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**

Appellant

-and-

**CHEYENNE SHARMA**

Respondent

-and-

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(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. Canada's prisons are the new residential schools.

2. Such was the conclusion reached by Maclean's magazine after an extensive investigation of Canada's criminal justice system in 2016.[1]

3. Indeed, little hope has been given to Indigenous people that the colonial foundations of the justice system will be uprooted, for when one looks past the discourse and promises of government to this effect, almost all that can be found by way of progress is one small act: the sentencing reform of 1996.[2]

4. As Chief Justice Lamer noted in *Proulx,* the sentencing reform of 1996, and in particular the Conditional Sentence Order ("**CSO**") which it created, are aimed at integrating restorative justice principles in sentencing to remedy the overincarceration of Indigenous people.[3]

5. For lack of any other legal footing, aspirations to decolonize the sentencing regime have mostly been funnelled through s 718.2(e) of the *Criminal Code* and its companion tool, the CSO.

6. In this remedial context, curtailing the discretion of sentencing judges to impose a CSO in the circumstances provided by ss 742.1(c)-(e) of the *Criminal Code* (the "**Impugned Provisions**") is constitutionally flawed: it is both discriminatory and arbitrary.

7. It is discriminatory because it reinforces, perpetuates, and exacerbates a colonial approach to justice against Indigenous people (who have long surpassed crisis levels of over-representation in the justice system) by backtracking on the little progress made through use of the CSO.

8. It is arbitrary because it is fundamentally inconsistent with the sentencing regime as whole, departs from the individualized nature of the sentencing process, and curtails the discretion of the sentencing judge to impose an otherwise fit and proper sentence for no rational reason.

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[1] *Canada's prisons are the 'new residential schools',* Maclean's, February 18, 2016 (*https://www.macleans.ca/news/canada/canadas-prisons-are-the-new-residential-schools/*)]

[2] Bill C-41, *An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*, SC 1995, c 22.

[3] *R v Proulx*, 2000 SCC 5 at paras 15, 92.

**PART II – QUESTIONS IN ISSUE**

9. The BCCLA takes a position on three issues pertaining to both the s 7 and s 15 analysis to be conducted in this matter.

10. With respect to the s 7 analysis, the BCCLA's position is as follows:

i. When conducting an arbitrariness analysis, the identification of the Impugned Provisions' purpose and effect must be seen as a contextual inquiry. The Impugned Provisions must not be viewed in isolation, but rather situated within the wider context of s 742.1, the sentencing reform of 1996, and Part XXIII of the *Code* as a whole. The purpose of s 742.1 as a whole is to provide sentencing judges with a meaningful alternative to incarceration for non-dangerous and less serious offenders, and in particular Indigenous defendants.

ii. With this proper contextual understanding of the Impugned Provisions, it is readily apparent that they are arbitrary: they frustrate the aim of s 742.1 and are otherwise inconsistent with the 1996 reform and the foundational principles of Part XXIII of the *Criminal Code*.

11. With respect to the s 15 analysis, the BCCLA takes the following position:

i. The floodgates argument is no answer to a s 15 discrimination claim. Given the urgent crisis of over-representation of Indigenous people in all aspects of the criminal justice system, the first prong of the s 15 test will often be met when laws are related to the operation of this system. Such laws are not necessarily *prima facie* discriminatory – they must also perpetuate, reinforce, or exacerbate a historical or systemic disadvantage of Indigenous people to meet such a test. In this case, the Impugned Provisions do just that by reverting to and reinforcing a colonial approach to justice.

12. BCCLA takes no position on the ultimate outcome of the appeal.

## PART III – STATEMENT OF ARGUMENT

### A. Section 7 of the *Charter*

13. There is an unfortunate tendency in the s 7 jurisprudence – noted in this Court's decision in *Bedford* – to view overbreadth as a form of *partial* arbitrariness.[4] Such a view renders arbitrariness an analytically irrelevant tool, as it would be completely subsumed in overbreadth.

