COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Sharma, 2020 ONCA 478
DATE: 20200724
DOCKET: C66390

Feldman, Gillese and Miller JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Cheyenne Sharma

Appellant

Nader Hasan and Stephen Aylward for the appellant

Kevin Wilson for the respondent

Khalid Janmohamed and Robin Nobleman for the interveners HIV & AIDS Legal Clinic Ontario and Canadian HIV/AIDS Legal Network

Jonathan Rudin and Emily R. Hill for the intervener Aboriginal Legal Services Legal Clinic

Adam Bond for the intervener Native Women's Association of Canada

Promise Holmes Skinner and Samara Secter for the intervener the Criminal Lawyers' Association (Ontario)

Adriel Weaver and Jessica Orkin for the interveners Women's Legal Education and Action Fund Inc. and the David Asper Centre for Constitutional rights

Heard: November 20, 2019

On appeal from the sentence imposed on February 20, 2018 by Justice Casey Hill of the Superior Court of Justice, sitting without a jury, with reasons reported at 2018 ONSC 1141, 44 C.R. (7th) 341

Feldman J.A.:

> Sentencing judges are among those decision-makers who have the power to influence the treatment of aboriginal offenders in the justice system. They determine most directly whether an aboriginal offender will go to jail, or whether other sentencing options may be employed which will play perhaps a stronger role in restoring a sense of balance to the offender, victim, and community, and in preventing future crime.
>
> *R. v. Gladue*, [1991] 1 S.C.R. 688, at para. 65

A. OVERVIEW

[1] Ms. Sharma is a young Indigenous woman who pleaded guilty to importing a significant quantity of cocaine, contrary to s. 6(1) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, and received a sentence of 17 months' incarceration.

[2] At her sentencing hearing, Ms. Sharma asked the court to strike down s. 742.1(c) of the *Criminal Code*, which removes the availability of a conditional sentence for offences, prosecuted by indictment, where the maximum penalty is 14 years or life in prison, under s. 15 of the *Charter of Rights and Freedoms*, because its effect is to discriminate against Aboriginal offenders on the basis of race. The sentencing judge rejected the application and imposed the custodial sentence.

[3] On this sentence appeal, Ms. Sharma asks the court to strike down s. 742.1(c), and a similar provision in s. 742.1(e)(ii),[1] on the basis that they contravene two sections of the *Charter*: they contravene s. 15 of the *Charter* because their effect is to discriminate against Aboriginal offenders on the basis of race, and they contravene s. 7 of the *Charter* because they are arbitrary and overbroad in relation to their purpose. While the s. 7 challenge was initially raised before the sentencing judge, it was withdrawn at the submission stage after all the evidence was heard and he did not rule on it. This court allowed Ms. Sharma to raise the s. 7 challenge on the appeal.

[4] I agree with Ms. Sharma that the impugned provisions contravene both ss. 7 and 15 of the *Charter* and are not saved by s. 1. I would allow the appeal and strike down the provisions. I would set aside Ms. Sharma's custodial sentence. As submitted by Ms. Sharma, the appropriate sentence would have been 24 months less a day, to be served conditionally. However, as Ms. Sharma has served her custodial sentence, I would substitute a sentence of time served.

B. THE OFFENDER AND THE OFFENCE

[5] Ms. Sharma is a 25-year-old Canadian woman of Ojibwa ancestry and is a member of the Saugeen First Nation.

---

[1] By oversight, Ms. Sharma did not ask the sentencing judge to strike down s. 742.1(e)(ii). With the consent of the Crown, that section is included in the constitutional challenge on the appeal.

[6] On June 27, 2015, Ms. Sharma returned from a trip to Surinam, landing at Toronto Pearson International Airport with a suitcase containing 1971.5 grams of cocaine. She needed money because she was behind on rent and facing eviction. She agreed to fly to Surinam to retrieve the drugs in exchange for $20,000 from her boyfriend to avoid homelessness for herself and for her daughter. After she was apprehended, she confessed to the RCMP that she had been paid to transport the cocaine, which had an estimated street value of roughly $130,000. She was 20 years old when she imported the drugs, and she had no prior criminal record.

[7] After pleading guilty to importing two kilograms of cocaine contrary to s. 6(1) of the *CDSA*, Ms. Sharma described her personal circumstances to a case worker in the following terms, as part of a report of Ms. Sharma's personal history filed pursuant to *R. v. Gladue*, [1999] 1 S.C.R. 688:

> Well around the time it happened, I was two months behind in rent and I was about to be evicted and I had other bills to pay. The guy who I was dating at the time said he could help me out with the money but I would have to do something for him. He said I would have to take a vacation and do a few things for him down there. I said okay because I didn't have any way to get the money to pay off my bills and it needed to be paid or else me and my daughter would have gone homeless and I couldn't let that happen because I didn't bring life into this would to be raised like that – without a home. I wanted to raise my daughter better than I was raised. I wanted to be independent and take care of her and when I got behind in rent I didn't know what to do but I knew I had to do something about it. I was in a very bad place – a low point in my life.

> I remember the day I had to leave I was freaking out. I didn't want to do it but he said I had to do it and he reminded me about how I was gonna be evicted. I remember crying outside the airport smoking cigarettes before I had to go and check in.

[8] Ms. Sharma endured significant personal hardship growing up.

[9] As a child, Ms. Sharma, her mother, and her siblings moved in with her grandmother, after her father was arrested for murder and deported to Trinidad. Her grandmother attended two residential schools between the ages of 4 and 16. Given her background, the sentencing judge characterized Ms. Sharma as "an intergenerational survivor of the government's residential school effort to eradicate the cultural heritage of her people": at para. 266.

[10] When Ms. Sharma was 13 years old, she was raped by two men while she was walking home. She left school, ran away from home, and by age 15, she started working as a sex worker. At 16, she enrolled in high school but dropped out because she could not afford the $400 uniform. She is a single mother who gave birth to her daughter at age 17. Over the years, she has attempted suicide more than once and has struggled with depression and anxiety.

C. SENTENCING PROCEEDINGS

[11] The sentencing proceedings below involved a number of legislative provisions and *Charter* challenges by Ms. Sharma.

(1) Relevant Legislation

[12] I begin with the regime that governed the sentencing of Ms. Sharma.

[13] First, the offence of importing more than one kilogram of a Schedule I substance attracted a mandatory minimum sentence of two years' imprisonment, pursuant to s. 6(3)(a.1) of the *CDSA*, subject to the following proviso, in s. 8:

> **8** The court is not required to impose a minimum punishment unless it is satisfied that the offender, before entering a plea, was notified of the possible imposition of a minimum punishment for the offence in question and of the Attorney General's intention to prove any factors in relation to the offence that would lead to the imposition of a minimum punishment.

[14] Second, among the general sentencing principles contained within ss. 718, 718.1, and 718.2 of the *Criminal Code*, s. 718.2(e) was notably relevant to the sentencing of an Aboriginal offender like Ms. Sharma. That provision codifies the principle that "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders." The Supreme Court has held that s. 718.2(e) specifically instructs courts to consider whether to impose a conditional sentence, namely a sentence served in the community under strict conditions, pursuant to s. 742.1 of the *Criminal Code*: *Gladue*, at para. 40.

[15] Third, a package of *Criminal Code* amendments from 2012, enacted as part of the *Safe Streets and Communities Act*, S.C. 2012, c. 1, shaped the sentencing

landscape for Ms. Sharma by modifying s. 742.1 to make conditional sentences unavailable for offenders convicted of certain categories of offence. These amendments are at the crux of Ms. Sharma's appeal.

[16] The relevant parts of s. 742.1, including the amendments, read as follows:

> **742.**1 If a person is convicted of an offence and the court imposes a sentence of imprisonment of less than two years, the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the conditions imposed under section 742.3, if
>
> …
>
> **(b)** the offence is not an offence punishable by a minimum term of imprisonment;
>
> **(c)** the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 14 years or life; [and]
>
> …
>
> **(e)** the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is ten years, that
>
> …
>
> **(ii)** involved the import, export, trafficking or production of drugs[.]

(2) Constitutional Issues on Sentencing

[17] Through the intervener, Aboriginal Legal Services, Ms. Sharma raised a number of constitutional challenges at the sentencing hearing.

[18] First, she argued that the two-year mandatory minimum in s. 6(3)(a.1) of the *CDSA* infringed her right to be free from cruel and unusual punishment, contrary to s. 12 of the *Charter*.

[19] On the day of Ms. Sharma's arrest, the Crown served a notice pursuant to s. 8 of the *CDSA*, indicating its intent to seek the two-year mandatory minimum sentence. In fact, during the two years that followed Ms. Sharma's arrest, the Crown sought a sentence in the six-year range. That position changed to three years and six months in the Crown factum filed on sentencing in September 2017, on the basis of balancing the seriousness of the offence with the *Gladue* factors codified in s. 718.2(e) of the *Criminal Code*. One week later, the Crown withdrew the notice pursuant to s. 8 of the *CDSA* and instead sought a sentence of 18 months in light of the personal hardship Ms. Sharma had endured.

[20] The issue then arose whether the court should hear the s. 12 *Charter* challenge to the two-year mandatory minimum, which had been rendered moot by the Crown's changed position. The sentencing judge accepted Ms. Sharma's submission that he should hear the s. 12 challenge along with the s. 15 challenge. Evidence relevant to the s. 12 issue had already been heard, Aboriginal Legal Services had been granted leave to intervene, Ms. Sharma was represented, and all parties were prepared for the argument.

[21] The sentencing judge struck down the two-year mandatory minimum sentence in s. 6(3)(a.1) of the *CDSA*, as it would have constituted cruel and unusual punishment when applied to Ms. Sharma and a number of reasonable hypothetical offenders. The Crown has not appealed that declaration of invalidity.

[22] Second, Ms. Sharma initially challenged the constitutionality of the restriction on the availability of conditional sentences in ss. 742.1(b) and 742.1(c) of the *Criminal Code* on the basis that they violated her liberty rights under s. 7 and her equality rights under s. 15 of the *Charter*.

[23] While Ms. Sharma's pleadings and notice of constitutional question at trial raised both ss. 7 and 15, the intervener, whose counsel had carriage of the *Charter* arguments, abandoned but did not concede the s. 7 issue at the conclusion of the evidence. The parties thus only argued the s. 15 issue.

[24] The sentencing judge rejected Ms. Sharma's s. 15 challenge to s. 742.1(c). Although he acknowledged that s. 742.1(c) rendered offenders like Ms. Sharma ineligible for conditional sentences, he found that she had not met her onus of showing discriminatory impact because of a lack of statistical information before the court on the impact of the provision on Aboriginal offenders. Because conditional sentences remain available for a majority of offences, the sentencing judge held that he was unable to determine whether the law created a "distinction"

based upon Aboriginal status and, if so, whether that distinction gave rise to unconstitutional discrimination.

[25] As he had struck down the mandatory minimum sentence that would have applied to Ms. Sharma, the sentencing judge declined to rule on the constitutionality of s. 742.1(b), the provision denying conditional sentences to offenders convicted of offences that attract a mandatory minimum penalty.

[26] In the result, the sentencing judge determined that an appropriate sentence for Ms. Sharma was 18 months' imprisonment, reduced to 17 months to take account of her presentence detention and lengthy periods on bail.

D. ISSUES ON APPEAL

[27] Ms. Sharma argues that ss. 742.1(c) and 742.1(e)(ii) of the *Criminal Code* are unconstitutional because:

1. They infringe the s. 15 rights of Aboriginal offenders by discriminating on the basis of race.
2. They infringe her s. 7 liberty rights because they are overbroad and arbitrary.
3. The infringements of ss. 7 or 15 cannot be saved by s. 1.

E. THE LEGISLATIVE CONTEXT

[28] Before turning to the substantive issues in this appeal, it is necessary first to provide some context for the impugned provisions and their legislative history.

[29] Conditional sentences came into force in 1996 in s. 742.1 of the *Criminal Code* as part of major sentencing reforms intended to encourage the application of principles of restorative justice in sentencing and to reduce overincarceration and the use of prison sentences, where appropriate.

[30] When they were introduced, conditional sentences represented a unique mode of sentencing. Conditional sentences allow a sentencing judge to impose a sentence to fit the circumstances of the offender and further the goals of denunciation and deterrence, but permit the offender to serve that sentence in the community on conditions including a form of house arrest. The statutory scheme sets out certain mandatory conditions in s. 742.3(1) and confers discretion on the sentencing judge to impose further conditions in s. 742.3(2). When first enacted, a conditional sentence could be imposed where three conditions were met: the offence did not carry a mandatory minimum sentence; the sentence imposed was less than two years; and serving the sentence in the community would not pose a danger to the community.

[31] As part of the same reform initiative, Parliament also enacted s. 718.2(e). That provision instructs sentencing judges to consider all available sanctions other than imprisonment for “all offenders, with particular attention to the circumstances of aboriginal offenders.”

[32] At the time the reforms were adopted, the Minister of Justice explained to the House of Commons Standing Committee on Justice and Legal Affairs that alternatives to incarceration were necessary given the reality that Aboriginal offenders were overrepresented in prisons, as quoted at para. 47 of *Gladue*:

> [T]he reason we referred specifically [in s. 718.2(e)] to aboriginal persons is that they are sadly overrepresented in the prison populations of Canada. I think it was the Manitoba justice inquiry that found that although aboriginal persons make up only 12% of the population of Manitoba, they comprise over 50% of the prison inmates. Nationally aboriginal persons represent about 2% of Canada's population, but they represent 10.6% of persons in prison. Obviously there's a problem here.
>
> What we're trying to do, particularly having regard to the initiatives in the aboriginal communities to achieve community justice, is to encourage courts to look at alternatives where it's consistent with the protection of the public – alternatives to jail – and not simply resort to that easy answer in every case.

[33] In other words, Parliament recognized the significant problem of overrepresentation of Aboriginal people in prisons in Canada, and enacted both a directive to sentencing judges in s. 718.2(e) and, most importantly, a real tool to address the problem in s. 742.1: the conditional sentence.

[34] In its landmark 1999 decision in *Gladue*, the Supreme Court identified s. 718.2(e) as a "watershed", not merely a restatement of existing principles of restraint in sentencing: at para. 39. The court stated, at para. 40, that the purpose

of s. 718.2(e) was remedial, particularly given the concurrent introduction of the conditional sentence in s. 742.1:

> The availability of the conditional sentence of imprisonment, in particular, alters the sentencing landscape in a manner which gives an entirely new meaning to the principle that imprisonment should be resorted to only where no other sentencing option is reasonable in the circumstances. The creation of the conditional sentence suggests, on its face, a desire to lessen the use of incarceration. The general principle expressed in s. 718.2(e) must be construed and applied in this light.

[35] In its analysis of the purpose of s. 718.2(e) as it relates specifically to Aboriginal people, the court discussed at length the "serious problem of aboriginal overrepresentation in Canadian prisons": *Gladue*, at para. 59. The court observed that this problem is well documented and only one manifestation of the broader issue of Aboriginal overrepresentation in the criminal justice system, noting, at para. 61:

> Not surprisingly, the excessive imprisonment of aboriginal people is only the tip of the iceberg insofar as the estrangement of the aboriginal peoples from the Canadian criminal justice system is concerned. Aboriginal people are overrepresented in virtually all aspects of the system. As this Court recently noted in *R. v. Williams*, [1998] 1 S.C.R. 1128, at para. 58, there is widespread bias against aboriginal people within Canada, and "[t]here is evidence that this widespread racism has translated into systemic discrimination in the criminal justice system".

[36] The court then addressed the limited but important role that sentencing judges could play in remedying injustice against Aboriginal people, at para. 65 of *Gladue*:

> It is clear that sentencing innovation by itself cannot remove the causes of aboriginal offending and the greater problem of aboriginal alienation from the criminal justice system. The unbalanced ratio of imprisonment for aboriginal offenders flows from a number of sources, including poverty, substance abuse, lack of education, and the lack of employment opportunities for aboriginal people. It arises also from bias against aboriginal people and from an unfortunate institutional approach that is more inclined to refuse bail and to impose more and longer prison terms for aboriginal offenders. There are many aspects of this sad situation which cannot be addressed in these reasons. What can and must be addressed, though, is the limited role that sentencing judges will play in remedying injustice against aboriginal peoples in Canada. Sentencing judges are among those decision-makers who have the power to influence the treatment of aboriginal offenders in the justice system. They determine most directly whether an aboriginal offender will go to jail, or whether other sentencing options may be employed which will play perhaps a stronger role in restoring a sense of balance to the offender, victim, and community, and in preventing future crime. [Emphasis added.]

[37] Importantly, the court in *Gladue* rejected the suggestion that sentences that prioritize restorative justice principles are more lenient than sentences that impose a term of imprisonment. Rather, they reflect Aboriginal justice concepts and enable a sentencing judge to impose a sentence that will better serve the purposes of

sentencing for an Aboriginal offender, as the court recognized at para. 74 of *Gladue*:

> [O]ne of the unique circumstances of aboriginal offenders is that community-based sanctions coincide with the aboriginal concept of sentencing and the needs of aboriginal people and communities. It is often the case that neither aboriginal offenders nor their communities are well served by incarcerating offenders, particularly for less serious or non-violent offences. Where these sanctions are reasonable in the circumstances, they should be implemented. In all instances, it is appropriate to attempt to craft the sentencing process and the sanctions imposed in accordance with the aboriginal perspective.

[38] On the issue of the relationship between s. 15 of the *Charter* and s. 718.2(e), the court stated, at para. 87 of *Gladue*:

> There is no constitutional challenge to s. 718.2(e) in these proceedings, and accordingly we do not address specifically the applicability of s. 15 of the *Charter*. We would note, though, that the aim of s. 718.2(e) is to reduce the tragic overrepresentation of aboriginal people in prisons. It seeks to ameliorate the present situation and to deal with the particular offence and offender and community. The fact that a court is called upon to take into consideration the unique circumstances surrounding these different parties is not unfair to non-aboriginal people. Rather, the fundamental purpose of s. 718.2(e) is to treat aboriginal offenders fairly by taking into account their difference.

