

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

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

APPELLANT
(Respondent)

and

CHEYENNE SHARMA

RESPONDENT
(Appellant)

and

**ATTORNEY GENERAL OF ONTARIO
ATTORNEY GENERAL OF BRITISH COLUMBIA
ATTORNEY GENERAL OF ALBERTA
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(Pursuant to Rule 35 of the Rules of the *Supreme Court of Canada*)

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PART I – STATEMENT OF FACTS

A. OVERVIEW

1. The question in this appeal is whether Parliament has the constitutional authority to restrict the general availability of conditional sentences for serious crimes without offending ss. 7 or 15 of the *Charter*. The implication of the majority decision below is that it cannot. By constitutionalizing legislation of general application as it stood at a particular point in time, Parliament will forever be precluded from enacting or amending the criminal law – unless it is to make it more lenient. Neither the equality guarantee in s. 15 nor the protection against overbreadth in s. 7 require such a fettering of the legislative process.

2. There is no controversy about the facts. The respondent imported nearly two kilograms of cocaine in exchange for \$20,000. She was sentenced to 17 months in prison – well below the established range of six to eight years for this type of offence – in recognition of her life of exceptional hardship as an Indigenous Canadian. It is undisputed that the legacies of colonialism have had devastating effects on Indigenous communities leading to all manner of economic, social and political harm, including overrepresentation in the criminal justice system at every stage. It is also undisputed that the importation of cocaine is a pernicious crime that leads inexorably to extraordinary human suffering.

3. *Gladue* principles and s. 718.2(e) of the *Criminal Code* mandate that sentencing judges pay particular attention to the circumstances of Indigenous offenders and consider “all *available* sanctions, other than imprisonment, that are *reasonable in the circumstances*.” Trial judges decide, based on all of the circumstances of the offence and offender before them, and an elaborate framework of principles in Part XXIII of the *Code*, what is “reasonable”. Parliament decides what is “available”. In 1996, Parliament created conditional sentences in an attempt to address over-incarceration. While Parliament always intended that conditional sentences would only apply to less serious offences, the disposition was not so limited in practice. Parliament therefore amended the conditional sentence provisions several times to bring the legislation in line with its intended purpose. In 2012, Parliament limited the availability of these sentences for certain prescribed serious offences including, in s. 742.1(c), those punishable by a maximum sentence of 14 years or life in prison. This was a policy choice for Parliament to make.

4. The majority below held that these limits, while facially neutral, contravened s. 15 of the *Charter* in their adverse effect on Indigenous offenders like the respondent. In so doing, the majority collapsed the two stages of this Court’s s. 15 jurisprudence into one single inquiry about historic disadvantage, without any requirement for a demonstrated discriminatory distinction, or effect. A proper contextual inquiry reveals that the limited availability of a particular penal sanction neither creates a distinction on the basis of race, nor perpetuates the historic disadvantage experienced by Indigenous offenders. By construing the conditional sentence provisions as originally enacted as a benefit for Indigenous offenders – or, by analogy, any offenders who can be characterized as an over-incarcerated group – from which Parliament can never derogate, the majority created an unworkable framework that may render much of crime and punishment constitutionally suspect.

5. Limiting the availability of conditional sentences for specified categories of serious offences is not overbroad. The majority below mischaracterized the purpose of the enacting legislation and failed to recognize established jurisprudence from this Court that maximum sentences are an appropriate proxy for seriousness. A proper application of the analysis under s. 7 supports the legislation. There was a rational connection between the purpose of the legislation and its impacts – impacts that were attenuated by the availability of dispositions other than incarceration in the *Code*. It is Parliament’s responsibility to determine what type of offence is a “serious offence” when setting the parameters for punishment.

6. The legislation is consistent with ss. 15 and 7 of the *Charter*. In the alternative, if this Court finds that it is not, then any limit is justified by s. 1.

B. THE FACTS

7. On June 27, 2015, the respondent imported just under two kilograms of cocaine into Canada through Pearson International Airport. She was to be paid \$20,000.00 to do so.¹ The cocaine was concealed in two large bags in the lining of her locked suitcase. The key to the lock, which the respondent had purchased, was in her purse.² The cocaine tested as 79% pure and had an estimated

¹ *Sentencing Decision* at paras 2, 6, 9 [Appellant’s Record (AR), Vol I, Tab 1, pp 4-6].

² Transcript of Proceedings, June 20, 2016, at p 8, ll 1-35 [AR, Vol II, Tab 7, p 10].

value of nearly \$130,000.00.³ The respondent admitted her crime in a videotaped statement to the police.⁴ She had no criminal record.

8. A year later, on June 20, 2016, she entered a guilty plea to importing cocaine. A year after that, having adjourned the matter to allow the defence to pursue a constitutional challenge to the relevant legislation, the sentencing hearing commenced in June 2017.⁵

1. Sentencing hearing: the positions of the parties

9. The *Controlled Drugs and Substances Act (CDSA)* provides for a mandatory minimum punishment of two years in jail for anyone convicted of importing a Schedule I substance like cocaine.⁶ Noting that the general range of sentence for the offence was six to eight years, the Crown's initial position was that the respondent ought to be sentenced to a term of incarceration of six years. In September of 2017, acknowledging the mitigating personal circumstances of the respondent and the "unique circumstances of this case", the Crown recommended that a lower sentence of 3.5 years would be appropriate.⁷ Shortly after that, after careful review of the "exceptional circumstances of this case" and an acknowledgement that the *Gladue* factors were likely "directly responsible" for bringing the respondent before the Court, the Crown withdrew its notice to seek the two-year mandatory minimum and reduced its sentencing recommendation to 18 months jail.⁸

10. The respondent sought a conditional sentence of imprisonment that was statutorily unavailable to her by virtue of two restrictions governing conditional sentences in s. 742.1 of the *Criminal Code*: s. 742.1(b), which precludes the imposition of a conditional sentence for any offence punishable by a mandatory minimum term of imprisonment; and s. 742.1(c), which prohibits a conditional sentence if the offence was prosecuted by indictment and carries a maximum sentence of 14 years or life in prison. The respondent challenged the constitutionality of both

³ *Sentencing Decision* at para 9 [AR, Vol I, Tab 1, p 6].

⁴ *Sentencing Decision* at para 6 [AR, Vol I, Tab 1, p 5].

⁵ *Sentencing Decision* at para 2 [AR, Vol I, Tab 1, p 4].

⁶ *Controlled Drugs and Substances Act*, SC 1996, c 19, s 6(3)(a.1).

⁷ *Sentencing Decision* at para 31 [AR, Vol I, Tab 1, p 16].

⁸ *Sentencing Decision* at para 35 [AR, Vol I, Tab 1, p 17]; Transcript of September 18, 2017, p 33, l 13-p 34, l 5 [AR, Vol II, Tab 10, pp 164-165].

provisions pursuant to s. 15 of the *Charter*. Although the respondent's initial notice of constitutional question alleged contraventions of both ss. 7 and 15, the s. 7 argument was not pursued at trial. Counsel for the respondent did not make any submissions about s. 7 and Aboriginal Legal Services, who intervened in the proceedings to advance some of the constitutional issues, expressly abandoned any s. 7 argument, telling the trial judge “section 7 is out.”⁹ The respondent also challenged the two-year mandatory minimum for importing in s. 6(3)(a.1) of the *CDSA* as an infringement of s. 12.

2. Sentencing hearing: restrictions on conditional sentences constitutional

11. The evidence at the five-day sentencing hearing largely consisted of a *Gladue* report that detailed the respondent's personal circumstances and the expert evidence of sociology Professor Carmela Murdocca.¹⁰

12. *Gladue Report*. At the time of the offence, the respondent was 20 years old. She is a member of the Saugeen First Nation whose maternal grandmother was a Residential School survivor.¹¹ Her aunt recounted the impact residential schools had on their family in terms of intergenerational trauma.¹² The respondent has endured homelessness, sexual assault, substance abuse and attempted suicide.¹³ She is the single mother of a young daughter. She committed the offence because she was two months behind on her rent and concerned that she was about to be evicted.¹⁴

13. *Social context evidence*. The respondent adduced the evidence of Prof. Murdocca to provide social-context evidence about, among other things, how the legacies of colonialism have resulted in intergenerational trauma for Indigenous families and communities.¹⁵ She was qualified as an expert on the experiences of Indigenous people in the criminal justice system, the historical context surrounding the sentencing of Indigenous people, and the profiles of racialized women charged

⁹ Transcript of September 19, 2017, p 26, ll 1-14 [AR, Vol III, Tab 11, p 28].

¹⁰ Gladue Report for Cheyenne Sharma, September 19, 2016 [Gladue Report], Exhibit 9 [ONCA Appeal Book (“ONCA-AR”), Vol III, Tab 14]; CV and Willsay Statement of Carmela Murdocca, Exhibit 1 [ONCA-AR, Vol III, Tab 6, pp 126-152].

¹¹ *Sentencing Decision* at paras 11-12 [AR, Vol I, Tab 1, p 6].

¹² Gladue Report, pp 1-11, Exhibit 9 [ONCA-AR, Vol III, Tab 15, pp 1818-1828].

¹³ *Sentencing Decision* at para 15 [AR, Vol I, Tab 1, pp 6-8].

¹⁴ *Sentencing Decision* at para 8 [AR, Vol I, Tab 1, pp 5-6].

¹⁵ *Sentencing Decision* at para 20 [AR, Vol I, Tab 1, p 9].

with drug crimes.¹⁶ She testified about the link between colonialism, racism and criminalization, in particular of Indigenous women.

14. Prof. Murdocca’s will-say statement cited more than thirty articles and reports to support her opinion.¹⁷ The bulk of these materials supported the undisputed propositions that Indigenous people are overrepresented in the criminal justice system, including through over-incarceration, and that the legacies of colonialism and residential schools, as well as ongoing systemic discrimination, have had a devastating impact on Indigenous communities.¹⁸

15. The sentencing judge was engaged with the issues the parties raised. He summarized the statistics on Indigenous over-incarceration tendered by the respondent – with appropriate caveats given the historic under-recording of Indigenous status in the prison system. While these statistics demonstrated a significant chasm between the percentage of Indigenous persons in Canadian society and the percentage of Indigenous persons in provincial institutions, the sentencing judge found that they did not demonstrate that the restrictions imposed on conditional sentences exacerbated the problem of Indigenous over-incarceration.

16. Before ruling on the constitutionality of the impugned provisions, the sentencing judge carefully considered not only the evidence before the Court, but also the legal landscape that informed the issues. The sentencing judge borrowed heavily from this Court’s decision in *Gladue* to underscore the “staggering injustice experienced by Aboriginal peoples within the criminal justice system” and “the devastating impact of over-incarceration upon Canada’s Aboriginal peoples.”¹⁹ The sentencing judge also borrowed heavily from this Court’s decision in *Ipeelee* to define how the sentencing court must give effect to the principle of restraint in s. 718.2(e) and consider the unique systemic and background factors which may have played a role in bringing an

¹⁶ Transcript of Proceedings, June 9, 2017, p 7, ll 10-15 [AR, Vol II, Tab 9, p 32].

¹⁷ Book of Authorities Concerning the Willsay Statement of Carmela Murdocca (“Exhibit 1, Murdocca BOA”) [ONCA-AR, Vol I-III, Tabs 6.1-6.35].

