S.C.C. FILE NO. 37233

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

JEFFREY G. EWERT

APPELLANT
(Respondent)

- and -

HER MAJESTY THE QUEEN IN RIGHT OF CANADA (THE COMMISSIONER OF THE CORRECTIONAL SERVICE OF CANADA, THE WARDEN OF KENT INSTITUTION and THE WARDEN OF MISSION INSTITUTION)

RESPONDENT
(Appellant)

NATIVE WOMEN'S ASSOCIATION OF CANADA, CANADIAN ASSOCIATION OF ELIZABETH FRY SOCIETIES, MENTAL HEALTH LEGAL COMMITTEE, WEST COAST PRISON JUSTICE SOCIETY, PRISONERS' LEGAL SERVICES, CANADIAN HUMAN RIGHTS COMMISSION, ABORIGINAL LEGAL SERVICES, CRIMINAL LAWYERS' ASSOCIATION (ONTARIO), BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION and UNION OF BRITISH COLUMBIA INDIAN CHIEFS

INTERVENERS

FACTUM OF THE INTERVENERS, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION and UNION OF BRITISH COLUMBIA INDIAN CHIEFS

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

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PART I: OVERVIEW AND STATEMENT OF FACTS

1. Systemic bias and discrimination experienced by Aboriginal peoples in the Canadian justice system do not end at the prison doors. While the gross overrepresentation of Aboriginal peoples in Canadian jails has long been recognized, with efforts by Parliament and the Supreme Court of Canada to address the problem, it is less well known that the gap in correctional outcomes between Aboriginal and non-Aboriginal offenders is similarly disproportionate. As reported by the Office of the Correctional Investigator, Aboriginal offenders in federal penitentiaries serve disproportionately more of their sentence behind bars, are under-represented in community supervision programs, and are grossly over-represented in maximum security institutions and segregation placements.[1] This is the first opportunity for this Court to hear legal arguments concerning Aboriginal offenders and this important branch of the criminal justice system.

2. In the present case, the trial judge found that psychological tests used by Correctional Services Canada ("CSC") to assess the safety risk of Aboriginal prisoners are susceptible to cross-cultural bias and therefore unreliable. The security ratings produced by these risk assessment and security classification tools can have a significant adverse impact on the liberty of prisoners as they affect parole eligibility, access to programs, early or temporary release, and security classification and placement within a particular institution. Despite repeated promises to do so, CSC has not conducted research to ensure these assessment tools are valid and reliable for Aboriginal prisoners.

3. The joint interveners accept the findings of fact reached by the trial judge.

PART II: POSITION WITH RESPECT TO THE APPELLANT'S QUESTIONS

4. The joint interveners support the position of the Appellant that CSC`s use of the impugned tools, without ensuring their reliability for Aboriginal offenders, constitutes a breach of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 ("*CCRA*") and a violation of section 7 of the *Canadian Charter of Rights and Freedoms.*

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[1] Canada, Office of the Correctional Investigator, *Spirit Matters: Aboriginal People and the Corrections and Conditional Release Act* (Ottawa: Office of the Correctional Investigator, 2012) at p. 5.

5. CSC's reliance on the impugned tools, without ensuring their reliability for Aboriginal offenders, is contrary to the principles of fundamental justice ("POFJs") of proportionality (in being overbroad and arbitrary) and the state's obligation to obey the law (based on the Respondent's statutory breach of ss. 4(g) and 24(1) of the *CCRA*).

6. The joint interveners submit that CSC's reliance on the impugned tools, without ensuring their reliability for Aboriginal offenders, is also contrary to another POFJ— that *Gladue* principles must be considered by all decision-makers who have the power to influence the treatment of Aboriginal offenders in the criminal justice system whenever an Aboriginal person's liberty is at stake in criminal and related proceedings. The joint interveners submit that this POFJ is closely related to and animated by principles of proportionality and substantive equality, but is deserving of recognition as a distinct element of these broader principles.

