SCC Court File No. 39346

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

BETWEEN:

HER MAJESTY THE QUEEN

Appellant
(Respondent)

And

CHEYENNE SHARMA

Respondent
(Appellant)

And

ATTORNEY GENERAL OF SASKATCHEWAN, ATTORNEY GENERAL OF BRITISH COLUMBIA, ABORIGINAL LEGAL SERVICES INC., FEDERATION OF SOVEREIGN INDIGENOUS NATIONS, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, QUEEN'S PRISON LAW CLINIC, HIV & AIDS LEGAL CLINIC ONTARIO AND HIV LEGAL NETWORK (JOINTLY), CANADIAN BAR ASSOCIATION, WOMEN'S LEGAL EDUCATION AND ACTION FUND INC., LEGAL SERVICES BOARD OF NUNAVUT, CRIMINAL LAWYERS' ASSOCIATION (ONTARIO), CANADIAN CIVIL LIBERTIES ASSOCIATION, NATIVE WOMEN'S ASSOCIATION OF CANADA, DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS, ONTARIO NATIVE WOMEN'S ASSOCIATION, ASSEMBLY OF MANITOBA CHIEFS, CANADIAN ASSOCIATION OF ELIZABETH FRY SOCIETIES, JOHN HOWARD SOCIETY OF CANADA, CRIMINAL TRIAL LAWYERS ASSOCIATION, L'ASSOCATION QUÉBÉCOISE DES AVOCATS ET AVOCATES DE LA DÉFENSE

Interveners

FACTUM of the
NATIVE WOMEN'S ASSOCIATION OF CANADA

(Pursuant to Rule 42 of the
Rules of the Supreme Court of Canada)

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PART I – OVERVIEW

1. This factum analyzes whether *Criminal Code* ss. 742.1(c) and 742.1(e)(ii) (the "impugned provisions") create a race-based distinction exacerbating and perpetuating systemic discrimination and historical prejudice against Indigenous People.
2. The Native Women's Association of Canada ("NWAC") agrees with the majority for the Ontario Court of Appeal ("the majority")'s finding that the impugned provisions unjustifiably infringe the s. 15(1) equality guarantee in the *Canadian Charter of Rights and Freedoms* ("the *Charter*"). The impugned provisions create a distinction on the basis of race because they undermine *Criminal Code* s. 718.2(e) and related *Gladue* case law ("the *Gladue* principles"), indispensable tools aimed at redressing systemic discrimination against Indigenous People at sentencing. By undermining the *Gladue* principles, the impugned provisions perpetuate intergenerational family separation and incarceration cycles, adversely impacting reconciliation.
3. These arguments avoid duplicating parties' submissions by focusing on the two following considerations in the s. 15(1) analysis:
    a. The Appellant's floodgates argument proposes a s. 15(1) distinction analysis that may bar future Indigenous claimants bringing s. 15(1) *Charter* challenges; and
    b. The impugned provisions perpetuate intergenerational Indigenous overincarceration cycles, undermining reconciliation.

A. Concise Fact Statement

4. The following facts are relevant to NWAC's submissions:
    a. Cheyenne Sharma was a 20-year-old Ojibwa woman and single mother with a clean criminal record when she confessed to importing nearly 2 kg of cocaine into Canada on 27 June 2015 in exchange for $20,000 to avoid homelessness for herself and her two-year-old daughter.[1]
    b. Ms. Sharma is an intergenerational residential school survivor who suffered sexual violence from a young age.[2] She posed a low risk to reoffend[3] and the sentencing judge

[1] *R v Sharma*, 2020 ONCA 478 [*Sharma*] at paras 5-6.
[2] *Ibid* at 9-10.
[3] *Ibid* at 125.