¹⁸ By way of example of the numerous documents that are not controversial and not in dispute on appeal, Tab 1 of the Murdocca BOA contained a copy of this Court’s decision in *Ipeelee*, Tab 10 contained the *Report of the Commission of Inquiry into Certain Events at the Prison for Women in Kingston*, and Tab 34 contained the *Summary of the Final Report of the Truth and Reconciliation Committee 2015*.

¹⁹ *Sentencing Decision* at paras 57, 60, citing the decision of this Court in *Gladue*, paras 34, 51 and 88 [AR, Vol I, Tab 1, pp 27-28].

Indigenous offender before the Courts.²⁰ Finally, the sentencing judge examined appellate case law to determine an appropriate sentencing range for the importation of hard drugs like cocaine, and emphasized the gravity of the offence and serious harm caused to society by this pernicious crime.²¹

17. *Constitutional ruling.* The sentencing judge rendered a detailed and carefully reasoned decision in which he determined that the mandatory minimum penalty of two years incarceration for importing more than one kilogram of cocaine violated s. 12 of the *Charter* and could not be saved by s. 1.²² The Crown did not appeal that decision. The sentencing judge dismissed the argument that the conditional sentence restrictions resulted in adverse impact discrimination against Indigenous offenders contrary to s. 15 of the *Charter*.

18. *Reformatory sentence imposed.* On February 20, 2018, the sentencing judge held that, in view of the gravity of this offence, “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.”²³ He imposed 18 months jail, less one-month allowance for pre-sentence custody and other factors, in view of the *Gladue* principles and the respondent’s circumstances.

19. The respondent served that sentence before her appeal was heard by the court below.²⁴

3. Court of Appeal: split decision on constitutionality of the provisions

20. The respondent appealed her sentence to the Court of Appeal for Ontario, now alleging that both ss. 742.1(c) and (e)(ii) contravened both ss. 15 and 7 of the *Charter*. The Court of Appeal granted the respondent's request to make the s. 7 argument for the first time on appeal. The Court also considered, at the request of the respondent on consent of the Crown, the constitutionality of s. 742.1(e)(ii), even though it was not engaged by, and had not been raised in, the litigation at first instance – her offence involved the import of drugs, but it was not one “for which the maximum term of imprisonment is 10 years.” This particular provision did not preclude the respondent from receiving a conditional sentence.

²⁰ *Sentencing Decision* at paras 61-69 [AR, Vol I, Tab 1, pp 29-37].

²¹ *Sentencing Decision* at paras 70-83 [AR, Vol I, Tab 1, pp 37-41].

²² *Sentencing Decision* at paras 118-237 [AR, Vol I, Tab 1, pp 61-93].

²³ *Sentencing Decision* at paras 264-266 [AR, Vol I, Tab 1, pp 101-102].

²⁴ *Reasons of the Court of Appeal* at para 187 [AR, Vol I, Tab 2, p 183].

21. Feldman J.A. for the majority, found both conditional sentence restrictions infringed both sections of the *Charter*, and could not be saved by s. 1. Having struck down the legislative impediment, the majority allowed the appeal and would have substituted an 18-month conditional sentence order for the 18-month prison term handed down at trial. Since the respondent had already served her sentence, the Court ordered that no further time ought to be served.

22. Miller J.A., in dissent, would have upheld the constitutionality of the legislation and dismissed the appeal. He fundamentally disagreed with the majority's decision that the impugned legislation contravened s. 15 of the *Charter*. He viewed the majority's interpretation of the remedial effect of conditional sentences as effectively constitutionalizing ordinary legislation, a result, he stated, that is unsound. He concluded that Parliament's legislative decision, though perhaps harsh or mistaken, was not discriminatory. In the event he was mistaken in that regard, he found that the legislation could be justified under s. 1 of the *Charter*. He also disagreed that the impugned legislation violated the principle of overbreadth – there was no violation of s. 7 of the *Charter*.

PART II – QUESTIONS IN ISSUE

23. This appeal raises the following constitutional questions:

1. *Do ss. 742.1(c) and 742.1(e)(ii) of the Criminal Code infringe the right to equality of Indigenous offenders guaranteed by s. 15 of the Canadian Charter of Rights and Freedoms?*

No. They do not infringe s. 15.

2. *If the answer to Question 1 is in the affirmative, is the infringement justified under s. 1 of the Charter?*

Yes. Any infringement of s. 15 is justified under s. 1.

3. *Do ss. 742.1(c) and 742.1(e)(ii) of the Criminal Code infringe s. 7 of the Canadian Charter of Rights and Freedoms?*

No. They do not infringe s. 7.

4. *If the answer to Question 3 is in the affirmative, is the infringement justified under s. 1 of the Charter?*

Yes. Any infringement of s. 7 is justified under s. 1.

PART III – STATEMENT OF ARGUMENT

A. CONDITIONAL SENTENCES WERE NEVER MEANT FOR SERIOUS OFFENCES

24. In 1996, Parliament enacted Part XXIII of the *Criminal Code* in an effort to bring consistency and a unified, principled approach to sentencing.²⁵ Described by this Court as a “watershed”, this legislation marked “the first codification and significant reform of sentencing principles in the history of Canadian criminal law.”²⁶ At the time, provincial and territorial jail facilities were overcrowded. Individuals still served sentences for defaulting on fines.²⁷ The imposition of short jail terms for less serious offences contributed to overcrowding. By placing a new emphasis on restorative justice principles, Parliament had two objectives: (1) to reduce the rate of incarceration, and (2) to improve the effectiveness of sentencing.²⁸ The conditional sentence – which allowed for the imposition of reformatory terms that could be served in the community – aimed to achieve both objectives.²⁹ As stated in *Proulx*: “The conditional sentence is a meaningful alternative to incarceration for *less serious* and *non-dangerous* offenders.”³⁰

25. Hansard debates illuminate how Parliament always intended for conditional sentences to be available for less serious offences.³¹ When describing conditional sentences, the Minister of Justice clearly articulated that it would not be available for all offenders — it was intended for the less serious who could be effectively managed in the community.³² In evidence to the Senate Standing Committee on Legal and Constitutional Affairs, the Coordinator of the Sentencing Project stated that offenders subject to the new conditional sentence would be “managed in the community

²⁵ Bill C-41, *An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*, SC 1995, c 22.

²⁶ *R v Gladue*, [1999] 1 SCR 688 at para 39.

²⁷ *House of Commons Debates*, 35-1, Vol 133, No 93 (20 September 1994) at 5872-5873 & 5915 (Hon Allan Rock & Hon Russell MacLellan); *Minutes of the Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, 35-1, No 62 (17 November 1994) at 62:27 (Hon Allan Rock); *House of Commons Debates*, 35-1, Vol 133, No 218 (14 June 1995) at 13830 (Hon Sue Barnes).

²⁸ *R v Proulx*, 2000 SCC 5 at para 20.

²⁹ *R v Proulx*, 2000 SCC 5 at para 21.

³⁰ *R v Proulx*, 2000 SCC 5 at para 21 [emphasis added].

³¹ See e.g. *House of Commons Debates*, 35-1, Vol 133, No 219 (15 June 1995) at 13952 (Hon Jean Augustine); *Senate Debates*, 35-1, vol 2 (20 June 1995) at 1827 (Lise Bacon). See also footnote 27.

³² *House of Commons Debates*, 35-1, Vol 133, No 93 (20 September 1994) at 5873.

under conditions which are enforceable and credible with the police organizations, with victims and with the administration of justice.”³³

26. Over the past 25 years, statutory restrictions on the availability of conditional sentences have changed as Parliament tried to balance its concerns about over-incarceration against public safety. When first introduced, conditional sentences were available for any and all offences provided (1) there was no mandatory minimum penalty, (2) a judge determined the appropriate jail sentence was less than two years and (3) “serving the sentence in the community would not endanger the safety of the community.”³⁴ Just one year later, amid concerns that conditional sentences were being given for “some rather serious matters,”³⁵ Parliament added to the preconditions for a conditional sentence the requirement that the court must be satisfied that it “would be consistent with the fundamental purpose and principles of sentencing.”³⁶ Parliament’s concern regarding inconsistent dispositions was not only for violent offences like sexual assault, but also for serious fraud and property offences.³⁷ At that time Parliament did not exclude specific categories of offences from the conditional sentencing regime, although this Court noted that it could “easily” have chosen to do so.³⁸

27. A decade later, in 2007, Parliament again amended s. 742.1 to address concerns that conditional sentences were still being inappropriately handed down for serious offences causing serious harm. When introducing the amendments, the Parliamentary Secretary to the Minister of Justice stated there were “far too many instances of improper use of this type of sentence” because

³³ *Senate Standing Committee on Legal and Constitutional Affairs*, 35-1, No 45 (27 June 1995) at 45:36 (Gordon Parry).

³⁴ Bill C-41, *An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*, SC 1995, c 22, s. 742.1.

³⁵ *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 35-2, issue 60 (21 April 1997) at 25 (Fred Bobiasz, Senior Counsel, CLPS, Department of Justice).

³⁶ Bill C-17, *An Act to amend the Criminal Code and certain other Acts*, SC 1997, c 18, s 107.1; *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 35-2, issue 60 (21 April 1997) at 25 (Fred Bobiasz, Senior Counsel, CLPS, Department of Justice); *House of Commons Debates*, 35-2, Vol 134, No 154 (11 April 1997) at 9602-3 (Hon Allan Rock); *Senate Debates*, 35-2, Vol 136, No 89 (15 April 1997) at 1907 (Lorna Ann Milne).

³⁷ *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 35-2, issue 60 (21 April 1997) at 25 (Fred Bobiasz, Senior Counsel, CLPS, Department of Justice).

³⁸ *R v Proulx*, 2000 SCC 5 at para 79.

“conditional sentences were never intended for serious offences.”³⁹ The Minister of Justice included examples in his remarks.⁴⁰ Statistics Canada presented evidence that one-third of drug trafficking and one in five sexual assault convictions resulted in conditional sentences.⁴¹ Although the government introduced it as an amendment directed at indictable offences of ten years or more to capture “the most serious offences” including drug offences,⁴² what resulted was an amendment with a statutory prohibition on conditional sentences for “serious personal injury offences”; as well as terrorism offences or criminal organization offences prosecuted by indictment for which the maximum term of imprisonment is ten years.⁴³ That language was similar to language the previous government had offered in Bill C-70, a measure that died on the order table.⁴⁴ The resulting 2007 amendments, designed to “ensure a cautious and more appropriate use of conditional sentences, reserving them for less serious offences that pose a low risk to community safety”, were upheld as constitutional by the Quebec Court of Appeal.⁴⁵

28. In 2012 with the *Safe Streets and Communities Act* (SSCA), Parliament imposed further limits on the availability of conditional sentences while simultaneously moving away from the language of “serious personal injury” that had required judicial interpretation as to what offences were properly captured.⁴⁶ While s. 742.1 of the *Code* continued to give judges the discretion to order that the offender serve the sentence in the community, the amendments replaced the more subjective “serious personal injury offence” with clearly defined categories of offences for which a conditional sentence would not be an appropriate or available sanction. Two of these categories are at issue in this appeal: s. 742.1(c) which prohibits the imposition of a conditional sentence for any offence for which the maximum sentence is 14 years or life, and s. 742.1(e)(ii) which excludes

³⁹ *House of Commons Debates*, 39-1, Vol 141, No 28 (29 May 2006) at 1621 (Rob Moore).

⁴⁰ *House of Commons Debates*, 39-1, Vol 141, No 28 (29 May 2006) at 1635-1637 (Hon Vic Toews).

