SCC Court File No. 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

and

CHEYENNE SHARMA

RESPONDENT

and

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TABLE OF CONTENTS

PART I – OVERVIEW 1
PART II – STATEMENT OF POSITION 1
PART III – LEGAL ARGUMENT 1
A. **The nature of the problem and one aspect of the solution** 1
  i. **The problem of mass incarceration of Indigenous people** 2
  ii. **Conditional sentences are part of the solution** 3
B. **The sky is not falling, the floodgates are not opening and we are not sliding down a slippery slope** 4
  i.Nothing in the Court of Appeal decision prohibits raising maximum sentences or otherwise amending the Criminal Code 4
  ii.Forever Is A Long Time 6
C. **One is Too Many** 7
  i.Discrimination Requires a Remedy 7
  ii.The numbers game 9
PART IV – POSITION ON COSTS 10
PART V – ORDER SOUGHT 10
PART VI – TABLE OF AUTHORITIES 11

PART I – OVERVIEW

1. Aboriginal Legal Services (ALS) intervenes in this case pursuant to an Order issued by Justice Martin on February 3, 2022.
2. ALS was first granted intervener status to address the constitutional issues in by this case when the initial sentencing hearing took place at the Ontario Superior Court.[1] During that hearing ALS called expert evidence, filed a written factum, and made oral arguments. ALS was also granted intervener status consent of all parties, when the matter was heard at the Ontario Court of Appeal.[2] As a result of these earlier interventions, ALS has particular knowledge regarding the constitutional arguments in this case.

PART II – STATEMENT OF POSITION

3. This Court has repeatedly decried the systemic discrimination faced by Indigenous people in the criminal justice system. The decision by the Court of Appeal in not only recognizes the existence of that discrimination but provides a meaningful remedy grounded in the equality rights provisions of s. 15 of the *Charter of Rights and Freedoms.*

PART III – LEGAL ARGUMENT

4. ALS will make three arguments with respect to the case at bar:
   A. The issue of Indigenous overrepresentation is best understood as a form of mass incarceration and the decision of the Ontario Court of Appeal is properly responsive to this crucial issue;
   B. The decision of the Ontario Court of Appeal does not prevent Parliament from increasing maximum sentences or otherwise amending the *Criminal Code* other than ensuring that conditional sentences remain an option when a sentence of under two years is otherwise appropriate; and
   C. Proving the adverse effects discrimination occasioned by the impugned provisions in the *Criminal Code* in this case does not require detailed statistical evidence.

A. The nature of the problem and one aspect of the solution

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[1] *R v Sharma*, 2018 ONSC 1141 [*Sharma ONSC*].
[2] *R v Sharma,* 2020 ONCA 478 [*Sharma ONCA*].

i. The problem of mass incarceration of Indigenous people

5. In *Gladue*[3] and *Ipeelee*[4] this court examined rates of Indigenous overrepresentation in prison as a percentage of the overall prison population. While the 1999 rates were seen as a crisis[5] and the rate in 2012 left the court struggling to find words to describe the situation,[6] rates of Indigenous overrepresentation continue to rise to the point that now 31% of inmates in Canadian prisons are Indigenous.[7]
6. As grim as those figures are, they actually mask the magnitude of the problem. In *Gladue*, this Court also examined Canada's rate of imprisonment per 100,000 of population. The significance of this measure is that it allows for comparisons between countries.[8] Using those figures, the Court noted that while Canada's rate of 130 per 100,000 was much lower than that of the United States at 655 per 100,000, it "…obviously cannot instil a sense of pride."[9]
7. The Canadian imprisonment rate cited in *Gladue* was the national rate, but when those numbers are broken down into Indigenous and non-Indigenous rates, as a recent study by Sprott, Webster and Doob has done,[10] the reality of the problem comes into stark relief.
8. In 1996, when s. 718.2(e) was enacted, the non-Indigenous rate of imprisonment was 98.6 per 100,000. The Indigenous rate was 510 per 100,000. Indigenous Canadians were five times more likely to be imprisoned than non-Indigenous Canadians.[11]

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[3] *R v Gladue*, [1999] 1 SCR 688 [*Gladue*].

