

## REFLECTIONS ON THE SUPREME COURT OF CANADA'S DECISION IN *R. v. SHARMA*

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*The criminal law has been criticized for failing to engage with the right to equality when delineating its permissible scope. While these criticisms are forceful, they must also be tempered by the structure of judicial review. The Supreme Court's recent decision in R. v. Sharma is illustrative. Despite an avid dissent, a narrow majority found that Parliament's decision to amend a prior sentencing law that conferred a benefit to a minority group could not by itself sustain a violation of the right to equality. This approach is principled as any other interpretation would undermine the constitutional framework for punishment under the Canadian Charter of Rights and Freedoms. This follows as the essence of the constitutional challenge in Sharma concerned whether refusing to permit a conditional sentence order for select offences would result in an unconstitutional punishment. By finding a violation of the right to equality, the minority circumvented the gross disproportionality standard required to declare a punishment unconstitutional under section 12 of the Charter. In its place, the minority would have imposed a mere proportionality standard under section 1 for any punishment laws that retract a previously granted benefit to a minority group. Such an approach might be justifiable if there were no other means to consider equality interests when determining the constitutionality of sentencing laws. However, that is not the case as the reasonable hypothetical offender analysis under section 12 can ensure that the equality considerations implicit in the criminal law are given due weight. While conducting the analysis under section 12 does not change the result in Sharma, it upholds the principle underlying that provision requiring the scope of sentencing policy to remain reasonably broad to account for differing political opinions about the appropriate use of punishment.*

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### I. INTRODUCTION

In *R. v. Sharma*,<sup>1</sup> the Supreme Court of Canada considered a constitutional challenge to limitations on the conditional sentence order (CSO) or “jail in the community” provisions of the *Criminal Code* of Canada.<sup>2</sup> While the CSO sentencing option was broadly available when first enacted, it has been incrementally narrowed by subsequent Parliaments.<sup>3</sup> The applicant in *Sharma* alleged that Parliament’s decision to narrow the availability of CSOs

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<sup>1</sup> 2022 SCC 39 [*Sharma*].

<sup>2</sup> RSC 1985, c C-46.

<sup>3</sup> The legislative history will be reviewed below.

violated sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*.<sup>4</sup> While a narrow majority rejected these arguments, an avid dissent determined that the law violated both provisions. This approach was unusual as apex courts typically invoke only one right when striking down a constitutionally infirm law.<sup>5</sup> The choice to use both rights suggests that the dissent thought there was value added by employing each right in this case, a decision it did not expand upon in its reasoning.

Counsel's framework for the constitutional challenge was also peculiar given the particular rights employed. As Justice Karakatsanis observes, "[t]here is nothing novel, unwieldy, or unsound about subjecting sentencing law to constitutional scrutiny" under numerous rights provisions.<sup>6</sup> There is nevertheless something unwieldy, unsound, and unfortunately not novel<sup>7</sup> about ignoring the provision of the *Charter* governing quantum of sentence when the constitutional issue derives from the quantum of sentence imposed on the offender. Put differently, the prohibition against cruel and unusual punishment found in section 12 of the *Charter* is the most relevant right to address the issue in *Sharma*.<sup>8</sup> While unclear from the lower court proceedings, the applicants likely avoided pleading this provision because of perceived doctrinal limitations, namely, the requirement that the applicant demonstrate that a person might reasonably be subjected to a *grossly* disproportionate quantum of punishment.<sup>9</sup>

The deep divide between the majority and dissent in *Sharma* is also notable because of a disagreement about the permissible scope of a constitutional bill of rights. In updating the equality test recently elucidated in *Fraser v. Canada (Attorney General)*,<sup>10</sup> the majority in *Sharma* expressly incorporated concerns relating to political process when determining whether a law violates the equality right. While the narrow dissent vehemently disagreed with this modification, I contend that the majority's approach was necessary to address the most glaring issue with the applicant's argument in *Sharma*: it permits one legislature to pass its conception of progressive legislation in a way that necessarily results in a subsequent legislature violating the right to equality when rolling back any benefits provided to a minority group. While rolling back benefits may constitute poor policy — and I am of the view that this was the case with the amendments at issue<sup>11</sup> — this cannot be enough to violate the equality right. The minority's retort that Parliament could justify its law under section 1 misses the point: Parliament is entitled to enact sentencing laws without those laws being scrutinized by courts under section 1 absent proof that the law infringes section 12 of the *Charter*.<sup>12</sup> Any other conclusion imposes a mere proportionality standard for sentencing

<sup>4</sup> Part I of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].

<sup>5</sup> See e.g. Colton Fehr, *Constitutionalizing Criminal Law* (Vancouver: UBC Press, 2022).

<sup>6</sup> *Sharma*, *supra* note 1 at para 177.

<sup>7</sup> See e.g., Jamie Cameron, "Fault and Punishment Under Sections 7 and 12 of the Charter" (2008) 40 SCLR (2d) 553 criticizing the Supreme Court's first section 7 judgment in *Reference re Section 94(2) of the Motor Vehicle Act*, [1985] 2 SCR 486.

<sup>8</sup> *Charter*, *supra* note 4, s 12.

<sup>9</sup> *R v Bissonnette*, 2022 SCC 23 at paras 61–63 [*Bissonnette*] citing *R v Smith*, [1987] 1 SCR 1045; *R v Luxton*, [1990] 2 SCR 711; *R v Ferguson*, 2008 SCC 6; *R v Nur*, 2015 SCC 15 [*Nur*]; *R v Lloyd*, 2016 SCC 13 [*Lloyd*]. To be clear, my comment here is speculative only.

<sup>10</sup> 2020 SCC 28 [*Fraser*].

<sup>11</sup> Pre-*Sharma*, see Steven Penney & Colton Fehr, "Enacting the Charter Made Us More Liberal and Less Democratic" (20 April 2022), online: <[thehub.ca/2022-04-20/opinion-enacting-the-charter-made-us-more-liberal-and-less-democratic/](https://thehub.ca/2022-04-20/opinion-enacting-the-charter-made-us-more-liberal-and-less-democratic/)>.

<sup>12</sup> *Sharma*, *supra* note 1 at paras 201–202, 245.

laws engaging equality interests when the language of section 12 of the *Charter* as interpreted by the Supreme Court is clear that the standard governing sentencing is one of gross disproportionality.<sup>13</sup>

Requiring litigants to challenge sentencing laws under section 12 of the *Charter* nevertheless raises the question: what role is there for equality when constitutionally structuring the criminal law? In my view, any concern about equality concerns being overlooked is alleviated by the fact that section 12 allows litigants to rely upon “reasonable hypothetical offenders” when determining whether a sentence constitutes grossly disproportionate punishment. As Indigenous peoples are vastly overrepresented in the Canadian criminal justice system, it follows that *R. v. Gladue*<sup>14</sup> factors must permeate every aspect of punishment analysis to determine whether a punishment is grossly disproportionate. While such an approach renders mandatory minimum punishments more vulnerable to constitutional challenge, I contend that the high bar for section 12 review must lead to the conclusion that the amendments at issue in *Sharma* were constitutional. While this approach results in what I think is a poor law remaining on the books, constitutional review requires more than evidence that a policy is “bad” to some informed citizens. The *Charter* instead must allow the scope of sentencing policy to remain reasonably broad to account for differing political opinions about the appropriate course of criminal justice. While such deference is clearly not without limits, using the equality right to read out the gross disproportionality standard swings the pendulum too far in the other direction.<sup>15</sup>

This rationale may also be used to reject an alternative constitutional argument that might serve to strike down the CSO provisions at issue in *Sharma*. In my view, the impugned provisions are inconsistent with a fundamental principle of sentencing: proportionality. This principle requires that sentencing judges give due weight to *both* the gravity of the offence and the moral blameworthiness of the offender.<sup>16</sup> The CSO provisions arguably restrict the ability of judges to comply with this fundamental principle of sentencing. The Supreme Court nevertheless rejected a similar constitutional argument less than a decade ago.<sup>17</sup> Contrary to scholarly criticisms (including my own) of that decision,<sup>18</sup> I contend that the proportionality principle in sentencing — despite being declared a fundamental principle of sentencing under section 718.1 of the *Criminal Code* — cannot qualify as a principle of fundamental justice under section 7 of the *Charter*. The Supreme Court was correct that any other conclusion would impermissibly interfere with the constitutional scope of sentencing law explicitly delineated under section 12.<sup>19</sup> Put differently, constitutionalizing the proportionality principle in sentencing would fail to leave Parliament adequate room to recalibrate sentencing law as contemplated by section 12.

<sup>13</sup> The majority does not make this point likely because the constitutional challenge was limited to challenges under sections 7 and 15 of the *Charter*. See *ibid* at para 82.

