SCC No. 39346

IN THE SUPREME COURT OF CANADA
(On Appeal from the Ontario Court of Appeal)

B E T W E E N :

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Appellant

- and -

CHEYENNE SHARMA

Respondent

- and -

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(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. While the Canadian Association of Elizabeth Fry Societies ("CAEFS") aspires to a future without prisons, mitigating the harms of criminalization and incarceration under the current system is, in CAEFS' submission, a constitutional imperative. Yet in the more than two decades since this Court's decision in *R. v. Gladue,* in which the now well-established framework for sentencing Indigenous people was articulated, the promise of a fairer more equitable justice system has not only not been realized but is further out of reach than ever with the crisis of overrepresentation and alienation of Indigenous people worsening.

2. In this appeal, this Court is asked to consider the constitutionality of statutory provisions limiting the availability of conditional sentences of imprisonment for certain offences. The issue arises in the context of an Indigenous woman whose tragic personal circumstances are sadly all too common among incarcerated women and gender diverse people.

3. CAEFS intervenes in this appeal to advance two submissions. First, CAEFS submits that courts should avoid a strict analytical distinction between ss. 7 and 15 of the *Charter* when considering limits on life, liberty and security of the person in contexts imbued with discrimination. The interaction of Indigenous people with the criminal justice system is undeniably one such context. The promise of *Gladue* and its progeny will be more fully realized where s. 7 and the principles of fundamental justice are animated by the principle of substantive equality, even in cases where an independent breach of s. 15 of the *Charter* may not be established or even pleaded.

4. Second, CAEFS argues that this Court should reaffirm the principle that when Parliament rolls back or repeals remedial legislation, a *Charter* breach may result without "constitutionalizing" the subject legislation. This is true whether or not Parliament was constitutionally required to enact the particular statutory regime in issue. Parliament remains free to legislate within constitutional limits, but this may require the repealed or amended provisions to be replaced with alternative legislation to mitigate the discriminatory effects that would otherwise result.

5. CAEFS accepts the summary of facts as stated by the Appellant and takes no position on any disputed facts.

PART II – POSITION THE QUESTION IN ISSUE

6. CAEFS takes no position on the outcome of this appeal. For the purposes of its intervention, CAEFS simply seeks to assist the Court by offering its views on how to refine its approach to the intersection of ss. 7 and 15 of the *Charter* in order to enhance access to justice and ensure that the vindication of *Charter*-protected rights remains in reach for Indigenous women and gender diverse people who interact with the criminal justice system.

PART III – STATEMENT OF ARGUMENT

(i) This Court should not maintain a strict analytical separation between ss. 7 and 15 of the *Charter* in the context of penal legislation

7. This Honourable Court has long recognized that the *Charter* protects a "complex of interacting values."[1] Each enunciated right informs the proper interpretation of the others depending on the context of a given case and the various rights that are in issue.[2] Yet, at least when considering the constitutionality of penal legislation, courts have continued to deal with challenges pursuant to s. 7 and s. 15 as discrete inquiries. CAEFS submits that the maintenance of analytical silos around ss. 7 and 15 is not appropriate in the context of Indigenous people convicted of crimes. Separating the s. 7 and s. 15 analysis creates barriers to access to justice. Moreover, it prevents the courts from fully understanding and addressing the systemic oppression of Indigenous women in Canada.

8. This Court has repeatedly acknowledged that Indigenous people are grossly overrepresented in Canadian jails due to widespread racism and systemic discrimination both

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[1] *R. v. Lyons*, [1987] 2 S.C.R. 309 at p. 326.
[2] See e.g. *Lyons*, *supra*; *R. v. Tran*, [1994] 2 S.C.R. 951 and *Michaud v. Quebec (Attorney General)*, [1996] 3 S.C.R. 3.

within the justice system and in Canadian society more broadly.[3] To its credit, this Court has not shied away from finding that governments have been complicit in the marginalization of Indigenous peoples. The Court has thus instructed sentencing courts to take judicial notice of how the history of colonialism, displacement and residential schools has led to worse outcomes on a number of different social metrics, including the higher levels of incarceration for Indigenous peoples.[4]

9. In the case of Indigenous women such as the Respondent, intersecting marginalizations, including gender, Indigeneity, family status and economic precarity give rise to a complex set of challenges which contribute to their increased likelihood of criminalization and incarceration.

