



# THE IMPACT OF THE CHARTER ON SENTENCING

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# 40 YEARS AT A GLANCE

## **Centre Stage**

s. 12 limits on Mandatory Minimum Penalties (*Smith, Nur, Lloyd*)

## **Side Stage**

s. 12 and the Penal Experience (Solitary cases, *Bissonnette*)

## **Equality: The Missing Act?**

Equality reasoning in *Gladue, Boudreault, Sharma*

# CENTRAL CLAIM

The *Charter* has mainly been concerned with the problem of *penal excess* under s. 12.

- S. 12 has acted as a brake on *penal populism* (the use of sentencing policy to mobilize electoral support).
- S. 12 has played surprisingly little role in the regulation of prison conditions, though that may change with the reasoning in *R v. Bissonnette*, 2022 SCC 23.

Challenges brought under s. 15 in the sentencing area have, officially, failed.

- However, *equality reasoning* has appeared in the reasonable hypothetical device in *Lloyd* and in the analysis of the impact of the victim surcharge in *Boudreault*.
- *Sharma* may entail recognition that *Gladue* is constitutionally protected under s. 15.



## 3 Main Questions

- (1) **The Standard:** is the penalty grossly disproportionate to the punishment that is appropriate: *Smith* 1987, *Nur* 2015, *Lloyd* 2016, *Boudreault* 2018
- (2) **The Process:** consider the offender before the court *or* the law's reasonably foreseeable applications: *Smith* 1987, *Morrisey* 2002, *Nur* 2015, *Lloyd* 2016
- (3) **The Remedy:** strike the law, no constitutional exemptions: *Ferguson*, 2008

## *R v Smith*, SCC 1987

### **Stage 1: Focus on the Offender**

1. Gravity of the offence
2. Personal characteristics of individual
3. Particular circumstances of case
4. Measure the “effect of the sentence actually imposed”
5. General deterrence irrelevant here

## *R v Smith*, SCC 1987

### **Stage 2: consider the “reasonable hypothetical” offender**

- 7-year term grossly disproportionate “in light of the wide net cast by s. 5(1)”
- “covers numerous substances of varying degrees of dangerousness and totally disregards the quantity of the drug imported”
- Ignores whether for personal consumption or trafficking
- Ignores nonexistence of previous convictions

What offends s. 12: “the certainty, not just the potential.”

Prosecutorial discretion no cure.

After 1987:  
Scholars Lament

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Kent Roach, “Searching for Smith: The Constitutionality of Mandatory Minimum Sentences,” *Osgoode Hall Law Journal* (2001)

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Debra Parkes, “From Smith to Smickle: The Charter’s Minimal Impact on Mandatory Minimum Sentences” *Supreme Court Law Review* (2012)

## *R v Nur*, 2015 SCC 15

**The Provision:** s. 95(2)(a)(i), three years imprisonment for possessing a loaded prohibited firearm or restricted firearm, or an unloaded prohibited firearm or restricted firearm together with readily accessible ammunition that is capable of being discharged in the firearm, unless the person is a holder of [registration / licence].

**The Reasonable Hypothetical:** The licensed and responsible gun owner who stores his unloaded firearm safely with ammunition nearby.

**Provision Invalid:** Parliament could narrow offence by limiting to “those engaged in criminal activity” or “conduct that poses a danger to others.”

Moldaver J (Rothstein and Wagner JJ)  
dissenting

**This *isn't* a reasonable hypo.**

- Not a single licencing-type case where grossly disproportionate sentence imposed. Crown proceeds summarily in those cases. Hypo presumes Crown will not make fair, just, and appropriate election.

**If prosecutors use MMP inappropriately:**

- It would be a “*per se* abuse of process” to decide to prosecute by way of indictment that will generate grossly disproportionate sentence. Offender can raise at sentencing, seek s. 24(1) remedy.