PART III: STATEMENT OF ARGUMENT

A. POFJ that *Gladue* principles must be considered when making decisions that infringe on the liberty of Aboriginal persons in the criminal justice system

7. For several decades, various reports, commissions, and courts have called attention to the gross overrepresentation of Aboriginal people in the Canadian criminal justice system. In 1991, the Aboriginal Justice Inquiry of Manitoba found that the criminal justice system was discriminatory and needed to be more responsive to the substantially different values and experiences of Aboriginal people.[2] The Royal Commission on Aboriginal Peoples ("RCAP") was later established to investigate and propose solutions for how to restore justice to the relationship between Aboriginal and non-Aboriginal people in Canada. In its 1996 *Report on Aboriginal People and Criminal Justice in Canada*, one of RCAP's key findings was that:

> The Canadian criminal justice system has failed the Aboriginal peoples of Canada—First Nations, Inuit, and Métis people, on-reserve and off-reserve, urban and rural—in all territorial and governmental jurisdictions. The principal reason for this crushing failure is the fundamentally different world views of Aboriginal and non-Aboriginal people with respect to such elemental issues as the substantive content of justice and the process of achieving justice.[3]

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[2] Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba*, vol. 1, *The Justice System and Aboriginal People* (1991) at pp. 1 and 86

[3] Canada. Royal Commission on Aboriginal Peoples. *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada*. (Ottawa: The Commission, 1996) at p. 309 ["RCAP Report"].

8. The Commission of Inquiry into certain events at the Prison for Women also found in 1996 that the penal environment did not fit easily with the Aboriginal holistic, community-oriented approach to restoration. As observed by Commissioner Louise Arbour, "Cultural alienation in the correctional environment has a damaging impact on assessments for classification and risk."[4]

9. In the decades since these reports, there has been an evolving societal consensus that the criminal justice system must attempt to remedy this problem by accounting for the unique systemic and background factors**,** and fundamentally different cultural values and world views of Aboriginal people. This need to account for differences in experience and culture has been codified in the context of sentencing, at section 718.2(e) of the *Criminal Code*[5], and also in the context of corrections, at s. 4(g) of *CCRA*[6].

10. The principles underlying s. 718.2(e) of the *Criminal Code* were recognized and discussed in detail in *R. v. Gladue*[7]. This Honourable Court recognized the widespread racism and discrimination faced by Aboriginal persons in Canadian society and directed sentencing judges to take into account: (1) the unique systemic and background factors which may have played a part in bringing the particular Aboriginal person into the criminal justice system and (2) the types of sanctions that may be appropriate in the circumstances, taking into account an Aboriginal person's heritage or cultural connection.[8]

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[4] Canada. Commission of Inquiry into certain events at the Prison for Women in Kingston (Ottawa: The Commission, 1996) at section 4.3.7

[5] RSC, 1985, c C-46. Section 718.2(e) mandates that a court that imposes a sentence shall take into consider the principle that "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders".

[6] Section 4 of the *CCRA* sets out the principles that are to guide CSC in achieving the purpose of the federal correctional system set out at section 3 (that is, to contribute to the maintenance of a just, peaceful and safe society by (a) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and (b) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and their communities). Among these principles, Parliament has included at s. 4(g) a direction that "correctional policies, programs and practices respect gender, ethnic, cultural and linguistic differences and are responsive to the special needs of women, aboriginal peoples, persons requiring mental health care and other groups" [emphasis added].

[7] [1999] 1 SCR 688, 1999 CanLII 679 ["*Gladue*"]

[8] *Gladue, supra*, at para. 61 and 66

11. Appellate courts across the country have subsequently referred to the "underlying philosophy"[9] or "principles underlying"[10] *Gladue* and have held that these principles apply to other areas of the criminal justice system, including in the contexts of: bail[11], parole eligibility, dangerous offender applications, civil contempt[12], extradition proceedings[13], jury selection[14], not criminally responsible review board hearings[15], and whether a young person should be tried in youth or adult court[16].

12. The joint interveners submit that the intersection between the liberty and substantive equality interests of Aboriginal persons engaged by the justice system cannot simply be a matter of statute, but necessarily has constitutional implications. It is submitted that now is the time to recognize a POFJ mandating that *Gladue* principles be considered by all decision-makers who have the power to influence the treatment of Aboriginal offenders in the criminal justice system where that person's liberty is at stake (the "proposed POFJ").