10. These challenges are so well understood that, in CAEFS's submission, the persistent absence of substantive equality for Indigenous women who become involved with the criminal justice system should inform the Court's s. 7 analysis without requiring any engagement with the framework that would otherwise govern a discrimination inquiry under s. 15.

11. CAEFS disagrees with the Appellant's submission that "it does not automatically follow … that because of this pre-existing social context, the restrictions on the availability of conditional sentences must necessarily create an adverse effect on the basis of race." We have come far enough in our understanding of governments' multi-generational complicity in the marginalization of Indigenous people that CAEFS submits there should be a presumption that any legislative measure which risks exacerbating their relative disadvantage ought to be considered in the Court's analysis pursuant to s. 7 of the *Charter,* given the additional implication of the right to life, liberty and security of the person.

(a) Establishing Discrimination for the Purposes of s. 7 of the *Charter*

12. CAEFS recognizes that equality has not been recognized as a principle of fundamental justice per se. However, CAEFS proposes that when assessing the constitutionality of a penal

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[3] *R. v. Williams*, [1998] 1 S.C.R. 1128; *R. v. Gladue*, [1999] 1 S.C.R. 688; *R. v. Ipeelee*, [2012] 1 S.C.R. 433 and *Ewert v. Canada*, [2018] 2 S.C.R. 165.

[4] *Ipeelee*, *supra*, at para. 60

provision and whether it is overbroad, arbitrary or grossly disproportionate courts should expressly consider whether the impugned provision has the effect of reinforcing, perpetuating or exacerbating the historical disadvantage of Indigenous peoples, particularly when it comes to overincarceration. This approach should be taken whether or not the claimant has directly established that the provision creates a distinction based on race or other intersecting enumerated or analogous grounds.

13. This proposed approach recognizes the dual harms associated with discrimination and the loss of liberty, both of which are experienced with unacceptable frequency by Indigenous women. While in a conventional s. 15 analysis the emphasis is understandably on discriminatory *distinctions*, CAEFS submits that, at least in the context of penal legislation, the requirement to establish a distinction based on race is unduly onerous given the repeated pronouncements of this Court and enumerable lower courts, tribunals and Commissions regarding their overincarceration.

14. Within traditional s. 15 analyses, claimants are not required to establish that an impugned law is responsible for creating the social or physical barriers which has made the law disadvantageous for the claimant group.[5] CAEFS submits that this approach should be adopted in the s. 7 context as well. CAEFS also submits that the requirement under *Fraser* that claimants establish a distinction based on an enumerated ground be eliminated or at least relaxed in s. 7 claims such as the one in issue in this appeal.

15. In the Court below, Feldman J.A. did find at the first stage of the *Taypotat*[6] analysis that the effect of the *Safe Streets and Communities Act* amendments resulting in ss. 742.1(c) and 742.1(e)(ii) was to create a distinction based on race.[7] CAEFS agrees with that analysis, particularly given how the impugned provisions deprive Indigenous people convicted of crimes of the benefit of the *Gladue* framework. However, in the event that this Court finds that the court below erred in its approach to finding a distinction, as the Appellant suggests, CAEFS submits that the removal of an alternative to incarceration – one which was specifically crafted to alleviate the overincarceration of Indigenous people – is discriminatory for the purposes of assessing whether

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[5] *Fraser v. Canada*, 2020 SCC 28 at para. 71.
[6] *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30 at para. 19.
[7] *R. v. Sharma*, 2020 ONCA 478 at para. 70.

the impairment of the right to liberty pursuant to s. 7 accords with the principles of fundamental justice.

16. Similarly, the requirements of stage two of the *Taypotat* test should be relaxed when linking s. 7 to the systemic discrimination experienced by Indigenous people. Here again, the fact that the Respondent was deprived of a conditional sentence, which the trial judge held would otherwise have been a fit sentence, should be enough to establish the discriminatory effect of ss. 742.1(c) and 742.1(e)(ii). If the crisis of overincarceration is going to be appropriately addressed, trial judges should be vested with as much discretion as possible to ensure that convicted people are not deprived of non-carceral sentences which are otherwise fit.