<sup>14</sup> [1999] 1 SCR 688 [*Gladue*].

<sup>15</sup> See e.g. Colton Fehr, “Tying Down the Tracks: Severity, Method, and the Text of Section 12 of the *Charter*” (2021) 25 Can Crim L Rev 235 responding to *R v Hills*, 2020 ABCA 263.

<sup>16</sup> *R v Proulx*, 2000 SCC 5 at para 83 [*Proulx*].

<sup>17</sup> *R v Safarzadeh-Markhali*, 2016 SCC 14 at paras 67–73 [*Safarzadeh-Markhali*].

<sup>18</sup> See e.g. Andrew Menchynski & Jill R Presser, “A Withering Instrumentality: The Negative Implications of *R. v. Safarzadeh-Markhali* and Other Recent Section 7 Jurisprudence” (2019) 81 SCLR (2d) 75; Fehr, *Constitutionalizing Criminal Law*, *supra* note 5 at 46–47.

<sup>19</sup> *Safarzadeh-Markhali*, *supra* note 17 at paras 67–73.

The article unfolds as follows. In Part II, I outline the legal issues in *Sharma* and the relevant disagreements between the majority and minority judgments. While the majority was correct to reject the applicant's section 15 argument, its reasoning failed to adequately engage with the relationship between the right to equality and other *Charter* rights. In Part III, I then contend that *Sharma* ought to have been resolved under section 12 of the *Charter* as that provision deals directly with the case's main concern: the appropriate quantum of punishment. Fortunately, the structure of section 12 is capable of incorporating the equality considerations at issue in *Sharma*. The fact that the law would nevertheless be upheld is not problematic as it affirms the principle that a disagreement as to the propriety of a legal policy will not always be sufficient to result in a law being unconstitutional. I conclude in Part IV by considering and rejecting an alternative constitutional argument, namely, that the CSO provisions at issue in *Sharma* violate a potential principle of fundamental justice requiring proportionality in sentencing. The rationale for rejecting this constitutional argument — that quantum of sentence is governed by section 12 of the *Charter* — applies with equal force to the equality argument put forward in *Sharma*.

## II. CONDITIONAL SENTENCE ORDERS

While the CSO laws were initially viewed as a positive innovation, subsequent Parliaments considered this sentencing option too lenient with respect to many categories of offences. This in turn served as a barrier to *Sharma* receiving a CSO. While *Sharma*'s challenge was successful at the Ontario Court of Appeal,<sup>20</sup> I contend that the majority of the Supreme Court was correct to overturn this finding. However, I maintain that the majority's reasons should have turned on the impact of any declaration of unconstitutionality on basic principles of constitutional interpretation as opposed to a finding that the evidence did not prove that the CSO amendments disproportionately impacted Indigenous offenders.

### A. LEGISLATIVE HISTORY

Up until 1996, the principles underlying sentencing in Canada were found in the common law. In an *Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*,<sup>21</sup> Parliament changed course and ushered in a complete sentencing regime to guide judges when imposing sentences. As the Supreme Court explained in *Gladue*, this legislation constituted “a watershed, marking the first codification and significant reform of sentencing principles in the history of Canadian criminal law.”<sup>22</sup> Not only did this legislation codify traditional principles of sentencing — separation, denunciation, deterrence, and rehabilitation — it also provided two innovative sentencing provisions: the CSO laws and what is now commonly referred to as the *Gladue* provision. The objectives underlying these two provisions and many other amendments contained in what is now Part XXIII of the *Criminal Code* were twofold: reducing reliance on prison as a sanction and expanding the use of restorative justice principles in sentencing.<sup>23</sup>

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<sup>20</sup> *R v Sharma*, 2020 ONCA 478 at para 186 [*Sharma* ONCA].

<sup>21</sup> SC 1995, c 22.

<sup>22</sup> *Gladue*, *supra* note 14 at para 39.

<sup>23</sup> *Ibid.* These aims were largely viewed as necessary as Canada previously was among the leaders in industrialized democracies when relying upon prison as a sanction. See *ibid* at para 52.

When first enacted, the CSO provisions found in section 742.1 of the *Criminal Code* permitted offenders to serve their term of imprisonment in the community in a broad range of circumstances. As the Supreme Court explained in *Proulx*,<sup>24</sup> only four preconditions needed to be met before a CSO would be ordered. First, the offence for which the accused was being sentenced could not impose a mandatory term of imprisonment. Second, the sentencing judge must determine that a sentence of less than two years was appropriate for the offence(s). Third, a CSO must not endanger the community based on the sentencing judge's evaluation of the offender's conduct and background. Finally, the sentencing judge must be satisfied that imposing a CSO would not be inconsistent with the fundamental purposes and principles of sentencing.<sup>25</sup> If these conditions were met, section 742.3 of the *Criminal Code* prescribed a series of mandatory<sup>26</sup> and discretionary<sup>27</sup> conditions that the sentencing judge could impose in lieu of incarceration.

While the *Gladue* provision found in section 718.2(e) of the *Criminal Code* did not create a novel sentence, it nevertheless provided valuable guidance to sentencing judges when sentencing Indigenous offenders in particular. That provision states 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."<sup>28</sup> Combined with the CSO provision's general direction to trial judges to emphasize restorative justice principles when determining if prison is an appropriate sanction, section 718.2(e) required that additional attention be given to those principles when sentencing Indigenous offenders. This direction was viewed as necessary given Canada's history of colonialism and the resulting vastly disproportionate incarceration rates of Indigenous peoples in Canadian prisons.<sup>29</sup>

Despite the open-ended wording of the CSO provision and the mandate provided under the *Gladue* provision, the Crown initially contended that a long list of crimes — such as "sexual offences against children; aggravated sexual assault; manslaughter; serious fraud or theft; serious morality offences; impaired or dangerous driving causing death or bodily harm; and trafficking or possession of certain narcotics" — inherently ought not result in a CSO.<sup>30</sup> The Supreme Court disagreed in *Proulx*. As Chief Justice Lamer explained, the Crown's "approach focuses inordinately on the gravity of the offence and insufficiently on the moral blameworthiness of the offender."<sup>31</sup> Any approach that considered only the gravity of the offence was inconsistent with the fundamental principle of sentencing requiring that all sentences be proportionate in light of *both* the gravity of the offence and the moral blameworthiness of the offender.<sup>32</sup>

Parliament responded to the Crown's failed attempt in *Proulx* to limit the circumstances in which a CSO may be ordered by passing two separate pieces of legislation. The first,

<sup>24</sup> *Supra* note 16.

<sup>25</sup> *Ibid* at para 127 (summarizing the approach for determining whether a CSO is appropriate).

<sup>26</sup> *Criminal Code*, *supra* note 2, s 742.3(a).

<sup>27</sup> *Ibid*, s 742.3(b).

<sup>28</sup> *Ibid*, s 718.2(e).

<sup>29</sup> See generally *Gladue*, *supra* note 14.

<sup>30</sup> *Proulx*, *supra* note 16 at para 80.

<sup>31</sup> *Ibid* at para 83.

<sup>32</sup> *Ibid*.

enacted in 2007, was entitled *An Act to amend the Criminal Code (conditional sentence of imprisonment)*.<sup>33</sup> It provided two additional limitations on when a CSO may be granted. First, the legislation prevented those convicted of a “serious personal injury offence” as defined in section 752 of the *Criminal Code* from receiving a CSO.<sup>34</sup> Second, the amendments prevented courts from granting a CSO if a person was convicted of “a terrorism offence or a criminal organization offence prosecuted by way of indictment for which the maximum term of imprisonment is ten years or more.”<sup>35</sup>

The second set of amendments arose from legislation passed in 2012 entitled the *Safe Streets and Communities Act*.<sup>36</sup> These amendments expanded upon the list of offences for which a CSO could not be granted. In particular, it excluded CSOs for any offence prosecuted by way of indictment “for which the maximum term of imprisonment is 14 years or life” or for which the maximum term is 10 years and “(i) resulted in bodily harm, (ii) involved the import, export, trafficking or production of drugs, or (iii) involved the use of a weapon.”<sup>37</sup> In addition, the amendments prohibited offenders convicted of a lengthy list of specific offences from being granted a CSO. These offences included prison breach,<sup>38</sup> criminal harassment,<sup>39</sup> sexual assault,<sup>40</sup> kidnapping,<sup>41</sup> trafficking in persons,<sup>42</sup> abduction of a minor,<sup>43</sup> and various property-related offences.<sup>44</sup>

## B. CONSTITUTIONAL CHALLENGE

The applicant’s challenge in *Sharma* sought to declare two restrictions on granting a CSO to be inconsistent with both sections 7 and 15 of the *Charter*. The section 7 challenge employed the overbreadth principle. For reasons I have explained elsewhere, I do not think this principle either provides a workable method of judicial review or qualifies as a principle of fundamental justice.<sup>45</sup> It is therefore more pressing to assess whether the impugned

<sup>33</sup> SC 2007, c 12 [*CSO Amendments*].

