory directive is not itself of constitutional force, but it is responsive to a constitutional obligation. As this Court held in *Gladue*, the "fundamental purpose of s 718.2(e)" is to treat Indigenous offenders "fairly by taking into account their difference".[17] In *Ipeelee*, this Court affirmed that *Gladue* principles "direct sentencing judges to abandon the presumption that all offenders and all communities share the same values when it comes to sentencing", and cited with approval *R v Vermette*, which described s 718.2(e) as "an acknowledgment that to achieve real equality, sometimes different people must be treated differently".[18] Similarly, in *United States v Leonard*, the Ontario Court of Appeal stressed that

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[15] The *Gladue* framework might equally and perhaps better be characterized as an effort to ensure that the *burden* of custodial sentences is not imposed on Indigenous people in a discriminatory manner – that is, one that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.

[16] See *Fraser*, *supra* at para 207 *per* Brown and Rowe JJ dissenting but not on this point (matters are different "where the government itself has created the inequality").

[17] *Gladue*, *supra* at para 87, emphasis added.

[18] *Ipeelee*, *supra* at paras 74, 71 (quoting 2001 MBCA 64 at para 39).

consideration of *Gladue* factors is required to "*avoid* the discrimination to which Aboriginal offenders are too often subjected and that so often flows from the failure of the justice system to address their special circumstances", noting that this approach "resonates with the principle of substantive equality".[19]

14. Section 718.2(e) is founded on the premise that taking a different approach to sentencing individual Indigenous offenders will contribute, albeit incrementally, to reducing Indigenous alienation from the criminal justice system and fostering substantive equality. While obviously not a panacea,[20] the remedial nature of s 718.2(e) is meaningful and important.[21] That the *Gladue* framework has not succeeded in reversing or even halting the accelerating trend of overrepresentation and overincarceration of Indigenous people does not detract from its equality-advancing purpose and potential.

15. A similar conclusion was reached by this Court in *Ewert* in relation to s 4(g) of the *Corrections and Conditional Release Act*, a "direction from Parliament … to advance substantive equality in correctional outcomes … for Indigenous offenders."[22] Like s 718.2(e) of the *Criminal Code*, s 4(g) requires decision makers to ensure that facially neutral practices do not discriminate against Indigenous persons and "reflects the long-standing principle of Canadian law that substantive equality requires more than simply equal treatment and that, indeed, 'identical treatment may frequently produce serious inequality'".[23] This Court noted in *Ewert* that over the two-and-a-half decades since s 4(g) was enacted, the gap between Indigenous and non-Indigenous offenders had continued to widen. The fact that s 4(g) had not corrected these disparities did not detract from its remedial significance but rather required that it be given meaningful effect.

16. The impugned provisions profoundly undermine the effect that can be given to s 718.2(e). Section 718.2(e) requires that the sentencing court consider "all *available* sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to

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[19] *United States v Leonard*, 2012 ONCA 622 at para 60, emphasis added.

[20] *Gladue*, *supra* at para 65.

[21] *Gladue*, *supra* at paras 33-34, 44.

[22] *Ewert*, *supra* at para 53.

[23] *Ewert*, *supra* at para 54, citing *Andrews*, *supra* at pp 164-65.

victims or to the community" for all offenders, with "particular attention to the circumstances of Aboriginal offenders." Provisions that restrict the availability of non-carceral sanctions in circumstances where they would otherwise be appropriate deny Indigenous offenders the full and meaningful effect of s 718.2(e). These provisions run afoul of s 15 not because they make sentencing outcomes harsher for certain Indigenous offenders, but because they fundamentally impair the operation of the *Gladue* sentencing framework in cases like that of the Respondent, in a manner that exacerbates and reinforces existing disadvantage.

17. In seeking to justify the discrimination, the Appellant asserts that the impugned provisions are underpinned by a pressing and substantial objective. But a clear articulation of this claimed objective is at best elusive. Appropriately identifying the legislative objective is critical to a proper s 1 analysis.[24] In particular, the purpose of the *Charter*-infringing measure must be articulated at an appropriate level of generality. If framed too broadly, the importance of the objective will be exaggerated; if construed too narrowly, the objective may merely reiterate the means chosen to achieve it. In either case, the structural integrity and rigour of the justification analysis will be compromised.

18. A pressing and substantial objective must be capable of precise and succinct articulation.[25] The Appellant proffers three possible objectives for the s 1 analysis of the impugned provisions: "prioritizing clarity and consistency", "establishing the paramountcy of denunciation and deterrence for serious types of offences" and "treating non-violent, serious offences as serious offences for sentencing".[26] The first two proposed objectives effectively and improperly collapse the distinction between legislative means and ends. If the objective of the impugned provisions is to prioritize clarity and consistency in sentencing outcomes, the means are effectively co-extensive: the objective is achieved by defining clear categories that do not allow for differential application in sentencing. Similarly, if the objective is establishing the paramountcy of denunciation and deterrence for certain serious types of offences, this is achieved through removing of sentencing options that give precedence to other sentencing objectives. These

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[24] *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 at para 144; *Frank v Canada (Attorney General)*, 2019 SCC 1 at para 46

[25] *R v Safarzadeh-Markhali*, 2016 SCC 14 at para 28.

[26] Appellant's Factum, paras 85, 88.

proposed objectives are inappropriately framed for the purposes of a justification analysis.