[4] *R v Ipeelee*, 2012 SCC 13 [*Ipeelee]*.

[5] *Gladue, supra* note 3 at para 64.

[6] *Ipeelee, supra* note 4 at para 62.

[7] Statistics Canada, Adult and Youth Correctional Statistics in Canada, 2018/ 2019, Jamil Malakieh (Ottawa:, 2020).

[8] Canada regularly reports on incarceration rates per 100,000 of population and compares its standing with those of other countries – see for example Statistics Canada - Adult correctional statistics in Canada, 2013/2014, at page 6; also in Appellant's Appeal Book Vol 1 at page 532.

[9] *Gladue, supra* note 3 at para 52.

[10] Jane B. Sprott, Cheryl Marie Webster, & Anthony N. Doob (forthcoming). "Criminal Justice Reform and the Mass Imprisonment of Indigenous People in Canada" in Kathryn M. Campbell and Stephanie Wellman (eds.), *Justice, Indigenous Peoples, and Canada: A History of Courage and Resilience.* (UK: Routledge).

[11] *Ibid* at 8.

9. By 2017/18 the non-Indigenous imprisonment rate dropped to 78.6 per 100,000 – a 20% decline from 1996. On the other hand, the Indigenous imprisonment rate rose to 677 per 100,000 - a 33% increase. Indigenous Canadians are now almost nine times more likely to be imprisoned than non-Indigenous Canadians.[12]
10. That same year, the rate of imprisonment in the United States was 655 per 100,000.[13] This means that the rate of imprisonment for Indigenous Canadians now exceeds that of the United States – the poster child for mass incarceration in the industrialized world.
11. To paraphrase this Court's finding in *Gladue*, these figures can only instil a sense of shame. Understanding the true nature of the problem is essential in determining the issues before this Court.
12. There can be no question that what Indigenous Canadians are now experiencing is mass incarceration. This phenomenon is not a crisis because that term implies something both exceptional and transitory and what is occurring to Indigenous people is neither.[14]

ii. Conditional sentences are part of the solution

13. While the removal of restrictions on access to conditional sentences will not, on its own, alleviate the mass incarceration of Indigenous people in Canadian prisons, it has made a difference already.
14. Since *Sharma* was decided in July 2020, there are five reported cases of Indigenous offenders in Ontario receiving conditional sentences that would have been previously unavailable.[15] These cases involve a fraud of almost $60,000,[16] sexual assault,[17] robbery,[18] and two cases of drug trafficking.[19] These were all serious cases on their facts

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[12] *Ibid* at 9.
[13] *Ibid* at 9.
[14] Erfat Arbel, "Rethinking the "Crisis" of Indigenous Mass Imprisonment" (2019) 34:3 CJLS 437 at 438.
[15] Because most sentencing decisions are unreported these figures must be seen, to paraphrase *Gladue,* to be just the tip of the iceberg – but in a good way.
[16] *R v Wapoose*, 2020 ONSC 6983.
[17] *R v R.S.*, 2021 ONSC 2263.
[18] *R v McCargar*, 2020 ONSC 5464.
[19] *R v Fuller,* 2021 ONSC 3788 (QL) [*Fuller*]; *R v Ashamock*, 2020 ONSC 6774.

and do not support the Appellant's concerns at paragraph 93 of their factum that the use of conditional sentences leads to net-widening.

15. In one of these cases, *Fuller*, after reviewing a detailed Gladue Report that "clearly establishes the link between the experiences suffered by his paternal grandmother while in residential schools and the devastating impact those experiences had and continue to have on both the offender's father and the offender"[20] the sentencing judge concluded:

> Post-*Sharma*, sentencing judges are expected where appropriate to use their broad powers to firmly address the continued over representation of aboriginal offenders in our jails. The use of such discretion permits judges to impose sentences that are culturally sensitive and contextualized, whist ensuring and acknowledging the harm done to the community and the need to ensure public safety. Such discretion also provides Courts with a chance to recognize promising prospects for rehabilitation.[21]

16. As this Court noted in *Gladue*[22] and *Ipeelee*[23] there are many factors that contribute to the mass incarceration of Indigenous people in Canada. Some of those factors are outside of the control of judges and some are not. The restrictions on access to conditional sentences are examples of state imposed actions that needlessly prevent judges from considering such sentences as proportionate responses to crimes committed by Indigenous people. Now that the imprisonment rates for Indigenous people exceed even the imprisonment rates in the United States, any and all reasonable steps to stop matters from becoming even worse must be able to be considered.

