Court File No. C66390

COURT OF APPEAL FOR ONTARIO

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

CHEYENNE SHARMA

Appellant

- and -

**ABORIGINAL LEGAL SERVICES,
CANADIAN HIV/AIDS LEGAL NETWORK AND
HIV & AIDS LEGAL CLINIC ONTARIO,
THE CRIMINAL LAWYERS' ASSOCIATION (ONTARIO),
NATIVE WOMEN'S ASSOCIATION OF CANADA,
WOMEN'S LEGAL EDUCATION AND ACTION FUND INC. AND
DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS**

Interveners

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PART I – OVERVIEW

1. At the heart of this case is an Indigenous woman whose lived experience embodies the intergenerational harms wrought by colonialism, sexism and racism and inflicted upon Indigenous women in Canada. The sustained and profound systemic discrimination against Indigenous persons in the administration of criminal justice has been repeatedly and forcefully recognized by the Supreme Court of Canada, including most recently in *Ewert*, where Wagner J (as he then was) noted that "discrimination experienced by Indigenous persons, whether as a result of overtly racist attitudes or culturally inappropriate practices, extends to all parts of the criminal justice system" (*Ewert v Canada*, 2018 SCC 30 at para 57). The gendered aspects of this discrimination have been well documented for years, first by the Royal Commission on Aboriginal People ("RCAP"), then by the Aboriginal Justice Inquiry of Manitoba ("AJIM"), and most recently by the National Inquiry into Missing and Murdered Indigenous Women and Girls ("MMIWG Inquiry").

2. This appeal challenges the constitutionality of ss 742.1(c) and (e)(ii) of the *Criminal Code*, which eliminate conditional sentences for certain offences. The Women's Legal Education and Action Fund Inc. ("LEAF") and the David Asper Centre for Constitutional Rights (the "Asper Centre") intervene to make submissions on the proper interpretation and application of s 15 of the *Charter*.

3. LEAF and the Asper Centre submit that the constitutionality of the impugned provisions must be assessed in the context of systemic discrimination against Indigenous people, especially Indigenous women, in the administration of criminal justice. The *Gladue* framework is intended to address one aspect of that discrimination, namely overincarceration, by requiring judges to take a different approach to sentencing Indigenous offenders and in particular to consider all

available and appropriate alternatives to incarceration. The effect of ss 742.1(c) and (e)(ii) is to deny Indigenous offenders for whom conditional sentences would otherwise be an available and appropriate option the benefit of the *Gladue* framework. By precluding sentencing judges from giving effect to the objective of remedial legislation (s 718.2(e) of the *Criminal Code*), these provisions exacerbate the existing disadvantage of Indigenous offenders and violate the constitutional imperative of substantive equality underlying the *Gladue* framework. This has a particularly pernicious impact on Indigenous women, whose systematic disadvantage at all points along the victimization-criminalization continuum requires close attention by sentencing judges in order to ensure that their substantive equality rights are respected. Finally, LEAF and the Asper Centre submit that in addition to being engaged directly under s 15, the principles of equality must also inform the interpretation of s 7 and in particular this Court's approach to the principles of fundamental justice that guard against arbitrariness and overbreadth.

PART II – FACTS

4. LEAF and the Asper Centre accept the facts as stated by the parties.

PART III – ISSUES AND LAW

i. Substantive equality requires a different approach to criminal justice for Indigenous people

5. Section 15 is intended to address systemic discrimination by protecting substantive equality rights. From its very first s 15 decision onward, "an insistence on substantive equality has remained central to the [Supreme] Court's approach to equality claims" (*R v Kapp*, 2008 SCC 41 at para 15). This approach recognizes that "identical treatment may frequently produce serious inequality" (*Andrews v Law Society of British Columbia*, [1989] 1 SCR 142 at p 164), and requires that differences be acknowledged and accommodated (*Kapp*, *supra* at para 28).

6. Achieving substantive equality is at least equally pressing in relation to the criminal justice system as to other forms of law. Incorporating an equality analysis into the substantive criminal law "is a constitutionally mandated technique for enriching both the process of legal problem-solving and the character of legal reasoning which may … increase the likelihood that disadvantage, vulnerability, and lack of power will not be further exacerbated" (Rosemary Cairns Way, "Incorporating Equality into Substantive Criminal Law: Inevitable or Impossible?" (2005) 4:2 *JL & Equality* 203 at 240).

