SCC File No. 39346

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

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant

- and -

CHEYENNE SHARMA

Respondent

- and -

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Part I. Overview and Position on Questions on Appeal

1. This case asks the Court to decide whether Parliament, having enacted a provision designed in part to remedy the notorious problem of Indigenous over-incarceration, is entitled to restrict access to that provision without replacement and without constitutional consequence. The parties agree that Indigenous persons are massively and unacceptably over-represented in Canada's prisons and jails. Under s. 15(1), they part company on whether restricting access to the conditional sentence regime (1) has an adverse impact on Indigenous persons and (2) has the effect of reinforcing, perpetuating, or exacerbating their acknowledged disadvantage.

2. Our submissions aim to assist the Court in resolving this second issue. While the parties are understandably focused on the problematic *quantity* of Indigenous over-incarceration, the QPLC proposes to complete the picture by highlighting the disproportionately harsh *quality* of that confinement. Indigenous prisoners—and in particular, Indigenous women prisoners—are not treated equally in Canada's prisons and jails. Our law of sentencing permits judges to account for this disparate impact in crafting a fit sentence. We say that our law also requires judges to consider this disparate impact in evaluating the constitutionality of a sentencing provision.

3. Though the QPLC takes no position on the outcome of this appeal, our submissions should be understood as supporting Fay Faraday's contention that "the right to equality means the right to be free from institutionalized and normalized conditions of oppression."[1] To the extent that this Court finds that the impugned provisions maintain or deepen the grooves of discrimination along which Indigenous disadvantage already travels, it should have no difficulty finding a corresponding breach of Cheyenne Sharma's right to be equal before and under the law.

[1] "The Elephant in the Room and the Straw Men on Fire" (2021) 30:2 Const F 15 at 26.

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Part II. Statement of Argument

A. Systemic inequities in the conditions of Indigenous imprisonment in Canada

4. The over-representation of Indigenous persons in Canada's prisons and jails is as notorious as it is persistent. But incarceration rates alone fail to tell the whole story. Not only are Indigenous persons incarcerated at much higher rates than the non-Indigenous population; they are also likely to experience significantly more punitive conditions of confinement. As this Court recognized in *Ewert*, "the gap between Indigenous and non-Indigenous offenders has continued to widen on nearly every indicator of correctional performance."[2] Relative to non-Indigenous offenders, "Indigenous offenders are more likely to receive higher security classifications, to spend more time in segregation, to serve more of their sentence behind bars, to be under-represented in community supervision populations, and to return to prison on revocation of parole."[3] Indigenous prisoners are "vastly over-represented" in use of force incidents, accounting for 39% of all individuals involved in uses of force by correctional officers while comprising 28% of the prison population.[4] Correctional officers were more likely to use force against an Indigenous prisoner regardless of their age, risk, security level, gender, or sentence length.[5] Indigenous prisoners are more likely to be separated from the general population and isolated in segregation or sent to a Structured

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[2] *Ewert v Canada (Attorney General)*, 2018 SCC 30 at para 60, citing Canada, Office of the Correctional Investigator, *Spirit Matters: Aboriginal People and the Corrections and Conditional Release Act—Final Report* (Ottawa: OCI, 22 October 2012), Canada, Office of the Correctional Investigator, *Annual Report of the Office of the Correctional Investigator 2015-2016* (Ottawa: OCI, 2016), and Canada, Office of the Auditor General, *2016 Fall Reports of the Auditor General of Canada: Report 3—Preparing Indigenous Offenders for Release* (Ottawa: OAG, 2016).
[3] *Ibid*.
[4] Canada, Office of the Correctional Investigator, *Annual Report 2020-2021* (Ottawa: Office of the Correctional Investigator, 2021) ("OCI 2020-21 Annual Report") at 5.
[5] *Ibid* at 20.

Intervention Unit.[6] During the pandemic, Indigenous prisoners were significantly more likely to be infected with COVID-19.[7]

5. For Indigenous women like Ms. Sharma, harsh conditions of confinement serve to compound intersecting grounds of disadvantage. Ms. Sharma is not only Indigenous. She is an Indigenous woman. As Debra Parkes writes, "[w]omen have long been 'correctional afterthoughts' given their small numbers relative to men."[8] As early as the 1970s, government bodies have been raising concerns about incarcerated women's inequitable access to recreation, programs, basic facilities, and space.[9] Women are more likely than men to be confined in higher security classifications, placed in an institution far from their home communities, deprived of access to rehabilitative programming, and denied community-based programming and involvement.[10]

6. Women are also more likely than men to be the primary caregivers of children. Imprisonment increases the risk that the state will apprehend the offender's child and a resulting "permanent loss of parental rights"—among the most serious collateral consequences an offender can face.[11] For Indigenous women, the apprehension of children by the Canadian state as a result of over-incarceration echoes the genocidal effects, if not the intent, of the residential school system and the Sixties Scoop.[12] Thus in *Inglis*, the race-neutral cancellation of the Mother Baby Program was found to have a "disproportionate impact on [Indigenous] women who are over-represented

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[6] Anthony N Doob and Jane B Sprott, "Understanding the Operation of Correctional Service Canada's Structured Intervention Units: Some Preliminary Findings" (26 October 2020) at 10-11; see also *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2019 BCCA 228 at paras 116-120.