14. In the BCCLA's submission, a robust arbitrariness analysis under s 7 of the *Charter* must contrast the effects of a specific legislative provision against its purpose by reference to the wider legislative scheme. Where (as is the case here) the effects of a specific provision are fundamentally inconsistent with the overall scheme, it will result in a "failure of instrumental rationality" in the form of arbitrariness.[5]

15. As this Court has noted, neither the effects nor the purpose of a specific provision can properly be ascertained in isolation. In the *Insite* case, for example, the wider legislative context was found to relieve a law of its potential unconstitutional effects.[6] Similarly, a law's effect may appear arbitrary within the frame of reference of the wider legislative scheme.[7]

16. Stated differently, the intrinsic rationality of a specific provision depriving an individual of their liberty interest must be assessed by reference to the provision's relationship (if any) with the overarching legislative context.

17. Such was the conclusion of this Court in the *Insite* case, where a ministerial refusal to grant an exemption under the *Controlled Drugs and Substances Act* ("**CDSA**") was deemed arbitrary as it was inconsistent with the wider legislative context of the CDSA as a whole, namely to protect health and public safety.[8] Similarly, this Court explained that a finding of arbitrariness in *Morgentaler* followed from an *inconsistency* between the effects of a law and its purpose.[9] The BCCLA submits such an inconsistency can arise with the wider legislative scheme as well.

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[4] *Canada (Attorney General) v Bedford*, 2013 SCC 72 at paras 111-117.
[5] *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 107.
[6] *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at para 109.
[7] *R v Nur,* 2015 SCC 15 at paras 110, 191.
[8] *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at paras 131-132.
[9] *Canada (Attorney General) v Bedford*, 2013 SCC 72 at paras 119 (citing *R. v. Morgentaler,* [1988] 1 SCR 30).

*i. Contextual approach*

18. The BCCLA's overarching concern is the failure of both the trial judge and the Ontario Court of Appeal to contextualize the constitutional analysis of the Impugned Provisions.

19. These provisions do not exist in a vacuum. They were enacted within a wider legislative context, including (i) the sentencing reform of 1996 (in particular ss 718.2(e) and 742.1); and (ii) Part XXIII of the *Code* generally.

20. Turning first to s 742.1, it bears noting that prior to the enactment of the Impugned Provisions, a CSO was not available for offenders that would endanger the safety of the community (s 742.1(a)), or who committed an offence subject to a minimum mandatory term of imprisonment (s 742.1(b)), or for whom the imposition of such a sentence would be inconsistent with the fundamental purpose and principles of sentencing (s 742.1(a)). The Impugned Provisions did not alter these preconditions, but simply tacked on additional disqualifying conditions.

21. Thus, even within the immediate legislative context of s 742.1, the effect of the Impugned Provisions is circumscribed to offenders who would otherwise have met the significant eligibility hurdles for a CSO, and denies them this possibility based solely on the fact that an offence captured by ss 742.1(c)-(e) was committed.

22. Contrary to the approach taking by the Ontario Court of Appeal, the Impugned Provisions must also be situated within the wider context of the sentencing reform of 1996 and Part XXIII of the *Code*.

23. The Ontario Court of Appeal rejected the purpose proposed by the parties in the context of its s 7 inquiry. Instead, the court formulated a narrower purpose that considered the amendments to s 742.1 in isolation: "to maintain the integrity of the justice system by ensuring that offenders who commit serious offences receive prison sentences."[10] The court landed on this position due to its insistence on an apparent distinction between enacting a law and repealing or amending it.

24. In taking this restrictive approach, the court divorced the Impugned Provisions from how they fit into the overall legislative scheme and its evolution over time. From a *Charter* perspective, when identifying the purpose of legislation there is no principled reason to distinguish between an

[10] *R v Sharma*, 2020 ONCA 478 at para 148.

enactment, or subsequent amendment or repeal. All are simply laws passed by Parliament, animated by purpose and having an effect on Canadians.

25. As Justice Abella noted recently, courts considering the constitutionality of enactments must resist the temptation to focus on the form of a law, and focus instead on its effects.[11]

26. Turning to the case at bar, it is impossible to understand any of the amendments to s 742.1 without first considering the wider aim sought to be achieved by Parliament through the sentencing reform of 1996: to reduce the use of prison as a sanction, especially for Indigenous people, including through the use of restorative justice in sentencing.