7. There is no question that Indigenous people experience "staggering injustice" (*R v Gladue*, [1999] 1 SCR 688 at para 88) and "systemic discrimination" within the Canadian criminal justice system (*R v Williams*, [1998] 1 SCR 1128 at para 58). That discrimination takes many forms, including the overwhelming and persistent overrepresentation of Indigenous people in custody. As the Court held in *Gladue*, the "figures are stark and reflect what may fairly be termed a crisis in the Canadian criminal justice system" (*supra*, at para 64)—and that crisis has only deepened over the past 20 years.

8. In 2017/2018, Indigenous persons represented approximately four percent of the adult population in Canada, but accounted for 30 percent of admissions to provincial or territorial custody, and 28 percent of admissions to federal custody. In comparison, in 2007/2008 Indigenous adults represented 21 percent of provincial/territorial custodial admissions, and 20 percent of federal custodial admissions. The growth in incarceration is particularly pronounced for Indigenous women. Between 2007/2008 and 2017/2018, the number of admissions of Indigenous men to provincial/territorial custody increased 28 percent, while the number of admissions of Indigenous women increased by a staggering 66 percent (Statistics Canada, *Adult and youth correctional statistics in Canada, 2017/2018* (May 9, 2019) at p 5). Between March

2009 and March 2018, the number of Indigenous women sentenced federally increased by 60 percent, such that by the end of that period 40 percent of all federally incarcerated women were Indigenous (Office of the Correctional Investigator, *Annual Report 2017-2018*, at 61).

9. Yet even at these deeply troubling and continually increasing rates, overincarceration is "only the tip of the iceberg insofar as the estrangement of aboriginal people from the Canadian criminal justice system is concerned" (*Gladue*, *supra* at para 61). The criminal law is profoundly implicated in the historic and continuing marginalization of Indigenous people. Indigenous people's exposure to the criminal justice system has been not only an effect but a mechanism of colonialism and cultural genocide. For example, the overincarceration of Indigenous people is deeply rooted in the experience of residential schools and the resulting intergenerational trauma (Truth and Reconciliation Commission ("TRC"), *Final Report*, Vol 5 (2015), p 7). At the same time, the criminal law reinforced and sustained the residential school system through police surveillance of Indigenous families and communities, the prosecution of those who resisted surrendering their children, and the investigation of runaways (TRC *Final Report*, Vol 5 (2015), pp 185-186). A variety of other laws and policies "designed to control, assimilate, or eliminate Indigenous peoples" have also been enacted and enforced through the criminal justice system (*Reclaiming Power and Place: Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol 1a, (2019) [*Reclaiming Power and Place*] at p 717).

10. The administration of criminal justice continues to inflict distinct, disproportionate and intergenerational harms on Indigenous families and communities. The actors and institutions that make up the criminal justice system, including police, courts, correctional facilities, and probation and parole officers, are typically located at a significant geographic remove from many Indigenous communities. This imposes additional, heavy burdens not only on Indigenous

accused and inmates but also sureties and family members who must travel for hours or even days to attend court or visit their loved ones—often with very limited means to do so. The high cost of travel, and even of long-distance phone calls, severely constrains continued contact between Indigenous persons in custody and their family members, including their children.

11. Denying bail to and imposing custodial sentences on Indigenous women who are mothers or caregivers of children has additional, devastating effects not only on them but also their children and communities. Like the appellant in this case, 64 percent of incarcerated Indigenous mothers are single parents. The overincarceration of Indigenous women "results in Indigenous children's being placed in another institutionalized colonial system" in which they are already profoundly overrepresented: while Indigenous children make up only seven percent of all children in Canada, they account for 48 percent of all children in the foster care system (*Reclaiming Power and Place*, *supra* at p 637). More Indigenous children are placed in foster care each year than attended residential school in any one year (TRC *Final Report*, Vol 5, (2015) at p 53). This is particularly troubling given the documented effects of placement in care, including loss of culture, language and identity where children are placed in non-Indigenous homes, and the increased risk that they will themselves become involved in the youth criminal justice system, a process known as the "child-welfare-to-prison-pipeline" (see *e.g.* Ontario Human Rights Commission, *Interrupted childhoods: Over-representation of Indigenous and Black children in Ontario child welfare*, (April 12, 2018) at s 4.4). The overincarceration of Indigenous women thus perpetuates the effects of intergenerational trauma and the disruption of Indigenous families and communities.