[39] However, the court also explained that the remedial nature of s. 718.2(e) does not require an automatic reduction in sentence for all Aboriginal offenders. Rather, the court held at para. 88, sentencing continues to reflect the full

circumstances of the offender and the offence, including the factor set out in s. 718.2(e):

> [Section 718.2(e)] is one of the statutorily mandated considerations that a sentencing judge must take into account. It may not always mean a lower sentence for an aboriginal offender. The sentence imposed will depend upon all the factors which must be taken into account in each individual case. The weight to be given to these various factors will vary in each case. At the same time, it must in every case be recalled that the direction to consider these unique circumstances flows from the staggering injustice currently experienced by aboriginal peoples with the criminal justice system. The provision reflects the reality that many aboriginal people are alienated from this system which frequently does not reflect their needs or their understanding of an appropriate sentence. [Emphasis in original.]

[40] By 2012, courts in Canada had had 13 years to implement the Supreme Court's directions in *Gladue*. However, in *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, the majority of the Supreme Court reported that "overrepresentation and alienation of Aboriginal peoples in the criminal justice system ha[d] only worsened" since *Gladue* and the 1996 *Criminal Code* amendments: at para. 62. The majority accepted that the failure to alleviate the situation could be the result of ongoing misunderstanding and misapplication of s. 718.2(e) and the *Gladue* decision. Writing for the majority, LeBel J. sought to provide additional guidance. He recognized, at para. 65, that overincarceration of Aboriginal people could be caused or contributed to by two circumstances: either Aboriginal people commit a

disproportionate number of crimes, or they are the victims of a discriminatory justice system.

[41] LeBel J. explained that the sentencing process can address both phenomena. Specifically, sentencing judges can address the first circumstance by imposing just sentences that meet the needs of Aboriginal offenders and their communities, thereby deterring criminality and rehabilitating offenders: *Ipeelee*, at para. 66.

[42] It is the second circumstance, however, that is the focus of s. 718.2(e). The role of sentencing judges, "as front-line workers in the criminal justice system", is to ensure that systemic factors do not inadvertently produce discriminatory sentencing results: *Ipeelee*, at para. 67. Factors such as employment status, family support, and education influence whether a person goes to jail in a borderline case. The court accepted that because social, political, and economic forces cause many Aboriginal people to experience instability in these areas, they are sentenced to jail more often, reflecting systemic discrimination: *Ipeelee*, at para. 67.

[43] The remedy available to sentencing judges is to impose just sanctions that do not operate in a discriminatory manner. At para. 72, LeBel J. instructed sentencing judges to consider:

> (1) the unique systemic and background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and (2) the types of sentencing procedures and sanctions which may be

> appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection. Both sets of circumstances bear on the ultimate question of what is a fit and proper sentence.

[44] In *Ipeelee*, the court emphasized and repeated the principles from *Gladue*, that Aboriginal communities traditionally have different conceptions of just punishment. By crafting a sentence to be served with appropriate conditions in the community that takes those views into account, the sentence imposed may be viewed as more just and may therefore be more effective in achieving the objectives of sentencing.

[45] The court also strongly rejected the suggestion that treating Aboriginal offenders differently in sentencing violates the parity principle, codified in s. 718.2(b) of the *Criminal Code*. That suggestion ignores the impact of the history of Aboriginal peoples in Canada, given that "[t]he overwhelming message emanating from the various reports and commissions on Aboriginal peoples' involvement in the criminal justice system is that current levels of criminality are intimately tied to the legacy of colonialism": at para. 77.

[46] Finally, LeBel J. identified two major errors that sentencing courts had made following *Gladue* that had the effect of both "significantly curtail[ing] the scope and potential remedial impact" of s. 718.2(e) as well as "thwarting what was originally envisioned by *Gladue*": *Ipeelee*, at para. 80.

[47] The first error was requiring offenders to prove a causal link between the systemic and background factors referred to in s. 718.2(e) and the commission of the offence. Requiring a causal link is an error because it is well recognized that Aboriginal people have suffered from systemic discrimination in Canada, the effects of which are interconnected and complex. At para. 83 of *Ipeelee*, LeBel J. quoted with approval the Aboriginal Justice Inquiry of Manitoba's conclusion that:

> Cultural oppression, social inequality, the loss of self-government and systemic discrimination, which are the legacy of the Canadian government's treatment of Aboriginal people, are intertwined and interdependent factors, and in very few cases is it possible to draw a simple and direct correlation between any one of them and the events which lead an individual Aboriginal person to commit a crime or to become incarcerated.

[48] Moreover, s. 718.2(e) does not require proof of causation: *Ipeelee*, at para. 83. The background factors are not an excuse for committing the crime, but are instead the context for assessing and imposing an appropriate sentence: at para. 83.

[49] The second error LeBel J. highlighted in sentencing decisions since *Gladue* related to the applicability of *Gladue* principles to serious or violent offences. Courts had picked up on one comment from *Gladue*, at paras. 33 and 79, that suggested that for such offences, Aboriginal offenders and other offenders would likely receive similar jail sentences. In *Ipeelee*, at paras. 86-87, LeBel J. clarified

that the *Gladue* framework was obligatory in every case and that the sentencing court has a duty to apply s. 718.2(e), including for serious and violent offences:

> Trying to carve out an exception from *Gladue* for serious offences would inevitably lead to inconsistency in the jurisprudence due to "the relative ease with which a sentencing judge could deem any number of offences to be 'serious'" ([R. Pelletier, "The Nullification of Section 718.2(e): Aggravating Aboriginal Over-representation in Canadian Prisons" (2001), 39 Osgoode Hall L.J. 469], at p. 479). It would also deprive s. 718.2(e) of much of its remedial power, given its focus on reducing overreliance on incarceration. A second question arises: Who are courts sentencing if not the offender standing in front of them? If the offender is Aboriginal, then courts must consider all of the circumstances of that offender, including the unique circumstances described in *Gladue*. There is no sense comparing the sentence that a particular Aboriginal offender would receive to the sentence that some hypothetical non-Aboriginal offender would receive, because there is only one offender standing before the court.
>
> The sentencing judge has a statutory duty, imposed by s. 718.2(e) of the *Criminal Code*, to consider the unique circumstances of Aboriginal offenders. Failure to apply *Gladue* in any case involving an Aboriginal offender runs afoul of this statutory obligation. As these reasons have explained, such a failure would also result in a sentence that was not fit and was not consistent with the fundamental principle of proportionality. Therefore, application of the *Gladue* principles is required in every case involving an Aboriginal offender, including breach of [a long-term supervision order], and a failure to do so constitutes an error justifying appellate intervention.

[50] In *Gladue* and *Ipeelee*, the Supreme Court made clear that when sentencing Aboriginal offenders, sentencing judges must consider all available sanctions other than imprisonment that are reasonable in the circumstances of the case. Section

718.2(e) is "focus[ed] on reducing overreliance on incarceration": *Ipeelee*, at para. 86. A significant alternative to incarceration is the conditional sentence, which Parliament created in s. 742.1.

[51] Section 742.1 read as follows, as originally enacted:

> **742.1** Where a person is convicted of an offence, except an offence that is punishable by a minimum term of imprisonment, and the court
>
> > **(a)** imposes a sentence of imprisonment of less than two years, and
> >
> > **(b)** is satisfied that serving the sentence in the community would not endanger the safety of the community,
>
> the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the offender's complying with the conditions of a conditional sentence order made under section 742.3.

[52] An important clarification was added in 1997, modifying the language of s. 742.1(b) to ensure that a conditional sentence would only be imposed when it would be consistent with the purposes and principles of sentencing in ss. 718-718.2:

> **742.1(b)** is satisfied that serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2,

[53] In 2007, Parliament amended the section to provide some further restrictions on the availability of the conditional sentence. The amended version provided:

> **742.1** If a person is convicted of an offence, other than a serious personal injury offence as defined in section 752, a terrorism offence

> or a criminal organization offence prosecuted by way of indictment for which the maximum term of imprisonment is ten years or more or an offence punishable by a minimum term of imprisonment, and the court imposes a sentence of imprisonment of less than two years and is satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2, the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the offender's compliance with the conditions imposed under section 742.3.

[54] Finally, in 2012, Parliament enacted the *Safe Streets and Communities Act*, which included the amendment to s. 742.1 to eliminate the availability of a conditional sentence for a broad array of offences, including the ones applicable to Ms. Sharma, in ss. 742.1(c) and 742.1(e)(ii):

> **742.1** If a person is convicted of an offence and the court imposes a sentence of imprisonment of less than two years, the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the conditions imposed under section 742.3, if
>
> …
>
> **(c)** the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 14 years or life; [and]
>
> …
>
> **(e)** the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years, that
>
> …
>
> **(ii)** involved the import, export, trafficking or production of drugs[.]

[55] In enacting the *Safe Streets and Communities Act*, the Parliamentary debates reveal that no consideration was given to the potential effect of the amendments on Aboriginal offenders. The issue was raised by opposition members and in the Senate, but no response was made.

F. SECTION 15

[56] Ms. Sharma argues that ss. 742.1(c) and 742.1(e)(ii) violate the s. 15 equality rights of Aboriginal persons. I would give effect to this ground of appeal.

(1) Reasons of the Sentencing Judge Rejecting the s. 15 Challenge

[57] The sentencing judge framed the impact of s. 742.1(c) on Ms. Sharma at para. 242 of his reasons as follows:

> Prior to enactment of the [*Safe Streets and Communities Act*] in 2012, offenders in Ms. Sharma's position, for approximately a 16-year period, would have been eligible for, and did in appropriate cases, receive a conditional sentence disposition. Now, because s. 742.1(c) of the *Code* eliminates such a sanction for offences carrying a maximum sentence of life imprisonment, a sentencing court has no resort to the option of imposing imprisonment on a conditional basis.

[58] The sentencing judge began the analysis of the constitutionality of this provision by setting out the two-part test from *R. v. Kapp,* 2008 SCC 41, [2008] 2 S.C.R. 483, at para. 248 of his reasons: "(1) does the impugned law create a distinction based on an enumerated or analogous ground?, and (2) does such a

distinction so found create a disadvantage by perpetuating prejudice or stereotyping?"

[59] The sentencing judge held that the s. 15 argument failed on the first prong. For most crimes, a conditional sentence remains available, and in the absence of a statistical record demonstrating a differential impact on Indigenous offenders, the sentencing judge concluded that the legislation did not create a distinction.

[60] He held that the absence of the option of a conditional sentence for certain offences did not impair his "broad discretion to do justice in individual cases including the imposition of less punitive sanctions for serious offences": at para. 258. Among those less punitive sanctions, sentencing judges could impose suspended sentences or probation, or fix a reformatory sentence at an appropriate length for the circumstances of the offender. Finally, the sentencing judge noted that the continued availability of parole and temporary absence permits attenuates the adverse impact of a custodial sentence.

[61] As a result, he dismissed Ms. Sharma's s. 15 *Charter* application.

(2) The Legal Principles

[62] Section 15(1) of the *Charter* provides the following guarantee:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[63] The test for determining whether a law contravenes this guarantee has evolved since the Supreme Court's decision in *Kapp*. It was most recently restated by the Supreme Court in *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548, and that restatement was confirmed by the majority in *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, [2018] 1 S.C.R. 464. In *Taypotat*, the court repeated that s. 15 protects substantive equality, and that its focus is "on laws that draw *discriminatory* distinctions — that is, distinctions that have the effect of perpetuating arbitrary disadvantage based on an individual's membership in an enumerated or analogous group" (emphasis in original): at para. 18.

[64] There are two parts to the analysis. First, the court must determine whether, on its face or in its impact, a law creates a distinction on the basis of an enumerated or analogous ground: *Taypotat*, at para. 19; *Centrale des syndicats du Québec v. Quebec (Attorney General)*, 2018 SCC 18, [2018] 1 S.C.R. 522, at para. 22. In *Quebec v. Alliance*, at para. 26, the court elaborated on the purpose and scope of the first step of the analysis: it is neither a preliminary merits screening, nor an onerous hurdle designed to weed out claims on technical bases. Instead, "its purpose is to ensure that s. 15(1) of the *Charter* is accessible to those whom it was designed to protect", and "to exclude claims that have 'nothing to do with substantive equality'": *Quebec v. Alliance*, at para. 26, citing *Taypotat*, at para. 19.

[65] The second part of the analysis focuses on arbitrary or discriminatory disadvantage and asks whether the impugned law "fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage": *Taypotat*, at para. 20; *Centrale*, at para. 22. The onus on the claimant is to "demonstrate that the law at issue has a disproportionate effect on the claimant based on his or her membership in an enumerated or analogous group": *Taypotat*, at para. 21. However, at this second stage of the analysis, the specific evidence required "will vary depending on the context of the claim" and "'evidence that goes to establishing a claimant's historical position of disadvantage' will be relevant": *Taypotat*, at para. 21, citing *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396, at para. 38. In *Quebec v. Alliance*, the majority clarified that at the second step, "the focus is not on 'whether a discriminatory attitude exists', or on whether a distinction 'perpetuates negative attitudes' about a disadvantaged group, but rather on the discriminatory *impact* of the distinction" (emphasis in original): at para. 28.

(3) Analysis

[66] The effect of the *Safe Streets and Communities Act*'s amendment resulting in ss. 742.1(c) and 742.1(e)(ii) is to preclude sentencing judges from imposing a conditional sentence on an offender convicted of an offence prosecuted by indictment where the maximum term of imprisonment is 14 years or life, or an

offence prosecuted by indictment involving the import, export, trafficking or production of drugs, where the maximum term of imprisonment is 10 years. Ms. Sharma is affected by both preclusions.

[67] The sentencing judge rejected Ms. Sharma's submission that the impugned provisions contravene s. 15 of the *Charter* because their effect is to deny Ms. Sharma the equal benefit of the law by discriminating against her on the basis of race. In my view, he erred in his conclusion and in his analysis. I would answer the two parts of the *Taypotat* analysis by holding, first, that the impugned provisions, in their impact on Aboriginal offenders including Ms. Sharma, create a distinction on the basis of race; and, second, that the provisions deny Ms. Sharma a benefit in a manner that has the effect of reinforcing, perpetuating, and exacerbating her disadvantage as an Aboriginal person.

(a) Distinction on the Basis of an Enumerated or Analogous Ground

[68] The first question is whether the impugned provisions create a distinction on an enumerated or analogous ground, either on their face or in their impact. Limiting claims to enumerated or analogous grounds screens out claims having nothing to do with substantive equality: *Taypotat*, at para. 19.

[69] Sections 742.1(c) and 742.1(e)(ii) are facially neutral. On their face, they apply equally to all offenders. However, it is in their effect that they create a distinction.

[70] Aboriginal offenders start from a place of substantive inequality in the criminal justice system. The overincarceration of Aboriginal people is one of the manifestations of that substantive inequality, which prompted Parliament to create the community-based conditional sentence and direct sentencing judges to consider that sanction, along with all others that do not involve imprisonment, when determining an appropriate punishment for Aboriginal offenders. The conditional sentence is one means of redressing the substantive inequality of Aboriginal people in sentencing. It is certainly the case that conditional sentences are available to all offenders, not just Aboriginal offenders. However, the legislative history and jurisprudence demonstrate that conditional sentences take on a unique significance in the context of Aboriginal offenders by conferring the added benefit of remedying systemic overincarceration. By removing that remedial sentencing option, the impact of the impugned provisions is to create a distinction between Aboriginal and non-Aboriginal offenders based on race.

[71] An analogy can be drawn between the *Safe Streets and Communities Act* amendments in this appeal and the legislation at issue in *Quebec v. Alliance*. In that case, a majority of the court struck down sections of the Quebec *Pay Equity Act*, C.Q.L.R., c. E-12.001, a remedial framework designed to redress gender discrimination in the workplace, because the impugned provisions maintained pay inequities for a period of time and, in that way, perpetuated the pre-existing

disadvantage of women in the workplace. The provisions therefore had the effect of drawing a distinction on the basis of gender.

[72] Similarly, because the impugned provisions of the *Safe Streets and Communities Act* limit the availability of the conditional sentence, a significant remedial tool in the *Gladue* framework, their effect is to draw a distinction on the basis of race.

[73] The Crown's position is that the claim fails on the first part of the test. The Crown analogizes the claim in this case to the s. 15 argument that was rejected by the trial judge in *R. v. Nur*, 2011 ONSC 4874, 275 C.C.C. (3d) 330, and upheld by this court: 2013 ONCA 677, 117 O.R. (3d) 401.[2] In *Nur*, the appellant argued that the mandatory minimum sentence for a firearms offence would affect black offenders disproportionately because they are overrepresented in the criminal justice system. Code J. held, at para. 82, that the mandatory minimum sentence for the firearms offence did not draw a race-based distinction against black offenders because it did not cause any discriminatory effect; rather, that effect existed independently of the provision. In reaching this conclusion, Code J. endorsed the reasoning of Green J. in *R. v. Johnson*, 2011 ONCJ 77, 268 C.C.C. (3d) 423, at para. 130, which he quoted at para. 81 as follows:

---

[2] The parties abandoned the s. 15 arguments before the Supreme Court of Canada: 2015 SCC 15, [2015] 1 S.C.R. 773.

> The Bill C-25 amendments, as I read them, do not create a distinction based on race. The impugned provisions apply to all offenders. While a disproportionate number of black and native persons may be captured by the amendments, they do not distinguish the Applicant from other offenders on the basis of his heritage, either in intent or effect. […] [T]he current demographic evidence relating to pretrial custody suggests that detention orders are correlated with considerations such as attenuated community ties, unemployment and a history of prior criminality. These factors may disproportionately characterize members of the black and Aboriginal community, but they are present in all racial and ethnic groups and <u>are far from universal or defining features of persons sharing either of the Applicant's ancestries.</u> Further, the Applicant's argument, logically pursued, renders much of criminal law – or, at minimum, those statutory instruments bearing on penal sanctions – vulnerable to s. 15 challenge on the same footing. This hardly seems tenable. [Emphasis added.]