<sup>34</sup> *Criminal Code*, *supra* note 2, s 752. The term “serious personal injury offence” may be satisfied in two ways. First, if the offender’s act was an indictable offence, other than high treason, treason, first degree murder or second degree murder, involving... the use or attempted use of violence against another person, or... conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage on another person, and for which the offender may be sentenced to imprisonment for ten years or more.

Alternatively, a serious personal injury offence occurs if an offender commits or attempted to commit an indictable offence under “section 271 (sexual assault), 272 (sexual assault with a weapon, threats to a third party or causing bodily harm) or 273 (aggravated sexual assault).”

<sup>35</sup> *CSO Amendments*, *supra* note 33, s 1.

<sup>36</sup> SC 2012, c 1 [*SSCA*].

<sup>37</sup> *Ibid*, s 34.

<sup>38</sup> *Criminal Code*, *supra* note 2, s 144.

<sup>39</sup> *Ibid*, s 264.

<sup>40</sup> *Ibid*, s 271.

<sup>41</sup> *Ibid*, s 279.

<sup>42</sup> *Ibid*, s 279.02.

<sup>43</sup> *Ibid*, s 281.

<sup>44</sup> *Ibid*, s 333.1 (motor vehicle theft), s 334(a) (theft over \$5000), s 348(1)(e) (breaking and entering a place other than a dwelling-house), s 349 (being unlawfully in a dwelling-house), and s 435 (arson for fraudulent purpose).

<sup>45</sup> Colton Fehr, “Re-thinking the Instrumental Rationality Principles of Fundamental Justice” (2020) 58:1 *Alta L Rev* 133; Fehr, *Constitutionalizing Criminal Law*, *supra* note 5 at 72–75; Colton Fehr, “Vaccine Passports and the Charter: Do They Actually Infringe Rights?” (2022) 43 *NJCL* 95 at 109–13. With that said, I appreciate the commentary from Judge Gorman in *R v Tucker-Merry*, 2022 CanLII 106404 (NLPC) at paras 36–40. He expresses disagreement with my remarks and correctly notes that the Supreme Court continues to apply the overbreadth principle. I respectfully suggest that the full scope of my argument was not considered by Judge Gorman. Nor has my argument received mention at

restrictions on granting CSOs violated the right more fervently argued in *Sharma*: the right to equality.<sup>46</sup>

## 1. THE RIGHT TO EQUALITY

Section 15 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.”<sup>47</sup> The purpose of the right is to ensure “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.”<sup>48</sup> The provision requires the applicant to prove 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.”<sup>49</sup> The two stages of the equality analysis are not “impermeable silos” given the fact that each stage considers the impact of the law on the protected group.<sup>50</sup> The analysis under each stage must nevertheless not be collapsed as each stage asks “fundamentally different questions.”<sup>51</sup>

At the first stage, laws are frequently challenged on the basis of “adverse effects” discrimination.<sup>52</sup> This form of discrimination arises “when a seemingly neutral law has a disproportionate impact on members of groups protected on the basis of an enumerated or analogous ground.”<sup>53</sup> Such an analysis necessarily requires comparing the impact of the law on the claimant group and demonstrating a disproportionate impact when compared to non-group members.<sup>54</sup> As the majority confirmed in *Sharma*, “leaving a gap between a protected group and non-group members *unaffected* does not infringe s. 15(1).”<sup>55</sup> On the other hand, it is not necessary for the applicant to show that the law or state action was the only cause of the inequality. Instead, the law or state action need only create or contribute to the unequal effect.<sup>56</sup> Although this may be proven in different ways, evidence of the “situation of the

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appellate courts (likely because no Crown representative has raised the view). In effect, the Supreme Court failed to establish that the “reasonably necessary” approach to overbreadth (what I call the “holistic approach”) is at all distinguishable from the minimal impairment branch of the section 1 test. As proportionality in the *R v Oakes*, [1986] 1 SCR 103, sense is not itself a principle of fundamental justice, I fail to see how the Supreme Court’s “reasonably necessary” conception of overbreadth meets the requirements for qualifying as a principle of fundamental justice. While the “individualistic approach” adopted in *Canada (Attorney General) v Bedford*, 2013 SCC 72 [*Bedford*], purported to allow for a breach of fundamental justice if a law impacted even a single person’s life, liberty, or security interests in an illogical manner, I fail to see how such a broad principle would attract adequate societal consensus to qualify as a principle of fundamental justice. For a similar argument, see *R v Michaud*, 2015 ONCA 585 at paras 146–54.

<sup>46</sup> Notably, the applicant abandoned the section 7 challenge at trial, only to renew the challenge at the Ontario Court of Appeal and Supreme Court of Canada. In my view, the main focus throughout the proceeding at each level of court was on the equality right.

<sup>47</sup> *Charter*, *supra* note 4, s 15.

<sup>48</sup> *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 171 [*Andrews*].

<sup>49</sup> *Sharma*, *supra* note 1 at para 27 citing *R v CP*, 2021 SCC 19 at paras 56, 141; *Fraser*, *supra* note 10 at para 27; *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at paras 19–20 [*Taypotat*].

<sup>50</sup> *Fraser*, *ibid* at para 82.

<sup>51</sup> *Sharma*, *supra* note 1 at para 30.

<sup>52</sup> This was the case in *Sharma*.

<sup>53</sup> *Fraser*, *supra* note 10 at para 30.

<sup>54</sup> *Sharma*, *supra* note 1 at para 31 citing *Andrews*, *supra* note 48 at 164.

<sup>55</sup> *Sharma*, *supra* note 1 at para 40 [emphasis in original].

<sup>56</sup> *Ibid* at para 45.

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 germane to the analysis.<sup>57</sup> While it is ideal for adverse impact claims to be supported by both types of evidence, this is not a strict requirement.<sup>58</sup> Similarly, while evidence of “statistical disparity and of broader group disadvantage” may prove useful, this type of evidence is not mandatory and its significance may vary.<sup>59</sup>

At the second stage, the applicant must demonstrate that the law or state action imposes burdens or denies benefits in a way that reinforces, perpetuates, or exacerbates a disadvantage.<sup>60</sup> In making this determination, it is imperative that the courts understand the systemic or historical disadvantage of the claimant group.<sup>61</sup> With such knowledge, courts are well-situated to assess whether the law reinforces, perpetuates, or exacerbates a disadvantage by assessing several factors: arbitrariness, prejudice, and stereotyping.<sup>62</sup> While these are not necessary components for proving a breach, they are useful in demonstrating that a law negatively effects a particular group.<sup>63</sup> A law will have an arbitrary effect if it “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.”<sup>64</sup> For a law or state action to prejudice the claimant, it must further or reinforce negative ideas about a person because they belong to a protected group.<sup>65</sup> Finally, stereotyping occurs where government action disadvantages the applicant “based on a stereotype that does not correspond to the[ir] actual circumstances and characteristics.”<sup>66</sup>

Courts must also consider the legislative context in determining whether a distinction is discriminatory.<sup>67</sup> As the Supreme Court held in *Withler*,<sup>68</sup> the analysis at the second stage must consider “the full context of the claimant group’s situation and the actual impact of the law on that situation.”<sup>69</sup> As the constitutionally impinged provision is often part of a larger legislative scheme, the Supreme Court in *Withler* confirmed that the broader scheme and purpose of the Act must be accounted for in the equality analysis and the “ameliorative effect of the law on others and the multiplicity of interests it attempts to balance will also colour the discrimination analysis.”<sup>70</sup> In so doing, it is necessary to consider “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.”<sup>71</sup> The multitude of considerations applicable in the law of sentencing in particular requires that courts pay close attention to the broader purposes of sentencing, “including rehabilitation, denunciation and deterrence, reparations to victims,

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<sup>57</sup> *Fraser*, *supra* note 10 at paras 57–58.

<sup>58</sup> *Ibid* at paras 60–61.

<sup>59</sup> *Ibid* at para 66.

<sup>60</sup> *Sharma*, *supra* note 1 at para 31.

<sup>61</sup> *Ibid* at para 52.

<sup>62</sup> *Ibid* at para 53.

<sup>63</sup> *Fraser*, *supra* note 10 at para 78.

<sup>64</sup> *Taypotat*, *supra* note 49 at para 20.

<sup>65</sup> *Sharma*, *supra* note 1 at para 53.

<sup>66</sup> *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 36 [*Withler*].

