SCC File # 39346

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant
(Respondent)

-and-

CHEYENNE SHARMA

Respondent
(Appellant)

-and-

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PART I – OVERVIEW AND POSITION ON FACTS

1. Principles of judicial economy and the doctrine of mootness permit a court to “decline to decide a case which raises merely a hypothetical abstract question”.[1] This is based on the idea that “judges should not squander time and resources on matters they need not decide”.[2] However, this Court has not taken a consistent approach to determining when multiple *Charter* claims raised and argued in a particular case ought to be fully decided. The Canadian Civil Liberties Association [CCLA] asks this Court to adopt a framework to determine when multiple rights claims ought to be decided, and to apply that framework in this case. The CCLA takes the position that, even if a s. 15 breach is found, this Court ought to also determine whether the impugned provision infringes s. 7 of the *Charter*.

2. Under s. 7 of the *Charter*, the Court of Appeal for Ontario held that the impugned provision was overbroad in part because the maximum sentence for a particular offence is a poor proxy for the gravity of that offence in the sentencing and post-sentencing context. The Appellant asks this Court to overturn that finding on the basis that Parliament commonly uses maximum sentence as a basis upon which to deprive an individual of access to particular procedures or benefits. The CCLA takes the position that an overbroad law is not cured by the fact that other laws may also be overbroad. The maximum sentence available for an offence indicates only the potential seriousness of that offence, not the actual seriousness of the offence for which an individual was convicted. As such, the use of maximum sentence to deprive an individual of access to a conditional sentence is overbroad.

3. The CCLA takes no position on the facts of this appeal.

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[1] *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at 353.
[2] *R. v. Lloyd*, 2016 SCC 13 at para. 18.

PART II – POSITION ON THE QUESTIONS IN ISSUE

4. The CCLA takes the following positions on the questions in issue in this appeal:

i) Do ss. 742.1(c) and 742.1(e)(ii) of the *Criminal Code* infringe the right to equality of Indigenous offenders guaranteed by s. 15 of the Canadian *Charter of Rights and Freedoms*?

- No position.

ii) If the answer to question 1 is in the affirmative, is the infringement justified under s. 1 of the *Charter*?

- No position.

iii) Do ss. 742.1(c) and 742.1(e)(ii) of the *Criminal Code* infringe s. 7 of the Canadian *Charter of Rights and Freedoms*?

- Yes, they deprive an individual of liberty and security of the person in an overbroad manner.

iv) If the answer to question 3 is in the affirmative, is the infringement justified under s. 1 of the *Charter*?

- No.

PART III – STATEMENT OF ARGUMENT

A. Deciding Multiple Rights Claims

5. Constitutional cases routinely raise rights claims under multiple sections of the *Charter*, with separate and distinct arguments at the rights infringement stage and, often, a global s. 1 argument. This Court regularly hears and decides constitutional challenges to legislation that involve multiple *Charter* rights claims, but has, of yet, provided no consistent framework for determining whether multiple rights claims ought to be decided once a single rights infringement has been found.

6. In many cases, this Court has simply declined to decide the second rights infringement as "unnecessary" where an infringement of the first right is found.[3] In some cases, this conclusion is reached before any s. 1 justification is considered.[4] In others, this Court has refrained from considering and deciding a second rights claim only after concluding that the first infringement is or is not justified under s. 1.[5] In yet other cases, the Court will fully consider both rights claims even if an infringement of one right is found.[6] There has been no consistent direction as to the

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[3] See, e.g., *R. v. C.P.*, 2021 SCC 19 at para. 119, per Abella J.; *Ontario (Attorney General) v. G*, 2020 SCC 38 at para. 77; *R. v. Nur*, 2015 SCC 15 at para. 110; *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 at para. 98; *Carter v. Canada (Attorney General)*, 2015 SCC 5 at para. 93; *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para. 160; *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 at para. 162 [*BC Health Services*]; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9; *R. v. Demers*, 2004 SCC 46 at para. 67; *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68 at para. 64; *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94 at para. 70; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877 at para. 84; *R. v. Heywood*, [1994] 3 S.C.R. 761 at 804-805; *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69.

[4] See, e.g., *C.P.*, *ibid*; *Nur*, *ibid* at para. 110; *Carter*, *ibid* at para. 93; *Bedford*, *ibid* at para. 160; *Thomson Newspapers*, *ibid* at para. 84.

[5] See, e.g., *G.*, *supra* at para. 77; *Saskatchewan Federation of Labour* at para. 98; *BC Health Services*, *supra* at para. 162; *Charkaoui*, *supra*; *Sauvé*, *supra* at para. 64; *Dunmore*, *supra* at para. 70; *Heywood*, *supra* at 804-805.