[74] The Crown argues that similarly in this case, the removal of the conditional sentence option does not create any distinction between Aboriginal and other offenders – that distinction already exists because of the social circumstances of Aboriginal people.

[75] I reject this argument and the analogy to the *Nur* decision. I do so for three reasons.

[76] The first reason relates to the final observation raised by Code J. in *Nur*, that the s. 15 argument amounted to the claim that because black offenders are disproportionately represented in the criminal justice system, then any penal provision will have a disproportionate effect on that community and will therefore

be vulnerable to a s. 15 challenge. In this case, the Crown presented a similar "floodgates" argument, namely that Ms. Sharma's claim amounted to saying that s. 742.1(c) created a distinction based on race because it was part of a discriminatory criminal justice system. In my view, the sentencing judge erred in accepting this argument and in characterizing Ms. Sharma's claim in this way.

[77] Parliament's purpose in enacting s. 718.2(e), together with the conditional sentence, was to address the issue of overincarceration generally and in particular, the overincarceration of Aboriginal offenders in Canada. In *Gladue*, the court stated at paras. 50 and 51:

> The parties and interveners agree that the purpose of s. 718.2(e) is to respond to the problem of overincarceration in Canada, and to respond, in particular, to the more acute problem of the disproportionate incarceration of aboriginal peoples.
>
> …
>
> [O]n the above points of agreement the parties and interveners are correct. A review of the problem of overincarceration in Canada, and of its peculiarly devastating impact upon Canada's aboriginal peoples, provides additional insight into the purpose and proper application of this new provision.

[78] In *Gladue*, the court drew a direct connection between ss. 718.2(e) and 742.1, observing that "[t]he general principle expressed in s. 718.2(e) must be construed and applied" in light of the desire, reflected in the creation of the conditional sentence, to reduce the use of incarceration: at para. 40; see also *R.*

v. Proulx, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 92. The court acknowledged that overincarceration was part of the larger issue of overrepresentation of Aboriginal people within the criminal justice system, and the role that systemic discrimination played in causing and contributing to the circumstances that allowed that problem to develop. However, while the remedial sentencing provisions are aimed at addressing the larger issue indirectly through restorative justice in the context of sentencing, their direct focus is on reducing the number of Aboriginal offenders sentenced to jail.

[79] The distinction that is created by the impact of the impugned provisions relates to the overincarceration of Aboriginal offenders, not their overrepresentation in the criminal justice system. By removing the ability to impose a conditional sentence instead of a prison sentence for an offence, the effect on an Aboriginal offender is to undermine the purpose and remedial effect of s. 718.2(e) in addressing the substantive inequality between Aboriginal and non-Aboriginal people manifested in overincarceration within the criminal justice system, which has been acknowledged by Parliament and the courts as requiring redress. I therefore reject the contention that any finding of a breach of s. 15 in this case will thereby open all penal provisions to a similar s. 15 attack.

[80] Second, based on *Nur*, the Crown argues that the impugned provisions did not “create” the distinction of overincarceration of Aboriginal offenders, which already existed. This submission effectively relates to the second part of the

analysis: the extent to which the law does or does not reinforce, exacerbate or perpetuate disadvantage for the affected group. Therefore, this submission properly belongs within the analysis under the second part. I nevertheless address it briefly here in response to the Crown's submission.

[81] While the Supreme Court in *Taypotat*, at para. 19, used the word "creates" in the articulation of the first part of the analysis, creating a distinction as opposed to perpetuating it was not intended to make the first part more onerous.

[82] The Supreme Court has made clear that the first part of the analysis was not intended to foreclose legitimate claims based on technicalities: *Quebec v. Alliance*, at para. 26. It was intended to ensure that the claim was based on an enumerated or analogous ground. In referring to the creation of a distinction, the first part of the analysis merely asks whether the legislation created a differential impact on the basis of a protected ground.

[83] Where a law establishes a new benefit, but does so in a discriminatory manner, that law will "create" a distinction. But where, as here, a law removes a remedial provision that was put in place to alleviate the discriminatory effect of other laws, then the removal of that remedial provision may not create a new distinction, but it will reinforce, perpetuate, or exacerbate the discriminatory effect that was intended to be alleviated by the remedial provision. As Abella J. explained in *Quebec v. Alliance*, at paras. 33-36, 42, provisions enacted to alleviate a

discriminatory impact are not unchangeable, and can be modified, but any modifications must be constitutionally compliant in their effect, and must not cause a discriminatory impact.

[84] At para. 33, Abella J. described the analytical framework for determining the constitutionality of amendments to a remedial scheme, with reference to the amended pay equity regime at issue in that case:

> I do not share the unions' view that once Quebec adopted ss. 40 to 43, it was constitutionally required to keep them on the books, so that any modification in the type or extent of protection afforded by those provisions would amount to a constitutional violation. To accept that submission in these circumstances would constitutionalize the policy choice embodied in the first version of the *Act*, improperly shifting the focus of the analysis to the *form* of the law, rather than its effects. Instead, there is a discriminatory impact because, assessed on their own and regardless of the prior legislative scheme, the impugned provisions perpetuate the pre-existing disadvantage of women. [Italics in original; underlining added.]

[85] Similarly here, as I discuss further in my reasons below, the effect of the impugned provisions that restrict the availability of the remedial conditional sentence option is to perpetuate the already existing disadvantage suffered by Aboriginal offenders of being sentenced to jail more consistently than other offenders. I note that this important explanation by Abella J. also answers the criticism raised by Miller J.A. in his dissenting reasons, at paras. 188-89 and 242-43.

[86] The third reason I would reject the analogy to *Nur* is that *Nur* did not involve discrimination against an Aboriginal offender. As Ms. Sharma states in her factum, the Supreme Court and Parliament (through s. 718.2(e)) have recognized that Aboriginal offenders "face a unique legacy of dislocation caused by government policies of cultural genocide through colonial expansion and residential schools." In *Ipeelee*, at para. 60, the Supreme Court affirmed:

> To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples.

(b) Reinforcing, Perpetuating, or Exacerbating Disadvantage

[87] The second part of the *Taypotat* analysis asks whether the impugned law has the effect of reinforcing, perpetuating, or exacerbating the disadvantage of the claimant. In this case, the question is whether the law has that effect on Ms. Sharma because she is Indigenous.

[88] Leading up to her commission of the offence at age 20, Ms. Sharma, an Indigenous woman, had a tragic personal history, which I have already described earlier in these reasons. While the sentencing judge did not state directly that he would have given Ms. Sharma a conditional sentence had he not been precluded from doing so by the *Safe Streets and Communities Act*, he acknowledged that "offenders in Ms. Sharma's position, for approximately a 16-year period, would

have been eligible for, and did in appropriate cases, receive a conditional sentence disposition": at para. 242. Based on Ms. Sharma's personal background and current circumstances, including her guilty plea, lack of prior convictions, and need to care for her very young child, Ms. Sharma was a prime candidate for a conditional sentence.

[89] But the *Safe Streets and Communities Act* denied her the availability of this community-based sanction. In doing so, for the reasons that follow, ss. 742.1(c) and 742.1(e)(ii) have the effect of reinforcing, perpetuating, or exacerbating the disadvantage that Ms. Sharma faces as an Indigenous person.

(i) Evidence of Historic Disadvantage

[90] The sentencing judge had the benefit of an extensive evidentiary record detailing the relationship between the historic disadvantage endured by Aboriginal people in Canada and their overrepresentation in the criminal justice system.

[91] Dr. Carmela Murdocca, an associate professor of sociology at York University, provided expert evidence at the sentencing hearing regarding the relationship between colonialism, racism, and the criminalization of Indigenous women. The sentencing judge stated, at para. 20:

> The expert witness' evidence discussed the linkage of colonialism and racism to criminalization in particular of indigenous women. In the context of systemic cultural genocide of our country's First Nations peoples, the colonialism process has had a direct impact on disproportionate involvement of these persons with the

> criminal justice system. The witness described the legacies of colonialism including systemic racism, educational challenges, lack of employment opportunities, loss of and disruption to cultural transmission processes, as well as social and economic and property disenfranchisement, and other resultant factors leading to disproportionate contact with the criminal justice system. The legacies of colonialism and overt racism have resulted in "intergenerational trauma for families and communities".

[92] Dr. Murdocca described how one of the legacies of colonialism and racism in Indigenous women's lives is victimization and how that leads to criminal acts. The sentencing judge quoted part of her evidence, at para. 23:

> Aspects of Indigenous women's social, economic and cultural experiences often inform their participation in serious offences. Research reveals that episodic or sustained victimization is a significant contextual factor in the commission of offences. There is much evidence to support the position that women's criminality is disproportionately a result of systemic disempowerment and violence.
>
> …
>
> In short, "victimization cannot be named as *the* cause of crime," however, experiences of victimization can assist in contextualizing why some Indigenous women experience constrained and limited life choices in light of racialized and gendered discrimination which strains access to social structures, resources and alternative options of economic support. [Emphasis in original.]

[93] Dr. Murdocca also explained that victimization and the legacies of colonialism and racism are connected to Indigenous women's participation in drug

crimes. She described drug crimes as “survival crimes” that, in most cases involving women, are executed under conditions of duress.

[94] With respect to the impact of the *Safe Streets and Communities Act* provisions dealing with conditional sentences, Dr. Murdocca highlighted research showing that a significant number of Aboriginal women who had received conditional sentences in the past would have been precluded from receiving the same sentences if the new provisions had applied at the time of their sentencing:

> Limiting, removing or restricting the conditional sentence option “removes one tool previously available to courts to mitigate the over-incarceration of Indigenous people.” I quote [Ryan] Newell’s article [“Making Matters Worse: The Safe Streets and the Ongoing Crisis of Indigenous Over-Incarceration” (2013) 51:1 Osgoode Hall L.J. 199] at length here to demonstrate some of the potential implications of restricting the use of conditional sentences for Indigenous women.
>
> > Research by Elspeth Kaiser-Derrick offers a stark illustration of the impact the [*Safe Streets and Communities Act*] will have on the availability of conditional sentences to Indigenous offenders. Kaiser-Derrick reviewed ninety-one cases of Indigenous women offenders to assess the ways that courts account for the *Gladue* factors. Of the ninety-one cases that Kaiser-Derrick analyzed between 1999 and 2011, thirty-one resulted in conditional sentences. She came to the following startling conclusion about how these thirty-one cases would be decided in the wake of the [*Safe Streets and Communities Act*]:
> >
> > [“]Following the 2012 s. 742.1 amendments, 29 of those 31 conditional sentence orders

> would no longer be possible. That bears repeating: either immediately on the law, or because on the facts the Crown proceeded by indictment for a hybrid offence now excluded by s. 742.1, 29 of the 31 Aboriginal women that received conditional sentence orders in my research would no longer be eligible for conditional sentences for the same offences/facts today. For one further case, I was unable to determine whether that offender would remain eligible for a conditional sentence, because the answer hinged on whether the Crown proceeded by indictment or summarily, which is unclear in the judgment. I only found one decision of the 31 that actually resulted in a conditional sentence order that would continue to be eligible for a conditional sentence order after the 2012 amendments. To be clear, that means that those 29 (possibly 30, depending on the answer for the judgment I could not conclusively settle) criminalized Aboriginal women would likely have been sent to prison instead under the current 2012 law (although perhaps in limited cases a strict probationary term may have been ordered). This regressive turn in sentencing law is deeply troubling, and threatens to further exacerbate the ongoing problem of overrepresentation.["] [Footnotes omitted.]

[95] Other statistical evidence referred to by the interveners, Women's Legal Education and Action Fund Inc. and the David Asper Centre for Constitutional Rights, in their factum on the appeal, puts the issue of overrepresentation of Indigenous women in jail quite starkly. According to data from the Office of the Correctional Investigator, the interveners highlight that between March 2009 and March 2018, the number of Indigenous women sentenced federally increased by

60 percent, such that by the end of that period, 40 percent of all federally incarcerated women were Indigenous: Canada, Office of the Correctional Investigator, *Annual Report 2017-2018* (Ottawa: O.C.I., 2018), at p. 61. Directly relevant to the potential effect of conditional sentences, which are only available where the appropriate prison sentence is less than two years and would be served in a provincial institution, Indigenous persons represented 4 percent of the adult population of Canada in 2017-18 but accounted for 30 percent of admissions to provincial or territorial jails compared to 21 percent in 2007-08: Statistics Canada, *Adult and youth correctional statistics in Canada, 2017/2018*, by Jamil Malakieh, Catalogue No. 85-002-X (Ottawa: Statistics Canada, 2019), at p. 5. And over the same period, the increase in male Indigenous admissions to provincial or territorial institutions was 28 percent while the female increase was 66 percent: *Adult and youth correctional statistics*, at p. 5.

[96] These interveners also provided significant additional information about the effect of incarceration on Indigenous women, particularly single mothers and their communities, quoting from the reports of numerous commissions of inquiry, the most recent being the final report of the National Inquiry into Missing and Murdered Indigenous Women and Girls. One example is the impact on the children. When bail is denied or a custodial sentence is imposed on Indigenous women, their children may be placed in foster care, where Indigenous children are already overrepresented, accounting for 48% of children in foster care in Canada: Canada,

Reclaiming Power and Place: Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, vol. 1a (Ottawa: N.I.M.M.I.W.G., 2019), at p. 637. Documented effects of foster care on Indigenous children in non-Indigenous homes are loss of culture, language and identity, as well as the increased risk of involvement in the youth criminal justice system, a process known as the "child-welfare-to-prison pipeline": Ontario Human Rights Commission, *Interrupted childhoods: Over-representation of Indigenous and Black children in Ontario child welfare* (Toronto: O.H.R.C., 2018), at pp. 27-28. The interveners conclude, fairly, that "[t]he overincarceration of Indigenous women thus perpetuates the effects of intergenerational trauma and the disruption of Indigenous families and communities."

[97] The opinion and statistical evidence reinforces the findings of numerous commissions on the plight of Indigenous peoples in Canada as well as numerous judicial pronouncements by the Supreme Court on the link between colonialism and racism and discrimination against Indigenous people, and their circumstances of poverty, lack of education, and overrepresentation within the criminal justice system, as well as discrimination in the prison system and in sentencing: see, as a recent example, *Ewert v. Canada*, 2018 SCC 30, [2018] 2 S.C.R. 165, at para. 57.

(ii) The Evidentiary Onus

[98] Before addressing the merits of the s. 15 claim, I wish to address the evidentiary onus on Ms. Sharma in challenging the impugned provisions.

[99] One of the reasons the sentencing judge rejected the s. 15 claim was that he observed, at para. 257, that the court had no statistical information, and found that the record before him did not identify "the real measure and likely or established impact" of any adverse effect in order to determine whether it would qualify as a distinction based on Aboriginal status. He also stated that restricting the availability of conditional sentences for crimes with a maximum sentence of 14 years or life and for certain drug offences would have a minimal impact on Aboriginal offenders, and that only in "a very few cases" would Aboriginal offenders be incarcerated where a conditional sentence would also have been appropriate: at para. 256.

[100] In my view, the sentencing judge's reliance on Ms. Sharma's failure to lead statistical evidence to prove discriminatory impact constitutes an error of law as well as a misapprehension of the available evidence on this critical issue.

[101] First, with respect to the error of law, the Supreme Court instructed in *Taypotat* that while the onus remains on the claimant to establish disproportionate and discriminatory effect, "the specific evidence required will vary depending on the context of the claim, but 'evidence that goes to establishing a claimant's

historical position of disadvantage' will be relevant": *Taypotat*, at para. 21, citing *Withler*, at para. 38. This principle follows the direction in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, that if direct evidence is not available, courts may rely on logical inferences and judicial notice: at para. 77. In this case, it was not necessary to lead statistical evidence to establish that removing the conditional sentence option would disproportionately impact Aboriginal offenders. It was therefore an error of law to require that evidence.

[102] In respect of the available evidence, first there was the direct evidence of Dr. Murdocca on the link between systemic discrimination and overrepresentation of Aboriginal people in the criminal justice system in general, and female Aboriginal offenders in particular, because of their specific challenges. Dr. Murdocca also provided direct evidence of the same link to the participation by Aboriginal women in the crime of importing drugs. Second, the sentencing judge was entitled to take judicial notice of the phenomenon of overincarceration of Aboriginal offenders and the fact that systemic discrimination is recognized as a direct cause of that phenomenon in Canada. These matters are beyond any serious controversy, as reflected in the jurisprudence of the Supreme Court.

[103] Third, even if statistics had been available regarding how many Aboriginal offenders would have received conditional sentences had the impugned provisions not been enacted, they would not have presented a useful picture. A worthwhile set of statistics would have identified the population of Aboriginal offenders who

were incarcerated when they otherwise would have been eligible for a conditional sentence. That population of offender would have had to receive a sentence of less than two years, an eligibility criterion for conditional sentencing: *Criminal Code*, s. 742.1. However, Ms. Sharma was convicted of an offence that attracted a mandatory minimum of two years' imprisonment: *CDSA*, s. 6(3)(a.1).

[104] As a consequence, before the trial judge struck down the mandatory minimum sentence in s. 6(3)(a.1) of the *CDSA*, there would have been no other similarly situated offenders who were incarcerated for fewer than two years, subject to the limited exception in s. 8 of the *CDSA*. Statistics would accordingly have been unable to capture the impact of the impugned provisions on Aboriginal offenders, as it would be difficult to identify the population that was specifically deprived of a conditional sentencing option.

[105] The point is that, even in the absence of statistics, the effect of the impugned provisions is to exacerbate the disadvantage experienced by an Aboriginal offender whose background and circumstances, when considered under the *Gladue* framework, weighed in favour of a conditional sentence had one been available. As the impugned provisions remove an important tool that would have allowed the sentencing judge to give effect to the mandate of s. 718.2(e), this is one of the cases foreseen in *Taypotat* in which direct statistical evidence was not required to prove Ms. Sharma's claim.