⁴¹ *House of Commons, Standing Committee on Justice and Human Rights*, Evidence, 39-1, No 14 (21 September 2006) at 1-2 (Lynn Barr-Telford).

⁴² *House of Commons Debates*, 39-1, Vol 141, No 28 (29 May 2006) at 1623 (Rob Moore).

⁴³ Bill C-9, *An Act to Amend the Criminal Code (Conditional Sentence of Imprisonment)*, SC 2007, c 12.

⁴⁴ *House of Commons Debates*, 39-1, Vol 141, No 28 (29 May 2006) at 1625 (Sue Barnes).

⁴⁵ *R v Perry*, 2013 QCCA 212 at para 66, leave to appeal ref’d, [2013] 3 SCR ix.

⁴⁶ Bill C-10, *Safe Streets and Communities Act*, SC 2012, c 1. *House of Commons Debates*, 41-1, vol 146, No 18 (22 September 2011) at 1357 (Shelly Glover). See e.g. *R v Steele*, 2014 SCC 61.

offences involving the import, export, trafficking or production of drugs that are prosecuted by indictment and have a maximum penalty of ten years.

29. The new provisions that specifically set out categories of offences were aimed at eliminating debate over what constitutes a serious crime. The Parliamentary Secretary to the Minister of Justice advised that they addressed the concerns of Canadians “who no longer want to see conditional sentences used for serious crimes, whether they are violent crimes or property crimes.”⁴⁷ The proposed amendments would have retained “all the existing prerequisites for conditional sentences but would make it crystal clear which offences are ineligible.”⁴⁸ The House of Commons and Senate Committees heard a number of objections to the legislation as a whole. The Parliamentary Secretary was asked about the limits the amendments would place on judicial discretion, and defended the amendments as an exercise of Parliament’s role in setting sentencing policy.⁴⁹

30. The restrictions on conditional sentences in s. 742.1 represent policy choices made by Parliament in legislating crime and punishment. Parliament is in the best position to make these choices. As this Court recognized in *Lloyd*, “Parliament has the power to make policy choices with respect to the imposition of punishment for criminal activities, and the crafting of sentences that it deems appropriate to balance the objectives of deterrence, denunciation, rehabilitation and protection of society.”⁵⁰ Where, as here, there is no constitutional infirmity, it is not for the Court “to second-guess the wisdom of policy choices made by our legislators.”⁵¹

B. LIMITING THE AVAILABILITY OF ONE TYPE OF PUNISHMENT DOES NOT OFFEND SUBSTANTIVE EQUALITY

31. The promise of equality in s. 15 “entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern,

⁴⁷ *House of Commons Debates*, 41-1, Vol 146, No 17 (21 September 2011) at 1318 (Robert Goguen).

⁴⁸ *House of Commons Debates*, 41-1, Vol 146, No 56 (29 November 2011) at 1315 (Kerry-Lynne D. Findlay).

⁴⁹ *House of Commons Debates*, 41-1, Vol 146, No 17 (21 September 2011) at 1318 (Robert Goguen).

⁵⁰ *R v Lloyd*, 2016 SCC 13 at para 45.

⁵¹ *Reference re ss. 193 and 195(1)(c) of the Criminal Code (Man)*, [1990] 1 SCR 1123 at 1199.

respect and consideration.”⁵² This is the fundamental premise that has driven equality jurisprudence since *Andrews*. While the framework for identifying a breach of s. 15 has evolved over time, the animating norm of all s. 15 cases has been substantive equality. The majority below erred in their application of this Court’s jurisprudence on substantive equality to find a breach of s. 15. The provisions do not create a race-based distinction, nor are they discriminatory. The majority failed to appreciate the full legal and social context in which sentencing operates. In the face of a sympathetic claimant, they succumbed to the temptation to “rewrite the terms of the legislative program”⁵³ by conflating the availability of a conditional sentence with *Gladue* principles that exist independently of s. 742.1 of the *Criminal Code*. Restrictions on conditional sentences do not undermine the principle of restraint, nor the broader *Gladue* framework.

32. Virtually all legislation distinguishes and makes categories. Not every distinction or differentiation in treatment at law will transgress the equality guarantee of s. 15.⁵⁴ As this Court held in *Andrews*: 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.⁵⁵ The entire *raison d’être* of criminal law is to draw distinctions. Criminal law distinguishes conduct that is morally acceptable to society from conduct that is not. The *Criminal Code* provides what the punishment will be for transgressions of these social conduct rules. Within the realm of punishment, Parliament has prescribed many options, though not all will necessarily be available for every crime. The majority erred when ruling that the limitations Parliament placed on the availability of one particular form of punishment drew a distinction on the basis of race.

33. This Court has consistently affirmed the two-part test for analyzing s. 15 claims first established in *Kapp* and *Withler*.⁵⁶ As recently stated by the Chief Justice in *C.P.*, a law will contravene s. 15 if: (1) on its face or in its impact, it creates a distinction based on enumerated or analogous grounds; and (2) it imposes burdens or denies a benefit in a manner that has the effect

⁵² *Law Society of British Columbia v Andrews*, [1989] 1 SCR 143 at 171.

⁵³ *Hodge v Canada (Minister of Human Resources Development)*, 2004 SCC 65 at para 26.

⁵⁴ *Law Society of British Columbia v Andrews*, [1989] 1 SCR 143 at 168-169.

⁵⁵ *Law Society of British Columbia v Andrews*, [1989] 1 SCR 143 at 168-169.

⁵⁶ *R v Kapp*, 2008 SCC 41; *Withler v Canada (Attorney General)*, 2011 SCC 12.

of reinforcing, perpetuating or exacerbating a disadvantage.⁵⁷ The Court of Appeal mistakenly conflated the two lines of inquiry under s. 15, essentially working backwards from the respondent's disadvantage as an Indigenous person to find that there was a distinction. They also paid insufficient regard to the context within which the legislation exists. Finally, they removed *any* evidentiary burden from the rights claimant at stage one.

1. Stage one: The legislation did not create a race-based distinction

34. In enacting s. 742.1 Parliament intended to make conditional sentences an option for less serious offences. Parliament has amended s. 742.1 several times to give effect to that intention. It is the latest amendment, in 2012, that the majority below found unconstitutional. They relied on the decision of this Court in *Alliance*, where Abella J. held that her finding of discriminatory impact was not a comparison of two versions of the legislation, which would “constitutionalize the policy choice embodied in the first version of the Act”.⁵⁸ Rather, there was a discriminatory impact because “assessed on their own and regardless of the prior legislative scheme”, the impugned provisions perpetuated disadvantage.⁵⁹ Although the majority relies on Abella J.’s rationale, they fail to apply it in their analysis: assessed on their own and *regardless of the prior legislative scheme*, there is no distinction on the basis of race. Section 742.1(c) as it currently stands precludes a conditional sentence where someone is convicted of an offence punishable by a maximum of 14 years or life in prison. The distinction, if any, created by this section, *standing alone*, is between those convicted of offences punishable by less than 14 years, and those convicted of offences punishable by 14 years or more. This is not a race-based distinction.

35. The only possible route to a distinction comes when one makes a temporal comparison between the availability of conditional sentences in 1996 and their availability now. And even then, the distinction is more theoretical than real. It is undisputed that the evidence with respect to Indigenous people, like the respondent, establishes that they are overrepresented in the criminal justice system, including being over-incarcerated, and that this is due to the legacies of colonialism and systemic discrimination. It does not automatically follow, however, that because of this pre-existing social context, the restrictions on the availability of conditional sentences must necessarily

⁵⁷ *R v C.P.*, 2021 SCC 19 at para 141 [emphasis added].

⁵⁸ *Quebec v Alliance*, 2018 SCC 17 at para 33.

⁵⁹ *Quebec v Alliance*, 2018 SCC 17 at para 33; *Reasons of the Court of Appeal* at paras 84-85 [AR, Vol I, Tab 2, p 138].

create an adverse effect on the basis of race. The Court of Appeal erred by starting from the premise of Indigenous disadvantage thereby collapsing both stages of the test and eliminating the requirement to first find a distinction.

A. The failure to apply stage one

36. Establishing an alleged breach of s. 15 imposes an evidentiary burden that has long required more than judicial notice of a notorious fact. This is particularly so where the impugned law does not discriminate on its face, but rather, is alleged to do so in its effect. Where the claim is one of adverse effect, “the claimant has more work to do at the first step.”⁶⁰ In *Fraser*, Abella J. held that there are two types of evidence that will be “especially helpful in proving that a law has a disproportionate impact on members of a protected group.”⁶¹ The first is evidence about the “situation of the claimant group” and the second is evidence about “the results of the law.” Justice Abella held that while not necessary to found a complaint, “ideally” an adverse effects claim would have both.⁶²

37. The “situation of the claimant group” in this case is not in dispute. The issue is whether the impact or “results” of this law *created* a distinction on the basis of an enumerated ground. While the impugned law need not have created the social circumstances to give rise to a distinction,⁶³ this does not relieve claimants of their burden to establish that the law’s effect is to create a distinction on the basis of a prohibited ground. As Iacobucci J. noted in *Symes*: “We must take care to distinguish between effects which are wholly caused, or are contributed to, by an impugned provision, and those social circumstances which exist independently of such a provision.”⁶⁴

38. Stage one specifically asks whether, on its face or in its impact, a law *creates* a distinction on the basis of an enumerated or analogous ground.⁶⁵ Contrary to what the majority below held, the question of causation here does not “make the first part more onerous” nor “foreclose legitimate

⁶⁰ *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 64.

⁶¹ *Fraser v Canada (Attorney General)*, 2020 SCC 28 at para 56.

⁶² *Fraser v Canada (Attorney General)*, 2020 SCC 28 at para 60.

⁶³ *Fraser v Canada (Attorney General)*, 2020 SCC 28 at para 71.

⁶⁴ *Symes v Canada*, [1993] 4 SCR 695 at 764-765.

⁶⁵ *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at para 19.

claims based on technicalities.”⁶⁶ It is unlike *Griggs*, where, as this Court explained in *Fraser*, the nexus between education and race was clearly established.⁶⁷ Restrictions on conditional sentences are not a proxy for race. Establishing some form of causation or effect is not a mere technicality. It should be – and always has been – a fundamental first step in the analysis.

39. In *Taypotat*, this Court rejected the claim of discrimination because the claimant did not demonstrate a link between the legislation and the alleged disparate effect.⁶⁸ In that case, the enactment of an Election Code with a Grade 12 education requirement for a Chief prevented Louis Taypotat, who had been the Chief for most of the previous three decades, from running in the election. Mr. Taypotat argued that the education requirement violated s. 15 because it had a disproportionate effect on older community members who live on a reserve. This Court dismissed his claim at the first stage of the s. 15 inquiry because there was “virtually no evidence” to support an adverse effect.⁶⁹ While this Court stated that statistical evidence will not invariably be required to establish adverse effect of a facially neutral law, where the disparate impact is not immediately apparent, there must be some link between the law and the claimed effect. As stated by Abella J.:

I think intuition may well lead us to the conclusion that the provision has some disparate impact, but before we put the Kahkewistahaw First Nation to the burden of justifying a breach of s. 15 in its Kahkewistahaw Election Act, **there must be enough evidence to show a prima facie breach.** While the evidentiary burden need not be onerous, **the evidence must amount to more than a web of instinct.** The evidence before us, even in combination, does not rise to the level of demonstrating any relationship between age, residence on a reserve, and education among members of the Kahkewistahaw First Nation, let alone that arbitrary disadvantage results from the impugned provisions.⁷⁰

40. In this case, similar to *Taypotat*, the sentencing judge found the record inadequate to prove that the restrictions imposed on conditional sentences had any adverse effect:

A difficulty on this record is identifying the real measure and likely or established impact of such an adverse effect, such as it may be, to determine whether it can qualify as a “distinction” based upon Aboriginal status. The

⁶⁶ *Reasons of the Court of Appeal* at paras 81-82 [AR, Vol I, Tab 2, p 137].

