SCC Court File No.: 42025

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

BETWEEN:

HIS MAJESTY THE KING

APPELLANT

-and-

KEVEN BOILY

RESPONDENT

-and-

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INTERVENERS

FACTUM OF THE INTERVENERS, THE AKWESASNE JUSTICE DEPARTMENT AND THE MENTAL HEALTH LEGAL ADVOCACY COALITION,
(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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THE AKWESASNE JUSTICE DEPARTMENT AND THE MENTAL HEALTH LEGAL ADVOCACY COALITION

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Factum of the Interveners, the Akwesasne Justice Department and the Mental Health Legal Advocacy Coalition

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

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PART I — OVERVIEW AND FACTS

1. The Akwesasne Justice Department (AJD) and the Mental Health Legal Advocacy Coalition (MHLAC) (the "Interveners") intervene to assist this Court in understanding that restricting sentencing options through rules or precedent will disproportionately affect Indigenous communities and those with mental health issues. This could result in greater numbers of individuals with recorded convictions, fewer receiving community-based outcomes, reduced access to restorative sentencing structures, and ultimately further over-incarceration.

2. An approach to sentencing that gives presumptive or overriding weight to deterrence and denunciation can exacerbate harm to Indigenous communities and those with mental health difficulties. By contrast, rehabilitative, individualized and contextual approaches mitigate harm, reduce recidivism, and maintain judicial discretion, while reinforcing Canada's constitutional reconciliation obligations. This Court has an opportunity and an obligation to ensure that "public interest" analyses, and deterrence and denunciation principles, are interpreted in a manner that strengthens, rather than undermines, Indigenous legal principles and prevents further harm to those with mental health issues.

3. The AJD works alongside the Ontario and Quebec criminal courts by connecting community members with local Indigenous resources for rehabilitation, housing, supervision during release, providing resources for traditional healing interventions, and facilitating sentencing circles. The Mohawks of Akwesasne exercise inherent jurisdiction over their justice system, affirmed by s. 35 of the *Constitution Act, 1982,* the *Royal Proclamation of 1763,* and Articles 5 and 34 of the *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP").

4. The MHLAC is a national legal advocacy organization established by and comprised of individuals with former or current experiences with Canada's mental health system. Its efforts

concentrate on systemic advocacy, legal rights and policy reform as they pertain to issues arising from the intersection of mental health challenges and the law.

5. The Interveners' submissions focus on this Court's consideration of the public interest analysis during sentencing. The Interveners urge this Court to include their clients' lived and documented experiences in the "public interest analysis" during sentencing considerations. The Interveners do not suggest that a punitive approach is always inappropriate, but rather that its presumptive application will be detrimental. The public interest is served by preserving individualized sentencing because Indigenous circumstances and mental-health evidence can materially alter what proportionality, accountability, rehabilitation and public safety require in a particular case.

6. The Interveners take no position on the facts as set out by the parties in their factums.

PART II — ISSUES

7. The issues in this appeal, as identified by the Appellant, are a) whether the Court of Appeal erred in finding that the trial judge appropriately weighed the aggravating factors identified in sections 718.04, 718.2(a)(ii), (ii.1), (ii.2), (iii) and (iii.1), and 718.201 of the *Criminal Code*, and b) whether the trial judge appropriately considered the seriousness of the choking offence under s. 267(c) of the *Criminal Cod*e.

PART III — STATEMENT OF ARGUMENT

A. A PUBLIC INTEREST ANALYSIS MUST INCLUDE INDIGENOUS PERSONS

(i) Indigenous Sentencing Realities

8. The majority in *Boily* emphasized the need for individualized sentencing, recognizing the continued relevance of rehabilitation and mental health, even where deterrence and denunciation warrant particular attention.[1] Those principles closely align with the remedial sentencing

[1] *R. c. Boily* 2025 QCCA 841 at paras 28, 30, 32-35

frameworks developed in *Gladue*[2] and *Ipeelee*[3], which direct sentencing judges to consider all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community, with particular attention to Aboriginal offenders. These seminal decisions reflect careful considerations to address the crisis of overincarceration of Indigenous persons.