B. The sky is not falling, the floodgates are not opening and we are not sliding down a slippery slope

i. Nothing in the Court of Appeal decision prohibits raising maximum sentences or otherwise amending the Criminal Code

17. In the first paragraph of their factum the Appellant sets out their overarching concern with the decision of the Court of Appeal:

> By constitutionalizing legislation of general application as it stood at a particular point in time, Parliament will forever be precluded from enacting or amending the

[20] *Fuller, supra* note 19 at para 23.
[21] *Ibid* at para 39.
[22] *Gladue, supra* note 3 at para 58.
[23] *Ipeelee, supra* note 4 at para 74.

criminal law – unless it is to make it more lenient.[24]

18. The Appellant then goes on at paragraph 60 to assert "Any increase to a maximum sentence, or any conditions placed on any non-custodial sanctions, would all be susceptible to invalidation on the basis of s. 15" and at paragraph 61 that "it is not just future amendments that are vulnerable, but existing provisions as well."
19. The argument advanced by the Appellant is that the decision of the Court of Appeal represents a significant incursion on the principle of Parliamentary supremacy. The fundamental problem with this argument is that misstates and misapprehends the decision of the Court of Appeal.
20. The entire focus of the Court of Appeal's decision with respect to s. 15 was the extent to which the impugned sections of the *Criminal Code* fettered the ability of the sentencing judge to arrive at a proportionate sentence that did not require a custodial sentence.[25] The touchstone for the Court of Appeal was ensuring fidelity to this Court's repeated direction that a proportionate sentence is one that balances the seriousness of the offence with the moral blameworthiness of the offender and, in arriving at that sentence, clearly considers the Indigenous offender's *Gladue* factors.[26]
21. In the case at bar, the Court of Appeal determined that a proportionate sentence for the Respondent should have been a conditional sentence.[27] Because the impugned provisions did not allow for a conditional sentence, she was sent to jail. Sending an Indigenous offender to jail when jail is not the proportionate response clearly exacerbates the crisis of overrepresentation and contributes to the mass incarceration of Indigenous people.
22. Since the finding in the decision under appeal, Ontario courts have heard cases involving Indigenous offenders who now qualify for a conditional sentence but who have nevertheless received jail sentences.[28] If jail is the proportionate response, after considerations required by *Gladue*, then that decision is unimpeachable.
23. There is nothing in the decision from the Court of Appeal that prohibits Parliament from amending the *Criminal Code* to create higher maximum sentences. As long as a

[24] Appellant's Factum at para 1 [*Appellant's Factum*].
[25] *Sharma ONCA, supra* note 2 at para 130.
[26] *Ibid* at para 112.
[27] *Ibid* at para 184.
[28] *R v PL,* 2022 ONSC 452; *R v Trudeau*, 2021 ONCJ 243; *R v Reddick,* 2020 ONCA 786.

proportionate sentence for an Indigenous offender can include the possibility of conditional sentence, then Parliament may increase maximum sentences as it sees fit.[29]

24. In Bill C-75, Parliament amended the *Criminal Code* and increased the maximum sentences for over 125 summary conviction offences.[30] These offences all previously had maximum sentences of six months or more and all were increased to two years less a day. This significant increase to the maximum sentences is in no way fettered or impugned by the decision of the Court of Appeal.
25. Consider an Indigenous offender being sentenced for theft under $5,000 today. Prior to September 19, 2019 – when Bill C-75 came into force - the maximum sentence the person could receive was six months.[31] Now the maximum sentence is two years less a day. The Appellant's position is that if the person receives an eight-month sentence they will be able to successfully challenge that sentence based on the s. 15 reasoning of the Court of Appeal. That assertion is wrong.
26. In this hypothetical case, the sentencing judge still has the option to impose a conditional sentence if they believe that is the proportionate response. If the proportionate response is a jail sentence then, as long as the judge seriously considers *Gladue* factors, whatever proportionate sentence is arrived at is an acceptable sentence. There is no s. 15 concern with an eight-month sentence when the previous maximum was six months, as long as an eight-month sentence is the proportionate sentence and the possibility exists for a conditional sentence.

