



SUPREME COURT OF CANADA

CITATION: R. v. Sharma, 2022
SCC 39

APPEAL HEARD: March 23,
2022

JUDGMENT RENDERED:
November 4, 2022

DOCKET: 39346

BETWEEN:

His Majesty The King in Right of Canada
Appellant

and

Cheyenne Sharma
Respondent

- and -

**Attorney General of British Columbia, Attorney General of Saskatchewan,
Aboriginal Legal Services Inc., Federation of Sovereign Indigenous Nations,
British Columbia Civil Liberties Association, Queen's Prison Law Clinic, HIV
& AIDS Legal Clinic Ontario, HIV Legal Network, Canadian Bar Association,
Women's Legal Education and Action Fund Inc., Legal Services Board of
Nunavut, Criminal Lawyers' Association (Ontario), Canadian Civil Liberties
Association, Native Women's Association of Canada, David Asper Centre for
Constitutional Rights, Ontario Native Women's Association, Assembly of
Manitoba Chiefs, Canadian Association of Elizabeth Fry Societies, John
Howard Society of Canada, Criminal Trial Lawyers' Association and
Association québécoise des avocats et avocates de la défense**
Intervenors

CORAM: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer and Jamal JJ.

**JOINT REASONS
FOR JUDGMENT:** Brown and Rowe JJ. (Wagner C.J. and Moldaver and Côté JJ.
(paras. 1 to 113) concurring)

**DISSENTING
REASONS:** Karakatsanis J. (Martin, Kasirer and Jamal JJ. concurring)
(paras. 114 to 260)

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David Asper Centre for Constitutional Rights,
Ontario Native Women’s Association,
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Canadian Association of Elizabeth Fry Societies,
John Howard Society of Canada,
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Indexed as: R. v. Sharma

2022 SCC 39

File No.: 39346.

2022: March 23; 2022: November 4.

Present: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer and Jamal JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Right to equality — Discrimination based on race — Right to liberty — Fundamental justice — Sentencing — Aboriginal offenders — Conditional sentences — Aboriginal offender pleading guilty to importing cocaine and seeking conditional sentence — Offender challenging constitutionality of Criminal Code provisions making conditional sentences unavailable for certain serious offences and categories of serious offences — Sentencing judge holding conditional sentence unavailable for offender and dismissing Charter challenge — Court of Appeal striking down impugned provisions on basis that they are overbroad and discriminate against Aboriginal offenders — Whether unavailability of conditional sentence infringes offender's Charter-protected rights — Canadian Charter of Rights and Freedoms, ss. 7, 15(1) — Criminal Code, R.S.C. 1985, c. C-46, ss. 718.2(e), 742.1(c), 742.1(e)(ii).

In 2015, S, a woman of Ojibwa ancestry and a member of the Saugeen First Nation, arrived in Toronto on an international flight. Her suitcase was found to contain 1.97 kilograms of cocaine. She confessed that her partner had promised to pay her

\$20,000 to bring the suitcase to Canada, and pleaded guilty to importing a Sch. I substance contrary to s. 6(1) of the *Controlled Drugs and Substances Act*. At the time, S was 20 years old, with no prior criminal record, and was two months behind on rent and facing eviction. S had become a single mother at 17, had few supports, and the prospect of homelessness for her child motivated her to agree to import the drugs. A pre-sentence (*Gladue*) report also noted that S's grandmother was a residential school survivor, S's mother had spent time in foster care, S had been sexually assaulted, and she had dropped out of school due to financial difficulties.

S sought a conditional sentence. Conditional sentences are a type of incarceration, provided for under s. 742.1 of the *Criminal Code*, that permit offenders who meet statutory criteria to serve their sentences under strict surveillance in their communities, rather than in jail. In 2012, Parliament amended the conditional sentencing regime to make such sentences unavailable for certain serious offences. Three prerequisites must be met before a conditional sentence can be imposed: the offender must not have been convicted of one of the offences listed at paragraphs 742.1(b) through (f) of the *Criminal Code*; a court would have otherwise imposed a sentence of imprisonment of fewer than two years; and the safety of the community would not be endangered by the offender serving the sentence in the community. Where these prerequisites are met, a court must consider whether a conditional sentence is appropriate, having regard to the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2. In particular, s. 718.2(e) provides 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”.

The 2012 amendments to the *Criminal Code* prevented S from receiving a conditional sentence. In particular, s. 742.1(c) made conditional sentences unavailable for any offence with a maximum term of imprisonment of 14 years or life, such as the offence to which S pleaded guilty. S brought *Charter* challenges against s. 742.1(c) and against s. 742.1(e)(ii), which made conditional sentences unavailable for offences, prosecuted by indictment, having a maximum term of imprisonment of 10 years and involving the import, export, trafficking, or production of drugs. The sentencing judge held that a conditional sentence was unavailable to S, dismissed her *Charter* challenges under ss. 7 and 15, and imposed a sentence of 18 months’ imprisonment. A majority of the Court of Appeal held that ss. 742.1(c) and 742.1(e)(ii) were overbroad under s. 7 and discriminated against Indigenous offenders like S under s. 15(1). It struck down the provisions and sentenced S to time served.

Held (Karakatsanis, Martin, Kasirer and Jamal JJ. dissenting): The appeal should be allowed and the sentence imposed at first instance restored.

Per Wagner C.J. and Moldaver, Côté, **Brown** and **Rowe JJ.**: Sections 742.1(c) and 742.1(e)(ii) are constitutional. They do not limit S’s s. 15(1) *Charter* rights; S did not demonstrate that the impugned provisions created or contributed to a disproportionate impact on Indigenous offenders, relative to

non-Indigenous offenders, as she must show at the first step of the s. 15(1) analysis. Nor do they limit S's s. 7 *Charter* rights. Their purpose is to enhance consistency in the conditional sentencing regime by making imprisonment the typical punishment for certain serious offences and categories of offences, and that is what they do. Maximum sentences are a reasonable proxy for the seriousness of an offence and, accordingly, the provisions do not deprive individuals of their liberty in circumstances that bear no connection to their objective.

The two-step test for assessing a s. 15(1) claim requires the claimant to demonstrate that the impugned law or state action a) creates a distinction based on enumerated or analogous grounds, on its face or in its impact; and b) imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage. This framework also applies in cases of adverse impact discrimination, which occurs when a seemingly neutral law has a disproportionate impact on members of groups protected on the basis of an enumerated or analogous ground. However, uncertainty in the evidentiary burden in adverse impact cases has arisen when courts collapse the two steps of analysis into one. The two steps are not watertight compartments or impermeable silos, since each step considers the impact of the impugned law on the protected group. While there may be overlap in the evidence at each step, the two steps ask fundamentally different questions. As such, the analysis at each step must remain distinct from the other. While Karakatsanis J. stresses the "touchstone" of substantive equality, a court's focus must ultimately be directed to the two-step test. Where, applying that test, the claimant's burden at either step of s. 15(1)

is not met, there is no infringement of s. 15 and therefore no substantively unequal outcome.

The first step for assessing a s. 15(1) claim examines whether the impugned law creates or contributes to a disproportionate impact on the claimant group based on a protected ground. The disproportionate impact requirement necessarily introduces comparison into the first step, and causation is a central issue. The claimant must establish a link or nexus between the impugned law and the discriminatory impact, but does not need to show why the law being challenged has that impact. Two types of evidence are helpful: evidence about the full context of the claimant group's situation, and evidence about the outcomes that the impugned law or policy has produced in practice. Ideally, claims of adverse impact discrimination should be supported by both. To give proper effect to the promise of s. 15(1), however, a claimant's evidentiary burden cannot be unduly difficult to meet. Courts should bear in mind that: no specific form of evidence is required; the claimant need not show the impugned law or state action was the only or the dominant cause of the disproportionate impact; the causal connection may be satisfied by a reasonable inference; scientific evidence of causation should be carefully scrutinized; and novel scientific evidence should be admitted only if it has a reliable foundation.

The second step asks whether that impact imposes burdens or denies benefits in a manner that has the effect of reinforcing, perpetuating, or exacerbating a disadvantage. Not every distinction is discriminatory. Courts must examine the

historical or systemic disadvantage of the claimant group. Leaving the situation of a claimant group unaffected is insufficient to meet the step two requirement: a negative impact or worsened situation is required. Several factors may assist in determining whether claimants have met their burden at step two: arbitrariness, prejudice, and stereotyping. Concerning arbitrariness, a distinction that is based on an individual's actual capacities will rarely be discriminatory; but a distinction that fails to respond to the actual capacities and needs of the members of the group will often be discriminatory. Stereotyping or prejudice can play a critical role if the impugned law furthers stereotypes and prejudicial notions or stigmatizing ideas about members of a protected group, and, in so doing, perpetuates the disadvantage they experience. With regard to the evidentiary burden at step two, the claimant need not prove that the legislature intended to discriminate, a court may take judicial notice of notorious and undisputed facts, and courts may infer that a law has a discriminatory effect, where such an inference is supported by the available evidence.

In addition, to determine whether a distinction is discriminatory under the second step, courts should consider the broader legislative context. Relevant considerations include: the objects of the scheme, whether a policy is designed to benefit a number of different groups, the allocation of resources, particular policy goals sought to be achieved, and whether the lines are drawn mindful as to those factors. A contextual approach is particularly significant when analyzing the constitutionality of sentencing regimes. As for the scope of the government's obligation under s. 15(1), there is no general, positive obligation on the state to remedy social inequalities or enact

remedial legislation, nor is the legislature bound to its current policies. Furthermore, when the state does legislate to address inequality, it can do so incrementally.

In the instant case, S has not satisfied her burden at the first step, and thus there is no need to consider step two. Section 15(1) is not infringed. The impugned provisions do not create or contribute to a disproportionate impact on S as an Indigenous offender. While the crisis of Indigenous incarceration is undeniable, S adduced no statistical information to demonstrate that the impugned provisions create or contribute to increased imprisonment of Indigenous offenders, relative to non-Indigenous offenders. The sentencing judge was required to, and did, take account of the particular circumstances of Indigenous offenders, and that is what Parliament has directed in s. 718.2(e). However, this provision does not guarantee that Indigenous offenders will not receive carceral sentences. While it sets out an important policy, it is a legislative provision, not a constitutional imperative.

With respect to s. 7, the impugned provisions limit S's liberty interests; the question is whether they do so in a manner that accords with the principles of fundamental justice — i.e., whether they are arbitrary or overbroad. As the law's purpose is the principal reference point, its proper identification is crucial. It is important to characterize this purpose at the appropriate level of generality, and the framing of purpose must be precise and succinct. The most significant and reliable indicator would be a statement of purpose within the subject law, but courts can also look to the text, context, and scheme of the legislation, and extrinsic evidence. Extrinsic

evidence should be used with caution: statements of purpose in the legislative record may be rhetorical and imprecise, or poor indicators of purpose. What is to be identified is Parliament's purpose, not the purposes of its individual members. Courts should strive to arrive at a precise and succinct statement that faithfully represents the legislative purpose. Overly broad statements can artificially make impugned provisions unassailable to arguments of overbreadth or arbitrariness. In the instant case, it is clear, from the text, context, scheme and extrinsic evidence, that the purpose of the amendments was to enhance consistency in the conditional sentencing regime by making imprisonment the typical punishment for certain serious offences. The means by which Parliament achieved this purpose was to remove the availability of a conditional sentence for those offences. The effect of the amendments is to reduce the number of sentences served in the community.

A law is overbroad when it imposes limits in a manner that is not rationally connected to the purpose of the law. Given the impugned provisions' purpose, they are not overbroad. First, maximum sentence is a suitable proxy for offence seriousness. Second, the definition of a serious offence is a normative assessment for which Parliament must be granted significant leeway. Finally, the seriousness of an offence should not be confused with the circumstances of an offender; while the circumstances which led S to import drugs are tragic and attenuate her moral culpability, those facts do not make her offence any less serious.

As for arbitrariness, it exists where there is no connection between the effect of a provision and its purpose. The impugned provisions are not arbitrary. Their purpose is to enhance consistency in the conditional sentencing regime by making imprisonment the typical punishment for certain serious offences. Where a sentencing judge determines that jail is warranted, offenders convicted of those offences will serve their sentences in jail, rather than in the community. There is an obvious connection between the effect of the provisions and their purpose, and S's rights are thus not limited arbitrarily.

Per Karakatsanis, Martin, Kasirer and Jamal JJ. (dissenting): In 1999, the Court called Indigenous overincarceration a crisis in the Canadian criminal justice system. Since then, Indigenous incarceration rates have climbed and those of Indigenous women have soared. Overincarceration is an ongoing source of intergenerational harm to families and communities and a striking sign of the discrimination that Indigenous peoples experience in the criminal justice system. Sentencing law is uniquely positioned to ameliorate the racial inequalities in Canada's criminal justice system. Ensuring that Canadian sentencing provisions are consistent with the liberty and equality guarantees under the *Charter* is therefore essential. The Court is required to do so in the instant case.

The appeal should be dismissed. Sections 742.1(c) and 742.1(e)(ii) are unconstitutional. They infringe s. 7 because they deprive some individuals of their liberty in a manner that is overbroad: by using maximum sentences as a proxy for the

seriousness of an offence, capturing the most and the least serious criminal conduct, they overstep their aim of punishing more serious offences with incarceration. They also infringe s. 15(1) because they impair the remedial effect of s. 718.2(e) — which directs judges to consider alternatives to imprisonment “with particular attention to the circumstances of Aboriginal offenders” — in a manner that creates a distinction on the basis of race, and that reinforces, perpetuates, and exacerbates the historical disadvantages of Indigenous people.

With respect to s. 7 of the *Charter*, incarceration would deprive S of her liberty. The question is whether the deprivation conforms to the principles of fundamental justice, including the principle that a law that deprives a person of life, liberty or security must not be overbroad. Overbreadth occurs where there is no rational connection between the law’s purposes and some of its impacts. This requires identifying the purpose and the scope of the law to determine whether it goes too far by sweeping conduct into its ambit that bears no relation to its objective.

The first step is to determine the purpose of the challenged provisions. The purpose’s framing should focus on the ends of the legislation rather than on its means, be at an appropriate level of generality and capture the main thrust of the law in precise and succinct terms. Discerning the purpose requires considering the stated objective in the legislation, if any; the text, context and scheme of the legislation; and extrinsic evidence. In the instant case, Parliament’s purpose was to ensure offenders who commit more serious offences serve prison time. This purpose strikes the appropriate balance

between precision and generality, without conflating the means with the ends, nor amounting to a virtual repetition of the provisions.

The second step asks whether the law goes further than reasonably necessary to achieve its legislative goals. The ultimate question is whether the law violates basic norms because there is no connection between its purpose and an effect. In the instant case, Parliament used maximum sentences as the gauge of the seriousness of an offence. But maximum sentences only show that an offence is potentially serious, not that it is necessarily so. Maximum sentences are a flawed proxy for the gravity of offences, which can be committed in circumstances ranging in severity. While maximum sentences provide general guidance, and can assist in setting sentencing ranges, that guidance only goes so far in individual cases. A fit sentence is always defined by the totality of circumstances. As well, the s. 7 analysis cannot simply defer to Parliament's choices about crime and punishment. There is nothing novel, unwieldy, or unsound about subjecting sentencing law to constitutional scrutiny.

Sections 742.1(c) and 742.1(e)(ii) are overbroad and constitute *prima facie* infringement of s. 7 of the *Charter*. They exceed their purpose in applying to offences committed at the lowest range of severity, and in having some effects that bear no relation to their aim. They target more serious offences through the proxy of maximum sentences, yet they capture conduct for which the maximum sentence would far overshoot the offence's gravity. This impact bears no connection to the provisions'

purpose. Since the provisions are overbroad, it is unnecessary to address whether they are also arbitrary.

To succeed under s. 15(1), a claimant must show that the law or state action, on its face or in its impact, creates a distinction based on enumerated or analogous grounds, and imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage. While distinct, the two steps may overlap; the same facts that illustrate a distinction may also illustrate its discriminatory character. The evidentiary requirements vary with the context. When a law creates a facial distinction, the test can be satisfied by reading the relevant text. But claimants in adverse impact cases must show that although the law purports to treat everyone the same, it has a disproportionately negative impact that can be identified by factors relating to enumerated or analogous grounds. For both steps, courts may take judicial notice of social facts where appropriate.

The first step is not a preliminary merits screen, nor an onerous hurdle designed to weed out claims on technical bases; it is aimed at ensuring that those who access the protection of s. 15(1) are those it is designed to protect. The test makes clear that step one only requires a distinction based on a protected ground. Although a distinction can be proven in different ways, evidence of the situation of the claimant group and the physical, social, cultural or other barriers they face, and evidence about the outcomes that the impugned law or policy has produced in practice, are particularly helpful. Ideally, adverse impact claims should be supported by both kinds of evidence,

but both are not always required. And while evidence of statistical disparity and of broader group disadvantage may assist, neither is mandatory.

The second step considers the impact of the distinction, asking whether the law has the effect of reinforcing, perpetuating, or exacerbating disadvantage. Claimants may, but need not, prove that the distinction is arbitrary or perpetuates prejudicial or stereotypical attitudes. And while a challenged law may satisfy step two by widening a group's disadvantage, a law may discriminate without aggravating that disadvantage. What matters is the claimant group's situation and the actual impact of the law on that situation. This means the state's intentions are not decisive — the state can discriminate without intending to. Nor is the absence of differential treatment decisive — discrimination may also arise from a failure to take into account the true characteristics of a disadvantaged group. In practice, true equality may sometimes demand differential treatment, and not every distinction is discriminatory. Even where legislative amendments do produce discriminatory effects, the *Charter* invites the state to justify rights limitations under s. 1. Section 15(1) is not a complete code; it must be read together with s. 1. The fault-line of the division between them is justification, which falls to the state. A fair burden on claimants is only to show that there is a discriminatory impact. The state then bears the burden of justifying its choices and goals.

The majority seeks to revise this framework. The thrust of its revisions is to raise the bars at each step of the test: by renewing focus on causation, which adds nothing to the existing framework and recalls rejected pre-*Charter* approaches; by

eschewing the test's language of "create a distinction" for more ambiguous "created or contributed to a disproportionate impact"; by claiming that leaving the situation of a claimant group unaffected is insufficient to meet step two of the test; by importing elements of state justification into step two; by pre-emptively foreclosing the possibility of general, positive obligations on the state to remedy social inequalities or enact remedial legislation; by asserting, without support, that it is not enough to show that the law restricts an ameliorative program at step one; and by diminishing the role of interveners. These revisions are unsolicited, unnecessary, and contrary to *stare decisis*, and would dislodge foundational premises of the existing jurisprudence.

In the instant case, S has satisfied both stages of the s. 15(1) test. The first question is whether ss. 742.1(c) and 742.1(e)(ii), on their face or in their impact, create a distinction based on enumerated or analogous grounds. The provisions impair an accommodation — the remedial function of s. 718.2(e) — in a manner that differentially impacts Indigenous offenders. This flows not from the mere existence of historical disadvantage, but from the combined effect of ss. 718.2(e) and 742.1. Conditional sentences under s. 742.1 benefitted a specific sector of Indigenous offenders: those for whom probation was too lenient, but prison too harsh. They allowed courts to integrate Indigenous visions of justice into community-based sanctions. Together with s. 718.2(e), they provided an ameliorative measure that was intended to facilitate the substantive equality mandate under s. 718.2(e) and reduce the overrepresentation of Indigenous offenders in prison. While s. 718.2(e) does not specifically instruct courts to consider a conditional sentence for an Indigenous

offender, excluding conditional sentences from its ambit would greatly diminish its remedial purpose. Prohibiting the use of conditional sentences for some Indigenous offenders undermined the specific accommodation offered by s. 718.2(e): that is, a different sentencing methodology that was animated by their unique needs and circumstances. Given the relationship between s. 718.2(e) and ss. 742.1(c) and 742.1(e)(ii), the challenged provisions necessarily impact Indigenous offenders differently; a distinction arises from the interaction of these provisions, against a backdrop of facts of which courts must take judicial notice. Further evidence is not required because the distinction is plain.

The next question is whether the law imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage. The claimant group's historical position of disadvantage in the instant case is a matter of judicial notice and the vast overrepresentation of Indigenous peoples in prisons is well-established. This position of disadvantage is worse still for Indigenous women, many of whom continue to face multiple and compounding forms of discrimination. Conditional sentences were never meant to be a catch-all solution. But by impairing the *Gladue* framework, the challenged provisions removed an accommodation capable of ameliorating, to some degree, these historical disadvantages for S and other Indigenous offenders, which reinforces, perpetuates, and exacerbates their disadvantage. First, the impugned provisions logically require sentencing judges to impose more prison sentences than they otherwise would. For Indigenous offenders whose background conditions make them especially unfit for prison, this only

compounds their disadvantage. Second, the provisions deny offenders a sentencing option that better accords with Indigenous visions of justice, as conditional sentences better facilitate activities that reflect sacred connection between Indigenous people and the natural world. By leaving no other realistic option but prison, ss. 742.1(c) and 742.1(e)(ii) remove an important tool, and sometimes the only tool, for judges to realize restorative justice principles necessary to craft a fair sentence for Indigenous offenders. This not only perpetuates overrepresentation, but perpetuates cultural loss, dislocation, and community fragmentation. Substantive equality demands a different approach — one that considers the types of sentencing sanctions which may be appropriate in the circumstances for the offender because of their Aboriginal heritage or connection.

