



Case in Brief: ***R. v. Sharma***

Judgment of November 4, 2022 | On appeal from the Court of Appeal for Ontario
Neutral citation: 2022 SCC 39

The Supreme Court rules that banning conditional sentences for certain offences is constitutional.

In 2015, Cheyenne Sharma, arrived in Toronto on an international flight with almost two kilograms of cocaine in her suitcase. The 20-year-old woman with no criminal record confessed to the RCMP that her partner had promised her \$20,000 to bring the suitcase to Canada. She plead guilty to importing cocaine. Since Ms. Sharma is a woman of Ojibwa ancestry and member of the Saugeen First Nation, the court requested a *Gladue* report, which is a pre-sentencing report for Indigenous offenders. This report noted that Ms. Sharma's grandmother was a residential school survivor and that her mother had spent time in foster care. The report also noted that Ms. Sharma had been sexually assaulted and had dropped out of school.

The *Gladue* report gets its name from the Supreme Court of Canada's 1999 ruling in *R. v. Gladue*, which established the factors that courts must take into account when sentencing Indigenous offenders.

Conditional sentencing was introduced in 1996. This type of punishment allows offenders to serve their sentences under strict surveillance in their communities, rather than in jail. In 2012, Parliament changed the law to eliminate conditional sentences for certain offences listed in paragraphs 742.1(b) to (f) of the *Criminal Code*.

Three requirements must be met before a conditional sentence can be imposed: (1) the offender must not have been convicted of any of those offences; (2) a court would have otherwise imposed a prison sentence of less than two years; and (3) the safety of the community would not be endangered by the offender serving the sentence in the community. If an offender meets these requirements, a judge must then determine whether a conditional sentence is appropriate and in line with the fundamental principles of sentencing. This includes section 718.2(e) of the *Criminal Code*, which directs judges to consider alternatives to imprisonment "with particular attention to the circumstances of Aboriginal offenders". This provision was enacted to reduce the overrepresentation of Indigenous offenders in jail, among other reasons.

When Ms. Sharma sought a conditional sentence, she was found ineligible because she had plead guilty to an offence covered by section 742.1(c) of the *Criminal Code* and which carried a maximum prison sentence of 14 years or life. Ms. Sharma challenged the constitutionality of that section, along with section 742.1(e)(ii), which makes conditional sentences unavailable for any offence that carries a maximum prison sentence of 10 years and involves drugs.

The sentencing judge confirmed that Ms. Sharma was not eligible for a conditional sentence. He also dismissed her challenges under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*. Section 7 guarantees everyone the right to life, liberty and security of the person, while section 15 guarantees everyone the right to equal treatment before the law. The sentencing judge imposed an 18-month prison sentence.

Ms. Sharma appealed her sentence and the dismissal of her *Charter* challenges to the Ontario Court of Appeal. It allowed her appeal and ruled that sections 742.1(c) and 742.1(e)(ii) had violated section 7 because they were too broad, and had violated section 15 because they discriminated against Indigenous offenders like Ms. Sharma. The Court of Appeal sentenced Ms. Sharma to time already served in jail. The Crown then appealed to the Supreme Court of Canada.

The Supreme Court has allowed the Crown's appeal.

Sections 742.1(c) and 742.1(e)(ii) of the *Criminal Code* are constitutional.

Writing for a majority of the judges, Justices Russell Brown and Malcolm Rowe found sections 742.1(c) and 742.1(e)(ii) constitutional. They said there is no section 15 *Charter* violation. The majority noted that although the crisis of Indigenous incarceration is undeniable, Ms. Sharma did not demonstrate that the challenged provisions created or contributed to a disproportionate impact on Indigenous offenders, compared to non-Indigenous offenders. Ms. Sharma was required to show this disproportionate effect as a first step in the section 15 analysis, which she did not.

The majority also said there is no section 7 *Charter* violation because the provisions achieve their intended purpose, which is “to enhance consistency in the conditional sentencing regime by making imprisonment the typical punishment for certain serious offences and categories of offences”. They added that maximum sentences provide a reasonable indication of the seriousness of an offence, and as such, the provisions do not deprive individuals of their liberty in circumstances that are unconnected to their objective.

Ms. Sharma’s 18-month prison sentence was restored. However, since she has already served her time in prison, no further orders were made.

Breakdown of the decision: *Majority:* Justices [Brown](#) and [Rowe](#) allowed the appeal (Chief Justice [Wagner](#) and Justices [Moldaver](#) and [Côté](#) agreed) | *Dissenting:* Justice [Karakatsanis](#) would have dismissed the appeal, finding sections 742.1(c) and 742.1(e)(ii) unconstitutional (Justices [Martin](#), [Kasirer](#) and [Jamaal](#) agreed)

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