ii. Forever Is A Long Time

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[29] Benjamin Ralston, "R. v. Sharma: Addressing Systemic Discrimination in the Criminal Justice System" (2020) 7 Crim Reports 367 at 379.

[30] Forty summary offences whose maximum exceeded six months were raised to two years less a day, from Library of Parliament, Legislative Summary of Bill C-75. Additionally cl. 316 of Bill C-75 increased the default maximum penalty in s. 787. The number of offences is not contained but our research indicates 88 summary convictions were affected.

[31] *Criminal Code,* RSC 1985, c C-46, s 334(b)(ii), s 787(1) as it appeared on 18 September 2019.

27. The other reason to challenge the Appellant's assertion that the decision will tie Parliament's hands "forever"[32] is that it assumes the mass incarceration of Indigenous people will always remain.
28. This Honourable Court should not be prepared to concede that Indigenous over-representation is permanent and incapable of resolution. If over-representation is corrected, as the Truth and Reconciliation Commission urges in its Calls to Action,[33] and as the federal government has repeatedly pledged to do,[34] then the systemic discrimination continually recognized by this Honourable Court will no longer exist. Without that systemic discrimination there is no s.15 claim.
29. The decision under appeal does not prevent Parliament from legislating more stringent sentencing provisions, Parliament is free to do so. Section 15 only requires that such a change not exacerbate the existing systemic discrimination against a group entitled to its protection.
30. Unless the Crown's position is that the criminal justice system will always discriminate against Indigenous people, the fear they are stoking by arguing that Parliament's hands are forever tied when it comes to amending the *Criminal Code*, is misplaced.

C. One is Too Many

i. Discrimination Requires a Remedy

31. In 1803, Justice Marshall of the United States Supreme Court famously wrote in *Marbury v Madison*[35] that the "very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury"[36] and warned that a government cannot be called a "government of laws, and not of men ... if the laws furnish no remedy for the violation of a vested legal right."[37]

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[32] *Appellant's Factum, supra* note 24.
[33] Truth and Reconciliation Commission, Final Report, Vol. 5, *Canada's Residential Schools: The Legacy,* (2015) at pp. 240-242; *Calls to Action* No. 30.
[34] Speech from the Throne by Governor General Adrienne Clarkson, 29 January 2001, at 11; Mandate letter from Prime Minister Justin Trudeau to Minster of Justice and Attorney General of Canada, 16 December 2021, at 12 and 19.
[35] *Marbury v Madison*, 5 US (1 Cranch) 137 (1803).
[36] *Ibid* at para 57.
[37] *Ibid* at para 61.

32. This Court has repeatedly found that it was the deliberate and intentional acts of government that led Indigenous people to experience the horrific impacts of colonialism. It is colonialism that provides the best explanation for why Indigenous people are disproportionately involved with the criminal justice system. Compounding this problem is that Indigenous people continue to experience discrimination in and through the operations of the criminal justice system. From *Williams*[38] to *Gladue*[39] to *Ipeelee*[40] to *Ewert*[41] to *Barton*[42] this finding has been reiterated for over twenty-one years. In *Barton* this Court stated, "when it comes to truth and reconciliation from a criminal justice system perspective, much-needed work remains to be done."[43]

33. This Court's analysis in *Symes,* cited by the Appellant at paragraph 37 of their factum, is not relevant to this case.[44] The differential burden of childcare on women is a social circumstance that is independent of government decisions regarding tax deductions or credits. The experiences of colonialism and the continued discrimination faced by Indigenous people in the justice system are not analogous. It is government action that furthered the colonial agenda and is responsible for the mass incarceration of Indigenous people. It is government action that restricts access to conditional sentences. These are not independent acts, they are interconnected and interdependent.