9. Canada's criminal justice system has a shameful and tragic history of mistreatment and alienation of Indigenous persons.[4] Canada has committed to implementing the recommendations of the TRC,[5] as well as being a signatory to the UNDRIP.[6] Parliament has also addressed this issue through codification of sec. 718.2(e) in the *Criminal Code,* as an attempt to address this intractable problem. Our courts now acknowledge that the current overrepresentation of Indigenous persons in the criminal justice system is linked to decades of colonial harms that continue today. These many historical realities, including laws, policies, and jurisprudence, the erosion of Indigenous language, the imposition of band council governments, the deprivations and intergenerational impact of residential schools, and the overall attack on Indigenous legal systems, have all substantially contributed to Indigenous people's lives today.

10. The overrepresentation of Indigenous persons in the criminal justice system is accompanied by disproportionately high rates of victimization of Indigenous women, in particular as victims of

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[2] *R. v. Gladue*, [1999] 1 S.C.R. 688 [*Gladue*]
[3] *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433 [*Ipeelee*]
[4] See *Quebec (Attorney General) v. Pekuakamiulnuatsh Takuhikan*, 2024 SCC 39 at para 183, Tulloch, Michael T. *Report of the Independent Street Checks Review*. Toronto: Queen's Printer for Ontario, 2018; See *R. v. Barton,* 2019 SCC at para 199.
[5] Truth and Reconciliation Commission of Canada [TRC]
[6] United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295 (Annex), UN GAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2007), arts 5, 34.

physical assault, sexual assault and spousal violence.[7] The National Inquiry into Missing and Murdered Indigenous Women and Girls (MMIWG) concluded that the disproportionately high rates of violence against women are the result of the ongoing deliberate state actions and inactions, which find their roots in colonial practices amounting to race and gender-based genocide.[8] Being Indigenous, in and of itself, is considered a risk factor for violent victimization of Indigenous women.[9]

11. Indigenous victims are reflexively less likely to pursue state justice as they are aware of the ensuing community harm and that they may be blamed for subjecting a community member to those outside interventions. Victims' concerns include exposing their kin to a criminal justice system widely recognized as disproportionately punitive toward Indigenous peoples and potential backlash.[10] In a highly relational society, a punitive approach over a rehabilitative approach furthers the harm it purports to address.[11]

12. Specialized considerations in sentencing for Indigenous persons prioritize accountability to the community, restoring harms and reintegrating the offender back into the community, where appropriate. This context, and direction from this court in *Gladue and Ipeelee*,[12] requires that reasonable sentencing programs and procedures must be explored, attuned to both an offender's Indigenous heritage and the gravity of the offence.

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[7] Jillian Boyce, Victimization of Aboriginal People in Canada, 2014. Statistics Canada, June 28, 2016 [Boyce]; Mahony, T. H., J. Jacob and H. Hobson. 2017. "Women and the Criminal Justice System" In Women in Canada: A gender-based statistical report. Statistics Canada

[8] See *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, Government of Canada (2019).

[9] Boyce, *supra* note 7.

[10] *R. v. Ipeelee,* 2012 SCC 13 at para 60.

[11] *R. v. Mason*, 2011 MBPC 48 at para. 9-10; *R. v. Gladue*, [1999] 1 SCR 688 at para 56; *R. v. Moses*,[1992] 71 CCC (3d) 347, [1992] 3 CNLR 116, 1992 CanLII 12804 at pages 374-378.

[12] *Gladue*, *supra* note 1 at paras 33–34; *Ipeelee*, *supra* note 2 at paras 60–61.

(ii) Punitive Justice Disproportionately Harms Indigenous Communities

13. Punitive justice disproportionately harms Indigenous communities, especially when it involves incarceration.[13] Consequences for family members involve the loss of emotional support, as well as the loss of an income earner, and companionship; there are also long-term health effects from incarceration, including premature mortality.[14] Losing family members to incarceration mimics the historical harm and employs the carceral logic of residential schools.