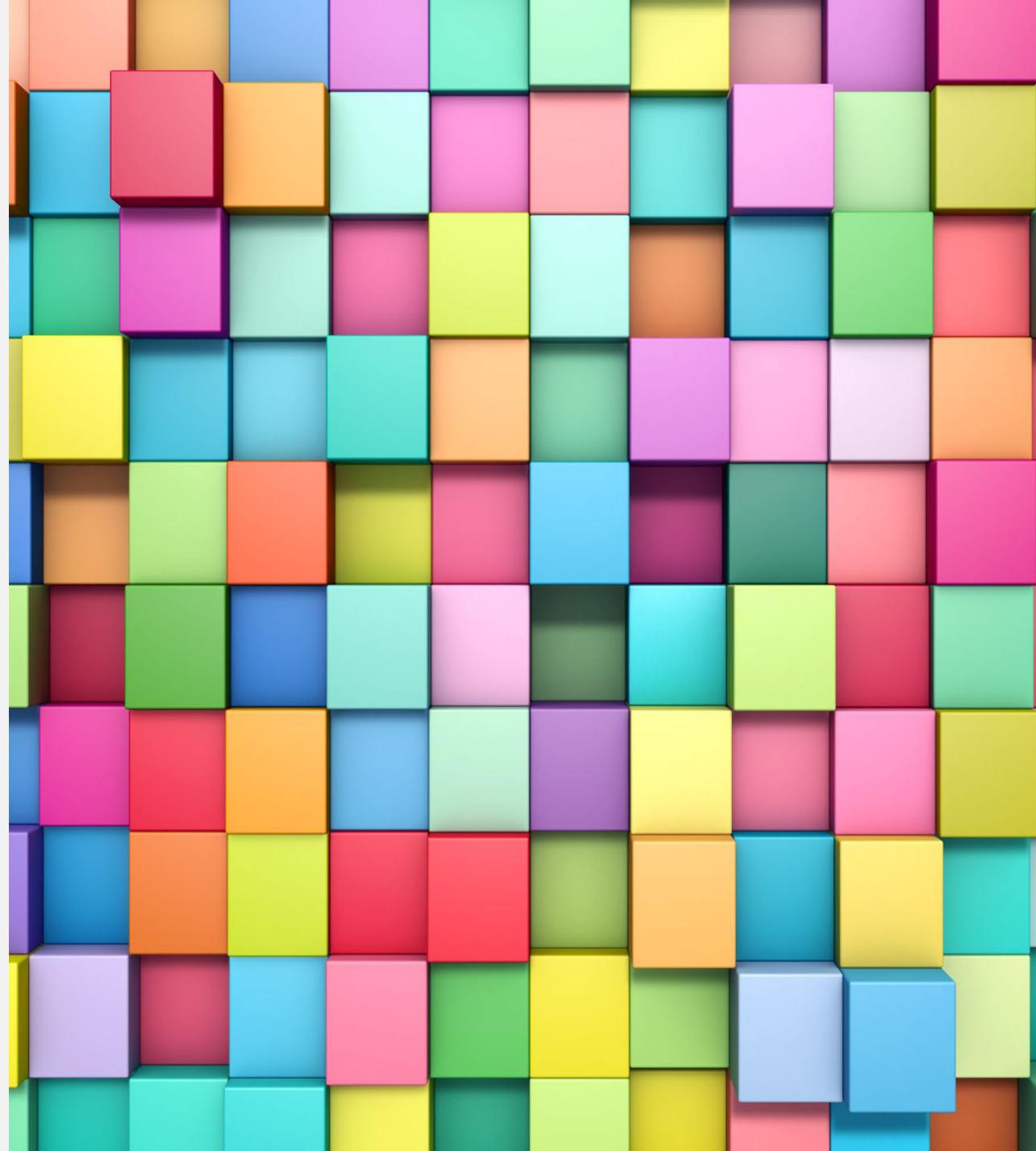
*R v Lloyd*, 2016 SCC 13

**The provision:** Section 5(3)(a)(i)(D) (CDSA) One year imprisonment for possession for the purpose of trafficking a Schedule I substance

**The Reasonable Hypothetical:** addicts who possess small quantities they intend to share with a friend or other addicts

- Trafficking is serious, but provision casts net over wide range of conduct
- Applies to professional drug dealers selling for profit, but also to situations with no profit motive and heavy aspect of drug dependency.

Equality:  
The Missing Act?



“A Disappointing  
Silence”

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Elizabeth Sheehy, “The Discriminatory Effects of Bill C-15’s Mandatory Minimum Sentences” (2010) 70 *Criminal Reports* 302.

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David Paciocco, “The Law of Minimum Sentences: Judicial Responses and Responsibility” (2015) 19 *Can. Crim. L. Rev.* 173

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Sarah Chaster, “Cruel, unusual, and constitutionally infirm: mandatory minimum sentences in Canada” (2018) 23 *Appeal* 89

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Rosemary Cairns Way “A Disappointing Silence: Mandatory Minimums and Substantive Equality” (2015) 18 *Criminal Reports* 297

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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 *The Criminal Law Quarterly* 312.

