SCC Court 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 IN RIGHT OF CANADA

Appellant

and

CHEYENNE SHARMA

Respondent

and

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PART I - OVERVIEW

1. The John Howard Society of Canada ("**the JHSC**") intervenes in this appeal pursuant to the Order of Martin J. dated February 3, 2022, to provide submissions on the nature and use of conditional sentences and the proper approach to the first step of the s. 15 analysis. The JHSC has a long history of advocacy on criminal justice issues and brings a distinct perspective in its submissions as a national non-profit organization directly serving offenders.

2. The JHSC takes no position on the outcome of the appeal.

PART II - THE JHSC'S POSITION ON THE ISSUES ON WHICH IT INTERVENES

3. The JHSC makes two central submissions:

(a) **Conditional sentences are a distinct and meaningful sentencing tool**. They can be appropriately imposed for serious crimes which otherwise call for incarceration, even where denunciation and deterrence are important sentencing principles. Removing them from the sentencing arsenal materially constrains sentencing judges' discretion and ability to impose a fit sentence, including by employing alternatives to incarceration; and

(b) **The first step of the s. 15 analysis considers the effects of the impugned law on the claimant and the groups to which she belongs**—in this case, Ms. Sharma and other similarly situated Indigenous women. The JHSC urges this Court not to isolate the s.15 analysis from 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".[1] In particular:

(i) A focus on causality should not obscure the first stage analysis of the law's effects on the claimant group and effectively resurrect a formal equality approach; and

(ii) Insisting that statistical evidence is required to show a disproportionate impact in the circumstances of this case distorts the first stage analysis and the nature of the claim. The type of evidence needed to show a disproportionate impact in this case is present.

[1] *Ontario (Attorney General) v G*, 2020 SCC 38 at para 43 [***Ontario v G***].

PART III - CONCISE STATEMENT OF ARGUMENT

A. Conditional sentences can appropriately be imposed for serious crimes, even where denunciation and deterrence are important sentencing principles

4. Removing conditional sentences from the sentencing arsenal materially constrains sentencing judges' ability to exercise discretion and impose a fit sentence in all of the circumstances. Specifically, it limits sentencing judges' ability to use alternatives to incarceration that are punitive but also in "general...more effective than incarceration" at achieving rehabilitation.[2] Conditional sentences provide offenders with access to community services offered by organizations like the JHSC, which facilitate rehabilitation and subsequent reintegration; mitigate the harsh effects of separation from family and community; and avoid the traumas of a custodial sentence. These considerations are particularly acute for Indigenous offenders.[3]

5. As explained below, appellate-level jurisprudence from across the country has established and reinforced the status of conditional sentences as a singular sentencing tool. The Court of Appeal for Ontario's decision in this appeal has permitted Ontario courts to use this tool to craft fit, non-custodial sentences in at least 29 reported cases (see **Appendix "A"**). The JHSC urges the Court to consider this jurisprudential context in its analyses under ss. 7 and 1 of the *Charter*.

(i) This Court has established that conditional sentences are both punitive and rehabilitative

6. In *R v Proulx* and its companion cases, this Court explained that conditional sentences are a tool that can serve both punitive and rehabilitative principles. As Chief Justice Lamer stated, "it is the punitive aspect of a conditional sentence that distinguishes it from probation."[4]

7. Indeed, a conditional sentence is a "punitive sanction capable of achieving the objectives of denunciation and deterrence", which may be used for serious offences where to do so would not endanger community safety.[5] It is a sentence of imprisonment that carries "a real threat of incarceration" for the remainder of the sentence upon breach of a condition.[6] Even where restorative objectives are of diminished importance, a conditional sentence may be appropriate.[7]

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[2] *R v Proulx*, 2000 SCC 5 at para 22 [***Proulx***].
[3] *R v Gladue*, [1999] 1 SCR 688 at para 68 [***Gladue***].
[4] *Proulx* at para 22.
[5] *Proulx* at para 22. See s. 742.1(a) of the *Criminal Code*.
[6] *Proulx* at para 21. See ss. 742.6(1) and (9) of the *Criminal Code*.
[7] *Proulx* at para 114.

