Court File No. 41431

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE NOVA SCOTIA COURT OF APPEAL)

BETWEEN:

HIS MAJESTY THE KING

Appellant

- and -

HARRY ARTHUR COPE

Respondent

- and -

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

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. This appeal concerns the interplay of multiple sentencing provisions of the *Criminal Code* aimed at addressing the particular circumstances of Indigenous people. Those circumstances include the continuing harms of colonialism, dispossession and displacement, the intergenerational trauma of residential schools, and endemic anti-Indigenous racism. They also include the persistence and resurgence of Indigenous legal orders, the resilience and resourcefulness of Indigenous communities, and the availability of alternative approaches to sentencing that denounce and deter harmful wrongdoing by promoting accountability, safety, and healing.

2. The David Asper Centre for Constitutional Rights (the "Asper Centre") submits that in interpreting and applying ss 718.04, 718.201 and 718.2(e), regard must be had to the constitutional values and imperatives that animate them. More specifically, the Asper Centre submits that:

a. Section 718.2(e), like ss 718.04 and 718.201, is aimed at fostering substantive equality and redressing the systemic racism Indigenous people experience in the criminal legal system as perpetrators as well as victim of crime;

b. Section 718.2(e) is intended not merely to address the growing crisis of Indigenous mass incarceration but to support a restructuring of the relationship between settler and Indigenous legal orders and promote reconciliation; and

c. Both of these underlying purposes must be recognized and given effect in determining the relationship between ss 718.2(e), 718.04 and 718.201, and in the courts' approach to sentencing in cases in which those provisions are engaged.

3. The Asper Centre takes no position on the facts in this appeal.

PART II – QUESTIONS IN ISSUE

4. The Asper Centre intervenes to address the second question stated by the Appellant, namely how courts should approach sentencing when ss 718.04, 718.201, and 718.2(e) are all engaged.

PART III – STATEMENT OF ARGUMENT

A. Section 718.2(e) promotes substantive equality

5. As successive commissions of inquiry, Parliament, and this Court have repeatedly recognized, widespread racism against Indigenous people has translated into systemic discrimination in the enforcement and application of the criminal law.[1] The mechanisms of discrimination are multiple and varied, and its effects are pervasive. In *Ewert*, Wagner J (as he then was) observed 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, including the prison system".[2]

6. Indigenous people experience systemic discrimination and "staggering injustice" in the criminal legal system both as persons who have been accused or found guilty of wrongdoing and as persons who have experienced harm at the hands of others. For example, as this Court has affirmed, "hurtful biases, stereotypes, and assumptions"[3] – including prejudicial beliefs about credibility, worthiness, and propensity to engage in certain activities – can distort the fact-finding process in cases involving Indigenous accused and those involving Indigenous complainants. Failing to identify and confront these discriminatory attitudes deprives Indigenous accused and offenders of their right to equality before and under the law,[4] *and* deprives Indigenous complainants and victims – especially Indigenous women and girls – of the equal protection and benefit of the law.[5]

7. Similarly, the mass incarceration of Indigenous people, which this Court deemed a "crisis" in 1999, has only accelerated over the decades since, with the incarceration of Indigenous women increasing at an especially troubling rate. At the same time, the criminal justice system has also

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[1] See *e.g.* *R v Williams*, [1998] 1 SCR 1128 at para 58 (SCC) [*Williams*]; *R v Gladue*, [1999] 1 SCR 688 at para 61 (SCC) [*Gladue*].

[2] *Ewert v Canada*, 2018 SCC 30 at para 57 [*Ewert*].

[3] *Williams*, *supra* note 1 at paras 54, 58; *R v Barton*, 2019 SCC 33 at para 199 [*Barton*].

[4] *Williams*, *supra* note 1 at para 48.

[5] *Barton*, *supra* note 3 at para 204.

failed to respond to – indeed, has reproduced and exacerbated – what has repeatedly been described as an epidemic of violence against Indigenous women and girls.[6]

8. Parliament has sought to redress systemic discrimination against Indigenous people both as victims and perpetrators of harm by enacting the sentencing provisions engaged in this case. As the Appellant observes, ss 718.04 and 718.201 are aimed at addressing the disproportionate victimization of Indigenous women and girls and promoting equality.[7] Sections 718.2(e) is likewise aimed at fostering substantive equality – the "animating norm" of s 15 and one of the "core concepts on which our justice system rests". [8]

9. Section 718.2(e) responds and gives effect to the constitutional imperative of substantive equality, both as a *Charter* right and a foundational principle of the criminal justice system. It is "an acknowledgement that to achieve real equality, sometimes different people must be treated differently."[9] Simply put, the "fundamental purpose of s 718.2(e) is to treat [Indigenous] offenders fairly by taking into account their difference."[10]

10. As the Ontario Court of Appeal stressed in *United States v Leonard*, the requirement to consider *Gladue* factors in order to avoid the discrimination to which Indigenous offenders are too often subjected "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'".[11] In *Ipeelee*, this Court affirmed that the same sentencing approaches result in differential impacts and outcomes for Indigenous offenders and, citing Professor Quigley's conclusion that there is thus "a constitutional imperative to

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[6] *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, Vol 1a (Ottawa: National Inquiry into Missing and Murdered Indigenous Women and Girls, 2019) at paras 55, 75; *R v Sharma*, 2022 SCC 39 at para 234 [*Sharma*] *per* Karakatsanis J, dissenting but not on this point.