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Kent Roach, “Plan B for Implementing Gladue: the Need to Apply Background Factors to the Punitive Sentencing Purposes” (May 2019)

**Step 1: Creates a distinction based on an enumerated or analogous ground.**

**Step 2: Distinction creates a disadvantage by perpetuating prejudice or stereotyping.**

**R v Sharma** 2018 ONSC

**Failed:** No statistical information of likely or existing distinction based on Aboriginal status.

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**R v Madeley** 2018 ONSC

**Failed:** No statistical information confirming impact of MMP on the mentally disabled.

**R v JED**  
2017 MBPC

**Failed:** No evidence that *all* offenders with ASD have reduced moral culpability so no distinction based on mental disorder.

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**R v McKenzie-Sinclair**  
2015 MBPC 5

**Failed:** Provision applies to everyone. Indigenous people may be impacted more (denied bail more often) as a reflection of their social circumstances rather than the operation of the provision.

**R v Chambers** 2014 YKCA

**Failed:** Provision is more likely to affect Indigenous people but this distinction is based on who breaks the law not race.

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**R v Hailemolekot** 2013 MBQC

**Failed:** No evidence that Black people are disproportionately charged under provision.

**R v B (TM)** 2011 ONCJ

**Passed:** Distinction based on Indigeneity because provision denies benefit of s 718.2(e).

**Failed:** No evidence of evidentiary link between the distinction and disadvantage – need to know *how many* indigenous offenders it will impact.

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**R v Nur** 2011 ONSC

**Failed:** Evidence that Black people are disproportionately charged under provision but no evidence that the law is the cause of it.

**R v Johnson** 2011 ONCJ

**Failed:** Provision does not create distinction based on race as it applies to all offenders.

# 1. The reasonable hypothetical *Nur* and *Lloyd*

***Nur* at ONCA, Justice Doherty guards against personal characteristics:**

“It seems to me that if the hypothetical offender is to be endowed with individual characteristics that can mitigate the penalty, then, regardless of the offence, one could describe an offender for whom a mandatory minimum punishment would be grossly disproportionate.”

***Nur* at SCC, Reasonable hypothetical “may take into account personal characteristics”**  
(para. 76)

- In *Nur*, provision is struck based only on how the offence could be committed in such a broad range of ways.
- In *Lloyd*, the provision is struck based on *both* the breadth of the offence and the possible circumstances of the offender.

## 2. The victim surcharge analysis infused with equality reasoning

*R v. Madeley*, 2016 ONCJ 108 (**overturned**)

Justice Paciocco strikes provision under s. 15: (1) Mentally disabled are adversely affected, because poverty is characteristic of enumerated class. (2) Distinction deepens historic disadvantage.

*R v. Michael*, 2014 ONCJ (endorsed in *Boudreault*, 2018)

Justice Paciocco brings concern with inequality and disadvantage to “circumstances of offender” analysis under s. 12, both in terms of context within which offending occurs and impact of penalty.

*R v. Boudreault*, 2018 SCC 58



# MANDATORY VICTIM SURCHARGE



Section 737 of the *Criminal Code*

30% of any fine already imposed

*Or, if no fine imposed:*

\$100 for every summary conviction

\$200 for every conviction punishable by indictment

Section 737(4): funds collected go to the provinces to administer victim services

# BILL C-37: INCREASING OFFENDERS' ACCOUNTABILITY FOR VICTIMS ACT (2013)

## Tories propose bill to double victim surcharge



Meagan Fitzpatrick · CBC News · Posted: Apr 24, 2012 12:34 PM ET | Last Updated: April 24, 2012



## Tories to double, make mandatory \$100-200 surcharge for convicted criminals

*The federal government is delivering on a promise to crime victims by doubling and making mandatory the surcharge convicts are required to pay upon sentencing.*

# Judges' defiance of victim surcharge sparks debate on limits of judicial role

NOVEMBER 27, 2016  
*THE GLOBE AND MAIL*

*R v Michael*, 2014 ONCJ 360

Convicted of 9 offences occurring on 3 occasions

All charges involved damage to property or assault  
while Mr. Michael was grossly intoxicated

**Total victim surcharge \$900**

Mr. Michael

26-year-old Inuit man

Drug and alcohol dependency

Unemployed

Homeless

Social assistance of \$250/month

*R v Boudreault, 2018 SCC 58*

7 charges of breaking and entering  
1 charge of attempt breaking and entering  
1 charge of possession of stolen goods  
1 charge of assault with a weapon  
1 charge of possession of a prohibited  
weapon