[7] OCI 2020-2021 Annual Report, *supra* note 4 at iii, citing Canada, Office of the Correctional Investigator, *Third COVID-19 Status Update* (Ottawa: Office of the Correctional Investigator, 2021).

[8] Debra Parkes, "Women in Prison: Liberty, Equality, and Thinking Outside the Bars" (2016) 12 JL & Equal 127 ("Parkes 2016") at 129. See also Lisa Kerr, "How Sentencing Reform Movements Affect Women" in David Cole and Julian Roberts, eds, *Sentencing in Canada: Essays in Law, Policy, and Practice* (Toronto: Irwin Law, 2020) 250.

[9] Parkes 2016, *ibid* at 129.

[10] *Ibid*.

[11] Lisa Kerr, "How Sentencing Reform Movements Affect Women" in David Cole and Julian Roberts, eds, *Sentencing in Canada: Essays in Law, Policy, and Practice* (Toronto: Irwin Law, 2020) 250 at 254, citing *Inglis v British Columbia (Minister of Safety)*, 2013 BCSC 2309 at 485.

[12] Parkes 2016, *supra* note 8 at 142, citing *Inglis*, *ibid* at paras 551-52.

in the prison population and whose status as mothers is burdened by the history of colonialism, displacement, and residential schooling."[13]

7. Indigenous women's imprisonment has been the subject of a series of reports and inquiries into systemic discrimination in recent years. A 2018 report of the House of Commons Standing Committee on the Status of Women found that Indigenous women prisoners were massively overrepresented in maximum security classifications, resulting in "a negative effect on female inmates' living conditions and well-being, access to programming, and post-incarceration outcomes."[14] Ironically, the very factors that diminish moral culpability and are considered mitigating at the sentencing phase – addiction, lack of social supports, or a history of trauma, for example – are used *against* Indigenous women within corrections as they tend to produce worse scores on risk assessments, resulting in more restrictive conditions of confinement and lower rates of discretionary release.[15] The 2019 final report of the National Inquiry into Missing and Murdered Indigenous Women and Girls found that "compared with non-Indigenous women in federal custody, Indigenous women are over-represented in incidents of self-injury, segregation, use-of-force incidents, and maximum security."[16] In its 2020-21 annual report, the Office of the Correctional Investigator dedicated an entire section to the specific hardships faced by Indigenous women in federal prisons, warning that they are "over-represented in the places and circumstances with the greatest restrictions on liberty."[17]

8. Put simply, the problem of systemic inequality in Indigenous women's imprisonment is not limited to their significant numerical over-representation. Compared to offenders convicted of identical offences, Indigenous women serve a greater portion of their sentence in prison, and that portion is more dangerous, more isolating, less rehabilitative, and less free.

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[13] *Inglis*, *ibid* at para 544 [summarizing the claimant's submissions; adopted at para 562].
[14] Canada, Parliament, House of Commons, Standing Committee on the Status of Women, *A Call to Action: Reconciliation with Indigenous Women in the Federal Justice and Correctional Systems*, 42nd Parl, 1st Sess, (June 2018) at 84-87.
[15] *Ibid*.
[16] National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report*, vol 1a (Ottawa: NIMMIWG, 2019) at 635.
[17] OCI 2020-2021 Annual Report, *supra*, note 4 at 42.

B. Accounting for systemic discrimination in sentencing: the proportionality principle

9. The sentencing provisions of the *Criminal Code* authorize sentencing judges to take unusually harsh conditions of imprisonment into account in crafting a fit sentence. Proportionality is the fundamental principle of sentencing and the *sine qua non* of a just sanction.[18] This is a highly individualized analysis. To the extent that the impact of imprisonment is greater on a particular offender, proportionality may require a reduction in sentence to ensure that the punishment fits the crime.[19] Thus, offenders with significant physical or mental disabilities,[20] offenders in law enforcement,[21] and transgender offenders[22] have all been recognized as classes of persons who, depending on the facts of the case, may be entitled to a reduction in sentence to recognize their significantly harsher experience of imprisonment. More recently, courts across the country have recognized the pains of pandemic imprisonment – reduced or eliminated programming and visitor access, increased risk of viral transmission, and round-the-clock "lockdowns" amounting to *de facto* solitary confinement – as a relevant collateral consequence that can justify sentence reductions even in very serious cases.[23]