[6] See, e.g., *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46 (finding no s. 11(d) infringement but finding an infringement of s. 8); *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 at para. 152 (finding breaches of both ss. 2(a) and 2(b), and justifying each breach separately under s. 1); *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69 (finding both a ss. 2(b) and 15 violation); *Libman v. Canada (Attorney General)*, [1997] 3 S.C.R. 569 at para. 36 (finding both a ss. 2(b) and 2(d) infringement); *B.(R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 (finding a justified breach of s. 2(a) but considering s. 7 and finding no breach); *R. v. Daviault*, [1994] 3 S.C.R. 63 (considering both s. 7 and 11(d) infringements together); *R. v. Généreux*, [1992] 1 S.C.R. 259 at 310 (deciding and dismissing a s. 15 claim after finding a s. 11(d) breach); *R. v. Seaboyer; R. v Gayme*, [1991] 2 S.C.R. 577 (considering both ss. 7 and 11(d) and finding infringements of both rights); *R. v. Sit*, [1991] 3 S.C.R. 124 (also considering both ss. 7 and 11(d) and finding infringements of both rights); *R. v. Keegstra*, [1990] 3 S.C.R. 697 (considering both

circumstances in which it may be appropriate to consider both rights claims, or whether separate s. 1 analyses are appropriate where both rights claims are decided.

7. The CCLA takes the position that this case provides this Court with an appropriate opportunity to develop an analytical framework applicable to cases raising multiple rights claims. Such a framework is necessary for both substantive and practical purposes. As a matter of substance, where multiple *Charter* rights are infringed, the s. 1 analysis and the remedy, if necessary, will depend on the nature of the right that was infringed. This is because s. 1 requires the state to justify the particular limitation on the right that is at issue, not the legislative scheme as a whole.[7] The nature of the justificatory process may differ where multiple rights limitations are at stake. For example, a provision that limits freedom of expression and the right to equality may be minimally impairing of the right to freedom of expression, but not the right to equality – or vice versa. A full s. 1 justificatory analysis is only possible where all rights breaches are considered.

8. Further, a s. 1 analysis is not simply an academic exercise aimed at tallying up all the particular flaws in a legislative provision. Instead, the s. 1 analysis informs the constitutional remedy to be ordered should a limitation not be justified. Section 52 of the *Constitution Act, 1982* states that a law that is inconsistent with the provisions of the Constitution "is, to the extent of the inconsistency, of no force or effect". The limitation/justification analysis defines the extent to which a particular law is inconsistent with the *Charter*, and therefore the extent to which the law is of no force or effect.

9. This is a particularly acute concern in this case, where the s. 15 claim is based on a particular disadvantaged group – Indigenous persons – while the s. 7 claim applies to everyone. If this Court were to find a s. 15 breach and decline to decide the s. 7 issue, for example, the impugned provision would be of no force and effect to the extent to which it deprived Indigenous people of access to a conditional sentence. The provision would still be in full force and effect in its

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the ss. 2(b) and 11(d) claims separately, and justifying each under s. 1 separately); *R. v. Hess and Nguyen*, [1990] 2 S.C.R. 906 (finding a breach of s. 7 but going on to consider s. 15).

[7] *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 at para. 45.

application to non-Indigenous people, even though it would be of entirely no force and effect if a non-justified s. 7 infringement was found.

10. Further, the nature of the rights infringement necessarily informs the nature of the remedy granted and the legislature's response. As Justice Karakatsanis explained in *G*, the public's entitlement to a public order of laws that organize society and protect it from harm means that courts must "tailor remedies to retain constitutional aspects of an unconstitutional law where possible".[8] Such tailoring can only occur where the full extent of the constitutional infringement is made known.

11. Finally, as a practical matter, parties and intervenors should know, *in advance*, the extent to which it is likely that this Court will consider and decide multiple rights claims. This enables parties to consolidate their submissions and focus on the actual issues in a case, while ensuring no organization wastes precious time and resources intervening on an issue that will not ultimately be decided. Access to justice and efficiency in this Court's operations would benefit from a framework governing the adjudication of multiple rights claims.

12. If this Court chooses to adopt such a framework, the CCLA submits that the following list of non-exhaustive factors ought to be considered in determining whether additional rights claims ought to be considered and decided:

i) Are the rights claims overlapping, such that breach of one right necessarily entails breach of another?[9] Where breach of one right necessarily entails a breach of the second right, this may weigh against exhaustively analyzing both rights claims.

ii) Are the factual matrices underpinning both rights claims the same? For example, are the same groups affected under each claimed right (as in *G*) or does one claim involve a broader affected group than the other (as in this case)? Where the factual matrices or affected groups differ, this weighs in favour of deciding both rights claims.