8. While a conditional sentence is generally more lenient than the same term of incarceration, it is not always a "lighter" punishment: requiring an offender to take responsibility and make reparations for their conduct while subject to strict restrictions may be more onerous.[8] Conditional sentences also tend to be longer than the custodial sentences that would otherwise be imposed.[9]

(ii) Appellate courts across Canada have applied the* Proulx *principles to conditional sentences

9. Recent appellate decisions applying *Proulx* highlight that (1) carefully crafted conditional sentences are both punitive *and* tailored to an offender's circumstances; and (2) sentencing judges must consider the punitive, denunciative, and deterrent aspects of conditional sentences.

Carefully crafted conditional sentences are both punitive and tailored to an offender's circumstances

10. In *R v Anderson*, the Nova Scotia Court of Appeal upheld a carefully crafted conditional sentence for convictions for firearms-related offences that was responsive to the specific circumstances of the offender.[10] The extensive and restrictive nature of the conditions imposed highlights the serious, punitive nature of a properly crafted conditional sentence, as well as the ability to tailor conditions to respond to the circumstances of a particular offender, which in *Anderson* included consideration of the impact of anti-Black racism. These conditions included, among other things: (i) eight months of house arrest; (ii) a subsequent eight months of 9am-6pm curfew; (iii) a further two years of probation; (iv) address restrictions; (v) Afrocentric therapy interventions to address trauma; (vi) education interventions; (vii) a requirement to seek out mentorship from at least one of two named organizations; and (viii) community service.[11]

11. In *R v Morris*, a five-judge panel of the Court of Appeal for Ontario identified the conditional sentence in *Anderson* as an example of how courts can craft appropriate conditional sentences responsive "both to the needs of denunciation and deterrence and the rehabilitative potential of the offender".[12] In *Morris*, the Court considered an offender who ran from the police while carrying a loaded handgun in his coat and then disposed of his coat, with the gun, in a public place. Although no party on appeal sought a conditional sentence, as Mr. Morris was already in

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[8] *Proulx* at para 41; *Gladue* at para 72.

[9] See for example: *R v McCargar,* 2020 ONSC 5464 at para 69; *R v Doering,* 2020 ONSC 5618 at para 77; *R v Fredson*, 2020 ONCJ 519 at para 105; *R v Hu,* 2021 ONCJ 312 at para 29.

[10] *R v Anderson*, 2021 NSCA 62 at para 159 [***Anderson***].

[11] *Anderson* at para 72.

[12] *R v Morris*, 2021 ONCA 680 at para 126 [***Morris***].

custody on other charges at the time, the Court commented that "had Mr. Morris been before the courts exclusively on these charges and had a conditional sentence, like that ordered in *Anderson (NSCA)*, been available, the trial judge would have had to give that option serious consideration."[13]

Courts must consider the punitive, denunciative, and deterrent aspects of conditional sentences

12. The Court of Appeal for Ontario has highlighted that conditional sentences are serious sentences and may be appropriate even where denunciation and deterrence are primary:

> <u>Even if denunciation and deterrence were the overriding objectives in this case, a sentence of imprisonment was not the only route to achieve them</u>. A conditional sentence recognizes the seriousness of the offences while at the same time acknowledging and promoting the significant strides in rehabilitation that the appellant has made with the help of his family and the medical community.[14]

13. Consistent with the above principles, appellate courts across Canada have overturned sentences where the judge at first instance treated conditional sentences as insufficiently punitive or unable to meet requirements of denunciation and/or deterrence. The unique sentencing space the conditional sentence occupies has thus been cemented. For example:

- In *R v Mantla*, the Northwest Territories Court of Appeal substituted a conditional sentence for a custodial sentence and cautioned against conflating conditional sentences with the less serious probation order. The Court emphasized that "[u]nlike a probation order, which is primarily rehabilitative, a conditional sentence order generally includes punitive conditions, such as house arrest, which restrict the offender's liberty."[15]

- In *R v Dickson*, the British Columbia Court of Appeal overturned a custodial sentence for two counts of fraud over $5000 and substituted a conditional sentence followed by two years of probation. The Court found the sentencing judge insufficiently weighed the deterrent effect of conditional sentences.[16]

- In *Barchichat c R*, the Quebec Court of Appeal overturned a custodial sentence where the trial judge failed to properly consider a conditional sentence, stating: "I am of the view that [the sentencing judge] erred in law by emphasizing deterrence and denunciation to such an

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[13] *Morris* at para 181.
[14] *R v Fabbro*, 2021 ONCA 494 at para 27 (emphasis added).
[15] *R v Mantla*, 2020 NWTCA 6 at para 31 [***Mantla***].
[16] *R v Dickson*, 2007 BCCA 561 at paras 42-44 [***Dickson***].

extent that she did not follow the approach set out in *Proulx* to exclude a conditional sentence in the present case."[17] Notably, a conditional sentence was available when Mr. Barchichat was sentenced, but is now unavailable for the offence because of s. 742.1(c).[18]

- In *R v Bergh*, the Alberta Court of Appeal recognized that it was possible to both "achieve the necessary punitive measures, providing general deterrence and denunciation" for careless use of firearms and consider rehabilitation in a conditional sentence.[19] The Court substituted an appropriately crafted conditional sentence for the custodial sentence.

(iii) Sentences are more fit when judges have the option of a conditional sentence

14. Trial judges have imposed at least 25 conditional sentences that would have been unavailable without the Court of Appeal's decision in this appeal (see **Appendix A**).[20]

15. Additionally, in the following examples, appellate courts substituted conditional sentences for custodial sentences following the Court of Appeal's decision in this case:

- In *R v Johnson*, an individual convicted of drug trafficking appealed his pre-*Sharma* custodial sentence. Hoy JA concluded that the sentencing judge had erred in principle and substituted a conditional sentence because it was a fit sentence having regard to all the circumstances of the offence and offender. Hoy JA explicitly noted the *Sharma* decision in the appeal, stating that had the "option" of a conditional sentence "been available to the trial judge, I suspect she would have availed herself of it."[21]

- In *R v Kebede*, an individual convicted of possession of cocaine for the purpose of trafficking received a 9-month custodial sentence. Following *Sharma*, the Court found that a 9-month conditional sentence was appropriate because: a) the trial judge's decision strongly suggested he would have imposed a conditional sentence had it been available; b) while on bail, the appellant had stayed out of trouble and received community support; and c) none of the principles of sentencing would be served by reincarcerating the appellant.[22]

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[17] *Barchichat c R*, 2020 QCCA 282 at para 20 [***Barchichat***].
[18] *Barchichat* at para 14.
[19] *R v Bergh*, 2019 ABCA 151 at paras 28-29.
[20] Two of the decisions flowed from a challenge to s. 742.1(f)(iii) based largely on this appeal.
[21] *R v Johnson*, 2021 ONCA 257 at para 42.
[22] *R v Kebede*, 2021 ONCA 283 at para 23.

- In *R v Cowan*, an individual convicted of possession of cocaine for the purposes of trafficking who had been sentenced to 9 months in custody was granted a conditional sentence on appeal. The offender was a low-level trafficker with mental disabilities. Fairburn ACJO, Doherty JA, and Watt JA found that "a conditional sentence with appropriate terms can serve the ultimate purpose of sentencing and properly reflect a consideration of the applicable sentencing principles."[23]