The limitations on ss. 7 and 15(1) are not justified under s. 1. The Crown must demonstrate that the legislative objective is pressing and substantial, and that the means chosen are proportional to that objective, in that: (1) they are rationally connected to that objective; (2) they are minimally impairing of the right; and (3) there is proportionality between the deleterious and salutary effects of the law. While the provisions at issue serve a pressing and substantial objective, and while there is a rational connection between ensuring serious crimes are punished by incarceration and removing the possibility of conditional sentences for certain offences, the provisions are not minimally impairing. The state must show that there is no less drastic means of achieving the objective; but the Crown has not shown this in respect of either breach. Nor are the provisions' salutary effects proportionate to their deleterious effects. The Crown has led no evidence to suggest that the benefits to incarcerating those offenders

who were formerly eligible for a conditional sentence outweigh the costs to their liberty. And the costs to the equality interests of Indigenous peoples are still more profound, since they may include separation from one's community, work or family — harms only exacerbated in the case of young single mothers — while contributing to the continued overrepresentation of Indigenous offenders in prison. The state has not met its burden under s. 1.

Cases Cited

By Brown and Rowe JJ.

Considered: *R. v. Gladue*, [1999] 1 S.C.R. 688; *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61; *R. v. C.P.*, 2021 SCC 19; *Fraser v. Canada (Attorney General)*, 2020 SCC 28; *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548; *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396; *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, [2018] 1 S.C.R. 464; **referred to:** *R. v. Wells*, 2000 SCC 10, [2000] 1 S.C.R. 207; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483; *Symes v. Canada*, [1993] 4 S.C.R. 695; *Weatherley v. Canada (Attorney General)*, 2021 FCA 158; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307; *Canada (Attorney General) v. Bedford*, 2013 SCC 72,

[2013] 3 S.C.R. 1101; *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176; *R. v. Kokopenace*, 2015 SCC 28, [2015] 2 S.C.R. 398; *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *R. v. J.-L.J.*, 2000 SCC 51, [2000] 2 S.C.R. 600; *R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239; *Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61; *Ontario (Attorney General) v. G*, 2020 SCC 38; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *R. v. Serov*, 2016 BCSC 636, 353 C.R.R. (2d) 264; *R. v. Chen*, 2021 BCSC 697; *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627; *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78, [2004] 3 S.C.R. 657; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229; *Schachter v. Canada*, [1992] 2 S.C.R. 679; *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429; *R. v. Morgentaler*, [1993] 1 S.C.R. 462; *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388; *R. v. Marshall*, [1999] 3 S.C.R. 533; *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584; *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331; *R. v. Safarzadeh-Markhali*, 2016 SCC 14, [2016] 1 S.C.R. 180; *R. v. Moriarity*, 2015 SCC 55, [2015] 3 S.C.R. 485; *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248; *Canada (Attorney General) v. Whaling*, 2014 SCC 20, [2014] 1 S.C.R. 392; *R. v. Heywood*, [1994] 3 S.C.R. 761; *R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500; *R. v. Friesen*, 2020 SCC 9; *R. v. Parranto*, 2021 SCC 46; *R. v. St-Cloud*, 2015 SCC 27, [2015] 2

S.C.R. 328; *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711; *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130; *R. v. Neary*, 2017 SKCA 29, [2017] 7 W.W.R. 730.

By Karakatsanis J. (dissenting)

Ewert v. Canada, 2018 SCC 30, [2018] 2 S.C.R. 165; *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433; *R. v. Gladue*, [1999] 1 S.C.R. 688; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101; *R. v. Moriarity*, 2015 SCC 55, [2015] 3 S.C.R. 485; *R. v. Neary*, 2017 SKCA 29, [2017] 7 W.W.R. 730; *R. v. Safarzadeh-Markhali*, 2016 SCC 14, [2016] 1 S.C.R. 180; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331; *R. v. Parranto*, 2021 SCC 46; *R. v. Laberge* (1995), 165 A.R. 375; *R. v. Morrissey*, 2000 SCC 39, [2000] 2 S.C.R. 90; *R. v. Sinclair* (1980), 3 Man. R. (2d) 257; *R. v. Cheddesingh*, 2004 SCC 16, [2004] 1 S.C.R. 433; *R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163; *R. v. Friesen*, 2020 SCC 9; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500; *R. v. Luxton*, [1990] 2 S.C.R. 711; *R. v. Turtle*, 2020 ONCJ 429, 467 C.R.R. (2d) 153; *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396; *Fraser v. Canada (Attorney General)*, 2020 SCC 28; *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, [2018] 1 S.C.R. 464; *Ontario (Attorney General) v. G.*, 2020 SCC 38; *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548;

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; *Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61; *R. v. Turpin*, [1989] 1 S.C.R. 1296; *R. v. Chouhan*, 2021 SCC 26; *Miron v. Trudel*, [1995] 2 S.C.R. 418; *Centrale des syndicats du Québec v. Quebec (Attorney General)*, 2018 SCC 18, [2018] 1 S.C.R. 522; *R. v. C.P.*, 2021 SCC 19; *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183; *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458; *R. v. Lavallee*, [1990] 1 S.C.R. 852; *Moge v. Moge*, [1992] 3 S.C.R. 813; *R. v. Wells*, 2000 SCC 10, [2000] 1 S.C.R. 207; *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692; *Inglis v. British Columbia (Minister of Public Safety)*, 2013 BCSC 2309, 298 C.R.R. (2d) 35; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130; *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66, [2004] 3 S.C.R. 381; *R. v. Oakes*, [1986] 1 S.C.R. 103; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229; *Weatherall v. Canada (Attorney General)*, [1993] 2 S.C.R. 872; *Egan v. Canada*, [1995] 2 S.C.R. 513; *Lavoie v. Canada*, 2002 SCC 23, [2002] 1 S.C.R. 769; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567.

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APPEAL from a judgment of the Ontario Court of Appeal (Feldman, Gillese and Miller JJ.A.), 2020 ONCA 478, 152 O.R. (3d) 209, 390 C.C.C. (3d) 1, 465 C.R.R. (2d) 81, 65 C.R. (7th) 1, [2020] O.J. No. 3183 (QL), 2020 CarswellOnt 10511 (WL), setting aside a decision of Hill J., 2018 ONSC 1141, 405 C.R.R. (2d) 119, 44 C.R. (7th) 341, [2018] O.J. No. 909 (QL), 2018 CarswellOnt 2566 (WL). Appeal allowed, Karakatsanis, Martin, Kasirer and Jamal JJ. dissenting.

Jennifer Conroy and Jeanette Gevikoglu, for the appellant.

Nader R. Hasan and Stephen Aylward, for the respondent.

Micah B. Rankin, for the intervener the Attorney General of British Columbia.

Noah Wernikowski, for the intervener the Attorney General of Saskatchewan.

Jonathan Rudin, for the intervener the Aboriginal Legal Services Inc.

Eleanore Sunchild, K.C., and Michael Seed, for the intervener the Federation of Sovereign Indigenous Nations.

Vincent Larochelle, for the intervener the British Columbia Civil Liberties Association.

Chris Rudnicki and Theresa Donkor, for the intervener the Queen's Prison Law Clinic.

Robin Nobleman and Ryan Peck, for the interveners the HIV & AIDS Legal Clinic Ontario and the HIV Legal Network.

Chantelle van Wiltenburg and Eric V. Gottardi, K.C., for the intervener the Canadian Bar Association.

Alisa Lombard and Aubrey Charette, for the intervener the Women's Legal Education and Action Fund Inc.

Eva Tache-Green, for the intervener the Legal Services Board of Nunavut.

Promise Holmes Skinner and Andrew Bigioni, for the intervener the Criminal Lawyers' Association (Ontario).

Michelle M. Biddulph and David M. Humphrey, for the intervener the Canadian Civil Liberties Association.

Laura Ezeuka, for the intervener the Native Women's Association of Canada.

Jessica Orkin and *Adriel Weaver*, for the intervener the David Asper Centre for Constitutional Rights.

Alana Robert and *Connor Bildfell*, for the intervener the Ontario Native Women's Association.

Carly Fox, for the intervener the Assembly of Manitoba Chiefs.

Emilie Taman, for the intervener the Canadian Association of Elizabeth Fry Societies.

Emily Young and *Andrew Max*, for the intervener the John Howard Society of Canada.

Kathryn Quinlan, for the intervener the Criminal Trial Lawyers' Association.

Maxime Raymond and *Emmanuelle Arcand*, for the intervener Association québécoise des avocats et avocates de la défense.

The judgment of Wagner C.J. and Moldaver, Côté, Brown and Rowe JJ. was delivered by

BROWN AND ROWE JJ. —

I. Introduction

[1] Conditional sentences are a form of punishment that allow offenders to serve their sentences in the community, rather than in jail. Parliament created the conditional sentencing regime in 1996. In 2012, it amended the regime to make conditional sentences unavailable for certain serious offences and categories of serious offences. This appeal addresses the constitutionality of certain of those amendments.

[2] In 2015, Ms. Sharma brought into Canada 1.97 kilograms of cocaine. She pleaded guilty to importing a Sch. I substance contrary to s. 6(1) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 (“CDSA”), and sought a conditional sentence. However, the 2012 amendments to the *Criminal Code*, R.S.C. 1985, c. C-46 made conditional sentences unavailable for offences with a maximum term of imprisonment of 14 years or life (s. 742.1(c)) and for offences, prosecuted by indictment, having a maximum term of imprisonment of 10 years and involving the import, export, trafficking, or production of drugs (s. 742.1(e)(ii)). The sentencing judge held that a conditional sentence was unavailable, and dismissed Ms. Sharma’s challenges under ss. 7 and 15(1) of the *Canadian Charter of Rights and Freedoms*. Ms. Sharma appealed. A majority of the Court of Appeal for Ontario held that the impugned provisions (ss. 742.1(c) and 742.1(e)(ii)) were overbroad under s. 7, and that they discriminated against Indigenous offenders like Ms. Sharma under s. 15(1). The Crown appeals from the Court of Appeal’s decision.

[3] We would allow the appeal and restore the sentencing judge's order. The impugned provisions do not limit Ms. Sharma's s. 15(1) rights. While the crisis of Indigenous incarceration is undeniable, Ms. Sharma did not demonstrate that the impugned provisions created or contributed to a disproportionate impact on Indigenous offenders, relative to non-Indigenous offenders, as she must show at the first step of the s. 15(1) analysis.

[4] Nor do the impugned provisions limit Ms. Sharma's s. 7 rights. Their purpose is to enhance consistency in the conditional sentencing regime by making imprisonment the typical punishment for certain serious offences and categories of offences. And that is what they do. Maximum sentences are a reasonable proxy for the seriousness of an offence and, accordingly, the provisions do not deprive individuals of their liberty in circumstances that bear no connection to their objective.

II. Facts

[5] In June 2015, Ms. Sharma, a woman of Ojibwa ancestry and a member of the Saugeen First Nation, arrived in Toronto on an international flight. Upon inspection, her suitcase was found to contain 1.97 kilograms of cocaine. She confessed that day to the RCMP that her partner had promised to pay her \$20,000 to bring the suitcase to Canada. At the time, she was two months behind on rent and facing eviction. Ms. Sharma was 20 years old, with no prior criminal record.

[6] Ms. Sharma pleaded guilty to importing a Sch. I substance contrary to s. 6(1) of the *CDSA*. Her sentencing was contested, and the judge ordered a *Gladue* report. This report revealed a life of significant hardship and intergenerational trauma. She had become a single mother at 17, had few supports, and the prospect of homelessness for her child motivated her to agree to her partner's request. The *Gladue* report noted that Ms. Sharma's grandmother was a residential school survivor, that Ms. Sharma's mother had spent time in foster care, and that Ms. Sharma had been sexually assaulted and had dropped out of school due to financial difficulties.

III. Legislative Framework

[7] Conditional sentences are a type of incarceration provided for under s. 742.1 of the *Criminal Code*. Such sentences permit offenders who meet statutory criteria to serve their sentences under strict surveillance in their communities, rather than in jail.

[8] Parliament legislated conditional sentences in 1996 in the *Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*, S.C. 1995, c. 22. The *Act* significantly reformed sentencing law (*R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 39), by including an express statement of the purposes and principles of sentencing, by providing for the conditional sentencing regime itself, and by enacting s. 718.2, which sets out considerations for judges to have regard to when determining a fit sentence. In particular, s. 718.2(e) provides 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”.

[9] Parliament’s principal objectives in enacting this legislation were to reduce sentences of imprisonment and to expand the use of restorative justice principles in sentencing (*Gladue*, at para. 48; *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 15). Section 718.2(e) and the conditional sentencing regime in s. 742.1 were aimed at achieving these goals (*Proulx*, at paras. 21, 90 and 127; *Gladue*, at para. 40; *R. v. Wells*, 2000 SCC 10, [2000] 1 S.C.R. 207, at para. 31).

[10] The Court first considered s. 742.1 in *Proulx*. Under the legislation at that time, offenders were not eligible for a conditional sentence if (1) their offence was punishable by a minimum term of imprisonment; (2) the court would impose a term of imprisonment of more than two years; (3) imposing a conditional sentence would endanger the safety of the community; or (4) imposing a conditional sentence would be inconsistent with the fundamental purposes and principles of sentencing.

[11] In 2007, Parliament amended s. 742.1 to provide that conditional sentences would also not be available to offenders convicted of a “serious personal injury offence” as defined in s. 752.01, or for offenders convicted of other specific crimes (*An Act to amend the Criminal Code (conditional sentence of imprisonment)*, S.C. 2007, c. 12).

[12] Parliament again amended s. 742.1 in 2012 in the *Safe Streets and Communities Act*, S.C. 2012, c. 1, s. 34 (“SSCA”), resulting in the current version of s. 742.1. It reads as follows:

Imposing of conditional sentence

742.1 If a person is convicted of an offence and the court imposes a sentence of imprisonment of less than two years, the court may, for the purpose of supervising the offender’s behaviour in the community, order that the offender serve the sentence in the community, subject to the conditions imposed under section 742.3, if

(a) the court is satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2;

(b) the offence is not an offence punishable by a minimum term of imprisonment;

(c) the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 14 years or life;

(d) the offence is not a terrorism offence, or a criminal organization offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years or more;

(e) the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years, that

(i) resulted in bodily harm,

(ii) involved the import, export, trafficking or production of drugs,
or

(iii) involved the use of a weapon; and

(f) the offence is not an offence, prosecuted by way of indictment, under any of the following provisions:

(i) section 144 (prison breach),

- (ii) section 264 (criminal harassment),
- (iii) section 271 (sexual assault),
- (iv) section 279 (kidnapping),
- (v) section 279.02 (trafficking in persons — material benefit),
- (vi) section 281 (abduction of person under fourteen),
- (vii) section 333.1 (motor vehicle theft),
- (viii) paragraph 334(a) (theft over \$5000),
- (ix) paragraph 348(1)(e) (breaking and entering a place other than a dwelling-house),
- (x) section 349 (being unlawfully in a dwelling-house), and
- (xi) section 435 (arson for fraudulent purpose).

[13] While there have been various amendments, the structure of s. 742.1 remains substantially the same as that described in *Proulx*. In particular, three prerequisites must be met before a conditional sentence can be imposed:

- (1) the offender was not convicted of one of the offences listed at paras. 742.1(b) through (f) (“exclusionary provisions”);
- (2) a court would otherwise impose a sentence of imprisonment of fewer than two years (see *Proulx*, at paras. 49-61); and
- (3) the safety of the community would not be endangered by the offender serving the sentence in the community (see *Proulx*, at paras. 62-76).

[14] Where these prerequisites are met, a court must consider whether a conditional sentence is appropriate, having regard to the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2 (*Proulx*, at paras. 77-78).

IV. Judicial History

A. *The Sentencing Decision: Ontario Superior Court of Justice, 2018 ONSC 1141, 405 C.R.R. (2d) 119*

[15] Ms. Sharma's sentencing was contested. The Crown provided Ms. Sharma notice of the mandatory minimum sentence (as required by s. 8 of the *CDSA*) and sought a sentence of six years' imprisonment. Ms. Sharma sought a conditional sentence and community service. Three legislative barriers stood in her way: s. 6(3)(a.1) of the *CDSA*, which set out a mandatory minimum sentence of two years' imprisonment; s. 742.1(b) of the *Criminal Code*, which made conditional sentences unavailable for any offence with a mandatory minimum term of imprisonment; and s. 742.1(c) of the *Criminal Code*, which made conditional sentences unavailable for any offence with a maximum term of imprisonment of 14 years or life. Ms. Sharma brought *Charter* challenges against all three provisions, alleging that s. 6(3)(a.1) violates s. 12 and that ss. 742.1(b) and 742.1(c) violate ss. 7 and 15 (although she abandoned her s. 7 arguments during oral submissions).

[16] In light of these constitutional challenges, the Crown unilaterally rescinded the s. 8 *CDSA* notice (so that the mandatory minimum sentence would not apply to

Ms. Sharma). The Crown recommended a sentence of 18 months' imprisonment. While this left the constitutionality of s. 6(3)(a.1) moot, the sentencing judge chose to decide the issue, concluding that it violated s. 12 of the *Charter* and could not be saved under s. 1. As the mandatory minimum sentence did not apply in the circumstances, the constitutionality of s. 742.1(b) was also moot and was not decided.

[17] The sentencing judge heard testimony from one expert witness: Dr. Carmela Murdocca. Dr. Murdocca is an Associate Professor in the Department of Sociology at York University and studies "racialization, criminalization and social exclusion of Indigenous and racialized peoples in Canada" (para. 18). Dr. Murdocca's report indicated that "[a]spects of Indigenous women's social, economic and cultural experiences often inform their participation in serious offences" (para. 23). She further opined that "specific indicators", such as economic disadvantage and poverty, may render some Indigenous women "more vulnerable to being conscripted into drug couriership" (para. 25). In this way, Dr. Murdocca's testimony connected drug-related offences committed by Indigenous women to "the legacies of colonial[1] racism" (para. 25).

[18] Dr. Murdocca also testified about the unavailability of conditional sentences for certain drug offences. The introduction of mandatory minimum sentences for drug trafficking crimes, together with the removal of conditional sentences for any offence with a mandatory minimum, impeded the sentencing regime's capacity to

account for the “contextual and intersectional factors that render Indigenous women vulnerable to [committing] drug crimes” (para. 26).

[19] The sentencing judge held that the mandatory minimum sentence required by s. 6(3)(a.1) of the *CDSA* was grossly disproportionate in Ms. Sharma’s circumstances, and infringed s. 12. A fit sentence was 18 months’ imprisonment. The Crown did not appeal this ruling.

[20] Addressing s. 15, and having regard to the evidence before him, the sentencing judge dismissed Ms. Sharma’s challenge to s. 742.1(c). Ms. Sharma had adduced “no statistical information” on the impact of removing conditional sentences for various offences (para. 257). He questioned whether such impact existed, noting that sentencing judges “maintai[n] a broad discretion to do justice in individual cases including the imposition of less punitive sanctions for serious offences” (para. 258). The length of sentence remains within the discretion of a sentencing judge, and other alternatives to imprisonment remain, including suspended sentences and probation.

B. *Court of Appeal for Ontario, 2020 ONCA 478, 152 O.R. (3d) 209*

[21] Ms. Sharma appealed her sentence and the dismissal of her s. 15 challenge to s. 742.1(c); she sought a 24-month conditional sentence. The Court of Appeal also allowed Ms. Sharma to challenge, for the first time, the constitutionality of s. 742.1(e)(ii). Further, the Court of Appeal allowed Ms. Sharma to renew her s. 7

challenge to s. 742.1(c). The majority allowed Ms. Sharma's appeal, holding that the impugned provisions infringed both ss. 7 and 15, and sentenced her to time served.

[22] As to s. 15, the majority held that the impugned provisions, while facially neutral, created a distinction between Indigenous and non-Indigenous offenders. The constitutionality of s. 742.1 could not be determined without understanding s. 718.2(e). As s. 718.2(e) was introduced to address "substantive inequality" in the criminal justice system, undermining its operation by restricting the availability of conditional sentences had the effect of perpetuating substantive inequality (paras. 70 and 79). Where, as here, a law removes a remedial provision that was put in place to alleviate the discriminatory effect of other laws, then the removal of that remedial provision may not create a new distinction, but it will reinforce, perpetuate, or exacerbate the discriminatory effect that was intended to be alleviated by the remedial provision. The effect of the impugned provisions was to exacerbate the disadvantage faced by Indigenous offenders. This was apparent even in the absence of statistical evidence. In the majority's view, it was an error in law for the sentencing judge to require Ms. Sharma to lead statistical evidence to show this.

[23] With respect to s. 7, the majority found that the impugned provisions' purpose was to "maintain the integrity of the justice system by ensuring that offenders who commit serious offences receive prison sentences" (para. 148). In light of this purpose, the legislation was not arbitrary, but it was overbroad. Parliament intended to ensure offenders who committed *serious* crimes went to jail, but the impugned

provisions jailed offenders “regardless of the underlying conduct of any particular offender” (para. 158). Parliament could have narrowed the reach of the provisions or provided for judicial discretion in exceptional cases, but did not. The Crown advanced no arguments to justify the s. 7 breach under s. 1. Accordingly, the majority struck down the provisions.