13. For the reasons that follow, it is submitted that the proposed POFJ meets the three-part test for recognizing POFJs as articulated by this Honourable Court in *R. v. Malmo-Levine*[17]and applied in several cases since.[18] That is to say: (1) it is a "legal principle"; (2) there is "significant societal consensus" that the principle is "fundamental to the way in which the legal system ought fairly to operate"; and (3) the principle is sufficiently precise so as "to yield a manageable standard against which to measure deprivations of life, liberty or security of the person".[19]

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[9] See e.g. *R v Kokopenace*, 2013 ONCA 389 ["*Kokopenace*"] at para. 142: "In recent years, this court has come to the recognition that the *Gladue* principles properly extend beyond sentencing for criminal offences, and that *Gladue*'s underlying philosophy bears on other aspects of the interaction between Aboriginal peoples and the justice system" [emphasis added].
[10] See e.g. *R v Sim*, 2005 CanLII 37586 (ON CA) at para. 16 ["*Sim*"]: "I do not think that the principles underlying Gladue should be limited to the sentencing process and I can see no reason to disregard the Gladue principles when assessing the criminal justice system's treatment of NCR accused" [emphasis added].
[11] *R v Robinson*, 2009 ONCA 205
[12] *Frontenac Ventures Corp. v Ardoch Algonquin First Nation*, 2008 ONCA 534
[13] *United States v Leonard*, 2012 ONCA 622 ["*Leonard*"]
[14] *Kokopenace*, *supra*
[15] *Sim*, *supra*
[16] *R v N (M), [2006] 5 WWR 625 (NU CA)*, 2004 NUCA 2
[17] [2003] 3 SCR 571, 2003 SCC 74 at para. 113 ["*Malmo-Levine*"]
[18] See e.g.: *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, [2004] 1 SCR 76, 2004 SCC 4 ["*Canadian Foundation for Children, Youth and the Law*"]; *R v DB*, [2008] 2 SCR 3, 2008 SCC 25
[19] *Malmo-Levine*, *supra*, at para. 113

i. Legal Principle and Sufficient Consensus that the Duty is Fundamental

14. In the *BC Motor Vehicle Reference*, this Honourable Court held that principles of fundamental justice were "to be found in the basic tenets of our legal system" and were to exist as normative legal principles.[20] Over the years, the Court has provided further guidance on how to recognize a legal principle when there is sufficient societal consensus that the principle is fundamental to the way that the justice system ought to operate. A proposed rule or principle will be seen as a legal principle where it is manifested in various legal instruments and used "as a rule or test in common law, statutory or international law".[21]

15. Importantly, decisions of this Court have demonstrated that there are some legal principles that may not necessarily be deeply rooted in our legal system's history and traditions.[22] Some legal principles will instead emerge out of evolving societal values and normative judgments about what rights, interests and values should be protected in a free and democratic society.[23]

16. Here, the joint interveners submit that the proposed POFJ is indeed one that has emerged out of evolving societal values about what rights, interests and values should be protected in Canadian society. As noted above, the overrepresentation of Aboriginal people in the Canadian criminal justice system has been identified as a serious societal problem for the last several decades. This problem has been well-documented and has received the attention of a large number of studies, commissions and inquiries.[24]

17. From the findings of these various studies, commissions and inquires there has emerged a shared understanding that, for our criminal justice system to operate fairly, decision-makers must take into account the unique systemic and background factors and

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[20] *Re BC Motor Vehicle Act*, [1985] 2 SCR 486, 1985 CanLII 81 (SCC) ["*BC Motor Vehicle Reference*"] at para. 31
[21] *Canada (Attorney General) v Federation of Law Societies of Canada*, [2015] 1 SCR 401, 2015 SCC 7 at para. 91. See also *Canadian Foundation for Children, Youth and the Law*, *supra* at para. 9
[22] See e.g. *United States v Burns*, [2001] 1 SCR 283, 2001 SCC 7, where the Court recognized a POFJ that was not anchored in history, but rather based on policy considerations that took into account evolving standards of decency and the collective abhorrence towards the death penalty in Canadian and in other democratic nations.
[23] *Ibid.* See also Nader R. Hasan, "Three Theories of 'Principles of Fundamental Justice'", (2013) 63 SCLR (2d) 339 at pp. 361-365 for a further discussion of POFJs based on evolving societal values.
[24] See *Gladue*, *supra* note 4 at paras. 58-65 for an overview of the various studies, commissions, and inquiries that had looked at this issue as of the time of the Court's decision in 1999, but it includes the Manitoba Justice Inquiry, the RCAP and the Prison for Women Inquiry.

fundamentally different cultural values and world views of Aboriginal peoples when making decisions that infringe on the liberty of Aboriginal people. This principle can be recognized as a distinct element of the broader principles of proportionality and substantive equality, and is thus rooted in "the basic tenets of our legal system"[25]. This duty can also appropriately be considered to be a fundamental legal principle insofar as it has now been established as a rule in statute, in common law, and in various government policies.