34. The question at the heart of this appeal is what remedy exists to actually address the ongoing discrimination that this Honourable Court has highlighted over and over and over again. Full scale reform of the criminal justice system to rid it of all bias towards Indigenous people is an endeavour that is clearly beyond the scope of this court. The decision of the Court of Appeal just addresses the discrimination that arises from the restriction on access to conditional sentences. If there is no remedy for this specific discrimination, then the findings of this Court are, at their core, empty. This Court's repeated conclusions about racism in the criminal justice system are premised on a right

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[38] *R v Williams*, [1998] 1 SCR 1128 at para 58.
[39] *Gladue, supra* note 3 at para 60.
[40] *Ipeelee, supra* note 4 at para 57.
[41] *Ewert v Canada,* 2018 SCC 30 at para 57
[42] *R v Barton,* 2019 SCC 33 at para 199.
[43] *Ibid*.
[44] *Symes v Canada*, [1993] 4 SCR 695 at 764-765.

to a system without such bias; however, a right without a remedy is not truly a right at all.[45] If the *Charter* provides no recourse under any circumstance for Indigenous people, then the remaining work identified in *Barton* as required to achieve truth and reconciliation in the criminal justice system will remain unfinished.

ii. The numbers game

35. The s. 15 jurisprudence is clear that determining whether there has been a violation of the *Charter* is not always a matter of collecting statistics. That is because there is not a specific point at which making distinctions based on an enumerated or analogous ground moves from being permissible to becoming a breach of the *Charter*. The sentencing judge in this case fell into this error when he determined that s. 15 was not breached because there was no specific evidence about how many Indigenous people charged with drug importation were affected by the removal of the conditional sentencing option.[46] The Appellant falls into this error as well.
36. In *Eldridge*,[47] the applicants were not required to show how many deaf people were impacted by not having access to sign language interpreters at the hospital.[48] The Supreme Court relied on the facts of their cases and then considered their experience as a microcosm of the experiences of deaf people in society generally.
37. In *Vriend*,[49] the Appellant challenged the Alberta *Individual Rights Protection Act* because it did not allow complaints to be brought against employers if they dismissed an employee because they were gay or lesbian. The Court concluded this was a case of adverse effects discrimination and a violation of s. 15.[50]
38. In finding that Mr. Vriend's s. 15 rights were violated, this Honourable Court engaged in a significant examination of the discrimination faced by gays and lesbians in Canada. That examination looked at historical attitudes towards gays and lesbians and contemporary manifestations of that discrimination as well.[51] Nowhere in the decision are

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[45] *R v Rahey*, [1987] 1 SCR 588, 33 CCC (3d) 289 at para 87.
[46] *Sharma ONSC, supra* note 1 at paras 256-257.
[47] *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624.
[48] *Ibid* at para 83.
[49] *Vriend v Alberta*, [1998] 1 SCR 493.
[50] *Ibid* at para 104.
[51] *Ibid* at para 82.

any statistics provided that show how many gays and lesbians were dismissed by their employers in Alberta because of their sexual orientation.

39. In this case, the Appellant argues that Ms. Sharma's s. 15 claim fails because she could not show how many Indigenous people were imprisoned for drug trafficking. That argument, if correct, should also have proven fatal in *Vriend*, since there was a similar lack of data about the number of gays and lesbians in Alberta dismissed because of their sexual orientation. That this argument held no sway in *Vriend* shows that the position advanced by the Appellant fundamentally misstates and misunderstands the equality guarantee under the *Charter*.

40. Section 15 prohibits discrimination against members of enumerated and analogous groups. It does not give governments a pass if they just discriminate against one or two people. In this case, similar to *Eldridge* and *Vriend*, the adverse effects discrimination faced by Ms. Sharma must be understood in the context of the systemic discrimination faced by Indigenous people as a whole and recognized repeatedly by this Court. Even if Ms. Sharma were the only Indigenous person ever charged with drug importing in Canada, that would still mean the provisions of ss. 742.1(c) and (e) (ii) violated s. 15.