17. While it may be true, as the Appellant submits, that the proportion of Indigenous inmates in provincial/territorial custody remained relatively stable after the impugned provisions were enacted, it would be a gross oversimplification to conclude on that basis that the provisions were not discriminatory in their effects. There could be other explanations, including discretion exercised by police and prosecutors in charging and plea bargaining in order to avoid the discriminatory effects of ss. 742.1(c) and 742.1(e)(ii) as applied to Indigenous people. It is may be impossible to know because those decisions are not made transparently and are not subject to judicial review short of abuse of process.[8] The public interest is better served by vesting discretion in sentencing judges whose decisions are rendered publicly with a requirement to give reasons, and are subject to appellate review. The effects of the impugned provisions on rates of incarceration of Indigenous people may not be readily capable of objective quantification. There is no defensible reason to impose such an onerous evidentiary burden on a class of claimants whose discriminatory treatment by the justice system is so notorious.

18. In conclusion, CAEFS proposes that the fact that the overincarceration of Indigenous women and gender diverse people has been caused in significant part by the actions of governments, including colonialism, displacement and residential schools, should be enough to underpin a claim that an alleged breach of s. 7 arises in a discriminatory context, if the impugned

[8] *R. v. Anderson*, 2014 SCC 41 at para. 1.

legislation would remove a non-custodial disposition from the sentencing judge's menu of sentencing options. That discriminatory context in turn supports a modified approach to s. 7.

(b) The Modified Approach to the Principles of Fundamental Justice When Discrimination has been Established for the Purposes of s. 7

19. While CAEFS is ultimately of the view that there are more effective, life affirming and just forms of accountability than incarceration, it accepts that under existing frameworks, not all custodial sentences are constitutionally infirm pursuant to s. 7 of the *Charter*, even when a discriminatory context has been established.

20. The principles of fundamental justice raised by the Respondent in the court below were arbitrariness and overbreadth.[9] CAEFS submits that this Court should consider the implications of systemic discrimination under the gross disproportionality principle.

21. Section 7 prohibits Parliament from requiring sentencing judges to impose grossly disproportionate sentences.[10] While proportionality is a fundamental principle of sentencing, it is not a principle of fundamental justice for the purposes of s. 7 of the *Charter*. In *Safarzadeh-Markhali*, this Court held that Parliament has a broad discretion to modify and abrogate the statutory principles of sentencing set out in s. 718 of the *Criminal Code* subject only to s. 12 of the *Charter*.[11] CAEFS submits that s. 15 of the *Charter* imposes an additional limit on the exercise of Parliament's discretion.

22. This Court initially rejected the proposition that equality under the law was a principle of fundamental justice pursuant to s. 7 when its *Charter* jurisprudence was still in its infancy. LeDain J. held that because s. 15 had not come into immediate effect it would be contrary to Parliament's intention to anchor a s. 7 claim on a breach of the principle of equality at a time when s. 15 itself could not be invoked.[12] However, this rationale no longer holds water and, in any event, even if

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[9] *R. v.* Sharma, *supra,* at para. 139.
[10] *R. v. Safarzadeh-Markhali*, 2016 SCC 14 at para. 71 and *R. v. Lloyd*, 2016 SCC 130 at para. 47.
[11] *Safarzadeh-Markhali*, *supra*, at para. 71.
[12] *R. v. Cornell*, [1988] 1 S.C.R. 461 at para. 25.

equality is not a principle of fundamental justice it may still inform the gross disproportionality analysis under s. 7.