27. If sub-ss 718.2(c),(d) and (e) reflect and animate this purpose, s 742.1 is the primary tool given to sentencing judges to achieve it.

28. In this Court's own words, the conditional sentence was specifically designed as a means to achieve the twin objectives of the 1996 reform, by providing a meaningful alternative to the incarceration of less serious and non-dangerous offenders.[12]

29. Section 742.1's overall purpose and objective have not changed since 1996. The section's purpose is to give sentencing judges a meaningful alternative to the incarceration of less serious and non-dangerous offenders.

30. Furthermore, s 742.1 is not a self-standing piece of legislation. It is a cog in Part XXIII and aims to be coherent with the principles espoused by the sentencing regime as a whole: the individualized nature of sentencing proceedings, the cardinal principle of proportionality, and the codified objectives and principles of sentencing.

31. The Impugned Provisions, viewed in this proper context, will fail to meet the requirements of instrumental rationality if their effects are inconsistent with the overall purpose of s 742.1 or Part XXIII of the *Code*. Any constitutional analysis of the Impugned Provisions must resist the temptation to overemphasize the specific purpose of the subsections, as this artificially insulates

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[11] *Québec (P-G) v Alliance,* 2018 SCC 17 at para 33.
[12] *R v Proulx,* 2000 SCC 5 at para 21.

the provisions from judicial scrutiny by insulating them from the overarching purpose pursued by Part XXIII of the *Code* and s 742.1.

32. While the overbreadth analysis remains valid with this contextual approach, the arbitrariness analysis finds a renewed pertinence.

*ii. Arbitrariness*

33. With a proper contextual understanding of the Impugned Provisions' effect and purpose, it is readily apparent that they are not only overbroad, but also arbitrary: (i) they further no purpose that is not already captured by s 742.1, and (ii) their effects have no connection to the purpose captured by s 742.1 and, indeed, render s 742.1 inconsistent with the sentencing reforms of 1996 and the remainder of Part XXIII of the *Criminal Code*.

34. Subsections 742.1(a)-(b), together with the requirement of a reformatory term of imprisonment, and the cautious exercise of judicial discretion, have successfully achieved the purpose of restricting the application of s 742.1 to less serious and non-dangerous offenders.[13]

35. The effect of the compounded exclusions created by Parliament only prevent sentencing judges from imposing a CSO on otherwise non-dangerous and less serious offenders based on an arbitrary list of offences, which runs directly counter to the purpose of s 742.1 and the sentencing reforms of 1996. Thus, the effect of the Impugned Provisions bears no connection whatsoever to the purpose of providing a meaningful alternative to incarceration of non-dangerous and less serious offenders. The opposite result is achieved.

36. The Impugned Provisions' arbitrary nature also emerges when the scope of s 742.1 is contrasted with the scope of s 731 (probation orders). By means of the Impugned Provisions, Parliament has legislated that certain offences, despite being subject to no mandatory minimum, are inherently too serious and therefore excluded from the CSO regime. Yet every single offence *in effect* captured by this exclusion can also be punished by means of a probation order, which is a more lenient form of punishment than a CSO. This is nonsensical, and renders the list of offences arbitrary as submitted above. If an offence is not inherently too serious to be punished by means

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[13] *R v Proulx,* 2000 SCC 5.

of a probation order, it must follow that it is also not inherently too serious to be punished by means of a CSO.

37. The Impugned Provisions are also fundamentally inconsistent with the foundational principles of the sentencing regime, as are most attempts to curtail judicial discretion to impose a fit and proper sentence.

38. Indeed, the Impugned Provisions remove judicial discretion to impose a conditional sentence where a listed offence has been committed.

39. In doing so, these subsections introduce what Lamer C.J. predicted would be an "unwarranted rigidity in the determination of whether a condition sentence is a just and appropriate sanction."[14]

40. The sections further lead to the inconsistent impositions of sanctions and the incapacity of sentencing judges to give meaningful effect to the codified principles and purpose of sentencing, particularly s 718.2(e).