(iii) Applying Part Two of the *Taypotat* Analysis

[106] The Crown's position, which was accepted by the sentencing judge, is that the removal of the conditional sentence for the affected offences does not have the effect of exacerbating the condition of overincarceration of Indigenous offenders and therefore does not implicate substantive equality considerations, because sentencing judges retain the discretion to order other sentencing options such as a suspended sentence and probation. The Crown argues that judges are not prevented from giving effect to the remedial objective of s. 718.2(e) and their role as directed by *Gladue* and *Ipeelee*. To quote from the Crown's factum: "Judges are still perfectly able to take on that role. They simply have one less tool at their disposal in specified circumstances."

[107] Before this court, the Crown argued that even without the availability of conditional sentences, sentencing judges can give effect to the *Gladue* framework by fixing a prison sentence of an appropriate length. In my view, this submission reflects a misunderstanding of the remedial purpose of s. 15. It is not disputed that the imposition of a prison sentence can reflect the proper balancing of the sentencing objectives of denunciation, deterrence, and rehabilitation. The *Gladue* framework does not undermine that fundamental premise. Rather, it asks sentencing judges to consider imposing a community-based sanction that also balances the sentencing objectives but carries with it the added benefit of redressing the problem of overrepresentation of Aboriginal offenders in Canada's

prisons. It is the denial of this benefit that is at issue in this appeal, not the respective fitness of custodial and conditional sentences.

The Sentencing Landscape in the Wake of the *Safe Streets and Communities Act*

[108] First, I observe that the Crown's suggestion that courts replace conditional sentences with suspended sentences appears to fly in the face of Parliament's stated purpose in enacting the *Safe Streets and Communities Act*, which was to ensure that offenders go to jail for the affected offences because they represent serious crimes, as I discuss in my analysis under s. 7.

[109] In any event, I disagree with the Crown's characterization of the sentencing landscape in the wake of the *Safe Streets and Communities Act* amendments, and with its premise that the continued availability of suspended sentences lessens any adverse impact of the impugned legislation. The Crown's position fails to acknowledge that suspended sentences and probation differ in important respects from conditional sentences, and that those sanctions are rarely available for the affected offences.

[110] In *Proulx*, the Supreme Court explained that a conditional sentence, unlike a suspended sentence, is a jail sentence but served in the community. It serves the functions of deterrence and denunciation: *Proulx*, at paras. 41, 67. Indeed, conditional sentences may be available even in cases where deterrence and denunciation are the paramount sentencing objectives: *R. v. Wells*, 2000 SCC 10,

[2000] 1 S.C.R. 207, at para. 35. A suspended sentence, on the other hand, is intended to promote rehabilitation and is normally imposed where deterrence and denunciation are not needed for the particular offender in the particular circumstances, or where there are exceptional circumstances: *Proulx*, at paras. 32-36; see *Criminal Code*, ss. 731(1), 732.1, and 732.2.

[111] In support of its position, the Crown placed significant weight on its contention that in the ordinary course, sentencing judges would be unlikely to impose conditional sentences for serious offences like those captured by ss. 742.1(c) and 742.1(e)(ii). Of course, a conditional sentence was never available where the appropriate sentence in all the circumstances of the case was two years' imprisonment or more. It is only in cases where the appropriate sentence is less than two years that a conditional sentence is available. Therefore, it is only in cases where the offence is one included in the ambit of the two impugned sections, but the circumstances of the commission of the offence do not call for a penitentiary-length sentence that the impugned provisions have removed the option of a conditional sentence. The issue whether all the included offences are "serious" is discussed below in the context of s. 7.

[112] However, to the extent that the included offences are considered to be serious offences, in *Ipeelee*, the Supreme Court made clear that *Gladue* principles must be applied in every case, irrespective of the seriousness of the offence. Failure to do so would "deprive s. 718.2(e) of much of its remedial power, given its

focus on reducing overreliance on incarceration": *Ipeelee*, at para. 86. The duty of the sentencing judge is to consider the unique circumstances of Aboriginal offenders in every case, including serious ones, to ensure a fit and proportionate sentence.

The Limited Availability of Suspended Sentences

[113] Furthermore, even if conditional and suspended sentences were equivalent sanctions, the case law demonstrates that suspended sentences are far more difficult to obtain than conditional sentences for Aboriginal and other marginalized offenders.

[114] The intervener the Criminal Lawyers' Association points out that where a conditional sentence is unavailable, courts are resorting to a prison sentence, even when it is not required. It cites as examples *R. v. Castelein*, 2018 MBQB 37; *R. v. Diabikulu*, 2016 BCPC 390; and *R. v. Clunis*, 2018 ONCJ 194. In those cases, jail sentences were imposed on a single mother with no prior criminal record who took significant steps toward rehabilitation after her arrest for drug offences, on a 23-year-old black man with no adult record, and on a young marginalized first offender, all because a conditional sentence in the community was not an available sentence.

[115] Moreover, the CLA explains that sentencing judges rarely and inconsistently find exceptional circumstances warranting suspended sentences and that such

sentences are disproportionately unavailable for marginalized offenders, because the effects of discrimination are viewed as “common” rather than “rare”, exceptional circumstances are very difficult to demonstrate from custody, and exceptional circumstances ignore racism and stereotyping.

[116] On this issue, the CLA identified and assessed 59 cases where an offender asked for a suspended sentence based on exceptional circumstances, in order to determine what types of circumstances have qualified. These included significant rehabilitation, overcoming addiction, youthfulness, lack of criminal record, gainful employment, remorse, character reference letters, education, familial and community support, compliance with bail conditions, and guilty pleas. However, according to the CLA, these factors are applied in an unpredictable manner, making the availability of a suspended sentence unreliable as an alternative to incarceration.

[117] More importantly, the types of factors required for a suspended sentence effectively exclude many, if not most, marginalized offenders, including Aboriginal offenders and especially Aboriginal women.

[118] First, courts have viewed circumstances arising from systemic discrimination as commonplace and therefore not exceptional, thereby treating the most sympathetic circumstances as ineffective in the calculus of qualification for a

suspended sentence: see, e.g., *R. v. McIvor*, 2019 MBCA 34, at para. 64; *Clunis*, at paras. 23, 26.

[119] Second, because Indigenous people are disproportionately denied bail and are less likely to be rehabilitated in custody, as the court in *Gladue* acknowledged at paras. 65 and 68, they are less likely to meet the exceptional circumstances criteria. For example, in the 59 cases that were identified by the intervener where a suspended sentence was requested, the offender received such a sentence in 27 cases, and in each one, the offender was on bail and consequently able to overcome addiction, attend rehabilitative programs, obtain employment, or engage in other productive activities.

[120] Third, the requirements for employment and lack of a criminal record again effectively exclude marginalized people whose circumstances of unemployment and criminal activity are affected by racism and systemic discrimination. Simply put, the determination of the appropriateness of a suspended sentence differs in important respects from the conditional sentencing calculus and often works to the disadvantage of Aboriginal offenders.

[121] In concluding his analysis for dismissing the s. 15 application, the sentencing judge nevertheless found suspended sentences to be an acceptable alternative to conditional sentences, stating, at para. 262:

> In the aftermath of the [*Safe Streets and Communities Act*'s] restriction on the availability of conditional

> sentences, various courts have accepted that a suspended sentence and probation, as opposed to incarceration, is an appropriate alternative in the absence of the conditional imprisonment option – see, for example, [*R. v. Neary*, 2017 SKCA 29, 37 C.R. (7th) 95, leave to appeal refused, [2017] S.C.C.A. No. 254; *R. v. Dickey*, 2016 BCCA 177, 335 C.C.C. (3d) 478; *R. v. Voong*, 2015 BCCA 285, 325 C.C.C. (3d) 267; and *R. v. Elliott*, 2017 BCCA 214, 349 C.C.C. (3d) 1].

[122] In some of these cases, the judges were indeed able to find exceptional circumstances in order to impose a suspended sentence. However, I would respectfully disagree with the sentencing judge that those courts found a suspended sentence to be an alternative to a conditional sentence. In *Voong*, the Court of Appeal for British Columbia expressly acknowledged that it is a legal error to simply substitute a suspended sentence for a conditional sentence, as the two types of sentence are governed by different principles: at para. 62.

Conclusion on the Limited Availability of Suspended Sentences

[123] In my view, the position of the Crown, the analysis of the sentencing judge, and the result in this case provide the clearest indication of why a suspended sentence cannot be viewed as an available alternative to a conditional sentence.

[124] The sentencing judge specifically declined to impose a suspended sentence for Ms. Sharma, given the gravity of the offence of importing cocaine. He stated, at paras. 264-65:

> The gravity of the offence of importing cocaine requires a sentencing court to impose a disposition proportionate

> to the seriousness of the crime. A sentencer's consideration of factors personal to an offender, including her degree of responsibility, moral blameworthiness and particular mitigating circumstances cannot be allowed to diminish recognition of the gravity of the offence to the point of unwarranted imbalance where principles of denunciation and deterrence are reduced to hollow talking points only.
>
> A suspended sentence and probation, an intermittent sentence of imprisonment, or a sentence of less incarceration than a global sentence of 18 months would not amount to a fit sentence.

[125] As part of the justification for the 18-month sentence, the sentencing judge referred to Ms. Sharma's intergenerational survival of the residential school regime, together with the following eight specific factors that would militate in favour of a sentence more focused on rehabilitation, at para. 266:

> (1) Ms. Sharma is a first offender
> (2) she was aged 20 when the offence was committed
> (3) a guilty plea was entered
> (4) as the single mother of a 2-year-old child, the offender's motivation to commit the offence arose in desperate financial circumstances where she was unemployed and facing imminent eviction from her home
> (5) the offender confessed to the RCMP on the date of her arrest
> (6) the offender has been on judicial interim release for over 2 ½ years and has relocated to Christian Island

(7) incarceration of the offender will separate her from her daughter – while family can care for the child, the offender's incarceration perpetuates a generational pattern of separation from family
(8) the offender is a low risk to reoffend and has made rehabilitative efforts since arrest.

[126] But these factors, which included many that have been found to constitute exceptional circumstances in other cases, were not sufficient for the sentencing judge to impose a suspended sentence instead of a jail term. Critically, consideration of Ms. Sharma's circumstances as an Aboriginal offender and the *Gladue* principles did not overcome the prominence of the sentencing principles of denunciation and deterrence because of the sentencing judge's view of the seriousness of the offence in this case.

[127] The Crown argues that in this case, because prison was the appropriate sentence for Ms. Sharma after applying the *Gladue* and *Ipeelee* frameworks, the fact that a conditional sentence was not available did not worsen the crisis of overrepresentation. This submission ignores the fact that after considering the *Gladue* factors, the sentencing judge found, as submitted to him by the Crown, that a suspended sentence was not available, and therefore he had to impose a custodial sentence. Contrary to the Crown's submission, this case demonstrates that for a female Aboriginal offender whose background and circumstances, when considered under the *Gladue* framework, would have pointed toward a conditional

sentence had it been available, the effect of the impugned provisions is to exacerbate her disadvantage as an Aboriginal person by removing the one remedy that would have allowed the sentencing judge to give effect to the mandate of s. 718.2(e).

The Crown's Overarching Position

[128] The Crown's overarching opposition to the s. 15 application is its "floodgates" position that Ms. Sharma's argument amounts to saying that, "because of Indigenous overrepresentation in the criminal justice system, *any* Parliamentary enactment of general application that makes the criminal law more stringent *necessarily* violates s. 15" (emphasis in original), and, as a consequence, Parliament can never make the criminal law more stringent, only more lenient. For example, a *Criminal Code* amendment increasing a maximum sentence for a given offence would risk running afoul of s. 15 if this court accepted Ms. Sharma's arguments.

[129] I would strongly reject this contention. It is based on a misunderstanding of Ms. Sharma's position and of the s. 15 analysis. As the Supreme Court explained in *Gladue*, the purpose of s. 718.2(e) is to address the issue of Aboriginal overincarceration by providing a sentencing directive of restraint, a mandate to consider in every case the circumstances of an Aboriginal offender because they arise in part from the history of systemic discrimination, and an available remedy

in s. 742.1 of a conditional sentence to be served in the community, where appropriate in all the circumstances. By reducing overincarceration, these provisions are intended to also affect the larger issue of Aboriginal overrepresentation in the criminal justice system. But the provisions are focused directly on sentencing.

[130] The relationship between ss. 718.2(e) and 742.1 in sentencing is well established. The conditional sentence is a central tool given to sentencing judges to apply the *Gladue* factors. By restricting the availability of the conditional sentence, the impugned amendments deprive the court of an important means to redress systemic discrimination against Aboriginal people when considering an appropriate sanction. *Criminal Code* amendments that make the criminal law more stringent or that increase a maximum sentence for an offence would not have the same effect. Sections 742.1(c) and 742.1(e)(ii) undermine the purpose of the *Gladue* framework, exacerbating and perpetuating the discriminatory disadvantage of Aboriginal offenders in the sentencing process.

[131] Accordingly, for all of these reasons, I cannot accept the Crown's contention that the impugned provisions of the *Safe Streets and Communities Act* do not impair the ability of sentencing judges to consider alternatives to imprisonment when sentencing Aboriginal offenders. To the contrary, the Act deals a significant blow to the remedial policy that Parliament enacted in s. 718.2(e) of the *Criminal*

Code. When amending remedial policies, Parliament must not do so in a discriminatory fashion: *Alliance*, at paras. 36-37.

[132] The intent of the Act is to incarcerate offenders convicted of certain offences. The reality is that the Act will result in more Indigenous offenders serving their sentences in jail rather than in their communities. Thus, I conclude that ss. 742.1(c) and 742.1(e)(ii) deny the benefit of a conditional sentence in a manner that has the effect of reinforcing, perpetuating or exacerbating the disadvantage of Aboriginal offenders, and is therefore contrary to s. 15 of the *Charter*.

G. SECTION 7

[133] Ms. Sharma also asks this court to find the impugned provisions to be contrary to s. 7 of the *Charter* and not saved by s. 1. Ms. Sharma argues that ss. 742.1(c) and 742.1(e)(ii) violate her s. 7 liberty rights because they are arbitrary and overbroad relative to the legislative purpose. I agree.

(1) Argument Raised for the First Time on Appeal

[134] As discussed above, although Ms. Sharma's constitutional challenge before the sentencing judge involved both ss. 7 and 15, following the presentation of evidence, counsel for Aboriginal Legal Services, who had carriage of the *Charter* arguments for Ms. Sharma, advised the sentencing judge that s. 7 was not being pursued. Before this court, Ms. Sharma again raised the issue of s. 7 in her notice

of appeal, and the material filed on the appeal by all parties, including by the interveners, addresses s. 7.

[135] Because the Crown's initial position was that this Court should not hear the s. 7 challenge for the first time on appeal, the court heard argument on that issue at the opening of the appeal, retired to consider the issue, and announced its decision to entertain the s. 7 argument, with reasons to follow.

[136] In *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3, at paras. 20 and 22, the Supreme Court gave guidance to appellate courts on how to deal with this issue. An appellate court has discretion to hear a new issue on appeal, including a constitutional issue, but the test for doing so is a stringent one, and the court's discretion should not be exercised routinely or lightly: at para. 22. The court set out, at para. 20, the factors that will influence a court's discretion to hear a new constitutional issue on appeal:

> Whether to hear and decide a constitutional issue when it has not been properly raised in the courts below is a matter for the Court's discretion, taking into account all of the circumstances, including the state of the record, fairness to all parties, the importance of having the issue resolved by this Court, its suitability for decision and the broader interests of the administration of justice.

[137] We were satisfied that these considerations weighed in favour of hearing the s. 7 challenge in this appeal. Importantly, during oral argument, the Crown conceded that it would suffer no prejudice from an adjudication of the s. 7 issue. The parties built the evidentiary record at trial on the basis that the s. 7 issue would

proceed. Similarly, on this appeal, the parties all submitted materials to this court to be used if the s. 7 challenge went forward. They addressed s. 7 in their written material and prepared to make oral submissions. We had the benefit of knowledgeable interveners representing affected stakeholders to assist with all aspects of the issue. The court also prepared to hear the issue, which was ripe for decision on a rich evidentiary record, together with the s. 15 challenge. We concluded, therefore, that it was in the interest of the administration of justice for the court to proceed to hear and decide the issue.

(2) The Legal Principles

[138] Section 7 of the *Charter* guarantees that:

> Everyone 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.

[139] Both parties agree that Ms. Sharma has suffered a deprivation of liberty because she was sentenced to jail. The issue is whether that deprivation of liberty was in accordance with the principles of fundamental justice. Ms. Sharma submits that the deprivation was not in accordance with the principles against arbitrariness and overbreadth.

[140] These two principles were explained by the Supreme Court in *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at paras. 111 and 112, as follows:

> Arbitrariness asks whether there is a direct connection between the purpose of the law and the impugned effect on the individual, in the sense that the effect on the individual bears some relation to the law's purpose. There must be a rational connection between the object of the measure that causes the s. 7 deprivation, and the limits it imposes on life, liberty, or security of the person ([Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms*, 1st ed. (Toronto: Irwin Law, 2012)], at p. 136). A law that imposes limits on these interests in a way that bears *no connection* to its objective arbitrarily impinges on those interests. Thus, in [*Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791], the law was arbitrary because the prohibition of private health insurance was held to be unrelated to the objective of protecting the public health system.
>
> Overbreadth deals with a law that is so broad in scope that it includes *some* conduct that bears no relation to its purpose. In this sense, the law is arbitrary *in part*. At its core, overbreadth addresses the situation where there is no rational connection between the purposes of the law and *some*, but not all, of its impacts. For instance, the law at issue in [*R. v. Demers*, 2004 SCC 46, [2004] 2 S.C.R. 489] required unfit accused to attend repeated review board hearings. The law was only disconnected from its purpose insofar as it applied to permanently unfit accused; for temporarily unfit accused, the effects were related to the purpose. [Emphasis in original.]