[24] The dissenting judge held that the impugned provisions did not infringe Ms. Sharma’s ss. 7 or 15 rights. On s. 15(1), he observed that the proper analytical framework was the subject of controversy. The dissenting judge agreed with the majority that Ms. Sharma’s claim met the first step. However, the majority’s application of the test would have the effect of “immunizing ordinary legislation from amendment or repeal” (para. 189). This was impermissible. Parliament had no constitutional obligation to establish the conditional sentencing regime and, therefore, must be allowed to repeal it. In his view, Ms. Sharma failed to demonstrate that the impugned provisions were arbitrary or unfair, a necessary element under the second step of the s. 15(1) framework. The legislation did not infringe her s. 15 rights.

[25] On s. 7, the dissenting judge generally agreed with the majority’s characterization of the legislation. Contrary to the majority, he held that the impugned provisions are not overbroad, as Parliament’s decision to use maximum sentences as a “rough indicia of seriousness” was appropriate (para. 283).

V. Analysis

[26] As a preliminary point, we note that, at the Court of Appeal, Ms. Sharma challenged the constitutionality of s. 742.1(c) and s. 742.1(e)(ii). The majority held that Ms. Sharma was “affected by both preclusions” (para. 66). We do not see Ms. Sharma as being affected by s. 742.1(e)(ii), as it applies only to offences for which the maximum term of imprisonment is 10 years. That said, as the majority of the Court of Appeal considered s. 742.1(e)(ii), and as the parties made submissions on it before this Court, we will address its constitutionality.

A. *Section 15*

[27] Section 15(1) of the *Charter* states:

15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[28] The two-step test for assessing a s. 15(1) claim is not at issue in this case.

It requires the claimant to demonstrate that the impugned law or state action:

- (a) creates a distinction based on enumerated or analogous grounds, on its face or in its impact; and
- (b) imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage (*R. v. C.P.*, 2021 SCC 19, at paras. 56 and 141; *Fraser v. Canada (Attorney*

General), 2020 SCC 28, at para. 27; *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548, at paras. 19-20).

[29] While this framework is set out in the above-cited cases, its proper application and the burden of proof at each step is not clear. That is particularly so in cases of adverse impact discrimination, which “occurs when a seemingly neutral law has a disproportionate impact on members of groups protected on the basis of an enumerated or analogous ground” (*Fraser*, at para. 30; see also *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396, at para. 64; *Taypotat*, at para. 22). Rather than explicitly singling out members of the protected group for differential treatment, the law does so indirectly (*Fraser*, at para. 30). This is the allegation here: that, while facially neutral, the impugned provisions disproportionately impact Ms. Sharma, as an Indigenous woman.

[30] Uncertainty in the evidentiary burden in adverse impact cases has arisen when courts collapse the two steps of analysis into one, as the majority at the Court of Appeal did here (see para. 83). The two steps are not watertight compartments or “impermeable silos” (*Fraser*, at para. 82), since each step considers the impact of the impugned law on the protected group. While there may be overlap in the evidence that is relevant at each step, the two steps ask fundamentally different questions. As such, the analysis at each step must remain distinct from the other.

[31] The first step examines whether the impugned law created or contributed to a *disproportionate impact* on the claimant group based on a protected ground. This

necessarily entails drawing a *comparison* between the claimant group and other groups or the general population (*Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 164). The second step, in turn, asks whether that impact imposes burdens or denies benefits in a manner that *has the effect of reinforcing, perpetuating, or exacerbating a disadvantage*. The conclusion that an impugned law has a disproportionate impact on a protected group (step one) does not lead automatically to a finding that the distinction is discriminatory (step two).

[32] Deciding the issues raised in this appeal requires us to resolve three particular uncertainties associated with the s. 15(1) framework:

- (a) whether the claimant must prove that the impugned law or state conduct *caused* (in the sense of *created or contributed to*) the disproportionate impact on the claimant;
- (b) whether *the entire legislative context* is relevant to the s. 15(1) inquiry;
and
- (c) whether s. 15(1) imposes a *positive obligation* on the legislature to enact remedial legislation, and relatedly, whether the legislature can *incrementally* address disadvantage.

[33] On a careful reading, this Court's jurisprudence answers these questions. In so saying, we do not alter the two-step test for s. 15(1). Rather, we seek to bring

clarity and predictability to its application, with a view to assisting parties to *Charter* challenges, judges adjudicating them, and legislators seeking to further s. 15's equality guarantee.

[34] We add that it should not be surprising that clarification is necessary. This Court has described s. 15(1) as the *Charter*'s "most conceptually difficult provision" (*Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at para. 2). The development of its analytical framework is "daunting" (B. McLachlin, P.C., "Equality: The Most Difficult Right" (2001), 14 *S.C.L.R.* (2d) 17, at p. 17), and it has gone through multiple formulations since 1989 (A. Puchta, "*Quebec v A* and *Taypotat*: Unpacking the Supreme Court's Latest Decisions on Section 15 of the *Charter*" (2018), 55 *Osgoode Hall L.J.* 665, at p. 665). Academics have criticized the current framework from various perspectives, the common thread being that it is unclear and, thus, leads to inconsistent application (see, e.g., J. Koshan and J. Watson Hamilton, "Meaningless Mantra: Substantive Equality after *Withler*" (2011), 16 *Rev. Const. Stud.* 31, at p. 61; M. Young, "Unequal to the Task: 'Kapp'ing the Substantive Potential of Section 15" (2010), 50 *S.C.L.R.* (2d) 183, at p. 185; R. Moon, "Comment on *Fraser v Canada (AG)*: The More Things Change" (2021), 30:2 *Const. Forum* 85).

[35] Our analysis proceeds in two parts. First, we provide guidance on the application of both steps of the s. 15(1) framework, with a preliminary point about the relationship between substantive equality and the two-step test. Under the first step, we discuss causation and its relationship with the evidentiary burden to establish

disproportionate impact. Under the second step, we discuss three key issues: (1) the claimant’s evidentiary burden to establish that a distinction is discriminatory; (2) the role of legislative context; and (3) the scope of the state’s obligations to remedy social inequalities. Second, we apply the s. 15(1) framework to the impugned provisions.

[36] We conclude that Ms. Sharma has not satisfied her burden at the first step. She has not demonstrated that the impugned provisions create or contribute to increased imprisonment of Indigenous offenders for the relevant offences, relative to non-Indigenous offenders. The sentencing judge found that Ms. Sharma adduced *no* statistical information showing that the law creates such a distinction. While evidence of statistical disparity may not have been required to advance her s. 15 claim, the sentencing judge was correct to find that Ms. Sharma had not met her evidentiary burden at the first step based on the record presented. The Court of Appeal erred by interfering with the sentencing judge’s finding of fact, and compounded this error by saying that no such evidentiary burden need be met.

(1) Guidance on the Section 15(1) Framework

(a) *Preliminary Point About Substantive Equality*

[37] Several recent decisions of this Court refer to substantive equality as the “animating norm” of s. 15 (*Fraser*, at para. 42, citing *Withler*, at para. 2; *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at paras. 15-16; *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*,

2018 SCC 17, [2018] 1 S.C.R. 464, at para. 25). In these decisions, the Court stated that s. 15 of the *Charter* specifically protects substantive equality.

[38] The means by which substantive equality is protected is the application of the two-step test, as set out within each of these decisions (*Fraser*, at para. 27; *Withler*, at para. 30; *Kapp*, at para. 17; *Alliance*, at para. 25). This test has been affirmed repeatedly at this Court. While our colleague stresses the “touchstone” of substantive equality, a court’s focus must ultimately be directed to *the test*, as stated by the jurisprudence. And where, applying that test, the claimant’s burden at either step of s. 15(1) is not met, there is no infringement of s. 15 (and, therefore, no substantively unequal outcome).

(b) *Step One: Proving the Law, on its Face or in its Impact, Creates or Contributes to a Distinction on the Basis of a Protected Ground*

[39] Two questions arise. First, what is the *standard* by which courts should measure impact? And secondly, how may claimants *prove* impact?

[40] We start with the difference between impact and *disproportionate* impact. All laws are expected to impact individuals; merely showing that a law impacts a protected group is therefore insufficient. At step one of the s. 15(1) test, claimants must demonstrate a *disproportionate* impact on a protected group, as compared to non-group members. Said differently, leaving a gap between a protected group and non-group members *unaffected* does not infringe s. 15(1).

[41] The disproportionate impact requirement necessarily introduces comparison into the first step. As McIntyre J. explained in *Andrews*: “[Equality] is a comparative concept, the condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises” (p. 164; see also *Fraser*, at para. 55). This Court no longer requires a “mirror comparator group” (*Withler*, at paras. 55-64; *Fraser*, at para. 94). However, *Withler* confirms that comparison plays a role at both steps of the s. 15(1) analysis. At the first step, the word “distinction” itself implies that the claimant is treated differently than others, whether directly or indirectly (*Withler*, at para. 62, cited in *Fraser*, at para. 48).

[42] As we have explained, in adverse impact cases, the law appears facially neutral. At step one, the claimant must present sufficient evidence to prove the impugned law, in its impact, *creates or contributes to* a disproportionate impact on the basis of a protected ground (*Fraser*, at para. 60, citing *Taypotat*, at para. 34; *Alliance*, at para. 26; *Symes v. Canada*, [1993] 4 S.C.R. 695, at pp. 764-65). Causation is thus a central issue. In *Withler*, the Court observed:

In other cases, establishing the distinction will be more difficult, because what is alleged is indirect discrimination: that although the law purports to treat everyone the same, it has a disproportionately negative impact on a group or individual that can be identified by factors relating to enumerated or analogous grounds. . . . In that kind of case, the claimant will have more work to do at the first step. [para. 64]

[43] Since the *Charter*'s adoption, "claimants have been required to demonstrate, through evidence, some sort of nexus between a particular action of the state, such as legislation, and an infringement of a Charter right or freedom" (*Weatherley v. Canada (Attorney General)*, 2021 FCA 158, at para. 42 (CanLII), citing *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at pp. 447 and 490; *Symes*, at pp. 764-65; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, at para. 60; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at paras. 73-78; *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176, at paras. 126 and 131-34; *R. v. Kokopenace*, 2015 SCC 28, [2015] 2 S.C.R. 398, at paras. 251-53).

[44] This is confirmed by a long line of s. 15 jurisprudence: the claimant must establish a link or nexus between the impugned law and the discriminatory impact. In *Symes*, the Court stressed the importance of distinguishing between adverse impacts "caused" or "contributed to" by the impugned law and those which "exist independently of" the impugned provision or the state action (p. 765). As Abella J. explained in *Taypotat*:

... intuition may well lead us to the conclusion that the provision has some disparate impact, but before we put the [government] to the burden of justifying a breach of s. 15 ... , there must be enough evidence to show a *prima facie* breach. While the evidentiary burden need not be onerous, the evidence must amount to more than a web of instinct. [para. 34]

[45] The causation requirement between the impugned law or state action and the disproportionate impact is recognized in the jurisprudence through the words “created” or “contributed to”. Section 15(1) claimants must demonstrate that the impugned law or state action *created or contributed to* the disproportionate impact on the claimant group at step one (*Symes*, at p. 765). Both terms — “created” and “contributed to” — describe cause. “Contributed to” merely recognizes that the impugned law need not be the only or the dominant cause of the disproportionate impact.

[46] This is consonant with *Fraser*. In that case, Abella J. confirmed that once a claimant demonstrates that the impugned law or state action creates or contributes to the disproportionate impact on a group, they need not go further and show exactly *why* the law being challenged has that impact (*Fraser*, at paras. 63 and 70; *Weatherley*, at paras. 66-75).

[47] Two examples illuminate Abella J.’s reasoning from *Fraser* and the associated burden of proof on a claimant at step one. In *Fraser*, the claimants had to demonstrate that the pension plan created or contributed to an adverse impact on the enumerated ground of sex. Said differently, the claimants had to prove that state action (the legislated restrictions to the pension plan) created or contributed to the impact (disproportionately reduced pensions) for individuals who were part of a protected group (women). The Court, however, imposed no further burden of demonstrating that

being part of a protected group caused the impact: the claimants did not have to prove they were unable to acquire full-time pension credit *because* they were women.

[48] For the Court, Abella J. relied on *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), to illustrate her reasoning. In *Griggs*, the claimant did not have to show that he was denied employment opportunities because he was African American. However, the claimant *did* have to establish that the high school education requirement created or contributed to the adverse effect of disqualifying African Americans for those jobs as compared to other applicants. Demonstrating that a law created or contributed to a disproportionate impact on a protected group is sufficient for step one.

[49] In confirming the claimant’s causation burden at step one, we are mindful of the evidentiary hurdles and the asymmetry of knowledge (relative to the state) that many claimants face. In *Fraser*, Abella J. referred to two types of evidence that are helpful in proving that a law has a disproportionate impact: evidence about the “full context of the claimant group’s situation” (*Withler*, at para. 43, cited in *Fraser*, at para. 57) and evidence about “the outcomes that the impugned law or policy . . . has produced in practice” (*Fraser*, at para. 58.) Ideally, claims of adverse impact discrimination should be supported by *both* (para. 60). To give proper effect to the promise of s. 15(1), however, a claimant’s evidentiary burden cannot be unduly difficult to meet. In that regard, courts should bear in mind the following considerations:

- (a) No specific form of evidence is required.

(b) The claimant need not show the impugned law or state action was the *only* or the *dominant* cause of the disproportionate impact — they need only demonstrate that the law was *a* cause (that is, the law created *or contributed to* the disproportionate impact on a protected group).

(c) The causal connection may be satisfied by a reasonable inference. Depending on the impugned law or state action at issue, causation may be obvious and require no evidence. Where evidence is required, courts should remain mindful that statistics may not be available. Expert testimony, case studies, or other qualitative evidence may be sufficient. In all circumstances, courts should examine evidence that purports to demonstrate a causal connection to ensure that it conforms with standards associated to its discipline.

(d) Courts should carefully scrutinize scientific evidence (see National Judicial Institute, *Science Manual for Canadian Judges* (2018); see also National Research Council and Federal Judicial Center, *Reference Manual on Scientific Evidence* (3rd ed. 2011)).

(e) If the scientific evidence is novel, courts should admit it only if it has a “reliable foundation” (*R. v. J.-L.J.*, 2000 SCC 51, [2000] 2 S.C.R. 600, at para. 33; see also *R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239, at para. 36).

[50] In summary, the first step asks whether the impugned provisions create or contribute to a disproportionate impact on the claimant group based on a protected ground as compared to other groups. If a claimant establishes that the law or state action creates or contributes to a disproportionate impact, the court should proceed to the second step. But to be clear, while the evidentiary burden at the first step should not be undue, it must be fulfilled. The particular evidentiary burden on claimants will depend on the claim. What remains consistent is that there is a burden on claimants at step one.

(c) *Step Two: Proving the Law Imposes Burdens or Denies Benefits in a Manner That Has the Effect of Reinforcing, Perpetuating, or Exacerbating Their Disadvantage*

(i) Evidentiary Burden

[51] It has never been the view of this Court that every distinction is discriminatory (*Andrews*, at p. 182). Hence the importance of the second step of the s. 15(1) test, requiring the claimant to establish that the impugned law imposes burdens or denies benefits in a manner that has the effect of reinforcing, perpetuating, or exacerbating the group's disadvantage. The question becomes, what does it mean to reinforce, perpetuate, or exacerbate disadvantage?

[52] Courts must examine the historical or systemic disadvantage of the claimant group. Leaving the situation of a claimant group unaffected is insufficient to meet the step two requirements. Two decisions of this Court demonstrate this point. In *Fraser*, Abella J. observed: "The goal is to examine the impact of the harm caused to

the affected group”, which may include economic exclusion or disadvantage, social exclusion, psychological harms, physical harms or political exclusion (para. 76 (emphasis added), citing C. Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (2010), at pp. 62-63). In *Withler*, this Court explained that a negative impact or worsened situation was required:

Whether the s. 15 analysis focusses on perpetuating disadvantage or stereotyping, the analysis involves looking at the circumstances of members of the group and the negative impact of the law on them. The analysis is contextual, not formalistic, grounded in the actual situation of the group and the potential of the impugned law to worsen their situation. [para. 37]

[53] This Court has outlined several factors that may assist a judge in determining whether claimants have met their burden at step two: arbitrariness, prejudice, and stereotyping. These factors are not necessary components; while “[t]hey may assist in showing that a law has negative effects on a particular group, . . . they ‘are neither separate elements of the *Andrews* test, nor categories into which a claim of discrimination must fit’” (*Fraser*, at para. 78, citing *Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61, at para. 329). Nonetheless, courts may usefully consider whether these factors are present:

(a) **Stereotyping or prejudice:** These factors played a critical role at step two in *Ontario (Attorney General) v. G*, 2020 SCC 38. There, the Court held that the impugned law had a discriminatory impact because it furthered stereotypes and “prejudicial notions” about persons with

disabilities (para. 62), reinforced “the stigmatizing idea that those with mental illness are inherently and permanently dangerous” and, in so doing, perpetuated the disadvantage they experienced (para. 65).

- (b) **Arbitrariness:** A distinction that does not withhold access to benefits or impose burdens, or that is based on an individual’s actual capacities, will rarely be discriminatory (*Andrews*, at pp. 174-75). Abella J. described the role that arbitrariness can play in the analysis in both *Quebec v. A* (at paras. 221 and 331) and *Taypotat* (at paras. 16, 18, 20, 28 and 34). *Taypotat* focused on “arbitrary — or discriminatory — disadvantage, that is, whether the impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage” (para. 20 (emphasis added)).

[54] Again, *Fraser* is illustrative. To recall, at step one, the claimants had to demonstrate that the pension plan created or contributed to a disproportionate impact on the enumerated ground of sex. Once that requirement was met, at step two they had to show that the disproportionate impact imposed burdens or denied benefits in a manner that had the effect of reinforcing, perpetuating or exacerbating the historic or systemic disadvantage against that group. Since pension plans have been historically designed “for middle and upper-income full-time employees with long service,

typically male” (para. 108, citing *Report of the Royal Commission on the Status of Pensions in Ontario* (1980), at p. 116), the state action “perpetuate[d] a long-standing source of economic disadvantage for women” (para. 113). Thereby, the second step was satisfied.

[55] In light of that test, it is helpful to underline three points regarding the evidentiary burden at step two:

(a) The claimant need not prove that the legislature *intended* to discriminate (*Fraser*, at para. 69; *Ontario v. G*, at para. 46, citing *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 62; *Andrews*, at p. 173).

(b) Judicial notice can play a role at step two. As this Court recognized in *Law*, “a court may take judicial notice of notorious and undisputed facts, or of facts which are capable of immediate and accurate demonstration, by resorting to readily accessible sources of indisputable accuracy” (para. 77, citing J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (1992), at p. 976). Of note here, the Court has taken judicial notice of the history of colonialism and how it translates into higher levels of incarceration for Indigenous peoples (*R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at para. 60).

(c) Courts may *infer* that a law has the effect of reinforcing, perpetuating, or exacerbating disadvantage, where such an inference is supported by the available evidence (*Law*, at para. 75). One must bear in mind, however, that inference is not mere assertion; nor is it *a priori* reasoning.

(ii) Legislative Context

[56] To determine whether a distinction is discriminatory under the second step, courts should also consider the broader legislative context.

[57] Such an approach is well-supported in our jurisprudence. In *Vriend v. Alberta*, [1998] 1 S.C.R. 493, this Court held “[t]he comprehensive nature of the Act must be taken into account in considering the effect of excluding one ground from its protection” (para. 96). Similarly, in *Withler*, the analysis was said to entail consideration of “the full context of the claimant group’s situation and the actual impact of the law on that situation” (para. 43). Where the impugned provision is part of a larger legislative scheme (as is often so), the Court explained, that broader scheme must be accounted for (para. 3), and the “ameliorative effect of the law on others and the multiplicity of interests it attempts to balance will also colour the discrimination analysis” (para. 38 (emphasis added)). In *Taypotat*, Abella J. harboured “serious doubts” that the impugned law imposed arbitrary disadvantage, particularly after considering the context of the relevant legislation “as a whole” (para. 28).

[58] Most recently, in *C.P.*, the constitutionality of s. 37(10) of the *Youth Criminal Justice Act*, S.C. 2002, c. 1 (“YCJA”) was at issue. The impugned provision did not provide young persons an automatic right of appeal to this Court where an appellate judge below dissents on a question of law, as the *Criminal Code* provides to adult offenders. Chief Justice Wagner, writing for four members of this Court, explicitly and carefully considered the entire legislative scheme, observing that the YCJA is designed to balance multiple goals — not only enhanced procedural protections, but also timely intervention and prompt resolution (para. 146). He further explained that an “approach requiring line-by-line parity with the *Criminal Code* without reference to the distinct nature of the underlying scheme of the YCJA would indeed be contrary to the contextual approach” (para. 145). In choosing not to provide young persons with an automatic right to appeal, he concluded “Parliament did not discriminate against them, but responded to the reality of their lives” (para. 162). Therefore, step two was not satisfied. We would endorse this approach, as it is consistent with *Withler*, *Taypotat*, and *Vriend*.

