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R v. Sharma: CAEFS Response to the "Confounding" Decision That "Ignores the Historic Disadvantage of Indigenous People"

Friday, November 4th, 2022 (Ottawa, Ontario): Today, the Supreme Court of Canada, in a 5-4 decision found no violation of either s. 7 or s. 15(1) of the Charter in R v. Sharma. The Canadian Association of Elizabeth Fry Societies (CAEFS), who were one of 21 intervenors, is deeply disappointed with this decision.
In 2016, Cheyenne Sharma, a young Indigenous woman, pleaded guilty to drug-related importation charges in exchange for $20,000 from her boyfriend, a task she carried out to avoid eviction for herself and her daughter. Because Sharma is of Ojibwa ancestry and a member of the Saugeen First Nation, the trial court took her background of trauma into account for sentencing, as required by the Criminal Code since 1999 under the "Gladue principles." However, another part of the Code — enacted in 2012 – bars community-based sentences for offences such as drug-trafficking that carry maximum penalties of 14 years.

The Ontario Court of Appeal concluded in this case that the Criminal Code provisions which precluded the sentencing court from imposing a conditional sentence on Ms Sharma were discriminatory and contrary to the right not to be deprived of her liberty except in accordance with the principles of fundamental justice. It is unfortunate that Canada chose to appeal this decision, while claiming publicly to be committed to addressing systemic discrimination in the criminal justice system. In the case of Indigenous women, such as Cheyenne Sharma, intersecting marginalizations – including gender, race, intergenerational impacts of colonization, family status and economic precarity – give rise to a complex set of challenges that contribute to an increased likelihood of over-surveillance, under-protection, criminalization, and incarceration.

Emilie Taman (Champ and Associates), who acted as counsel for CAEFS in this case, notes: "This decision completely ignores the historic disadvantage of Indigenous people; the special relationship between Indigenous people and the Crown; and the government's direct complicity in the systemic discrimination which has led to, among many other disadvantages, the overincarceration of Indigenous people, particularly Indigenous women."

As an intervenor in this case, CAEFS submitted that any approach to penal reform which could reasonably be anticipated to perpetuate or exacerbate the overincarceration of Indigenous people, particularly women and gender diverse people, is grossly disproportionate and fails to accord with the principles of fundamental justice. The vulnerability of Indigenous people to overincarceration is the result of generations of state sponsored oppression and marginalization of First Nations, Inuit, and Metis people. Our submission was not acknowledged in the decision; however, the dissenting opinion found that both s. 7 and s. 15 of the Charter were violated.

"The number of Indigenous women in prison continues to rise at alarming rates. Indigenous women now make up more than 50% of all federally sentenced women in Canada. Clearly, the tools that are being used to address this crisis of mass incarceration of Indigenous people are not working – and the failure of the Court in this decision to

recognize this is confounding" said Emilie Coyle, the executive director of CAEFS. "Intervening in this case is aligned with CAEFS commitment to *act* to end the criminalization of Indigenous women and gender diverse people. Now, our task is to push Parliament to do what the Supreme Court did not. This decision should be seen as a call to action to Parliament to address discrimination in the justice system, rather than a reason to tolerate it."

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