File No. 39935

BEFORE THE

SUPREME COURT OF CANADA

ON APPEAL FROM THE COURT OF APPEAL OF QUEBEC

BETWEEN:

HIS MAJESTY THE KING

APPELLANT
(Appellant)

-and-

ATTORNEY GENERAL OF QUEBEC

APPELLANT
(Appellant)

-and-

MAXIME BERTRAND MARCHAND

RESPONDENT
(Respondent)

-and-

DIRECTOR OF PUBLIC PROSECUTIONS
ATTORNEY GENERAL OF SASKATCHEWAN
ATTORNEY GENERAL OF ONTARIO
ATTORNEY GENERAL OF ALBERTA
ASSOCIATION QUÉBÉCOISE DES AVOCATS ET AVOCATES DE LA DÉFENSE
NUNAVIK CIVIL LIBERTIES ASSOCIATION

INTERVENERS

INTERVENER'S FACTUM
NUNAVIK CIVIL LIBERTIES ASSOCIATION

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

THÉMIS MULTIFACTUM INC.
4, rue Notre-Dame Est, bur. 100, Montréal (Québec) H2Y 1B8
Téléphone : 514 866-3565 Télécopieur : 514 866-4861
info@multifactum.com www.multifactum.com

File No. 39935

BEFORE THE

SUPREME COURT OF CANADA

Me Christine Renaud
Christine Renaud, avocate
19, Cours le Royer Ouest
Bureau 305
Montréal, Québec, H1Y 2W4

Tel.: 514 627-3072
Fax: 438 794-9505
crenaud.avocate@gmail.com

Me Louis-Nicholas Coupal-Schmidt
Coupal Chauvelot s.a.
460, rue Saint-Gabriel
Bureau 500
Montréal, Québec, H2Y 2Z9

Tel.: 514 531-9855
Fax: 514 221-4064
lncoupal@gmail.com

Counsel for the Intervener,
Nunavik Civil Liberties Association

Me Lina Thériault
Me Nicolas Abran
Directeur des poursuites criminelles et pénales
393, Saint-Jacques Ouest, bureau 600
Montréal (Québec) H2Y 1N9
Tel.: 514 873-6493, poste 53068
Fax: 514 873-6475
lina.theriault@dpcp.gouv.qc.ca
nicolas.abran@dpcp.gouv.qc.ca

Counsel for the appellant,
His Majesty the King

Me Isabelle Bouchard

Directeur des poursuites criminelles et pénales
17, rue Laurier, bureau 1.230
Gatineau (Québec) J8X 4C1
Tel: 819 776-8111, poste 60442
Fax: 819 772-3986
isabelle.bouchard@dpcp.gouv.qc.ca

Agent for the appellant,
His Majesty the King

THÉMIS MULTIFACTUM INC.
4, rue Notre-Dame Est, bur. 100, Montréal (Québec) H2Y 1B8
Téléphone : 514 866-3565 Télécopieur : 514 866-4861
info@multifactum.com www.multifactum.com

File No. 39935

BEFORE THE

SUPREME COURT OF CANADA

Me Pierre Rogué
Me Alexandre Duval
Bernard, Roy (Justice – Québec)
1, rue Notre-Dame Est
Bureau 8.00
Montréal (Québec) H2Y 1B6
Tel.: 514 393-2336, poste 51926
Fax: 514 873-7074
pierre.rogue@justice.gouv.qc.ca
alexandre.duval@justice.gouv.qc.ca

Counsel for the appellant,
Attorney General of Quebec

Me Pierre Landry

Noël et Associés, s.e.n.c.r.l.
225, Montée Paiement
2e étage
Gatineau (Québec) J8P 6M7
Tel.: 819 503-2178
Fax: 819 771-5397
p.landry@noelassocies.com

Agent for the appellant,
Attorney General of Quebec

Me Sylvain Leboeuf
Me Julie Dassylva
Ministère de la Justice du Québec – Direction du droit constitutionnel et autochtone
1200, route de l'Église
4e étage
Québec (Québec) G1V 4M1
Tel.: 418 643-1477
poste 21010 (Me Leboeuf)
poste 20776 (Me Dassylva)
Fax: 418 644-7030
sylvain.leboeuf@justice.gouv.qc.ca
julie.dassylva@justice.gouv.qc.ca