[141] I note at the outset that the Supreme Court has held that challenges to sentencing legislation from the perspective of proportionality ought generally to rely on the gross disproportionality standard that developed in the jurisprudence under s. 12, the *Charter*'s guarantee against cruel and unusual punishment: *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130, at paras. 40-42. Nevertheless, sentencing legislation remains vulnerable to a s. 7 challenge on the basis of

overbreadth or arbitrariness, as the court accepted in a decision released on the same day as *Lloyd: R. v. Safarzadeh-Markhali*, 2016 SCC 14, [2016] 1 S.C.R. 180. As Ms. Sharma's appeal raises issues of overbreadth and arbitrariness, it is fit for adjudication under s. 7.

(3) The Purpose of the Impugned Legislation

[142] In order to assess whether a law is either arbitrary or overbroad, the first step is to determine the purpose of the law, because both tests involve an analysis of the relationship between the law's effects and its legislative objective. In *Safarzadeh-Markhali*, at para. 31, the court set out the three sources for determining an impugned law's purpose for the overbreadth analysis: statements of purpose in the legislation; the text, context, and scheme of the legislation; and extrinsic evidence such as legislative history and evolution.

[143] A number of courts have already opined on the purpose of the *Safe Streets and Communities Act*. In *Neary*, at para. 35, the Court of Appeal for Saskatchewan identified four broad purposes of the Act:

> a) providing consistency and clarity to the sentencing regime;
>
> b) promoting of public safety and security;
>
> c) establishing paramountcy of the secondary principles of denunciation and deterrence in sentencing for the identified offences;
>
> d) treating of non-violent serious offences as serious offences for sentencing purposes.

[144] The parties have accepted this statement of the purposes of the Act in this appeal. However, it is up to this court to determine the purpose of the specific impugned provisions, using the three tools identified by the Supreme Court.

[145] Turning to those tools, in March 2012, the *Safe Streets and Communities Act* received royal assent as an omnibus bill which amended several acts, including the *CDSA*; the *Criminal Code*; the *State Immunity Act*, R.S.C. 1985, c. S-18; the *Corrections and Conditional Release Act*, S.C. 1992, c. 20; the *Youth Criminal Justice Act*, S.C. 2002, c. 1; and the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. These amendments included the conditional sentence amendments relevant to this appeal, at s. 34. With respect to the conditional sentence amendments, the *Safe Streets and Communities Act* summarizes the changes in its preamble as follows:

> Part 2 amends the *Criminal Code* to
>
> …
>
> (e) eliminate the reference, in section 742.1, to serious personal injury offences and to restrict the availability of conditional sentences for all offences for which the maximum term of imprisonment is 14 years or life and for specified offences, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years.

[146] The Minister of Justice and his Parliamentary Secretary at the time explained to Parliament the purpose of the changes to s. 742.1 of the *Criminal Code* in a number of speeches before the House of Commons. On September 21, 2011, at second reading, Mr. Robert Goguen, the Parliamentary Secretary, stated

that in drafting the *Safe Streets and Communities Act*, "This government is addressing the concerns of Canadians who no longer want to see conditional sentences used for serious crimes, whether they are violent crimes or property crimes": *House of Commons Debates*, 41-1, vol. 146, No. 17 (21 September 2011), at 1755. On October 6, 2011, the Minister stated:

> [A]s you can see by the bill before you, the bill is very specific that with the most serious offences within the *Criminal Code*, you will not be eligible to go home afterward. There are and will continue to be serious consequences.
>
> Again, I think this helps people's confidence in the criminal justice system. We all have a stake in seeing that people have confidence in our justice system, and also in our political system. [Emphasis added.] (House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 41-1, No. 4 (6 October 2011), at 0910)

[147] Subsequently, on March 6, 2012, during consideration of Senate amendments to the bill, the Minister expressed the purpose of the legislation in the House of Commons in the following terms:

> As Minister of Justice and Attorney General of Canada, it is my responsibility to maintain the integrity of the justice system. We need legislation that is responsive to what is happening on our streets and meets the expectations of Canadians in the 21st century. The proliferation of drugs and violent crime is, unfortunately, a reality in this day and age and it is our job as parliamentarians to deal with criminals, to protect society and do whatever we can to deter crime.
>
> …

> The bill deals also with conditional sentences, usually referred to as house arrest. Our legislation would ensure that serious crimes such as sexual assault, kidnapping and human trafficking would not result in house arrest. Conditional sentences would continue to be unavailable for any offence with a mandatory minimum penalty. In addition, a conditional sentence would never be available for offences with a maximum of 14 years or life imprisonment; or for offences with a maximum penalty of 10 years that result in bodily harm or involve the import, export, trafficking or production of drugs or involve the use of a weapon; nor for a range of other offences including kidnapping, theft over $5,000 or motor vehicle theft. Our act would ensure that serious offences, including serious property offences like arson, would also not result in house arrest. <u>This would ensure that jail sentences for such offences are served in jail</u>. [Emphasis added.] (*House of Commons Debates*, 41-1, vol. 146, No. 90 (6 March 2012), at 1025, 1035)

[148] The specific provisions in ss. 742.1(c) and 742.1(e)(ii) remove two groups of offences from the offences for which a conditional sentence may be imposed. From the context of the amendments and statements by the Minister about the intent and purpose of the legislation, I discern that the purpose of the two impugned provisions is to maintain the integrity of the justice system by ensuring that offenders who commit serious offences receive prison sentences. The means by which the legislation implements Parliament's purpose is by removing the availability of a conditional sentence for offences where the maximum penalty is 14 years or life or 10 years in the case of offences involving the import, export, trafficking or production of drugs.

[149] Maintaining the distinction between the objective of the law and the means chosen to achieve it is significant in the s. 7 analysis: *R. v. Moriarity*, 2015 SCC 55, [2015] 3 S.C.R. 485, at para. 27. While the means chosen can shed light on the purpose of the law, a narrow articulation of the purpose amounting to a virtual repetition of the challenged provision risks eroding the distinction between ends and means and may "effectively foreclose any separate inquiry into the connection between them": *Moriarity*, at para. 28; see also *Safarzadeh-Markhali*, at para. 27.

(4) Arbitrariness

[150] Ms. Sharma argues that the impugned provisions are arbitrary because they create a gap in the sentencing range available for the covered offences by removing the middle of the range, thereby forcing judges to impose a sentence that is either too high or too low. She refers to the conditional sentence as the "missing middle", which she equates with the sentencing gap in *Nur*, and relies on a comment by Moldaver J. in his dissenting reasons in that case. I would reject this argument.

[151] In *Nur*, the firearms offence in s. 95 of the *Criminal Code* carried a mandatory minimum sentence of three years if prosecuted by indictment as a first offence, but a maximum sentence of one year if prosecuted summarily. The result was a sentencing gap of two years for the same offence, depending on the prosecutorial route chosen. While the majority struck down the provision under s. 12 of the *Charter* and thus found it unnecessary to consider whether it also violated s. 7,

Moldaver J., in his dissenting reasons, would have upheld the provision under both ss. 7 and 12 of the *Charter*. He declined to find the two-year sentencing gap arbitrary for the purposes of s. 7 because he was satisfied that prosecutorial discretion would be used appropriately to cure any potential arbitrary effect. However, he did not "gainsay the possibility that, in other circumstances, this type of gap might raise s. 7 concerns": at para. 191.

[152] In my view, even if the purported "missing middle" in this case could be equated to the sentencing gap that existed in s. 95 of the *Criminal Code*, this submission fails the test for arbitrariness. Parliament's objective was to maintain the integrity of the justice system by ensuring that offenders who commit serious offences receive jail sentences: where a conditional sentence would have been available and imposed in the circumstances, sentencing judges will now substitute a prison sentence. To the extent that Parliament would view a conditional sentence as the middle of the sentencing range, its purpose was to remove that middle option with the intent that judges will impose a more stringent, denunciatory, and deterrent sentence. The effect of removing the conditional sentence option is not arbitrary because it coincides with Parliament's purpose.

(5) Overbreadth

[153] Ms. Sharma also submits that the impugned provisions violate s. 7 of the *Charter* because they are overbroad. Although the purpose of the amendments was to ensure that serious offences would always attract a custodial sentence, the

provisions identify seriousness by focusing on the maximum sentence for an offence (14 years or life imprisonment, or 10 years for drug offences involving importing, exporting, trafficking or production) and consequently capture a broad spectrum of offences and underlying criminal conduct that can range from the low to the high end of seriousness or gravity. In other words, Ms. Sharma submits that the maximum sentence for an offence is not an appropriate proxy for its seriousness.

[154] Ms. Sharma argues that the purpose of providing a significant maximum sentence for many offences in the *Criminal Code* is to have that sentence available for egregious cases and circumstances that could arise. It does not indicate that the underlying prohibited conduct is always or even most often going to call for such a sentence. As a result, using a high maximum sentence as a proxy for the seriousness of the offence and the crime is not reasonable and results in overbreadth.

[155] Ms. Sharma suggests that there are a number of effective and reasonable methods that could have been used to identify serious offences. For instance, a constitutionally valid mandatory minimum is one indicator of the seriousness of an offence: even where the circumstances are particularly sympathetic, the offence is so serious that the minimum sentence is not inappropriate. Another method that Parliament has used is to classify an offence, such as theft, assault and sexual assault, by tiers of severity, thereby subjecting conduct at the serious end of the

spectrum to its own sentencing regime. A third method is for Parliament to designate certain aggravating features, such as terrorism, as always serious.

[156] However, by using the maximum sentence to designate serious offences that require a custodial sentence, Ms. Sharma submits that the legislation includes a number of offences which, while by no means trivial, often attract a low sentence. Counsel for Ms. Sharma researched sentences imposed for five offences for which a conditional sentence is no longer available because they are punishable by a maximum term of 14 years' imprisonment – forging a passport and possession of counterfeit money contrary to the *Criminal Code*, and price-fixing, false advertising, and deceptive telemarketing contrary to the *Competition Act*, R.S.C. 1985, c. C-34 – and found that the longest sentence imposed for any of them was two years (for deceptive telemarketing). The breadth of the sentencing range available for the included offences and the sentences actually imposed for such offences show that they are not always the type of serious offence that the impugned provisions were intended to affect.

[157] The Crown's position is that Parliament's purpose was to remove the conditional sentence option for serious offences and that the impugned provisions are therefore rationally connected to the amendments' purpose. As discussed in the previous section, however, that position conflates the purpose of the legislation, to maintain the integrity of the justice system by ensuring that offenders who commit serious offences receive jail sentences, with the means used to

accomplish it, which is the removal of the conditional sentence option for offences punishable by high maximum penalties.

[158] Nevertheless, on the issue of defining which offences are serious, the Crown argues that Parliament was entitled to use the maximum sentence to determine the seriousness of the offence in a generic sense, referring to *R. v. Hamilton* (2004), 72 O.R. (3d) 1 (C.A.), at para. 90, regardless of the underlying conduct of any particular offender. I would reject this submission.

[159] Since the inception of conditional sentences, this mode of punishment has been subject to two internal limits: the offence must not have attracted a mandatory minimum sentence, and the sentencing judge must have determined that a fit sentence for the offender would be less than two years in prison. On the surface, the *Safe Streets and Communities Act* amendments purport to restrict the availability of conditional sentences for certain classes of offences. However, the practical impact of the legislation is to alter the sentencing landscape most directly for those offenders convicted of an offence with a high maximum penalty who nevertheless deserved penalties at the low end of the sentencing range, by denying those offenders the availability of a conditional sentence. For more serious offenders who would ordinarily have received a prison sentence exceeding two years, the *Safe Streets and Communities Act* has no effect on the sentencing landscape, as those offenders could not have received conditional sentences to begin with.

[160] In this respect, the impact of ss. 742.1(c) and 742.1(e)(ii) is similar in scope to the impact of the impugned legislation in *Safarzadeh-Markhali*. That case concerned s. 719(3.1) of the *Criminal Code*, which denied enhanced sentencing credit for days spent in pre-trial detention to an offender who was refused bail because of previous convictions, and that was endorsed on the offender's record pursuant to s. 515(9.1). Writing for a unanimous court, McLachlin C.J. found that the legislative purpose of s. 719(3.1) was to "to enhance public safety and security by increasing violent and chronic offenders' access to rehabilitation programs" (emphasis omitted): at para. 47. At para. 53, she held that the law was overbroad because it applied to offenders in circumstances that did not further the legislative purpose:

> First, the provision's ambit captures people it was not intended to capture: offenders who do not pose a threat to public safety or security. Section 515(9.1) is broadly worded. It catches any person denied bail primarily for a criminal record, without specifying or even broadly identifying the nature or number of offences that would warrant a s. 515(9.1) endorsement. The section may therefore ensnare persons whose imprisonment does not advance the purpose of the law. For example, a person with two or three convictions for failing to appear in court might be subject to a s. 515(9.1) endorsement, even though he or she did not pose any real threat to public safety or security. And even if such a person receives greater access to rehabilitative programming and benefits from it, the consequence is not necessarily to improve public safety and security. In short, a s. 515(9.1) endorsement is an inexact proxy for the danger that an offender poses to public safety and security. The Crown says the law casts the net broadly because targeting all

> offenders with a criminal record is a more practical option than attempting to identify only offenders who pose a risk to public safety and security. But practicality is no answer to a charge of overbreadth under s. 7: *Bedford*, at para. 113.

[161] Sections 742.1(c) and 742.1(e)(ii) are even less precisely tailored to their purpose than the legislation at issue in *Safarzadeh-Markhali*. As discussed, in a practical sense, the only offenders who face an altered sentencing regime by virtue of the *Safe Streets and Communities Act* amendments are those whose circumstances would ordinarily militate in favour of a sentence at the lower end of the spectrum. While there will be cases where eliminating the availability of a sentence served in the community and mandating a sentence of imprisonment could meet Parliament's purpose of incarcerating those who commit serious crimes, there will be many other cases where, as in *Safarzadeh-Markhali*, the impugned provisions will impact people they were not intended to capture.

[162] The Crown responds that Parliament's intent was to impose jail sentences on offenders convicted of the designated offences, whether or not the circumstances of the crime made their conduct serious criminal conduct. In other words, the consequence applies to serious offences in the abstract, regardless of whether the offence, as committed in any particular case, involves serious criminality.

[163] I would reject this submission. It is belied by the review of the sources for determining Parliament's intent, as discussed above, which was to ensure that

offenders convicted of serious crimes serve their sentences in prison. The intent of the amendments was to promote the integrity of the administration of justice and the public's confidence in it by ensuring that serious crimes are punished with a sufficiently strong sentence, which Parliament deems to be a sentence of incarceration.

[164] Parliament's chosen proxy for assessing the seriousness of an offence is its maximum sentence. There are, however, a number of problems with that analogy.

[165] The Crown's submission that this court's reasoning in *Hamilton* provides a foundation for the use of maximum penalties as a proxy for an offence's seriousness is inconsistent with this court's reasoning in that case and misconceives the sentencing process. In *Hamilton*, the issue was the determination of a fit sentence for the offence of importing cocaine. In setting out the analytical framework, Doherty J.A. considered the proportionality requirement under s. 718.1 of the *Criminal Code*, which provides that "[a] sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender." He stated, at para. 90, that the gravity of the offence is a product of both the potential penalty imposed and the specific features of the commission of the crime:

> The "gravity of the offence" refers to the seriousness of the offence in a generic sense as reflected by the potential penalty imposed by Parliament and <u>any specific features of the commission of the crime</u> which may tend

> to increase or decrease the harm or risk of harm to the community occasioned by the offence. For example, in drug importation cases, the nature and quantity of the drug involved will impact on the gravity of the offence. Some of the factors which increase the gravity of the offence are set out in s. 718.2(a). [Emphasis added.]

[166] He continued, at para. 91, by explaining that "the degree of responsibility of the offender" addresses the offender's role in carrying out the crime, as well as "any specific aspects of the offender's conduct or background that tend to increase or decrease the offender's personal responsibility for the crime."

[167] When read in context, Doherty J.A.'s acknowledgement that the maximum penalty for an offence can reflect its seriousness in a generic sense was tempered significantly by his concurrent observation that the actual circumstances in which a specific offender committed a specific offence will play a critical role in the determination of seriousness. This description is consistent with the sentencing framework in the *Criminal Code* and Ms. Sharma's submission that the seriousness of a crime is not determined solely by the maximum penalty, viewed in isolation. Sentencing is not an abstract inquiry and cannot be divorced from the circumstances of the commission of the crime, which will reduce or increase the level of seriousness of the offence in any particular case. Furthermore, I observe that the jurisprudence reflects that while maximum penalties are not reserved for some abstract conception of the worst possible offender, they are nevertheless rarely imposed: *R. v. Cheddesingh*, 2004 SCC 16, [2004] 1 S.C.R. 433, at para. 1; *R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163, at para. 20.

[168] Ms. Sharma sought to distinguish the case of *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711, in which the Supreme Court found that a provision of the *Immigration Act, 1976*, S.C. 1976-77, c. 52, did not violate the principles of fundamental justice by using conviction of an offence with a maximum penalty of five years or more as a proxy for "serious criminality", so as to prevent a permanent resident from remaining in Canada. I agree that that decision is distinguishable. First, the parties in *Chiarelli* did not frame their submissions with reference to the principles of fundamental justice that have since crystallized in the jurisprudence and that are raised in this appeal. The court therefore did not address the issue in terms of comparing the purpose of the law with the scope of its impugned effects. Second, that case turned on the proposition that Parliament was entitled to adopt an immigration policy to regulate non-citizens' rights to enter and remain in Canada, and that it was not unfair to deport a person for a crime punishable by five years in prison when that was a known condition for remaining in Canada: at pp. 733-34.

[169] I note, further, that the relevant immigration legislation, in its modern form, includes as grounds of inadmissibility not only the maximum penalty for an offence, but also the length of the prison term actually imposed on the permanent resident or foreign national: see *Immigration and Refugee Protection Act*, s. 36(1)(a). The latter measure is intended as a proxy for serious criminality: see *Tran v. Canada*

(Public Safety and Emergency Preparedness), 2017 SCC 50, [2017] 2 S.C.R. 289, at para. 25.