10. Relying on the proportionality principle, sentencing judges have reduced sentences to reflect the harsher conditions of imprisonment the offender before them is likely to experience because of systemic discrimination. In *F(A)*, Justice Stach recognized that "a sentence of

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[18] *Criminal Code* s. 718.1; *R v Ipeelee*, 2012 SCC 13 at para 37.
[19] See *R v Suter*, 2018 SCC 34 at para 48. Benjamin L Berger calls this concept "individualized proportionality": see "Proportionality and the Experience of Punishment" in David Cole & Julian Roberts, eds, *Sentencing in Canada: Essays in Law, Police, and Practice* (Toronto: Irwin Law, 2020) 368.
[20] See EG *R v Salehi*, 2022 BCCA 1 at paras 66-71, *R v Nuttall*, 2001 ABCA 277 at paras 8-9, *R v R(A)* (1994), 88 CCC (3d) 184, 1994 CanLII 4524 (Man CA), and *R v Wallace*, (1973) 11 CCC (2d) 95, 1973 CanLII 1434 (Ont CA) at para 100.
[21] See EG *R v Theriault*, 2020 ONSC 6768 at para 78, aff'd 2021 ONCA 517, *R v Braile*, 2019 ABCA 477 at para 65, and *R v Fisher*, 2019 BCCA 33 at para 82.
[22] See EG *R v Klassen*, 2021 SKQB 22 at para 54, *R v Whaley*, 2018 ABPC 63 at para 53, and *R v Forster*, 2012 BCSC 1682 at paras 34 and 56.
[23] Lisa Kerr and Kristy-Anne Dubé, "The Pains of Imprisonment in a Pandemic" (2021) 46:2 Queen's LJ 327; Chris Rudnicki, "Confronting the Experience of Imprisonment in Sentencing: Lessons from the COVID-19 Jurisprudence" (2021) 99:3 Can Bar Rev 469; Terry Skolnik, "Criminal Law During (and After) COVID-19" (2020) 43:3 Man LJ 145.

imprisonment is for most aboriginal [sic] peoples far more difficult than a similar sentence for many other non-native Canadians."[24] For F(A) in particular, incarceration had to be understood together with the fact that he "seldom ventured" from his community, that he spoke Oji-Cree "and almost no English", and that imprisonment would "produce a loneliness that is far greater than any sense of loneliness he may have experienced in isolation in the wilderness."[25] The Court of Appeal for Ontario affirmed Justice Stach's "careful, thorough and sensitive reasons for sentence" and in particular his "opinion that a penitentiary sentence would be far more difficult for [F(A)] than a similar sentence for the general population."[26] In *Batisse*, the same court considered the effect that the location of imprisonment would have on the Indigenous woman offender, observing that a penitentiary sentence "would diminish her prospect of rehabilitation by removing her from her community, her children, and her support network, as the closest federal institution for women is … 750 kilometres from the Matachewan community where her sister and children are located."[27] More recently in *Marfo*, in the context of sentencing a Black offender, Justice Ducharme held that "(i)f a sentence is more onerous for a Black man because of systemic anti-Black racism in the correctional system, then any sentence I impose must be shortened to recognize this fact."[28]

11. To borrow Justice Ducharme's language, conditional sentences are uniquely suited to "recognizing the fact" of systemic discrimination in the conditions of confinement while achieving objectives of denunciation and deterrence. As this Court held in *Proulx*, a conditional sentence is a sentence of jail.[29] It permits judges to impose a sentence that denounces and deters while still honouring the remedial direction of s. 718.2(e), a provision "which contemplates the greater use of conditional sentences and other alternatives to incarceration in cases of [Indigenous] offenders."[30] A conditional sentence order permits a judge to tailor its terms to the particular needs of the offender before them and to supervise the offender during the life of the sentence. Where there has been non-compliance, the conditional sentence permits the judge to respond in a manner

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[24] *R v F (A)* (1994) 35 CR (4th) 62, 1994 CarswellOnt 116, (Ont CJ) at para 22.
[25] *Ibid* at paras 22 and 26.
[26] *R v F (A)* (1997) 101 OAC 146, 1997 CanLII 14505 (Ont CA) at para 17.
[27] *R v Batisse*, 2009 ONCA 114 at para 37.
[28] *R v Marfo*, 2020 ONSC 5663 at para 52.
[29] *R v Proulx*, 2000 SCC 5 at para 41 and 67.
[30] *Ibid* at para 92.

they deem proportionate – changing the optional conditions to render the sentence more punitive, ordering the offender to serve some portion of the unexpired sentence in custody, or even terminating the order and directing that the offender spend the entire balance in "real jail".[31]

12. By contrast, once a sentencing judge has imposed a term of imprisonment, they become *functus officio* and have no power to change it. Conditional sentences provide judges with a vital tool to ensure an Indigenous woman does not become disproportionate as a result of their disparately harsh experience of incarceration.