41. Statistics regarding the number of people impacted by a particular aspect of discrimination may be relevant in the s. 1 discussion as the government attempts to justify its violation of s. 15, but it has no place in this case in the determination under s. 15 of whether discrimination has occurred.

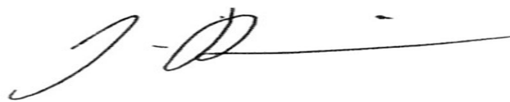
PART IV – POSITION ON COSTS

42. ALS seeks no costs and respectfully submits that no costs be ordered against it.

PART V – ORDER SOUGHT

43. ALS takes no position on disposition of appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 28th day of February 2022.



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Jonathan Rudin, Counsel for the Intervener, ALS

PART VI – TABLE OF AUTHORITIES

AUTHORITIES	PINPOINT
Eldridge v British Columbia (Attorney General), [1997] 3 SCR 624	83
Ewert v Canada, 2018 SCC 30	57
Marbury v Madison, 5 US (1 Cranch) 137 (1803) [ALS Book of Authorities, Tab 4]	57, 61
R v Ashamock, 2020 ONSC 6774	3
R v Barton, 2019 SCC 33	199
R v Fuller, 2021 ONSC 3788 (QL) [ALS Book of Authorities, Tab 2]	23, 39
R v Gladue, [1999] 1 SCR 688	52, 60, 64
R v Ipeelee, 2012 SCC 13	57, 62
R v McCargar, 2020 ONSC 5464	63
R v P.L., 2022 ONSC 452	89
R v Rahey, [1987] 1 SCR 588, 33 CCC (3d) 289	87
R v Reddick, 2020 ONCA 786	10
R v R.S., 2021 ONSC 2263	246
R v Sharma, 2018 ONSC 1141	256, 257
R v Sharma, 2020 ONCA 478	112, 130, 184
R v Trudeau, 2021 ONCJ 243	66
R v Wapoose, 2020 ONSC 6983	58
R v Williams, [1998] 1 SCR 1128	60
Symes v Canada, [1993] 4 SCR 695	764-765
Vriend v Alberta, [1998] 1 SCR 493	82, 104

LEGISLATION	
Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*. 1st Sess, 42nd Parl, 2019	cl. 316
Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act,* 1982	s.1, s. 15
*Criminal Code***,** RSC 1985,c C-46, as it appeared on 18 September	s 334(b)(ii), s

2019	787(1)
Criminal Code, RSC 1985, c C-46	s 718.2(e), s 742.1(c)

SECONDARY SOURCES	PINPOINT
Benjamin Ralston, "R. v. Sharma: Addressing Systemic Discrimination in the Criminal Justice System" (2020) 7 Crim Reports 367 [Respondent's Book of Authorities, Tab 8]	379
Erfat Arbel, "Rethinking the "Crisis" of Indigenous Mass Imprisonment" (2019) 34:3 CJLS 437	438
Jane B. Sprott, Cheryl Marie Webster, & Anthony N. Doob (forthcoming). "Criminal Justice Reform and the Mass Imprisonment of Indigenous People in Canada" in Kathryn M. Campbell and Stephanie Wellman (eds.), *Justice, Indigenous Peoples, and Canada: A History of Courage and Resilience.* (UK: Routledge) [ALS Book of Authorities, Tab 1]	8, 9
Library of Parliament, "Legislative Summary of Bill C-75."	Table 2
Mandate letter from Prime Minister Justin Trudeau to Minster of Justice and Attorney General of Canada, 16 December 2021	12, 19
Speech from the Throne by Governor General Adrienne Clarkson, 29 January 2001 [ALS Book of Authorities, Tab 3]	11
Statistics Canada, Adult and Youth Correctional Statistics in Canada, 2018/ 2019, Jamil Malakieh (Ottawa:, 2020)	4
Statistics Canada - Adult correctional statistics in Canada, 2013/2014	6
Truth and Reconciliation Commission, Final Report, Vol. 5, *Canada's Residential Schools: The Legacy*, (2015) at pp. 240-242; *Calls to Action* No. 30.	No. 30