S.C.C. FILE NO. 41431

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE NOVA SCOTIA COURT OF APPEAL)

BETWEEN:

HIS MAJESTY THE KING

APPELLANT
(Respondent)

-and-

HARRY ARTHUR COPE

RESPONDENT
(Appellant)

-and-

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Table of Contents

FACTUM OF THE INTERVENER LEAF……..……1

PART I. OVERVIEW AND STATEMENT OF FACTS..... 1
PART II. ISSUES 2
PART III. STATEMENT OF ARGUMENT..... 2
A. Incarceration does not make Indigenous women safer 2
B. Courts ought to defer to sentencing alternatives from Indigenous justice systems that improve Indigenous women's safety..... 9
PART IV. & V. COSTS & ORDER SOUGHT..... 10
PART VI. TABLE OF AUTHORITIES..... 12

PART I. OVERVIEW AND STATEMENT OF FACTS

1. Colonial history creates a paradox of violence and marginalization. Indigenous women and girls are overrepresented as victims[1] of violent crimes.[2] Indigenous people, including Indigenous women, are also overrepresented within the Canadian prison system.[3] The Crown bears responsibility for this colonial history and its contemporary impacts. Yet, courts continue to impose prison sentences instead of forms of accountability flowing from other forms of accountability recommended by Indigenous communities.

2. The Women's Legal Education and Action Fund ("**LEAF**") submits that the lower courts' and Crown's approaches to sentencing makes two problematic assumptions:[4] (1) incarceration of Indigenous persons provides the greatest protection for vulnerable Indigenous women; and (2) prison is the most effective way to deter and denounce crime.

3. Research and case law show that prison does not reduce recidivism, thus undermining the safety of Indigenous women.[5] LEAF submits that Indigenous-led justice initiatives and sentencing recommendations are more likely to meet the goal of safety for Indigenous women in the long term than approaches to sentencing based in Euro-western tradition.

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[1] LEAF notes that while the *Criminal Code* uses language of "victim" and "offender", particularly in the context of Indigenous Peoples there is significant overlap of who may be a "victim" and "offender". LEAF uses these terms for consistency with the *Criminal Code*, with a caveat that the terms create a false dichotomy.

[2] Jane McMillan, *Addressing Mi'kmaq Family Violence: Family Violence and Aboriginal Communities: Building Our Knowledge and Direction through Community Based Research and Community Forums* (Millbrook: Mi'kmaq-Nova Scotia-Canada Tripartite Forum Special Projects Fund, May 2011) at 87 [McMillan]; National Inquiry into Missing and Murdered Indigenous Women and Girls, Reclaiming Power and Place: *The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, Vol. 1a*, (Ottawa: NIMMIWG, 2019) at 55 [MMIWG Report Vol. 1a].

[3] *R v Sharma*, 2022 SCC 39 at para 123-24 (obiter in the dissent) [*Sharma*]; McMillan, *supra* note 2 at 79-80, 85, 87-89.

[4] Nova Scotia Provincial Court Sentencing Decision, February 16, 2023, Record of the Appellant, Part 1, Tab B, at pg 14, 16, 21-22; *R v Cope,* 2024 NSCA 59, at para 17, 213, 218, 233, 242, 243 [Court of Appeal Decision].

[5] *R v Rooke*, 2009 BCPC 210, paras 63-66 [*Rooke*]; *R v Frenette*, 1997 NSCA 92 at para 18 [*Frenette*]; *R v Gloade*, 2019 NSPC 55 at para 61 [*Gloade*]; *R v Gladue*, [1999] 1 SCR 688 at para 56 [*Gladue*].

4. The constitutional imperative of reconciliation calls on the courts to broaden the interpretation of sentencing principles in sub-sections 718.2(e), 718.201, and 718.04 of the *Criminal Code* to promote reconciliation and equality, and to meaningfully promote Indigenous women's long-term safety.