Counsel for the appellant,
Attorney General of Quebec

THÉMIS MULTIFACTUM INC.
4, rue Notre-Dame Est, bur. 100, Montréal (Québec) H2Y 1B8
Téléphone : 514 866-3565 Télécopieur : 514 866-4861
info@multifactum.com www.multifactum.com

File No. 39935

BEFORE THE

SUPREME COURT OF CANADA

Me Samuel Bérubé de Deus
Bureau d'aide juridique d'Alma
530, rue Collard Ouest
Bureau 201
Alma (Québec) G8B 1N3
Tel.: 418 668-7917
Fax: 418 668-0804
samuel.berube@ccjsaglac.ca

Counsel for the respondent,
Maxime Bertrand Marchand

Me Julie Laborde
Public Prosecution Service of Canada
200, boul. René-Lévesque Ouest, 9e étage
Montréal (Québec) H2Z 1X4
Tel.: 438 270-2140

julie.laborde@ppsc-sppc.gc.ca

Counsel for the intervener,
Director of Public Prosecutions

Me François Lacasse
Public Prosecution Service of Canada
160, Elgin Street, 12th Floor
Ottawa (Ontario) K1A 0H8
Tel.: 613 957-4770
Fax: 613 941-7865
francois.lacasse@ppsc-sppc.gc.ca

Agent for the intervener,
Director of Public Prosecutions

Me Jennifer A.Y. Trehearne
Attorney General of Ontario
Crown Law Office – Criminal
720 Bay Street, 10th Floor
Toronto (Ontario) M7A 2S9
Tel.: 416 212-0893
Fax: 416 326-4656
jennifer.trehearne@ontario.ca

Counsel for the intervener,
Attorney General of Ontario

THÉMIS MULTIFACTUM INC.
4, rue Notre-Dame Est, bur. 100, Montréal (Québec) H2Y 1B8
Téléphone : 514 866-3565 Télécopieur : 514 866-4861
info@multifactum.com www.multifactum.com

File No. 39935

BEFORE THE

SUPREME COURT OF CANADA

Me Grace Hession-David
Me Katherine Roy
Attorney General of Saskatchewan
300-1874 Scarth Street, 3rd Floor
Regina (Saskatchewan) S4P 4B3
Tel.: 306 787-5490
Fax: 306 787-8878
grace.hessiondavid2@gov.sk.ca
katherine.roy@gov.sk.ca

Counsel for the intervener,
Attorney General of Saskatchewan

Me D. Lynne Watt

Gowling WLG (Canada) LLP
160 Elgin Street, Suite 2600
Ottawa (Ontario) K1P 1C3
Tel.: 613 786-8695
Fax: 613 788-3509
lynne.watt@gowlingwlg.com

Agent for the intervener,
Attorney General of Saskatchewan

Me Andrew Barg
Justice and Sollicitor General
Appeals & Prosecution Policy Branch
300 Centrium Place, 332-6 Avenue SW
Calgary (Alberta) T2P 0B2
Tel.: 403 297-6005
Fax: 403 297-3453
andrew.barg@gov.ab.ca

Counsel for the intervener,
Attorney General of Alberta

Me D. Lynne Watt
Gowling WLG (Canada) LLP

160 Elgin Street, Suite 2600
Ottawa (Ontario) K1P 1C3
Tel.: 613 786-8695
Fax: 613 788-3509
lynne.watt@gowlingwlg.com

Agent for the intervener,
Attorney General of Alberta

Me Hugo Caissy
Caissy & Pelletier-Quirion, avocats (*ad hoc*)
49, boul. Saint-Benoît Ouest, bureau 5
Amqui (Québec) G5J 2B8
Tel.: 418 629-4404, poste 1803
Fax: 418 629-3515
hcaissy@ccjbslg.qc.ca

Counsel for the intervener,
Association québécoise des avocats et des avocates de la défense