⁶⁷ *Fraser v Canada (Attorney General)*, 2020 SCC 28 at para 70.

⁶⁸ *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at para 15.

⁶⁹ *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at para 24.

⁷⁰ *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at paras 33-34 [emphasis added].

Court has no statistical information. For most crimes, a conditional sentence remains a sentencing option.⁷¹

41. The restrictions imposed on the availability of conditional sentences in 2012 did not remove conditional sentences as a viable sentencing option for Indigenous offenders. To the contrary, conditional sentences remained available for most crimes. The evidence tendered by the respondent provided “direct evidence”, as the majority below describes, of “the link between systemic discrimination and overrepresentation of Aboriginal people in the criminal justice system”.⁷² There is no dispute about that. The majority also accepted the expert’s evidence that systemic discrimination could be linked to the participation of Indigenous persons in crimes like drug importing. The problem is that the majority didn’t go any further to ask – but do these limitations on conditional sentences actually create an adverse effect? The majority instead looked at the sympathetic offender before the Court and concluded that because her background and circumstances, in light of *Gladue*, “weighed in favour of a conditional sentence,” “statistical evidence was not required to prove” that the restrictions that prevented her from getting one had an adverse effect.⁷³

B. No evidence of adverse effect

42. First, while the background and circumstances of the offender may weigh in favour of a conditional sentence, the seriousness of the crime did not. Proportionality requires an examination of both. Importing nearly two kilograms of cocaine is a very serious crime – customarily punished by six to eight years in the penitentiary – that has devastating effects on the community.⁷⁴ It is for that reason that the sentencing judge said expressly that nothing short of 18 months jail was fit.⁷⁵

43. Second, the respondent did lead statistical evidence – it just did not support her argument.⁷⁶ Any impact on Indigenous incarceration would be expected to show up as an increase in reformatory rather than penitentiary jail sentences (because conditional sentences are available

⁷¹ *Sentencing Decision* at para 257 [AR, Vol I, Tab 1, p 99].

⁷² *Reasons of the Court of Appeal* at para 102 [AR, Vol I, Tab 2, p 147].

⁷³ *Reasons of the Court of Appeal* at para 105 [AR, Vol I, Tab 2, p 148].

⁷⁴ *R v Parranto*, 2021 SCC 46 at para 87; *R v Hamilton*, 2004 CanLII 5549 (ON CA) at para 113.

⁷⁵ *Sentencing Decision* at para 265 [AR, Vol I, Tab 1, p 101].

⁷⁶ *Sentencing Decision* at para 102 [AR, Vol I, Tab 1, pp 54-55].

only within the reformatory range), yet the proportion of Indigenous inmates in provincial/territorial custody barely changed at all after the restrictions on conditional sentences came into effect. To the extent there was a change, there was a slight *decrease* in the four years immediately following the introduction of the legislation.⁷⁷

44. Without overemphasizing the significance of statistics – recognizing that they may not be the most reliable means of tracking Indigenous representation in the criminal justice system – the evidentiary onus was on the respondent. As noted by this Court in *Fraser*, in assessing the “results of a system” – critical to establishing whether an adverse impact was suffered – statistics can be helpful, “especially if the pool of people adversely affected by a criterion or standard includes *both* members of a protected group *and* members of more advantaged groups.”⁷⁸ Prof. Murdocca’s opinion provided both quantitative and qualitative evidence; but neither established the purported effect. Although the Crown acknowledged the significant overrepresentation of Indigenous people in both provincial and federal correctional institutions,⁷⁹ Prof. Murdocca also acknowledged that the rising numbers of Indigenous offenders in custody had been a trend since the 1980s and 1990s.⁸⁰ The reports she relied on primarily pre-dated the 2012 *SSCA* that enacted the restrictions on conditional sentences at issue, and no studies about conditional sentences and incarceration focused on the time period between 2012 and the hearing.⁸¹ With respect to the one study of differential use of conditional sentences, she acknowledged that its ultimate conclusion was that it was “unknown if recent statutory amendments that have restricted the use of conditional sentences may affect Aboriginal offenders disproportionately compared to non-Aboriginal offenders.”⁸²

45. Prof. Murdocca’s experience with criminal law was academic. Her opinion, and the material she relied on, was not neutral in its assessment of the *SSCA*: it contained legal opinion that the legislation infringed the rights of Indigenous people.⁸³ For example, the LLM thesis she relied

⁷⁷ *Sentencing Decision* at para 102 [AR, Vol I, Tab 1, pp 54-55].

⁷⁸ *Fraser v Canada (Attorney General)*, 2020 SCC 28 at para 58.

⁷⁹ Transcript of Proceedings, October 24, 2017, at p 20, ll 15-25 [AR, Vol III, Tab 12, p 132].

⁸⁰ Transcript of Proceedings, June 9, 2017, at p 21, l 15-p 22, l 10 [AR, Vol II, Tab 9, pp 46-47].

⁸¹ Transcript of Proceedings, June 9, 2017, at p 59, l 25-p 60, l 20 [AR, Vol II, Tab 9, 84-85].

⁸² Transcript of Proceedings, June 9, 2017, at p 61, l 5-p 65, l 2 [AR, Vol II, Tab 9, pp 86-90].

⁸³ Willsay Statement of Carmela Murdocca, at pp 11-13, paras 35-41, Exhibit 1 [ONCA-AR, Vol I, Tab 6, pp 150-152].

on as an illustration of circumstances in which some Indigenous women would no longer be eligible for conditional sentences was a qualitative study, focusing on how judges analyzed *Gladue* factors.⁸⁴ None involved drug importation.⁸⁵ When asked if the author concluded that *almost all* Indigenous women who previously received conditional sentences would not receive them under the amended legislation, Prof. Murdocca responded: “absolutely not”.⁸⁶ Further, Indigenous offenders were not shown to be over-incarcerated for the crime of importing. Indigenous offenders, and in particular female Indigenous offenders, were in fact *underrepresented* in federal prison populations as only 2.3% of those incarcerated for importing or exporting drugs between 2000 and 2004.⁸⁷

46. After careful review of the evidence that was tendered, including having the benefit of *viva voce* evidence before him, the sentencing judge was of the view that it did not support a distinction on the basis of race. The Court of Appeal was wrong to overturn his decision. Both the majority and the dissent conflated stages one and two of the test, thereby eliminating the requirement this Court has established that the legislation itself must first create a distinction on the basis of an enumerated ground. On a literal application of the approach adopted below, any and all legislation may be found non-compliant with s. 15 because it is the pre-existing social circumstances that become determinative, rather than the legislation itself.

2. Stage two: any distinction is not discriminatory

47. Even if the majority was correct to find that the law created a distinction on the basis of race, they erred in determining, at the second stage of the test, that the provisions “deny the *benefit* of a conditional sentence in a manner that has the effect of reinforcing, perpetuating or exacerbating

⁸⁴ E. Kaiser-Derrick, *Listening to what the criminal justice system hears and the stories it tells : judicial sentencing discourses about the victimization and criminalization of Aboriginal women*, T, University of British Columbia, 2012, at pp 19-20 (Exhibit 1, Murdocca BOA) [ONCA-AR, Vol II, Tab 6(15), pp 591-592].

⁸⁵ Transcript of Proceedings, June 9, 2017, p 90, ll 10-20 [AR, Vol II, Tab 9, p 115].

⁸⁶ Transcript of Proceedings, June 9, 2017, p 82, ll 1-8 [AR, Vol II, Tab 9, p 107].

⁸⁷ Transcript of Proceedings, June 9, 2017, p 49, l 13 - p 54, l 20 [AR, Vol II, Tab 9, p 74-79]; Correctional Service Canada, [Profile of Federally Sentenced Women Drug Offenders](#), May 2009, p 6, (Exhibit 1, Murdocca BOA) [ONCA-AR, Vol II, Tab 6(27), p 1044].

the disadvantage of Aboriginal offenders.”⁸⁸ The majority’s analysis hinged on an interpretation of the 1996 legislation creating conditional sentences that is incorrect: the conditional sentencing regime is not inseparable from the principle of restraint in s. 718.2(e) or this Court’s *Gladue* framework. Their analysis also depended on two assumptions that were not supported by the record at trial: (i) that conditional sentences were beneficial in reducing Indigenous over-incarceration and (ii) that the restrictions actually exacerbated the problem. Finally, the majority failed to consider the broader social, political and legal context of the legislation, and brushed away concerns about the impact their doctrinal pronouncements would have on criminal law; an impact that superior courts and appellate courts have grappled with ever since this case was decided.⁸⁹

A. Sections 742.1 and 718.2(e) are not inextricably linked

48. How to situate claims of discrimination within their social, legal and political context in order to define the norm of substantive equality has been the subject of much debate in this Court. Context is key. As stated by Wagner C.J., in *C.P.*, “understanding the distinct legislative scheme” underlying the provisions “is crucial to the assessment of the *actual* impact of the law.”⁹⁰ The proper context of s. 742.1(c) is Part XXIII of the *Code*.

49. Enacted by Parliament in 1996, the new Part XXIII of the *Code* provided a comprehensive framework for trial judges to apply in sentencing those convicted of crimes. As part of this sweeping legislative reform Parliament set out the fundamental purpose and principles of sentencing in s. 718 – to protect society and to contribute to respect for the law and maintenance of a just, peaceful and safe society by imposing just sanctions in line with the stated objectives of denunciation, deterrence, separation, rehabilitation, reparation, and promotion of responsibility and acknowledgement of harm.⁹¹ In s. 718.2 Parliament laid out a number of other sentencing principles for trial judges to consider in determining a fit sentence, including mitigating and aggravating circumstances of the offence, parity, totality and restraint. The principle of restraint, in s. 718.2(e) provides that all *available* sanctions, other than imprisonment, that are *reasonable in the*

⁸⁸ *Reasons of the Court of Appeal* at para 132 [AR, Vol I, Tab 2, p 160] [emphasis added].

⁸⁹ See e.g. *R v R.S.*, 2021 ONSC 2263; *R v Boyde*, 2021 NLSC 28; *R v Chen*, 2021 BCSC 697; *R v Merkel*, 2021 BCCA 445—to name a few.

⁹⁰ *R v C.P.*, 2021 SCC 19 at para 145 [emphasis in original].