Principle is rooted in the basic tenets of our legal system

18. The proposed POFJ is closely related to and animated by the broader principles of proportionality and substantive equality. It reflects the basic tenet of our legal system that just sanctions must be proportionate to both the gravity of the offence and the circumstances of the offender.[26] It also reflects the understanding that "[j]ust sanctions are those that do not operate in a discriminatory manner".[27] As the Ontario Court of Appeal held in *United States v. Leonard*:

> Gladue stands for the proposition that insisting that Aboriginal defendants be treated as if they were exactly the same as non-Aboriginal defendants will only perpetuate the historical patterns of discrimination and neglect that have produced the crisis of criminality and over-representation of Aboriginals in our prisons … Gladue factors must be considered in order to avoid the discrimination to which Aboriginal offenders are too often subjected and that so often flows from the failure of the justice system to address their special circumstances.[28]

19. The joint interveners submit that the failure of a decision-maker to consider the unique circumstances of an Aboriginal person in the criminal justice system, when making a decision that infringes on the liberty of that person, would constitute a breach of the principles of proportionality and substantive equality.

Principle is codified in different statutes

20. The proposed POFJ is manifested in various legal instruments. Section 718.2(e) of the *Criminal Code* and section 4(g) of the *CCRA* both impose a positive obligation on

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[25] *BC Motor Vehicle Reference*, *supra* at para. 31
[26] *R v Ipeelee*, [2012] 1 SCR 433, 2012 SCC 13 ["*Ipeelee*"] at paras. 36-39. In *Ipeelee*, this Court held that the *Gladue* principles were tied to section 7 of the *Charter* and that a failure to consider these factors in sentencing represented a violation of the principle of proportionality.
[27] *Ipeelee*, *ibid.* at para. 68
[28] *Leonard*, *supra* at para. 60

decision-makers—in the contexts of sentencing and corrections, respectively—to consider the unique circumstances and special needs of Aboriginal individuals when making decisions that on their liberty**.**

21. Comments made about section 718.2(e) of the *Criminal Code* when it was introduced in the House of Commons conveyed a growing understanding that ameliorating the problem of overrepresentation of Aboriginal people in the justice system would require consideration of the unique circumstances of Aboriginal offenders.[29] The inclusion of section 4(g) in the *CCRA* was similarly seen as a legislative development that "responded to some of the most significant issues raised by the Royal Commission on Aboriginal Peoples about the corrections and correctional release system".[30]

Principle operates as a rule at common law

22. The proposed POFJ has now been widely established as a rule at common law. In *Gladue*, the Court considered this principle in the context of sentencing specifically, and its codification in section 718.2(e) of the *Criminal Code*. The Court indicated, however, that its findings did not rest on the existence of a section of the *Criminal Code*. Instead, the Court emphasized that the philosophy underlying its decision applied beyond the context of sentencing, to the criminal justice system as a whole:

> It is clear that sentencing innovation by itself cannot remove the causes of aboriginal offending and the greater problem of aboriginal alienation from the criminal justice system. The unbalanced ratio of imprisonment for aboriginal offenders flows from a number of sources, including poverty, substance abuse, lack of education, and the lack of employment opportunities for aboriginal people. It arises also from bias against aboriginal people and from an unfortunate institutional approach that is more inclined to refuse bail and to impose more and longer terms for aboriginal offenders. There are many aspects of this sad situation which cannot be addressed in these reasons. What can and must be addressed, though, is the limited role that sentencing judges will play in remedying injustice against aboriginal peoples in Canada. Sentencing judges are among

[29] See *Ipeelee*, *supra* at paras. 56-58. At para. 56 the Court quotes former Minister of Justice Allan Rock, commenting on the 1996 Bill C-41 amendments and section 718.2(e) specifically: "'the reason we referred specifically there to aboriginal persons is that they are sadly overrepresented in the prison populations of Canada' (House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, No. 62, 1st Sess., 35th Parl. November 17, 1994, at p. 15)"

[30] *Strategic Plan for Aboriginal Corrections, 2006-2011, supra* at p. 6 [Appeal Book, Volume 8, p. 2034]

those decision-makers who have the power to influence the treatment of aboriginal offenders in the justice system.[31]

23. Since the *Gladue* decision, appellate courts across the country referred to the "underlying philosophy"[32] or "principles underlying"[33] *Gladue* and have held that these principles apply to the criminal justice system broadly.[34] For example, in *Sim*, Moldaver J. of the Ontario Court of Appeal (as he then was) applied *Gladue* to not criminally responsible proceedings, finding that "the appropriate placement" of Aboriginal offenders should take into account *Gladue* factors, and that "the internment milieu is often culturally inappropriate and regrettably discrimination towards them is so often rampant in penal institutions."[35]