[7] Appellant's Factum at paras 58, 64-65.

[8] *Barton*, *supra* note 3 at para 202.

[9] *R v Vermette*, 2001 MBCA 64 at para 39, approved in *R v Ipeelee*, 2012 SCC 13 at para 71 [*Ipeelee*].

[10] *Gladue*, *supra* note 1 at para 87.

[11] *United States v Leonard*, 2012 ONCA 622 at para 60 (leave ref'd 2013 CanLII 11308 (SCC)), citing *R v Kapp*, 2008 SCC 41 at para 15. See also *Ewert*, *supra* note 2 at para 59.

avoiding excessive concern about sentence disparity", directed courts to "ensure that a formalistic approach to parity in sentencing does not undermine the remedial purpose of s 718.2(e)."[12]

11. The analytic framework developed by this Court in *Gladue* identifies two interrelated aspects of Indigenous difference that must be considered in sentencing Indigenous offenders.

12. The first is the unique systemic or background factors that may have played a part in bringing the particular offender before the court. Courts must take judicial notice of the effects of colonialism, dispossession and displacement, and the intergenerational trauma of residential schools, and how they "continue 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 Indigenous peoples.[13] These factors may shed light on the accused's level of moral blameworthiness; failing to take them into account "would violate the fundamental principle of sentencing – that the sentence must be proportionate to the gravity of the offence *and the degree of responsibility of the offender*."[14]

13. Further, these unique systemic and background factors mean that Indigenous persons are "more adversely affected by incarceration and less likely to be 'rehabilitated' thereby, because the internment milieu is often culturally inappropriate and regrettably discrimination towards them is so often rampant in penal institutions."[15] That observation, made over a quarter century ago, is equally true today. Indeed, as this Court noted in *Ewert*, reports indicate growing disparities in correctional outcomes between Indigenous and non-Indigenous prisoners.[16]

14. The second aspect of Indigenous difference that must be considered is the types of sentencing procedures and sanctions which may be appropriate for the offender because of their particular Indigenous heritage or connection. This aspect relates not to the degree of culpability of the offender but to the effectiveness of the sentence itself. As this Court stressed in *Ipeelee*, the *Gladue* principles "direct sentencing judges to abandon the presumption that all offenders and all

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[12] *Ipeelee*, *supra* note 9 at para 79.
[13] *Ibid* at para 60.
[14] *Ibid* at para 73 [emphasis in original].
[15] *Gladue*, *supra* note 1 at para 68.
[16] *Ewert*, *supra* note 2 at paras 60-61.

communities share the same values when it comes to sentencing and to recognize that, given these fundamentally different world views, different or alternative sanctions may more effectively achieve the objectives of sentencing in a particular community."[17]

15. This part of the *Gladue* framework aims to go beyond ameliorating the effects of systemic discrimination to address its root cause, namely the imposition on Indigenous peoples of a colonial legal system that fails to respect and is often in conflict with Indigenous laws, cultures and practices. In so doing, and as discussed further below, it not only fosters substantive equality but responds to repeated and urgent calls to recognize Indigenous law and to restructure the relationship between Indigenous and settler colonial legal orders.

B. Section 718.2(e) promotes reconciliation

16. The Aboriginal Justice Inquiry of Manitoba described the persistent and stereotypical misunderstanding of Indigenous legal values, processes, and conceptions of justice as "the heart of systemic discrimination".[18] Similarly, the Royal Commission on Aboriginal Peoples 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.[19]

17. More recently, the MMIWG Inquiry 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.[20]

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[17] *Ipeelee*, *supra* note 9 at para 74.

[18] *Report of the Aboriginal Justice Inquiry of Manitoba, vol 1, The Justice System and Aboriginal People*. (Winnipeg: Public Inquiry into the Administration of Justice and Aboriginal People, 1991) at page 36.

[19] *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada*. (Ottawa: The Commission, 1996) at page 309. See also *First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by the Honourable Frank Iacobucci* (Toronto: Ministry of the Attorney General, 2013) at para 26.