[59] Relevant considerations include: the objects of the scheme, whether a policy is designed to benefit a number of different groups, the allocation of resources, particular policy goals sought to be achieved, and whether the lines are drawn mindful as to those factors (*Withler*, at para. 67; see also paras. 3, 38, 40 and 81).

[60] A contextual approach is particularly significant when analyzing the constitutionality of sentencing regimes. Here, the impugned provisions cannot properly

be considered in a manner that is divorced from the broader context of sentencing law as provided for in Part XXIII of the *Criminal Code*. Part XXIII reflects a balance or interaction among the statutory principles set out in s. 718 of the *Criminal Code*, including rehabilitation, denunciation and deterrence, reparations to victims, separation from society, and the principle of restraint in s. 718.2(e). Also relevant to the legislative context is the internal limit contained in s. 718.2(e). The provision instructs courts to consider for all offenders “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 the circumstances of Aboriginal offenders” (see *Proulx*, at paras. 94-101).

[61] Parliament has the exclusive authority to legislate in matters of sentencing policy. There is no constitutional right to any particular sentence, including a conditional sentence (*R. v. Serov*, 2016 BCSC 636, 353 C.R.R. (2d) 264, at para. 35; *R. v. Chen*, 2021 BCSC 697, at para. 212 (CanLII)). Parliament had no positive obligation to create the conditional sentence regime. This Court stated in *Proulx* that Parliament could “have easily excluded specific offences” from the conditional sentencing regime when it came into force in 1996 (para. 79). It chose to do so later, and may choose to do so in the future. That is inherent in the role of Parliament, informed by experience and by the wishes of the electorate. As we explain in greater detail below, Parliament is not bound by its past policy choices, and sentencing legislation must be assessed on its own to determine whether it is constitutionally compliant, without having regard to the prior legislative scheme (*Alliance*, at para. 33).

In the context of equality claims regarding criminal sentencing policy, an area of law that involves multi-faceted and complex policy considerations, the s. 15(1) analysis must be conducted with sensitivity and due regard to the present legislative scheme.

(iii) The Scope of the State's Obligations to Remedy Social Inequalities

[62] Given the questions raised in this appeal, it is important to confirm two principles related to the government's obligations under s. 15(1).

[63] First, s. 15(1) does not impose a general, positive obligation on the state to remedy social inequalities or enact remedial legislation (*Thibaudeau v. Canada*, [1995] 2 S.C.R. 627, at para. 37; *Eldridge*, at para. 73; *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78, [2004] 3 S.C.R. 657, at para. 41; *Alliance*, at para. 42). Were it otherwise, courts would be impermissibly pulled into the complex legislative domain of policy and resource allocation, contrary to the separation of powers. In *Alliance*, this Court struck down amendments to Quebec's pay equity legislation that "interfere[d] with access to anti-discrimination law" by undermining existing legislative pay equity protections (para. 39). But in so doing, Abella J. expressly *declined* to impose a "freestanding positive obligation on the state to enact benefit schemes to redress social inequalities" (para. 42). The Court further affirmed that s. 15(1) does not bind the legislature to its current policies:

I do not share the unions' view that once Quebec adopted ss. 40 to 43, it was constitutionally required to keep them on the books, so that any modification in the type or extent of protection afforded by those

provisions would amount to a constitutional violation. To accept that submission in these circumstances would constitutionalize the policy choice embodied in the first version of the Act, improperly shifting the focus of the analysis to the form of the law, rather than its effects. Instead, there is a discriminatory impact because, assessed on their own and regardless of the prior legislative scheme, the impugned provisions perpetuate the pre-existing disadvantage of women. [Emphasis added; emphasis in original deleted; para. 33.]

[64] Secondly, this Court in *Alliance* confirmed that, when the state does legislate to address inequality, it can do so *incrementally*:

The result of finding that Quebec's amendments breach s. 15 in this case is not, as Quebec suggests, to impose a freestanding positive obligation on the state to enact benefit schemes to redress social inequalities. Nor does it undermine the state's ability to act incrementally in addressing systemic inequality. [Emphasis added; para. 42.]

[65] Incrementalism is deeply grounded in *Charter* jurisprudence. In *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, the Court accepted that the state may implement reforms "one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind" (p. 772 (emphasis added)). Expanding on the passage in *Edwards Books*, La Forest J. confirmed in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, that a legislature "must be given reasonable leeway to deal with problems one step at a time, to balance possible inequalities under the law against other inequalities resulting from the adoption of a course of action, and to take account of the difficulties, whether social, economic or budgetary, that would arise if it attempted to deal with social and economic problems in their entirety" (p. 317). He also emphasized that, generally, courts "should not lightly use the *Charter*

to second-guess legislative judgment as to just how quickly it should proceed in moving forward towards the ideal of equality” (p. 318). See also *Schachter v. Canada*, [1992] 2 S.C.R. 679; *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429; and *Auton*, at paras. 61-62.

(2) Application to the Impugned Provisions

[66] For the reasons that follow, we are of the view that Ms. Sharma’s claim fails at the first step of the s. 15(1) analysis. The impugned provisions do not create or contribute to a disproportionate impact on Ms. Sharma as an Indigenous offender.

[67] The sentencing judge rejected Ms. Sharma’s s. 15(1) claim, concluding that there was “difficulty on this record” identifying an impact that he would classify as a distinction (para. 257). He held that Ms. Sharma adduced “no statistical information” demonstrating that the legislation caused a distinction (*ibid.*).

[68] The Court of Appeal disagreed with the sentencing judge’s conclusion on the first step, relying on the observation that “Aboriginal offenders start from a place of substantive inequality in the criminal justice system” (para. 70). Since the impugned provisions removed a remedial provision designed to address overincarceration of Indigenous offenders, the effect was to “exacerbate the discriminatory effect” (para. 83).

[69] The Court of Appeal collapsed the two-step s. 15(1) framework into a single step. In doing so, it erred in two ways. First, it failed to clearly delineate Ms. Sharma’s evidentiary burden at each step of analysis, using broad evidence of historic disadvantage to satisfy the causation burden at both steps:

The distinction that is created by the impact of the impugned provisions relates to the overincarceration of Aboriginal offenders, not their overrepresentation in the criminal justice system. By removing the ability to impose a conditional sentence instead of a prison sentence for an offence, the effect on an Aboriginal offender is to undermine the purpose and remedial effect of s. 718.2(e) in addressing the substantive inequality between Aboriginal and non-Aboriginal people manifested in overincarceration within the criminal justice system, which has been acknowledged by Parliament and the courts as requiring redress. [Emphasis added; para. 79.]

[70] Secondly, when analyzing Ms. Sharma’s evidence at the first step, the court erred by using the second-step s. 15(1) requirements:

Where a law establishes a new benefit, but does so in a discriminatory manner, that law will “create” a distinction. But where, as here, a law removes a remedial provision that was put in place to alleviate the discriminatory effect of other laws, then the removal of that remedial provision may not create a new distinction, but it will reinforce, perpetuate, or exacerbate the discriminatory effect that was intended to be alleviated by the remedial provision. [Emphasis added; para. 83.]

[71] To recall, the focus at the first step is on a disproportionate impact, not historic or systemic disadvantage. The Court of Appeal addressed the wrong question at step one, focusing on the link between colonial policies and overincarceration of Indigenous peoples. While the situation of the claimant group is relevant at step one

(see *Fraser*, at paras. 56-57), it is not sufficient on its own to establish disproportionate impact. Nor is it enough to show that the law restricts an ameliorative program.

[72] To explain this point, we must directly address Ms. Sharma’s argument before this Court. Ms. Sharma submits that “conditional sentences are inextricably connected with s. 718.2(e), which *does* draw a race-based distinction, by expressly identifying Indigenous offenders as requiring particular consideration in the sentencing process. Any modification to the *Gladue* framework necessarily impacts Indigenous offenders differently than non-Indigenous offenders” (R.F., at para. 63 (emphasis in original)). She further submits that “[w]hile the Impugned Provisions apply to both Indigenous and non-Indigenous offenders, the undermining of the *Gladue* framework affects only Indigenous offenders” (para. 63). Our colleague adopts this argument, saying the distinction flows “from the combined effect of ss. 718.2(e) and 742.1” (para. 211).

[73] We accept that there is a link between the *Gladue* framework relating to s. 718.2(e) and the conditional sentence regime. Both were adopted as part of the same legislation aimed at reducing the use of prison as a sanction and expanding the use of restorative justice principles in sentencing (*Gladue*, at para. 48; *Proulx*, at paras. 15 and 18-21; *Wells*, at para. 6). However, Ms. Sharma’s burden at step one was to demonstrate that the specific provisions she challenged created or contributed to a disproportionate impact on Indigenous offenders. While she did not have to prove that the impugned provisions removed access to a conditional sentence *because* she was

Indigenous or that the impugned provisions were the *only* or the *dominant* cause of the disproportionate impact, she *did* have to demonstrate a causal connection.

[74] The sentencing judge did not accept that the impugned provisions disproportionately impact Indigenous offenders, for good reason. Dr. Murdocca testified that it was “unknown if recent statutory amendments that have restricted the use of conditional sentences may affect Aboriginal offenders disproportionately compared to non-Aboriginal offenders” (A.R., vol. II, at pp. 86-90 (emphasis added)). In light of all the evidence, the sentencing judge determined Ms. Sharma failed to satisfy step one. While the Court of Appeal overturned the sentencing judge’s conclusion, it failed to identify *any* evidence supporting Ms. Sharma’s argument that the impugned provisions created or contributed to a disproportionate impact on Indigenous offenders (see paras. 68-89). In saying this, we recognize that the Court of Appeal relied on fresh evidence, adduced by interveners, and expert evidence from Dr. Murdocca. It examined this evidence, however, at step two of its analysis (see paras. 90-105).

[75] We note here, in passing, our serious concern with interveners supplementing the record at the appellate level. As stated in *R. v. Morgentaler*, [1993] 1 S.C.R. 462, “[t]he purpose of an intervention is to present the court with submissions which are useful and different from the perspective of a non-party who has a special interest or particular expertise in the subject matter of the appeal” (p. 463, cited in *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579, at paras. 52-53). Intervenors must,

however, accept the record as defined by the parties in first instance (*Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388; *R. v. Marshall*, [1999] 3 S.C.R. 533, at para. 9; *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584, at para. 59). Interveners creating a new evidentiary record at the appellate level undermines the trial process. That is *not* how our system of justice, including constitutional adjudication, is designed to work.

[76] In short, the Court of Appeal erred by removing Ms. Sharma's evidentiary burden at step one. This is inconsistent with the sentencing judge's finding that Ms. Sharma failed to establish a distinction on the basis of a protected ground (para. 257). The Court of Appeal improperly substituted its own view of the matter. In this case, while Ms. Sharma was not required to adduce a specific type of evidence, she had to demonstrate that the impugned provisions created or contributed to a disproportionate impact. Ms. Sharma, for example, could have presented expert evidence or statistical data showing Indigenous imprisonment disproportionately increased for the specific offences targeted by the impugned provisions, relative to non-Indigenous offenders, after the *SSCA* came into force. Such evidence might establish that the removal of conditional sentences created or contributed to a disproportionate impact on Indigenous offenders.

[77] By overturning the sentence, the Court of Appeal not only departed from its proper role but misapplied the jurisprudence of this Court. In light of the sentencing judge's findings, Ms. Sharma's argument before this Court — that the impugned

provisions “necessarily impac[t] Indigenous offenders differently” — cannot be accepted.

[78] Ms. Sharma argued that removing the availability of conditional sentences undermined a trial judge’s ability to give effect to s. 718.2(e). She alleges that the removal of one “accommodation”, the availability of conditional sentences for certain offences, disproportionately impacts Indigenous offenders. We do not accept this argument. It is clear that s. 718.2(e) is still meaningfully operable, as it was given effect in this case. As long as judges retain broad discretion to impose a range of available sentences, we query whether altering a single sentencing provision could undermine s. 718.2(e) in the manner Ms. Sharma suggests.

[79] It is undisputed that the sentencing judge must take account of the particular circumstances of Indigenous offenders, as that is what Parliament has directed in s. 718.2(e). How this is to be done may take various forms and the *Criminal Code* provides judges broad discretion to craft a proportionate sentence, given the offender’s degree of responsibility, the gravity of the offence and the specific circumstance of each case (*R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at para. 58). For instance, sentencing judges may consider other non-carceral options such as suspended sentences and probation. They may also reduce sentences below the typical range.

[80] It is true that suspended sentences are “primarily a rehabilitative sentencing tool”, whereas conditional sentences “address both punitive and rehabilitative

objectives” (*Proulx*, at para. 23). Suspended sentences are not irrelevant to applying s. 718.2(e). *Proulx* does not prohibit judges from using suspended sentences “to endeavour to achieve a truly fit and proper sentence in the particular case” (*Gladue*, at para. 33). Where conditional sentences are unavailable, judges may give effect to s. 718.2(e) by considering suspended sentences with openness and flexibility.

[81] In any event, and as we say, it is clear that s. 718.2(e) was given effect in the circumstances of this case. The judge sentenced Ms. Sharma to 18 months’ incarceration, taking into account her experience as an Indigenous person under the *Gladue* framework, which was well below the established range for similar offences (sentencing reasons, at para. 80). As a reminder, s. 718.2(e) does not guarantee that Indigenous offenders will not receive carceral sentences.

[82] As a final point, although our colleague assures us that “[r]epealing or amending s. 742.1, or even s. 718.2(e), will not automatically contravene s. 15(1)” (para. 244), the logical conclusion of her reasons suggests the contrary. While s. 718.2(e) sets out an important policy, it is a legislative provision, not a constitutional imperative, and it is open to Parliament to amend it, even if to narrow the circumstances in which it applies. Viewed in this light, our colleague’s proposition is novel and its implications are profound and far-reaching. Parliament would be prevented from repealing or amending existing ameliorative policies in many cases, unless courts are persuaded that such changes are justified under s. 1. This would amount to a transfer of sentencing policy-making from Parliament to judges. Such an outcome would be

contrary to the separation of powers, at odds with decades of our jurisprudence stressing Parliament's latitude over sentencing within constitutional limits, and must be rejected.

[83] Given the above, there is no need to consider step two. Section 15(1) is not infringed.

B. *Section 7*

(1) Introduction

[84] Section 7 states:

7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[85] The parties agree that the impugned provisions limit Ms. Sharma's liberty interests. The question that follows is whether they do so in a manner that accords with the principles of fundamental justice. Ms. Sharma argued before the Court of Appeal that the impugned provisions are arbitrary and overbroad. The majority agreed that the impugned provisions were overbroad, but not arbitrary. In our view, the impugned provisions are neither.

[86] Arbitrariness and overbreadth both consider the connection between the purpose of the impugned law and the limits it imposes on life, liberty, or security of the person (*Bedford*, at paras. 114-19). A law is arbitrary when it imposes limits on these interests in a way that bears no connection to its purpose — that is, when it “exacts a constitutional price in terms of rights, without furthering the public good that is said to be the object of the law” (*Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at para. 83). And it is overbroad when it imposes limits on these interests in a manner that is not rationally connected to the purpose of the law (*Bedford*, at para. 112; *Carter*, at para. 85).

[87] As the law’s purpose is the principal reference point, its proper identification is crucial to the s. 7 analysis (*R. v. Safarzadeh-Markhali*, 2016 SCC 14, [2016] 1 S.C.R. 180, at para. 24; *R. v. Moriarity*, 2015 SCC 55, [2015] 3 S.C.R. 485, at para. 24). Indeed, identifying a law’s purpose may be determinative of its constitutionality (R. J. Sharpe and K. Roach, *The Charter of Rights and Freedoms* (7th ed. 2021), at p. 279). It is important to characterize the purpose of a law at the appropriate level of generality (*Safarzadeh-Markhali*, at para. 27; *Moriarity*, at para. 28). At one end of the spectrum lies an abstract purpose akin to the animating social value. At the other extreme is a “virtual repetition of the challenged provision, divorced from its context” (*Safarzadeh-Markhali*, at para. 27). A proper framing of purpose lies somewhere between these two poles, and is precise and succinct (*Moriarity*, at para. 29).

[88] The most significant and reliable indicator of legislative purpose would, of course, be a statement of purpose within the subject law. Beyond that, generally, courts seeking to identify legislative purpose look to the text, context, and scheme of the legislation and extrinsic evidence, which can (subject to the caution we offer below) include Hansard, legislative history, government publications and the evolution of the impugned provisions (*Safarzadeh-Markhali*, at para. 31; *Moriarity*, at para. 31; *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248, at para. 37).

[89] Extrinsic evidence should be used with caution. Statements of purpose in the legislative record may be rhetorical and imprecise (*Safarzadeh-Markhali*, at para. 36; R. Sullivan, *The Construction of Statutes* (7th ed. 2022), at p. 293). Decontextualized statements by members of Parliament can be poor indicators of parliamentary purpose (see, e.g., *Canada (Attorney General) v. Whaling*, 2014 SCC 20, [2014] 1 S.C.R. 392, at paras. 67-68). What is to be identified is the purpose of *Parliament*, being that of its collective membership as expressed in its legislative act, and *not* the purposes of its individual members. As this Court has recognized in *R. v. Heywood*, [1994] 3 S.C.R. 761, at p. 788, “the intent of particular members of Parliament is not the same as the intent of the Parliament as a whole”.

[90] Warnings of imprecision aside, legislative history can be useful in determining legislative purpose (*Safarzadeh-Markhali*, at para. 36). Two stages in the legislative process are of particular assistance (and this is true both of Parliament and

of provincial legislatures). At second reading, the Minister who introduces the legislation sets out, usually in a formal and structured way, what the legislation is intended to achieve and the means by which it seeks to do so. Second reading is approval in principle. Following such approval, legislation is referred to committee for detailed, clause-by-clause consideration. Explanations provided to the legislative committee by the Minister, the Minister's Parliamentary Secretary or departmental officials can provide further authoritative statements regarding intent. At the federal level, procedures in the Senate parallel those of the House of Commons. Thus, the second reading speech by the Senator who introduces the legislation, as well as the explanations by departmental officials at committee hearings, can also be useful.

[91] Having reviewed whatever sources are available, courts should strive to arrive at a precise and succinct statement that faithfully represents the legislative purpose of the impugned provision (*Safarzadeh-Markhali*, at para. 28; *Moriarity*, at para. 29). Overly broad, multifactorial statements of purpose can artificially make impugned provisions unassailable to arguments of overbreadth or arbitrariness. In *Safarzadeh-Markhali*, the Court defined the purpose of denying enhanced credit for pre-sentence custody as “enhanc[ing] public safety and security by increasing violent and chronic offenders’ access to rehabilitation programs” (para. 47 (emphasis deleted)). In *R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754, the purpose of the law was “to combat people smuggling” (para. 34; see also *Moriarity*, at para. 29). Courts must then use this same precise and succinct statement of purpose within the

subsequent analysis. The statement of the purpose should be maintained and not change throughout the analysis.

(2) Application to the Impugned Provisions

(a) *The Impugned Provisions Aim to Enhance Consistency in the Conditional Sentencing Regime by Making Imprisonment the Typical Punishment for Certain Serious Offences and Categories of Offences*

[92] With these directions in mind, we turn to the first step of the analysis: determining the purpose of ss. 742.1(c) and 742.1(e)(ii). As we will explain, the impugned provisions have the same purpose: to enhance consistency in the conditional sentencing regime by making imprisonment the typical punishment for certain serious offences and categories of offences.

[93] We consider it significant that the impugned provisions are contained within the exclusionary provisions, that is, paras. 742.1(b) through (f). These exclusionary provisions list offences and categories of offences for which conditional sentencings are unavailable. Parliament adopted these exclusionary provisions together in 2012 in the *SSCA*; the Minister's second reading remarks to Parliament addressed these exclusions as a group. Given the legislative text, the purpose of the two impugned provisions — ss. 742.1(c) and 742.1(e)(ii) — is the same. To hold otherwise would result in purposes tied too tightly to the means, which is impermissible.

[94] Two occurrences provide important background to Parliament's introduction of the exclusionary provisions: this Court's decision in *Proulx* and the 2007 amendments to s. 742.1. We explain each below.

[95] *Proulx* addressed the initial iteration of s. 742.1 and stated various considerations for judges when granting a conditional sentence. At that time, the exclusionary provisions were not part of s. 742.1. Several parties had argued that a presumption should apply *against* conditional sentences for certain serious offences, such as sexual offences against children, manslaughter and trafficking or possession of certain narcotics (para. 80). The Court dismissed those submissions, stating that "a conditional sentence is available in principle for all offences in which the statutory prerequisites are satisfied" (para. 79 (emphasis in original)). The Court explained that while the gravity of offences is relevant to determining whether a conditional sentence is appropriate in the circumstances, it was both "unwise and unnecessary to establish judicially created presumptions that conditional sentences are inappropriate for specific offences" (para. 81 (emphasis added); *Wells*, at para. 45).