Me Paul Charlebois
Charlebois, Swanston, Gagnon, avocats
166, rue Wellington
Gatineau (Québec) J8X 2J4
Tel.: 819 770-4888, poste 105
Fax: 819 770-0712
pcharlebois@csgavocats.com

Agent for the intervener,
Association québécoise des avocats et des avocates de la défense

THÉMIS MULTIFACTUM INC.
4, rue Notre-Dame Est, bur. 100, Montréal (Québec) H2Y 1B8
Téléphone : 514 866-3565 Télécopieur : 514 866-4861
info@multifactum.com www.multifactum.com

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PART I: OVERVIEW AND STATEMENT OF FACTS

1. Nunavik's Inuit (Nunavimmiut) are the most overrepresented Indigenous peoples in Quebec's judicial services and prisons, a situation not only not improving, but worsening[1].

2. Courts have the duty to consider alternatives to incarceration for Nunavik's Inuit, in *all* cases, as per the teachings of this honourable Court in *Gladue*[2] and *Ipeelee*[3] and what section 718.2(e) of the *Criminal Code*[4] commands.

3. Mandatory minimum sentences of imprisonment (*MMSI*), such as the one imposed by section 172.1(2)a) of the *Criminal Code*[5], prevent sentencing judges from crafting proportional and individual sentences for Nunavik's Inuit, therefore exacerbating the disadvantages and gross overrepresentation *Gladu*e and *Ipeelee* were meant to address. Curtailing sentencing judges' discretion upon sentencing deprives Nunavimmiut of having the ameliorative measures of the *Gladue* framework and s. 718.2(e) applied to them.

4. *MMSI* also prohibit sentencing judges from taking into account Inuit laws and community perspective, as prescribed by this honourable Court in *Gladue*, *Ipeelee* and *Wells*[6], which are however essential to adequately protect Nunavimmiut communities and victims, to properly rehabilitate Inuit offenders and to slowly bring reconciliation to Nunavik.

5. Furthermore, in many reasonably foreseeable cases of Nunavimmiut offenders, *MMSI* would constitute cruel and unusual punishment, contrary to section 12 of the *Canadian Charter of Rights and Freedoms*[7] (hereafter, the "*Charter*").

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1 See statistics below, from paras. 8 and following.
2 *R. v. Gladue*, [1999] 1 SCR 688.
3 *R. v. Ipeelee*, 2012 SCC 13.
4 *Criminal Code*, R.S.C. 1985, c. C-46, s. 718.2(e).
5 *Id.*, s. 172.1(2)a).
6 *R. v. Wells*, 2000 SCC 10.
7 *Canadian Charter of Rights and Freedoms*, s 12, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

PART II: QUESTIONS IN ISSUE

6. The Nunavik Civil Liberties Association (hereafter, "the NCLA") takes a position on two issues related to the present appeal:

   a. The NCLA first submits that *MMSI* render impossible the application of the *Gladue* framework in tailoring a proportional and individualized sentence for Nunavimmiut, both with regards to the moral blameworthiness of the offender and the community and indigenous perspectives;

   b. It secondly submits that *MMSI* may not resist the constitutional test of s. 12 of the *Charter*, as Nunavimmiut offenders, faced with the particularities of Nunavik, offer reasonably foreseeable cases where it would be cruel and unusual.

PART III: STATEMENT OF ARGUMENT

A. Nunavimmiut and the Judicial and Correctional Services

7. Quebec's Inuit are drastically overrepresented in accusations of crimes against the person, and of sexual nature. In a population of merely 14,000 people, among which approximately 90% are Inuit[8], hundreds of accusations of offences of a sexual nature are laid yearly against Nunavimmiut. Although there is no statistics for the infraction of luring a child, in 2021 alone, there were at least 272 accusations for sexual assaults, and 106 accusations for "*other sexual crimes*", 91 of which against a minor victim[9]. In 2021, a total of 7,819 persons were arrested by the police services, whereas a total of 4,523 crimes against the person were

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[8] Statistics Canada. 2022. (table) *Census Profile*. 2021 Census of Population. Statistics Canada Catalogue no. 98-316-X2021001. Ottawa. Released August 17th, 2022. https://www12.statcan.gc.ca/census-recensement/2021/dppd/prof/index.cfm?Lang=E (accessed September 8, 2022)

[9] Kativik Regional Police Force, Crimes against the person, Nunavik, 2013-2021. https://www.nunivaat.org/doc/document/2019-10-17-01.pdf (accessed September 8, 2022)

judicialized[10]. 43.2% of all the charges and 47% of all charges related to domestic violence laid against people living in Indigenous communities between 2001 and 2017 in Quebec involved residents of Nunavik communities, albeit Inuit only represent 12% of the Indigenous population of Quebec[11].