5. Moreover, substantive equality is the animating norm of the constitutionally guaranteed right to equality under the *Canadian Charter of Rights and Freedoms*.[6] It is incumbent upon the courts to ensure that its decisions are in line with the constitutional principle of substantive equality, and that laws are not interpreted in a manner that reinforces, perpetuates, or exacerbates a disadvantage.[7] This Court has an opportunity and obligation to guide future decision makers to expand interpretations of deterrence and denunciation to validate and promote Indigenous legal principles and systems instead of interpreting these principles in a manner that subverts Indigenous justice systems.

6. LEAF accepts the facts as stated in the Factum of the Respondent.[8]

PART II. ISSUES

7. LEAF adopts the statement of issues as presented by the Respondent.[9]

PART III. STATEMENT OF ARGUMENT

A. Incarceration does not make Indigenous women safer

8. The Court of Appeal (both the majority and dissent) in *R v Cope*, 2024 NSCA 59 (the "**Court of Appeal decision**") references the safety of victims of intimate partner violence, specifically Indigenous women, as the primary motivating factor behind the sentencing decisions in the case at bar, but come to different conclusions on the appropriate prison

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[6] *Sharma*, *supra* note 3 at para 37; see also *Fraser v Canada (Attorney General)*, 2020 SCC 28 at para 42 [*Fraser*], *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 2 [*Withler*], *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143.
[7] *Sharma*, *supra* note 3 at para 31; *R v Williams,* [1998] 1 SCR 1128 at para 44 [*Williams*]; *R v Nasogaluak*, 2010 SCC 6 at para 2 [*Nasogaluak*]; *R v Wust*, [2000] 1 SCR 455 at para 34; *Winko v British Columbia (Forensic Psychiatric Institute)*, [1999] 2 SSCR 625 at para 38.
[8] Factum of the Respondent Harry Arthur Cope, dated July 30, 2025 SCC File No. 41431 at paras 7-29 [Respondent Factum].
[9] Respondent Factum, *supra* note 8 at para 30.

sentence length.[10] In the instant appeal, the Appellant cites Indigenous women's safety as justification for a longer prison sentence despite Indigenous sentencing recommendations to the contrary.[11]

9. LEAF challenges the presumptions in both lower court decisions and the Appellant's factum[12] that incarceration is the best, most effective way for a sentence to denounce and deter violence against Indigenous women and hold offenders accountable.

Incarceration does not address recidivism and therefore does not meet the objective of deterrence

10. "Safety" is neither simply an interpretive principle nor a mere incantation; it is a lived experience. It is a state of existence that the colonial state has historically failed to promote for Indigenous women, adversely impacting the equality rights of Indigenous women.[13] This is why Parliament undertook several revisions of the *Criminal Code* in recent years – to hold those individuals who engage in violence against Indigenous women responsible.[14]

11. Responsibility is not a static precept across cultures. This case exemplifies the limited way in which the justice system engages with concepts of deterrence, accountability, and safety in sentencing approaches to forge the path of responsibility..

12. Prison does not end recidivism. To the contrary, prison contributes to recidivism – particularly for Indigenous offenders – undermining the goal of rehabilitation.[15] For example, in a Statistics Canada 2016 study in Saskatchewan, Indigenous adult offenders had a higher re-offence rate in the colonial criminal justice system (67%) vs non-

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[10] Court of Appeal Decision, *supra* note 4, at paras 16, 110-21, 177-79, 305 17, 111-13, 230-35.
[11] Factum of the Appellant His Majesty the King, dated June 5, 2025, SCC File No. 41431 at paras 83, 87 [Appellant Factum].
[12] Appellant Factum, *supra* note 11.
[13] MMIWG Report Vol. 1a, *supra* note 2, at pg 508.
[14] Appellant Factum, *supra* note 11, at para 48 citing *House of Commons Debates*, Vol 148, No. 435 (17 June 2019) at 29245 (Hon. David Lametti).
[15] *R v Mason*, 2011 MBPC 48 at p. 9-10 [Mason]; *Gladue*, *supra* note 5 at para 56; *R v Moses*, [1992] 71 CCC (3d) 347, [1992] 3 CNLR 116, 1992 CanLII 12804 at pages 374-78 [*Moses*].