⁹¹ *Criminal Code*, RSC 1985, c C-46, s 718.

circumstances and consistent with the harm done should be considered for all offenders, with “particular attention to the circumstances of Aboriginal offenders.”⁹²

50. In the same sentencing reform package Parliament created the conditional sentence in s. 742.1. While enacted at the same time, the conditional sentence in s. 742.1 and the principle of restraint in s. 718.2(e) are not co-dependent. The principle embodied by s. 718.2(e) is a direction to sentencing judges to use incarceration as a last resort for all offenders, and particularly so for Indigenous offenders. It is a mandate – sentencing judges *must* use incarceration as a last resort for all offenders and pay particular attention to the unique circumstances of Indigenous offenders when crafting a fit sentence.⁹³ By contrast, s. 742.1 is not a mandate. It is one of many penal provisions that a sentencing judge can consider if it is *available* and *reasonable* in the circumstances. The majority below conflated these two provisions, misconstruing *Gladue*:

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. 40.⁹⁴

51. That is not what this Court says in paragraph 40 of *Gladue*. The Court considered s. 742.1 when looking to Part XXIII as a whole to inform the purpose of s. 718.2(e).⁹⁵ Discussing whether the new sentencing regime was merely a codification of existing law or a significant watershed, this Court looked at the entire scheme of the legislation as it applied broadly to all offenders and wrote that the introduction of conditional sentences suggested a desire by Parliament to lessen the use of incarceration. In writing that s. 718.2(e) had to be construed within this broader context, including the introduction of the new conditional sentence form of punishment, this Court was speaking to the general intention of Parliament to decrease incarceration – not that s. 718.2(e) specifically “instructs courts to consider whether to impose a conditional sentence” in cases involving an Indigenous offender. The majority’s misinterpretation of *Gladue* informs the rest of its analysis, leading them to constitutionalize an otherwise ordinary penal provision and trivialize the principle that s. 718.2(e) was meant to impart.

⁹² *Criminal Code*, RSC 1985, c C-46, s 718.2.

⁹³ *R v Gladue*, [1999] 1 SCR 688 at para 88.

⁹⁴ *Reasons of the Court of Appeal* at para 14 [AR, Vol I, Tab 2, p 110] [emphasis added].

⁹⁵ *R v Gladue*, [1999] 1 SCR 688 at paras 39-47.

52. Section 718.2(e) is bigger than one tool in the sentencing toolbox. As this Court recognized in *Ipeelee*, “the crushing failure of the Canadian criminal justice system *vis-à-vis* Aboriginal peoples is due to the fundamentally different world views of Aboriginal and non-Aboriginal people with respect to such elemental issues as the substantive content of justice and the process of achieving justice.”⁹⁶ Despite *Ipeelee*’s exhaustive review of how s. 718.2(e) and this Court’s decision in *Gladue* should be understood and applied, there is not one mention of s. 742.1 or conditional sentences in general. The language chosen by Parliament in s. 718.2(e) is naturally limited to all “available” sanctions that are “reasonable in the circumstances.” Subject to constitutional review for gross disproportionality, what is “available” for any particular offence is determined by Parliament. What is “reasonable in the circumstances” will be determined on a case-by-case basis by the sentencing judge, based on all “available” options, and taking into account the gravity of the offence and moral responsibility of the offender, including their personal circumstances.⁹⁷

53. Contrary to the decision of the majority below, the remedial purpose of s. 718.2(e) is not inextricably entwined with the availability of a particular form of punishment in the *Criminal Code*. Both provisions exist within a broader framework of sentencing principles designed to balance a multitude of competing factors, and a range of available sanctions. The restrictions on the eligibility criteria for but one of those sanctions are not discriminatory.

B. Conditional sentences are not a “benefit” from which Parliament can never derogate

54. Parliament created the conditional sentence as a means of addressing over-incarceration in general. Canadian prisons were crowded. Too many people were being sent to jail. Conditional sentences were created – but not restricted to Indigenous offenders. In the immediate aftermath of the legislation, between 1996 and 2001, non-Indigenous admissions to custody declined by 22 percent, but Indigenous admissions to custody increased by three percent.⁹⁸ This Court, in *Ipeelee*, found that “the overrepresentation and alienation of Aboriginal peoples in the criminal justice system” had only worsened since the introduction of the 1996 sentencing reforms.⁹⁹ Between 2001

⁹⁶ *R v Ipeelee*, 2012 SCC 13 at para 74.

⁹⁷ *R v Ipeelee*, 2012 SCC 13 at paras 37-38.

⁹⁸ *R v Ipeelee*, 2012 SCC 13 at para 62.

⁹⁹ *R v Ipeelee*, 2012 SCC 13 at para 62.

and 2006, there was again an overall decline in prison admissions, except for Indigenous persons whose admissions continued to go up.¹⁰⁰ It is unclear whether the advent of conditional sentences actually ameliorated disproportionate Indigenous incarceration.¹⁰¹

55. It is also unclear whether imposing restrictions on the availability of conditional sentences in 2012 had an adverse effect. Based on the record before the Court there seemed to be an impact following the 2007 amendment for personal injury offences, but the same trend was not apparent in 2012. As discussed above, the percentage of Indigenous offenders in reformatory custody actually decreased following the 2012 amendments. Similarly, even after the majority's decision made conditional sentences available for importing Schedule I substances in Ontario, the only reported case where such a sentence was imposed is this one.

56. Even if the statistical picture was clearer, the normative prescriptions of *Gladue* and the disenfranchisement Indigenous people experience in the criminal justice system cannot be reduced to a sentencing calculation. As Miller J.A. articulately stated when analyzing whether any adverse impact on Indigenous offenders was discriminatory, “[i]t 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.”¹⁰² This Court recognized the same in *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.”¹⁰³ As this Court further noted in *Gladue*, “there are many aspects of this sad situation which cannot be addressed through these reasons.”¹⁰⁴ The situation is complex. Parliament had to balance a multitude of interests. In assessing the actual impact of the impugned legislation this Court must take all of these circumstances into account.¹⁰⁵

¹⁰⁰ *R v Ipeelee*, 2012 SCC 13 at para 62.

¹⁰¹ K. Roach, “[Conditional Sentences, Restorative Justice, Net-Widening and Aboriginal Offenders](#)” at p 26 (Paper delivered at the symposium The Changing Face of Conditional Sentencing 2001). J. Roberts, “[Discovering the Sphinx: Conditional Sentencing after the Supreme Court Judgment in R. v. Proulx](#)” at pp 42, 46 (Paper delivered at the symposium The Changing Face of Conditional Sentencing 2001).

¹⁰² *Reasons of the Court of Appeal* at para 254, Miller JA dissent [AR, Vol I, Tab 2, pp 212-213].

¹⁰³ *R v Gladue*, [1999] 1 SCR 688 at para 65.

¹⁰⁴ *R v Gladue*, [1999] 1 SCR 688 at para 65.

¹⁰⁵ *R v C.P.*, 2021 SCC 19 at paras 144-145.

57. Construing the stand-alone conditional sentence provision in s. 742.1 as a benefit for Indigenous offenders detaches it from the full context of sentencing as reflected in Part XXIII of the *Criminal Code*. Benefits like pension schemes, access to healthcare services, or education, grant individuals a singularly positive social or material benefit. Sentencing, however, is not purely to “benefit” the offender but rather to balance a set of statutory principles set out in s. 718 of the *Code*. Rehabilitation, but also denunciation and deterrence, reparations to victims, and separation from society *may* all play a role. As will the principle of restraint in s. 718.2(e) and this Court’s jurisprudence in *Gladue* and *Ipeelee*.

58. Judges take from all the *available* dispositions in the *Criminal Code* to craft sentences that alleviate the historical disadvantage and systemic discrimination faced by Indigenous offenders in the criminal justice system.¹⁰⁶ *Gladue* mandates a different methodology, but not a different result.¹⁰⁷ In determining a fit sentence in any particular case, the paramount consideration is always proportionality. A sentence must be proportionate to *both* the gravity of the offence and the degree of responsibility of the offender.¹⁰⁸ Where, as here, the unique mitigating personal circumstances of the offender attenuate, in part, their moral blameworthiness, this will be a factor in sentencing – as will the objective severity of the crime. As Doherty J.A. wrote in *Hamilton*:

The reality is that the crime of importing cocaine is so serious and harmful to the community that conditional sentences will, in the vast majority of cases, not adequately reflect the gravity of the offence or send the requisite denunciatory and deterrent message....

The crime of importing cocaine is no less serious because the importer did it for reasons which attract empathy and mitigate personal culpability...The respondents had a choice to make and they made that choice knowing full well the harm that the choice could cause to the community.¹⁰⁹

The majority decision below imposes a remedial burden on Parliament that is impossible to reconcile with criminal law’s cornerstone principles of agency and personal responsibility.

¹⁰⁶ *R v Friesen*, 2020 SCC 9 at para 38.

¹⁰⁷ *R v Wells*, 2000 SCC 10; *R v Brown*, 2020 ONCA 657 (pre-Sharma); *R v Gray*, 2021 ONCA 86 (post-Sharma).

¹⁰⁸ *Criminal Code*, RSC 1985, c C-46, s 718.1; *R v Friesen*, 2020 SCC 9 at para 30.

¹⁰⁹ *R v Hamilton*, 2004 CanLII 5549 (ON CA) at paras 113, 139, 140. See also Justice Moldaver’s discussion of the seriousness of drug crime in *R v Parranto* at paras 84-101.

59. Parliament was under no obligation to implement conditional sentences. In 1996, courts had to be satisfied “that serving the sentence in the community would not endanger the safety of the community.”¹¹⁰ Although Parliament set the eligibility criteria for a conditional sentence broadly, this Court in *Proulx* recognized that “Parliament could have easily excluded specific offences in addition to those with a mandatory minimum term of imprisonment but chose not to.”¹¹¹ The fact that Parliament chose to do so years later, with the benefit of experience in how the courts were interpreting the provisions in practice, should not be viewed as constitutionally unsound.¹¹² Even the principle of restraint in s. 718.2(e) has been amended since its introduction in 1996. As found by Miller J.A. in dissent below, Parliament could have excluded drug offences, or other serious offences, from the original scope of the legislation and it would not have been unconstitutional to do so. To draw a constitutionally relevant distinction between creating a particular regime and amending it later is “putting form over substance” contrary to this Court’s decision in *Alliance*.¹¹³

60. The problem with the majority’s judgment is not limited to the facts of this case: wherever there are limits defining the boundaries of legislative schemes that benefit a disadvantaged group, those limits can never be amended without infringing s. 15(1).¹¹⁴ It is well-established that the “government is not bound by the undertakings of its predecessor”.¹¹⁵ Yet, on an application of the majority’s decision below, every government would be. Legislative reform in criminal law could only ever go one way: more lenient. Any increase to a maximum sentence, or any conditions placed on any non-custodial sanctions, would all be susceptible to invalidation on the basis of s. 15 because they will necessarily have a disproportionate effect on Indigenous persons – or any persons – who are overrepresented in the criminal justice system.

¹¹⁰ Bill C-41, *An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*, SC 1995, c 22, s 742.1(b).

¹¹¹ *R v Proulx*, 2000 SCC 5 at para 79.

¹¹² *R v Chouhan*, 2021 SCC 26 at paras 140-143.

¹¹³ *Reasons of the Court of Appeal* at para 239, Miller JA, dissenting [AR, Vol I, Tab 2, p 206], citing *Quebec v Alliance*, 2018 SCC 17 at para 33.

¹¹⁴ *Reasons of the Court of Appeal* at para 242, Miller JA, dissenting [AR, Vol I, Tab 2, p 207].

¹¹⁵ *R v Chouhan*, 2021 SCC 26 at para 140; *Reference re Canada Assistance Plan (Canada)*, [1991] 2 SCR 525 at 559-560; *Granovsky v Canada (Minister of Employment and Immigration)*, [2000] 1 SCR 703 at para 14.