16. Similarly, in *Salem v R*, the Court of Appeal of Quebec granted leave to appeal a custodial sentence to an applicant found guilty of conspiracy to possess and possession of heroin for the purposes of trafficking. The sentencing judge determined that though a conditional sentence combined with significant community service work would have been a more appropriate sentence, that sentence was unavailable due to s. 742.1(c). The Court granted leave to appeal the sentence (including to challenge the constitutionality of s. 742.1(c)) "notably in light of the Ontario Court of Appeal's decision in *Sharma*", and conditionally released the offender pending appeal.[24]

17. By removing conditional sentences from the sentencing judge's set of tools, the provisions at issue create a meaningful gap that prevents judges from applying the most fit and appropriate sentences. The implication of each of these cases is that the custodial sentence of imprisonment initially given to that offender was a less fit sentence and would not have been imposed had conditional sentences been a tool accessible to the sentencing judge.

B. The first step of the s. 15 analysis considers the effects of the impugned law on the claimant and the groups to which she belongs

18. In an adverse effects discrimination claim, the first question courts ask is whether the impugned provision "creates a distinction based on enumerated or analogous grounds" on its face or in its impact.[25] If the law has a disproportionate impact on members of a protected group, there will be a distinction.[26] The analysis focuses on the law's effects on the claimant and the groups to which they belong. It should not be obscured by a misplaced focus on either causality or statistics.

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[23] *R v Cowan*, 2021 ONCA 729 at para 22. See also *R v Posthumus*, 2020 ONCA 760 at para 21.
[24] *Salem v R*, 2021 QCCA 809 at para 4.
[25] *Fraser v Canada (Attorney General)*, 2020 SCC 28 at para 27 [***Fraser***].
[26] *Ontario v G* at para 40; *Fraser* at para 30.

(i) Focusing on causality obscures the analysis of the effects on Ms. Sharma and the groups to which she belongs

19. This Court recently reaffirmed in *Fraser* that "the heart of substantive equality is the recognition that identical or facially neutral treatment may 'frequently produce serious inequality.'"[27] Despite this Court's cautions against formal equality approaches based on "treating likes alike", they persistently reappear in different guises.[28] In this case, one of those guises is the importation of a causality requirement at the first stage.

20. The Appellant's position that a law must "create" a distinction, viewed in isolation, obscures analysis of the provisions' effects on Ms. Sharma. In essence, the Appellant takes the position that the impugned law must cause the distinction on its own, and makes this clear by stating that "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."[29]

21. Finding that the challenged law creates a distinction at the first stage of the test does not require finding that the challenged law creates that distinction *independently* of its effects on the claimant group. In an adverse effects claim, courts must consider the challenged law's effects on members of the protected group in the context of the protected group's circumstances, taken as those circumstances are. As Abella J noted in *Fraser*, it is "unnecessary to inquire into whether the law itself was responsible for creating the background social or physical barriers which made a particular rule, requirement or criterion disadvantageous for the claimant group."[30]

22. Requiring that the impugned law create a distinction standing alone would reproduce the formalism s. 15 seeks to avoid: it would look at whether the law creates a distinction on its face—in this case, based on indigeneity. This Court has repeatedly rejected approaches based on "treating likes alike" because they can allow discriminatory effects to evade scrutiny under a veneer of identical treatment.[31] Indeed, limiting the first-stage analysis to the contested law "standing

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[27] *Fraser* at para 47, citing *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at para 164 [***Andrews***].
[28] *Andrews* at 166, *Withler v Canada (Attorney General)*, 2011 SCC 12 at paras 41-43 [***Withler***].
[29] Factum of Her Majesty the Queen in Right of Canada at para 34 [***Appellant's factum***].
[30] *Fraser* at para 71.
[31] *Andrews* at 166; *Withler* at para 43; *Centrale des syndicats du Québec v. Quebec (Attorney General)*, 2018 SCC 18, at paras 26-28 [***Centrale***].

alone"[32] eliminates the possibility of establishing *any* effects-based discrimination, contrary to decades of this Court's jurisprudence.