C. Systemic inequality in the experience of imprisonment ought to be considered under the second branch of the *Taypotat* test

13. Just as the conditions of confinement are relevant in crafting a fit sentence, so too are they relevant in considering the constitutionality of a sentencing provision. In *Smith*, an early s. 12 case, Justice Lamer (as he then was) held that it is not simply the length of a given sentence that engages constitutional scrutiny, but also "the effect of the sentence actually imposed": "twenty years for a first offence against property would be grossly disproportionate, but so would three months of imprisonment if the prison authorities decide it should be served in solitary confinement."[32]

14. Though *Smith* was a s. 12 case, where harsh conditions of confinement have been shown to flow from systemic discrimination, they have attracted s. 15(1) scrutiny. In *Inglis*, Justice Ross of the British Columbia Supreme Court considered a constitutional challenge to the cancellation of the Mother Baby Program, which permitted women prisoners who gave birth during their sentence to remain with their babies.[33] Rejecting the government's argument that s. 15(1) could not prohibit it from repealing remedial programs—a species of which is advanced by the appellant in this case—Justice Ross concluded that the disparate impact of the program's cancellation infringed the claimants' equality rights. Importantly, she did not stop at a finding that the repeal of the Mother Baby Program infringed the rights of women. She held that Indigenous mothers and

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[31] *Criminal Code* s. 742.6(9).
[32] *R v Smith*, [1987] 1 SCR 1045 at 1073; see also *R v Morrissey*, 2000 SCC 39 at para 41.
[33] *Inglis*, *supra* note 11.

their infants are of particular concern given their over-representation in the incarcerated population and "the history of dislocation of Aboriginal families caused by state action."[34]

15. Justice Ross's thoughtful and extensive judgment anticipated much of this Court's subsequent equality jurisprudence. The unintended consequences of the criminal justice system on vulnerable groups are of central concern to s. 15's commitment to substantive over formal equality. Our courts properly intervene where government action has a disproportionate impact on a vulnerable group suffering from existing disadvantage.[35] Substantive equality demands a focus on "the concrete, material impacts the challenged law has on the claimant and the protected group or groups to which they belong in the context of their actual circumstances, including historical and present-day social, political, and legal disadvantage."[36] Rather than a formalistic and decontextualized approach, judges applying the s. 15 test should attend to "the concrete impact that laws have on individuals and groups, and the manner in which individuals' choices are embedded in their social and economic surroundings."[37] This includes a recognition that "intersecting group membership tends to amplify discriminatory effects or can create unique discriminatory effects not visited upon any group viewed in isolation."[38]

16. In the QPLC's submission, the call in the s. 15 context to attend to the actual, material impact of the law on the lived experience of marginalized groups echoes the proportionality principle's demand that sentencing judges attend to the actual, material impact of a proposed sanction on the lived experience of the offender before them. As Justice Stach did in *F(A)* and Justice Ducharme did in *Marfo*, sentencing judges have historically been entitled to take this disproportionately harsh experience of imprisonment into consideration when fashioning a fit sentence. The *Safe Streets and Communities Act* had the effect of depriving sentencing judges of an important mechanism for deterring and denouncing Indigenous persons convicted of serious offences while protecting them from disproportionately punitive custodial environments. If this Court is prepared to find that this had a disproportionate impact on Indigenous prisoners—and in

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[34] *Ibid* at para 612.
[35] *Fraser v Canada (Attorney General)*, 2020 SCC 28 at para 77.
[36] *Ontario (Attorney General) v G*, 2020 SCC 38 at paras 43.
[37] *Ibid* at para 44.
[38] *Ibid* at para 47.

particular, Indigenous women prisoners—it should have no trouble finding that it "perpetuates, reinforces, or exacerbates disadvantage" on the second branch of the *Taypotat* test.[39]

Part III. Submissions on Costs

17. The QPLC seeks no costs and asks that no costs be awarded against it.

Part IV. Nature of the Order Requested

18. The QPLC takes no position on the order to be made by this Court.

All of which is respectfully submitted this 2nd day of March, 2022.

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Counsel for the Intervener

Theresa Donkor
Counsel for the Intervener

[39] *Fraser*, *supra* note 35 at para 107.

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Part V. Table of Authorities

INTERVENER'S AUTHORITIES	CITED AT PARAGRAPH NO.
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LEGISLATION	SECTION(S)
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Safe Streets and Communities Act, SC 2012, c 1 *Loi sur la sécurité des rues et des communautés*, LC 2012, c 1	