<sup>67</sup> *Sharma*, *supra* note 1 at para 56.

<sup>68</sup> *Supra* note 66.

<sup>69</sup> *Ibid* at para 43.

<sup>70</sup> *Ibid* at paras 3, 38.

<sup>71</sup> *Sharma*, *supra* note 1 at para 59.



separation from society, and the principle of restraint in s. 718.2(e).<sup>72</sup> In so doing, courts must also be mindful of the fact that Parliament cannot be constitutionally bound by its past policy choices. Instead, “sentencing legislation must be assessed on its own to determine whether it is constitutionally compliant, without having regard to the prior legislative scheme.”<sup>73</sup>

The Supreme Court in *Sharma* also confirmed that section 15 of the *Charter* does not impose a positive duty on the state to remedy inequalities or enact remedial legislation, nor does it bind legislatures to current policies.<sup>74</sup> Any other conclusion “would be impermissibly pulled into the complex legislative domain of policy and resource allocation, contrary to the separation of powers.”<sup>75</sup> Moreover, when the state does legislate with respect to equality considerations, it is under no duty to fully address inequality in any particular area. Instead, the state may choose to address inequality with incremental steps.<sup>76</sup> As the Supreme Court concluded in *McKinney v. University of Guelph*,<sup>77</sup> legislatures “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.”<sup>78</sup> It follows that 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.”<sup>79</sup>

## 2. APPLICATION IN *SHARMA*

Cheyenne Sharma is an Indigenous woman of Ojibwa ancestry and a member of the Saugeen First Nation. As a result of financial struggles, she agreed to import nearly two kilograms of cocaine into Canada.<sup>80</sup> During her sentencing hearing, the sentencing judge was provided with what is commonly known as a “Gladue Report.” These reports provide individualized and communal context for sentencing judges when sentencing Indigenous offenders.<sup>81</sup> The report revealed that Sharma endured “a life of significant hardship and intergenerational trauma.”<sup>82</sup> She had lost her father and became addicted to alcohol at a young age, was sexually assaulted, and worked in the sex work industry during her teenage years.<sup>83</sup> Sharma had also become a single mother when she was 17 years old, had minimal access to support networks, and feared homelessness for both her and her child at the time of her offence.<sup>84</sup> The Gladue Report also revealed that Sharma’s grandmother was a

<sup>72</sup> *Ibid* at para 60.

<sup>73</sup> *Ibid* at para 61.

<sup>74</sup> *Ibid* at para 63 citing *Thibaudeau v Canada*, [1995] 2 SCR 627 at para 37; *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at para 73; *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, 2004 SCC 78 at para 41; *Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 at para 42.

<sup>75</sup> *Sharma*, *supra* note 1 at para 63.

<sup>76</sup> *Ibid* at paras 64–65.

<sup>77</sup> [1990] 3 SCR 229.

<sup>78</sup> *Ibid* at 317.

<sup>79</sup> *Ibid* at 318.

<sup>80</sup> See *Sharma*, *supra* note 1 at para 5.

<sup>81</sup> See e.g., Jonathan Rudin, “Aboriginal Over-Representation and *R. v. Gladue*: Where We Were, Where We Are and Where We Might Be Going” (2008) 40 SCLR (2d) 687 at 704–706.

<sup>82</sup> *Sharma*, *supra* note 1 at para 6.

<sup>83</sup> *Ibid* at para 121.

<sup>84</sup> *Ibid* at para 6.

residential school survivor, her mother spent time in foster care, and that Sharma dropped out of school for economic reasons.<sup>85</sup> Despite enduring these conditions, Sharma did not have a criminal record at the time of her offence.<sup>86</sup>

In her dissenting reasons, Justice Karakatsanis observed a painful truth: the tragedy of Sharma's circumstances is exacerbated by the fact that they are not unique.<sup>87</sup> As she observes, "[c]olonialism continues to engender longstanding, pervasive and persistent evils for Canada's Indigenous population, with roots as deep as its effects have been broad."<sup>88</sup> It is for this reason that it is imperative for courts to continue taking "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."<sup>89</sup> Despite efforts to address these issues, incarceration rates have persistently and substantially worsened over the last several decades giving rise to what at minimum must be described as a "crisis in the Canadian criminal justice system."<sup>90</sup>

Despite this context, the Crown prosecutor in *Sharma* provided a notice of intent to seek greater punishment under section 8 of the *Controlled Drugs and Substances Act*.<sup>91</sup> Given the significant quantity of drugs imported, the Crown additionally sought a six-year term of imprisonment which was consistent with the jurisprudence for the type of offence committed.<sup>92</sup> Notably, this sentence was substantially higher than the two-year mandatory minimum term of imprisonment applicable to Sharma set out in section 6(3)(a.1) of the *CDSA*. The fact that the sentence was for a mandatory period also ruled out the possibility of a CSO,<sup>93</sup> as did the fact that the mandatory sentence was for a duration too long to qualify for a conditional sentence.<sup>94</sup> The maximum available penalty being 14 years or higher also provided a barrier to Sharma qualifying for a conditional sentence.<sup>95</sup> Similarly, the prohibition on granting CSOs where the maximum term is 10 years and involved importing drugs continued to prohibit Sharma from receiving a CSO.<sup>96</sup>

In light of Sharma's constitutional challenge of the two-year mandatory minimum, the Crown's sentencing position softened considerably. It decided to unilaterally rescind its notice of intent to seek greater punishment, thereby resulting in the mandatory minimum sentence of imprisonment no longer being applicable to Sharma.<sup>97</sup> In addition, the Crown subsequently sought only an 18-month term of imprisonment rendering the possibility of a

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<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid* at para 5.

<sup>87</sup> *Ibid* at para 122.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid* citing *R v Ipeelee*, 2012 SCC 13 at para 60 [*Ipeelee*].

<sup>90</sup> *Sharma*, *supra* note 1 at paras 123–28, 142 for Justice Karakatsanis' stark review of the relevant statistics. See also *Gladue*, *supra* note 14 at para 64; *Ipeelee*, *ibid* at para 62; Jonathan Rudin, "Addressing Aboriginal Overrepresentation Post-*Gladue*: A Realistic Assessment of How Social Change Occurs" (2009) 54:4 *Crim LQ* 447 at 452.

<sup>91</sup> SC 1996, c 19 [*CDSA*].

<sup>92</sup> *R v Sharma*, 2018 ONSC 1141 at paras 31, 35, 73-83 [*Sharma* ONSC] citing *R v Cunningham* (1996), 27 OR (3d) 786 (CA) [*Cunningham*]; *R v Madden* (1996), 27 OR (3d) 640 (CA) [*Madden*].

<sup>93</sup> *Criminal Code*, *supra* note 2, s 742.1(b).

<sup>94</sup> *Ibid*, s 742.1.

<sup>95</sup> *Ibid*, s 742.1(c); *CDSA*, *supra* note 91, s 6(3)(a.1).

<sup>96</sup> *Criminal Code*, *supra* note 2, s 742.1(e)(ii).

<sup>97</sup> *Sharma*, *supra* note 1 at para 16.

sentence of anything higher unlikely in the circumstances.<sup>98</sup> The possibility of a two-year sentence therefore no longer provided a realistic barrier for Sharma receiving a CSO. This left the prohibition against receiving a CSO for indictable offences that come with the possibility of a sentence of 14 years or more and the prohibition against awarding CSOs for drug offences with a maximum penalty of ten years or more as the objects of constitutional challenge.<sup>99</sup>

The majority concluded that the applicant's equality challenge failed the first step of the section 15 analysis given an absence of statistical information proving that the legislation resulted in a constitutionally relevant distinction.<sup>100</sup> In the majority's view, the Ontario Court of Appeal erred by collapsing the two steps of the equality inquiry. In so doing, it concluded that broad evidence of historic disadvantage was sufficient to establish that the law would have a disparate effect on Indigenous peoples.<sup>101</sup> The focus at the first stage, however, is on the impact of the law, not the existence of historic or systemic disadvantage.<sup>102</sup> While the evidentiary burden at the first stage is not meant to be onerous, evidence must exist to establish that the impugned law created a distinction based on an enumerated or analogous ground.<sup>103</sup> The main expert witness called to testify for the applicant nevertheless found that it was "unknown if [the] recent statutory amendments that have restricted the use of conditional sentences may affect Aboriginal offenders disproportionately compared to non-Aboriginal offenders."<sup>104</sup>

Writing in dissent, Justice Karakatsanis concluded that "[r]emoving 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."<sup>105</sup> For the minority, "[t]his 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."<sup>106</sup> While the impugned amendments applied to all people, they also "undermined the specific accommodation offered by s. 718.2(e): that is, a different sentencing methodology that was animated by [Indigenous peoples'] unique needs and circumstances as Indigenous people."<sup>107</sup> For this reason, the amendments "more acutely affected Indigenous offenders than it did others, creating a differential impact on a group based on race."<sup>108</sup>

In my view, the conclusion that the CSO provisions failed the first step of the equality analysis is suspect. By virtue of enacting section 718.2(e), Parliament clearly and correctly took the view that the criminal law, in general, more acutely impacts Indigenous people. This truth is no less evident today than it was when the sentencing provisions were first codified.