acknowledged incarceration would separate her from her young daughter, perpetuating intergenerational family separation patterns.[4]

c. Indigenous overincarceration patterns prompted Parliament to enact s. 718.2(e) of the *Criminal Code* in 1995 as part of major amendments to codify sentencing purposes and principles.[5] *Gladue* principles encourage conditional sentences to redress Indigenous overincarceration patterns and harms.[6]

d. In 2012, Parliament enacted the *Safe Streets and Communities Act*, removing conditional sentences where, *inter alia*, the offence carries a maximum term of imprisonment of 14 years or life or 10 years where the offence involves drug import, export, trafficking or production.[7]

e. Ms. Sharma's sentencing judge could not impose a conditional sentence. She was sentenced to 18 months in jail.[8]

PART II – QUESTIONS IN ISSUE

5. NWAC's intervention deals with the following issues:
    a. Do *Criminal Code* ss. 742.1(c) and 742.1(e)(ii) infringe Indigenous People's right to equality as guaranteed by s. 15(1) of the *Canadian Charter of Rights and Freedoms*?
        i. Do the impugned provisions create a distinction on the basis of race?
        ii. Do the impugned provisions exacerbate or perpetuate Indigenous People's systemic discrimination and historical disadvantage?
6. Yes. The impugned provisions infringe s. 15(1).
    a. The impugned provisions create a race-based distinction because they create disparate impacts for Indigenous People in ways they do not impact non-Indigenous people. The impugned provisions subvert the *Gladue* principles, denying Indigenous People like Ms. Sharma a sentence that reflects their unique and systemic backgrounds.

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[4] *Ibid*.
[5] Bill C-41, *An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*, 1st Sess, 35th Parl (assented to 13 July 1995); *R v Ipeelee*, 2012 SCC 13 [*Ipeelee*] at para 56.
[6] *R v Gladue*, [1999] 1 SCR 688 at para 64, 171 DLR (4th) 385 [*Gladue*].
[7] Bill C-10, *Safe Streets and Communities Act,* 1st Sess, 41st Parl, 2012, cl 34 (assented to 13 March 2012).
[8] *Sharma, supra* note 1 at paras 26 and 127.

b. The impugned provisions exacerbate and perpetuate Indigenous People's systemic discrimination and historical disadvantage by contributing to intergenerational family separation cycles and Indigenous overincarceration, undermining reconciliation.

PART III- STATEMENT OF ARGUMENT

A. The impugned provisions create a race-based distinction.

7. NWAC agrees with the majority's findings that the impugned provisions create a distinction on the basis of race because they deprive courts of a legislated means tailored to redress Indigenous overincarceration, thereby undermining the *Gladue* principles and reconciliation.[9]
8. The s. 15(1) analysis first asks whether the impugned provisions, on their face or in their impact, create a distinction based on an enumerated or analogous ground.[10]
9. The Appellant's floodgates argument suggests the impugned provisions do not create a race-based distinction and that the majority's ruling constitutionalizes most criminal law provisions. This argument substitutes the majority's distinction analysis with a *post hoc* argument presuming the impugned provisions disproportionately impact Indigenous People because of "social circumstances of disadvantage".[11] This argument would inoculate many, if not most, Indigenous *Charter* challenges to criminal law provisions because the logic, if followed, prevents Indigenous claimants from establishing the first part of the s. 15(1) test. This would block Indigenous claimants from bringing sentencing equality claims because the government can point to "social circumstances of disadvantage" as contributing to disproportionate Indigenous overincarceration rates.
10. The impugned provisions affect Indigenous People differently than non-Indigenous people. The conditional sentence test set out in *Proulx*[12] assesses whether conditional sentences are appropriate when applying s. 718.2(e) for Indigenous People like Ms. Sharma. Removing the conditional sentence option for some offences impedes a judge's ability to craft a proportionate sentence for Indigenous people.

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[9] *Sharma, supra* note 1 at para 130.
[10] *Fraser v Canada*, 2020 SCC 28 [*Fraser*] at para 50.
[11] Factum of the Appellant at paras 37, 46 and 62.
[12] *R v Proulx*, 2000 SCC 5 at para 77.

11. The impugned provisions create a distinction that only impacts Indigenous People who would otherwise benefit from a sentence that meaningfully reflects *Gladue* principles.