[20] National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous*

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".[21]

18. The *Gladue* framework is no more a panacea for the imposition of the colonial legal system than it is for the mass incarceration of Indigenous people. Properly applied, however, the *Gladue* framework can make space – albeit highly circumscribed – for Indigenous laws and understandings of justice to play a role in the sentencing process. As Marie-Andrée Denis-Boileau and Marie-Ève Sylvestre observe, the second step of the *Gladue* analysis as amplified by *Ipeelee* "invites the Canadian state and justice system to recognize the existence of Indigenous legal orders."[22] The requirement to consider the procedures and sanctions that may be appropriate and effective because of the offender's particular Indigenous heritage and connections "represents an open door to legal pluralism and to the possibility of rethinking sentencing", a "contact zone where innovation and internormativity become possible."[23]

19. Section 718.2(e), as interpreted and applied by this Court, thus not only requires that courts recognize and take into account the effects of colonialism on Indigenous offenders, but also takes a small yet significant step toward decolonizing the criminal justice system and cultivating a new relationship between Indigenous and settler legal orders. It thereby furthers the constitutional imperative of reconciliation[24] as well as substantive equality. As this Court has affirmed, reconciliation "will not be accomplished in a single sacred moment, but rather through a continuous transformation of relationships and a braiding together of distinct legal traditions and sources of power that exist".[25] In this regard, as the Truth and Reconciliation Commission aptly

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Women and Girls, Vol 1a (Ottawa: NIMMIWG, 2019) at page 717 [*Reclaiming Power and Place*].

[21] *Ibid* at page 636.

[22] Marie-Andrée Denis-Boileau and Marie-Ève Sylvestre, "*Ipeelee* and the Duty to Resist" (2018) 51:2 UBC L Rev 548 at page 606 ["*Ipeelee* and the Duty to Resist"].

[23] *Ibid* at pages 577, 604.

[24] *Sharma*, *supra* note 6 at para 114 *per* Karakatsanis J, dissenting but not on this point.

[25] *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 at para 90.

observed, the establishment of respectful relationships – the foundation for reconciliation – requires the revitalization of Indigenous law and legal traditions.[26]

20. Like civil and common law legal traditions, Indigenous legal traditions continue to evolve to address changing circumstances and new realities. They are expressed and implemented in a variety of forms and fora – including ones, like sentencing circles, that operate in dialogue with the criminal legal system. Accordingly, sentencing circles can serve not merely to provide the court with a better understanding of the offender, the victim, the community and the supports it offers to both parties, but to better ensure that the process and the outcome of sentencing engage with and reflect Indigenous legal principles and practices. Community participation in both the crafting and the carrying out of sentences, affirmed by the *Gladue* framework, responds to and begins to redress the underlying cause of Indigenous alienation from the criminal legal system.

C. Both of the animating purposes of s 718.2(e) must be taken into account in sentencing accused in cases that also engage ss 718.04 and 718.201

21. It is essential to note that s 718.2(e) and ss 718.04 and 718.201 are not necessarily or inherently in conflict with each other. In many cases, the principles of denunciation and deterrence can readily be reconciled with the principle of restraint set out in s 718.2(e), particularly when appropriate regard is paid to Indigenous legal principles and practices. As this Court observed in *Gladue*, in cases where background and systemic factors have played a significant role, it is

> incumbent upon the sentencing judge to consider these facts in evaluating whether imprisonment would actually serve to deter, or to denounce crime in a sense that would be meaningful to the community of which the offender is a member. In many instances, more restorative sentencing principles will gain primary relevance precisely because the prevention of crime as well as individual and social healing cannot occur through other means.[27]

Put differently, a non- or shorter custodial sentence involving community supervision, programming, and accountability measures may be entirely if not more consistent with the principles of denunciation and deterrence than incarceration.

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[26] *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg, 2015) at page 16.

[27] *Gladue*, *supra* note 1 at para 69.

22. Even in cases where sentencing judges consider there to be some tension between the various sentencing principles, denunciation and deterrence cannot be privileged to the extent that they effectively defeat the purposes of s 718.2(e). Fostering substantive equality requires taking into account the effects of colonialism for both victims and perpetrators. Moreover, courts must attend to those factors within the necessarily individualized process of sentencing. Weighing these factors must not become a mechanical exercise in which a particular perspective on denunciation and deterrence that prioritizes carceral sentencing options automatically prevails, because of the dual burden of colonialism and the disproportionate harms of intimate partner violence borne by Indigenous women. Rather, the focus must always remain on individualized, case-by-case sentencing: "For *this* offence, committed by *this* offender, harming *this* victim, in *this* community, what is the appropriate sanction under the *Criminal Code*?"[28]

23. Further, and at least as significantly, advancing the reconciliatory purpose of *Gladue* requires that sentencing courts consider, respect, and respond to Indigenous laws and perspectives as expressed through sentencing circles and similar initiatives.