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<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid* at paras 15–20.

<sup>100</sup> *Ibid* at para 67 citing *Sharma* ONSC, *supra* note 92 at para 257.

<sup>101</sup> *Sharma*, *supra* note 1 at para 69.

<sup>102</sup> *Ibid* at para 71.

<sup>103</sup> *Ibid* at para 69.

<sup>104</sup> *Ibid* at para 74. The Supreme Court notes at para 76 that the defendant "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."

<sup>105</sup> *Ibid* at para 211.

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid* at para 223.

<sup>108</sup> *Ibid.*

It therefore takes little imagination to conclude that Indigenous peoples are much more likely than other groups of offenders to not qualify for a CSO as a result of the impugned amendments. Put differently, their vast overrepresentation in the criminal justice system renders it likely that Indigenous people will be impacted to a much greater extent than other minority groups.

The applicant's claim nevertheless faces a much more formidable obstacle at the second stage of the equality analysis. While the majority did not explicitly apply this step, it was implicit in its judgment that it agreed with Justice Miller's dissenting reasons at the Ontario Court of Appeal that the legislative context necessarily excluded any finding that the law violated the second requirement for proving a breach of the equality right.<sup>109</sup> The majority's brief reasons are worth quoting in full:

[A]lthough 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)”... 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.<sup>110</sup>

The minority retorted that this “argument conflates form and effects.”<sup>111</sup> In its view, “Parliament's choices are always subject to the Constitution, including its choices to amend or repeal legislation.”<sup>112</sup> As a result, “[i]f 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.”<sup>113</sup> Citing the Supreme Court's recent judgment in *R. v. Chouhan*,<sup>114</sup> the minority opines that the constitutional problem arises “not because the statutory provisions themselves are constitutionally protected,” but “because their repeal or modification gives rise to unconstitutional effects.”<sup>115</sup> The minority instead would consider the state's policy objectives for amending or repealing ameliorative legislation at the section 1 stage of the analysis.<sup>116</sup>

While the minority is correct that legislative amendments are not immune from constitutional scrutiny, courts should be careful about lumping all types of amendments into the same category. Where a revision merely narrows a previously granted benefit, concerns about the structure of constitutional democracy cannot be discarded as “conflat[ing] form and

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<sup>109</sup> *Ibid* at para 82.

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid* at para 200.

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.*

<sup>114</sup> 2021 SCC 26 [*Chouhan*].

<sup>115</sup> *Sharma*, *supra* note 1 at para 200, citing *Chouhan*, *ibid* at para 145.

<sup>116</sup> *Ibid* at paras 201–203.

effects.”<sup>117</sup> The CSO legislation, if originally passed in its present form, would not be subject to constitutional scrutiny for its impact on the equality rights of Indigenous peoples. It is only because this legislation was initially passed more broadly and subsequently narrowed that an unconstitutional effect allegedly arises. In effect, then, the minority’s interpretation of section 15 *does* constitutionalize the original legislation, as Parliament’s only recourse in rolling back the previously provided benefit is to concede a section 15 breach and offer policy justifications under section 1 of the *Charter*.

The minority’s suggestion that its approach is not concerning as any repealing legislation might still be justified under section 1 is also unpersuasive. While section 1 forms part of the *Charter*, requiring Parliament to justify its sentencing laws circumvents the actual provision designed to govern quantum and method of punishment: the prohibition against “cruel and unusual punishment” enumerated in section 12 of the *Charter*.<sup>118</sup> As I explain in more detail below, section 12 prohibits imposing *grossly* disproportionate punishment or utilizing any method of punishment that undermines human dignity interests.<sup>119</sup> As the method of punishment (imprisonment) does not undermine human dignity, the central issue in *Sharma* should have been whether the quantum of sentence was grossly disproportionate. That question is sidestepped by requiring the *state* to demonstrate that its legislation is not disproportionate — a much lower standard — under section 1 of the *Charter*. This is likely what the majority meant when it said that the minority’s approach “would amount to a transfer of sentencing policy-making from Parliament to judges.”<sup>120</sup>

### III. PLEADING THE WRONG RIGHT

The foregoing analysis raises the question: why was section 12 of the *Charter* not used in *Sharma* when considering the constitutionality of the CSO provisions? While there is not a hierarchy of rights in the *Charter*,<sup>121</sup> my recent scholarship has explored whether there may be reasons to prefer certain rights when constitutionally challenging a criminal law. This critique takes its cue from a peculiar feature of *Charter* history in criminal law: the Supreme Court’s strong preference for employing section 7 over any other right.<sup>122</sup> In my work, I have contended that section 7 ought to be relegated to a “gap-filling” role with other specifically enumerated rights taking on a lead role in constitutionally structuring the criminal law.<sup>123</sup> The *Sharma* case nevertheless raises additional questions: should counsel be asked to employ the right(s) most directly related to the law’s impact on their person? If so, how would this impact the ability of the law to engage with equality issues? As equality considerations can be included within the punishment analysis, I contend that future litigants should generally plead constitutional challenges to punishments under section 12.

<sup>117</sup> *Ibid* at para 200.

<sup>118</sup> *Charter*, *supra* note 4, s 12.

<sup>119</sup> *Bissonnette*, *supra* note 9 at para 64.

<sup>120</sup> *Sharma*, *supra* note 1 at para 82.

<sup>121</sup> *Dagenais v Canadian Broadcasting Corp.* [1994] 3 SCR 835 at 877 (“[a] hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the *Charter* and when developing the common law”).

<sup>122</sup> Fehr, *Constitutionalizing Criminal Law*, *supra* note 5 at 138.

<sup>123</sup> *Ibid* at 140–41.

## A. CHOOSING AMONG RIGHTS

Section 7 of the *Charter* 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.”<sup>124</sup> During the early *Charter* years, the Supreme Court used the concept of “fundamental justice” to constitutionalize myriad principles of criminal law theory such as those imposing physical voluntariness,<sup>125</sup> moral involuntariness,<sup>126</sup> and proportionality between fault and stigma requirements.<sup>127</sup> Subsequently, the Supreme Court pivoted away from constitutionalizing principles of criminal law theory and instead began relying upon various principles of means-ends or “instrumental rationality” as the dominant method for constitutionally structuring the criminal law.<sup>128</sup> These principles — arbitrariness, overbreadth, and gross disproportionality — generally require that all laws that engage an individual’s life, liberty, or security of the person not impact those interests in an illogical or harsh manner.<sup>129</sup>

More recently, scholars have sought to shift away from employing section 7 of the *Charter* and instead utilize section 15 as the primary means for structuring the criminal law.<sup>130</sup> As Jonathan Rudin puts it, employing the equality right “tells it like it is.”<sup>131</sup> In his view, employing classical liberal rights can serve to mask “the reality of the disparate impact of criminal law on vulnerable groups.”<sup>132</sup> Similarly, Maneesha Deckha observes that employing the equality right “can shine a much needed spotlight on systemic[ally] disadvantage[d] [peoples].”<sup>133</sup> According to this view, focusing on the way a law impacts the liberty or security interests of a person or the fact that a law is inconsistent with a principle of criminal law theory glosses over the “on the ground impact” of the criminal law. Relying upon equality when challenging the constitutionality of a criminal law can therefore be expected to dramatically impact debates in Parliament and broader society about how to respond to judicial decisions concerning the criminal law’s impact on minorities.<sup>134</sup>

In a recent book, I contend that the dominant role carved out for section 7 of the *Charter* when structuring the criminal law is unwarranted. The reason for this is simple: courts act more legitimately when they strike down a law using a specifically enumerated right rather than a vague concept such as fundamental justice.<sup>135</sup> While section 7 is also technically enumerated in the *Charter*, the idea is that the other rights provisions clearly communicate

<sup>124</sup> *Charter*, *supra* note 4, s 7.

<sup>125</sup> *R v Daviault*, [1994] 3 SCR 63.

<sup>126</sup> *R v Ruzic*, 2001 SCC 24.

<sup>127</sup> *R v Vaillancourt*, [1987] 2 SCR 636.

<sup>128</sup> *Bedford*, *supra* note 45 at para 107.

<sup>129</sup> *Ibid* at paras 111–23.

