SCC 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 IN RIGHT OF CANADA

Appellant

- and –

CHEYENNE SHARMA

Respondent

- and -

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TABLE OF CONTENTS

PART I – OVERVIEW

1. It has been over 25 years since Parliament enacted s. 718.2(e) of the *Criminal Code*.[1] The purpose of this provision is well known: to redress the "tragic overrepresentation" of Indigenous peoples in prison.[2] Despite its clear objective, the remedial aim of this legislation has not yet been realized. Not only are current rates of Indigenous incarceration higher than they were in 1996; today's judges often cannot access *the* primary tool to avoid sentencing many Indigenous peoples to prison.

2. This Court is called upon to articulate Indigenous peoples' equality rights during the sentencing process. The Court must determine whether the decision to dismantle the conditional sentence order for a large swath of offenders[3] violates the constitutional guarantee of substantive equality for Indigenous peoples. The Canadian Bar Association ("CBA") submits that the restrictions on conditional sentences violate s. 15(1) of the *Charter* in a manner that cannot be saved under s. 1.

3. The CBA's submission focuses on the status of s. 718.2(e) of the *Criminal Code.* This provision, as elaborated in *R. v. Gladue*, has become the fulcrum of Canada's approach to sentencing Indigenous offenders. The methodology codified by s. 718.2(e) has gone by many names; judges have described this approach as applying the "*Gladue* framework,"[4] considering "*Gladue* factors,"[5] and adhering to "*Gladue* principles."[6] These varied articulations of the purpose of s. 718.2(e) all convey the same message: courts must consider the "animating norm of substantive equality"[7] when sentencing Indigenous offenders.

4. Section 718.2(e) should be properly understood as quasi-constitutional legislation. This provision gives effect to the constitutional imperative of substantive equality in the Indigenous sentencing context. This aspirational law is implemented through the conditional sentence order,

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[1] *Criminal Code,* R.S.C. 1985, c. C-46 [*Criminal Code*].
[2] *R. v. Gladue,* [1999] 1 S.C.R. 688 at para. 87 [*Gladue*].
[3] See ss. 742.1(c) and (e)(ii) of the *Criminal Code.*
[4] *R. v. Sharma,* 2020 ONCA 478, paras. 127, 130
[5] *R. v. Friesen,* 2020 SCC 9, para. 104; *R. v. Parranto,* 2021 SCC 46, paras. 46, 81 [*Parranto*].
[6] *Parranto,* paras. 49, 80, *R. v. Boutilier,* 2017 SCC 64, para. 108 *per* Karakatsanis J. [*Boutilier*]; *R. v. Ipeelee,* 2012 SCC 13, para. 87 [*Ipeelee*] ("*Gladue* principles").
[7] *Ontario (Attorney General) v. G,* 2020 SCC 38 at para. 43.

which was enacted *together* with s. 718.2(e) to redress Indigenous overincarceration. Contrary to the appellant's assertion, the decision to uphold a *Charter* violation for impairing s. 718.2(e)'s remedial purpose will not "constitutionalize ordinary legislation."[8] Section 718.2(e) of the *Criminal Code* is – and always has been – far from ordinary.

PART II – STATEMENT OF POSITION

5. The CBA will make two broad submissions:

(1) Section 718.2(e) of the *Criminal Code* should be recognized as having quasi-constitutional status under s. 15 of the *Charter.*

(2) Parliament's limitation on conditional sentences impairs the operation of s. 718.2(e) in a manner that violates s. 15(1) of the *Charter.* The impugned provisions impose widespread limitations on conditional sentences, without providing for residual judicial discretion to respond to the circumstances of Indigenous offenders. This frustrates the remedial purpose of s. 718.2(e), which violates the principle of substantive equality enshrined in s. 718.2(e) of the *Criminal Code* and s. 15(1) of the *Charter.*

PART III – ARGUMENT

A. Section 718.2(e) Has Quasi-Constitutional Status

i. Quasi-Constitutional Laws Give Legislative Expression to Charter Rights

6. This Court has long recognized that certain forms of legislation have a quasi-constitutional status. Prominent examples include human rights instruments,[9] privacy legislation,[10] and legislation implementing language rights.[11] These laws are described as quasi-constitutional because they are "closely linked" to the values and rights set out in the Constitution.[12]

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[8] Factum of the Appellant, para. 62.
[9] *McCormick v. Fasken Martineau Dumoulin LLP,* 2014 SCC 39 at para. 17; *British Columbia Human Rights Tribunal v. Schrenk,* 2017 SCC 62 at para. 31.
[10] *Lavigne v. Canada (Office of the Commissioner of Official Languages),* 2002 SCC 53 at paras. 24-25 [*Lavigne*]; *Douez v. Facebook, Inc.*, 2017 SCC 33 at para. 59; *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401,* 2013 SCC 62 at para. 19.
[11] *Mazraani v. Industrial Alliance Insurance and Financial Services Inc.,* 2018 SCC 50 at paras. 1, 25-28 [*Mazraani*].
[12] *Lavigne,* para. 25.