Indigenous offenders (54%).[16] A 2017 Correctional Service of Canada study found that generally Indigenous offenders who are incarcerated are more likely to reoffend than non-Indigenous offenders.[17] Courts have also recognized this reality.[18] It is reasonable to conclude that incarceration is at least not successfully accomplishing deterrence among Indigenous offenders; judges in Canadian courtrooms have suggested the same.[19]

13. Case law shows how these statistics play out in the lived realities of Indigenous offenders. Indigenous offenders who are sentenced to prison often reoffend upon release.[20] Common themes among these cases include intergenerational trauma[21], personal trauma[22], and substance abuse,[23] particularly where these factors remain unaddressed in meaningful ways.

14. Notably, in *R. v. Kanate*, 2023 ONSC 4601, a young Indigenous man had his first encounter with the criminal justice system as a minor, for an assault against his abusive father while attempting to protect his mother; he was later imprisoned for multiple reoffences.[24] In ordering the Dangerous Offender designation for Mr. Kanate, the sentencing judge

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[16] Department of Justice Canada, JustFacts: Recidivism in the Criminal Justice System (Ottawa: Department of Justice Canada, 2020), at p. 2. This disparity jumped to 80% recidivism rate for Indigenous offenders when isolated for those incarcerated, versus 57% for non-Indigenous offenders. Similar disproportions were observed in Nova Scotia and Quebec, see pages 2-4.
[17] Correctional Service of Canada, *The Relationship between Length of Incarceration and Recidivism*, by Sara Rubenfeld & Mari C Shanahan Somerville (Ottawa: Correctional Service of Canada, 30 June 2017), at pp. 15-17.
[18] *Mason*, *supra* note 15 at p. 9-10; *Gladue*, *supra* note 5 at para 56; *Moses*, *supra* note 15 at pages 374-78.
[19] *Moses*, *supra* note 15 at pages 374-78; *R v Kanate*, 2023 ONSC 4601 at para 114 [*Kanate*]; *Mason*, *supra* note 15 at pages 9-10.
[20] See: *Kanate*, *supra* note 19; *R v Morgan*, 2017 ONSC 5618; *R v Simon*, 2006 ABPC 21 [*Simon*]; *R v Crazybull*, 1993 ABCA 197; *R v Carlick* 1999 CanLII 6378; *R v Hopkins,* 2000 ABCA 23 (CanLII); *R v Heavyrunner,* [2003] A.J. No. 1641 [*Heavyrunner*]; *R v Reid*, [2005] A.J. No. 539 [*Reid*]; *R c LP*, 2020 QCCA 1239 [*LP*]; *R c Crow,* 2021 QCCQ 11037 [*Crow*]; *R c Qalingo*, 2020 QCCQ 1698 [*Qalingo*]; *Moses*, *supra* note 15.
[21] *Simon supra* note 20 at para 20; *Qalingo*, *supra* note 20 at para 37.
[22] *Kanate*, *supra* note 19 at para 9; *Morgan*, *supra* note 20; *Simon supra* note 20 at para 29; *Crow*, *supra* note 20, at para 10; *Qalingo*, *supra* note 20, at para 19.
[23] *Kanate*, *supra* note 19 at para 15; *Simon supra* note 20 at para 21, 27; *Heavyrunner, supra* note 20; *Reid*, *supra* note 20; *LP, supra* note 20 at para 38; *Crow*, *supra* note 20 at para 14; *Qalingo*, *supra* note 20 at para 25.
[24] *Kanate*, *supra* note 19 at para 9.