[96] While this Court properly declined to create judicial exclusions, Parliament in the proper exercise of its authority did so through legislative amendment. As discussed, in 2007, Parliament amended s. 742.1. The 2007 amendments provide background to Parliament's desire to introduce consistency into the regime in 2012. The 2007 amendments provided that conditional sentences would not be available to offenders convicted of a "serious personal injury offence". When subsequently

repealing this prerequisite, the Minister discussed that courts had defined “serious personal injury offences” inconsistently and in a manner that did not accord with parliamentary intent (*House of Commons Debates*, vol. 145, No. 38, 3rd Sess., 40th Parl., May 3, 2010, at pp. 2282-83).

[97] The current version of s. 742.1 was enacted in 2012 via the *SSCA*. The *SSCA* combined several previous bills that had died on the order paper after Parliament’s dissolution. Notably, the *SSCA* included a word-for-word reintroduction of Bill C-16, *Ending House Arrest for Property and Other Serious Crimes by Serious and Violent Offenders Act*, 3rd Sess., 40th Parl., 2010, which was initially meant to replace s. 742.1. To understand the current version of s. 742.1, we must go back to the second reading speeches for Bill C-16, which originally introduced the amendments.

[98] The Minister’s second reading speech for Bill C-16 explained that the amendments aimed to clarify that conditional sentences were not available for serious property and violent offences:

Bill C-16 proposes amendments to the Criminal Code to ensure that conditional sentences are never available for serious and violent offenders, and serious property offences which were never intended to be eligible for a conditional sentence in the first place.

. . .

It is this aspect of the existing conditional sentencing provisions that are so problematic and this is what the bill before us today addresses. Rather than leaving it to the individual courts to determine whether a particular case qualifies as a serious personal injury offence, this bill clearly identifies all offences which will never be eligible for a conditional sentence. It removes the uncertainty and provides clarity to our law.

...

... [T]his bill would provide the needed clarity and the certainty to say which offences are not eligible for a conditional sentence. ...

...

It is my view that the current conditional sentencing regime still fails to categorically make conditional sentences ineligible for many very serious crimes. Greater clarity and greater consistency is needed to limit the availability of conditional sentences and to protect Canadians from serious and violent offenders.

...

Conditional sentences are an appropriate sentencing tool, in many cases. However, access to them does need to be restricted when it comes to serious property and serious violent offences. [Emphasis added.]

(*House of Commons Debates*, May 3, 2010, at pp. 2282-84)

[99] Specific references were made to Bill C-16 during the Minister's second reading speech for the *SSCA*. The Minister reiterated that "these proposals seek to make it explicitly clear that a conditional sentence is never available for" the categories of offences and the specific offences enumerated (*House of Commons Debates*, vol. 146, No. 17, 1st Sess., 41st Parl., September 21, 2011, at p. 1299). At the second reading in the Senate, the Senator who introduced the legislation on behalf of the Minister emphasized that "[t]he lack of consistency [in conditional sentencing] is a problem in our justice system" (*Debates of the Senate*, vol. 148, No. 39, 1st Sess., 41st Parl., December 8, 2011, at p. 831). As the parliamentary record reveals, the *SSCA* was part of a larger initiative by Parliament to adopt a deterrence-based approach to crime (Canadian Bar Association, *Submission on Bill C-10, Safe Streets and Communities*

Act, October 2011 (online), at p. 2). In furtherance of this approach, Parliament aimed to address what it saw as the use of conditional sentences for serious offences that warranted imprisonment.

[100] Parliament identified certain offences for which conditional sentences would not be available. The exclusionary provisions are precise: only specific offences or categories of offences trigger their application. Thus, Parliament sought to impose bright-line limitations on the availability of conditional sentences.

[101] It is clear, from the text, context, scheme and extrinsic evidence, that a desire to enhance consistency in the conditional sentencing regime by making imprisonment the typical punishment for certain serious offences and categories of offences was the object of these amendments. This is the *purpose* of the exclusionary provisions.

[102] The *means* by which Parliament achieved this purpose was to remove the availability of a conditional sentence for certain offences and categories of offences. In doing so, Parliament left open the possibility that relatively less serious criminal behaviour can receive a non-carceral sentence (suspended sentence, probation, conditional discharge, etc.) or a flexible carceral sentence (intermittent sentence). Parliament made clear, however, that an offender should generally be sentenced to a term of imprisonment for offences listed in the exclusionary provisions.

[103] Finally, the *effect* of the exclusionary provisions of s. 742.1 is to reduce the number of offenders who serve their sentences in the community.

(b) *The Impugned Provisions Are Not Overbroad*

[104] The Court of Appeal found “no rational connection between the impugned provisions’ purpose and some of their effects” (para. 174). Inasmuch as the impugned provisions prevent offenders who commit non-serious offences from receiving a conditional sentence, they are overbroad (para. 174). Maximum sentence, which the provisions use as a marker of seriousness, is not, in the Court of Appeal’s view, a suitable proxy (para. 164).

[105] As we have explained, in enacting the impugned provisions, Parliament intended to enhance consistency in the conditional sentencing regime by making imprisonment the typical punishment for certain serious offences and categories of offences. Given this purpose, the Court of Appeal erred in three ways. First, maximum sentence *is* a suitable proxy for seriousness. Second, the definition of a serious offence is a normative assessment in respect of which Parliament must be granted significant leeway. And finally, the Court of Appeal confused seriousness of an offence with the circumstances of an offender and their moral culpability. We explain each point in turn.

[106] First, this Court has *repeatedly* accepted that the maximum sentence for an offence is a reflection of, and a proxy for, its seriousness (*R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at paras. 36 and 56; *R. v. Friesen*, 2020 SCC 9, at paras. 95-96; *R. v.*

Parranto, 2021 SCC 46, at para. 60; *R. v. St-Cloud*, 2015 SCC 27, [2015] 2 S.C.R. 328, at para. 60; *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711, at p. 734). In many areas, Parliament has structured policies using maximum sentence as the measure for seriousness — e.g., the availability of absolute and conditional discharges (*Criminal Code*, s. 730(1)); record suspensions (*Criminal Records Act*, R.S.C. 1985, c. C-47, s. 4(2)(b)); and inadmissibility to Canada in the immigration context (*Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 36(1)(a)). In the present case, Parliament’s primary aim was to enhance consistency in sentencing. It determined that bright-line rules, drawn by reference to the maximum sentence, are the best way to achieve this goal. Deference towards Parliament is particularly apt given that the concept of “serious offences” is not subject to precise definition.

[107] This leads us to the second error we identify in the Court of Appeal’s overbreadth analysis. Reasonable people may disagree about which offences are “serious” enough to warrant jail sentences. These are judgment calls, and there is no obvious reason to prefer one or the other. Ultimately, as this Court has maintained, the call rests not with the preferences of judges, but with those collectively expressed by Parliament as representatives of the electorate. As explained in *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130, at para. 45:

Parliament has the power to make policy choices with respect to the imposition of punishment for criminal activities and the crafting of sentences that it deems appropriate to balance the objectives of deterrence, denunciation, rehabilitation and protection of society.

[108] Finally, to the extent the Court of Appeal pointed to Ms. Sharma's circumstances as demonstrative of Parliament's overreach, it collapsed the concept of seriousness of the offence into the concepts of circumstances of the offender and particulars of the crime. On this point, we endorse the sentencing judge's comments: "[Ms. Sharma] committed a serious offence in importing cocaine — a reality undisturbed by her personal culpability or mitigating factors" (para. 141 (emphasis added)). The Court of Appeal for Saskatchewan made a similar point in *R. v. Neary*, 2017 SKCA 29, [2017] 7 W.W.R. 730: "The gravity and seriousness of the offences are not attenuated by the personal circumstances of the accused" (para. 39). We accept entirely that the circumstances which led Ms. Sharma to import drugs are tragic and that her moral culpability was thereby attenuated (which was reflected in a sentence of 18 months rather than the six years initially proposed by the Crown). But those facts do not make importation of a Sch. I substance, particularly in the quantity she carried, any less serious.

[109] Given the purpose of the impugned provisions articulated above and their effects, we conclude that they are not overbroad.

(c) *The Impugned Provisions Are Not Arbitrary*

[110] Ms. Sharma submits that the impugned provisions are arbitrary, as they create a "gap" in the sanctions available for sentencing judges. The idea is that, where a proportionate sentence would have been a conditional sentence, it follows that the

sentence actually imposed as a result of the impugned provisions would be either too high or too low.

[111] But the existence of a “gap”, if indeed there is one, does not speak to arbitrariness. Rather, arbitrariness exists where there is no connection between the effect of a provision and its purpose. That understood, the impugned provisions are not arbitrary. As stated before, their purpose is to enhance consistency in the conditional sentencing regime by making imprisonment the typical punishment for certain serious offences and categories of offences. Where a sentencing judge determines that a jail sentence is warranted, offenders convicted of those offences will serve their sentences in jail, rather than in the community. There is an obvious connection between the effect of the provisions and their purpose, and Ms. Sharma’s rights are not limited arbitrarily.

[112] Therefore, while s. 742.1 limits Ms. Sharma’s liberty interests, it does so in a manner that accords with the principles of fundamental justice. Accordingly, it is unnecessary for us to have regard to s. 1, as no limit of ss. 15 or 7 has been established.

VI. Conclusion

[113] We would allow the appeal. Sections 742.1(c) and 742.1(e)(ii) are constitutional. We would set aside the order of the Court of Appeal, and restore the sentence imposed at first instance. As Ms. Sharma has served her sentence, no further orders are required.

The reasons of Karakatsanis, Martin, Kasirer and Jamal JJ. were delivered
by

KARAKATSANIS J. —

I. Introduction

[114] The overrepresentation of Indigenous people in Canada’s prisons is a present-day product of this country’s colonial past. As Indigenous incarceration rates have climbed, and those of Indigenous women have soared, some have compared Canadian correctional facilities to residential schools (see Truth and Reconciliation Commission, *The Final Report of the Truth and Reconciliation Commission of Canada*, vol. 5, *The Legacy* (2015), at p. 219). Like residential schools before it, this overincarceration is an ongoing source of intergenerational harm to families and communities. It is a striking sign of the discrimination that Indigenous peoples experience in “all parts of the criminal justice system” (*Ewert v. Canada*, 2018 SCC 30, [2018] 2 S.C.R. 165, at para. 57). And it remains a poignant obstacle to realizing the constitutional imperative of reconciliation.

[115] Sentencing law cannot erase this country’s colonial past. Nor can it remove the causes behind an offender’s crime. But it is uniquely positioned to ameliorate — or aggravate — the racial inequalities in our criminal justice system. Ensuring that Canadian sentencing provisions are consistent with the liberty and equality guarantees

under the *Canadian Charter of Rights and Freedoms* is therefore essential. This case requires us to do so.

[116] Cheyenne Sharma, a 20-year-old Indigenous mother to an infant daughter, was owing two months' rent, and facing eviction, when her then-partner made her an offer: fly to Suriname, collect a suitcase, and return with it to Canada, for \$20,000. When agents for the Canada Border Services Agency cut into the luggage upon her return, they found nearly two kilograms of cocaine, worth around \$130,000. Ms. Sharma was arrested and charged with importing over one kilogram of a prohibited substance, contrary to s. 6(1) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 (*CDSA*).

[117] Ms. Sharma pleaded guilty, but challenged several provisions of the *CDSA* and the *Criminal Code*, R.S.C. 1985, c. C-46, under ss. 7, 12 and 15(1) of the *Charter*. The trial judge sentenced Ms. Sharma to 18 months' imprisonment, concluding that s. 742.1(c) of the *Criminal Code* — which prohibits conditional sentences for a range of offences — precluded him from imposing a community sentence. The Court of Appeal for Ontario then struck down ss. 742.1(c) and 742.1(e)(ii) — the latter prohibiting conditional sentences for certain drug offences — as violating ss. 7 and 15(1) of the *Charter*. It substituted a conditional sentence of two years less a day.

[118] I agree with the majority of the Court of Appeal. Sections 742.1(c) and 742.1(e)(ii) infringe s. 7 because they deprive some individuals of their liberty in a manner that is overbroad: by using maximum sentences as a proxy for the seriousness

of an offence, capturing the *most* and the *least* serious criminal conduct, they overstep their aim of punishing more serious offences with incarceration. And they infringe s. 15(1) because they impair the remedial effect of s. 718.2(e) — which directs judges to consider alternatives to imprisonment “with particular attention to the circumstances of Aboriginal offenders” — in a manner that creates a distinction on the basis of race, and that reinforces, perpetuates, and exacerbates the historical disadvantages of Indigenous peoples.

[119] As the Crown has justified neither infringement under s. 1 of the *Charter*, I would conclude that the provisions are unconstitutional and would uphold the Court of Appeal’s declaration that they are of no force and effect under s. 52(1) of the *Constitution Act, 1982*. I would, accordingly, dismiss the appeal.

II. Background

[120] We are all, in part, the product of our circumstances. In this appeal, Ms. Sharma’s own history intersects with three others: with the intergenerational effects of colonialism; with the corresponding, and rising, rates of Indigenous incarceration; and with Parliamentary and judicial responses to the sentencing of Indigenous offenders.

[121] Ms. Sharma belongs to the Saugeen First Nation and is of Ojibwa ancestry. The obstacles in her life have been formidable. The granddaughter of a residential school survivor, she lost her father at age 5, when he was arrested, deported to Trinidad,

convicted of murder, and sentenced to 12 years' imprisonment. At age 13, having run away from home, she fell into alcoholism and was sexually assaulted. At age 15, employed as a sex worker, she nearly died of a drug overdose. At age 16, unable to afford the school uniform, she dropped out of high school. At age 17, abandoned by the father, she gave birth to a daughter. And at age 20, unsupported by the child's father, behind on rent, and facing homelessness, she chose to commit the crime at issue. She has no other entry on her criminal record. Having already survived several suicide attempts, she lapsed into further depression, stress, anxiety, and alcohol dependency when her mother died during the sentencing proceedings. At the time of her sentence, she had moved to reserve lands on Christian Island and was working toward her sobriety and her high school education.

[122] Ms. Sharma's story is tragic, but not unique. Colonialism continues to engender longstanding, pervasive and persistent evils for Canada's Indigenous population, with roots as deep as its effects have been broad. And courts now recognize this in law. Today, courts "must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples" (*R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at para. 60).

[123] Indigenous overincarceration has been a particularly acute and visible issue for some decades. Already a "notorious fact in Aboriginal communities by the 1970s",

report after report from the late 1980s onward chronicled the problem in ever more alarming detail (J. Rudin, “Aboriginal Over-representation and *R. v. Gladue*: Where We Were, Where We Are and Where We Might Be Going” (2008), 40 *S.C.L.R.* (2d) 687, at p. 687; see, in particular, M. Jackson, “Locking Up Natives in Canada” (1989), 23 *U.B.C. L. Rev.* 215; 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); Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (1996); J. Rudin, *Aboriginal Peoples and the Criminal Justice System* (2005)).

[124] And still things worsened. In the 1980s, with Aboriginal peoples representing only 2 percent of Canada’s population, Aboriginal offenders represented roughly 17 percent of its provincial and territorial custody population (*R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 58, citing Jackson, at pp. 215-16), and 10 percent of its federal penitentiary population (J. V. Roberts and R. Melchers, “The Incarceration of Aboriginal Offenders: Trends from 1978 to 2001” (2003), 45 *C.J.C.C.J.* 211, at p. 220). Yet by 2018-19, Indigenous persons, representing only 4.5 percent of Canada’s adult population, had come to represent 31 percent of its admissions to provincial and territorial custody, and 29 percent of its admissions to federal custody (Statistics Canada, *Adult and youth correctional statistics in Canada, 2018/2019* (December 2020), at p. 5). In Manitoba and Saskatchewan, the provinces with the highest relative Indigenous adult populations, admissions reached 75 percent (p. 5). Incredibly, Canada’s Indigenous inmate population grew by nearly 43 percent between

2009 and 2018 even as the sirens of overrepresentation continued to sound ever louder (Office of the Correctional Investigator of Canada (OCI), *Annual Report 2017-2018* (2018), at p. 61).

[125] Striking as they are, those figures understate the incarceration rates of Indigenous women. Accounting for only about 4 percent of the female population, Indigenous women now comprise 42 percent of federally incarcerated women, with their population in federal institutions having increased by an astounding 73.8 percent over the past decade (OCI, *Annual Report 2020-2021* (2021), at p. 41).

[126] Inside prisons, Indigenous offenders also experience some of incarceration's harshest effects. They are more likely than their peers to "receive higher security classifications, to spend more time in segregation, to serve more of their sentence behind bars before first release, to be under-represented in community supervision populations, and to return to prison on revocation of parole" (*Ewert*, at para. 60).

[127] As with incarceration rates themselves, those harms are further pronounced for Indigenous women (National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report*, vol. 1a (2019), at p. 635; I.F., Queen's Prison Law Clinic, at para. 7), over 70 percent of whom in federal custody are also mothers to underage children (OCI, *Annual Report 2014-2015* (2015), at p. 50). Those mothers are most often young, single, and the sole supporting parent (K. Miller, "Canada's Mother-Child Program and Incarcerated Aboriginal Mothers:

How and Why the Program is Inaccessible to Aboriginal Female Offenders” (2018), 37 *C.F.L.Q.* 1, at p. 7).

[128] The dislocations that the statistics imply — the lost jobs, the separated families, the cultural alienations, the broken societies — are harder to quantify, but no less grave. Noting that an Indigenous boy born in Saskatchewan in 1960 had a 70 percent chance of being incarcerated by the age of 25, Professor Jackson wrote in 1988 that prison had “become for many young native people the contemporary equivalent of what the Indian residential school represented for their parents” (p. 216). Many years later, the Truth and Reconciliation Commission of Canada echoed those comments in its 2015 *Final Report*, where it compared the experience of Indigenous offenders in prison to the experiences of Indigenous children in residential schools:

Prison today is for many Aboriginal people what residential schools used to be: an isolating experience that removes Aboriginal people from their families and communities. They are violent places and often result in greater criminal involvement as some Aboriginal inmates, particularly younger ones, seek gang membership as a form of protection. Today’s prisons may not institutionally disparage Aboriginal cultures and languages as aggressively as residential schools did, but racism in prisons is a significant issue. In addition, prisons can fail to provide cultural safety for Aboriginal inmates through neglect or marginalization. Many damaged people emerged from the residential schools; there is no reason to believe that the same is not true of today’s prisons.

(Sentencing reasons, at para. 123, citing Truth and Reconciliation Commission, at p. 219.)

Among its 94 “calls to action”, the Commission called for “eliminating the overrepresentation of Aboriginal people in custody”, and in particular that of

Aboriginal youths, over the ensuing decade (Truth and Reconciliation Commission, *Calls to Action* (2015), calls 30 and 38). With the close of that decade nearing, those calls are more urgent than ever.

[129] Efforts to remedy the problem, however, are nothing new. In the 1980s, as overrepresentation became harder to ignore, it dovetailed with Parliamentary attention to sentencing reform (D. Daubney and G. Parry, “An Overview of Bill C-41 (The Sentencing Reform Act)”, in J. V. Roberts and D. P. Cole, eds., *Making Sense of Sentencing* (1999), 31, at pp. 31-33). Then in 1995, following preparatory work of several years, Parliament enacted Bill C-41, or the *Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*, S.C. 1995, c. 22. The law, which came into force the following year, created Part XXIII of the *Criminal Code*, marking the “first codification and significant reform of sentencing principles in the history of Canadian criminal law” (*Gladue*, at para. 39).

[130] Among other things, Bill C-41 introduced two key measures for addressing overrepresentation. Section 718.2(e) directed sentencing judges to consider “all available sanctions other than imprisonment that are reasonable in the circumstances . . . with particular attention to the circumstances of Aboriginal offenders”. And, s. 742.1 created conditional sentences — expanding the “available sanctions” — which allowed offenders to serve their sentence in their community, under strict conditions, rather than in prison. Speaking in Parliamentary debates, Minister of Justice Allan Rock explained that the former was an effort, “particularly

having regard to the initiatives in the aboriginal communities to achieve community justice, . . . to encourage courts to look at alternatives where it's consistent with the protection of the public — alternatives to jail — and not simply resort to that easy answer in every case” (*Gladue*, at para. 47 (emphasis deleted)).

[131] The regime first came before the Court in 1998, in *Gladue*. The accused, a 19-year old Cree mother, had pleaded guilty to manslaughter after stabbing her common law husband to death. Except for her Cree ancestry, and the fact that she resided off-reserve in McLennan, Alberta, almost nothing was said about her Indigenous identity at sentencing. Finding that s. 718.2(e) did not apply since she lived off-reserve, the judge sentenced her to three years' imprisonment. A majority of the Court of Appeal for British Columbia dismissed the appeal, concluding that while not applying s. 718.2(e) was an error, it was immaterial, since nothing in Ms. Gladue's background would have made a difference in her sentence. Ms. Gladue then appealed to this Court.

[132] The question was how to interpret s. 718.2(e). Had it changed the law, introducing a new approach to sentencing Indigenous offenders?