14. Indigenous persons disproportionally suffer the long-term impacts of a criminal record when compounded with overlapping systemic oppressions. Adverse consequences resulting from criminal records include the loss of future employment and housing opportunities, loss of family and community connections, trauma from incarceration, and increased risk of repeated contact with the justice system.[15] These effects are exacerbated in remote communities given language barriers, limited economic mobility, over-policing, and challenges accessing courts and social services, which in turn interfere with release condition compliance.[16]

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[13] *R. v. Ipeelee,* 2012 SCC 13 at para 59-61, National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report*, vol. 1a (2019), ch. 4, "Colonization as Gendered Oppression," at 229–336; National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report*, vol.1b (2019), Calls for Justice 14.1–14.9 at 197; 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, Volume 2: A Supplementary Report – Quebec* (2019), ch 5, "The Lack of Safety for Indigenous Women, Girls, and 2SLGBTQQIA People" at 91-101

[14] Truth and Reconciliation Commission of Canada, *Calls to Action* (2015), Calls to Action 30–31.

[15] A. Bressan and K. Coady, *Guilty Pleas among Indigenous People in Canada*, Department of Justice Canada (Research and Statistics Division, 2017).

[16] *Ibid* note 15.

ii) Strict Sentencing Contravenes Constitutional Obligations of Reconciliation and Hinders Judicial Discretion

15. Canada's commitments to reconciliation support preserving the availability of culturally responsive and individualized sentencing. Since this Court's ruling in *Gladue,* the availability of viable, culturally relevant community-based programming has improved, including conditional sentences or discharges to Indigenous communities, intensive probation, Indigenous Persons Courts, restorative justice, healing lodges, and sentencing circles.[17] A rule or strong presumption against less punitive sentences in cases of interpersonal violence or serious assault would unduly constrain a sentencing judge's ability to account for the ongoing effects of colonialism and to advance reconciliation. It would also restrict the individualized balancing of sentencing objectives, including deterrence, denunciation, and rehabilitation.

A presumption against discharges will result in more registered convictions and will narrow the range of community-based sentencing outcomes available to judges. It risks reducing access to restorative sentencing structures, and ultimately further entrenching Indigenous overincarceration.[18] These concerns are especially acute in northern, rural, communities where therapeutic supports are limited, treatment infrastructure is sparse, and courts are already struggling to operationalize meaningful alternatives to custody.

[17] Clark, S. *Overrepresentation of Indigenous People in the Canadian Criminal Justice System: Causes and Responses*. (Ottawa: Department of Justice Canada, 2017).
[18] *Ibid* note 17.

B. INCARCERATION IS DISPROPORTIONATELY HARMFUL FOR PRISONERS WITH MENTAL HEALTH ISSUES

16. Our Courts have recognized how harsh sentencing can worsen pre-existing mental health conditions or cause such conditions to surface, due to the adverse effects of social isolation.[19] The detrimental impact of incarceration on people living with serious mental health issues is a factor that is acknowledged by our courts and that must be considered at sentencing.[20]

17. Sentencing that avoids not only incarceration, but a criminal record, is responsive to the overcriminalization of people with mental health conditions who have been historically subjected to discrimination in every facet of daily life.[21] Conditional discharges are an important sentencing option, where available, to minimize the over-criminalization of people with serious mental health issues.

C. WHEN MENTAL HEALTH EVIDENCE MUST BE CONSIDERED AT SENTENCING

18. The law is not clear regarding when in fact mental health issues may be considered at sentencing. The Ontario Court of Appeal has suggested that mental health can only be taken into consideration where the offender establishes both a causal connection between their mental illness and their offending conduct and that a lengthy custodial sentence would have a "serious negative effect on the offender such that it should be reduced on compassionate grounds."[22] However, other

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[19] *Canadian Civil Liberties Assn. v. Canada (Attorney General)*, 2019 ONCA 243 at para. 66; see also *British Columbia Civil Liberties Assn v. Canada (Attorney General),* 2018 BCSC 62 and *British Columbia Civil Liberties Assn. v. Canada (Attorney General)*, 2019 BCCA 228.
[20] *R. v. Fabbro,* 2021 ONCA 494 at para. 25; *R. v. Ellis,* 2013 ONCA 739.
[21] Correctional Services Canada , Office of the Correctional Investigator Annual Report, 2024-25, at p. 89, available online.
[22] *R. v. Fabbro,* 2021 ONCA 494 at para 25; *R. v. Ellis,* 2013 ONCA 739.

courts in Canada, including the Ontario Court of Appeal have not required both elements to be established.[23]

19. Mental health evidence is relevant and must be given meaningful consideration where it forms a significant part of the circumstances of the offence or the offender. Evidence of the likely detrimental impact on the accused's mental health condition is not necessary where mental health issues form a vital part of the circumstances of the offence and must therefore inform the court's assessment of the gravity of the offence and moral blameworthiness of the offender.