8. In 2018-2019, 1099 Quebec's Inuit, accused or convicted, were under the care of the correctional services of Quebec, an increase of 10% since 2015-2016: there were 514 new detention sentences and 798 Inuit were detained for at least one day[12]. Bluntly put, in 2018-2019, approximately 5.7% of Nunavik's population spent at least one day in detention. These numbers are always ever increasing: from 69 Inuit as part of the daily population in the Quebec correctional services in 2006-2007 to 196 in 2015-2016 (an increase of 183%, and a ratio 16 times higher than the ratio for non-Indigenous people[13]), their overall representation among the Indigenous population increased from 39% to 59%[14].

9. Nunavimmiut are persistently overrepresented in the criminal justice and correctional services. Nevertheless, and albeit the *James Bay and Northern Quebec Agreement* provided

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10 Kativik Regional Police Force, Arrests and Detention, Nunavik, 2013-2021. https://www.nunivaat.org/doc/document/2019-10-17-08.pdf (accessed September 8, 2022); Kativik Regional Police Force, Crimes against the person, Nunavik, 2013-2021. https://www.nunivaat.org/doc/document/2019-10-17-01.pdf (accessed September 8, 2022)

11 Public Inquiry Commission on relations between Indigenous Peoples and certain public services in Québec: listening, reconciliation and progress, *Final report*, Gouvernement du Québec, 2019, p. 295. [Commission Viens] https://www.cerp.gouv.qc.ca/fileadmin/Fichiers_clients/Rapport/Final_report.pdf; Portrait de la judiciarisation autochtone au Québec, Pièce P-839-115, Commission Viens, p. 11 and 15, https://www.cerp.gouv.qc.ca/fileadmin/Fichiers_clients/Documents_deposes_a_la_Commission/P-839-115.pdf Portrait de la judiciarisation en matière de violence conjugale impliquant des personnes autochtones, Commission Viens, Pièce P-839-114, p. 6. https://www.cerp.gouv.qc.ca/fileadmin/Fichiers_clients/Documents_deposes_a_la_Commission/P-839-114.pdf

12 Profil des Inuits confiés aux Services correctionnels en 2018-2019, Ministère de la Sécurité publique, https://cdn-contenu.quebec.ca/cdn-contenu/adm/min/securite-publique/publications-adm/publications-secteurs/services-correctionnels/profil-clientele-correctionnelle/profil_corr_inuits_2018-2019.pdf?1624307916

13 Commission Viens, *supra*, note 11, p. 336.

14 Profil des Autochtones confiés aux services correctionnels en 2015-2016, Ministère de la Sécurité publique, p. 30. https://cdn-contenu.quebec.ca/cdn-contenu/adm/min/securite-publique/publications-adm/publications-secteurs/services-correctionnels/profil-clientele-correctionnelle/profil_corr_autoch_2015-2016.pdf?1624377473

in 1975 that, "*as quickly as possible (...) the appropriate detention institutions shall be established within the judicial district of Abitibi so that Inuit should not be, unless circumstances so require, detained, imprisoned or confined in any institution below the 49th parallel*[15]", there is no prison in any of the fourteen (14) villages of Nunavik, incarceration therefore occurring thousands of kilometers away from home for Nunavimmiut. This distance, along with being detained in a foreign language and environment, creates a harsher incarceration for them than for most Canadians[16]. In *Sharma*, though dissenting, the honourable Justice Karakatsanis highlighted that prison terms, not only aggravating overrepresentation, also perpetuated "*cultural loss, dislocation, and community fragmentation*[17]". In *Ewert*, this Court also recognized that Indigenous peoples faced systemic discrimination in prisons[18].