41. All of the criteria contained in sub-ss 742.1(c)-(f) also share one fatal flaw. They offend the very core and foundation of sentencing: its individualized nature.

42. Conditional sentences are now one of the tools available in the sentencing judge's toolbox. As such, they must be made available and applied in a manner that is consistent with the sentencing principles of Canadian law.

43. In short, the flaw of the Impugned Provisions is not that merely that they create a "middle gap", as was contended in the Court of Appeal.

44. Rather, when taking a step back and looking at the sentencing regime as a whole, the Impugned Provisions give rise to a "patchwork" middle, where some offences can be punished by means of a conditional sentence and others cannot, for no reason consistent with any of the animating principles of sentencing, the objectives of the 1996 reform, nor the purpose of s 742.1 itself.

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[14] *R v Proulx,* 2000 SCC 5 at para 81.

45. On the contrary, the Impugned Provisions specifically target individuals for whom a conditional sentence of imprisonment would be consistent with the fundamental purpose or principles of sentencing, and denies them this possibility for no apparent rational reason. That is the essence of arbitrariness.

46. In the result, the Impugned Provisions create a sentencing regime which has lost its spirit of individualization and proportionality, by creating arbitrary distinctions between the way in which different offenders are punished.

47. To formulate it differently, the Impugned Provisions are arbitrary as they fail to give effect to even the most general of all purposes that can be attributed to a sentencing law: they do not lead to the imposition of a just and appropriate sentence in the circumstances of a particular case.

### B. Section 15 of the *Charter*

48. Throughout these proceedings, the appellant has suggested that the implications of a ruling in favour of the respondent with respect to s 15 of the *Charter* would be to render the entire *Criminal Code* constitutionally suspect.

49. With respect, any system which affects a protected group as disproportionately as the criminal justice system affects Indigenous people is at the very least constitutionally suspect and warrants scrutiny under s 15 of the *Charter.*

50. This Court's jurisprudence on s 15 has evolved with the clear intention of detecting and preventing systemic discrimination.

51. Given the disproportionate number of Indigenous people affected by a criminal justice system that was imposed upon them without any consideration or accommodation of their particular circumstances, there is no reason to shy away from the proposition that a law relating to the operation of this system will meet the first prong of the s 15 analysis: it will necessarily impact a disproportionate number of Indigenous people.

52. This does not mean that any such law will be discriminatory; the floodgates argument is unwarranted. The law will only be discriminatory if it also has the effect of "perpetuating, reinforcing, or exacerbating" a disadvantage faced by the protected group, and if it is not otherwise justified by government.

53. The disadvantages faced by Indigenous people in the judicial system are complex and multifaceted. At the sentencing level, two such disadvantages were identified and partially remediated through the sentencing reform of 1996: (i) the failure of sentencing judges to understand, acknowledge and give full effect to the reality of Indigenous people[15], and (ii) the failure of the sentencing regime to accord greater importance to community-based sanctions and restorative justice.[16]

54. Rolling back the availability of CSOs is discriminatory not because of its "quantitative" effect, but rather because of its "qualitative" effect on the sentencing process. It will prevent sentencing judges from incorporating Indigenous world-views and realities in the sentencing process, instead forcing them to separate Indigenous people from their communities via incarceration.

55. Individualization in sentencing requires a judge to consider and give full effect to the Indigenous roots of a defendant. It is not possible to understand such a defendant's criminality without first understanding its systemic roots: the legacy of colonialism.

56. It is also impossible to give effect to the personal circumstances of Indigenous defendants without having a meaningful alternative to the separation of the defendant from their community.

57. Indeed, the idea that rehabilitating an Indigenous defendant is best done by sending them to government institutions removed from their community, culture and world-view is strangely consonant with the darkest episode of colonialism.

58. The sentencing reform of 1996 mandated judges to always give full effect to the Indigenous status of a defendant, to give greater respect for Indigenous perspectives and justice initiatives, and to stop incarcerating defendants, in particular Indigenous people, unless it was necessary to do so.