[133] This Court held that s. 718.2(e) had changed the law: the provision directed judges “to undertake the process of sentencing aboriginal offenders differently” (para. 33), not because they deserve “more” attention in sentencing, but because their “*circumstances are unique*, and different from those of non-aboriginal offenders” (para. 37 (emphasis in original)). The reference to Aboriginal offenders, it explained,

“suggests that there is something different about aboriginal offenders which may specifically make imprisonment a less appropriate or less useful sanction” (para. 37).

[134] Those differences were, broadly speaking, two-fold. First, Indigenous offenders often confront “unique systemic or background factors”: the “low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness, and community fragmentation”, rooted in years of dislocation, that contribute to their higher incidence of crime and incarceration (paras. 66-67). Second, an offender’s Indigenous heritage may inform the “types of sentencing procedures and sanctions which may be appropriate in the circumstances” (para. 66), since Indigenous concepts of sentencing, although “vary[ing] widely”, often place greater emphasis upon restorative justice and “the importance of community-based sanctions” than does the general law of sentencing (paras. 73-74).

[135] Section 718.2(e) directed sentencing judges to consider and give effect to both factors, using the tools created in Bill C-41. Conditional sentences in particular, gave “an entirely new meaning” to the remedial purpose of s. 718.2(e), by expanding the range of available alternatives to imprisonment (para. 40). Attention was owed “to the fact that Part XXIII, through ss. 718, 718.2(e), and 742.1, among other provisions, ha[d] placed a new emphasis upon decreasing the use of incarceration” (para. 93(4.)).

[136] This was key if sentencing judges were to address, however modestly, the systemic injustices against Indigenous peoples in the criminal justice system:

What can and must be addressed . . . is the limited role that sentencing judges will play in remedying injustice against aboriginal peoples in Canada. Sentencing judges are among those decision-makers who have the power to influence the treatment of aboriginal offenders in the justice system. They determine most directly whether an aboriginal offender will go to jail, or whether other sentencing options may be employed which will play perhaps a stronger role in restoring a sense of balance to the offender, victim, and community, and in preventing future crime. [para. 65]

In *all* cases involving Indigenous offenders, then, sentencing judges had to consider their unique circumstances, taking judicial notice “of the systemic or background factors and the approach to sentencing which is relevant” to them (at para. 83), and integrating those concerns into fit sentences.

[137] *Gladue* seemed to herald a turning point in the sentencing of Indigenous offenders. Still, the Court worried that s. 718.2(e) “might come to be interpreted and applied in a manner which would have no real effect upon the day-to-day practice of sentencing aboriginal offenders in Canada” (para. 34). And indeed, by 2012, with overrepresentation again on the rise, the Court in *Ipeelee* saw that courts had “significantly curtailed the scope and potential remedial impact” of s. 718.2(e), “thwarting what was originally envisioned by *Gladue*” (para. 80).

[138] In *Ipeelee*, this Court redoubled its earlier guidance. It emphasized that, as “a remedial provision designed to ameliorate the serious problem of overrepresentation of Aboriginal people in Canadian prisons”, s. 718.2(e) “calls upon judges to use a different method of analysis in determining a fit sentence for Aboriginal offenders”, taking account of their unique systemic or background factors and culturally

appropriate sentences (para. 59). It reiterated that courts “must take judicial notice” of colonialism’s ongoing effects (at para. 60), with which overrepresentation is “intimately tied” (para. 77). It clarified that courts should not require Indigenous offenders to show a “causal link between background factors and the commission of the current offence” before applying s. 718.2(e), a link that would be “extremely difficult” to establish (paras. 81 and 83). And it cautioned against diluting s. 718.2(e)’s effect in “serious or violent offences” (para. 84), a carve-out that would “deprive s. 718.2(e) of much of its remedial power” (para. 86). Rather, judges must consider the unique circumstances of Aboriginal offenders in *all* cases; failing to do so would not only contravene s. 718.2(e), but would “result in a sentence that was not fit and was not consistent with the fundamental principle of proportionality” (para. 87).

[139] The conditional sentence framework, meanwhile, had undergone some shifts. When first introduced in 1996, conditional sentences were made available whenever the offence carried no mandatory minimum, the appropriate jail term would have been less than two years, and when the offender would not “endanger the safety of the community” (Bill C-41, s. 6). Amendments in 1997 then specified that conditional sentences had to be “consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2” (*Criminal Law Improvement Act*, 1996, S.C. 1997, c. 18, s. 107.1). Then in 2007, further amendments made conditional sentences unavailable for “serious personal injury offence[s] as defined in section 752”, and for terrorism or criminal organization offences, prosecuted by way of indictment, for which the maximum sentence was at least 10 years imprisonment

(*An Act to amend the Criminal Code (conditional sentence of imprisonment)*), S.C. 2007, c. 12, s. 1).

[140] In 2012, the same year *Ipeelee* was decided, Parliament again reframed conditional sentences in the *Safe Streets and Communities Act*, S.C. 2012, c. 1 (SSCA). The SSCA removed the reference to “serious personal injury offences” and provided that conditional sentences would be unavailable, among other things, for offences punishable by up to 14 years’ or life imprisonment (s. 742.1(c)); and certain drug offences punishable by up to 10 years’ imprisonment (s. 742.1(e)(ii)):

742.1 If a person is convicted of an offence and the court imposes a sentence of imprisonment of less than two years, the court may, for the purpose of supervising the offender’s behaviour in the community, order that the offender serve the sentence in the community, subject to the conditions imposed under section 742.3, if

...

(c) the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 14 years or life;

...

(e) the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years, that

...

(ii) involved the import, export, trafficking or production of drugs . . .

[141] When Ms. Sharma was sentenced six years later, s. 742.1(c) precluded her — otherwise a “prime candidate for a conditional sentence” (C.A. reasons, at para. 88) — from serving her sentence in her community.

[142] In 1999, this Court called the situation a “crisis in the Canadian criminal justice system” (*Gladue*, at para. 64). Thirteen years later, citing Professor Rudin, it asked: “If Aboriginal overrepresentation was a crisis in 1999, what term can be applied to the situation today?” (*Ipeelee*, at para. 62, citing J. Rudin, “Addressing Aboriginal Overrepresentation Post-*Gladue*: A Realistic Assessment of How Social Change Occurs” (2009), 54 *Crim. L.Q.* 447, at p. 452). Words failed then, and they fail now. The time for mere concern has long since passed. Put simply: we must do better.

III. Procedural History

A. *Ontario Superior Court of Justice, 2018 ONSC 1141, 405 C.R.R. (2d) 119 (Hill J.)*

[143] Hill J. concluded that the mandatory minimum sentence that Ms. Sharma would otherwise have served under s. 6(3)(a.1) of the *CDSA* infringed s. 12 of the *Charter* and could not be saved under s. 1. But he dismissed the argument that s. 742.1(c) infringed s. 15(1), finding the court had “no statistical information” that would assist in “identifying the real measure and likely or established impact of such an adverse effect, such as it may be, to determine whether it can qualify as a ‘distinction’ based upon Aboriginal status” (para. 257). He sentenced Ms. Sharma to 18 months’ imprisonment.

B. *Court of Appeal for Ontario, 2020 ONCA 478, 152 O.R. (3d) 209 (Feldman and Gillese JJ.A., Miller J.A. Dissenting)*

[144] Ms. Sharma added s. 742.1(e)(ii) to her constitutional challenge on appeal with the Crown's consent. She also renewed her argument on s. 7 of the *Charter*, which she had abandoned at first instance. The Crown did not appeal the finding that the minimum sentence under s. 6(3)(a.1) was unconstitutional.

[145] Feldman J.A., writing for the majority, concluded that ss. 742.1(c) and 742.1(e)(ii) infringed ss. 7 and 15(1) of the *Charter* and could not be saved by s. 1.

[146] On s. 7, Ms. Sharma's liberty was clearly deprived; the issue was whether the provisions were arbitrary or overbroad. The purpose of those provisions was to "maintain the integrity of the justice system by ensuring that offenders who commit serious offences receive prison sentences" (para. 148). The provisions were not arbitrary because removing conditional sentences coincided with Parliament's purpose. But they were overbroad because "using a high maximum sentence as a proxy for the seriousness of the offence" (para. 154) caught some offenders the provisions "were not intended to capture" (para. 161): namely, those whose offences, while susceptible to stiff sentences, were less serious in the circumstances.

[147] On s. 15(1), the majority explained that conditional sentences "take on a unique significance in the context of Aboriginal offenders" as a remedy for "systemic overincarceration" (para. 70). By limiting that tool, the provisions undermined "the purpose and remedial effect of s. 718.2(e) in addressing the substantive inequality between Aboriginal and non-Aboriginal people" in Canada's prison system (para. 79). This created a distinction on the basis of race and had the effect of reinforcing,

perpetuating, or exacerbating Ms. Sharma’s disadvantages as an Indigenous person. The sentencing judge erred in requiring further material evidence, since the judge was entitled to take judicial notice of the “historic disadvantage endured by Aboriginal people in Canada” (para. 90) and “the fact that systemic discrimination is recognized as a direct cause” of their overrepresentation in the criminal justice system (para. 102).

[148] The majority concluded that the provisions could not be saved under s. 1 and declared them of no force and effect.

[149] Miller J.A., in dissent, would have dismissed the appeal. The provisions did not infringe ss. 7 or 15. Their purpose was to “ensure that offenders who commit serious crimes receive fit sentences, deemed to include a period of incarceration” (para. 283). They are not overbroad because it is for Parliament, not courts, to decide what constitutes a serious crime. And although the provisions drew a distinction based on race, Parliament did not treat Indigenous offenders as less equal than other offenders, so the distinction was not discriminatory. Had the provisions infringed s. 15(1), he would have upheld them under s. 1.

IV. Discussion

[150] Two *Charter* rights — ss. 7 and 15(1) — frame this appeal. Each engages distinct analyses. I consider them in turn.

A. *Section 7*

[151] The first issue is whether ss. 742.1(c) and 742.1(e)(ii) infringe s. 7 of the *Charter*, which provides that “[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” Incarceration would deprive Ms. Sharma of her liberty. The question, therefore, is whether the deprivation conforms to the principles of fundamental justice. Two principles are relevant in this case: overbreadth and arbitrariness. Since I conclude that the impugned provisions are overbroad, it is unnecessary to address whether the law is arbitrary.

(1) Overbreadth

[152] It is a principle of fundamental justice that a law that deprives a person of life, liberty or security must not be overbroad. Overbreadth concerns situations “where there is no rational connection between the purposes of the law and some, but not all, of its impacts” (*Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 112 (emphasis deleted)). In other words, an overbroad law is “arbitrary in part” (para. 112 (emphasis deleted)).

[153] The analysis requires identifying the purpose and the scope of the law to determine whether it “goes too far by sweeping conduct into its ambit that bears no relation to its objective” (*Bedford*, at para. 117). I discuss each below.

(2) Purpose

[154] The first step is to determine the purpose of the challenged provisions. The purpose's framing should "focus on the ends of the legislation rather than on its means, be at an appropriate level of generality and capture the main thrust of the law in precise and succinct terms" (*R. v. Moriarity*, 2015 SCC 55, [2015] 3 S.C.R. 485, at para. 26). This requires some discernment, since a purpose articulated in "too general terms . . . will provide no meaningful check on the means employed to achieve it: almost any challenged provision will likely be rationally connected to a very broadly stated purpose" (para. 28).

[155] The parties disagree on the appropriate statement of legislative purpose: the Crown advances the one adopted by the Court of Appeal for Saskatchewan in *R. v. Neary*, 2017 SKCA 29, [2017] 7 W.W.R. 730, while Ms. Sharma advances the one adopted by the majority in the court below, with which the dissenting justice substantially agreed (paras. 148 and 282).

[156] In *Neary*, the court concluded that the *SSCA* reflected "at least the following broad purposes: (a) providing consistency and clarity to the sentencing regime; (b) promoting of public safety and security; (c) establishing paramountcy of the secondary principles of denunciation and deterrence in sentencing for the identified offences; and (d) treating of non-violent serious offences as serious offences for sentencing purposes" (para. 35). But in my view, these sub-purposes improperly focus on the broad objectives underlying the legislation as a whole, rather than the specific

provisions at issue, and so cannot ground an overbreadth analysis in this case (*R. v. Safarzadeh-Markhali*, 2016 SCC 14, [2016] 1 S.C.R. 180, at para. 30).

[157] Nor can I entirely adopt the purpose statement of the court below, being “to maintain the integrity of the justice system by ensuring that offenders who commit serious offences receive prison sentences” (C.A. reasons, at para. 148). Just as “providing consistency and clarity to the sentencing regime” and “promoting of public safety and security” are too general, so too is “maintain[ing] the integrity of the justice system”. In my view, it is better characterized as an “animating social value” (*Moriarity*, at para. 28).

[158] What, then, is the purpose of the impugned provisions? Discerning the purpose requires this Court to consider the stated objective in the legislation, if any; the text, context and scheme of the legislation; and extrinsic evidence such as legislative history and evolution (*Moriarity*, at para. 31).

[159] The amendment to s. 742.1 was one of a series of measures set out in the *SSCA*, which amended several acts, including the *CDSA*, the *Criminal Code*, the *State Immunity Act*, R.S.C. 1985, c. S-18, the *Corrections and Conditional Release Act*, S.C. 1992, c. 20, the *Youth Criminal Justice Act*, S.C. 2002, c. 1, and the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. The bill’s overall direction was to “move quickly to reintroduce comprehensive law-and-order legislation to combat crime and terrorism” (*House of Commons Debates*, vol. 146, No. 2, 1st Sess., 41st Parl., June 3, 2011, at pp. 15-19). As a result, Canada’s sentencing regime adopted sterner and more

predictable sanctions: for example, it introduced mandatory minimum imprisonment sentences for drug and sexual offences and it stiffened sentences for violent youth crimes.

[160] The amendments to s. 742.1 in particular aimed to remove community sentences for offenders who commit more serious offences. The Minister of Justice stressed that the sentencing reforms would “prevent the use of conditional sentences for serious violent and property crimes” (*House of Commons Debates*, vol. 146, No. 17, 1st Sess., 41st Parl., September 21, 2011, at pp. 1298-99; see also *House of Commons Debates*, June 3, 2011, at pp. 15-19; C.A. reasons, at paras. 146-47). For the Parliamentary Secretary to the Minister of Justice, the government was “addressing the concerns of Canadians who no longer want to see conditional sentences used for serious crimes, whether they are violent crimes or property crimes” (*House of Commons Debates*, September 21, 2011, at pp. 1316-18). This concern explains why Parliament narrowed the ambit of eligibility for conditional sentences.

[161] In my view, Parliament’s purpose in enacting ss. 742.1(c) and 742.1(e)(ii) was to ensure offenders who commit more serious offences serve prison time. To this extent, I agree with the majority of the Court of Appeal. This purpose strikes the appropriate balance between precision and generality, without conflating the means with the ends, nor amounting to a “virtual repetition of the challenged provision, divorced from its context” (*Moriarity*, at para. 28).

(3) Effects

[162] The second step asks whether the law goes further than reasonably necessary to achieve its legislative goals (*Safarzadeh-Markhali*, at para. 50). The ultimate question is whether the law violates basic norms because there is no connection between its purpose and an effect (*Bedford*, at para. 119). An overbroad effect on even one person is sufficient to establish a breach of s. 7 (*Bedford*, at para. 123; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at para. 85). Whether the extent of such effects is justifiable is a question for s. 1.

[163] In seeking to ensure that offenders who commit more serious offences serve prison time, Parliament used maximum sentences as the gauge of the seriousness of an offence. Both provisions thus precluded conditional sentences for offences where the maximum sentence is 14 years or life (s. 742.1(c)), or 10 years, in offences involving the import, export, trafficking or production of drugs (s. 742.1(e)(ii)).

[164] But maximum sentences only show that an offence is *potentially* serious, not that it is *necessarily* serious. While the nature of the designated offences are serious in the abstract, the range of conduct they cover can be less serious. Worst-case scenarios say nothing about baseline cases. I agree with the majority in the Court of Appeal below that maximum sentences are a flawed proxy for the gravity of offences which can be committed in circumstances ranging in severity, from the relatively more serious to the relatively less serious.

[165] Consider the designated offences: they are wide-ranging and lack a uniform or coherent view of the seriousness of any given infraction. The offences caught by

s. 742.1(c), for instance, range from offences like manslaughter (s. 236) or dangerous operation of a conveyance causing death (ss. 320.13(3) and 320.21), to offences like forging a passport (s. 57(1)) or possession of counterfeit money (s. 450(b)).

[166] As is typical, many of those offences “cover a wide range of conduct and may attract a broad range of sentences” (*R. v. Parranto*, 2021 SCC 46, at para. 53). The scope of manslaughter, for example, runs from “near accident” to “near murder” (*R. v. Laberge* (1995), 165 A.R. 375 (C.A.), at para. 6; see also *R. v. Morrissey*, 2000 SCC 39, [2000] 2 S.C.R. 90, at para. 72, per Arbour J.). It presents “the widest possible range for sentencing among all the offences in the *Criminal Code*”, such that life imprisonment and a suspended sentence may each be appropriate in different contexts (*R. v. Sinclair* (1980), 3 Man. R. (2d) 257 (C.A.), at para. 2). This variety has led appellate courts to identify different categories of severity within a given offence for sentencing purposes (see *Parranto*, at paras. 53 and 56-57).

[167] Section 742.1(e)(ii), too, covers a range of conduct. It neither distinguishes the type of drug trafficked nor the quantum, encompassing large-scale commercial schemes and small-scale imports for personal use. In the words of the Canadian Civil Liberties Association, it spans the gulf, in terms of relative seriousness, between a person who “imports 30kg of fentanyl to distribute to addicts across the country” and one “who brings a quarter of an ounce of cocaine into Canada to use at a party” (I.F., at para. 16).

[168] Maximum penalties of any kind will furthermore “by [their] very nature be imposed only rarely” (*R. v. Cheddesingh*, 2004 SCC 16, [2004] 1 S.C.R. 433, at para. 1; see also *R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163, at para. 20). They are reserved for crimes of sufficient gravity and blameworthiness. The break and enter offence under s. 348(1) of the *Criminal Code*, for instance, is punishable by life imprisonment if committed in a dwelling-house, and by up to 10 years in prison if committed elsewhere. But before the challenged provisions were enacted, the average sentence imposed on most offenders was less than one year in custody, if they were sentenced to prison at all (D. Plecas et al., *Do Judges Take Prior Record into Consideration? An Analysis of the Sentencing of Repeat Offenders in British Columbia* (2012), at p. 7).

[169] Granted, this Court has said that maximum sentences not only “help determine the gravity of the offence”, but are “one of Parliament’s principal tools” to do so (*R. v. Friesen*, 2020 SCC 9, at paras. 95-96). Indeed, maximum sentences provide general guidance on the gravity of an offence, and can assist in setting sentencing ranges. But that general guidance only goes so far in individual cases. A fit sentence is always defined by the totality of circumstances. The question is always: for “this offence, committed by this offender, harming this victim, in this community, what is the appropriate sanction under the *Criminal Code*?” (*Gladue*, at para. 80 (emphasis in original)). For that reason, “the structure of maximum penalties under the *Code* frequently provides little guidance to sentencing judges in imposing punishments in individual cases” (*R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 36).

[170] Constitutionally valid mandatory minimums are different because they set a floor, not a ceiling: the offences they attach to are so serious that the minimum is appropriate even for a highly sympathetic offender in highly mitigating circumstances. For instance, a mandatory life sentence without parole eligibility for 25 years — the minimum punishment for first degree murder committed in the course of a crime of domination (*Criminal Code*, s. 231(5)) — was found to respect s. 7 because the corresponding offence is so inherently vile that the sentence will always be proportionate (*R. v. Luxton*, [1990] 2 S.C.R. 711, at pp. 721-23). The offences captured in ss. 742.1(c) and 742.1(e)(ii) lack a similar baseline.

[171] The Crown, however, says that Parliament's approach is constitutionally permissible for three reasons.

[172] First, the Crown argues that gauging seriousness through maximum sentences is far from novel. Parliament has used maximum sentences elsewhere to determine the objective gravity of an offence, for instance in absolute or conditional discharges, which s. 730(1) deems unavailable for offences punishable by 14 years or life. The constitutionality of such provisions — including s. 730(1) — is not before this Court. But the present situation is also unique. Most obviously, as Ms. Sharma points out, the restrictions on conditional sentences imposed by the challenged provisions are the only type of legislative measure that restricts a person's physical liberty based solely on the potential maximum sentence. And here, as I have explained, a maximum

sentence fails to track the gravity of every offence; it does not provide a rational basis to imprison *every* accused it applies to.

[173] Second, the Crown suggests that judicial discretion will prevent any unduly broad impact: other sentencing alternatives will ensure that offenders undeserving of prison time will avoid time behind bars. As the Canadian Civil Liberties Association pointed out, this argument only further highlights the provisions’ vast reach in capturing offences at the lowest level of seriousness. Conduct nearly warranting a suspended sentence is far removed from conduct warranting a maximum sentence. But more importantly, the most relevant of these alternatives — intermittent sentences or suspended sentences — will not always be available or proportionate; they offer only a very limited safeguard.