10. This dramatic overrepresentation of Inuit in Quebec's judicial and correctional services is intertwined with the recent colonization of Nunavik and the dire effects of intergenerational trauma[19]. As a result of colonization, Nunavik is plagued with unemployment, alarmingly high suicidal rates, a severe housing crisis, a dramatic lack of services and the disastrous consequences of drugs and alcohol abuse[20].

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15 James Bay and Northern Quebec Agreement, November 11, 1975, s. 20.0.25 [James Bay and Northern Quebec Agreement].

16 Commission Viens, *supra* note 11, p. 345-347; Special Report by the Quebec Ombudsman, Detention conditions, administration of justice and crime prevention in Nunavik, 2016. https://protecteurducitoyen.qc.ca/sites/default/files/pdf/rapports_speciaux/2016-02-18_detention-conditions-in-Nunavik.pdf ; *R. c. Iserhoff*, 2019 QCCQ 2339.

17 *R. v. Sharma*, 2022 SCC 39, at para. 241.

18 *Ewert v. Canada*, 2018 SCC 30, at para. 53.

19 This honourable Court recently reiterated that it could take judicial notice of the history of colonialism and how it translates into overincarceration of Indigenous peoples. *R. v. Sharma*, *supra* note 17, at para. 55; *R. v. Ipeelee*, *supra* note 3, at para. 60, *R. v. Boutilier*, 2017 SCC 64, at para. 108. Lyne St-Louis et Phoebe Atagotaaluk, « Inuit Piusungat (Our Inuit Ways) », dans Barreau du Québec, Service de la formation continue, Développements récents en droit des Autochtones (2021), vol. 493, Montréal (QC) Éditions Yvon Blais, p. 228-229.

20 Commission Viens, *supra* note 11, notably p. 105, 124, 230-233; We Can do Better: Housing in Inuit Nunangat, Report of the Standing Senate Committee on Aboriginal Peoples, March 2017, https://sencanada.ca/content/sen/committee/421/APPA/Reports/Housing_e.pdf

11. Nunavik's Inuit face severe and multiple hardships and inequality to an extent faced by few other members of the Canadian society. Their overrepresentation in the judicial and correctional services can and must be redressed and bettered through courts' decisions.

B. The *Gladue* Framework and Section 718.2(e) of the *Criminal Code*

12. The NCLA's overarching concern in the present appeal is the right of Nunavimmiut offenders to receive proportional and individualized sentences crafted in respect of s. 718.2(e) and of the teachings of this honourable Court in *Gladue*, *Ipeelee*, and *Wells* which entails taking into account the unique Nunavik community perspective, as well as Inuit laws.

13. In *Gladue* and *Ipeelee*, this honourable Court examined the dire overrepresentation of Indigenous offenders in prison. It stressed the necessity to take into consideration the particularities of Indigenous offenders in crafting fair and individualized sentences, so as to fight this overrepresentation and give effect to s. 718.2(e). In order to impose individualized and proportionate sentences for Indigenous offenders, courts must balance the seriousness of the offence with the moral blameworthiness of the accused through an analysis of the *Gladue* factors, as well as taking into account his or her particular Indigenous heritage or connection, which includes his or her community's perspective and Indigenous laws[21].

14. In *Boudreault*, applying these principles, this honourable Court concluded that the mandatory victim surcharge disregarded proportionality in sentencing and undermined Parliament's intention to ameliorate the serious problem of overrepresentation of Indigenous peoples in prison, whilst reiterating the need to adapt sentencing to the tragic history of treatment of Indigenous peoples in the Canadian justice system[22].