12. The criminal justice system has also denied Indigenous people the protections it affords to non-Indigenous Canadians. This is perhaps most apparent in its utterly inadequate response to

the criminal victimization of Indigenous women and girls who are subjected to violence, exploitation and abuse at grossly disproportionate rates. The rate of violent victimization experienced by Indigenous women is nearly double that of Indigenous men and close to triple that of non-Indigenous women, and cannot be fully explained by an increased presence of other victimization risk factors. Simply being an Indigenous woman is a risk factor for violent victimization (Statistics Canada, *Victimization of Aboriginal people in Canada, 2014* (June 2016) at p 9; MMIWG Inquiry, *Interim Report* (2017) at p 8). The failure of the Canadian justice system to protect Indigenous women is well-established and thoroughly documented (*Reclaiming Power and Place*, *supra*, at p 717, citing the AJIM and the RCAP).

13. These phenomena—intergenerational trauma, disproportionate subjection to violent victimization, and overcriminalization and overincarceration—are closely and inextricably intertwined in the lived experience of Indigenous women. The MMIWG Inquiry found that "Overwhelmingly, incarcerated [Indigenous] women are residential school survivors or have family members who are residential school survivors (*Reclaiming Power and Place*, *supra* at p 637). Further, "Violence is a precursor for many Indigenous women who are incarcerated. Ninety per cent of Indigenous women who are incarcerated have a history of domestic physical abuse, and 68% have a history of domestic sexual abuse" (*ibid* at p 636).

14. The systemic discrimination experienced by Indigenous people in the criminal justice system results in part from the fact that it fails to reflect and is often in conflict with Indigenous laws, cultures, and practices. Indeed, the AJIM described the persistent and stereotypical misunderstanding of and refusal to recognize Indigenous culture, law, and understandings of justice as being at "the heart of systemic discrimination" (Vol 1, c 2). Similarly, the RCAP identified "the fundamentally different world views of Aboriginal and non-Aboriginal people

with respect to such elemental issues as the substantive content of justice and the process of achieving justice" as the "principal reason" why the criminal justice system has failed Indigenous people (*Bridging the Cultural Divide* at p 309).

15. The Independent Review of First Nations representation on Ontario juries noted the

> conflict that exists between First Nations' cultural values, laws, and ideologies regarding traditional approaches to conflict resolution, and the values and laws that underpin the Canadian justice system. … First Nations people observe the Canadian justice system as devoid of any reflection of their core principles or values, and view it as a foreign system that has been imposed upon them without their consent (The Honourable Frank Iacobucci, *First Nations Representation on Ontario Juries*, 2013 at para 26).

16. Most recently, the National Inquiry into Missing and Murdered Indigenous Women and Girls concluded that:

> The Canadian justice system is premised on settler-colonial society's values, beliefs, laws and policies. It is a justice system that fails to include Indigenous concepts of justice. The Canadian justice system has been imposed on Indigenous Peoples and has oppressed and replaced the Indigenous justice systems that served Indigenous communities effectively since time immemorial (*Reclaiming Power and Place*, *supra* at p 717).

As a result, "Indigenous women must rely on a criminal justice system that is in no way reflective or adaptive of their cultural history and reality" (*Ibid* at p 636).

17. The urgent and repeated findings of numerous commissions of inquiry "cry out for recognition of the magnitude and gravity of the problem, and for responses to alleviate it'" (*Gladue*, *supra* at para 64). They also engage s 15 of the *Charter*. The constitutional imperative of substantive equality requires that measures be taken to address the profound and persistent systemic discrimination encountered by Indigenous people—including the particular and intersecting forms of disadvantage experienced by Indigenous women—in their interactions with the criminal justice system. More specifically, substantive equality for Indigenous people requires a different approach to criminal justice.

ii. The Gladue framework is a response to the constitutional imperative of substantive equality

18. The *Gladue* framework has as its foundation s 718.2(e), which was Parliament's chosen means of responding to one of the many ways in which the criminal justice system has failed Indigenous people, namely overincarceration. Parliament has also sought to address systemic discrimination against Indigenous people within the correctional system by enacting s 4(g) of the *Corrections and Conditional Release Act*, which the Supreme Court recently held "can only be understood as a direction from Parliament … to advance substantive equality in correctional outcomes for … Indigenous offenders" (*Ewert*, *supra* at para 53; see also paras 54-59). The *Gladue* framework is also a direction from Parliament, namely that judges seek to remedy systemic discrimination against Indigenous offenders through sentencing (*R v Ipeelee*, 2012 SCC 13 at paras 67-68). It must similarly be understood as a response to the constitutional imperative of substantive equality. While obviously not a panacea (see *Gladue*, *supra* at para 65), the *Gladue* framework nevertheless fulfills some of s 15's promise for Indigenous offenders.