<sup>130</sup> See e.g., Jonathan Rudin, “Tell It Like It Is: An Argument for the Use of Section 15 Over Section 7 to Challenge Discriminatory Criminal Legislation” (2017) 64:3&4 Crim LQ 317 [Rudin, “Criminal Legislation”]; Jennifer Koshan, “Redressing the Harms of Government (In)Action: A Section 7 Versus Section 15 *Charter* Showdown” (2013) 22:1 Const Forum Const 31; Elizabeth Sheehy, “Equality and Supreme Court Criminal Jurisprudence: Never the Twain Shall Meet” (2010) 50 SCLR (2d) 1.

<sup>131</sup> Rudin, “Criminal Legislation,” *ibid* at 317.

<sup>132</sup> *Ibid* at 317–18, 324.

<sup>133</sup> Maneesha Deckha, “A Missed Opportunity: Affirming the Section 15 Equality Argument Against Physician-Assisted Death” (2016) 10 McGill JL & Health S69 at S73.

<sup>134</sup> Rudin, “Criminal Legislation,” *supra* note 130 at 331–32. See also Christine Boyle, “The Role of Equality in Criminal Law” (1994) 58:1 Sask L Rev 207; Rosemary Cairns Way, “Attending to Equality: Criminal Law, the *Charter* and Competitive Truths” (2012) 57 SCLR (2d) 40.

<sup>135</sup> Fehr, *Constitutionalizing Criminal Law*, *supra* note 5, ch 1, 5.

(as far as constitutional provisions go) a right that the polity agreed warrants protection.<sup>136</sup> The open-ended concept of “fundamental justice” does not. Instead, it allows courts to invoke their preferred conception of justice when striking down a law. While the polity also agreed to include this right in the *Charter*, I maintain that the greater legitimacy inherent in employing a specifically enumerated right weighs heavily in favour of relegating the concept of fundamental justice to a “gap filling” role. Put differently, section 7 should only be used in cases where a law is truly unjust but could not be struck down using specifically enumerated rights.<sup>137</sup>

As for the right to equality, I agree that this right should be utilized when the facts of the case fits within the confines of the Supreme Court’s legal test, a test that was appropriately tempered in *Sharma* by broader principles of constitutionalism.<sup>138</sup> In addition to possessing greater legitimacy by virtue of being specifically enumerated, I think equality as a right can often speak differently and more directly to the impact of a criminal law than traditional liberal principles of constitutional law such as freedom of expression or the presumption of innocence.<sup>139</sup> The equality right also speaks much differently and more profoundly than when courts use the instrumental rationality principles of fundamental justice to strike down a law. Concluding that a law is unconstitutional because its means and ends are not adequately aligned permits the legislature to respond in a broad variety of ways as the constitutional defect derives from the unique balancing of means and ends in that particular case. As experience demonstrates with laws governing sex work,<sup>140</sup> euthanasia,<sup>141</sup> and solitary confinement,<sup>142</sup> Parliament can respond by slightly altering the means or ends of the law without doing much to address the constitutional harms at issue.<sup>143</sup> I therefore agree with the commentators cited earlier that employing the right to equality can provide more meaningful guidance for legislatures crafting reply laws.<sup>144</sup>

<sup>136</sup> Centre for Constitutional Studies, “Book Launch: *Constitutionalizing Criminal Law*, by Colton Fehr” (17 October 2022) at 00h:43m:38sff, online (video): <[www.youtube.com/watch?v=vn2l\\_UJNnEo](http://www.youtube.com/watch?v=vn2l_UJNnEo)>. I thank Eric Adams for pushing me to clarify what I meant by “enumerated right.”

<sup>137</sup> Fehr, *Constitutionalizing Criminal Law*, *supra* note 5, ch 5. Notably, my argument is more complicated as it also considers institutional capacity arguments. In short, it is unlikely that generalist apex courts — at least based on the Supreme Court of Canada’s experience — will be capable of constitutionalizing a coherent theory of criminal law. See ch 2.

<sup>138</sup> *Ibid*, ch 4. See also Part II.B.2, above.

<sup>139</sup> *Charter*, *supra* note 4, ss 2(b), 11(d).

<sup>140</sup> *Protection of Communities and Exploited Persons Act*, SC 2014, c 25 [PCEPA] in response to *Bedford*, *supra* note 45. Numerous commentators contended that the PCEPA did not address the issues raised in *Bedford*. See e.g. Ella Bedard, “The Failures of Canada’s New Sex Work Legislation,” *Rank and File* (7 April 2015), online: <[rankandfile.ca/the-failures-of-canadas-new-sex-work-legislation/](http://rankandfile.ca/the-failures-of-canadas-new-sex-work-legislation/)>; Mike Blanchfield, “Supreme Court Strikes Down Canada’s Anti-Prostitution Laws as Charter Breach” *Global News* (20 December 2013), online: <[globalnews.ca/news/1042861/supreme-court-strikes-down-canadas-anti-prostitution-laws/](http://globalnews.ca/news/1042861/supreme-court-strikes-down-canadas-anti-prostitution-laws/)>; Chris Bruckert, “*Protection of Communities and Exploited Persons Act*: Misogynistic Law Making in Action” (2015) 30:1 CJLS 1 at 1–3; Leah Horlick, “Bill C-36: Two Steps Back” (2014) 48 Can Dimension 11; Natalie M Snow, Mollie K Steely & Tusty ten Bensel, “The Right to Life, Liberty and Security for Prostitution: *Canada v. Bedford*” (2020) *Women & Crim Justice* 1; Paula Simons, “Proposed Bill ‘Is Going to Be a Disaster’; New Law Would Make Sex World More Dangerous” *Edmonton Journal* (7 June 2014); Michael Den Tandt, “Tories Makes a Hash of New Prostitution Bill; Bill C-36 Can Only Put Sex Workers at Greater Risk” *Montreal Gazette* (6 June 2014).

<sup>141</sup> Fehr, *Constitutionalizing Criminal Law*, *supra* note 5 at 120–22, citing *An Act to Amend the Criminal Code and to Make Related Amendments to Other Acts (Medical Assistance in Dying)*, SC 2016, c 3; *Carter v Canada (Attorney General)*, 2015 SCC 5.

<sup>142</sup> Fehr, *Constitutionalizing Criminal Law*, *ibid* at 125–26, citing *An Act to amend the Corrections and Conditional Release Act and another Act*, SC 2019, c 27, passed in response to *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2019 BCCA 228; *Canadian Civil Liberties Association v Canada (Attorney General)*, 2019 ONCA 243.

<sup>143</sup> Fehr, *Constitutionalizing Criminal Law*, *ibid*, ch 3.

<sup>144</sup> *Ibid*.

While I think equality is often a preferable right to engage the constitutionality of criminal laws that directly impact minority interests, I nevertheless disagree with the dissent's statement in *Sharma* that the majority's approach effectively "withdraw[s] a category of state actions — such as those repealing or amending existing ameliorative policies — from *Charter* scrutiny."<sup>145</sup> Those laws are not removed from *Charter* scrutiny just because the *means* by which they are challenged are affected. Put differently, just because one right cannot feasibly be pleaded by the applicant in a given circumstance does not mean other rights that also consider values underlying the right to equality may not be employed in its place.<sup>146</sup> In the context of *Sharma*, I contend below that nothing in the majority's reasons prevented the law from being constitutionally scrutinized in a manner that is sensitive to the legitimate equality claims at issue under the provision most directly relevant to whether a quantum of sentence is constitutional: section 12 of the *Charter*.

## B. SECTION 12 OF THE *CHARTER*

The prohibition against cruel and unusual punishment found in section 12 of the *Charter* protects offenders from two types of punishments: any quantum of punishment that is grossly disproportionate to an otherwise just sentence and any method of punishment that undermines human dignity.<sup>147</sup> As the use of imprisonment does not undermine human dignity, the path for constitutionally impinging the restrictions on the CSOs at issue in *Sharma* requires the offender to demonstrate that a sentence results in a grossly disproportionate sentence as applied to a hypothetical offender.<sup>148</sup> The justification for imposing this high standard is simple: it accounts for the fact that people in a constitutional democracy will reasonably disagree on the appropriate punishment for many criminal offences. Legislatures therefore must be given significant latitude in providing a framework for determining what qualifies as an appropriate sentence. As sentencing law inherently provides judges with significant discretion — with each provincial appellate court capable of exercising that discretion differently<sup>149</sup> — Parliament necessarily must observe trends in sentencing jurisprudence to correct them where it deems necessary. Presumably, the election of the Conservatives in 2006 provided the impetus for the criminal justice reforms at issue in *Sharma* given the latter government's notorious "tough on crime" stance.