[170] Finally, the Crown also submits that the legislation is not overly broad in respect of the offence in issue in this appeal to which Ms. Sharma pleaded guilty, importing cocaine, or the offence of aggravated sexual assault, which was specifically addressed by the interveners HIV & AIDS Legal Clinic Ontario and Canadian HIV/AIDS Legal Network. In respect of importing cocaine, the Crown argues that the need for denunciation and deterrence justifies the removal of the conditional sentence option. In the case of aggravated sexual assault, which the interveners argue can be committed by non-disclosure of HIV even where the accused takes precautions to prevent transmission and transmission does not occur, the Crown submits that the lesser sentences of a suspended sentence, an intermittent sentence, and a fine are still available for less blameworthy cases.

[171] With respect, in making that argument, the Crown mischaracterizes the conditional sentence as a form of punishment that carries no deterrent or denunciatory effect. Even in cases where deterrence and denunciation are the paramount sentencing objectives, a conditional sentence may be appropriate, depending on "the nature of the conditions imposed, the duration of the conditional sentence, and the circumstances of the offender and the community in which the conditional sentence is to be served": *Proulx*, at para. 114; see also *Wells*, at para.

35. These principles apply equally to the offences of drug importation and aggravated sexual assault.

[172] Moreover, even if accepted, these submissions do not assist the Crown where the impugned provisions are overbroad in respect of any of the included offences. In *Bedford*, the court stated that the s. 7 analysis regarding arbitrariness, overbreadth, and gross disproportionality is qualitative, not quantitative, and that "a grossly disproportionate, overbroad, or arbitrary effect on one person is sufficient to establish a breach of s. 7": at para. 123.

[173] In *Lloyd*, where the Supreme Court struck down the one-year mandatory minimum sentence for a controlled substances offence because it applied in situations where the sentence amounted to cruel and unusual punishment under s. 12 of the *Charter*, the court suggested two paths to insulate such provisions from *Charter* non-compliance: at paras. 35-36. Similar paths could apply, with appropriate modification, to the impugned provisions of the *Safe Streets and Communities Act*. One is to narrow the reach of the law. The other is to provide a residual judicial discretion for exceptional cases. There no doubt are other methods as well. None were applied to the provisions at issue in this appeal.

[174] I conclude that the impugned provisions are contrary to s. 7 of the *Charter* because they resulted in the deprivation of Ms. Sharma's liberty in a manner that was not in accordance with the principle of fundamental justice of overbreadth.

There is no rational connection between the impugned provisions' purpose and some of their effects.

H. SECTION 1

[175] As I have determined that ss. 742.1(c) and 742.1(e) infringe ss. 7 and 15 of the *Charter*, the onus falls on the Crown to justify those infringements under s. 1 of the *Charter*.

[176] Dealing first with the s. 7 breach, in its written submissions, the Crown recognizes that infringements of s. 7 are "difficult, but not impossible" to justify under s. 1, based on *Bedford*, at paras. 125-29, and advances no substantive arguments to justify the alleged s. 7 infringement. As a result, I conclude that the s. 7 infringement is not saved under s. 1.

[177] Turning next to the s. 15 breach, the Crown argues that the provisions meet the four elements of the test set out in *R. v. Oakes*, [1986] 1 S.C.R. 103, as subsequently restated in *Canada (Attorney General) v. Hislop*, 2007 SCC 10, [2007] 1 S.C.R. 429. Although the onus is on the Crown to prove each of these elements, the Crown filed no evidence to substantiate a s. 1 argument.

[178] Even if the Crown could establish that the provisions have a pressing and substantial objective, in my view, the s. 1 justification fails at the minimal impairment stage of the analysis. The Crown argues that the provisions are minimally impairing of Ms. Sharma's rights because they "only remove one sentencing option of many". As discussed above, they remove the only sentencing

alternative to imprisonment that could have been available for this crime and for this offender. As in the game of musical chairs, when the chairs are removed, there is no place left to sit down.

[179] There is also no basis to find that the deleterious effects of the impugned provisions on Aboriginal people are outweighed by the salutary effect of the provisions. The deleterious effects are serious. These provisions as enacted take no account of the special circumstances of Aboriginal offenders and the need to address their disadvantage based on race that has resulted in the overincarceration of Aboriginal people. The breach of s. 15 is not saved by s. 1.

I. REMEDY

[180] I would strike down ss. 742.1(c) and 742.1(e)(ii) of the *Criminal Code*. The Crown did not ask the court to declare the provisions inapplicable only to Aboriginal offenders if it found a breach. In my view, it is for Parliament to determine to what extent, if any, it may re-enact these provisions, bearing in mind the position of other offender groups potentially affected.

[181] In oral argument, the Crown requested a suspended declaration of invalidity. The Crown has not met the high standard of showing that a declaration with immediate effect would pose a danger to the public or imperil the rule of law: *R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599, at para. 98. Accordingly, I would apply the declaration of invalidity with immediate effect.

[182] As for Ms. Sharma, she asks this court to set aside her sentence and substitute a conditional sentence of imprisonment of 24 months less a day, although she has served her sentence of 17 months in prison. The Crown submits that the sentence imposed was a fit sentence and is entitled to deference.

[183] Having found the provisions that precluded the imposition of a conditional sentence to be in breach of ss. 7 and 15, this court may consider whether a conditional sentence is the appropriate sentence for Ms. Sharma. No deference is owed to the decision to impose a sentence of imprisonment, as the sentencing judge erred in concluding that a conditional sentence was not available.

[184] Taking into account Ms. Sharma's personal circumstances as a single mother, her guilty plea, her lack of criminal record, together with the *Gladue* factors which address her personal history, including her grandmother's attendance at residential school, her survival of sexual violence, her experience in foster care, her lack of education and poverty, as well as her determination to re-educate herself and work to make a good home for her daughter and to maintain her cultural identity, a conditional sentence served in the community would have been an appropriate sentence to achieve the sentencing objectives of s. 718.2(e).

[185] As a conditional sentence is served in the community, it is often appropriate that it be a somewhat longer sentence to achieve the objectives of deterrence and denunciation as well as rehabilitation. I would therefore set aside the sentence of 17 months in prison and substitute a conditional sentence of 24 months less a day,

as suggested by the appellant. However, as Ms. Sharma has completed her sentence of incarceration, further time spent subject to a conditional sentence is not in the interests of justice in light of the time spent in prison.

J. DISPOSITION

[186] For all of these reasons, I would allow the appeal and declare that ss. 742.1(c) and 742.1(e)(ii) of the *Criminal Code* unjustifiably infringe ss. 7 and 15 of the *Charter* and are, therefore, of no force or effect.

[187] I would set aside Ms. Sharma's sentence of 17 months' imprisonment, declare that a conditional sentence of 24 months less a day should have been imposed, but as she has served her custodial sentence, no further time is to be served.

"K. Feldman J.A."
"I agree. E.E. Gillese J.A."

B.W. Miller J.A. (Dissenting):

[188] If Parliament enacts legislation expected to benefit an historically disadvantaged group – legislation it had no obligation to enact – can a later Parliament amend or repeal it, having concluded the legislation was misconceived? The immediate answer is yes, according to the bedrock constitutional principle that a Parliament cannot bind its successor: *Reference re Bowater's Pulp & Paper Mills Ltd.*, [1950] S.C.R. 608, at p. 640, *per* Rand J. (concurring), and at p. 657, *per* Estey J. (concurring). Ordinary legislation is never immune from amendment or repeal. An interpretation of s. 15(1) of the *Charter* that results in constitutionalizing ordinary legislation – permanently locking in any legislation perceived as remedial of disadvantage – is unsound.

[189] The effect of my colleague's reasons runs to the contrary: that contemporary s. 15(1) *Charter* doctrine operates to lock in place a statute intended to benefit an historically disadvantaged group. If s. 15(1) operates as my colleague sets out – immunizing ordinary legislation from amendment or repeal, subject only to s. 1 – something has gone seriously wrong with s. 15(1) doctrine. What that problem is, and how to fix it, is at the heart of this appeal. In short, the problem is a new and reductive conception of discrimination articulated in *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548, breaking from the long history of s. 15(1) doctrine since its emergence in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143. On this new conception, the imposition or maintenance of a

burden of any kind is stipulated as sufficient basis for establishing an infringement of s. 15(1), without regard to the essential question of whether that burden has resulted from any sort of wrong – whether intentional or not – on the part of the legislature. This question, which requires that the claim of discrimination be assessed within the decision-making context, must remain if s. 15(1) analysis is to be a substantive inquiry into wrongful discrimination.

A. INTRODUCTION

[190] Parliament was under no obligation to establish a conditional sentencing regime. It did so in the expectation that such a regime would allow for criminal punishments that would be more conducive to reform of the offender, benefitting both the offender and the community. This reform was undertaken simultaneously with another: a statutory direction to sentencing judges to prioritize alternatives to incarcerating all offenders, and particularly Aboriginal offenders.

[191] Parliament vested judges with the discretion to determine which offenders could benefit from conditional sentences, and what the terms of such sentences should be. However, this grant of discretion, like all grants of discretion, is bounded. The legislation provides that for some offences and some offenders, a conditional sentence will not be an available option.

[192] The legislation at issue in this appeal removed some of the discretion previously exercised by sentencing judges. Parliament determined that for some

offences, justice will require incarceration, a more complete deprivation of the offender's range of freedom, regardless of what a sentencing judge may otherwise have concluded. This legislation is an exercise of one of Parliament's most important functions – setting the boundaries of the adequate and necessary penalties for crimes.

[193] This court is asked to examine the constitutionality of that legislative decision through the lenses of s. 15(1) and s. 7 of the *Charter*. The doctrines elaborating these constitutional provisions are complex bodies of law. In order to be guided by these doctrines, it is inadequate to simply take a snapshot of doctrine as it has been formulated in the most recent judgments of the Supreme Court. As later judgments build on or modify propositions established in earlier cases, contemporary doctrine in this area of law cannot be properly understood without attention to the course of doctrinal development. Accordingly, I begin with a brief doctrinal history of s. 15(1), including its interaction with s. 1. I then apply that doctrine to the issues on this appeal, before turning finally to s. 7.

[194] In the result, I disagree with my colleague on each rights claim, as I have concluded that the impugned legislation violates neither s. 15(1) nor s. 7. I would dismiss the appeal.

B. SECTION 15 – A BRIEF DOCTRINAL HISTORY

[195] Section 15 of the *Charter of Rights and Freedoms* provides:

> (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[196] Since the Supreme Court first established a methodology for the interpretation of s. 15(1) in *Andrews*, the doctrine has undergone continual change. Doctrinal innovations have been adopted, then discarded. Appeals to architectonic concepts such as dignity and autonomy, first thought to provide greater clarity and direction, were abandoned as unhelpful and burdensome distractions.

[197] None of this would have surprised the *Andrews* court. That court was especially clear-minded that the meaning of s. 15's key concepts – equality and discrimination – are contested. These concepts were left undefined in the text of s. 15(1), and as a political community we disagree not only about the meaning of these concepts, but about the criteria to be used in determining whether they have been respected. With respect to equality in particular, McIntyre J. remarked that it is "an elusive concept [that], more than any of the other rights and freedoms guaranteed in the *Charter*, […] lacks precise definition": at p. 164. Ten years later, Iacobucci J. wrote that s. 15 "is perhaps the *Charter*'s most conceptually difficult

provision": *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at para. 2.

[198] The history of s. 15(1) doctrine suggests that we not be overconfident that its development has reached a terminus. To contribute to the development of s. 15(1) doctrine, understanding what is stable and what requires further refinement requires a preliminary discussion of the key concepts of equality and discrimination. It also requires attention to the subtle but significant changes in methodology that occurred between *Andrews* in 1989 and *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, [2018] 1 S.C.R. 464, and in *Centrale des syndicats du Québec v. Quebec (Attorney General)*, 2018 SCC 18, [2018] 1 S.C.R. 522. What follows, then, is a brief discussion of the purpose or foundational principle underlying s. 15(1), before attending to the two principal concepts through which s. 15(1) doctrine has been articulated: substantive equality and discrimination. From there I will provide a brief overview of how these concepts have been worked into the s. 15(1) test, which is intended to guide the reasoning of judges and others who are guided by law.

(1) Foundations of Equality

[199] Section 15(1) begins with the declaration that "[e]very individual is equal before and under the law", a principle that lies at the heart of constitutionalism and

the rule of law. The whole of s. 15 – and the whole of the *Charter* and the Canadian constitutional order – is premised on the radical equality of persons and the rejection of natural hierarchies. The animating purpose of s. 15, as articulated by LeBel J. in *Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61, is to safeguard the shared commitment to the principle that all human beings have equal worth: at paras. 136-38. Or as stated equivalently in *Law*, the purpose is to recognize all persons, notwithstanding their great disparities in abilities and needs, "as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration": at para. 51.

(a) Substantive Equality

[200] The Supreme Court of Canada has specified that s. 15(1) is premised on a particular conception of equality, which it has called "substantive equality". Unfortunately, the court has never provided an account of this concept suited to the central role it is supposed to play in s. 15(1) reasoning. Of late, the concept has no obvious analytical function, and has been deployed mainly as a rhetorical flourish, with "substantive" either serving as an intensifier, or meaning "real" as opposed to merely "apparent": see e.g. *Taypotat*, at paras. 17, 19; *Quebec v. Alliance*, at paras. 25-27.

[201] In earlier jurisprudence, the court expounded the concept by way of contrast with the ancient concept of "formal equality" as, for example, in *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396, at para. 39:

> Substantive equality, unlike formal equality, rejects the mere presence or absence of difference as an answer to differential treatment. It insists on going behind the facade of similarities and differences. It asks not only what characteristics the differential treatment is predicated upon, but also whether those characteristics are relevant considerations under the circumstances.

[202] However, as many legal scholars have attested,[3] this conception of substantive equality is not readily distinguishable from the concept of formal equality, associated with Aristotle, that the court intended to use as a contrast. The difference between the two is either merely terminological, or is rooted in a misunderstanding of formal equality. As explained below, the *Andrews* court erred in its supposition that formal equality precluded assessment of the substance of a legislative provision, and was concerned only with the question of whether legislation – whatever its justice or injustice – was applied impartially. Substantive equality was proposed by the Supreme Court as a corrective: to direct that the substance of legislation should also be subject to scrutiny. But this is a proposition that formal equality never denied. Once this erroneous understanding of formal

---

[3] See Dale Gibson, *The Law of the Charter: Equality Rights* (Toronto: Carswell, 1990), at pp. 70-81; Patrick J. Monahan, Byron Shaw, Padraic Ryan, *Constitutional Law*, 5th ed. (Toronto: Irwin Law, 2017), at pp. 462-65; David M. Beatty, "The Canadian Conception of Equality" (1996) 46:3 U.T.L.J. 349, at pp. 350-53; Charles-Maxime Panaccio, "Section 15 and Distributive Underinclusiveness: Aristotle's Revenge" (2018) 38:1 N.J.C.L. 125.

equality is cleared away, substantive equality can simply be understood as formal equality at full stretch.

[203] Formal equality is the proposition that "things that are alike should be treated alike, while things that are unalike should be treated unalike in proportion to their unalikeness": *Andrews*, at p. 166, quoting from Aristotle's *Nicomachean Ethics*. As H.L.A. Hart noted in *The Concept of Law*, although "'[t]reat like cases alike and different cases differently' is a central element in the idea of justice, it is by itself incomplete and, until supplemented, cannot afford any determinate guide to conduct": 3rd ed. (Oxford: Oxford University Press, 2012), at p.159. That is, and as also noted in the passage from *Withler* quoted above, "until it is established what resemblance and differences are relevant, 'Treat like cases alike' must remain an empty form. To fill it we must know when, for the purposes in hand, cases are to be regarded as alike and what differences are relevant": Hart, at p. 159.

[204] Thus, as a critical tool for assessing the wrongness of discrimination, the principle of formal equality can only ever be a beginning. It is a form or framework for analysis. It invites but cannot answer the question: what is a relevant basis for discriminating among persons, for treating equals differently? The criterion for this additional inquiry can only be supplied by external, normative judgments about what persons and groups are owed.

[205] These judgments have been supplied, in part, by the prohibited grounds enumerated in s. 15(1), and grounds that are analogous to these: race, national or ethnic origin, colour, religion, sex, age, and mental or physical disability. These prohibited grounds partially fill in the form. In the case of direct discrimination, they are grounds that can seldom be a relevant basis for treating persons differently. In the case of indirect discrimination, they can seldom be a relevant basis for accepting negative side-effects of government action to be imposed on others. More contextual information is of course needed to determine whether a distinction drawn (or permitted) on these grounds is reasonable. In the language of *Withler*, the question is whether the "characteristics the different treatment is predicated upon […] are relevant considerations under the circumstances": at para. 39. This analysis of whether distinctions respect equality and are reasonable, or do not respect equality and are unreasonable, was set out in the *Andrews* test, largely carried out using the vocabulary of discrimination.

(b) Discrimination

[206] All legislation inevitably draws some distinctions and ignores others. When is it wrong to do so? This problem was identified by McIntyre J. in *Andrews*, at pp. 168-69:

> It is not every distinction or differentiation in treatment at law which will transgress the equality guarantees of s. 15 of the *Charter*. It is, of course, obvious that legislatures may – and to govern effectively – must treat different

> individuals and groups in different ways. Indeed, such distinctions are one of the main preoccupations of legislatures. The classifying of individuals and groups, the making of different provisions respecting such groups, the application of different rules, regulations, requirements and qualifications to different persons is necessary for the governance of modern society. As noted above, for the accommodation of differences, which is the essence of true equality, it will frequently be necessary to make distinctions. What kinds of distinctions will be acceptable under s. 15(1) and what kinds will violate its provisions?

[207] Section 15(1) doctrine is intended to provide a framework for identifying wrongful discrimination. That doctrine, as it was formulated in *Andrews*, presupposes a distinction between direct and indirect discrimination. This appeal turns on a question of indirect discrimination. As explained below, assessing legislation for indirect discrimination brings added complexity.