**Total victim surcharge \$1400**

Mr. Boudreault

Unemployed high school dropout

Has never been steadily employed

Homeless

Using large amounts of marijuana

At the time of sentencing, had not earned  
an income in nearly two years

## Victim Surcharge Imposes 4 Interrelated Harms On Some Offenders

- a) Disproportionate financial consequences
- b) Ongoing threat of incarceration / detention
- c) Targeted by collection agencies
- d) Effectively an indeterminate sentence



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**Prevents sentencing judge from applying sentencing principles**

- Proportionality
- Rehabilitation
- *Gladue* analysis

**Adds up to s. 12 breach.**



## Justice Martin in *Boudreault*: s. 12 becomes infused with equality-reasoning

Para. 3: In effect, not only are impecunious offenders treated far more harshly than those with access to the requisite funds, their inability to pay this part of their debt to society may further contribute to their disadvantage and stigmatization.

Para. 28: [T]he victim surcharge also has a significant impact on the liberty, security, equality, and dignity of those subject to its application.

Para. 58: In a constitutional context, the court is also called upon to consider the rights of particular individuals who may be affected by this punishment in a way that is grossly disproportionate, understanding that people have varied life situations and many are impecunious, impoverished, ill, disabled, addicted and/or otherwise disadvantaged. Given this focus, it is less important that other individuals who are differentially situated may be able to pay, that some other fines set by law may be higher or that the amount of the surcharge depends on the number of offences committed.

Para. 86: [T]he cumulative charge-by-charge basis on which the victim surcharge is imposed increases the likelihood that it will disproportionately harm offenders who are impoverished, addicted, and homeless. These circumstances will often bring them into conflict with the law .... This reality alone will result in higher total amounts owing. Furthermore, any conditions attached to discharge or probation for these offenders would likely include a prohibition against consuming alcohol and drugs.... [P]eople suffering from addiction routinely accumulate numerous breaches without causing serious harm or anyone.

## JUSTICE CÔTÉ, DISSENTING

[183] In *Smith*, this Court identified several forms of treatments and punishments that will always violate s. 12 : **the lash, the lobotomisation of certain dangerous offenders, and the castration of sexual offenders** (pp. 1073-74) ... my view is that the requirement that all offenders pay a surcharge of only \$100 or \$200 per offence — a surcharge which cannot be enforced against the liberty or property of an offender who is simply too poor to pay — **does not rise to this level.**

## The second prong: *Bissonnette*

[60] the two prongs of the right not to be subjected to cruel and unusual punishment may now be considered .... This distinction is often blurred, and it would be helpful in the context of this appeal to clarify certain points in this regard...

**First Prong:** Grossly disproportionate amounts of punishment.

**Second Prong:** Degrading or dehumanizing methods of punishment that are cruel and unusual by nature, intrinsically incompatible with human dignity.

➤ Kerr, Lisa, and Benjamin L. Berger. “Methods and Severity: The Two Tracks of Section 12” (2020), 94 S.C.L.R. (2d) 235.

### 3. Gladue is clearly an equality project

**Core idea: formally equal treatment at sentencing can be akin to discrimination**

Judges are “front-line workers” who can ensure that “systemic factors do not lead inadvertently to discrimination in sentencing.” (*Ipeelee*, para. 67)

## *SHARMA ARGUMENTS*

**Core idea:** A law that denies benefit of *Gladue* to Indigenous people discriminates on the basis of race. Equal treatment of Indigenous people mandates attention to circumstances and sentencing on the basis of that information.