24. This too is part of the statutory duty imposed by s 718.2(e). As this Court has explained, the "unique circumstances" of Indigenous offenders consist not only of the factors that may affect their moral culpability but also the differences in world view, law and approaches to addressing harm that may make alternatives to incarceration more effective in achieving the purposes of sentencing in a particular community. It must be recognized, however, that these different world views, laws and approaches generally will not be presented to a sentencing judge in the language of common law sentencing principles. To properly give effect to the substantive equality and reconciliatory promises of the *Gladue* framework, it is thus essential that sentencing judges – who will often lack the experience to see and engage with Indigenous legal principles as *law* – receive clear direction regarding their responsibilities in this context.

25. As this Court has repeatedly held, the failure of a sentencing judge to consider Indigenous offenders' unique circumstances breaches their statutory obligation and constitutes an error

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[28] *Ibid* at para 80 [emphasis in original].

justifying appellate intervention.[29] Thus, just as it is an error in principle for a sentencing judge to fail to consider whether background and systemic factors affected an Indigenous offender's moral culpability, it is equally an error in principle for a sentencing judge to fail to substantively consider and address the recommendations of a sentencing circle, including by giving reasons for adopting or rejecting them.

26. The general importance of reasons in criminal matters is well-established. Reasons communicate to those affected by a decision why that decision was made; provide public accountability; help to ensure fair and accurate decision making; and permit effective appellate review.[30] Where reasons are so deficient as to frustrate appellate review, that deficiency may itself amount to an error of law justifying appellate intervention.[31] In relation to sentencing circle recommendations specifically, the importance of reasons acquires an added dimension. Reasons that thoughtfully and explicitly address sentencing circle recommendations demonstrate respect for Indigenous communities' unique capacities and expertise, recognize Indigenous conceptions and systems of justice, and contend with the relationship between settler and Indigenous legal orders.

27. The absence or inadequacy of reasons for rejecting sentencing circle recommendations, in contrast, not only fails to advance but actively undermines s 718.2(e)'s reconciliatory purpose. As Denis-Boileau and Sylvestre underline, "the negation of Indigenous laws, and the fact that an Indigenous person is being judged by a *common law* tribunal, is a background and systemic factor in itself."[32] Similarly, Hadley Friedland writes that the continual imposition of laws, policies and practices through the Canadian justice systems results in "a context of, not just intergenerational trauma, but intergenerational injustice."[33] The absence of meaningful engagement with sentencing circle recommendations and the imposition of sanctions that reflect consideration only of common

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[29] *R v Anderson*, 2014 SCC 41 at para 24; *Ipeelee*, *supra* note 9 at para 85. See also *R v Kakekagamick* (2006), 81 OR 664 at para 56 (ONCA).

[30] *R v REM*, 2008 SCC 51 at paras 11-12.

[31] *R v Sheppard*, 2002 SCC 26 at para 46.

[32] "*Ipeelee* and the Duty to Resist", *supra* note 22 at page 606 [emphasis in original].

[33] Hadley Friedland, "To Light a Candle: A Solution-Focused Approach Toward Transforming the Relationship Between Indigenous Legal Traditions and the Criminal Justice System" (2023) 56:1 UBC L Rev 69 at page 91.

law sentencing principles furthers the negation of Indigenous laws and perpetuates intergenerational injustice, thus reinforcing the very factors that s 718.2(e) was intended to remedy to the extent possible through the sentencing process.

28. The duty under s 718.2(e) to consider the recommendations of sentencing circles or similar bodies as part of the unique circumstances of Indigenous offenders is in no way sufficient to redress the harms resulting from the imposition of the colonial criminal justice system. It is, however, a necessary part of the work of reconciliation. This is equally true in cases in which ss 718.04 and 718.201 are also engaged. Recognition of the particular vulnerability of Indigenous women is not a basis to abandon respectful and individualized attention to the unique perspective, world view and conceptions of justice of the Indigenous community to which the offender being sentenced belongs. The requirements to consider the particular vulnerability of Indigenous women and to prioritize the objectives of denunciation and deterrence must not be interpreted or applied in such a way as to effectively nullify the reconciliatory purpose of s 718.2(e).

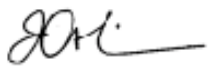
29. In particular, it cannot be presumed that incarceration is necessarily the only or the most effective way of achieving denunciation and deterrence – or that because a sentencing circle has recommended against further incarceration, it failed to have regard to those objectives or subordinated them to other purposes. What is required instead is respectful and reasoned engagement with community understandings of and approaches to achieving denunciation and deterrence, grounded in attention to Indigenous legal orders and openness towards Indigenous legal principles.

PARTS IV & V – SUBMISSIONS RESPECTING COSTS & ORDER REQUESTED

30. The Asper Centre does not seek costs, and asks that no costs be ordered against it.

31. The Asper Centre takes no position on the outcome of this appeal but respectfully requests that it be determined in accordance with the foregoing submissions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of September, 2025.



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