19. The *Gladue* framework requires judges to take a different approach to sentencing Indigenous offenders. In particular, judges are required to consider an Indigenous offender's circumstances when determining a fit sentence. Those circumstances are "significantly different" from those of non-Indigenous offenders, and include (a) the unique systemic or background factors which may have played a part in bringing the particular Indigenous offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Indigenous heritage or connection (*Gladue*, *supra* at paras 66, 77).

20. In *Gladue*, the Supreme Court held that s 718.2(e) is intended to address the systemic ways in which the criminal justice system has failed Indigenous people, namely by disregarding their substantially different cultural values and experiences (at paras 62-63). The Court found that the fundamental purpose of s 718.2(e) was to treat Indigenous offenders "fairly *by taking into account their difference*" (at para 87, emphasis added).

21. In *Ipeelee*, the Supreme Court affirmed the necessity of taking into account the distinct history of Indigenous people in Canada, particularly the legacy of colonialism and "the devastating intergenerational effects of the collective experiences of Aboriginal peoples" (at para 82), as well as differences in worldview that might render alternative sanctions more effective in achieving the objectives of sentencing in a particular community. The Court noted that the *Gladue* principles "direct sentencing judges to abandon the presumption that all offenders and all communities share the same values when it comes to sentencing" (at para 74), and cited with approval *R v Vermette*, which described s 718.2(e) as "an acknowledgment that to achieve real equality, sometimes different people must be treated differently" (at para 71, quoting 2001 MBCA 64 at para 39).

22. The Court rejected the contention that the *Gladue* framework is inconsistent with the principle of parity in sentencing enshrined in s 718.2(b) of the *Criminal Code*, quoting (at para 79) Professor Tom Quigley's observation that:

> It is true that on the surface imposing the same penalty for the nearly identical offence is only fair. That might be closer to the truth in a society that is more equitable, more homogenous and more cohesive than ours. But in an ethnically and culturally diverse society, there is a differential impact from the same treatment. Indeed, that has been recognized in the jurisprudence on equality rights under the *Charter*. Thus, there is a constitutional imperative to avoiding excessive concern about sentence disparity.

23. This Court has also rejected a formal equality approach and recognized that the *Gladue* framework is grounded in and reflects the *Charter* principle of substantive equality. In *United States v Leonard*, 2012 ONCA 622, this Court held that the Minister of Justice erred in law in concluding it would be unfair to other, non-Indigenous accused if he were to apply the *Gladue* framework in determining whether to order the surrender of an Indigenous person sought for extradition. In rejecting the Minister's approach, this Court stressed that:

> *Gladue* factors must be considered in order to *avoid* the discrimination to which Aboriginal offenders are too often subjected and that so often flows from the failure of the justice system to address their special circumstances. Treating *Gladue* in this manner resonates with the principle of substantive equality grounded in the recognition that "equality does not necessarily mean identical treatment and that the formal 'like treatment' model of discrimination may in fact produce inequality" (at para 60, citing *R v Kapp*, *supra* at para 15, emphasis added).

24. Both the Supreme Court of Canada and this Court have found the *Gladue* framework to be remedial in nature, intended to redress the serious problem of overrepresentation of Indigenous people in the criminal justice system and the discrimination to which they are too often subjected. While the Court in *Gladue* did not specifically address the application of s 15 of the *Charter*, there being no constitutional challenge to s 718.2(e) before it, it responded to the contention that certain interpretations of s 718.2(e) could amount to "reverse racism" by emphasizing that "the aim of s 718.2(e) is to reduce the tragic overrepresentation of aboriginal people in prisons. It seeks to ameliorate the present situation and to deal with the particular offence and offender and community" (at para 87).

25. The *Gladue* framework requires judges to take judicial notice of the continued effects of colonialism, displacement, and residential schools that have produced the crisis of overcriminalization and overincarceration of Indigenous people in Canada (*Ipeelee*, *supra* at para 60). Individual offenders do not bear the burden of having to prove that this systemic

discrimination, to which they are necessarily subject if they are Indigenous, exists. Nor are individual offenders required to establish a causal connection between background factors and the commission of the offence in question. The interconnections between systemic factors and an individual's offending are simply too complex to establish a direct correlation. And in any event, these systemic factors do not operate as a justification for the offence but rather provide the necessary context to enable the court to craft a fit sentence (*Ipeelee*, *supra* at paras 82-83).

iii. Sections 742.1(c) and (e)(ii) violate s 15 by depriving Indigenous offenders of the benefit of the Gladue framework

26. Section 718.2(e) of the *Criminal Code* requires 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." Ordinarily, where the requirements set out in s 742.1(a) are met, available sanctions would include conditional sentences. The effect of ss 742.1(c) and 742(e)(ii), however, is to eliminate conditional sentences for certain offences. This deprives Indigenous offenders convicted of those offences for whom conditional sentences would otherwise be appropriate of the benefit of the *Gladue* framework. Denial of access to remedial procedures for discrimination—including consideration of *Gladue* factors in sentencing—violates s 15 (see *Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 [*Alliance*] at para 40).