acknowledged that he was "very aware that the criminal justice system, which placed a 20-year-old Indigenous man in a Federal penitentiary, has had a role in creating the behavioral problems and the attitude of Mr. Kanate."[25]

15. In the context of the Millbrook community (Mr. Cope's community), incarceration is incompatible with Indigenous Mi'kmaq values and traditions of reciprocity, consensual decision making, mutual forgiveness, tangible reparations, and balancing relations.[26] Offenders who are removed and isolated from the community through incarceration cannot repair wronged relations in a way that addresses root causes and facilitates reciprocity.[27] Isolation caused by incarceration lacks the social deterrents culturally and historically used in Mi'kmaq communities to resolve problems, including disorder and violence.[28]

16. Canadian courts have recognized that creating safety through actively reducing recidivism requires treatment of the sources of crime.[29] This was aptly stated by Justice Stuart in *R v Moses*:

> …It is patently hypocritical to recognize the underlying causes of a repeat offender's crimes and then require him to cure himself [...] The justice system expects offenders with fragile self-images, overwhelmed by personal problems, lacking any significant personal support system, without financial or personal resources to function independently, to miraculously gain control over their life. When they fail (most treatment specialists predict a relapse [...]), the justice system too readily closes the door on further rehabilitation and opens the door to jail[30]

17. In reference to the recommendations of the sentencing circle in this case, the sentencing judge opined that the recommended treatment was "an ideal program for someone like Mr. Cope, the best that could be offered, I would think, in the province."[31] Still, the sentencing judge imposed a prison sentence, despite noting the suitable alternative that

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[25] *Kanate*, *supra* note 19 at para 114.
[26] McMillan, *supra* note 2 at pp. 40-42, 80, 125-26, 130.
[27] McMillan, *supra* note 2 at pp. 40-42, 80, 125-26, 130.
[28] McMillan, *supra* note 2 at p. 40-42, 80, 125-26.
[29] *Moses*, *supra* note 15 at paras 374-78.
[30] *Moses*, *supra* note 15 at paras 377-78.
[31] Record of the Appellant ["*RA*"], Tab 4 at 233.

would employ meaningful social control and address the root causes of Mr. Cope's behaviour, in the interest of denunciation and deterrence.

18. Assuming that incarceration better accomplishes denunciation, deterrence, and safety for victims prevents the meaningful application of sentencing principles in sub-sections 718.04, 718.201, and 718.2(e) for an identifiable group of marginalized people. Without relevant and meaningful methods of social control to address the root causes of violent behaviour, recidivism continues without improving Indigenous women's safety.[32]

Prison is not the only way that courts can effectively signal deterrence and denunciation of violence

19. The second implicit assumption in the lower court decisions and the Appellant's submissions is that prison is either the only correct or effective way that violent conduct can be denounced or deterred. This assumption is reached without exploring alternative sentences to imprisonment for Indigenous offenders as mandated by sub-section 718.2(e).

20. It is also critical for the Court to grapple with the substantive inequality Indigenous women face when trying to access safety and security through the criminal justice system. Where mechanisms like incarceration fail to promote Indigenous women's safety but remain prioritized, substantive equality cannot be achieved.

21. Denunciation and deterrence can be fulfilled through alternative means and understood from different perspectives. For example, denouncing a crime can take the form of the offender being held publicly accountable in a community setting. Deterrence can take place through addressing roots of crime like addiction, trauma, disconnection from culture, and lack of coping skills, thus diminishing the causes of violence before more violence can take place. Without a meaningful assessment of what deterrence and denunciation effectively mean for specific Indigenous Peoples, a conclusion as to effective sentencing leaves the objectives of sub-section 718.2(e) grounded in presumption rather than evidence, the result of which is unlikely to be effective in promoting safety. Despite the sentencing circle's recommendation for a community-based sentence targeting the root causes of Mr. Cope's

[32] McMillan, *supra* note 2 at p 80.