[174] Intermittent sentences cannot exceed 90 days (s. 732(1)), and may thus fail to be proportionate for an offender who would otherwise receive a longer sentence of house arrest. Nor can every offender spend their weekends in jail; as the Legal Services Board of Nunavut suggests, intermittent sentences may be effectively unavailable for some Indigenous offenders in remote communities where frequent travel is unworkable (I.F., at paras. 13-15; see also *R. v. Turtle*, 2020 ONCJ 429, 467 C.R.R. (2d) 153).

[175] And suspended sentences serve different purposes from conditional sentences. Conditional sentences target “offenders who would otherwise be in jail but who could be in the community under tight controls” (*R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 36 (emphasis deleted)). They are designed to “permit the accused

to avoid imprisonment but not to avoid punishment”, and can achieve the objectives of general deterrence and denunciation (paras. 35 and 127(8.)). Suspended sentences, by contrast, are primarily a rehabilitative sentencing tool, and so are less well-suited when deterrence and denunciation are paramount (para. 23). There are “strong indications that Parliament intended the conditional sentence to be more punitive than probation” (paras. 28 and 55).

[176] Finally, the Crown suggests that a finding of overbreadth would improperly substitute the Court’s own view of the seriousness of an offence for Parliament’s, trespassing on the latter’s policy choices. Similarly, my colleagues Justices Brown and Rowe suggest that, absent a precise definition, Parliament’s definition of serious offences is owed deference — like other policy choices, it is a “judgment call” that “rests not with the preferences of judges, but with those collectively expressed by Parliament as representatives of the electorate” (para. 107).

[177] But the s. 7 analysis cannot simply defer to Parliament’s choices about crime and punishment. All legislation reflects judgment calls, and some uses terms not subject to precise definition; yet neither implies that the legislation is any more likely to respect the *Charter*. There is nothing novel, unwieldy, or unsound about subjecting sentencing law to constitutional scrutiny. Indeed, it is a court’s *role* to ensure that legislation complies with the *Charter*.

[178] My colleagues raise one further point. The Court of Appeal, they say, “collapsed the concept of seriousness of the offence into the concepts of circumstances

of the offender and particulars of the crime” (para. 108). While I agree that the offender’s personal circumstances are conceptually distinct from the gravity of the offence itself, the seriousness of an offence depends on the circumstances that surround its commission (*Friesen*, at para. 96). As I have explained, the permutations of an offence can be many and varied.

[179] In my view, therefore, the provisions exceed their purpose in applying to offences committed at the lowest range of severity. The provisions have some effects that bear no relation to their aim. They are overbroad.

(4) Conclusion

[180] Sections 742.1(c) and 742.1(e)(ii) target more serious offences through the proxy of maximum sentences, yet they capture conduct for which the maximum sentence would far overshoot the offence’s gravity. The provisions treat Ms. Sharma’s circumstances on par with a sophisticated and large-scale narcotics importation scheme. This impact bears no connection to the provisions’ purpose. I conclude that the challenged provisions are overbroad and constitute a *prima facie* infringement of s. 7 of the *Charter*.

B. *Section 15(1)*

[181] In 1996, Parliament sought to reduce the high rate of Indigenous incarceration in two key ways: by enacting the principle of restraint in s. 718.2(e),

which states that “all available sanctions other than imprisonment . . . should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders” (Bill C-41, s. 6); and by introducing the conditional sentence of imprisonment in s. 742.1, which provided an alternative to imprisonment by permitting offenders to serve jail time in the community (Roberts and Melchers, at p. 216).

[182] Before 2012, those provisions offered an Indigenous offender in Ms. Sharma’s shoes the chance to serve their sentence in their community, so long as it represented a reasonable alternative to imprisonment. After the *SSCA*’s enactment in 2012, however, that same offender became destined for prison unless their offence was so minor as to warrant a lesser non-custodial sentence. This was so regardless of whether background or systemic factors lay behind their criminality, whether those factors made incarceration especially unsuitable, or whether culturally appropriate conditions in the community would better safeguard their links to their heritage.

[183] In restricting the availability of conditional sentences, ss. 742.1(c) and 742.1(e)(ii) thus denied sentencing judges the principal tool for keeping many Indigenous offenders out of prison, in the face of an ongoing legal directive to seek alternatives, and at a time when the word “crisis” failed to capture the enormity of Indigenous overrepresentation in Canada’s prisons (*Ipeelee*, at para. 62). Do the provisions thereby violate the equality guarantee under s. 15(1) of the *Charter* on the basis of race?

[184] The answer, in my view, is yes. I agree with Feldman and Gillese JJ.A. in the decision below that the provisions discriminate by impairing an ameliorative measure that was designed to specifically affect Indigenous offenders.

[185] I turn to the legal framework for discrimination claims under s. 15(1) of the *Charter* before considering its application to this case.

(1) Legal Framework

[186] Section 15(1) of the *Charter* provides that “[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” Like other *Charter* rights, it must be read broadly and purposively (*Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 155-56). Its purpose is to ensure “equality in the formulation and application of the law”, for “the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration” (*Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 171).

[187] The touchstone of that commitment is substantive equality. A narrow reading of s. 15(1) might have secured individuals against formal discrimination in the law’s content or application, but ignored how facially neutral laws, faithfully applied, can produce discriminatory outcomes in practice. Instead, the Court has steadfastly held

that laws may discriminate in their effect or application no less than in their letter. Against mere formalism, substantive equality looks “behind the facade of similarities and differences” to the “actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group” (*Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396, at para. 39).

[188] The test reflects this outlook. To succeed under s. 15(1), a claimant must show that the law or state action: (1) on its face or in its impact, creates a distinction based on enumerated or analogous grounds; and (2) imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage (*Fraser v. Canada (Attorney General)*, 2020 SCC 28, at para. 27).

[189] The test’s evidentiary requirements vary with the context. When a law creates a facial distinction, the test can be satisfied by reading the relevant text. But claimants in “adverse impact” cases will generally “have more work to do” (*Withler*, at para. 64). Their task is to show that “although the law purports to treat everyone the same, it has a disproportionately negative impact on a group or individual that can be identified by factors relating to enumerated or analogous grounds” (para. 64).

[190] The first step is “not a preliminary merits screen, nor an onerous hurdle designed to weed out claims on technical bases” (*Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, [2018] 1 S.C.R. 464, at para. 26); it is “aimed at ensuring that those who access the protection of s. 15(1) are those it is designed to protect” (*Ontario (Attorney*

General) v. *G*, 2020 SCC 38, at para. 41). While sometimes framed in different ways — for instance, as requiring a “disproportionate impact” on members of a protected group in adverse impact cases (*Fraser*, at para. 52) — the test makes clear that step one only requires a “distinction based on a protected ground” (para. 50). This standard is designed “to exclude claims that have ‘nothing to do with substantive equality’” (*Alliance*, at para. 26); not to impose scientific rigour or import elements of justification properly left to s. 1.

[191] In some cases, a distinction will be “apparent and immediate” (*Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548, at para. 33; *Fraser*, at para. 61). A lack of sign language interpretation for public health care services, for instance, is an evident barrier for those with hearing impairments (*Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624). In other cases, where the connection is less clear, the distinction will require further proof.

[192] Although a distinction “can be proven in different ways”, evidence of the “situation of the claimant group” and the “physical, social, cultural or other barriers” they face, and evidence “about the outcomes that the impugned law or policy . . . has produced in practice” are particularly helpful (*Fraser*, at paras. 55-59). Ideally, adverse impact claims should be supported by both, since alone the former may amount to a mere “web of instinct”, while solely relying on statistical disparity to support the latter may “leave open the possibility of unreliable results” (para. 60). But this is “not to say . . . that both kinds of evidence are always required” (para. 61). And while evidence of

“statistical disparity and of broader group disadvantage” may assist, neither is mandatory and their significance can vary (para. 67).

[193] The second step considers the impact of the distinction, asking “whether the law has the effect of reinforcing, perpetuating, or exacerbating disadvantage” (*Fraser*, at para. 76). While there is no rigid template, such impacts may include “[e]conomic exclusion or disadvantage, [s]ocial exclusion . . . [p]sychological harms . . . [p]hysical harms . . . [or] [p]olitical exclusion”, and must be “viewed in light of any systemic or historical disadvantages faced by the claimant group” (para. 76, citing C. Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (2010), at pp. 62-63). Claimants may, but need not, prove that the distinction is arbitrary or perpetuates prejudicial or stereotypical attitudes (paras. 78 and 80). And while a challenged law may satisfy step two by widening a group’s relative disadvantage, the term “perpetuate” indicates that a law may discriminate even if it does not aggravate that disadvantage. Care must be taken not to disregard how discrimination can result from “continuing to do things ‘the way they have always been done’” (F. Faraday, “One Step Forward, Two Steps Back? Substantive Equality, Systemic Discrimination and Pay Equity at the Supreme Court of Canada” (2020), 94 *S.C.L.R.* (2d) 301, at p. 310; see also J. Koshan, “Intersections and Roads Untravelled: Sex and Family Status in *Fraser v Canada*” (2021), 30:2 *Const. Forum* 29, at p. 31).

[194] While distinct, the two steps may overlap; the same facts that illustrate a distinction may also illustrate its discriminatory character (*Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at para. 85; *Fraser*, at para. 82). The same evidence may serve more than one analytical purpose.

[195] As elsewhere, courts may take judicial notice of social facts where appropriate, taking care “not to use judicial notice to recognize social phenomena that may not truly exist” (*Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61, at para. 154).

[196] Because substantive equality looks to real-world effects, the inquiry is always contextual. What matters is not the claimant group’s situation as compared to a similarly situated counterpart (*Withler*, at para. 60; *Fraser*, at para. 94), but the “claimant group’s situation and the actual impact of the law on that situation” (*Withler*, at para. 43, see also para. 40; *R. v. Turpin*, [1989] 1 S.C.R. 1296, at p. 1334; *Law*, at para. 30; *Quebec v. A*, at para. 51; *Taypotat*, at para. 18; *Ontario v. G*, at para. 43). The grounds of discrimination shaping that situation may intersect, compounding to form an individual or group’s experience (*Withler*, at para. 58). Indeed, in the context of systemic discrimination in the justice system, it is especially important to be alive to the intersectionality of disadvantage.

[197] The focus on the impact means the state’s intentions are not decisive — the state can discriminate without intending to. Nor is the absence of differential treatment decisive — discrimination may also arise from “the legislation’s failure to take into

account the true characteristics of a disadvantaged person or group within Canadian society (i.e., by treating all persons in a formally identical manner)” (*Law*, at para. 36). In practice, true equality may sometimes demand differential treatment; only additional interpretive services, for instance, can ensure that those with hearing impairments have equal access to public health care. While some acts discriminate by giving certain groups or individuals a “leg up”, others discriminate by failing to do so. There is no single template.

[198] Not every distinction is discriminatory, nor is every uniformity constitutionally sound. Identifying when a claim discloses discrimination requires rigorous analysis.

[199] It also requires balance. Section 15(1) has been described as the “broadest of all guarantees” (*Andrews*, at p. 185). The Court has been cautious to not exclude certain types of claims from s. 15(1)’s ambit pre-emptively, including the extent of any state obligations to take positive, remedial actions (*Eldridge*, at para. 73; *Alliance*, at para. 42). But much of the controversy in this case derives from the risk of defining the right too broadly, which, on some views, could undermine the separation of powers. For the Crown, the framework applied by the majority at the Court of Appeal could have the effect of constitutionalizing ordinary legislation, since it would restrict the state from amending or repealing its ameliorative measures (*A.F.*, at paras. 60-61).

[200] In my view, this argument conflates form and effects. As under s. 7, Parliament’s choices are always subject to the Constitution, including its choices to

amend or repeal legislation. Section 15(1) only “ensure[s] that whatever actions [the legislature] *does* take do not have a discriminatory impact” (*Alliance*, at para. 42 (emphasis in original)). If amendments or repeal create a distinction on enumerated or analogous grounds, and impose a burden or deny a benefit in a manner that reinforces, perpetuates, or exacerbates the group’s disadvantage, s. 15(1) requires courts to say so. The problem arises, in other words, “not because the statutory provisions themselves are constitutionally protected”, but “because their repeal or modification gives rise to unconstitutional effects” (*R. v. Chouhan*, 2021 SCC 26, at para. 145, per Rowe J., concurring). If no discrimination is present, s. 15(1) leaves legislatures a free hand.

[201] Even where legislative amendments *do* produce discriminatory effects, the Charter — distinctively among rights-conferring instruments — invites the state to justify rights limitations under s. 1 (*Andrews*, at pp. 175-78; *Turpin*, at p. 1330). Section 15(1) is not a complete code; it must “be read together” with s. 1 (*Miron v. Trudel*, [1995] 2 S.C.R. 418, at para. 141, per McLachlin J.). Only if the state fails to justify the limitation will the challenged law or state action be found unconstitutional.

[202] The fault line of the division between s. 15(1) and s. 1 is justification, which falls to the state. A fair burden on claimants, whose resources — financial or informational — are typically far lesser, is only to show that the impugned law or state action has a discriminatory impact on disadvantaged groups (*Miron*, at para. 139; *Fraser*, at para. 79). The state then bears the burden of justifying its policy choices and legislative goals. This reflects “the injunction to which this Court has adhered from the

earliest *Charter* cases: courts should interpret the enumerated rights in a broad and generous fashion, leaving the task of narrowing the *prima facie* protection thus granted to conform to conflicting social and legislative interests to s. 1” (*Miron*, at para. 130).

[203] This Court’s longstanding approach, grounded in substantive equality and the division of burdens between the claimant and the state (see *Law*, at para. 88), safeguards much of s. 15(1)’s “powerful remedial purpose” (*Ontario v. G*, at para. 39). A broad and generous approach to s. 15(1) “permits evolution and adaptation of equality analysis over time in order to accommodate new or different understandings of equality as well as new issues raised by varying fact situations” (*Law*, at para. 3). It gives life to s. 15(1)’s constitutional directive to continually scrutinize the existing order of things to see how Canadian law shapes up. To the extent the state’s laws or acts are unjustified, equality may well unsettle the *status quo*. Section 15(1) demands nothing less.

[204] I would add this. The above framework is settled law. While changing in form over time, the current iteration has been affirmed five times in the last four years (*Alliance*, at para. 25; *Centrale des syndicats du Québec v. Québec (Attorney General)*, 2018 SCC 18, [2018] 1 S.C.R. 522, at para. 22; *Fraser*, at para. 27; *Ontario v. G*, at para. 40; *R. v. C.P.*, 2021 SCC 19, at paras. 56 and 141). The roots of that framework extend much deeper in the case law. Yet under the guise of offering “clarity”, my colleagues seek to revise the test. In so doing, they resurrect their rejected arguments in *Alliance* and *Fraser*, lending credence to the concern that equality claimants must,

“with each new case, stand ready to defend the exact gains that have been won multiple times in the past” (*Fraser*, at para. 135, citing Faraday, at p. 330).

[205] My colleagues’ revisions permeate their reasons. Their thrust is to raise the bars at each step of the test: by renewing focus on causation (at paras. 42-49), which adds nothing to the existing framework and is reminiscent of rejected pre-*Charter* approaches (*Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183); by eschewing the test’s language of “created a distinction” for the more ambiguous “created or contributed to a disproportionate impact” (paras. 3, 29, 31, 32(a), 35-36, 40-42, 45-50, 54, 66, 71, 73-74 and 76); by claiming that “[l]eaving the situation of a claimant group unaffected is insufficient to meet the step two requirements” (para. 52), potentially undermining the term “perpetuate” in step two of the test; by importing elements of state justification into step two, requiring courts to consider Parliament’s “policy choices” and legislative “goals” (paras. 57-61); by pre-emptively foreclosing the possibility of “general, positive obligation[s] on the state to remedy social inequalities or enact remedial legislation” (para. 63); by asserting, without support, that it is “[not] enough to show that the law restricts an ameliorative program” at step one (para. 71); and by diminishing the role of interveners (paras. 74-75), critiquing their use of social science and other legislative fact evidence that this Court has regularly relied upon (*R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458, at para. 57, citing *R. v. Lavallee*, [1990] 1 S.C.R. 852; *Moge v. Moge*, [1992] 3 S.C.R. 813, at p. 853; *R. v. Wells*, 2000 SCC 10, [2000] 1 S.C.R. 207, at para. 53; *Gladue*, at para. 83; see also *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692, at paras. 89-97).

[206] My colleagues' revisions are not only unsolicited, unnecessary, and contrary to *stare decisis*; they would dislodge foundational premises of our equality jurisprudence. This is not "clarification"; it is wholesale revision.

(2) Application

[207] In my view, Ms. Sharma has satisfied both stages of the s. 15(1) test. Simply put, ss. 742.1(c) and 742.1(e)(ii) distinguish and reinforce, perpetuate, and exacerbate disadvantage on the basis of race because they impair an ameliorative measure that was designed to specifically benefit Indigenous offenders, who face pre-existing disadvantages in the Canadian justice system.

[208] I begin by addressing whether the provisions create a distinction on the basis of race, which requires examining the interrelated nature of conditional sentences and the *Gladue* framework under s. 718.2(e). I then turn to the second stage, and consider whether this distinction reinforces, perpetuates, or exacerbates disadvantage.

(a) *Distinction on the Basis of Race*

[209] The first question is whether ss. 742.1(c) and 742.1(e)(ii), on their face or in their impact, create a distinction based on enumerated or analogous grounds (*Fraser*, at para. 27). As an Indigenous person, it is uncontested that Ms. Sharma belongs to a protected group under s. 15(1). What is contested is whether the challenged provisions draw a distinction based on race.

[210] The Crown submits that there is no race-based distinction; instead, Indigenous overrepresentation in prisons can be attributed to social circumstances that exist apart from the provisions at issue. Ms. Sharma replies that the provisions impair an accommodation — the remedial function of the *Gladue* framework — in a manner that differentially impacts Indigenous offenders.

[211] I agree with Ms. Sharma. Removing conditional sentences for some offences has a differential impact on Indigenous offenders because it prevents sentencing judges from fulfilling the *Gladue* framework's substantive equality mandate. This distinction flows not, as the Crown suggests, from the mere existence of historical disadvantage, but from the combined effect of ss. 718.2(e) and 742.1.

[212] I consider the relationship between the two provisions before turning to how restrictions on conditional sentences imperil the remedial function of the *Gladue* framework, creating a race-based distinction.

(i) The Relationship Between Sections 718.2(e) and 742.1, and the *Gladue* Framework

[213] As I have explained, s. 718.2(e) reflects Parliament's attention to "the unique systemic and background factors affecting Indigenous peoples, as well as their fundamentally different cultural values and world views" (*Ewert*, at para. 58). In seeking to ameliorate Indigenous overrepresentation in Canadian prisons, and to encourage a restorative approach to sentencing (*Gladue*, at para. 93), s. 718.2(e)

“call[ed] upon judges to use a different method of analysis in determining a fit sentence for Aboriginal offenders”, thereby “abandon[ing] the presumption that all offenders and all communities share the same values when it comes to sentencing and . . . recogniz[ing] that, given these fundamentally different world views, different or alternative sanctions may more effectively achieve the objectives of sentencing in a particular community” (*Ipeelee*, at paras. 59 and 74). A uniform approach having proved no barrier to overrepresentation, s. 718.2(e) aimed to bring substantive equality to sentencing.

[214] Practically speaking, this methodology — now commonly referred to as the *Gladue* framework — calls upon judges to undertake the process of sentencing Indigenous offenders differently. It requires them to pay special “attention to the unique background and systemic factors which may have played a part in bringing the particular offender before the courts”, and to approach the procedure and the sanction imposed “in accordance with the aboriginal perspective” (*Gladue*, at paras. 69 and 74). As the interveners representing Indigenous peoples highlighted, the many Indigenous approaches to sentencing often share common principles, including community healing, reconciliation and the reintegration of the offender (I.F., Federation of Sovereign Indigenous Nations, at paras. 15-16; I.F., Assembly of Manitoba Chiefs, at paras. 18-22; I.F., Native Women’s Association of Canada, at paras. 12 and 23; I.F., Legal Services Board of Nunavut, at paras. 10-12).

[215] Section 718.2(e) provided the substantive equality *direction*; conditional sentences provided a means of *implementation*. Conditional sentences “changed the range of available penal sanctions in a significant way” by “alter[ing] the sentencing landscape in a manner which gives an entirely new meaning to the principle that imprisonment should be resorted to only where no other sentencing option is reasonable in the circumstances” (*Gladue*, at para. 40). The provision creating them — s. 742.1 — suggested, “on its face, a desire to lessen the use of incarceration” (para. 40). And the “general principle expressed in s. 718.2(e) must be construed and applied in this light” (para. 40).

[216] Indeed, the new approach to sentencing and the new non-custodial sanctions were, by design, intertwined: Parliament aimed to ensure that “jails [were] reserved for those who should be there”, which meant, “[w]hen appropriate, alternatives must be contemplated, especially in the case of Native offenders” (*House of Commons Debates*, vol. V, 1st Sess., 35th Parl., September 20, 1994, at pp. 5871 and 5873 (Hon. Allan Rock)).

[217] Since “it is often the case that imposing a custodial sentence on an aboriginal offender does not advance the remedial purpose of s. 718.2(e)” (*Wells*, at para. 39), conditional sentences offered an option that was “more effective than incarceration at achieving the restorative objectives of rehabilitation, reparations to the victim and community, and the promotion of a sense of responsibility in the offender”

(*Proulx*, at para. 22). Yet conditional sentences remained punitive and were capable of achieving the objectives of deterrence and denunciation (para. 22).