27. The Supreme Court has established a two-step approach for analyzing s 15 claims, affirmed most recently in *Alliance*:

(i) Does the impugned action, on its face or in its impact, create a distinction based on enumerated or analogous grounds?

(ii) If so, does the action impose a burden or deny a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating disadvantage?

28. It is essential that the two steps be kept analytically distinct. The question whether a law creates a distinction based on enumerated or analogous grounds does not depend on whether that distinction has a discriminatory effect, much less on the severity or extent of that effect. Conflating or collapsing the two stages—as the sentencing judge did in this case—imposes undue and inappropriate burdens on claimants and artificially forecloses the analysis, contrary to the explicit direction of the Supreme Court. As Abella J stated in *Alliance*, the first step of the s 15(1) test "is not a preliminary merits screen, nor an onerous hurdle designed to weed out claims on technical bases. Rather, its purpose is to ensure that s 15(1) of the *Charter* is accessible to those whom it was designed to protect" (at para 26). The first step of the test is intended to exclude only those claims "that have 'nothing to do with substantive equality'" and for that reason it is "not appropriate, at the first step, to require consideration of other factors—including discriminatory impact which should be addressed squarely at the second stage of the analysis" (*Alliance* at para 26, quoting *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at para 19).

29. Sections 742.1(c) and (e)(ii) satisfy the first step of the test: these facially neutral sentencing provisions impair the operation of the *Gladue* framework. Although these provisions apply to both Indigenous and non-Indigenous offenders, they create a distinction on the basis of Indigeneity because only Indigenous offenders are deprived of the benefit of the different approach to sentencing enshrined in the *Gladue* framework. Where impairment of the *Gladue* framework is at issue, the number or proportion of Indigenous offenders caught by the provision is irrelevant. This case is thus unlike those in which an adverse effect distinction is sought to be established on the basis that certain categories of offenders are more likely to be subject to a

facially neutral provision. Here, the distinction is made out on the basis that *all* Indigenous offenders subject to the impugned provision are deprived of the benefit of the *Gladue* framework to which they are entitled. The sentencing judge erred in failing to appreciate this crucial difference (see *R v Sharma*, 2018 ONSC 1141 at paras 256-257).

30. The second step of the test, in contrast, will only be satisfied in the far narrower and more limited class of cases where depriving an Indigenous offender of the benefit of the *Gladue* framework results in a sentence more onerous than the one she would otherwise have been given, thus reinforcing, perpetuating and exacerbating her pre-existing disadvantage.

31. The discriminatory impact of denying the benefit of the *Gladue* framework must be determined in relation to the individual offender. It is an error in principle to insist that the impact be measured quantitatively, or to require a claimant to show that it will have a statistically significant effect on the incarceration of Indigenous offenders in the aggregate, as the sentencing judge did in this case (*Sharma*, *supra* at paras 256-257). Such an approach imposes an impossible burden on a claimant to establish not only that a significant number of Indigenous offenders will be deprived of the benefit of the *Gladue* framework in relation to specific offences but also that those offenders would be sentenced differently if that framework applied. Since a sentence can only be imposed based on the specific circumstances of the offence and the offender, this would be an impossible exercise. In addition, and more fundamentally, this approach misunderstands the relationship between systemic discrimination and substantive equality rights in sentencing as reflected in *Gladue*.

32. The *Gladue* framework seeks to address discrimination at a systemic level through the necessarily individualized sentencing process. The framework is founded on the premise that

taking a different approach to sentencing individual Indigenous offenders will contribute, albeit incrementally, to reducing Indigenous alienation from the criminal justice system and fostering substantive equality. It directs that in each case, sentencing judges must inquire into the problem of systemic discrimination against Indigenous people in the criminal justice system, and "endeavour to remedy it, *to the extent that a remedy is possible through the sentencing process*" (*Ipeelee* at para 68, quoting *Gladue* at para 64, emphasis added by the Court in *Ipeelee*). The fact that a judge passing sentence in a particular case has an admittedly limited role to play in addressing and ameliorating systemic discrimination does not detract from the importance of that role nor relieve against that burden. The application of the *Gladue* framework in an individual case does not depend on the offender demonstrating that it will have a wider systemic impact. By the same token, an offender is not required to demonstrate that the impairment of the *Gladue* framework in an individual case will have a wider systemic impact in order to establish a discriminatory effect.