violent behaviour, the sentencing judge found that a five-year penitentiary sentence would better accomplish the goals of deterring violent behaviour and protecting the community.[33]

22. This approach presupposes that colonial sentencing is definitively more successful than Indigenous legal values and social control for Mr. Cope. This assumption is unfortunately in line with stereotypes of Indigenous justice as solely focused on a romanticized version of healing and support, and therefore less adept to deal with serious offences.[34] Perpetuating such stereotypes stands in juxtaposition to promoting substantive equality for Indigenous Peoples.[35]

23. Indigenous courts have developed intricate spaces for responsibility and accountability in offenders, while healing efforts focus on reintegration into the community, which usually occurs with or without isolation by prison.[36] For example, the Vancouver Aboriginal Transformative Justice Services Society, an Indigenous offender diversion program in Vancouver developed with the urban Indigenous community in Vancouver, implemented community-based plans with the aim of making amends and positive reintegration.[37]

24. In the instant case, the Mi'kmaw Legal Support Network ("MLSN") and the Mi'kmaw Native Friendship Centre ("MNFC") have made deliberate efforts over many years to develop holistic, culturally appropriate legal and justice services that promote accountability and rehabilitation through the Mi'kmaq Customary Law Program. LEAF adopts the description of the Mi'kmaq Customary Law Program as stated by the MLSN, MNFC, and Millbrook First Nation Coalition interveners and will not duplicate those arguments.

25. The Court can, and must, benefit from expanding its view and interpretation of deterrence and denunciation to include Indigenous perspectives on social control and accountability

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[33] Court of Appeal Decision, *supra* note 10 at para 30.
[34] Gabe Boothroyd, "Urban Indigenous Courts: Possibilities for Increasing Community Control Over Justice" (2019) 56:3 Ab L Rev 903 at 924 [Boothroyd].
[35] *Canadian Charter of Rights and Freedoms*, s 15, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11. [*Constitution Act, 1982*].
[36] Boothroyd, *supra* note 34 at 923.
[37] Boothroyd, *supra* note 34 at 915-916 (the program saw an 82% plan completion rate among offenders with positive feedback directly from offenders and community members).

as both severe and effective approaches to curtailing violence in Indigenous communities. Social control and addressing harms inflicted against community and community members is not a new concept to Indigenous Peoples.[38] Indigenous Peoples have long developed legal systems and social controls that are unique, meaningful and impactful.[39] While Canadian courts have developed an approach to sentencing that has generally favoured incarceration to demonstrate a scale of seriousness of crime, this perspective is not universal.

26. This case provides a clear example of how Indigenous perspectives on social control can emphasize accountability without relying on incarceration. For example, Mr. Cope's sentencing circle required him to articulate the precise impact his actions had on his community, and then the circle participants examined his crime in the larger context of his social, economic, family, and cultural environments to determine the roots of his actions, what must be done to prevent further assaults, and how to make reparations to various community relationships.[40] The sentencing circle in the instant case emphasized accountability, reparation, and prevention, as opposed to retribution and shame-based denunciation and deterrence.[41]

27. In her community-based research regarding the effectiveness of Mi'kmaq developed and led justice systems in Mi'kma'ki, Jane McMillan notes that while contact with the Canadian justice system fractures Indigenous Peoples' kin networks, community-based justice mechanisms can strengthen kin networks while also providing community-based deterrent effects grounded in shame, accountability, and responsibility.[42]

28. The use and application of Indigenous sentencing recommendations is nuanced and varied. Not all communities will have the same resources or developed processes. In isolated communities and in situations of intimate partner violence ("IPV") restorative justice

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[38] Boothroyd, *supra* note 34 at 924.
[39] Boothroyd, *supra* note 34 at 924.
[40] Supplemental Appeal Book of the Appellant Harry Arthur Cope, Nova Scotia Court of Appeal, 2023 at Tab 7, page 80 [Supplemental Appeal Book of the Appellant].
[41] Supplemental Appeal Book of the Appellant, *ibid*; McMillan, *supra* note 2 at 139.
[42] McMillan, *supra* note 2 at 139.