61. It is not just future amendments that are vulnerable, but existing provisions as well. The limits on a conditional sentence are no different than the limits Parliament places on other aspects of sentencing like eligibility for a conditional discharge or probation, or setting a maximum sentence. While the argument in this case is tailored to “over-incarceration”, this is just a subset of overrepresentation, which occurs at every stage of the criminal process, including conviction.¹¹⁶ The availability of an absolute or conditional discharge prescribed in s. 730(1) of the *Criminal Code* is limited by the same parameters as conditional sentences in s. 742.1(c). They are equally unavailable for anyone convicted of an offence where the maximum penalty is 14 years or life. The rationale of the majority of the Court of Appeal renders this section equally constitutionally suspect: because Indigenous offenders are overrepresented at conviction, any limits placed on the ability of trial judges to ameliorate the circumstances of Indigenous offenders at conviction with a discharge would transgress s. 15. This cannot be the law. Parliament decides whether something is criminal and if so, sets the appropriate penalty. In so doing it exercises a policy choice to decide whether certain types of punishment should be mandated, or available, for certain types of offences. By limiting the availability of discharges, like conditional sentences, to less serious offences, Parliament has exercised that choice.

62. It is well-known that there is systemic discrimination and disproportionate representation of Indigenous people in the criminal justice system. It is a tragic and urgent issue that calls out to be addressed. But the approach of the majority below is not the answer. To accept their reasoning is to accept that many, if not most, criminal law provisions of general application violate s. 15, not because they create a distinction, but because they exist within social circumstances of disadvantage. This approach constitutionalizes ordinary legislation and immunizes the policy choices of one government from amendment or repeal by the next. This is unworkable.

C. OVERSHOOTING OVERBREADTH: THE MAJORITY’S ERROR UNDER S. 7

63. The nature of the offences at issue in ss. 742.1(c) and 742.1(e)(ii) are serious types of offences for which limits on the availability of conditional sentences are not overbroad. A law is overbroad where there is no rational connection between the objective of the law, and some, but

¹¹⁶ Saghbini, Bressan and Paquin-Marseille, [Indigenous People in Criminal Court in Canada: An Exploration Using the Relative Rate Index](#), Justice Canada: Research and Statistics Division 2021 at p 11.

not all, of the conduct that it impacts.¹¹⁷ The threshold is high: there must be a total absence of connection between the law's effects and its objective.¹¹⁸ The overbreadth analysis looks at the means chosen by the legislature to accomplish its objective. Where Parliament is seeking to address a harm that is not insignificant or trivial, “the precise weighing and calculation of the nature and extent of the harm is Parliament's job.”¹¹⁹ The harm targeted by the crime of importing cocaine, like other offences punishable by life in prison, is not insignificant or trivial. Their objective gravity is the highest of any offences in the *Criminal Code*.

64. The majority’s decision that the provisions are overbroad turns on an incorrect characterization of the purpose of the enacting legislation, and a finding that Parliament was wrong to use maximum sentences as a “proxy” for what types of offences are serious.¹²⁰ The majority decision is in error. There is a connection between the purpose of the provisions and their impacts. It was open to Parliament to reference maximum sentences as part of enacting limits to the availability of conditional sentences. Moreover, the impact of the limits ss. 742.1(c) and 742.1(e)(ii) impose is attenuated by the availability of dispositions other than incarceration in the *Criminal Code*.

1. The majority incorrectly restated the legislative purpose

65. The first step in an analysis of overbreadth is to ascertain the purpose of the law. The relationship between the purpose of the law and its effect is critical to determining whether it is overbroad. The majority below improperly rejected the statement of purpose the parties accepted in favour of a much narrower purpose that did not reflect the full context of the enacting legislation or the tiered scheme of s. 742.1.¹²¹ Moreover, their decision implies that the respondent’s offence, importing more than a kilogram of cocaine, is not objectively grave — a characterization fundamentally out of step with this Court’s sentencing jurisprudence, most recently in *Parranto*.¹²²

¹¹⁷ *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 112.

¹¹⁸ *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 119.

¹¹⁹ *R v Malmo-Levine*, [2003] 3 SCR 571 at para 133.

¹²⁰ *Reasons of the Court of Appeal* at paras 153-169 [AR, Vol I, Tab 2, pp 169-178].

¹²¹ *Reasons of the Court of Appeal* at para 144 [AR Vol I, Tab 2, p 165].

¹²² *R v Parranto*, 2021 SCC 46 at paras 60, 91-92.

66. It is uncontroversial that “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intent of Parliament.”¹²³ Here, the Court of Appeal acknowledged that the parties had accepted that the purpose of the *SSCA*, including the specific conditional sentence restrictions at issue, was the same as that articulated by the Saskatchewan Court of Appeal in *R v. Neary*:

- 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.¹²⁴

There was no evidence before the Court of Appeal that justified the majority’s rejection of the *Neary* statement of purpose upon which all parties had agreed. The majority instead unduly narrowed the purpose to: “maintain[ing] the integrity of the justice system by ensuring that offenders who commit serious offences receive prison sentences.”¹²⁵

67. By improperly narrowing the purpose, the majority foreclosed any meaningful engagement with whether the effects of ss. 742.1(c) and (e)(ii) were connected to the purpose of the provisions. The majority’s statement of purpose falls short of this Court’s guidance in *Moriarity* by its failure to distinguish the purpose of the legislation from the means used to achieve the purpose. It fails to anchor the purpose of the limits on conditional sentences within the full context of the *SSCA* or Part XXIII of the *Criminal Code*. Finally, it incorrectly introduced a measure of proportionality by focusing on “offenders who commit” the serious offences when, at this stage, the only question was the objective seriousness of the offences themselves.

68. As this Court has found, an unduly narrow statement of purpose will almost always lead to a finding of overbreadth.¹²⁶ The majority’s restatement of purpose should be rejected. The *Neary*

¹²³ R. Sullivan, *Sullivan on the Construction of Statutes*, 6th Ed., (LexisNexis, September 2014) at Chapter 2 – Driedger’s Modern Principle.

¹²⁴ *Reasons of the Court of Appeal* at paras 143-144 [AR, Vol I, Tab 2, p 164-165]; *Sentencing Decision* at para 141 [AR, Vol I, Tab 1, p 68]; *R v Neary*, 2017 SKCA 29 at para 35, leave to appeal ref’d, [2017] 2 SCR viii.

¹²⁵ *Reasons of the Court of Appeal* at para 148 [AR, Vol I, Tab 2, p 167].

¹²⁶ *R v Moriarity*, 2015 SCC 55 at para 28.

statement of purpose better reflects the text, context, intent and scheme of the legislation. The restrictions placed on conditional sentences rendered the regime consistent with its original intent. As the Parliamentary Secretary to the Minister of Justice submitted during Debate in the House of Commons, the *SSCA* aimed “to establish *clear benchmarks* to allow for *consistent use* of conditional sentencing in order to respect Parliament's intention when it created this sentence.”¹²⁷ Conditional sentences were intended for less serious offences. Parliament had to amend the eligibility criteria several times to conform to this original intent. In 2007, Parliament limited conditional sentences for offences involving “serious personal injury”. This generated litigation where judges examined the circumstances of the offence rather than the type of offence to determine whether it was excluded.¹²⁸ In 2012, the government sought clarity. Parliament wanted to do away with “all of that uncertainty” about what offences qualified as serious personal injury.¹²⁹

69. Parliament also wanted to make it “crystal clear” that for certain categories of serious offences, a conditional sentence would never be an option.¹³⁰ Parliament’s purpose was sound. There was a need to prioritize clarity and consistency as well as to establish the paramountcy of denunciation and deterrence in sentencing for the most objectively grave offences in the *Criminal Code*, which s. 742.1(c) in particular represents. The types of serious offences excluded with the new restrictions included offences like importing a Schedule I narcotic such as cocaine, aggravated assault and aggravated sexual assault, robbery, torture, fraud over \$5000, or using a firearm in the commission of an offence — to name a few.¹³¹

70. The paramountcy of denunciation and deterrence for more serious types of offences is a purpose this Court itself has expressed. A conditional sentence is necessarily more lenient than a

¹²⁷ *House of Commons Debates*, 41-1, Vol 146, No 17 (21 September 2011) at 1317 (Robert Goguen) [emphasis added].

¹²⁸ See e.g. *R v Steele*, 2014 SCC 61; *R v Goulet*, 2011 ABCA 230; *R v Morgan*, 2005 CanLII 7254 (ON CA).

¹²⁹ *House of Commons Debates*, 41-1, Vol 146, No 18 (22 September 2011) at 1357 (Shelly Glover) [emphasis added].

¹³⁰ *House of Commons Debates*, 41-1, Vol 146, No 17 (22 September 2011) at 1357-1358 (Shelly Glover).

¹³¹ *Criminal Code*, RSC 1985, c C-46, ss 268, 273, 344, 269.1, 380, 85.

jail sentence.¹³² The language of *Proulx* is consistent with the understanding that a conditional sentence is a sanction for less serious offences.¹³³ *Fice* determined that a conditional sentence cannot become available to an offender who otherwise deserves a penitentiary term solely because of the time the offender spends in pre-sentence custody even if they pose no danger to the community.¹³⁴ Nor was Parliament's concern with the inconsistency of the conditional sentence regime illusory: "fairness in criminal punishment requires rules that are clear and certain."¹³⁵ The use of conditional sentences across Canada was uneven.¹³⁶ The *SSCA* responded to that problem and prioritized the *type* of offence based on objective gravity and the need for consistency and clarity – a problem the majority disregarded.

71. In any event, irrespective of whether the *Neary* statement of purpose or the statement of purpose from the majority below is used, the provisions at issue here are not overbroad. The use of categories to define eligibility for a conditional sentence brings certainty and clarity to the law and, by focusing on the most serious offences in the *Criminal Code*, ensures that denunciation and deterrence are appropriately emphasized.

2. Maximum sentences are an appropriate means to gauge objective seriousness

72. The maximum term of imprisonment is an appreciable indicator of the seriousness of an offence.¹³⁷ By choosing to define the seriousness of offences by their maximum penalty, Parliament found a clear way to delineate offences for which a conditional sentence is not available. There is a rational connection between the means chosen and the law's impacts. This Court has repeatedly accepted that maximum sentences are one of the principal tools available to Parliament to determine the objective gravity of an offence.¹³⁸

¹³² *R v Proulx*, 2000 SCC 5 at para 44; *Tran v Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50 at paras 24-28.

¹³³ *R v Proulx*, 2000 SCC 5 at para 21; *R v Wells*, 2000 SCC 10.

¹³⁴ *R v Fice*, 2005 SCC 32.

¹³⁵ *R v K.R.J.*, 2016 SCC 31 at para 25.

¹³⁶ Saghbini, Bressan and Paquin-Marseille, *Indigenous People in Criminal Court in Canada: An Exploration Using the Relative Rate Index*, Justice Canada: Research and Statistics Division 2021 at p 44.

¹³⁷ *R v M(CA)*, [1996] 1 SCR 500 at paras 36, 56.

¹³⁸ *R v Parranto*, 2021 SCC 46 at para 60; *R v Friesen*, 2020 SCC 9 at para 96.