23. Under s. 12, the Court's inquiry is into whether the statutory range of sentences could give rise to a sentence that is grossly disproportionate to the seriousness of the offence and the circumstances in which it was committed.[13] Under s. 7, on the other hand, the question is "whether the law's purpose taken at face value, is connected to its effects and whether the negative effect is grossly disproportionate to the law's purpose."[14]

24. CAEFS submits that where a s. 7 claimant has established a discriminatory context exists, a lack of proportionality which might not otherwise rise to the level of gross disproportionality may meet that constitutional standard by virtue of law's effect of perpetuating the disadvantage of the claimant group. As Lamer J. held in *R. v. Smith:*

> The effect of the sentence is often a composite of many factors and is not limited to the quantum or duration of the sentence but includes its nature and the conditions under which it is applied. Sometimes by its length alone or by its very nature will the sentence be grossly disproportionate to the purpose sought. Sometimes it will be the result of a combination of factors which, when considered in isolation, would not in and of themselves amount to gross disproportionality.[15]

25. CAEFS submits that this same logic applies here. While limiting the availability of conditional sentences by excluding certain offences may not, without more, be grossly disproportionate to the purpose of maintaining the integrity of the justice system by ensuring that people who commit serious offences receive prison sentences on its face, when the law's effect contributes to rather than mitigates discrimination in the system, the resulting disproportionality rises to the level of gross disproportionality because it renders the punishment "abhorrent or intolerable"[16] and "so excessive as to outrage standards of decency."[17] This is especially true for Indigenous women and gender diverse people.

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[13] Lloyd, *supra*, at para. 23.
[14] *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para. 125.
[15] *R. v. Smith*, [1987] 1 S.C.R. 1045 at para. 57
[16] *R. v. Lloyd*, *supra,* at para. 24.
[17] *Smith*, *supra,* at para. 54.

(ii) Discrimination can result from the repeal of remedial legislation without "constitutionalizing" the impugned provisions

26. Given the well-established understanding of the experience of Indigenous peoples and their profound marginalization resulting from historic and ongoing systems of oppression, CAEFS submits that the *Charter* should not be interpreted in such a way that would tolerate measures which represent a step backwards in the name of deference to Parliament.

27. While CAEFS accepts the Appellant's submission that Parliament was not required to establish the conditional sentencing regime in s. 742.1 of the *Criminal Code* as a component of its response to addressing overincarceration, it does not follow that the scheme in place prior to the enactment of the conditional sentencing regime was constitutionally valid. Parliament was and is required to address the crisis of overincarceration as part of its constitutional obligation to prevent systemic discrimination against Indigenous peoples in criminal justice and other institutions.

28. Accepting the proposition that Parliament was not required to establish a conditional sentencing regime, should not be conflated with an acceptance that the legislative sentencing scheme which pre-dated the enactment of s. 742.1 was constitutional. Nor does it support the notion that limiting the availability of conditional sentences does not violate ss. 7 or 15 of the *Charter.*

29. Measures which contribute directly or indirectly to the overrepresentation of Indigenous women in the criminal justice system undermine the constitutional guarantee of substantive equality and fail to accord with the principles of fundamental justice. This should be reflected in how courts interpret the gross proportionality standard.

(iii) Conclusion

30. Penal legislation is not the only factor which explains the pernicious and persistent crisis of overincarceration of Indigenous peoples, including women and gender diverse people. However, it is no doubt a significant factor. Parliament has had the benefit of decades of deference

and numerous sharp pronouncements from this Court regarding its role in the oppression of Indigenous peoples and its duty to address its effects. Yet the crisis of overrepresentation and alienation of Indigenous people in the criminal justice system is worsening.

31. CAEFS submits that any approach to penal reform which could reasonably be anticipated to perpetuate or exacerbate the overincarceration of Indigenous people, particularly women and gender diverse people, is grossly disproportionate and fails to accord with the principles of fundamental justice. CAEFS expects that this will be seen as unduly limiting Parliament's powers. However, the vulnerability of Indigenous people to overincarceration is the result of generations of state sponsored oppression and marginalization of First Nations, Inuit and Métis people. This should be seen as a call to action to Parliament to address discrimination in the justice system, rather than a reason to tolerate it.

PART IV – SUBMISSIONS ON COSTS

32. CAEFS does not seek costs and respectfully requests that no costs be ordered against it.

PART V – NATURE OF THE ORDER REQUESTED

33. CAEFS takes no position on the outcome of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 4TH DAY OF MARCH, 2022.

Emilie Taman

Counsel to the Intervener, Canadian Association of Elizabeth Fry Societies

PART VI – TABLE OF AUTHORITIES