B. The impugned provisions exacerbate and perpetuate systemic discrimination and historic disadvantage.

12. The impugned provisions perpetuate intergenerational Indigenous family separation cycles, driving systemic overincarceration and undermining reconciliation. This perpetuation of historical disadvantage is discrimination.[13] The impugned provisions impede Indigenous People's right to develop and maintain culturally appropriate, community-based rehabilitation customs and traditions.

i. *The impugned provisions perpetuate intergenerational Indigenous family separation cycles.*

13. Incarcerating Indigenous women who would otherwise receive conditional sentences perpetuates intergenerational colonial harms. The majority, citing intervener submissions, characterized Indigenous children's overrepresentation in foster care and Indigenous overincarceration as the "child-welfare-to-prison-pipeline."[14] The National Inquiry into Missing and Murdered Indigenous Women and Girls (the "National Inquiry") notes Canada's prisons house many residential school survivors and family members of survivors.[15] Overincarcerating Indigenous women facilitates further intergenerational trauma and family separation, leading more Indigenous children to the foster care system.[16]

14. The Office of the Correctional Investigator (OCI) of Canada's most recent data reveals pressure in the child-welfare-to-prison-pipeline is building. Indigenous women's federal incarceration rates are nearing 50 per cent, despite their representing only four per cent of the population.[17] Most incarcerated women are mothers.[18]

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[13] *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 [*Taypotat*] at para 20.
[14] *Sharma, supra* note 1 at para 96.
[15] Canada, *Reclaiming Power and Place: Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls,* vol 1a (Ottawa: 2019) [NIMMIWG], at 637.
[16] *Ibid.*
[17] Office of the Correctional Investigator, "Proportion of Indigenous Women in Federal Custody Nears 50%: Correctional Investigator Issues Statement" (17 December 2021), online: *Press Release* < www.oci-bec.gc.ca/cnt/comm/press/press20211217-eng.aspx>.
[18] Office of the Correctional Investigator, "Annual Report, 2020-2021" (Ottawa: OIC, 10 February 2022), at 42.

15. The *Charter* aims to advance substantive, not formal equality.[19] Substantive equality requires case-by-case consideration seeking to place the complainant in a position equal to other Canadians.[20] In the criminal sentencing context, Parliament recognized courts need to sentence Indigenous People differently from others to account for their unique systemic and background factors.[21]
16. The Truth and Reconciliation Commission (the "TRC") determined *Gladue* principles will fail to redress overincarceration if realistic alternatives to imprisonment are not available to sentencing judges.[22] The National Inquiry found the "prison as punishment" notion operates contrary to *Gladue* principles, concluding community-based resources for Indigenous women can better redress overincarceration.[23]
17. The impugned provisions discriminate against Indigenous People because they perpetuate and exacerbate disadvantage. They remove sentencing options that give meaning to the *Gladue* principles, depriving Indigenous People of proportionate sentences. This, in turn, contributes to Indigenous women's overincarceration, perpetuating intergenerational family separation patterns and contributing to Indigenous children's overrepresentation in foster care before "graduating" into the criminal justice system themselves.[24]

ii. The impugned provisions undermine reconciliation.

18. Indigenous justice systems, including sentencing and healing practices, are a precondition to reconciliation. A central TRC conclusion holds reconciliation requires governments recognize Indigenous People's right to self-determination, which encompasses the right to develop their own justice systems.[25] The impugned provisions impede this right, perpetuating harm.
19. The impugned provisions limit Indigenous rehabilitative practices. The *Constitution Act, 1982,* s. 35, enshrines the framework for reconciling Indigenous practices and traditions with the assertion of Crown sovereignty.[26] Though Ms. Sharma did not argue she should serve a

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[19] *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 165, 56 DLR (4th) 1.
[20] *Taypotat*, *supra* note 13 at para 19.
[21] *Ewert v Canada*, 2018 SCC 30 at para 58 citing *Gladue, supra* note 6 at para 33.
[22] Canada, Truth and Reconciliation Commission, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Ottawa: TRC, 2015) [TRC] at 173.
[23] NIMMIWG *supra* note 15 at 635 and 643.
[24] *Ibid* at 637.
[25] TRC, *supra* note 22 at 181.
[26] *R v Van der Peet,* [1996] 2 SCR 507 at para 31, 137 DLR (4th) 289 [*Van der Peet*].