Principle is found in various government policies and guidelines

24. The proposed POFJ has also been outlined in various government policies and guidelines. In the correctional context in particular, there are a number of Commissioner's Directives ("CDs") mandating that correctional authorities take into account the *Gladue* principles at all levels of decision-making respecting Aboriginal offenders.[36] This includes decision-making about security classification and re-classification.[37]

ii. Identified with Sufficient Precision

25. The proposed POFJ is sufficiently precise to provide a manageable standard against which to measure deprivations of life, liberty or security of the person.[38] The proposed POFJ requires that the unique and systemic background factors of Aboriginal persons, as well as their fundamentally different world views and values, must be taken into account when decisions impacting on their liberty interests are made. This is particularly important in the context of

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[31] *Gladue, supra* at para. 65 [emphasis added]
[32] *Kokopenace, supra*
[33] *Sim, supra*
[34] See footnotes 11 to 16 for examples of the different contexts within which the *Gladue* principles have been applied
[35] *Sim, supra*, at paras. 19 and 21. Moldaver J added at para. 23 that decisions relating to the reintegration of Aboriginal offenders "falls within the category of systemic problems identified in *Gladue* as contributing to the failure of the criminal justice system."
[36] See e.g. CD 702 on Aboriginal Offenders [Appeal Book, Vol II at pp. 207, 218, 219]; CD 705-2 on Information Collection [Appeal Book, Vol II at pp. 277, 413-414]; CD 710-6 on Review of Inmate Security Classification [Appeal Book, Vol II at pp. 490-491]
[37] *Ibid.*
[38] *Malmo-Levine, supra* at para. 113

corrections as different or alternative measures may be more effective in achieving correctional objectives.[39]

26. The proposed POFJ has proven to be sufficiently precise to enable the courts to apply it in various contexts within the criminal justice system,[40] and for CSC to include it in their Commissioner's Directives.

27. In the event that this Honourable Court is unwilling to recognize the joint interveners proposed new POFJ for all decision-makers in the criminal justice system, the joint interveners submit in the alternative that that this POFJ be recognized in the context of corrections specifically.

28. In *Ipeelee,* this Court held that it would not be consistent with the fundamental principle of proportionality for a sentencing judge to fail to apply *Gladue* principles in any case involving an Aboriginal offender.[41] In the corrections context, correctional officials are responsible for implementing the sentences decided upon by judges. They play a role very similar to sentencing judges in determining how an Aboriginal offender will be treated in the justice system, making decisions that impact an offender's parole eligibility, access to programs, early or temporary release, and security classification and placement.

B. Deprivation also contrary to POFJ that state is obliged to obey the law

29. The joint interveners agree with the Appellant that s. 4(g) of the *CCRA* imposes a positive duty on CSC to ensure that "correctional policies, programs and practices" are "responsive to the special needs" of Aboriginal peoples.[42] The joint interveners also support the Appellant's position that the breach of this statutory duty constitutes a violation of a recognized POFJ in its own right—that is, the principle that the state is obliged to obey the law.[43]

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[39] *Ipeelee*, *supra*, para. 74
[40] See footnotes 11 to 16 for examples of the different contexts within which the *Gladue* principles have been applied
[41] *Ipeelee*, *supra* at paras. 73, 75 and 87
[42] *CCRA*, *supra* at s. 4(g)
[43] See *R v Chambers*, 2014 YKCA 13. See also *Hitzig v Canada*, (2003) 231 DLR (4th) 104, 2003 CanLII 30796 (ONCA) at para. 115, where the Court of Appeal expressly stated, "We have no hesitation in concluding that the state's obligation to obey the law is a principle of fundamental justice".

30. The joint interveners emphasize the necessity of respecting this POFJ in the context of corrections specifically, given the stark power imbalance between correctional officials and prisoners. As this Honourable Court recognized in *Martineau v. Matsqui Institution*, "the rule of law must run within penitentiary walls".[44]

PARTS IV: COSTS

31. BCCLA and UBCIC do not seek costs and ask that none be awarded against them.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: September 14, 2017

Paul Champ, Bijon Roy and Christine Johnson
Counsel for the Interveners, British Columbia Civil Liberties Association and Union of British Columbia Indian Chiefs

[44] [1980] 1 SCR 602, 1979 CanLII 184 (SCC) at p. 622

PART VI: TABLE OF AUTHORITIES

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