The *Sharma* case nevertheless directly raises an important consideration in determining the amount of discretion Parliament ought to be afforded when crafting one-size-fits-all sentencing laws. While the Supreme Court allows applicants to develop "reasonable hypothetical offenders" when considering whether a punishment is grossly disproportionate,<sup>150</sup> it had not, until after *Sharma* was decided, explained what weight the impact of a law on minority groups ought to be given in the gross disproportionality calculus. This is likely because the Supreme Court's analysis in pre-*Sharma* cases determining

<sup>145</sup> *Sharma*, *supra* note 1 at para 245.

<sup>146</sup> This idea is influenced by Peter Hogg's understanding of equality as a "constitutional value." See e.g. Peter W Hogg, "Equality as a Charter Value in Constitutional Interpretation" (2003) 20 SCLR (2d) 113.

<sup>147</sup> *Bissonnette*, *supra* note 9 at 64.

<sup>148</sup> For a detailed review of the law permitting use of "reasonable hypothetical offenders" under section 12 of the *Charter*, see *Nur*, *supra* note 9 at paras 47–77.

<sup>149</sup> The Supreme Court rarely, if ever, interferes with the quantum of sentence imposed in an individual case.

<sup>150</sup> *Nur*, *supra* note 9 at paras 47–77.



whether a mandatory minimum punishment violates section 12 of the *Charter* glossed over the fact that sentencing laws impact minority populations more acutely.<sup>151</sup> Thankfully, the Supreme Court's very recent post-*Sharma* jurisprudence has now explained how such considerations ought to impact the sentencing analysis.<sup>152</sup> In my view, this will lead to the salutary effect of the history of colonialism strongly mitigating the appropriate sentence of the "reasonable hypothetical offender." This in turn will render mandatory minimum sentences even more likely to constitute grossly disproportionate punishment. This bolsters the Supreme Court's prudent suggestion that Parliament should "build a safety valve that would allow judges to exempt outliers for whom the mandatory minimum will constitute cruel and unusual punishment."<sup>153</sup>

The fact that the *Sharma* case does not involve a mandatory minimum sentence nevertheless provides important context for considering whether the impugned CSO provisions are consistent with section 12 of the *Charter*. As mentioned earlier, these laws instead provide that an offence that warranted a prison sentence — as is necessarily the case with anyone granted a CSO<sup>154</sup> — cannot be served in the community. The fact that this provision will necessarily impact many Indigenous peoples must animate the constitutional analysis. Yet so must the fact that the offender — after considering *Gladue* factors — will necessarily be determined to warrant a sentence of imprisonment. The mere fact that a sentence can no longer be served in the community when it is otherwise deserving of incarceration may seem imprudent to some, but such a result does not strike me as the type of punishment that would broadly shock the conscience of the community even when applied to minority groups. Instead, such a sentence more likely falls within the category of sentences with which a democratic society can reasonably express divergent views.

Viewing the CSO provisions at issue in *Sharma* through the lens of section 12 of the *Charter* can help illustrate why the law did not impact Cheyenne Sharma in a grossly disproportionate manner. To begin, it is important that those provisions did not prevent *Gladue* factors from significantly impacting Sharma's sentence. As I detailed earlier, the typical sentence for a first-time offender importing the amount and type of drugs imported by Sharma was six years.<sup>155</sup> The Crown ultimately lowered the sentence it was seeking to 18-months imprisonment because of *Gladue* factors. It nevertheless refused to go further and allow Sharma to serve her sentence in the community. While some judges were of the view that a CSO was warranted,<sup>156</sup> it is likely that other judges would not endorse an offender receiving such a sentence given the severe harm importing the quantity of drugs at issue in *Sharma* does to the community. Absent counsel devising an alternative reasonable hypothetical offender who would be in a more sympathetic position than Sharma — a task

<sup>151</sup> See most recently *Nur*, *ibid* at paras 78–106 (relying upon an offender who incorrectly registered their firearm and were subsequently subject to a three-year mandatory minimum sentence); *Lloyd*, *supra* note 9 at paras 29–33 (while the "reasonable hypothetical offender" analysis directly considered how a mandatory minimum sentence for trafficking drugs impacted drug addicts, the analysis ought to have gone further and also recognized that such an offender is far more likely to belong to a minority group). See also Sarah Chaster, "Cruel, Unusual, and Constitutionally Infirm: Mandatory Minimum Sentences in Canada" (2018) 23 *Appeal* 116.

<sup>152</sup> See Justice Martin's persuasive reasons in *R v Hills*, 2023 SCC 2 at paras 84–92.

<sup>153</sup> *Lloyd*, *supra* note 9 at para 36.

<sup>154</sup> See generally *Proulx*, *supra* note 16.

<sup>155</sup> See *Sharma* ONSC, *supra* note 92 at paras 31, 35, 73–83 citing *Cunningham*, *supra* note 92; *Madden*, *supra* note 92.

<sup>156</sup> *Sharma*, *supra* note 1 at para 224; *Sharma* ONCA, *supra* note 20 at para 88.

with which I have difficulty — I struggle to understand how the impugned CSO provisions could meet the high bar for qualifying as grossly disproportionate punishment.

Before moving forward, I should be clear at this juncture on two further points. First, I am not arguing that there is *no* role for the right to equality in the sentencing context. Importantly, the sentencing laws at issue in *Sharma* were laws of general application without any clear legislative intent to discriminate against a minority group. If, for instance, Parliament were to repeal section 718.2(e) of the *Criminal Code* because it thought the struggles of Indigenous people are irrelevant to sentencing there would be a clear intent to discriminate against Indigenous peoples. In that case, the specific and direct constitutional harm would be the choice to single out a group's experiences as irrelevant to the law which engages the essence of the equality analysis. This is very different from the scenario in *Sharma* involving a law that retracts a previously granted benefit provided to all people. Allowing the litigant to sidestep the gross disproportionality standard because that retraction disproportionately impacted a minority group utilizes a more general right to read out the more specifically applicable right. In that circumstance, the right to equality ought to take a back seat and play the role ascribed to it above, more as a value that impacts the punishment analysis through the vehicle of the reasonable hypothetical offender.

Second, I do not think the mere fact that other rights apply in a broad manner similar to that advocated for by the dissent in *Sharma* supports the argument that the right to equality should be read with similar breadth.<sup>157</sup> The obvious example is the right to free expression protected in section 2(b) of the *Charter*.<sup>158</sup> This right's broad scope which protects any attempt to "convey meaning" that is non-violent<sup>159</sup> does not to my knowledge intrude upon the space specifically carved out for another right. As this is the essence of the problem with applying the right to equality in the context of the *Sharma* case, the arguments contained herein remain unshaken. The equality principle can apply as generously as its wording permits so long as it does not crowd out a more specifically applicable right.

#### IV. PROPORTIONALITY IN SENTENCING

Before concluding, it is worth considering whether the principles of fundamental justice protected under section 7 of the *Charter* provide an alternative route to challenging the impugned restrictions on granting CSOs. As I contend below, the CSO provisions at issue in *Sharma* are plainly inconsistent with a fundamental principle of sentencing: proportionality. In my view, however, the overarching rationale for why proportionality in sentencing fails to qualify as a principle of fundamental justice dovetails with the reasons expressed thus far for why the minority's decision in *Sharma* ought to be rejected.

It should be stated at the outset that this alternative path for constitutionally challenging the CSO laws is fraught with difficulty as it would require overturning a recent Supreme Court precedent: *Safarzadeh-Markhali*.<sup>160</sup> Therein, the Supreme Court considered whether

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<sup>157</sup> I thank the reviewers for raising this general point.

<sup>158</sup> *Charter*, *supra* note 4, s 2(b).

<sup>159</sup> See e.g. *Reference re ss 193 and 195.1(1)(c) of Criminal Code (Man)*, [1990] 1 SCR 1123 at 1187; *R v Keegstra*, [1990] 3 SCR 697 at 731.

<sup>160</sup> *Supra* note 17.

the proportionality principle in sentencing qualified as a principle of fundamental justice under section 7 of the *Charter*.<sup>161</sup> The proportionality principle — which the Supreme Court described as a “central tenet of the sentencing process” — requires that any sentence judicially imposed be proportionate to *both* the gravity of the offence and the moral blameworthiness of the offender.<sup>162</sup>

The Supreme Court’s jurisprudence on granting CSOs illuminates why the impugned limitations on CSOs are inconsistent with the proportionality principle in sentencing. In *Proulx*, the Supreme Court was faced with an argument by the Crown that some offences falling within the initial requirements for imposing a CSO ought to inherently be excluded from the CSO regime. A unanimous Supreme Court rejected this position, noting that the problem with the argument “is that such an approach focuses inordinately on the gravity of the offence and insufficiently on the moral blameworthiness of the offender.”<sup>163</sup> In the Supreme Court’s view, such an approach “fundamentally misconstrues the nature of the principle. Proportionality requires that *full consideration* be given to both factors.”<sup>164</sup> Despite this understanding, Parliament subsequently decided to impose significant restrictions on the CSO regime that are inherently inconsistent with the proportionality principle in sentencing. This follows because the laws constitutionally challenged in *Sharma* will often require the gravity of the offence to be given undue prominence in crafting a sentence. The *Sharma* case is illustrative as the offender’s background weighed in favour of granting her a more lenient sentence (a CSO) but was ultimately unable to fully impact the sentencing court’s analysis.