structures and sentencing circles may result in recidivism or unsafe participation for survivors of violence.[43] It is important to consider Indigenous sentencing recommendations in the context in which they exist. Some restorative models have tried to manage these issues through separate circles for victims and offenders.[44]

29. Deterrence and denunciation can be viewed through a broader lens to include Indigenous sentencing recommendations based on culturally relevant models of social control. This is not to suggest that Indigenous cultures are inherently immune from violence and sexism, or that current gendered norms have always been relevant in Indigenous communities.[45] Rather, culturally relevant and effective Indigenous sentencing recommendations may be treated as accomplishing deterrence and denunciation within the scope of deference to the community through which these recommendations are born.

B. Courts ought to defer to sentencing alternatives from Indigenous justice systems that improve Indigenous women's safety

30. Denunciation and deterrence are destinations, the path to which will look different for each offender and each offence. Canadian courts are obligated by the constitutional imperatives of reconciliation to broaden sentencing principle interpretation to craft culturally effective, meaningful sentences.[46] This Court has an opportunity to guide decision makers to abide by the constitutional imperative of reconciliation and improve long-term safety for Indigenous women.

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[43] See *R. v. Bennett,* [1992] Y.J. No. 192 (Y Territory Crt), *R v Charleyboy*, [1993] BCJ NO 2854, *R v Naapaluk*, [1994] 2 CNLR 143, where the offenders had breached probation conditions from previous offences. See also *R v JJ*, [2004] 192 CCC (3d) 30 at para 34, Appellant's Book of Authorities, Nova Scotia Court of Appeal, 2023 Volume 1 Tab 22; and *R v Green,* [1992] Y.J. No 217 (Y Territory Crt) where offenders under conditions of sentencing circles for IPV reoffended, again committing IPV against the same partners.

[44] Verona E. Singer, "Restorative approaches and gendered violence: Moving beyond is it possible?" (Bridges Institute: Truro, 2019) at 6-9.

[45] Emily Snyder, Val Napoleon & John Borrows, "Gender and Violence: Drawing on Indigenous Legal Resources" (2015) 48:2 UBC L Rev 593 at 598-599, 610, 615-616.

[46] *Sharma, supra* note 3 at para 115.

31. The Appellant states that a longer prison sentence in the instant case accomplishes reconciliation.[47] Respectfully, LEAF submits that it is not up to the Crown to determine when reconciliation has been accomplished.

32. The constitutional imperative of reconciliation is a principle derived from section 35 of the *Constitution Act, 1982* which recognizes and affirms existing Aboriginal and treaty rights.[48] Indigenous communities have an existing inherent right to self-government and self-determination which include social controls through which harmful conduct is addressed in the best interest of the parties involved, including the community, using meaningful mechanisms inherent to, designed and led by the affected Indigenous community.[49]

33. In the instant case, the sentencing judge disregarded the thoughtful and culturally relevant sentencing recommendations based on Mi'kmaq legal principles in favour of colonial western ideology and presumed that incarceration is a more effective social control than community-based initiatives. This approach does not respect the inherent right to self-government and self-determination which are central to realizing reconciliation.

PART IV. & V. COSTS & ORDER SOUGHT

34. LEAF will not seek costs in this matter and asks that costs not be awarded against it. LEAF takes no position on the ultimate disposition of this Appeal.

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[47] Appellant Factum, *supra* note 11 at para 95.
[48] *Constitution Act, 1982*, *supra* note 35.
[49] *Reference re An Act respecting First Nations, Inuit and Metis children, youth and families,* 2024 SCC 5 at para 9 [C-92 Reference]; *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14 ("UNDRIP Act").

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10 day of September 2025.

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