73. Maximum sentences are used as a tool to mark objective gravity of an offence in many contexts. The right to a jury trial in s. 11(f) of the *Charter* is triggered only when the maximum punishment for the offence is imprisonment for five years or a more severe punishment.¹³⁹ Conditional discharges are not available for offences punishable by a maximum sentence of 14 years or life.¹⁴⁰ The definition of a “serious offence” in the criminal organization provisions includes “an indictable offence [...] for which the maximum punishment is imprisonment for five years or more.”¹⁴¹ The *Criminal Records Act* binds the eligibility for a record suspension to a number of prescribed circumstances which are, in part, tied to the maximum sentence.¹⁴² The *Immigration and Refugee Protection Act* makes reference to the maximum sentence when setting out what offences will constitute serious criminality for the purpose of admissibility.¹⁴³

74. Recently, this Court highlighted the objective gravity of drug offences involving Schedule I substances like the cocaine at issue in this case. In *Parranto*, this Court held that the appellant, a Métis offender, should be sentenced to fourteen years in the penitentiary despite his mitigating background and personal circumstances due to the objective gravity of commercial fentanyl trafficking and his criminal record. Justices Brown and Martin wrote:

Parliament has chosen to employ the mechanisms of criminal law and sentencing law to advance public safety, hold those who distribute drugs accountable, and communicate the wrongfulness of poisoning people and communities. This is perhaps most apparent in the maximum sentence for trafficking in a Schedule I drug, which is life in prison (CDSA, s. 5(3)(a)).¹⁴⁴

75. In concurring reasons, Moldaver J. emphasized the risks posed by trafficking in hard drugs, quoting Doherty J.A. in *Hamilton*,¹⁴⁵ who wrote that “violence is such a predictable consequence of the illicit drug trade that it cannot be dissociated from it.” And further: “Cocaine importation begets a multiplicity of violent acts. Viewed in isolation from the conduct which inevitably follows the importation of cocaine, the act itself is not a violent one in the strict sense. It cannot, however,

¹³⁹ *Canadian Charter of Rights and Freedoms*, s. 11(f).

¹⁴⁰ *Criminal Code*, RSC 1985, c C-46, s. 730(1).

¹⁴¹ *Criminal Code*, RSC 1985, c C-46, s. 467.1(1).

¹⁴² *Criminal Records Act*, RSC, 1985, c C-47, s 4(2)(b).

¹⁴³ *Immigration and Refugee Protection Act*, SC 2001, c 27, s 36.

¹⁴⁴ *R v Parranto*, 2021 SCC 46 at para 60.

¹⁴⁵ *R v Hamilton*, 2004 CanLII 5549 (ON CA).

be disassociated from its inevitable consequences.”¹⁴⁶ The “inevitable consequences” of the importation of cocaine – a destructive, insidious and powerfully addictive substance that is not natural to Canada – is great devastation and misery for those whose lives it touches. It is within this framework that Canadian courts have taken a hard line against drug importers and the couriers they rely on to facilitate their deadly trade. Irrespective of the personal circumstances of the offender, these are objectively serious offences.

76. The majority below erred by mischaracterizing the relationship between the objective seriousness of the offence as defined in the criminalizing provision, and the subjective moral blameworthiness of the offender that comes later. Parliament has always restricted the availability of a conditional sentence based on some measure of the objective seriousness of the offence. Whether that was encompassed in the language “endanger safety to the community” or “serious personal injury”, “terrorism” or “criminal organization offence”, or as delineated by the maximum sentence, they are all markers of the seriousness of the index offence.

77. This Court has expressly stated that maximum sentences “help determine the gravity of the offence and thus the proportionate sentence.”¹⁴⁷ With reference to the maximum penalties found in the *Criminal Code* in particular, this Court has noted that the maximum sentence provided for offences in the *Code* “determines objective gravity by indicating the ‘relative severity of each crime.’”¹⁴⁸ The maximum penalty for an offence in s. 742.1(c), 14 years or life in prison, is a clear and objective marker of seriousness and is not overbroad.

78. Section 742.1(e)(ii) is in fact a more tailored provision than s. 742.1(c), referring not only to a ten-year maximum sentence, but also to the circumstances of the offence. Section 742.1(e)(ii) sets out the availability of conditional sentences for drug-related offences prosecuted by indictment and punishable by ten years in prison. It is not overbroad to particularize and exclude such indictable offences related to drug trafficking, production and importing.

¹⁴⁶ *R v Parranto*, 2021 SCC 46 at para 89 [emphasis added by Moldaver J.].

¹⁴⁷ *R v Friesen*, 2020 SCC 9 at paras 95-96; *R v Parranto*, 2021 SCC 46 at para 60.

¹⁴⁸ *R v Friesen*, 2020 SCC 9 at para 96.

3. Judicial discretion inherent in sentencing defeats the argument of overbreadth

79. The “art” of sentencing involves an individualized assessment and careful balancing of sometimes conflicting factors.¹⁴⁹ Sentencing ranges articulated by appellate courts do not abdicate a trial judge’s responsibility to determine a fit sentence in accordance with the fundamental principle of proportionality that s. 718.1 sets out. Determining a fit sentence requires a careful, fact-specific analysis, and a consideration of any available sanction that will further the principles of sentencing. Conditional sentences exist within a wider scheme of sentencing dispositions within the *Criminal Code*. When they are unavailable, judges may resort to other available sentencing provisions. With respect to sentencing Indigenous offenders in particular, judges have applied *Gladue* principles to craft individualized sentences.¹⁵⁰

80. The majority incorrectly treated the impugned provisions like mandatory minimums rather than conditions that apply to only a single available sanction in the *Criminal Code*. Their statement that sections 742.1(c) and (e)(ii) “remove the only sentencing alternative to imprisonment that could have been available for this crime and for this offender” is flawed; sentencing ranges and starting points do not function as mandatory minimums. In the absence of a statutory mandatory minimum, a judge has the discretion to impose any available sanction. In this case, the sentencing judge struck down the mandatory minimum for the offence (which the appellant has not appealed). Subject to fitness, many options were on the table: any term of jail, an intermittent sentence, or, if the Court found that proportionality did not require imprisonment, a fine or a suspended sentence and probation.

81. A conditional sentence is not a fit sentence in this case. Cocaine trafficking and importing inflict social and economic harm.¹⁵¹ The respondent acted as a courier to bring almost two kilograms of cocaine into Canada for \$20,000. Her crime called for denunciation and deterrence. Large-scale drug offences are committed primarily for financial gain. “It falls to the courts to warn would-be couriers, in no uncertain terms, that they will pay a heavy price for choosing to import large quantities of hard drugs for quick personal gain”¹⁵² while turning a blind-eye to the inexorable

¹⁴⁹ *R v Parranto*, 2021 SCC 46; *R v Friesen*, 2020 SCC 9; *R v Lacasse*, 2014 SCC 64.

¹⁵⁰ See eg *R v McGill*, 2016 ONCJ 138; *R v Nicholson*, 2018 NSPC 59; *R v Lariviere*, 2021 ABQB 432.

¹⁵¹ *R v Lloyd*, 2016 SCC 13 at paras 26, 82.

¹⁵² *R v Cunningham*, [1996] OJ No 448 (CA) at para 22.

consequences of their acts. In *Hamilton*, the Court of Appeal for Ontario overturned the imposition of conditional sentences for two racialized female first-time offenders charged with importing who, because of race, gender and poverty were vulnerable targets for cocaine couriership. Doherty J.A., like the sentencing judge in this case, recognized that despite mitigating personal circumstances and the need to respect the principle of restraint, the objective seriousness of importing cocaine required incarceration.¹⁵³ As stated by the sentencing judge here: “Cheyenne Sharma committed a serious offence in importing cocaine – a reality undisturbed by her personal culpability or mitigating factors.”¹⁵⁴

D. THE RESTRICTIONS ON CONDITIONAL SENTENCES ARE JUSTIFIABLE UNDER S. 1

1. Any infringement of s. 15 is justified

82. If this Court finds that the restriction on conditional sentences infringes the respondent’s s. 15 rights, it is a reasonable limit that can be demonstrably justified in a free and democratic society within s. 1. As Kasirer J. noted in *C.P.*, “[t]he right to equality, like all *Charter* rights, must sometimes give way to legitimate societal objectives.”¹⁵⁵ Parliament must balance complex social factors when deciding the scope of punishment. Broader societal considerations are a key component that must inform the s. 1 analysis.¹⁵⁶ In this case, Hansard contains ample evidence of the public debate about the restrictions on conditional sentences. The debate demonstrates how Parliament made efforts to balance wide-ranging concerns, including Indigenous overrepresentation, in setting sentencing policy. Determining where to draw the line when faced with the complexities of how to address crime and punishment is exactly what Parliament is obligated and entitled to do.

83. Sections 742.1(c) and 742.1(e)(ii) make the eligibility criteria for conditional sentences more stringent than they were at their inception. If this Court finds that the narrower criteria for a conditional sentence impair the respondent’s s. 15 rights, it will have necessarily accepted that judicial notice of overrepresentation in the criminal justice system is sufficient to prove that a discriminatory distinction flows from a penal provision. However, ss. 742.1(c) and 742.1(e)(ii) are

¹⁵³ *R v Hamilton*, 2004 CanLII 5549 (ON CA) at para 100.

¹⁵⁴ *Sentencing Decision* at para 141 [AR, Vol I, Tab 1, p 67].

¹⁵⁵ *R v C.P.*, 2021 SCC 19 at para 174.

¹⁵⁶ *R v Malmo-Levine*, [2003] 3 SCR 571 at paras 131-133; *RJR MacDonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199 at para 135.

constitutional when read in conjunction with the broader social and legal context of sentencing that s. 1 requires.

84. The law is meant to articulate punishment in a way that “provides the contours for a sentence that reflects society’s most up-to-date view of the gravity of the offence and the degree of responsibility of the offender.”¹⁵⁷ Sections 742.1(c) and 742.1(e)(ii) were enacted with this very end in mind. The provisions are a proportional response that signals the severity of, and public contempt for, serious offences. They are “necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance.”¹⁵⁸ Failing to recognize the collective goals the restrictions on conditional sentences symbolize may render all criminal law vulnerable to the same s. 15 challenge. The majority below was wrong to dismiss this concern.

A. Sufficiently important objective

85. A law that limits a constitutional right must do so in pursuit of a sufficiently important objective that is consistent with the values of a free and democratic society.¹⁵⁹ The objectives of the provisions are pressing and substantial. Important societal interests can justify *Charter* infringements in criminal law.¹⁶⁰ Parliament has an obligation to make the criteria for any *Criminal Code* punishment clear and consistent with the fundamental purposes and principles of sentencing. Sections 742.1(c) and 742.1(e)(ii) both prioritize clarity and consistency and establish the paramountcy of denunciation and deterrence in sentencing for serious types of offences. They treat non-violent, serious offences, like importing a Schedule I substance, as serious offences for sentencing purposes. These are pressing and substantial objectives.

86. Public confidence in the administration of justice requires that Parliament balance a number of societal concerns when setting the parameters for non-custodial sentencing. Consideration must be given not just to the impact on offenders, but also the impact on communities. These concerns

¹⁵⁷ *R v Poulin*, 2019 SCC 47 at para 3.

¹⁵⁸ *R v Oakes*, [1986] 1 SCR 103 at 136.

¹⁵⁹ *R v Oakes*, [1986] 1 SCR 103 at 138; *R v K.R.J.*, 2016 SCC 31 at para 61.