23. Similarly, the dissenting judge at the Court of Appeal focused on how similar Ms. Sharma was to others who were ineligible for a conditional sentence, rather than engaging with the implications of ineligibility for the claimant herself, and for others belonging to the same protected groups.[33] The suggestion is that because Ms. Sharma has engaged in drug trafficking like others who are also affected by the impugned provisions, the effects the provisions have on her—in the context of her identity as an Indigenous woman—are not relevant. This does not accord with the guarantee of substantive equality, which "requires attention to the 'full context of the claimant group's situation', to the 'actual impact of the law on that situation', and to the 'persistent systemic disadvantages [that] have operated to limit the opportunities available' to that group's members."[34]

24. Instead, the s. 15 analysis should consider whether Ms. Sharma and other Indigenous women are affected by the law in a different and heavier manner than others, and if that difference is based on belonging to a group protected by s. 15. This is not to render "pre-existing social circumstances… determinative", but to properly consider the law's effects in context.[35]

(ii) Statistical evidence is not required to establish a disproportionate impact

25. Although the Appellant acknowledges that statistical evidence is not necessarily required to establish a disproportionate impact, its reasoning has the effect of requiring it nonetheless.

26. Despite noting that there *is* evidence of "the situation of the claimant group", the Appellant submits that there was no evidence to support finding that the impact of the impugned provisions was different for Ms. Sharma than for someone who is not an Indigenous woman with a child. By ignoring the evidence of the impact on Ms. Sharma and other Indigenous women, and focusing on statistics, the Appellant implicitly requires statistical evidence to establish the distinction.[36]

27. The Appellant's preoccupation with statistics at the first stage is a red herring—Ms. Sharma does not need to show that a disproportionate number of Indigenous people are convicted

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[32] See Appellant's factum at para 34.
[33] *Sharma (ONCA)* at paras 256-259.
[34] *Fraser* at para 42, citing *Withler*, at para 43; *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, at para 17 [***Taypotat***].
[35] Contrary to the Appellant's claim: Appellant's factum at para 46.
[36] Appellant's factum at paras 37, 39-40, 43-46.

of offences captured by the impugned provisions. Requiring Ms. Sharma to establish that those convicted of offences captured by the impugned provisions are disproportionately Indigenous is akin to requiring the claimants in *Eldridge* to establish that users of health services in British Columbia are disproportionately deaf individuals.[37]

28. On a proper approach to the evidentiary burden at the first stage of the s. 15 test in this case, the type of evidence needed to establish a disproportionate effect is straightforward: this Court need look no further than evidence of the provisions' effects on Ms. Sharma and other similarly situated Indigenous women.

29. Both evidence about the situation of the claimant group and evidence about the results of the law are present in this case.[38] First, "the 'situation of the claimant group'… is not in dispute", as this Court has taken judicial notice of the relevant facts in this case.[39]

30. Second, in addition to evidence about the results of the law in general, there is also evidence about the results of the law on Ms. Sharma and other members of the protected group. Ms. Sharma is a young woman of Ojibwa ancestry who is a member of the Saugeen First Nation and "an intergenerational survivor of the government's residential school effort to eradicate the cultural heritage of her people."[40] The record includes evidence about the effect of incarceration on Indigenous women—in particular, Indigenous mothers—like Ms. Sharma. For example:

> When bail is denied or a custodial sentence is imposed on Indigenous women, their children may be placed in foster care, where Indigenous children are already overrepresented, accounting for 48 per cent of children in foster care in Canada. Documented effects of foster care on Indigenous children in non-Indigenous homes are loss of culture, language and identity, as well as the increased risk of involvement in the youth criminal justice system, a process known as the "child-welfare-to-prison pipeline". The intervenors conclude, fairly, that "[t]he overincarceration of Indigenous women thus perpetuates the effects of intergenerational trauma and the disruption of Indigenous families and communities".[41]