20. Similarly, where there is evidence that incarceration is likely to have a detrimental impact on the offender as a result of their mental health condition, or where their rehabilitation will be best served by a non-custodial sentence, these highly relevant personal circumstances of the offender bear directly on the proportionality of the sentence, regardless of whether mental health challenges played a role in the offence itself. The degree to which mental health evidence informs the appropriate sentence will vary greatly from case to case.

21. Sentencing judges are in the best position to evaluate the extent to which mental health evidence is relevant to their analysis. Their decision about how to weigh the evidence will be entitled to significant deference, as long as they give it meaningful consideration in cases where it is relevant to one or more of the applicable sentencing principles.

D. HOW MENTAL HEALTH EVIDENCE CAN INFORM THE SENTENCING ANALYSIS

22. Mental health is not merely a "mitigating factor" warranting some reduction in sentence. It potentially bears on several different sentencing factors and principles. It may form part of the circumstances of the offence itself, or it may constitute a personal circumstance of the offender.

[23] *R. v. Dedeckere*, 2017 ONCA 799; *R. v. Gonzalez-Ramirez*, 2023 ONSC 5468; *R. v. Jago*, 2024 ABKB 509 at paras 67-77.

Sentencing judges must give specific and meaningful consideration to how mental health evidence informs their determination of the fit sentence.

23. Where mental health issues form part of the circumstances of the offence, principles such as general deterrence and denunciation play a less significant role, as those with mental health conditions are not an appropriate vehicle for demonstrating the law's disapproval and deterring others.[24] In some cases, mental health evidence will significantly impact the court's assessment of the gravity of the offence and moral blameworthiness of the offender.[25]

24. Sentencing courts must guard against over-reliance on the range in such cases. The range may be of little practical assistance when mental health evidence substantially differentiates the circumstances of the offence from the circumstances represented in the range cases. The range may remain a helpful starting point for the sentencing court, but it must not be permitted to divert the sentencing court from the task of crafting a fit and proportionate sentence for the individual before the court.

25. Mental health is also a personal circumstance of the offender that may inform the appropriate sentence, for instance by supporting a sentence that weighs rehabilitation more heavily than the other sentencing principles, or because incarceration is likely to have a seriously detrimental impact on the accused's mental health condition.[26]

26. Given that mental health evidence and its impact on sentencing will vary greatly from case to case, sentencing judges should be granted substantial leeway to account for the unique circumstances before them.[27] These circumstances will also include intersecting factors that contribute to the importance and appropriateness of, for example, non-custodial sentences. The

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[24] *R. v. Bertrand Marchand,* 2023 SCC 26 at para 158; *R. v. Batisse,* 2009 ONCA 114 at para. 38.
[25] See for example *Fabbro,* and *Jago* *supra* notes 22 & 23, and *R. v. Adamo,* 2013 MBQB 225.
[26] *R. v. McKenzie,* 2017 ONCA 126 at paras 26-36; *Bertrand Marchand* at para 128.
[27] *R. v. Parranto,* 2021 SCC 46 at paras 155, 137-138.

intersectional nature of contributing factors that may generally be considered mitigating will also differ in each case.

PARTS IV and V — COSTS AND ORDER SOUGHT

28. The Akwesasne Justice Department and the MHLAC do not seek costs and ask that no costs be awarded against them. The Interveners take no position on the disposition of this appeal as it pertains to the facts of the case before the Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 18th DAY OF AUGUST, 2026

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Part VI – Authorities

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3	*R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433 [*Ipeelee*]	8, 12, 14
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6	*R. v. Mason*, 2011 MBPC 48	11
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9	Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report* (2015), at 129–130, 187–188.	12
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12	Clark, S. *Overrepresentation of Indigenous People in the Canadian Criminal Justice System: Causes and Responses*. (Ottawa: Department of Justice Canada, 2017).	16
13	Correctional Services Canada, Office of the Correctional Investigator Annual Report, 2024-25, at p. 89, available online	19