33. The severity of the impact of a deprivation of the *Gladue* framework depends not on how broadly it affects Indigenous offenders generally, but how deeply it affects the individual Indigenous offender specifically. Where, as in this case, the offender is an Indigenous woman, that impact cannot be properly assessed without attending to the particular and intersectional forms of systemic discrimination that shape Indigenous women's offending and their experience of incarceration.

34. As the MMIWG Inquiry observes, the majority of crimes that Indigenous women commit are non-violent property and drug offences, which

> must be understood in the context of many Indigenous women's realities. Thirty seven per cent of First Nations women living outside of their community are living in poverty,

> 30% to 70% suffer from food insecurity, and 40% of Inuit women are living in housing that is overcrowded.
>
> A clear pattern emerges. The Canadian justice system criminalizes acts that are a direct result of survival for many Indigenous women. This repeats patterns of colonialism because it places the blame and responsibility on Indigenous women and their choices, and ignores the systemic injustices that they experience, which often lead them to commit crimes (*Reclaiming Power and Place*, *supra* at p 637).

35. When Indigenous women do commit violent offences, they are most often "'defensive or reactive to violence directed at them, their children, or a third party'" (*Reclaiming Power and Place*, *supra* at p 636). Further, as noted above, Indigenous women are victimized at appalling and grossly unequal rates, and the vast majority of Indigenous women who are incarcerated, whether for violent or non-violent offences, have been subjected to physical and/or sexual violence and abuse. Depriving Indigenous women whose offending is rooted in their experience of sexist and colonial marginalization and violence of the benefit of the *Gladue* framework compounds these harms. Imposing custodial rather than conditional sentences increases Indigenous women's social and economic marginalization and vulnerability, and exposes them to further violence and re-traumatization through the carceral system.

36. In addition, as previously described, Indigenous women are uniquely and disproportionately vulnerable to state removal of their children from their care and/or custody. This form of systemic and intersectional discrimination is historically rooted in the residential school system, was sustained through the "Sixties Scoop", and persists today in the over-representation of Indigenous children in care, leading the TRC to conclude that "Canada's child-welfare system has simply continued the assimilation that the residential school system started" (*Honouring the Truth, Reconciling for the Future* at p 138; see also the AJIM, *Final Report* at c 14). Depriving Indigenous women of the benefit of the *Gladue* framework and foreclosing

sentencing options that would allow them to continue to parent exacerbates their existing disadvantage. It reinforces, rather than remedies, the intergenerational trauma, cultural genocide, and damage to families and communities inflicted through successive colonial and assimilationist policies and practices—with profound and particular effects on Indigenous women and their children. LEAF and the Asper Centre adopt the Native Women's Association of Canada's submissions on the collateral consequences of incarcerating Indigenous women for their children and communities.

iv. Substantive equality requires that sentencing take into account the various ways in which Indigenous women are systemically disadvantaged along the victimization-criminalization continuum

37. Indigenous women are multiply disadvantaged and must contend with intersecting racist, sexist, and colonial stereotypes at all points along the victimization–criminalization continuum. Advancing the s 15 rights of Indigenous women—equality before and under the law, and equal benefit and protection of the law—accordingly requires that steps be taken to address systemic discrimination and bias in all aspects of Indigenous women's experience with the criminal justice system. For example, in sexual assault cases where Indigenous women or girls are complainants, "trial judges would be well advised to provide an express instruction aimed at countering prejudice against Indigenous women and girls" (see *R v Barton*, 2019 SCC 33 at para 200). Such an instruction "supports several core concepts upon which our justice system rests, including substantive equality" (*ibid* at para 202).

38. In sentencing, courts must be equally mindful of Indigenous women's interrelated experiences of systemic discrimination at various locations on the victimization–criminalization continuum. This particular case concerns substantive equality rights in sentencing for offences committed *by* Indigenous women. It cannot be forgotten, however, that substantive equality

rights are also engaged in sentencing for offences committed *against* Indigenous women and girls. Giving effect to the constitutional imperative of substantive equality requires an approach to sentencing that meaningfully addresses Indigenous women's and girls' grossly disproportionate subjection not only to incarceration but also to violent victimization. Indeed, and as set out in detail above, the two are inextricably tied together.