31. The Court of Appeal found a conditional sentence to be fit for Ms. Sharma in all of the

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[37] *Eldridge v British Columbia (Attorney General)*, [1997] 3 S.C.R. 624.
[38] *Fraser* at para 56.
[39] Appellant's factum at para 37; *Sharma (ONCA)* at para 102; *Gladue* at paras 83-84, 93; *R v Ipeelee*, 2012 SCC 13 at para 60.
[40] *Sharma (ONCA)* at para 10, citing trial judgement at para 266.
[41] *Sharma (ONCA)* at para 96 (internal citations omitted; emphasis added).

circumstances, but it was not available to her as a result of the impugned provisions. There is evidence to show that the effect on Ms. Sharma of serving a custodial sentence rather than a conditional sentence was to compound the intergenerational trauma inflicted by the state on Indigenous women, including through residential schools. These effects are contrary to Parliament's intention in enacting conditional sentences, and contrary to 25 years of guidance from this Court on the role sentencing judges should play in reducing the substantive inequality of Indigenous people in the criminal justice system. This evidence shows the requisite "disproportionate impact on members of a protected group."[42]

32. Finally, the JHSC notes that its approach to the first stage of s. 15 is distinct from that of the Respondent. While the JHSC agrees with the Respondent that the undermining of the *Gladue* framework under s. 718.2(e) can constitute the requisite disproportionate impact, the above analysis is intended to be both alternative and complementary to the Respondent's approach.

PART IV - SUBMISSIONS ON COSTS

33. The JHSC requests that no costs be awarded to or against it in relation to this appeal.

PART V - ORDER SOUGHT

34. The JHSC takes no position on the outcome of this appeal but respectfully requests that the Court consider the above submissions.

35. ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of March, 2022.

Andrew Max and Emily Young
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[42] *Fraser* at para 52.

Appendix "A"

Reported Ontario first-instance sentencing decisions in which conditional sentences that would have been unavailable pre-*Sharma* were imposed.[43]

R v Ashamock, 2020 ONSC 6774
R v Booker, 2021 ONCJ 625
R v Browne, 2021 ONSC 6097
R v Colton, 2021 ONCJ 249
R v De Souza, 2020 ONCJ 372
R v Forrestall, 2021 ONCJ 121
R v Fredson, 2020 ONCJ 519
R v Grant, 2021 ONCJ 507
R v Haniffa, 2021 ONCJ 674
R v Hayhoe, 2020 ONSC 8212
R v Kasotty, 2021 ONCJ 238
R v Marmontel, 2021 ONSC 2520
R v McCargar, 2020 ONSC 5464
R v Mori, 2020 ONCJ 620
R v Nacinovich, 2020 ONSC 7604
R v Nguyen, 2021 ONCJ 512
R v Parsons, 2020 ONSC 5412
R v PS, 2021 ONSC 5091
R v Reid, 2021 ONCJ 149
R v Ricketts, 2021 ONCJ 404
R v RS, 2021 ONSC 2263
R v White, 2021 ONSC 2476
R v Wapoose, 2020 ONSC 6983
R v Whittaker, 2021 ONSC 5278
R v Wright, 2020 ONCJ 513

[43] Two of these decisions (*R v RS*, *R v Browne*) flow from a challenge to s. 742.1(f)(iii) of the *Criminal Code* that was allowed largely based on the decision in this appeal.

PART VI - TABLE OF AUTHORITIES

AUTHORITIES	PARAGRAPH(S)
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Withler v Canada (Attorney General), 2011 SCC 12	38, 41-43

LEGISLATION	**SECTIONS**
Criminal Code, RSC 1985, c C-46	742.1(a), 742.1(c), 742.1(a)(e)(i), 742.6(1), 742.6(9)

HER MAJESTY THE QUEEN IN RIGHT OF CANADA -and- CHEYENNE SHARMA -and- ATTORNEY GENERAL OF ONTARIO et al.

Appellant | Respondent | Interveners

SCC Court File No. 39346

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

PROCEEDING COMMENCED AT
OTTAWA

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