[208] To treat like cases alike and different cases differently requires keen differentiation between like and unalike, and between different sorts of differences. It requires an account of what sorts of differences can be relevant in particular contexts. Distinctions drawn in legislation ought never to be based on grounds that are irrelevant to the benefit the legislation seeks to achieve, and the benefit to be achieved must never be premised on a denial of the equality of persons.

[209] *Andrews* recognized both limbs of discrimination: (i) direct discrimination, which looks entirely at the decision-makers' intentions or grounds for making

decisions; and (ii) indirect discrimination, which considers the unintended side-effects of the ends and means that were chosen.

[210] Legislation is directly discriminatory (in the pejorative sense) wherever a forbidden distinction is made either in the proposal adopted in the legislation or in the reasoning that led to the adoption of the proposal: John Finnis, “Equality and Differences” (2011) Am. J. Juris. 17, at p. 28. The prohibition on direct discrimination is intended to banish certain considerations from the minds of decision-makers in most contexts. Although all legislation operates by drawing distinctions, not all distinctions, even those drawn on enumerated or analogous grounds, are impermissible. Although there is no hierarchy of the prohibited grounds, direct discrimination on some grounds, such as race, is more likely to be constitutionally suspect than distinctions drawn on other grounds such as age: consider the many paternalistic legislative provisions singling out children for different treatment.

[211] As should be expected in a basically decent society, wrongful direct discrimination is rare: *Quebec v. A*, at para. 420, *per* McLachlin C.J. (concurring). Much more common – and more difficult to assess – is indirect discrimination. Indirect discrimination focuses on the unintended impact of legislation rather than its intended ends and the means chosen to obtain them. As explained by Professor Sophia Moreau, in “The Moral Seriousness of Indirect Discrimination” in H. Collins

& T. Khaitan, eds., *Foundations of Indirect Discrimination Law* (Portland: Hart Publishing, 2018) 123, at p. 125:

> [P]olicies that are indirectly discriminatory are often adopted in the service of perfectly innocent or even commendable goals, but end up having unfortunate side effects on groups that share a protected characteristic. A practice or a rule is treated as indirect discrimination under the law if it disadvantages those who share a particular protected characteristic, but disadvantages them only in an indirect way[.]

[212] Professor Moreau highlights that legislation with commendable aims – not premised on a prejudicial or stereotypical view of anyone – can nevertheless be wrongful. It is often appropriate to hold decision-makers to account not only for what they intend, but for what they allow to happen: see Sophia Moreau, "What is Discrimination?" (2010) 38:2 Philosophy & Public Affairs 143, at pp. 158-60. The prohibition of indirect discrimination is intended to require legislatures to give careful attention to the distinctions drawn (or not drawn) in legislation and to attend to the potential diffuse impacts of proposed legislation.

[213] The wrong that is committed by legislative decision-makers in indirect discrimination is in unfairly accepting the side-effects of a legislative course of action that may be otherwise constitutionally sound. This decision-making can be culpable even if the disadvantageous effect was neither desired nor foreseen. There need not be any discriminatory intention, or contempt, or animus toward the

affected group. It can simply be a matter of overlooking their interests, or failing to give their interests the significance rightly due to the interests of equals.

[214] Determining culpability for indirect discrimination is more complex than for direct discrimination, which focuses primarily on the presence or absence of an intention to discriminate. Properly understood, indirect discrimination is no less serious, categorically, than direct discrimination. Its wrongfulness, however, turns on a contextual analysis of what is required to treat persons as equals in particular decision-making contexts where governments have an obligation to legislate for the common good.

[215] Indirect discrimination is not established automatically by the finding that legislation has negatively (or even disproportionately) affected the interests or well-being of persons belonging to a protected category. This standard of culpability would make indirect discrimination akin to absolute liability. Indirect discrimination is better understood as a failure either to notice the impact of its actions on others, or to accord that impact sufficient weight in its deliberations. The analysis requires attention to the public good to be achieved through the legislation, and whether it can fairly be said that the legislature – in accepting the unintended side-effects of the legislation on the claimant group – thereby failed to treat them as persons, "equally capable and equally deserving of concern, respect and consideration": *Law*, at para. 51. It bears repeating that where the complaint of indirect discrimination is based on the legislature failing to give appropriate weight to the

interests of an historically disadvantaged group, the argument cannot be assessed without attending carefully to the full legislative context: the balance of burdens and benefits the legislation seeks to establish throughout the political community.

[216] The requirement that all be recognized as equally deserving of concern does not mean that all are entitled to the same treatment, or to have their interests equally prioritized. The point is elaborated by McIntyre J. in several places in *Andrews*, such as at p. 164: “every difference in treatment between individuals under the law will not necessarily result in inequality”. The obligation to recognize others as equals can co-exist with governmental choices that prioritize the immediate needs of some over others: *Finnis*, at p. 22, n. 15.

[217] When differential treatment is permitted, when it is required, and when it constitutes wrongful discrimination are not straightforward questions, and depend enormously on context. The *Andrews* test, as elaborated in *Law* and subsequent cases, provides a framework intended to direct courts to the relevant contextual factors. That framework, as I explain later, has been left in shadow, if not expressly abandoned, in more recent decisions.

(2) The *Andrews* Methodology

[218] The winding history of the development of s. 15(1) doctrine has been canvassed in many places, and perhaps best by LeBel J. in *Quebec v. A.* As LeBel J. recounted in his reasons, the analytical approach to establishing a *prima facie*

case of discrimination first established in *Andrews* is now expressed in two steps: *Quebec v. A*, at paras. 177-84.

[219] The first step has remained relatively stable: does the law create a distinction based on a ground enumerated in the text of s. 15(1), or a ground analogous to these?

[220] The formulation of the second step has changed frequently, though sometimes subtly. It remains the subject of significant disagreement. This inquiry, stated at its highest degree of abstraction, is whether the distinction identified in the first step is discriminatory. *Law* provided the most ambitious and analytically sophisticated framework to identify what makes a distinction discriminatory. It recast the second inquiry, at para. 88, as:

> Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

[221] The imposition of a burden or withholding of a benefit were not understood in *Law* to be sufficient to establish wrongful discrimination. *Law* directed courts to consider the manner in which a burden was imposed or a benefit withheld. To that end, it identified four “contextual factors” relevant to the identification of wrongful discrimination, at para. 88: (1) the existence of pre-existing disadvantage,

stereotyping, prejudice, or vulnerability experienced by the individual claimant as a member of a discrete and insular minority; (2) correspondence between the distinction drawn by the law and the complainant's actual needs, capacities, or circumstances; (3) whether the purpose of the impugned law was to ameliorate the condition of a more disadvantaged group; and (4) the nature and scope of the interest affected by the impugned law.[4] These factors are intended to help structure the inquiry into whether the imposition of a burden or the withholding of a benefit is discriminatory.

[222] In *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, the Supreme Court reaffirmed that discrimination, whether direct or indirect, does not turn on the decision-makers' attitudes toward the claimant group, whether prejudicial or otherwise. It reaffirmed the importance of the impact on the group: *Kapp*, at para. 23. The impact may be the perpetuation of prejudice or false stereotyping, but it need not: *Quebec v. A*, at para. 325, *per* Abella J. (dissenting, but not on this point). Although prejudice and stereotyping remain markers of wrongful discrimination,

---

[4] *Law* also relied heavily on the concept of human dignity, which has traditionally grounded the concept of equality: see paras. 51-54. The concept of human dignity that *Law* advanced, however, was idiosyncratic and highly subjective. The resulting conception of discrimination was a function of how legislation impacted a claimant's dignity, with dignity defined as "feelings" of self-respect and self-worth: at para. 53. This inquiry into human dignity as feelings of self-respect and self-worth was expressly rejected, in *R. v. Kapp*, as a misconceived "abstract and subjective notion" ill-suited to forming the basis for a legal test: 2008 SCC 41, [2008] 2 S.C.R. 483, at paras. 21-22. *Kapp* nevertheless affirmed, at para. 21, that the protection of all rights under the *Charter* has "as its lodestar the promotion of human dignity", and the other aspects of s. 15(1) doctrine articulated in *Law*, grounded in *Andrews*, have never been overturned.

they are not necessary elements of discrimination that the claimant must establish in all cases.

[223] In *Taypotat*, s. 15(1) doctrine took a reductive turn. The previous emphasis on the perpetuation of stereotyping and prejudice was replaced with the broader category of disadvantage, at para. 20: “whether the impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage”.

[224] As I explain below, this broad conception of disadvantage – potentially any setback to a person’s interests – is ill-suited to an assessment of indirect discrimination. It appears to rule out any consideration of the broader social context in which legislative decisions are made, including any regard for the responsibilities the legislature has to promote and preserve the public good. Without considering the impact on the public good, it becomes impossible to determine whether the legislature was wrong to have accepted the side-effects imposed on the group members in pursuit of that good. This goes to the heart of the s. 15(1) analysis – whether legislation is discriminatory – and is not something that can be pushed off to s. 1 analysis.

[225] To postpone contextual considerations to s. 1 (or to fail to address them at all) ruptures the “great continuity” in equality jurisprudence (*Law*, at para. 42) and

embraces an approach expressly rejected in *Andrews*: at p. 181. The doctrinal innovations of *Taypotat* are irreconcilable with *Andrews*, which has never been overturned, and to which every s. 15(1) judgment to date has expressly remained committed.

C. SECTION 15 – APPLICATION TO THE FACTS

[226] As my colleague aptly summarizes it, the *Safe Streets and Communities Act*, S.C. 2012, c. 1, precludes "sentencing judges from imposing a conditional sentence on an offender convicted of an offence prosecuted by indictment where the maximum term of imprisonment is 14 years or life, or an offence prosecuted by indictment involving the import, export, trafficking or production of drugs, where the maximum term of imprisonment is 10 years": at para. 66.

[227] This legislation is premised on a judgment by Parliament that conditional sentences had been imposed in circumstances where they were not fit and proper given the serious nature of the offences. In such circumstances, Parliament concluded, nothing short of incarceration could appropriately further the objectives of deterrence and denunciation. Parliament determined that custodial sentences were, as a rule, warranted for these offences, and thus that it would be a failure of justice to allow conditional sentences to be imposed for the commission of these offences. The means for carrying out this intention was to direct sentencing judges to no longer impose conditional sentences for these offences.

(1) Does the law create a distinction on the basis of an enumerated or analogous ground?

[228] No one suggests that the legislation discriminates directly. Race, in particular, plays no role in the proposal that Parliament intended to pursue through the legislation, nor in the legislative means chosen to pursue it. So the legislation does not "draw a distinction" in that sense. Instead, the claim is that the legislation has a differential impact on the interests of Aboriginal offenders, and because of this, it treats Aboriginal offenders differently.

[229] The distinctions drawn in the legislation were made on the basis of particular offences and the maximum penalties that they can attract. There was expert evidence at trial that Aboriginal women, such as the appellant, who experience great economic insecurity and dependency are, because of the exigencies of their circumstances, particularly at risk of recruitment into drug trafficking: see para. 25. However, there is no suggestion that the offences are so closely related to race that they serve as proxies for race.

[230] The appellant's primary argument is that the restriction on the availability of conditional sentences, although facially neutral, treats Aboriginal offenders differently than others because the legislation impairs the operation of another legislative provision, s. 718.2(e) of the *Criminal Code*, that is intended to reduce

overincarceration both generally and with specific reference to Aboriginal offenders.

[231] In *Quebec v. Alliance*, the Supreme Court explained that the first step of s. 15(1) analysis is not intended to assess the merits of the claim, but simply to frame the analysis and weed out claims obviously not based on enumerated or analogous grounds: at para. 26. The difficult work is meant to be undertaken at the second step. On that basis, I can agree with my colleague that the claim meets the first step.

(2) Is the distinction discriminatory?

[232] My colleague concludes that, "[b]y restricting the availability of the conditional sentence, the impugned amendments deprive the court of an important means to redress systemic discrimination against Aboriginal people when considering an appropriate sanction": at para. 130. The systemic discrimination in issue is said to be the overincarceration of Aboriginal persons.

[233] At the second stage of the *Andrews* test, something more is needed than a determination that a person or group has suffered a setback to their interests as a result of a government action. There must be a determination that the legislative decision, considered in context, is wrongful. In the case of this claim of indirect discrimination, the legislative decision is that some set of offences ought to be punished by incarceration. The means to accomplish this end is to provide that

offenders convicted of (in the appellant's case) drug offences prosecuted by indictment would not be eligible for conditional sentences. A side-effect of this decision, given that some offenders would inevitably be Aboriginal, is that the number of incarcerated Aboriginal offenders would therefore be higher than it would otherwise be. I do not agree with my colleague that the relevant impact of the *Safe Streets and Communities Act* lies in having "deprive[d] the court of an important means to redress systemic discrimination against Aboriginal people when considering an appropriate sanction": at para. 130. To formulate the matter in this way erroneously suggests that the court's rights have been infringed, and that the courts have some constitutional priority over Parliament (outside of the operation of s. 12) in setting the bounds of a fit and proper sentence. This would be contrary to recent Supreme Court jurisprudence on the respective roles of Parliament and the courts in establishing norms of punishment: *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130, at para. 43.

[234] How do we determine whether it was wrong for Parliament to have accepted this side-effect? I would reject the use of the bare criterion of perpetuating disadvantage. As I argue below, the adoption of this criterion as sufficient for the purposes of s. 15(1) analysis denatures, destabilizes, and trivializes equality rights jurisprudence. Second, I will argue that an analysis of the concept of overincarceration yields the conclusion that there has been no wrongful discrimination.

(a) The Constitutional Ratchet

[235] When the conditional sentencing regime was first established by the *Criminal Code*, it was not made available indiscriminately. Rather, Parliament decided to discriminate among types of offences. Eligibility for conditional sentences was restricted to offenders convicted of, among other things, offences that do not attract a mandatory minimum, and are sentenced to "imprisonment of less than two years".

[236] This discrimination among offences raises difficult questions for this appeal. As canvassed above, the restriction on drug trafficking offences took effect through the *Safe Streets and Communities Act*. But it is worth considering a counterfactual scenario in which this restriction had been part of the original legislation that created the conditional sentencing regime.

[237] In creating the conditional sentencing regime in the mid-1990s, it was open to Parliament to conclude that it would be wrong – an unfair distribution of benefits and burdens, and an injustice to the community – to make conditional sentences available for drug trafficking offences. Had it done so and excluded drug trafficking offences from the regime, would it have thereby failed to respect anyone's right to equal protection and benefit of the law without discrimination?

[238] The answer is clearly no.

[239] That being so, can it be said that there is a constitutionally relevant distinction between creating a conditional sentencing regime that excluded drug trafficking offences *ab initio*, and a regime that was later amended to exclude drug trafficking offences? Again, the answer must be no. These are two means to the same end. Either way, the availability of conditional sentences to Aboriginal offenders would be less than it would have otherwise been. It would result in greater incarceration. Unless there is a constitutionally relevant distinction between enacting legislation and amending it – something that would in any event be invisible to an analysis focused solely on the creation or perpetuation of disadvantage – treating these two means to the same end differently would be putting form over substance: *Quebec v. Alliance*, at para. 33.

[240] Suppose I am mistaken and Parliament could not have excluded drug trafficking offences from the conditional sentencing regime *ab initio*. A further set of difficulties must be confronted. The conditional sentencing regime, as it was originally enacted and as it remains, is not available universally. Most prominent among its restrictions is that conditional sentences are not available for any offence that attracts a mandatory minimum sentence or where the court imposes a sentence of imprisonment of two years or more. Undoubtedly, there are many Aboriginal offenders who, but for these restrictions, would receive conditional sentences instead of incarceration. Do these, and many other, restrictions on the

availability of conditional sentences also limit the s. 15(1) rights of Aboriginal offenders?

[241] It might be objected that this court is not asked to resolve these broader questions of constitutionality. That is true, but the problem of the two-year sentence limitation is illustrative of a problem of principle that cannot be avoided. On the logic of *Taypotat*, it would seem there could be no constitutionally permissible restrictions on the availability of conditional sentences whatsoever. Every conceivable restriction would exclude some offenders, and necessarily some Aboriginal offenders. Every Aboriginal offender who would be denied a conditional sentence because of the operation of a statutory restriction would contribute to overincarceration, constituting a disadvantage and an infringement of s. 15(1). Nothing short of unlimited availability of conditional sentences for all Aboriginal offenders, for all offences, would suffice. I struggle to square this outcome with the fact that Parliament was under no constitutional obligation to establish a conditional sentence regime in the first place.

[242] Moreover, this principle, like all legal principles, is universalizable and cannot logically be contained by the facts of the instant case. The problem, for the *Taypotat* test, caused by the creation of limits on conditional sentences would similarly obtain wherever there are limits defining the boundaries of legislative schemes that benefit a disadvantaged group. A scheme, once adopted, could never be amended without infringing s. 15(1).

[243] The broad *Taypotat* methodology inevitably leads to the phenomenon of the constitutional ratchet: “remedial” legislation can never be amended or repealed unless replaced by something more beneficial to the disadvantaged group.

[244] As I argued above, for s. 15(1) doctrine to provide guidance to judges, it must not stop at the determination that a group has been simply disadvantaged, in the sense that there has been a setback to the interests of its members. The analysis must address the further question of whether a person or group has suffered wrongful discrimination, in the sense of not being treated with the concern and respect that is owed to equals. This is necessarily a contextual inquiry that must extend beyond the preliminary issue of whether anyone has been disadvantaged. This contextual analysis is central to the application of the principle of substantive equality – the concept of what it means to treat others as equals and not draw distinctions using irrelevant criteria. To avoid this analysis – and move straight to s. 1 and the proportionality analysis required by *R. v. Oakes*, [1986] 1 S.C.R. 103 – would denature the right to equal protection and equal benefit of the law without discrimination.