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[8] *G*, *supra* at para. 156.
[9] *Re BC Motor Vehicle Act*, [1985] 2 S.C.R. 486 at para. 29.

iii) Were both claims fully argued at trial with a full evidentiary record adduced? If so, this weighs in favour of deciding both claims in order to reduce unnecessary future litigation.

iv) Do the interests of justice otherwise weigh in favour of deciding both claims on appeal?

v) Will the remedy or legislative response be impacted if only one of the rights claims is decided? If so, the interests of justice weigh in favour of deciding both rights claims in order to avoid unnecessary future litigation.

13. If these or similar factors are applied in this case, the CCLA takes the position that, even if a s. 15 infringement is found, it is appropriate to consider and fully decide the s. 7 issue. Breach of one right does not necessarily entail breach of the other, and the groups impacted by the rights claims differ. The s. 15 claim applies only to disadvantaged groups such as Indigenous persons, while the s. 7 claim necessarily applies to everyone. Parliament's response to this decision ought to be informed by a full assessment of the rights that are infringed and the justifications for those infringements. In that way, Parliament can craft an informed legislative response that does not generate future unnecessary litigation. It is therefore appropriate that both *Charter* claims be fully considered and decided in this case.

B. Maximum Sentence as a Proxy for Seriousness

14. With respect to the s. 7 issue, the CCLA takes the position that the Court of Appeal was correct to find that the maximum sentence available for a particular offence is a flawed proxy for the gravity of a particular offence, and that ss. 742.1(c) and (e) are therefore overbroad.

15. The maximum sentence available for an offence indicates the potential seriousness of the alleged conduct, or the *prima facie* "relative severity of each crime" as compared to other offences.[10] This is different from the assessment of the gravity of a particular individual's conduct in the context of crafting a fit and proportionate sentence, as the gravity of any particular offence is determined by examining "the circumstances that surround the commission of the offence".[11] When imposing sentence for a particular individual, the sentencing judge must examine the

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[10] *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 at para. 36.
[11] *R. v. Friesen*, 2020 SCC 9 at para. 96.

circumstances of the actual offence committed as well as the circumstances of the individual and weigh mitigating and aggravating factors in order to place a particular sentence within an established range, or to justify why a sentence below that established range ought to be imposed.[12] The maximum sentence available for a particular offence may inform the sentencing range for that offence, but it has little to say on what a fit and proportionate sentence would be in any particular case.

16. Many offences that have a high maximum sentence capture a wide spectrum of conduct, with the gravity of individual circumstances varying along that spectrum. Take, for example, the offence of importation of a Schedule I substance. This offence captures large-scale commercial importation schemes of pernicious substances such as fentanyl, but also the transportation of small amounts of Schedule I drugs for personal use across the border. It would stretch credulity to suggest that the person who imports 30kg of fentanyl to distribute to addicts across the country has committed as grave of an offence as the person who brings a quarter of an ounce of cocaine into Canada to use at a party. While both individuals may be guilty of importing a Schedule I substance and subject to a maximum penalty of fourteen years, there is no question that the gravity of their offences differs dramatically.

17. There are circumstances in which a sentencing judge may apply the principles of sentencing and conclude that a fit and proper sentence is a conditional sentence, even for an offence carrying a high maximum penalty. Were this not possible, there would be no need for s. 742.1(c) or (e) – there would be no reason to limit access to conditional sentences based on maximum sentence if, on proper application of the principles of sentencing for a particular offence, a sentencing judge could never conclude that a conditional sentence would be fit. Sections 742.1(c) and (e) therefore only exist to limit a sentencing judge's discretion to impose a fit sentence, based on a single factor that has little impact on the determination of a fit sentence in any particular case.

18. The Appellant defends this overbreadth by arguing that the utilization of maximum sentence as a proxy for the gravity of an offence in order to deprive an individual of access to statutory procedures or benefits is a common practice. It cites other provisions of the *Criminal*

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[12] *R. v. Parranto*, 2021 SCC 46 at paras. 16-17.

Code, the *Criminal Records Act*, the *Immigration and Refugee Protection Act*, and s. 11(f) of the *Charter* in support of this position.