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[15] *R v Gladue,* [1999] 1 SCR 688 at paras 42, 64; *R v Ipeelee,* 2012 SCC 13 at paras 60, 75.
[16] *R v Ipeelee,* 2012 SCC 13 at paras 74; *R v Gladue,* [1999] 1 SCR 688 at para 93; *R v Proulx,* 2000 SCC 5 at para 19.

59. Moreover, through the introduction of s 742.1, the reforms provided sentencing judges with a much-needed tool to adopt principles of restorative justice and community-based sanctions in response to criminality, especially for Indigenous defendants.

60. The appellant now suggests that a finding of discrimination in this matter would effectively spell the end of Parliament's ability to do as it pleases with the *Criminal Code*, other than to make it more lenient.

61. In the BCCLA's respectful submission, the appellant's argument stems from a confusion regarding the *raison d'être* of s 742.1 and the legislative reform of 1996. That particular section is not an act of leniency, as so aptly noted by Chief Justice Lamer in *Proulx*.[17] Rather, s 742.1 is a small step towards decolonizing the justice system by increasing the use of restorative justice in our judicial system through community-based dispositions, and by mandating sentencing judges to always pay particular attention to the personal circumstances of Indigenous peoples.

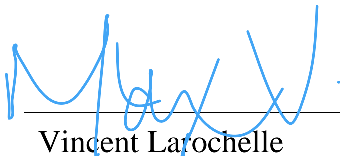
62. In short, s 742.1 is a modest but important step towards decolonizing the criminal justice system by ameliorating in part the historical disadvantages faced by Indigenous peoples.

63. A step from which there is no coming back, as to do so would discriminate against Indigenous people, whose over-representation in the criminal justice system is a direct legacy of colonialism.

## PART IV – COSTS

64. BCCLA seeks no costs and respectfully requests that none be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of March 2022 at Whitehorse, in the Yukon Territory.



Vincent Larochelle

for

Counsel for the Intervener
British Columbia Civil Liberties Association

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[17] *R v Proulx,* 2000 SCC 5 at para 41.

**PART V – AUTHORITIES**

| **CASE LAW** | **Paragraphs in Factum** |
|---|---|
| *Canada (Attorney General) v Bedford*, 2013 SCC 72 | 13, 14, 17, |
| *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 | 15, 17 |
| *Québec (P-G) v Alliance*, 2018 SCC 17 | 25 |
| *R v Gladue*, [1999] 1 SCR 688 | 53 |
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| *R v Nur*, 2015 SCC 15 | 15 |
| *R v Proulx*, 2000 SCC 5 | 4, 28, 34, 39, 53, 61 |
| *R v Sharma*, 2020 ONCA 478 | 23 |
| **SECONDARY SOURCES** | |
| *Bill C-41*, An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof, SC 1995, c 22. | 3 |
| *"Canada's prisons are the 'new residential schools"*, Maclean's, February 18, 2016 (https://www.macleans.ca/news/canada/canadas-prisons-are-the-new-residential-schools/) | 2 |

| **LEGISLATION** | **Paragraphs in Factum** |
|---|---|
| *Criminal Code*, RSC, 1985, c C-46, s 7<br><br>*Code criminel*, L.R.C. 1985, c. C-46, art 7 | 9, 10, 13, 14, 23 |
| *Criminal Code*, RSC, 1985, c C-46, s 15<br><br>*Code criminel*, L.R.C. 1985, c. C-46, art 15 | 9, 11, 48, 49, 50, 51 |
| *Criminal Code*, RSC, 1985, c C-46, s 718.2<br><br>*Code criminel*, L.R.C. 1985, c. C-46, art 718.2 | 5, 19, 27, 40 |
| *Criminal Code*, RSC, 1985, c C-46, s 731<br><br>*Code criminel*, L.R.C. 1985, c. C-46, art 731 | 36 |
| *Criminal Code*, RSC, 1985, c C-46, s 742.1<br><br>*Code criminel*, L.R.C. 1985, c. C-46, art 742.1 | 6, 10, 20, 21, 23, 26, 27, 30, 31, 33, 34, 35, 36, 41, 44, 59, 61, 62 |