conditional sentence to engage her aboriginal right to Anishinaabe legal traditions, the impugned provisions limit Indigenous People's access to rehabilitative customs and traditions central to their distinct identities. Where an Indigenous group establishes an activity is part of a practice, custom or tradition integral to their distinctive culture from before contact with Europeans (or before effective control by Europeans for Métis[27]) that activity will likely come within the scope of s. 35.[28]

20. Canada's recent commitment to align its laws with the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) lends significant weight to reconciliation's active role in criminal justice today. UNDRIP recognizes Indigenous People's right to promote, develop and maintain their distinctive customs, traditions, practices and judicial systems.[29] Although UNDRIP is a non-binding instrument, Parliament intends to treat the treaty as a "universal human rights instrument with application in Canadian law."[30]
21. This Court noted in *R v Côté*[31] and again recently in *R v Desautel*[32] that "perpetuating the historic injustice suffered by aboriginal peoples at the hands of colonizers" undermines s. 35's ongoing reconciliation purposes.[33]
22. Both the National Inquiry and the TRC raised Indigenous People's inability to access culturally appropriate rehabilitation resources in Canada's jails as a serious concern.[34] Indigenous justice systems based on Indigenous laws and healing practices address Indigenous overincarceration.[35] The National Inquiry found Canada's corrections and justice systems are "deeply rooted in colonialism", forcing Indigenous women to rely on a justice system that is not reflective of their cultures.[36]
23. Indigenous women are overincarcerated, away from their families and communities, at steadily increasing rates. The impugned provisions undermine the *Gladue* principles, thereby incarcerating Indigenous women for whom conditional sentences would otherwise be

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[27] *R v Powley*, 2003 SCC 43 at para 18.
[28] *Van der Peet, supra* note 25 at para 80.
[29] Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples,* 2nd Sess, 43rd Parl, cl 4(b) (assented to 21 June 2021) arts 34-35.
[30] *Ibid* at s 4(1).
[31] *R v Côté*, [1996] 3 SCR 139 at para 53, 138 DLR (4th) 385.
[32] *R v Desautel*, 2021 SCC 17 at para 33.
[33] *Ibid* at para 22.
[34] NIMMIWG, *supra* note 15 at 645 and TRC, *supra* at 170-1.
[35] *Ibid* TRC at 164.
[36] NIMMIWG, *supra* at 636 and see *Ewert, supra* note 21.

appropriate. Indigenous claimants may argue mandatory minimum sentences impede their right to undertake culturally appropriate, community-based rehabilitation activities that are part of the customs and traditions integral to their distinct identities.

24. Reconciliation is not a final legal destination; it is a process.[37] It is not aspirational rhetoric;[38] It is a commitment[39] Canada firmly and consistently repeats.[40] Reconciliation is not limited to land rights cases; it is a necessary component of criminal law's development. The process toward positive change need not be so challenging as to create a "paralyzing inertia" in attempting to satisfy each party involved, nor should reconciliation progress be abandoned when identifying the next right step is "too difficult."[41]
25. The majority's analysis is an objective, measured and purposeful approach that respects both the contours of Parliamentary sovereignty and Indigenous People's constitutionally protected equality rights.

PART IV – COSTS AND ORDERS

26. NWAC does not seek costs and asks that no costs be awarded against it. NWAC takes no position on the disposition of this appeal.

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

Adam Bond

Laura Ezeuka

Counsels for the Intervener, Native Women's Association of Canada

[37] *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73 at para 32.
[38] *R v Bloom*, 2016 ONCJ 8 at para 12.
[39] *Fontaine v Canada (Attorney General),* 2016 ONCA 241 at para 3.
[40] *Daniels v Canada (Indian Affairs and Northern Development),* 2016 SCC 12 at paras 34, 37.
[41] *R v Turtle*, 2020 ONCJ 429 at para 124.

PART V – TABLE OF AUTHORITIES

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