19. With respect to the other statutory provisions, it is respectfully submitted that these do not cure the overbreadth problem in s. 742.1 of the *Criminal Code*. All three provisions restrict access to a particular statutory benefit – whether it be a conditional discharge, a record suspension, or the right of non-citizens to remain within Canada – based on the maximum sentence legally available for an offence without regard to the circumstances of the actual offence that was committed. It may be the case that, depending on how maximum sentences are used and the amount of discretion the statutory schemes confer, these other provisions also suffer from similar overbreadth concerns. The idea that other provisions may also be overbroad if this Court finds that the impugned provision is overbroad is not a basis upon which to dismiss the s. 7 claim. As Justice Abella recently observed in *R. v. C.P.*, "we do not ask claimants to anticipate what other claims their success may inspire, the potential consequences of those claims, or to justify why they should succeed anyway."[13]

20. Finally, the Appellant points to s. 11(f) of the *Charter* as an example of the use of a maximum sentence being tied to access to a particular procedural right, being the right to trial by jury. However, this is a red herring. Section 11(f) of the *Charter* confers a constitutional right in the trial phase based on the seriousness of the potential punishment that may be inflicted – the more serious the potential punishment, the more stringent the procedural protections necessary in order to ensure that punishment is truly warranted. Because it is applicable in the trial phase, the protections of s. 11(f) are not based on an assessment of what punishment ought to be imposed for any particular individual. This is very different from s. 742.1, which only applies in the sentencing phase, and which deprives an individual of access to a fit sentence based only on the fact that a particular maximum sentence is available for that offence. While s. 11(f) of the *Charter* grants enhanced procedural protections where there is potential for serious punishment, s. 742.1 deprives an individual of an otherwise fit sentence based on that same potential. The two are not analogous.

21. The maximum sentence available for an offence indicates nothing more than the potential seriousness of that offence. Utilizing it as a proxy for the actual seriousness of an offence is

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[13] *C.P.*, *supra* at para. 112.

inherently overbroad, as it does not dictate what a fit sentence for any particular offence ought to be. Where Parliament uses the fact that an individual was convicted of a particular offence carrying a particular maximum sentence as a basis for denying that person access to a particular sentence that would otherwise be fit, or for denying access to the rehabilitative benefit of a record suspension, or to mandate automatic deportation, without regard for the circumstances of the offence or the individual and without any judicial discretion to consider those circumstances, the provision is overbroad.

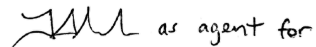
PART IV – SUBMISSIONS ON COSTS

22. The CCLA does not seek costs and respectfully requests that no costs be ordered against it.

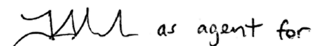
PART V – NATURE OF THE ORDER REQUESTED

23. The CCLA takes no position on the outcome of the appeal.

DATED at Toronto, this 2nd day of March, 2022.



David M. Humphrey
Counsel for the Intervener



Michelle M. Biddulph
Counsel for the Intervener

PART VI – AUTHORITIES RELIED UPON

Jurisprudence	Paragraph(s)
B.(R.) v. Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315	6
Borowski v. Canada (Attorney General), [1989] 1 S.C.R. 342	1
Canada (Attorney General) v. Bedford, 2013 SCC 72	6
Carter v. Canada (Attorney General), 2015 SCC 5	6
Charkaoui v. Canada (Citizenship and Immigration), 2007 SCC 9	6
Dunmore v. Ontario (Attorney General), 2001 SCC 94	6
Goodwin v. British Columbia (Superintendent of Motor Vehicles), 2015 SCC 46	6
Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia, 2007 SCC 27	6
Libman v. Canada (Attorney General), [1997] 3 S.C.R. 569	6
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Ontario (Attorney General) v. G, 2020 SCC 38	6, 10
Osborne v. Canada (Treasury Board), [1991] 2 S.C.R. 69	6
Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux, 2018 SCC 17	7
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R. v. Daviault, [1994] 3 S.C.R. 63	6
R. v. Demers, 2004 SCC 46	6
R. v. Friesen, 2020 SCC 9	15
R. v. Généreux, [1992] 1 S.C.R. 259	6
R. v. Hess and Nguyen, [1990] 2 S.C.R. 906	6
R. v. Heywood, [1994] 3 S.C.R. 761	6
R. v. Keegstra, [1990] 3 S.C.R. 697	6
R. v. Lloyd, 2016 SCC 13	1
R. v. M. (C.A.), [1996] 1 S.C.R. 500	15
R. v. Parranto, 2021 SCC 46	15
R. v. Seaboyer; R. v Gayme, [1991] 2 S.C.R. 577	6
R. v. Sit, [1991] 3 S.C.R. 124	6
Saskatchewan Federation of Labour v. Saskatchewan, 2015 SCC 4	6
Saskatchewan (Human Rights Commission) v. Whatcott, 2013 SCC 11	6
Sauvé v. Canada (Chief Electoral Officer), 2002 SCC 68	6
Thomson Newspapers Co. v. Canada (Attorney General), [1998] 1 S.C.R. 877	6