¹⁶⁰ See e.g. *R v C.P.*, 2021 SCC 19 at paras 184-187; *R v Chaulk*, [1990] 3 SCR 1303; *R v K.R.J.*, 2016 SCC 31.

apply equally to Indigenous communities. Indigenous communities are disproportionately affected by the opioid crisis.¹⁶¹ Indigenous people suffer a higher rate of crime than non-Indigenous people.¹⁶² For Indigenous women, in particular, they are close to three times as likely as non-Indigenous women to be victims of crime.¹⁶³ Pauktuutit, the Inuit Women’s Association of Canada, made representations to Parliament about their concern that “community-based alternatives to imprisonment can pose very serious risks for victims and others”.¹⁶⁴

B. Proportionality

87. As repeatedly observed by this Court, a measure of deference must be accorded to the legislature at this stage of the analysis.¹⁶⁵ One must recognize that legislative schemes that target important societal interests, including the reduction of antisocial behaviour, can involve difficult choices and reflect numerous overlapping and conflicting concerns.¹⁶⁶ Parliament has both the authority and the responsibility to set policy in respect of criminal procedures, sanctions, and sentencing.¹⁶⁷ The question for a court in assessing proportionality as part of a s. 1 analysis is whether the limit on the right imposed by the legislature “falls within a range of reasonable alternatives.”¹⁶⁸

(i) There is a rational connection

88. The majority erred when they found no rational connection between the impugned provisions and the objectives. The proper question at this stage is whether ss. 742.1(c) and (e)(ii) are rationally connected to the pressing and substantial objectives of prioritizing clarity and

¹⁶¹ Chiefs of Ontario and ODPRN, *Opioid Use, Related Harms, and Access to Treatment among First Nations in Ontario, 2013-2019* (December 2021).

¹⁶² Justice Canada, *JustFacts: Indigenous overrepresentation in the criminal justice system, January 2017* (Exhibit 1, Murdocca BOA) [ONCA-AR, Vol I, Tab 6(13), pp 561-562].

¹⁶³ Justice Canada, *JustFacts: Indigenous overrepresentation in the criminal justice system, January 2017* (Exhibit 1, Murdocca BOA) [ONCA-AR, Vol I, Tab 6(13), pp 561-562].

¹⁶⁴ *House of Commons, Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, 35:1, No 88 (28 February 1995) at 85:22 (Martha Flaherty).

¹⁶⁵ *R v K.R.J.*, 2016 SCC 31 at para 67; *Carter v Canada*, 2015 SCC 5 at para 97.

¹⁶⁶ *Carter v Canada*, 2015 SCC 5 at paras 97-98.

¹⁶⁷ *R v Malmo-Levine*, [2003] 3 SCR 571 at paras 130-133; *R v Ferguson*, 2008 SCC 6 at paras 54-56.

¹⁶⁸ *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 37.

consistency, establishing the paramountcy of denunciation and deterrence for serious types of offences, and treating non-violent, serious offences as serious offences for sentencing. A rational connection need not be established through scientific proof or empirical evidence. The government need only show “that there is a causal connection between the infringement and the benefit sought ‘on the basis of reason or logic.’”¹⁶⁹ The provisions eliminate one sentencing option of many. Where custody is required, so is a term of jail — which demonstrates society’s denunciation and has offenders convicted of serious crimes like fraud and drug offences in parity with those convicted of violent (formerly “serious personal injury”) offences.

(ii) Minimal impairment made out on the objectives at issue

89. Minimal impairment ensures that “the limit on the right is reasonably tailored to the objective.”¹⁷⁰ The limit must impair the right or freedom as little as possible; however, Parliament cannot be held to a standard of perfection.¹⁷¹ It is sufficient if the means adopted fall within a range of reasonable options.¹⁷² Parliament need not accept options which are less effective than the one chosen.¹⁷³ In assessing whether the alternative is less effective, the test is not whether it satisfies the objective to exactly the same extent or degree as the option selected. Rather, the test is whether Parliament can demonstrate the absence of alternative, less drastic, means of achieving the objective in a real and substantial manner.¹⁷⁴

90. The conditional sentence eligibility restrictions in ss. 742.1(c) and (e)(ii) remove only one sentencing option for only the types of offences Parliament has defined as serious by making them subject to the highest maximum sentences in our criminal legislation. The fact that the respondent may conceive of ways in which Parliament could have tailored the restrictions more precisely is not enough to show that they are not minimally impairing. The law falls within a range of reasonable alternatives. Prior options may have been less impairing, but they defeated the government’s objective of limiting conditional sentences to only less serious types of offences. As

¹⁶⁹ *R v Oakes*, [1986] 1 SCR 103 at 139; *R v K.R.J.*, 2016 SCC 31 at para 68.

¹⁷⁰ *Carter v Canada*, 2015 SCC 5 at para 102.

¹⁷¹ *R v Edwards Books and Art Ltd.*, [1986] 2 SCR 713 at paras 149-150.

¹⁷² *Quebec (Attorney General) v A*, [2013] 1 SCR 61 at paras 439, 447.

¹⁷³ *Canada (Attorney General) v JTI-Macdonald Corp.*, 2007 SCC 30 at paras 42-43.

¹⁷⁴ *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 55; *Carter v Canada*, 2015 SCC 5 at paras 102, 118; *R v K.R.J.*, 2016 SCC 31 at para 70.

stated in *Chaulk*, “the *Charter* does not require Parliament to ‘roll the dice’ in its effort to achieve ‘pressing and substantial’ objectives in order to accept the absolutely least intrusive legislative provision.”¹⁷⁵

(iii) Salutory benefits of the provisions outweigh the deleterious effects

91. This stage of the *Oakes* analysis requires overall proportionality between the deleterious effects of the measure on individuals and the salutary effects of the law for the collective good. A reviewing court should ask whether the overall effect of the law is disproportionate to Parliament’s objective. This final stage “performs a fundamentally distinct role”.¹⁷⁶ The Court makes “a broader assessment of whether the benefits of the impugned law are worth the costs of the rights limitation.”¹⁷⁷

92. The deleterious effect of serving a sentence in jail is tempered by the highly discretionary and tailored process that is sentencing. A sentencing judge is still required to exercise restraint. The impact of s. 742.1(c) on the respondent was that she served her custodial sentence in jail rather than the community. If the sentencing judge had been satisfied that a non-custodial disposition was a fit and proportionate sentence, he could have imposed one. He didn’t. While her personal circumstances were mitigating, importing nearly two kilograms of cocaine is an objectively grave offence. Few offenders, even before the *SSCA*, ever received a conditional sentence for importing a Schedule I substance. The sentencing judge in this case was attendant to all of the personal circumstances of the respondent, and recognized that many *Gladue* factors were responsible for bringing her before the Court. The restrictions at issue in this appeal remove but one sentencing option from the judge’s toolbox – they do not undermine the overall mandate.

93. More generally, whether conditional sentences can ameliorate discrimination and truly give effect to *Gladue* principles depends on the context and circumstances in which an offender serves their sentence. The conditions imposed by the sentencing judge can set an offender up for success or failure. Breaching conditions results in real jail. Community resources, individual resources, and

¹⁷⁵ *R v Chaulk*, [1990] 3 SCR 1303 at 1344.

¹⁷⁶ *R v K.R.J.*, 2016 SCC 31 at para 77.

¹⁷⁷ *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 77; *R v K.R.J.*, 2016 SCC 31 at para 77.

the nature of the conditions all play a role. At the inception of conditional sentences, Indigenous communities themselves expressed concern about whether there would be sufficient resources to administer the sanctions or have a meaningful effect on the discretion of trial judges.¹⁷⁸ Some literature on “net-widening” suggests that the availability of conditional sentences may even have contributed to disproportionate incarceration, positing that the availability of conditional sentences led judges to impose them in situations where they would have otherwise imposed fines or probation, leading to offenders who would not otherwise be imprisoned being sent to jail if they breached the terms of the conditional sentence order.¹⁷⁹

2. Any infringement of s. 7 is also justified

94. As a general principle, this Court has stated that it is difficult to justify a limit on s. 7 rights under s. 1, but it is not meant to be impossible.¹⁸⁰ Since the pronouncement of the principle in *BC Motor Vehicle Reference*, the analytical framework under s. 7 has undergone substantial transformation in relation to the principles of fundamental justice, including overbreadth. Considerations that prior to *Bedford* would have been within the s. 7 analysis have now shifted to the government’s burden under s. 1. Establishing overbreadth solely with respect to the effect on the individual claimant is sufficient to establish a breach of s. 7.¹⁸¹ There is no scope within the s. 7 analysis to consider the broader impacts of the law on other persons, other competing interests or the public good.¹⁸² The s. 1 analysis is both “quantitative and qualitative”, taking into account the “law’s impact in terms of society as a whole”.¹⁸³ While this Court has not to date upheld a limit

¹⁷⁸ *House of Commons, Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, 35:1, No 88 (28 February 1995) at 85:22-85:23 (Martha Flaherty); *House of Commons, Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, 35:1, No 88 (2 March 1995) at 88:6 (Ovide Mercredi).

¹⁷⁹ K. Roach, “[Conditional Sentences, Restorative Justice, Net-Widening and Aboriginal Offenders](#)” at p 26 (Paper delivered at the symposium *The Changing Face of Conditional Sentencing* 2001). J. Roberts, “[Discovering the Sphinx: Conditional Sentencing after the Supreme Court Judgement in R. v. Proulx](#)” at pp 42, 46 (Paper delivered at the symposium *The Changing Face of Conditional Sentencing* 2001).

¹⁸⁰ *R v Safarzadeh-Markhali*, 2016 SCC 14 at para 57; *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 129; *Re BC Motor Vehicle Act*, [1985] 2 SCR 486.

¹⁸¹ *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 123.

¹⁸² *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 125; *Carter v Canada*, 2015 SCC 5 at para 95.

¹⁸³ *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 126.

on s. 7 rights under s. 1, the logic of *Bedford* suggests that there must be greater scope for such an outcome, where the principle of overbreadth is concerned, than was the case prior to *Bedford*. If the only place that the broader impacts of a law on other persons and competing interests can be considered is under s. 1, s. 1 justification of a s. 7 infringement should not be so rare.

95. Section 1 allows for consideration of the public interest and the recognition that in some cases that interest justifies the s. 7 deprivation.¹⁸⁴ As this Court noted in *Carter*, “where competing societal interests are themselves protected under the *Charter*, a restriction on s. 7 rights may in the end be found to be proportionate to its objective.”¹⁸⁵ This is such a case. Even where Parliament has tailored the restrictions narrowly to apply to only one specific offence prosecuted by indictment, like indictable sexual assault in s. 742.1(f)(iii), superior courts have used the logic of the majority below to invalidate the provision, on the basis that some sexual assaults are “not so serious”.¹⁸⁶ The important legislative goals at issue in ss. 742.1(c) and (e)(ii), when measured against the limited nature of any s. 7 infringement, should lead this Court to conclude that the broader public interest justifies the infringement of individual rights.

PART IV – COSTS

96. The appellant does not seek costs, and makes no submission in that regard.

PART V – ORDER SOUGHT

97. That the appeal be granted, without costs, and that sections 742.1(c) and 742.1(e)(ii) be declared constitutional and the trial judge’s decision on sentence restored. Since the respondent has already served her sentence there is no need to request that the imposition of sentence be stayed.

PART VI – SUBMISSIONS ON CASE SENSITIVITY

98. There is no sealing or confidentiality order, publication ban, classification of information in the file that is confidential under legislation, or restriction on public access to information in this file that could have an impact on the Court’s reasons in the appeal.

¹⁸⁴ *Carter v Canada*, 2015 SCC 5 at para 95; *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 125.

¹⁸⁵ *Carter v Canada*, 2015 SCC 5 at para 95.

¹⁸⁶ *R v R.S.*, 2021 ONSC 2263.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Ottawa, in the Province of Ontario, this 15th day of December, 2021.

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Her Majesty the Queen in Right of Canada

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