[245] The division of reasoning between s. 15(1) and s. 1 is largely technical and artificial. The court in *Andrews* was preoccupied with establishing clear analytical roles for s. 15(1) and s. 1, and the lines drawn may be proving unstable. But it would be a mistake to respond to this instability, as *Taypotat* has, by decontextualizing s. 15(1) analysis and either leaving questions of context to s. 1

analysis – where they have no obvious home – or, more likely, setting them aside entirely. For not all contextual considerations relevant to a discrimination analysis will re-emerge under the *Oakes* test. That test is intended to assess how other principles proper to a free and democratic society interact with equality. The contextual component of a discrimination claim is either assessed at the s. 15(1) stage or not at all.

(b) A Contextual Review of the Legislation and Concept of Overincarceration

[246] The difficult questions canvassed above, and the inability of the *Taypotat* test to provide the resources to resolve them, suggest that there is something missing in the *Taypotat* test: a contextual inquiry into whether an instance of discrimination – understood from *Taypotat*, at para. 20, as the simple determination that some government action has "widen[ed] the gap" and set back the interests of a group identified by an enumerated or analogous ground – is wrongful.

[247] With this critique of *Taypotat* in mind, I will explain why I disagree with my colleague's conclusion that the appellant has been disadvantaged on the basis that the *Safe Streets and Communities Act* undermines the *Criminal Code*'s efforts to remedy overincarceration.

[248] My colleague identifies the relevant disadvantage as overincarceration of Aboriginal offenders. General overincarceration is the normative judgment that the state (both as a result of legislation and judicial sentencing decisions) has historically over-used incarceration as a sanction, and that its use should be reduced: *R. v. Gladue*, [1999] 1 S.C.R. 688, at paras. 52-57. Parliament intended to remedy general overincarceration with the requirement in s. 718.2(e) of the *Criminal Code* that "all available sanctions […] that are reasonable in the circumstances" should be considered in priority to imprisonment. This is a provision of broad application, but it also has specific language separately addressing the situation of Aboriginal offenders: sentencing judges are required to pay "particular attention to the circumstances of Aboriginal offenders".

[249] It is important to note at the outset that s. 718.2(e), although it is remedial – meaning that its enactment was intended to effect a change in the law and not merely codify the law as it existed – does not therefore have constitutional status. Just as the state of the law was changed through the enactment of s. 718.2(e) and its interpretation in *Gladue* and subsequent cases, these propositions of law are themselves subject to change through subsequent legislative enactments such as the *Safe Streets and Communities Act*.

[250] The reference in s. 718.2(e) to "all <u>available</u> sanctions, other than imprisonment" (emphasis added) is not a reference to a fixed category. What was an available sanction prior to the adoption of the *Safe Streets and Communities*

Act became an unavailable sanction. The effect of the Act's amendments was an increase in incarceration for both Aboriginal and non-Aboriginal offenders. The salient question is whether these changes are contrary to the *Charter*. I disagree with my colleague over the proposition that legislation that restricts the application of a "remedial" regime is inherently discriminatory and wrongful.

[251] The concept of Aboriginal overincarceration has two dimensions. One is the normative judgment underlying s. 718.2(e): courts have over-relied on incarceration generally and, as a requirement of justice, should use alternatives where available. Although overincarceration in this sense is an injustice, it is not the specific injustice of discrimination or failure to respect equality.

[252] A second type of Aboriginal overincarceration is comparative and does invite discrimination-based scrutiny. It is based on the empirical observation that Aboriginal offenders as a group have tended to receive more and longer custodial sentences than non-Aboriginal offenders for the same offences. Redressing this type of overincarceration has been a priority for both Parliament and the judiciary. In *Gladue* and in *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, the Supreme Court directed sentencing judges to be alive to systemic discrimination in sentencing, particularly the problem that facially neutral sentencing criteria themselves may systemically disadvantage Aboriginal offenders. One contributor to Aboriginal overincarceration has been the disproportionate difficulty faced by

Aboriginal offenders in satisfying the material and other conditions necessary for conditional sentences.

[253] My colleague draws the conclusion that because the appellant would likely have received a conditional sentence had one been available prior to the enactment of the *Safe Street and Communities Act*, but was instead incarcerated, her incarceration exacerbated the overall phenomenon of Aboriginal overincarceration, which constitutes disadvantage and is therefore an infringement of s. 15(1).

[254] I cannot agree. Statistical overincarceration, of course, is profoundly suggestive of injustice. Where some group of offenders consistently receives harsher treatment than others, something is wrong. But further analysis is required to determine what that wrong is. The wrong is not in the number of incarcerated offenders, such that every addition to that number is itself a wrong, or any subtraction an amelioration of the wrong. Consider: legislation directing that all Aboriginal offenders should automatically receive conditional sentences if they satisfy some arbitrary criteria, such as being left-handed, would reduce the absolute numbers of Aboriginal offenders incarcerated. In an attenuated sense it would reduce overincarceration. But given that it would do nothing to address the identification and remediation of the actual wrongs committed at the sentencing stage – wrongs evidenced by statistical overincarceration – it would not address overincarceration in a substantive sense. It would be an error to conclude from a

bare statistic – a change in the absolute numbers incarcerated – that the legislative change producing that consequence is either ameliorative or productive of wrongful discrimination.

[255] Some instances of incarceration are justifiable and others are not. What is at issue in this appeal is whether Parliament is entitled to decide, in categorical terms, that some offences, by their nature, will always merit a term of incarceration, no matter who commits them or in which circumstances. Whether this decision limits s. 15(1) rights is not established by the fact that more Aboriginal offenders, in absolute terms, will therefore be incarcerated than would otherwise have been the case.

[256] The decision to remove the availability of conditional sentences for drug importation and trafficking offences unquestionably has a negative impact on the appellant's interests and the interests of all Aboriginal persons convicted of these offences. The appellant loses the benefit of a more lenient sentence, which may have better assisted her reintegration into the community.

[257] The salient question is, in intending that persons who commit these drug trafficking offences be ineligible for conditional sentences, and in knowing that Aboriginal persons would also commit these offences and therefore also be ineligible for conditional sentences, and that the numbers of Aboriginal offenders incarcerated would therefore also rise, did the legislature treat Aboriginal offenders

as though they were not the equals of others – that their interests did not count, or were less important than the interests of others?

[258] It did not. It could not have escaped Parliament's knowledge that Aboriginal persons would be so impacted. It was even put to Parliament in committee and in debates in Parliament. My colleague objects that no answer was received: at para. 55. But the answer was the legislation. Parliament was under no duty to consult or to provide reasons. In deciding not to carve out any exemption for Aboriginal offenders, Parliament made the decision that for these and other serious offences, justice required that all offenders receive a sentence of incarceration. Nothing in this decision "widens the gap" between the appellant and any other offender charged with the same offences, treats the appellant as a means to an end, or treats the appellant in a manner that denies her agency or equality. The unfortunate reality is that many persons in Canada have suffered wrongs and deprivations similar to those suffered by the appellant. Many have been confronted with terrible options. But not all persons, and not all Aboriginal persons, have made the choice to participate in a scheme of drug importation.

[259] In legislating as it did, and accepting the side-effect that additional Aboriginal offenders would be incarcerated as a result, Parliament did not treat Aboriginal persons as undeserving of the concern, respect, and consideration owed to all members of the political community. Parliament's reasoning is categorical: offenders who choose to engage in drug trafficking crimes – whether they do so

from circumstances of poverty or riches – inflict harm on their communities, seize advantages for themselves, and thus upset the balance of benefits and burdens in a way that can only be restored through a focus on deterrence and denunciation, and the imposition of the more extreme deprivation of liberty that comes with incarceration. This policy rationale obtains irrespective of whether the offender is Aboriginal or a member of any other community in Canadian society.

[260] Parliament's legislative decision may be harsh. It may even be mistaken or unwise. But it is not for any of these reasons discriminatory.

D. SECTION 1

[261] Although I have concluded that the s. 15(1) rights of the appellant have not been limited by the legislation, I will nevertheless proceed to a s. 1 analysis in the event that the preceding analysis is mistaken.

[262] The Supreme Court mandated in *Oakes* that *Charter* rights analysis should follow a two-step inquiry. The first step, an inquiry into whether an exercise of a right or freedom has been limited by state action, may result in a provisional conclusion that invites the second inquiry: is the limit identified demonstrably justified in a free and democratic society?

[263] It is important to be clear about the nature of the analysis at both stages. The first-stage analysis is not directed toward the determination of whether a right has been violated, and the second stage is not a matter of justifying or excusing

violations of rights: *Bracken v. Fort Erie (Town)*, 2017 ONCA 668, 137 O.R. (3d) 161, at para. 61; *Bracken v. Niagara Parks Police*, 2018 ONCA 261, 141 O.R. (3d) 168, at para. 33. Were it otherwise, courts would be in the scandalous position of being invited to sanction rights violations. Canadian legislatures, in carrying out even the most ordinary and banal functions ordering the exercises of expression or liberty would thereby be chronic and deliberate "violators" of rights. They would even in many cases – as with the case of criminal prohibitions on making child pornography – be morally obligated to violate rights: Grégoire Webber, "Rights and Persons" in G. Webber, ed., *Legislated Rights: Securing Human Rights through Legislation* (Cambridge: Cambridge University Press, 2018) 27, at pp. 37-39. Such a conception of s. 1 reasoning would distort our understanding of the nature of rights, and how to reason using rights.

[264] It is only possible to determine that a claimant's *Charter* rights have been violated after considering whether the limit placed on the exercise of a *Charter* right is justified: *McKitty v. Hayani*, 2019 ONCA 805, 439 D.L.R. (4th) 504, at para. 81. Although the Supreme Court uses the language of "infringement" (and "violation"), it has explained that it does not use these terms in their ordinary, pejorative sense, but intends them to be understood as synonymous with "limit": *Frank v. Canada (Attorney General)*, 2019 SCC 1, [2019] 1 S.C.R. 3, at para. 40. The use of this artificial vocabulary is not necessarily fatal to sound reasoning, provided that it is understood that – whatever vocabulary one adopts – the conclusion of the first-

stage analysis is not a determination that anyone's *Charter* rights have been violated. However, I agree with Côté and Brown JJ., dissenting in *Frank*, that the use of the language of "infringement" and "violation" in this context is a serious impediment to clear *Charter* reasoning and for that reason ought to be avoided: *Frank*, at para. 122. As they noted, "[i]t distorts our constitutional discourse, and our understanding of rights and of the legitimate boundaries of state action, to speak of individuals having rights which may be justifiably violated by the state": *Frank*, at para. 122.

[265] The result of the first stage of *Charter* analysis is only ever provisional. It can only ever be provisional, because the rights claim has not yet been considered in full context – placed within a society of other persons and groups, each with their own needs and claims against governments and each other. As I stated in *Bracken v. Fort Erie*, at para. 61:

> The violation of a *Charter* right is […] established at the conclusion of the s. 1 analysis, after taking into account the reasons for the limit imposed by government, responding to the needs and circumstances of others living in community in a free and democratic society: Régimbald and Newman, *The Law of the Canadian Constitution*, 2nd ed. (Markham: LexisNexis Canada, 2017), at p. 546-47; see also Webber, *The Negotiable Constitution*.

(1) Pressing and Substantial Legislative Objective

[266] Following the *Oakes* framework, the preliminary inquiry is an identification of the purpose of the legislation, and an assessment of whether it is pressing and substantial.

[267] My colleague provides an initial characterization of the purpose of the legislation, at para. 148: “to maintain the integrity of the justice system by ensuring that offenders who commit serious offences receive prison sentences.” That characterization is supplemented at para. 163: “to promote the integrity of the administration of justice and the public’s confidence in it by ensuring that serious crimes are punished with a sufficiently strong sentence, which Parliament deems to be a sentence of incarceration.”

[268] I prefer a simpler formulation, which is nevertheless entirely consistent with my colleague’s: Parliament’s purpose in enacting the legislation was to ensure that offenders who commit serious crimes do not receive what Parliament has determined to be an excessively lenient sentence. Stated positively, it is that offenders who commit serious crimes receive fit sentences.

[269] Although my colleague does not express an opinion on the question in her s. 1 analysis, I cannot see any basis for judging this objective to be other than pressing and substantial. Justice can be equally served by legislation that prevents overly lenient punishment as well as overly harsh punishment.

[270] Once a law has been found to have a pressing and substantial objective, the framework involves a proportionality analysis that has been usefully summarized in *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, at para. 58:

> A law is proportionate if (1) there is a rational connection between the means adopted and the objective; (2) it is minimally impairing in that there are no alternative means that may achieve the same objective with a lesser degree of rights limitation; and (3) there is proportionality between the deleterious and salutary effects of the law. The proportionality inquiry is a normative and contextual one, which requires courts to examine the broader picture by "balanc[ing] the interests of society with those of individuals and groups". [Citations omitted.]

(2) Rational Connection

[271] There is no serious dispute that the legislation is rationally connected to its purpose.

(3) Minimal Impairment

[272] My colleague finds that the s. 1 analysis is resolved at the minimal impairment stage. She rightly rejects the Crown's argument that the legislation is minimally impairing because sentencing judges retain the option of providing a suspended sentence. That argument is indeed unimpressive, for the reasons given by my colleague. That does not, however, dispose of the minimal impairment issue.

[273] Minimal impairment is intended to be a technical inquiry rather than a normative one. Holding the objective of the legislation constant, could that objective be realized by more efficient (in this case, less restrictive) means?

[274] The objective of the legislation, on both my colleague's characterization and my own, is to prevent persons who have committed certain offences from receiving a type of sentence judged categorically to be unfit for that offence. However, the legislation is premised on the normative judgment that for some offences, imposing a conditional sentence would be a failure of justice – that nothing less than a period of incarceration would suffice. The reasoning is categorical, and does not admit of exceptions. It maintains that there are no details about the circumstances of the offence or of the offender – no personal circumstances – that could be relevant to the determination that persons who engage in the specified offences must receive at least some minimal period of incarceration.

[275] Parliament is permitted to make categorical determinations of this sort. The minimal impairment inquiry does not create an indefeasible requirement that every rule have exceptions. Arguments that rules ought to have exceptions are not technical ends-means inquiries of the sort that the minimal impairment inquiry is equipped to handle: Francisco J. Urbina, *A Critique of Proportionality and Balancing* (Cambridge: Cambridge University Press, 2017), at pp. 36-38. They are normative arguments that properly belong to the final inquiry – whether the legislation, all things considered, constitutes a reasonable limit on rights.

(4) Overall proportionality

[276] At this stage, what is required is an inquiry into the reasonableness of the balance struck between the salutary and deleterious effects of the impugned legislation. It is important to keep in mind that at this stage of the analysis there has been no finding that anyone's *Charter* rights have been violated, and the s. 1 inquiry is not as to whether the state was justified in violating a *Charter* right.

[277] The deleterious effect of the legislation on the appellant is that she has been more thoroughly deprived of her liberty than she would have been had she received a conditional sentence. The effects include the attendant social and economic harms that necessarily result from incarceration. The effects do not include any negative stereotyping or prejudice.

[278] To understand the salutary effects of the legislation requires an assessment of its function in maintaining a social order. Benefits that are common to all in a society necessarily appear more abstract and intangible – less real – than the immediate effects on a particular individual. But they are not, for that reason, any less real or significant in the analysis.

[279] The normative foundation of the impugned legislative provisions is the judgment that persons who commit certain offences ought to be punished by means of incarceration. It is a judgment about what justice requires, taking into account (with respect to drug trafficking and importing) the enormous financial

incentives and the incalculable human misery caused by those who facilitate drug addiction. It is a judgment that individual circumstances, including indigeneity, are irrelevant to the determination that a fit and proper sentence for such offences include some term of incarceration. Although addressing race-based disadvantage has itself been identified by Parliament as an important legislative objective, it is not the only objective to which Parliament must have regard, and it is subject to limits. I cannot find that in limiting the reach of conditional sentences in the way that it did, for the purposes that it did, Parliament acted unreasonably.

[280] My colleague faults the Crown for not having provided evidence in support of its position on s. 1: at para. 177. I am not clear about what the nature of such evidence would be. As McLachlin C.J. noted in *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45 – echoing Aristotle's injunction in Book 1 of *Nicomachean Ethics* "to look for precision in each class of things just so far as the nature of the subject admits" – "the courts cannot hold Parliament to a higher standard of proof than the subject matter admits of": at para. 89. The legislation at issue in this appeal is based on a normative proposition, not an empirical one: that conditional sentences are too freely available for offences that require a more severe punishment. Reasonable people may disagree as to whether this is a good policy judgment or a poor one. That is to be expected. This disagreement may give rise to further legislative change. But the question is for Parliament, not the court. Even if the law is in some ways misguided, it is not on the basis of a failure to respect anyone's

right to equal treatment and equal benefit of the law, which is what frames both the s. 15(1) analysis and the analysis of whether the limit defining that particular right is justified.

[281] I would not allow the appeal on this ground.

E. SECTION 7

[282] I am substantially in agreement with my colleague's framing of the s. 7 analysis and, as explained above, her characterization of the objective of the legislation. I also agree with her analysis and conclusion that the impugned legislation is not arbitrary and does not, for that reason, deprive the appellant of liberty in a manner that does not accord with principles of fundamental justice.

[283] However, I do not agree with my colleague's conclusion that the impugned legislation offends the principle of overbreadth. An overbroad law is one that is "so broad in scope that it includes *some* conduct that bears no relation to its purpose" (emphasis in original): *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 112. The purpose of the impugned provisions is to ensure that offenders who commit serious crimes receive fit sentences, deemed to include a period of incarceration. What constitutes a serious crime is of course debatable. But Parliament has sought to make the law determinant by reference to offences punishable by maximum periods of incarceration of 10 years and 14 years. It adopts, as the rough indicia of seriousness, the classifications previously

made by Parliament in assigning maximum sentences. I would not subordinate Parliament's assessment of the seriousness of these offences to my own.

F. DISPOSITION

[284] The impugned legislation does not limit the appellant's rights under either s. 15(1) or s. 7. I would dismiss the appeal.

Released: "K.F." July 24, 2020

"B.W Miller J.A."