39. If s 742.1(c) is struck down, conditional sentences will no longer be statutorily barred for a wide range of offences, including aggravated sexual assault. That offence can at present be made out on the basis of HIV non-disclosure, for which Indigenous women have been criminalized. It is also a horrific form of violence to which Indigenous women are disproportionately subjected as a result of the intersecting effects of racism, sexism, and colonialism. Determining the appropriateness of a conditional sentence for a specific offender and offence will continue to require judges to consider the limitations of the regime more generally as set out in s 742.1(a)—namely that serving the sentence in the community would not endanger the safety of community, and would be consistent with the fundamental purpose and principles of sentencing set out in ss 718 to 718.2. Pursuant to s 718.2, evidence that the offence was motivated by bias, prejudice or hate; evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner, a person under eighteen years of age, or a position of trust or authority in relation to the victim; and evidence that the offence had a significant impact on the victim, must be treated as aggravating circumstances.

40. Further, wherever conditional sentences are imposed, they must be carefully tailored to protect and foster the safety of women and girls.

v. Equality rights must inform the interpretation of section 7

41. The Supreme Court has repeatedly held that the provisions of the *Charter* are not to be read in isolation, but rather interpreted in light of one another (*R v Rahey*, [1987] 1 SCR 588; *Dubois v The Queen*, [1985] 2 SCR 350; *Law Society of Upper Canada v Skapinker*, [1984] 1 SCR 357). The "amplification of the content of each enunciated right and freedom imbues and informs our understanding of the value structure sought to be protected by the *Charter* as a whole and, in particular, of the content of the other specific rights and freedoms it embodies" (*R v Lyons*, [1987] 2 SCR 309 at p 326).

42. Equality rights enshrined in ss 15(1) and 28 of the *Charter* play an especially significant role in interpreting the scope and content of other *Charter* rights. As Justice McIntyre observed in *Andrews*, "The section 15(1) guarantee is the broadest of all guarantees. It applies to and supports all other rights guaranteed by the *Charter*" (at p 185). The "interpretive lens of the equality guarantee should therefore influence the interpretation of other constitutional rights"; more particularly, "principles of equality guaranteed by both s. 15 and s. 28, are a significant influence on interpreting the scope of protection offered by s. 7" (*New Brunswick (Minister of Health and Community Services) v G.(J.)*, [1999] 3 SCR 46 [*G.J.*] at para 112, *per* L'Heureux-Dubé J concurring). In considering the s 7 rights at issue and the applicable principles of fundamental justice, it is

> important to ensure that the analysis takes into account the principles and purposes of the equality guarantee in promoting the equal benefit of the law and ensuring that the law responds to the needs of those disadvantaged individuals and groups whose protection is at the heart of s. 15. The rights in s. 7 must be interpreted through the lens of ss. 15 and 28, to recognize the importance of ensuring that our interpretation of the Constitution responds to the realities and needs of all members of society (*G.J.* at para 115; see also *R v Darrach*, 2000 SCC 46 at para 70; *R v Mills*, [1999] 3 SCR 668 at paras 61, 90; *R v Tran*, [1994] 2 SCR 951 at p 976; *R v Osolin*, [1993] 4 SCR 595 at p 669; *R v Seaboyer*,

R v Gayme, [1991] 2 SCR 577 at pp 698-99 *per* L'Heureux-Dubé J, dissenting but not on this point).

43. The guarantee of substantive equality thus informs the scope and content of the s 7 interests and the principles of fundamental justice engaged in this case. Sections 742.1(c) and (e)(ii) are challenged on the basis of arbitrariness and overbreadth, both of which must be viewed through a substantive equality lens.

44. With respect to arbitrariness, the evidence establishes that the availability of conditional sentences has mitigated the overincarceration of Indigenous offenders. Between 2000 and 2015, over 46,000 Indigenous offenders received conditional sentences, most of whom would otherwise have been imprisoned (Andrew Reid, "The (Differential) Utilization of Conditional Sentences Among Aboriginal Offenders in Canada" at p 10, Appeal Book Vol I, Tab 6(3)). With respect to Indigenous women offenders specifically, one study that examined 91 cases between 1999 and 2011 identified 31 in which conditional sentences had been imposed. As a result of the 2012 amendments to s 742.1—which introduced the provisions challenged in this appeal, among others—29 of those conditional sentences would no longer be possible (cited in Will-Say of Dr Carmela Murdocca, Appeal Book Vol III, Tab 8 [*Murdocca Will-Say*] at para 40). Eliminating conditional sentences for offences that involve drugs or are punishable by a maximum of 14 years' or life imprisonment further contributes to the overincarceration of Indigenous offenders in general and Indigenous women in particular.