15. Very recently, it reaffirmed that the "*crisis of Indigenous incarceration is undeniable*" and that Parliament's legislative objective in enacting s. 718.2(e) was "*to reduce sentences of imprisonment and to expand the use of restorative justice principles in sentencing*[23]". It also

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21 *R. v. Gladue*, *supra* note 2, at para. 66; *R. v. Ipeelee*, *supra* note 3, at paras. 73-74.
22 *R. v. Boudreault*, 2018 SCC 58, para. 83.
23 *R. v. Sharma*, *supra* note 17, at paras. 3 and 9.

considered sentencing judges' duty to apply the *Gladue* framework and considerations pursuant to s. 718.2(e), which would be given effect "*as long as judges retain broad discretion to impose a range of available sentences*", also acknowledging that courts could, in order to take into account the particular circumstances of Indigenous offenders, consider non-custodial sentences or reduce sentences below the typical range[24]. *MMSI*, in permitting no other option than incarceration, thus prohibit sentencing judges from considering the Indigenous particularities of Nunavimmiut, thus impairing the remedial effect of s. 718.2(e).

16. *MMSI* render impossible the application of the *Gladue* framework in tailoring a proportional and individualized sentence, both with regards to the moral blameworthiness of the offender and his particular Indigenous heritage or connection. Hence, *MMSI*, such as the impugned provision, directly contribute to aggravating the crisis of Nunavimmiut overrepresentation in prisons, whereas it warrants courts to automatically send Inuit offenders to prison when imprisonment may not be the proportionate response as per *Gladue*, *Ipeelee*, and s. 718.2(e).

17. The Truth and Reconciliation Commission of Canada (hereafter "the TRC") was also of this opinion, whereas Call to Action 32 recommended that courts could depart from minimum mandatory sentences when required to do so for Indigenous offenders:

> 32. We call upon the federal government to amend the Criminal Code to allow trial judges, upon giving reasons, to depart from mandatory minimum sentences and restrictions on the use of conditional sentences[25].

18. Furthermore, the NCLA submits that *MMSI* prevent courts from giving meaning to the "second set of circumstances" of *Gladue* when sentencing Nunavimmiut. In *Gladue*, this honourable Court recognized that the current concepts of sentencing would be inappropriate for most Indigenous offenders, as they generally do not respond to the needs, experiences and perspectives of Indigenous peoples and communities[26]. Thus, when sentencing

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24 *R. v. Sharma*, *supra* note 17, at paras. 78-79.
25 Truth and Reconciliation Commission of Canada, Calls to Action, 2012. https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Calls_to_Action_English2.pdf (Accessed on September 8, 2022)
26 *R. v. Gladue*, *supra*, note 2, at para. 73.

Indigenous accused, courts must consider sentences and sanctions which may be appropriate in the circumstances for the offender because of their Indigenous heritage or connection[27]".

19. This "second set of circumstances[28]" from *Gladue*, includes three elements that courts must consider when sentencing Indigenous accused: "*(1) the community's perspectives, needs and alternatives to incarceration; (2) the Aboriginal Perspective, which was interpreted as including the "laws, practices, customs and traditions of the group"; and (3) culturally sensitive, appropriate and responsive sentences addressing the "underlying cause of the criminal conduct*[29]". This second set of circumstances goes directly to the effectiveness of sentences imposed upon Indigenous offenders, which helps prevent crimes and make societies safer[30]. This honourable Court also acknowledged that "*imposing a custodial sentence on an aboriginal offender does not advance the remedial purpose of s. 718.2(e), neither for the offender nor for his community*[31]". The TRC also recognized that Indigenous laws were needed to protect Indigenous communities and individuals[32].

20. *MMSI* prohibit courts from taking into account Nunavimmiut's community perspective and legal traditions when imposing sentences to Inuit offenders. As this honourable Court acknowledged, these "*fundamentally different world views*"[33] between Inuit laws and Canadian criminal law may explain the ineffectiveness of imposed sentences and their perpetual and increasing over-judicialization and over-incarceration[34]. The *James Bay and Northern Quebec agreement* also warrants that "*sentencing and detention practices should be revised to take into account the culture and way of life of the Inuit people*[35]".