The Supreme Court nevertheless refused to recognize proportionality in sentencing as a principle of fundamental justice. It came to this conclusion despite the Ontario Court of Appeal’s ruling to the contrary,<sup>165</sup> two of the Supreme Court’s prior precedents strongly implying a similar view,<sup>166</sup> and endorsement from leading scholars.<sup>167</sup> Justice Strathy’s unanimous opinion for the Ontario Court of Appeal primarily turned on the argument that proportionality in sentencing entitled an offender “to a process directed at crafting a just sentence” which in turn “prevents Parliament from making sentencing contingent on factors unrelated to the determination of a fit sentence.”<sup>168</sup> The Supreme Court rejected this argument, instead insisting that the only standard for constitutionally impinging a sentence is to demonstrate that the provision gives rise to a *grossly* disproportionate sentence as required by section 12 of the *Charter*.<sup>169</sup> As it explained, the *Charter* permits Parliament to “limit a sentencing judge’s ability to impose a fit sentence, but it cannot require a sentencing judge to impose grossly disproportionate punishment.”<sup>170</sup>

<sup>161</sup> *Ibid* at paras 67–73.

<sup>162</sup> *Ipeelee*, *supra* note 89 at para 36.

<sup>163</sup> *Proulx*, *supra* note 16 at para 83.

<sup>164</sup> *Ibid* [emphasis in original].

<sup>165</sup> *R v Safarzadeh-Markhali*, 2014 ONCA 627 at paras 82, 85 [*Safarzadeh-Markhali* ONCA].

<sup>166</sup> *Ipeelee*, *supra* note 89 at para 36; *R v Anderson*, 2014 SCC 41 at para 21.

<sup>167</sup> Kent Roach et al, *Criminal Law and Procedure: Cases and Materials*, 11th ed (Toronto: Emond Montgomery, 2015) at 1032.

<sup>168</sup> *Safarzadeh-Markhali* ONCA, *supra* note 165 at paras 82, 85 [emphasis omitted].

<sup>169</sup> *Safarzadeh-Markhali*, *supra* note 17 at paras 72–73.

<sup>170</sup> *Ibid* at para 71.

This argument received criticism from Andrew Menchynski and Jill Presser,<sup>171</sup> an opinion with which I expressed some support.<sup>172</sup> As these authors rightly note, the proportionality principle in sentencing is clearly a legal principle as it is codified in the *Criminal Code*.<sup>173</sup> It also meets the requirement that all principles of fundamental justice must be “sufficiently precise”<sup>174</sup> as the principle has been used as a primary tool for crafting sentences for over a century.<sup>175</sup> Finally, the authors contend that the proportionality principle in sentencing satisfies the most demanding requirement for receiving constitutional status: societal consensus that the principle is fundamental to justice.<sup>176</sup> In their view, the fact that the Supreme Court recognized that proportionality in sentencing is the driving force allowing for “the maintenance of a just, peaceful and safe society through the imposition of just sanctions” strongly supports the view that the principle would receive adequate consensus to qualify as a principle of fundamental justice.<sup>177</sup>

Upon further reflection, the Supreme Court’s reasons can be shaped in a more persuasive light. To begin, it is necessary to consider why the Supreme Court thinks that sentencing law can only be impacted under section 12 of the *Charter*. Citing its prior decision in *R. v. Malmo-Levine*; *R. v. Caine*,<sup>178</sup> the Supreme Court in *Safarzadeh-Markhali* affirmed that “a principle of fundamental justice embedded in s. 7 [cannot] give rise to a constitutional remedy against a punishment that does not infringe s. 12.”<sup>179</sup> This position might on first glance appear puzzling because section 7 allows other aspects of the substantive criminal law to be constitutionalized. Yet, other aspects of the substantive criminal law — the meaning of terms like *actus reus*, *mens rea*, justification, and excuse — are not explicitly mentioned in the *Charter*, thereby making it reasonable for courts to take a broader view of the relationship between those terms and section 7 of the *Charter*.<sup>180</sup>

The law of sentencing, on the other hand, is constitutionally defined both in terms of the permissible method and acceptable quantum of punishment. In essence, any method of punishment that undermines human dignity or punishment that is grossly disproportionate to what would otherwise be deemed a proper sentence sets the constitutional parameters of sentencing law.<sup>181</sup> Given such direct guidance within the *Charter*, it becomes difficult for courts to justify any interpretation of the term “fundamental justice” that would permit a section 7 violation when the impugned law is clearly consistent with section 12. This would be precisely the result if the proportionality principle in sentencing were used to

<sup>171</sup> Menchynski & Presser, *supra* note 18 at 91–92.

<sup>172</sup> Fehr, *Constitutionalizing Criminal Law*, *supra* note 5 at 46–47.

<sup>173</sup> Menchynski & Presser, *supra* note 18 at 91–92.

<sup>174</sup> *Greater Vancouver Transportation Authority v Canadian Federation of Students – British Columbia Component*, 2009 SCC 31 at para 50.

<sup>175</sup> Menchynski & Presser, *supra* note 18 at 91–92.

<sup>176</sup> For a review of the section 7 test, see *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4 at para 8.

<sup>177</sup> See Menchynski & Presser, *supra* note 18 at 91–92, citing *Ipeelee*, *supra* note 89 at para 37.

<sup>178</sup> 2003 SCC 74 [*Malmo-Levine*].

<sup>179</sup> *Safarzadeh-Markhali*, *supra* note 17 at para 72, citing *Malmo-Levine*, *ibid* at 160.

<sup>180</sup> I am aware of criticisms to the effect that “fundamental justice” was meant to be restricted to procedural principles. However, that argument has subsequently failed to gain much traction. For one of the more extensive accounts of this position, see K Michael Stephens, “Fidelity to Fundamental Justice: An Originalist Construction of Section 7 of the *Canadian Charter of Rights and Freedoms*” (2002) 13 NJCL 183. For a review of the Supreme Court’s justifications for imbuing “fundamental justice” with substantive content, see Fehr, *Constitutionalizing Criminal Law*, *supra* note 5 at 3–5.

<sup>181</sup> *Bissonnette*, *supra* note 9 at para 64.

constitutionally impinge the CSO provisions at issue in *Sharma*. As allowing for a novel principle of fundamental justice to circumvent the clear constitutional guidance provided within section 12 of the *Charter* is unprincipled, I struggle to see how the minority's decision in *Sharma* to allow for the interpretation of the right to equality to achieve the same end could be justified.

## V. CONCLUSION

The restrictions on CSOs at issue in *Sharma* are bad criminal justice policy. The fact that a law is bad policy does not *necessarily* translate into that law being unconstitutional. In a constitutional democracy, certain fundamental prerequisites must be respected when conducting constitutional analysis. Foremost among those principles is the requirement that one legislature cannot bind future legislatures with mere legislation. Retorting that the minority's interpretation of the equality right is sustainable because Parliament's law may ultimately be upheld under section 1 of the *Charter* is unpersuasive. Allowing the fact that a legislature rolled back an ameliorative provision to qualify as a rights breach effects a significant transfer of sentencing policy from Parliament to the judiciary. This follows because the approach changes the constitutional standard for sentencing from gross disproportionality to mere proportionality contrary to the text of the *Charter*.

If the impugned CSO provisions are consistent with the right to equality, it is prudent to consider how a *Charter* challenge to a sentencing provision like the one at issue in *Sharma* ought to have unfolded. My previous work argues for courts to pivot away from section 7 when constitutionally structuring the criminal law. While I endorse use of specifically enumerated rights — and I agree with scholars suggesting that the right to equality should be preferred in many instances — this cannot be a reason to ignore other enumerated rights. It is common sense that when a law is challenged because of the means or quantum of sentence it imposes that one should structure the constitutional challenge within the right specifically designed to address these issues. I would be concerned with this approach if equality rights could not be infused into the gross disproportionality analysis. As this is not the case, however, counsel in *Sharma* should have framed its arguments under section 12, not attempted to backdoor an equality challenge in a manner that circumvents the standard required for constitutionally impinging punishments.

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