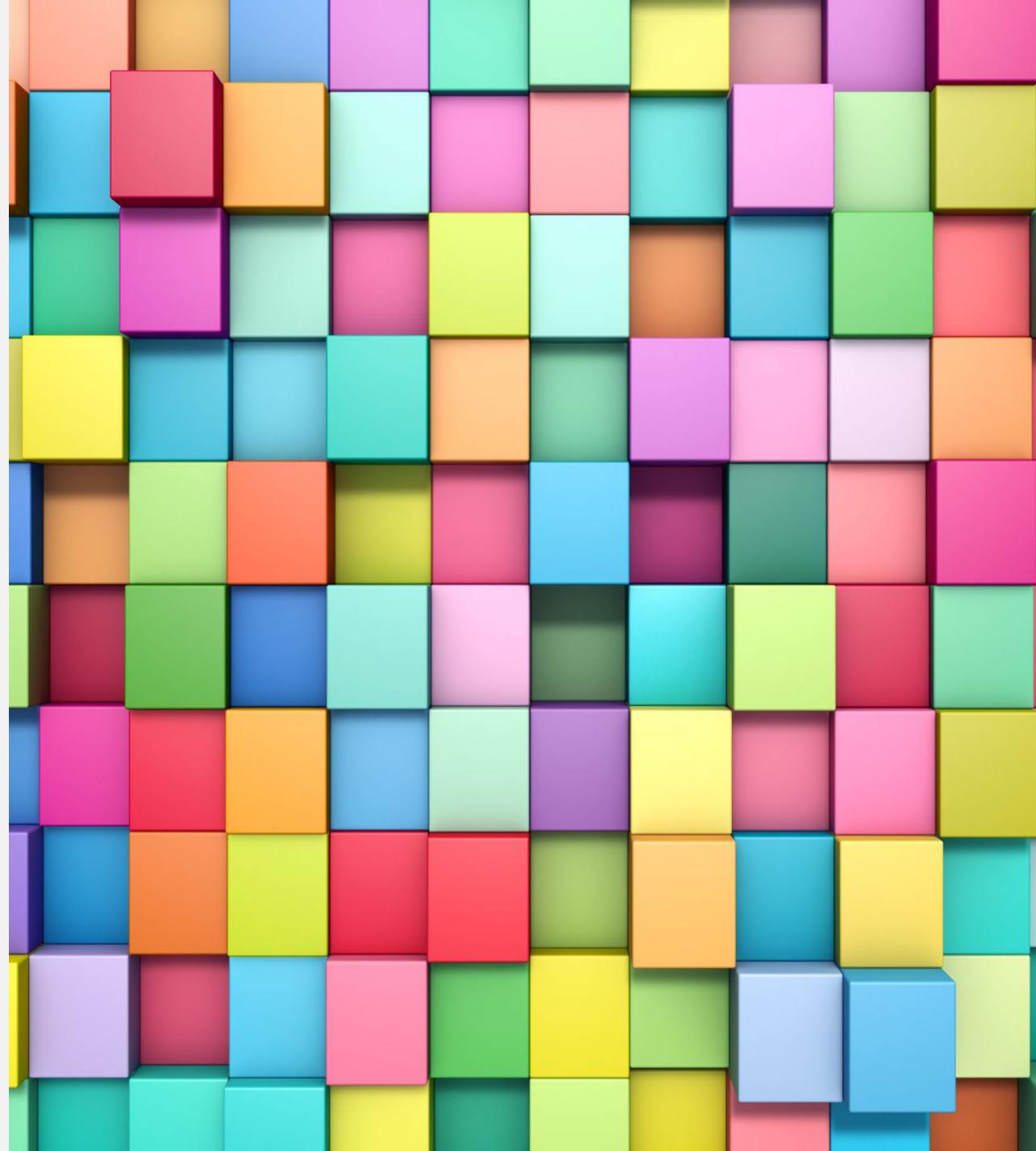
- **Counsel for Ms. Sharma:** “In 2012, Parliament dismantled a major part of the *Gladue* framework by making conditional sentences unavailable for a wide range of offences. The majority in the Court of Appeal rightly held that this violated s. 15 by exacerbating the historical disadvantage faced by Ms. Sharma as an Indigenous offender.
- **Factum of *LEAF* in *Sharma*:** “a claimant must be taken as they are, in the light of their full circumstances and history, and may be entitled to differential treatment in order to reach a fair result”
- **Factum of Canadian Bar Association in *Sharma*:** Section 718.2(e) gives expression to the *Charter* right of equality, and is the legislative embodiment of a constitutional guarantee of substantive equality under section 15.

**Little formal role for equality,  
but infused in s. 12 and  
common law of sentencing**

*Equality-reasoning* is part of s. 12 doctrine: it informed the reasonable hypothetical in *Lloyd* and the way that *Boudreault* analyzes the impact of the impugned law.

*Equality-reasoning* is a longstanding feature of our sentencing law, central in *Gladue* and to concepts like *fitness*, *blameworthiness*, *proportionality*, *parity*.

*Sharma* will address whether s. 15 prohibits interference with s. 718.2(e) as a remedial scheme required to pursue substantive equality.



## Failing to ‘Tell It Like It Is’?

“The problem with reliance on s. 7 and s. 12 to address the constitutional infirmities of criminal laws is that it masks the reality of the disparate impact of criminal law on vulnerable groups”; it serves to “stunt” public discourse, means that Courts cannot convey the real problem to Parliament.

Jonathan Rudin, *Tell It Like It is: An Argument for the Use of Section 15 over Section 7 to challenge Discriminatory Criminal Legislation* (2017)