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27 *R. v. Gladue*, *supra*, note 2, at para. 66; *R. v. Ipeelee*, *supra*, note 3, at para. 72.
28 Marie-Andrée Denis-Boileau, « The Gladue Analysis: Shedding Light on Appropriate Sentencing Procedures and Sanctions » (2021) 54:3 UBC Law Rev 537, p. 539 at p. 539.
29 *Id.*, p. 539-540.
30 *Id.*, p. 540; *R. v. Ipeelee*, *supra*, note 3, at paras. 66 and 74.
31 *R. v. Wells*, *supra*, note 6, at para. 39. See also para. 50.
32 Truth and Reconciliation Commission of Canada, Volume 6, p. 51, https://publications.gc.ca/collections/collection_2015/trc/IR4-9-6-2015-eng.pdf
33 *R. v. Ipeelee*, *supra*, note 3, at para. 74.
34 Our Inuit ways, *supra,* note 19, p. 225.
35 James Bay and Northern Quebec Agreement, *supra,* note 15, s. 20.0.24.

21. The involvement of the community in sentencing is a core part of Inuit laws[36], and it must be considered by courts sentencing Nunavimmiut offenders. According to various authors, in Inuit law, the priority is not to punish the offender, but rather to ensure that the community could return to a state of harmony, entailing a consensual approach and allowing the offender to better himself[37]. Public opinion is also of great importance, communities having been traditionally involved in practically all sanctions proceedings[38].

22. Inuit Elders have repeatedly stated in courts that the best deterrence and thus the most efficient sentence would be achieved "*when the accused faces the individual(s) he hurt, acknowledges their pain and takes responsibility for doing what is in his power to better his life by getting the necessary help*[39]". Hence, terms of imprisonment for Quebec's Inuit offenders in an environment alien to their culture, language and traditions may rarely or never be efficient or dissuade, thus failing at both rehabilitation and community protection[40].

23. The NCLA submits that, in order to protect Nunavimmiut communities and people, and to break the never-ending cycle of revolving doors for Quebec's Inuit in the judicial system, courts must, in *all* cases, be able to assess Inuit laws and community perspective in tailoring

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36 Our Inuit ways, *supra,* note 19, p. 216.

37 Norbert Rouland, *Les modes juridiques de solution de conflits chez les Inuit*, Études Inuit/Studies, vol. 3, numéro hors-série, 1979, 171 pp. Québec : Départementd'anthropologie, Université Laval, p. 17-18, http://classiques.uqac.ca/contemporains/rouland_norbert/modes_juridiques_inuit/rouland_modes_juridiques_inuit.pdf [Les modes juridiques]. Our Inuit ways, *supra,* note 19, p. 223-224; Commission Viens, Notes sténographiques du 26 janvier 2018, Testimony of Lisa Koperqualuk, p. 109-112; https://www.cerp.gouv.qc.ca/fileadmin/Fichiers_clients/Transcriptions/Notes_stenographiques_-_CERP_26_janvier_2018_.pdf; Commission Viens, Notes sténographiques du 23 novembre 2018, Testimony of Lucy Grey, p. 31, https://www.cerp.gouv.qc.ca/fileadmin/Fichiers_clients/Transcriptions/Notes_stenographiques_-_CERP_23_novembre_2018_avec_nos.pdf.

38 Les modes juridiques, *supra* note 35, at p. 23.

39 Our Inuit ways, *supra,* note 19, p. 232. See also, *Aqqusiurniq Sivunitsasiaguniqsamut - Inuit Justice Task Force Final Report: Blazing the Trail for a Better Future*, Inuit Justice Task Force, 1993, p. 100. https://www.cerp.gouv.qc.ca/fileadmin/Fichiers_clients/Documents_deposes_a_la_Commission/P-1141.pdf [Inuit Justice Task Force Report]

40 *R. v. Suter*, 2018 SCC 34, at paras. 46-48. This honourable Court recognized the impact of collateral consequences of a sentence on its effectiveness.

sentences for Inuit offenders[41]. This will provide more equality not only for the offenders, but for the victims and Nunavik's societies as a whole. The NCLA takes the opportunity to remind this honourable Court that the Canadian justice system and its penological principles were *imposed* upon Nunavimmiut[42]. The NCLA strongly contends that, in order to improve Nunavik's Inuit society, rehabilitate offenders, and protect victims, the judicial system must take into account and give effect to Inuit laws and legal traditions.