45. With respect to overbreadth, it is essential to take into account the impact on Indigenous women's substantive equality rights that results from eliminating conditional sentences for offences committed in many different circumstances and by a wide range of individuals. The expert evidence in this case establishes that Indigenous women who come into contact with the

criminal justice system "often 'live in poverty, are first time offenders, have been victims of prior abuse; and experience high rates of mental illness including depression and substance abuse problems'" (*Murdocca Will-Say* at para 17). For Indigenous women, drug crimes can be considered crimes of survival flowing from economic disadvantage and poverty, and the need to support children or family (*Murdocca Will-Say* at paras 27-28). Women who are charged with drug crimes are typically not career criminals; in fact, most drug crimes are the first offence for women charged (*Murdocca Will-Say* at para 28).

46. Indigenous women are disproportionately likely to fall into the category of offender for whom a conditional sentence would otherwise be appropriate. Accordingly, eliminating conditional sentences for "broad spectrum" offences punishable by a maximum of 14 years' or life imprisonment (s 742.1(c)) or offences involving the import, export, trafficking or production of drugs (s 742.1(e)(ii)) exacerbates systemic discrimination against Indigenous women within the criminal justice system and significantly impairs their substantive equality rights. This reality must be taken into account in assessing whether the impugned provisions offend basic values against arbitrariness and overbreadth in the criminal law.

PART IV – ORDER REQUESTED

47. LEAF and the Asper Centre take no position on the ultimate disposition of this appeal, and respectfully request that it be decided in accordance with these submissions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of July, 2019.

Jessica Orkin

Adriel Weaver

Counsel for the Interveners LEAF and the Asper Centre

SCHEDULE A – AUTHORITIES TO BE CITED

Jurisprudence

1. *Andrews v Law Society of British Columbia*, [1989] 1 SCR 142.
2. *Dubois v The Queen*, [1985] 2 SCR 350.
3. *Ewert v Canada*, 2018 SCC 30.
4. *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30.
5. *Law Society of Upper Canada v Skapinker*, [1984] 1 SCR 357.
6. *New Brunswick (Minister of Health and Community Services) v G.(J.)*, [1999] 3 SCR 46.
7. *R v Barton*, 2019 SCC 33.
8. *R v Darrach*, 2000 SCC 46.
9. *R v Gladue*, [1999] 1 SCR 688.
10. *R v Ipeelee*, 2012 SCC 13.
11. *R v Kapp*, 2008 SCC 41.
12. *R v Lyons*, [1987] 2 SCR 309.
13. *R v Mills*, [1999] 3 SCR 668.
14. *R v Osolin*, [1993] 4 SCR 595.
15. *R v Rahey*, [1987] 1 SCR 588.
16. *R v Seaboyer, R v Gayme*, [1991] 2 SCR 577.
17. *R v Tran*, [1994] 2 SCR 951.
18. *R v Williams*, [1998] 1 SCR 1128.
19. *R v Vermette*, 2001 MBCA 64.
20. *Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17.
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32. Ontario Human Rights Commission. *Interrupted childhoods: Over-representation of Indigenous and Black children in Ontario child welfare*. Toronto: Ontario Human Rights Commission, 2018.

33. Rosemary Cairns Way, "Incorporating Equality into Substantive Criminal Law: Inevitable or Impossible?" (2005) 4:2 *J.L. & Equality* 203.

SCHEDULE B – RELEVANT LEGISLATIVE PROVISIONS

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

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.

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.

Court File No. C66390

COURT OF APPEAL FOR ONTARIO

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

CHEYENNE SHARMA

Appellant

- and -

ABORIGINAL LEGAL SERVICES, CANADIAN HIV/AIDS LEGAL NETWORKAND HIV & AIDS LEGAL CLINIC ONTARIO, THE CRIMINAL LAWYERS' ASSOCIATION (ONTARIO), NATIVE WOMEN'S ASSOCIATION OF CANADA, WOMEN'S LEGAL EDUCATION AND ACTION FUND INC. AND DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS

Interveners

FACTUM OF THE INTERVENERS WOMEN'S LEGAL EDUCATION AND ACTION FUND INC. AND THE DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS

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