19. Alternatively, if these proposed objectives are permitted to be considered for the purposes of the s 1 analysis despite this overlap between the objectives and the means, it is inappropriate to also accord a substantial measure of deference to the legislature in the assessment of proportionality. In framing these proposed objectives, the Appellant has emphasized their intentionally absolutist nature, essentially asserting that no means apart from the categorical and inflexible approach chosen by Parliament could achieve the intended objective. The objectives proffered by the Appellant defeat a minimal impairment analysis: the objective has been framed to admit of no alternative means for its realization. Unless checked through a rigorous scrutiny of proportionality, this formulation of the objectives would completely compromise the s 1 analysis.

20. None of the objectives proffered by the Appellant is sufficient to satisfy the final stage of the s 1 analysis, when the effects of the measure (including a balancing of its salutary and deleterious effects) must be weighed against the stated legislative objective.[27] The impugned provisions deny Indigenous offenders like the Respondent a sentencing option that is uniquely responsive to their particular needs and circumstances, and that meaningfully (though not fully) redresses systemic discrimination in the criminal justice system. Removing the court's discretion to impose a conditional sentence in appropriate circumstances has profoundly negative implications for Indigenous individuals like the Respondent, as well as for their family members and communities. The impugned provisions create this infringement of Indigenous people's equality rights in service of an abstract and rhetorical insistence upon "clarity and consistency" in the treatment of those convicted of certain categories of offences, without regard for the particular circumstances of the offenders and the facts of the offences. In their insistence on formal equality – like treatment of the differently situated – the impugned provisions rest upon a repudiation of the philosophical foundations of the animating *Charter* norm of substantive equality. The serious deleterious impacts of the impugned provisions clearly outweigh any salutary effects.

C. The majority's approach does not "constitutionalize" the *Gladue* framework

21. As set out above, s 15 protects the substantive equality rights of Indigenous offenders in the formulation and application of the law, including the sentencing provisions of the *Criminal Code*.

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[27] *Frank*, *supra* at para 38.

Giving effect to that right – as to other rights of accused persons such as the right to a fair and public jury trial enshrined in ss 11(d) and (f) of the *Charter* – requires that "certain positive measures"[28] be taken by Parliament. This does not mean that the statutory provisions enacted to protect and promote that right are elevated to constitutional status. Neither, however, does it mean that changes to those provisions are immune from scrutiny.

22. To be clear, the *Gladue* framework was not the only means by which Parliament could have chosen to respond to its constitutional obligation to redress systemic discrimination against Indigenous people in the criminal justice system, including gross disparities in the crafting and carrying out of sentences. Parliament was not required to enact – and is not required to maintain – any particular remedial statutory scheme. It has latitude to select the means to correct constitutional defects, and where there are myriad options available to rectify the unconstitutionality of an existing system, it is not the courts' role to dictate how that is to be accomplished.[29] The availability of a range of possible measures to respond to the constitutional obligation does not, however, mean that Parliament can avoid taking steps to remedy systemic discrimination in the application of the criminal law – much less that it can take steps that exacerbate it.

23. As Rowe J observed in his concurring reasons in *Chouhan*, although statutory provisions are not themselves constitutionally protected, "repeal or modification of statutory provisions can raise issues of *Charter* compliance" "because their repeal or modification gives rise to unconstitutional effects."[30] The question is not whether Parliament had the authority to amend legislation and adopt a different approach than that taken by its predecessor. Rather, the question is – as always – whether the law enacted by Parliament is consistent with *Charter* rights, including the right to substantive equality, or instead has discriminatory or other rights-infringing effects.

24. Put another way, government is bound not by the undertakings of its predecessor but by the constitution. The constraint on legislative reform is not that it cannot fall below the floor set by previous enactments, but rather that it cannot fall outside the limits set by s 15 (unless justified

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[28] *R v Chouhan*, 2021 SCC 26 at para 143 *per* Rowe J concurring.

[29] See *Eldridge v British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at para 96; *Chouhan*, *supra* at para 136 *per* Rowe J concurring.

[30] *Chouhan*, *supra* at para 145 *per* Rowe J concurring.

under s 1). Parliament retains discretion to set and revise sentencing policy, and to determine what forms of punishment should be mandated or available for different categories of offence. That discretion is not, however, unfettered. It must be exercised in accordance with s 15 of the *Charter*. This is no different than the constraint on sentencing reform arising from ss 7 or 12.

25. Contrary to the Appellant's submissions,[31] there is nothing novel, unwieldy or unsound about subjecting sentencing laws of general application to constitutional scrutiny based on or informed by their discriminatory impact on Indigenous offenders. For example, in *Boudreault*, this Court found s 737 of the *Code*, which imposed a mandatory victim surcharge, was unconstitutional on the basis of gross disproportionality, in part because it "undermine[d] Parliament's intention to ameliorate the serious problem of overrepresentation of Indigenous peoples in prison".[32] Affirming the need to adapt criminal sentencing given the "tragic history of the treatment of aboriginal peoples within the Canadian criminal justice system", the Court noted that as a result, any criminal sanction that falls disproportionately on the marginalized and vulnerable will likely fall disproportionately on Indigenous peoples.[33] While that analysis was undertaken in relation to s 12 of the *Charter*, it also reflects the imperative of ensuring that the sentencing provisions of the *Criminal Code* do not operate in a discriminatory manner.

PARTS IV & V – COSTS & ORDER SOUGHT

26. The Asper Centre does not seek costs and asks that none be awarded against it.

27. The Asper Centre takes no position on the outcome of this appeal but respectfully requests that it be determined in accordance with the foregoing submissions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of March, 2022.

Jessica Orkin

Adriel Weaver

Counsel for the Intervener, the David Asper Centre for Constitutional Rights

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[31] Appellant's Factum, paras 60-61.

[32] *R v Boudreault*, 2018 SCC 58 at para 83.

[33] *Ibid.*

PART VI – TABLE OF AUTHORITIES

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