24. The NCLA therefore submits that *MMSI* render futile the *Gladue* principles when sentencing Nunavimmiut offenders as courts may not impose sentences individualized and proportional to the moral blameworthiness of the accused nor take into account their community's perspective, Inuit laws and culturally appropriate sentences. This, in turn, prevents efficient sentences and thus fails to contribute to a just, peaceful and safe society, halting the slow path towards reconciliation.

C. Nunavimmiut, the Impugned Provision and Section 12 of the *Charter*

25. As a second position, the NCLA submits that Nunavimmiut offenders would often represent, such as in the impugned provision at hand, reasonably foreseeable cases where *MMSI* would be cruel and unusual punishment, thus violating s. 12 of the *Charter*. When a *MMSI* may not be considered cruel or unusual on the particular individual being sentenced, courts, when appropriate, may ask themselves whether the provision's reasonably foreseeable applications would impose cruel and unusual punishment on other offenders[43].

26. In the present appeal, both the instance judge[44] and the Court of Appeal of Quebec[45] concluded to the unconstitutionality of the impugned mandatory minimum sentence in the case of the respondent. However, should this honourable Court conclude to the opposite, the NCLA submits that this impugned *MMSI*, along with any *MMSI*, could be declared

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41 Inuit Justice Task Force Report, *supra* note 37, p. 118.

42 See, notably, Mylène Jaccoud, L'Histoire de l'imposition du processus pénal au Nunavik (Nouveau-Québec Inuit), The journal of Human Justice, 6, 105-130 (1995), https://www.cerp.gouv.qc.ca/fileadmin/Fichiers_clients/Documents_deposes_a_la_Commission/P-409.pdf

43 *R. v. Nur*, 2015 SCC 15, paras. 49, 56-58; *R. v. Morrison*, 2019 SCC 15, at para. 144.

44 *R. c. Bertrand Marchand*, 2020 QCCQ 1135.

45 *R. v. Bertrand Marchand*, 2021 QCCA 1285.

unconstitutional on the basis of the second question, whereas reasonably foreseeable cases of Nunavimmiut offenders may arise for which such a sentence would be cruel and unusual.

27. It is reasonably foreseeable to expect cases of Nunavimmiut offenders with a moral blameworthiness tempered by *Gladue* factors, where a sentence ought to take into account Inuit laws and perspective on an efficient sentence, and where punishment is not paramount to dissuasion or deterrence. This honourable Court recognized, in *Gladue*, that Indigenous offenders are less likely to be rehabilitated by incarceration and more adversely affected by it, and that restorative justice was not less lenient[46]. The Court of Appeal of Quebec also recognizes that probation orders can provide deterrence and dissuasion[47].

28. It appears reasonable to foresee regular cases where Nunavimmiut's specific and regional particularities would warrant non-custodial sentences and where a minimum mandatory term of imprisonment, such as the impugned one, would be cruel and unusual punishment, thus violating s. 12 of the *Charter*. These imagined cases are based on reasonable inferences and do not represent fanciful or remote situations, nor are they mere speculation[48].

PART IV: Not applicable

PART V: REQUEST FOR PERMISSION TO PRESENT ORAL ARGUMENT

29. The Court has already authorized the Intervener, Nunavik Civil Liberties Association to present at the hearing an oral argument of no more than five minutes.

PART VI: Not applicable

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th of November 2022, in Montréal

C Renaud. Louis-Nicholas Coupal Schmidt

Me Christine Renaud
Christine Renaud, avocate

Me Louis-Nicholas Coupal-Schmidt
Coupal Chauvelot s.a.

Counsel for the Intervener Nunavik Civil Liberties Association

46 *R. v. Gladue*, *supra*, note 2, at paras. 68 and 72.
47 *R. c. Caron-Barette*, 2018 QCCA 516, at paras. 85-86; *Denis-Damée c. R.*, 2018 QCCA 1251, at paras. 116-119.
48 *R. v. Nur*, *supra*, note 43, para. 62.

PART VII: TABLE OF AUTHORITIES

Paragraph(s)

Jurisprudence

Doctrine

Doctrine (cont'd)

Legislation

Other

Other (cont'd)