[218] Conditional sentences benefitted a specific sector of Indigenous offenders: those for whom probation was too lenient, but prison too harsh, given their unique needs and circumstances. And they allowed courts to integrate Indigenous visions of justice into community-based sanctions. Together with s. 718.2(e), they provided an ameliorative measure for Indigenous peoples that was intended to facilitate the substantive equality mandate under s. 718.2(e) and reduce the overrepresentation of Indigenous offenders in prison.

[219] The Crown argues that s. 718.2(e)'s remedial purpose exists apart from conditional sentences; it only directs courts to consider "all available sanctions, other than imprisonment, that are reasonable in the circumstances", and it is for Parliament to determine what sentences are "available" (A.F., at paras. 49-53 (emphasis deleted)). Section 718.2(e) does not "specifically 'instruct] courts to consider whether to impose a conditional sentence' in cases involving an Indigenous offender" (A.F., at para. 51).

[220] Sections 718.2(e) can undoubtedly be imagined without s. 742.1; indeed, s. 718.2(e) requires courts to "carefully conside[r]" the length of a prison term even where no alternatives to incarceration are available, such that an Indigenous offender's jail term may be less than a non-Indigenous offender's for the same offence (*Gladue*, at para. 93(8.) and (12.)). But if no reasonable alternatives to incarceration exist, then s. 718.2(e) can only give partial effect to recognizing Indigenous peoples' unique

backgrounds and perspectives in sentencing. Excluding conditional sentences from s. 718.2(e)'s ambit would, as this Court anticipated in *Proulx*, “greatly diminish the remedial purpose animating Parliament’s enactment of [s. 718.2(e)], which contemplates the greater use of conditional sentences and other alternatives to incarceration in cases of aboriginal offenders” (para. 92). In *Ipeelee*, likewise, the Court cautioned that carving out an exception in the *Gladue* framework for serious offences would “deprive s. 718.2(e) of much of its remedial power, given its focus on reducing overreliance on incarceration” (para. 86).

[221] Sections 718.2(e) and 742.1 are neither wholly independent nor forever inseparable, yet they each invariably shape the other. For that reason, they have long been conceptualized together, both by Parliament at the time of their enactment, and indeed by this Court in its *Gladue* jurisprudence.

[222] My colleagues recognize this link, but imply that “the specific provisions [Ms. Sharma] challenged” were relevant at step one (para. 73). But a focus on the specific provisions divorced from the broader context would truncate the legal test. It would be contrary to the longstanding directive that distinctions in adverse impact cases be understood in their full context (*Withler*, at para. 43), and indeed, to a recent precedent of this Court finding that a distinction arose from the interaction of two statutes (*Ontario v. G*). In a test directed to adverse effects, there is no reason to ignore some types of effects as irrelevant.

(ii) Restrictions on Conditional Sentences Imperil the Remedial Function of the *Gladue* Framework

[223] By prohibiting the use of conditional sentences for many offences, the *SSCA* removed a sentencing option for all offenders. But for some Indigenous offenders, including Ms. Sharma, this undermined the specific accommodation offered by s. 718.2(e): that is, a different sentencing methodology that was animated by their unique needs and circumstances as Indigenous people. The amendments, in other words, more acutely affected Indigenous offenders than it did others, creating a differential impact on a group based on race. In this way, a distinction results from the law’s interaction with other legislative provisions or circumstances (*Ontario v. G*, at para. 51).

[224] The differential impact is apparent with respect to Ms. Sharma herself. Her background reflected, in the sentencing judge’s words, a “constellation of classic *Gladue* factors” (para. 266). As a first-time offender with a low risk of reoffending, and single mother to an infant daughter, she was undoubtedly a “prime candidate” for a conditional sentence (C.A. reasons, at para. 88). Yet because of the challenged provisions, such a sentence — which would consider her background as an Indigenous woman and draw on Indigenous legal perspectives — was unavailable.

[225] In my view, the impairment of s. 718.2(e) amounts to more than a web of instinct. It reflects a reality long-recognized throughout our *Gladue* jurisprudence:

removing conditional sentences for many offences has particular impact on Indigenous offenders. The distinction created on the basis of race is apparent.

[226] My colleagues would instead adopt the sentencing judge’s reasoning that Ms. Sharma had failed to lead sufficient evidence at stage one, and fault the Court of Appeal for failing to “identify *any* evidence” presented by Ms. Sharma at stage one (para. 74 (emphasis in original)). They add that Ms. Sharma “adduced *no* statistical information” to support a distinction (para. 36 (emphasis in original)); that Dr. Murdocca, an expert witness, had testified it was “unknown” whether the impugned provisions had “affect[ed] Aboriginal offenders disproportionately compared to non-Aboriginal offenders” (para. 74 (emphasis deleted)); and that Ms. Sharma “could have presented expert evidence or statistical data showing Indigenous imprisonment disproportionately increased for the specific offences targeted by the impugned provisions, relative to non-Indigenous offenders, after the *SSCA* came into force” (para. 76).

[227] But given the relationship between s. 718.2(e) and ss. 742.1(c) and 742.1(e)(ii), the challenged provisions *necessarily* impact Indigenous offenders differently; a distinction arises from the interaction of these provisions, against a backdrop of facts of which courts must take judicial notice (*Ipeelee*, at para. 60). Further evidence is not required because the distinction is plain.

[228] And in any event, neither expert evidence nor evidence of statistical disparity are mandatory in s. 15(1) claims (*Fraser*, at paras. 57 and 67). My colleagues offer no reasons for effectively raising the evidentiary bar of the first step.

[229] I have already addressed, in the s. 7 analysis, why the loss of conditional sentences matters, even with the continued availability of lesser non-custodial sentencing options (see paras. 174-176). And as I have explained above, they carry particular importance for Indigenous offenders. I cannot, therefore, accept my colleagues' further contentions that the impugned provisions create no distinction because s. 718.2(e) remains "meaningfully operable", and "judges retain broad discretion" as to how to "account [for] the particular circumstances of Indigenous offenders" (paras. 78-79). The question at this stage is only whether the impugned provisions draw a distinction on a protected ground. And for the reasons I have explained, they do.

(b) *Discrimination*

[230] The next question is whether the law imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage (*Taypotat*, at paras. 19-20). For the Crown, the social disadvantages facing Indigenous peoples exist independently of the impugned provisions. Ms. Sharma, in contrast, submits that the impugned provisions deny a benefit that perpetuates or exacerbates disadvantages for Indigenous peoples as a group, and for herself as an individual.

[231] I agree with Ms. Sharma. By failing to account for the distinct needs and circumstances of Indigenous offenders, the challenged provisions reinforce, perpetuate, and exacerbate the historical disadvantages of Indigenous peoples in sentencing.

[232] My analysis under the second stage proceeds in two parts. First, I show how the provisions, in impairing an ameliorative measure, reinforce, perpetuate, and exacerbate systemic discrimination. Second, I discuss the implications of this finding, and in particular the concern that it would destabilize criminal law as a whole, given the prevalence of discrimination against Indigenous peoples throughout our justice system.

(i) The Provisions Reinforce, Perpetuate, and Exacerbate Systemic Discrimination

[233] The claimant group's historical position of disadvantage in this case is a matter of judicial notice (*Gladue*, at para. 83; *Wells*, at para. 53; *Ipeelee*, at para. 60). And again, the vast overrepresentation of Indigenous peoples in prisons is well-established.

[234] Those disadvantages are worse still for Indigenous women, many of whom continue to face multiple and compounding forms of discrimination. Policies that have removed children from Indigenous families — from the residential school system and the “Sixties Scoop”, to today's overrepresentation of Indigenous children in care — have disproportionately impacted Indigenous mothers, who are typically primary

caretakers (National Inquiry into Missing and Murdered Indigenous Women and Girls, at pp. 281-83). Disenfranchisement under the *Indian Act*, R.S.C. 1985, c. I-5, coercive birth control measures like forced sterilization, pervasive stereotypes, and the ongoing epidemic of violence against Indigenous women and girls have been more direct causes of harm to Indigenous women (pp. 254-56, 266-67, 630-33 and 648-54).

[235] This history follows Indigenous women and shapes their experiences — both as victims and offenders — in the criminal justice system. It helps explain why Indigenous women are imprisoned at a higher rate than any other population; why, behind bars, they are more likely to have traumatic histories, mental health challenges, and self-harming tendencies (OCI (2021), at pp. 42-43); why they bear the brunt of prisons’ most punitive conditions (R.F., at paras. 7-8; OCI (2021), at pp. 27 and 42); and why they disproportionately face the risk of permanently losing parental rights (L. Kerr, “How Sentencing Reform Movements Affect Women”, in D. Cole and J. Roberts, eds., *Sentencing in Canada: Essays in Law, Policy, and Practice* (2020), 250, at p. 254, citing *Inglis v. British Columbia (Minister of Public Safety)*, 2013 BCSC 2309, 298 C.R.R. (2d) 35, at para. 485). Pulling the intergenerational cycle forward, their children often fall into the criminal justice system themselves in the so-called “child-welfare-to-prison pipeline” (C.A. reasons, at para. 96, quoting Ontario Human Rights Commission, *Interrupted childhoods: Over-representation of Indigenous and Black children in Ontario child welfare* (2018), at pp. 27-28).

[236] Tracing the lineage of intergenerational trauma makes clear that our criminal justice system is a significant and ongoing source of discrimination against Indigenous peoples. The fact that the challenged provisions did not create the problem is irrelevant (*Alliance*, at para. 32; *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at para. 84; *Fraser*, at para. 71). To blame overrepresentation solely on the pre-existing disadvantages suffered by Indigenous peoples is to ignore the plain reality that incarcerating people is an exercise of state power. And since the state is deeply implicated in the incarceration of Indigenous women through the criminal justice system, it has a constitutional obligation under s. 15(1) of the *Charter* to ensure that its laws do not operate to reinforce, perpetuate, or exacerbate conditions of inequality.

[237] Conditional sentences were never meant to be a catch-all solution. But by impairing the *Gladue* framework, the challenged provisions removed an accommodation capable of ameliorating, to some degree, these historical disadvantages for Ms. Sharma and other Indigenous offenders. And in my view, that reinforces, perpetuates, and exacerbates their historical disadvantage.

[238] First, the impugned provisions logically require sentencing judges to impose more prison sentences than they otherwise would, even when alternatives to prison would be consistent with the *Gladue* framework and other principles of sentencing. For Indigenous offenders whose background conditions make them especially unfit for prison, whose circumstances rest on the cusp of a prison sentence,

but for whom a lesser non-custodial sentence would be inappropriate, this only compounds their disadvantage.

[239] Second, the provisions deny offenders a sentencing option that better accords with Indigenous visions of justice. A uniform approach to sentencing is “often far removed from the understanding of sentencing held by [Indigenous] offenders and their community” (*Gladue*, at para. 70). And the failure to accommodate the needs, experiences, and perspectives of Indigenous offenders undermines the effectiveness of the sentence itself (*Ipeelee*, at para. 74).

[240] Some of the interveners in this appeal spoke to the latter point. The Legal Services Board of Nunavut submitted that custodial institutions are often geographically distant, displacing Indigenous peoples from their families and communities, as well as their culture, legal orders, and the land. The Federation of Sovereign Indigenous Nations explained that conditional sentences better facilitate “activities such as ‘on the land’ or ‘bush’ healing camps reflecting sacred connection between Indigenous people and the natural world” — experiences that “cannot be manufactured in an institution” (I.F., at para. 32). And the Ontario Native Women’s Association evoked the more serious impacts incarceration may have in the case of Indigenous women, whose personal losses to cultural identity and spiritual well-being may conjoin with the profound and ongoing impact of their absences on their communities (I.F., at para. 19).

[241] The discrimination is apparent. By leaving no other realistic option but prison, where anything less than a conditional sentence would be unfit, ss. 742.1(c) and 742.1(e)(ii) remove “an important tool, and sometimes the only tool, for judges to realize restorative justice principles necessary to craft a fair sentence for Indigenous offenders” (I.F., Federation of Sovereign Indigenous Nations, at para. 5). The restrictions deprive certain Indigenous offenders of sentences that would better accord with their needs and visions of justice. This not only perpetuates overrepresentation, but perpetuates cultural loss, dislocation, and community fragmentation. Substantive equality demands a different approach — one that considers “[t]he types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection” (*Gladue*, at para. 66(B); *Ipeelee*, at para. 66).

[242] In my view, Ms. Sharma has met her burden. By impairing this accommodation, these provisions reinforce, perpetuate, and exacerbate the disadvantages of an Indigenous offender.

(ii) The Floodgates Argument

[243] The thrust of the Crown’s position is that this conclusion would have far-reaching repercussions for our constitutional landscape and criminal justice system. My colleagues echo that charge in their reasons (see para. 82). I disagree. Quite the contrary: dismissing this appeal reinforces the rule of law by giving force to s. 15(1) of the *Charter*.

[244] Section 15(1) does not freeze the conditional sentence regime in time, nor does it constitutionalize remedial legislation. Repealing or amending s. 742.1, or even s. 718.2(e), will not automatically contravene s. 15(1), whose focus, again, is on the effects of a law, not its form (*Alliance*, at para. 33). Parliament could have advanced its policies in other ways: for example, it might have restricted conditional sentences but given sentencing judges residual discretion, or a “safety valve”, to avoid unconstitutional sentences (see *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130, at para. 36). Parliament’s enactment of harsher sanctions in general is not the problem; the issue lies in its manner of doing so.

[245] And framing the challenged provisions as policy decisions neither sanitizes their effects, nor insulates them from *Charter* review (*Alliance*, at para. 35). Parliament has the burden of justifying any inequalities that flow from the operation of its own laws, a burden that speculative concerns about “chilling effect[s]” on remedial initiatives cannot displace (para. 42; *Fraser*, at paras. 132-36). Holding otherwise would deny courts, and the *Charter* more broadly, their proper role as a check in our constitutional order. There is nothing novel in courts assuming that role, even when it results in unsettling fixed assumptions about the treatment of the disadvantaged. The true novelty would be to withdraw a category of state actions — such as those repealing or amending existing ameliorative policies — from *Charter* scrutiny. Nothing restricts courts’ “constitutional duty [to] rule on” those s. 15(1) challenges that are “properly made” (*Vriend*, at para. 56). Finally, as I have explained, policy reasons in favour of rolling back ameliorative measures are more appropriately considered under s. 1

(*Eldridge*, at para. 77), where the state may justify its actions. This longstanding framework not only secures legislatures from judicial overreach; it “itself expresses an important aspect of the separation of powers by defining, within its terms, limits on legislative sovereignty” (*Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66, [2004] 3 S.C.R. 381, at para. 104; see also *C.P.*, at paras. 173-75, per Kasirer J.).

[246] Nor would recognizing a s. 15(1) violation destabilize criminal law provisions of general application. Ms. Sharma’s argument, again, rests not on the existence of social disadvantage alone, but on the impairment of the *Gladue* framework, which was designed to specifically ameliorate problems in the sentencing of Indigenous offenders. While s. 742.1 is a law of general application, the challenge is not to that provision in isolation. It was enacted in part to enhance s. 718.2(e), and Ms. Sharma’s challenge is directly tied to its implications for the *Gladue* framework. Thus, the Crown’s suggestion that the application of s. 15(1) of the *Charter* to this case would facilitate a challenge to all laws of general application — based on their effect on disadvantaged Indigenous peoples — is misplaced.

[247] In sum, to be clear, these reasons should not be taken as constitutionalizing remedial legislation. Through s. 718.2(e), Parliament has created a “judicial duty” (*Gladue*, at para. 34) “to undertake the process of sentencing aboriginal offenders differently, in order to endeavor to achieve a truly fit and proper sentence in the particular case” (para. 33). This Court has found that Parliament’s intent in s. 718.2(e) was to recognize that particular attention should be given to the circumstances of

Aboriginal offenders “which may specifically make imprisonment a less appropriate or less useful sanction” for those offenders (para. 37). One such circumstance is that, for many such offenders, “community-based sanctions coincide with the aboriginal concept of sentencing and the needs of aboriginal people and communities” (para. 74). The exercise of this duty pursuant to s. 718.2(e) is to be undertaken in a manner consonant with principles of restraint, proportionality and individualization in sentencing.

[248] The ability of courts to give effect to s. 718.2(e) and apply the *Gladue* framework is central to this appeal. Sections 742.1 and 718.2(e) are intimately connected in both purpose and operation. The “unique circumstances” of Aboriginal offenders mean that community-based sanctions are in many cases appropriate and indeed commanded under s. 718.2(e) as a matter of fair and proportionate sentencing for offenders who, as a group, are understood to be disadvantaged (*Gladue*, at paras. 37-38). The majority of the Court of Appeal was right to observe that by restricting the availability of the conditional sentence option, the impugned provisions perpetuate an already existing disadvantage suffered by Aboriginal offenders (paras. 83-85). In these specific circumstances, courts cannot give proper effect to Parliament’s will as expressed through s. 718.2(e) and this Court’s instructions in *Gladue* without the tool of community-based conditional sentences.

[249] Recognizing and giving effect to adverse discrimination claims ensures the promise of s. 15(1) does not ring hollow. This *affirms*, rather than denies, the rule of law.

(3) Conclusion

[250] This case offers an opportunity to ensure that Indigenous peoples in the criminal justice system are entitled to equal protection and benefit under the law. I conclude that ss. 742.1(c) and 742.1(e)(ii) limit Ms. Sharma's s. 15(1) *Charter* rights.

V. Section 1

[251] The question becomes whether the limitations on ss. 7 and 15(1) of the *Charter* are “demonstrably justified in a free and democratic society”, under s. 1. In my view, they are not.

[252] The framework under s. 1 is well-established. The Crown must demonstrate that the legislative objective is pressing and substantial, and that the means chosen are proportional to that objective, in that “(1) the means adopted are rationally connected to that objective; (2) it is minimally impairing of the right in question; and (3) there is proportionality between the deleterious and salutary effects of the law” (*Carter*, at para. 94, citing *R. v. Oakes*, [1986] 1 S.C.R. 103).

[253] As I have explained, the challenged provisions limit two different *Charter* rights, which colour the s. 1 analysis in different ways. Section 7 violations are, in general, “difficult to justify” under s. 1, although it may be possible for the state to show that the violation is justified by a public good not captured under the rubric of life, liberty or security of the person (*Carter*, at para. 95). Section 15(1) violations, however, have been justified under s. 1 (*McKinney v. University of Guelph*, [1990] 3 S.C.R. 229; *Weatherall v. Canada (Attorney General)*, [1993] 2 S.C.R. 872; *Egan v. Canada*, [1995] 2 S.C.R. 513; *Lavoie v. Canada*, 2002 SCC 23, [2002] 1 S.C.R. 769; *N.A.P.E.; Quebec v. A*). When a law or state action limits multiple *Charter* rights, the state must justify all of the limitations to avoid a finding of unconstitutionality.

[254] The parties agree that the provisions serve a pressing and substantial objective, yet disagree over whether they satisfy the proportionality branch of the test. The standard at this stage is not perfection; the legislature is owed a measure of deference, especially when legislating in areas involving “a number of possible solutions to a particular social problem” (*Carter*, at para. 97).

[255] Still, the burden is the Crown’s at this stage. As both lower courts remarked, however, the Crown made relatively little attempt to justify the provisions in the lower court proceedings. The same is true here.

[256] Ms. Sharma argues that there is no rational connection between the provisions’ ends and the means chosen to achieve them: although the challenged legislation took away conditional sentences, it left “lesser non-custodial options

available”, such as suspended sentences (R.F., at para. 86). I cannot accept this argument. There is a rational connection between ensuring serious crimes are punished by incarceration and removing the possibility of conditional sentences for certain offences.

[257] But the provisions are not minimally impairing. The state must show that there is no “less drastic means of achieving the objective in a real and substantial manner” (*Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 55). And the Crown has not shown this in respect of either breach. The Crown’s argument that the provisions only remove one sentencing option fails to explain why circumscribing that one option could not have been better tailored, either with respect to the liberty or equality interests engaged. Like the majority in the court below, I would reject it.

[258] Nor are the provisions’ salutary effects proportionate to their deleterious effects. The Crown has led no evidence to suggest that the benefits to incarcerating those offenders who were formerly eligible for a conditional sentence outweighed the costs to their liberty. And the costs to the equality interests of Indigenous peoples are still more profound, since they may include separation from one’s community, work or family — harms only exacerbated in the case of young single mothers — while contributing to the continued overrepresentation of Indigenous offenders in prison, with all of its intergenerational fallout.

[259] The state has not met its burden under s. 1.

VI. Conclusion

[260] I conclude that ss. 742.1(c) and 742.1(e)(ii) are unconstitutional. Neither party made submissions on the appropriate remedy, and, in my view, an immediate declaration of invalidity under s. 52(1) of the *Constitution Act, 1982*, as ordered by the majority of the Court of Appeal, was in any event the right outcome. I would therefore dismiss the appeal.

*Appeal allowed, KARAKATSANIS, MARTIN, KASIRER and JAMAL JJ.
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