7. Quasi-constitutional legislation can be conceptualized as laws that give legislative expression to *Charter* rights. For example, this Court has described ss. 14 and 15 of the *Official Languages Act* as a "restate[ment]" of "the essence of the right guaranteed in s. 19(1) of the *Charter*."[13] Likewise, human rights statutes have been recognized as quasi-constitutional because they have been "enacted to give effect to the fundamental Canadian value of equality,"[14] which "lies at the centre of a free and democratic society."[15] This "privileged category" of quasi-constitutional legislation reflects "certain basic goals in our society"[16] and gives legislative expression to the rights enshrined in our Constitution.

8. The fact that the category of quasi-constitutional legislation is "privileged" signals that this status is uncommon. As the Federal Court observed, "the fact that a right guaranteed under the *Charter* is at stake will not elevate that statute to a quasi-constitutional status."[17] This Court has emphasized that judges must refrain from constitutionalizing a particular statutory scheme, and instead focus their analysis on the constitutional guarantee behind it.[18] This is precisely what quasi-constitutional legislation does: its special status stems from its longstanding codification of a constitutional norm, rather than its particularized mode of implementation.

9. The concept of quasi-constitutional legislation recognizes Parliament's participation in defining the scope and content of *Charter* rights. Elaborating the Constitution's open-textured guarantees is not solely a judicial exercise; in the words of Justice Rowe, "[l]egislatures are indispensable to secure, protect, and promote *Charter* rights."[19] As Professors William Eskridge and John Ferejohn note, "legislative and administrative deliberation over time can create entrenched governance structures and norms," and some statutes are capable of "transform[ing] constitutional baselines."[20] Where a *Charter*-implementing statute has become socially and

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[13] *Mazraani* at para. 28.
[14] *Loyer v. Air Canada*, 2006 FC 1172, para. 51.
[15] *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 at 615.
[16] *R. v. Beaulac*, [1999] 1 SCR 768, para. 21, citing *Canada (Attorney General) v. Viola*, [1991] 1 F.C. 373, at 386-87; see also *Lavigne*, para. 23.
[17] *Chopra v. Canada (Attorney General)*, 2013 FC 644 at para. 74.
[18] *R. v. Chouhan*, 2021 SCC 26, para. 84.
[19] *Chouhan*, para. 134 *per* Rowe J. (concurring).
[20] William N. Eskridge Jr. and John Ferejohn, *A Republic of Statutes* (New Haven: Yale University Press, 2015) at 6-7.

politically entrenched in our legal framework, it ought to inform the Court's evolving interpretation of corresponding *Charter* rights.

10. Allowing quasi-constitutional legislation to inform the interpretation of a corresponding *Charter* right is in keeping with recent guidance from this Court. Although quasi-constitutional legislation should be distinguished from unwritten constitutional principles—most notably, because quasi-constitutional legislation emanates from Parliament and has a textual form—the two instruments can play a similar role in interpreting the text of the *Charter.* As the majority states, unwritten constitutional principles "assist with purposive interpretation, informing 'the character and the larger objects of the *Charter* itself'".[21] The same approach should apply to s. 718.2(e) when assessing a s. 15(1) *Charter* claim in the Indigenous sentencing context.

ii. Section 718.2(e) Gives Legislative Expression to the Constitutional Imperative of Substantive Equality

11. Section 718.2(e) of the *Criminal Code* should be understood as quasi-constitutional legislation. This provision represents the legislative enactment of the constitutional imperative of substantive equality under s. 15(1) of the *Charter.* Section 718.2(e) reflects Parliament's recognition that "[Aboriginal offender's] circumstances are unique, and different from those of non-aboriginal offenders".[22] These Indigenous circumstances of disadvantage include:

> the history of colonialism, displacement, and residential schools … [which] continue … 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.[23]

Section 718.2(e) directs sentencing judges to respond to these unique circumstances when crafting a just and appropriate sentence. In line with a substantive equality approach, the "fundamental purpose of s. 718.2(e) is to treat aboriginal offenders fairly by taking into account their difference."[24]

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[21] *Toronto (City) v. Ontario (Attorney General),* 2021 SCC 34, para. 55.
[22] *Gladue,* para. 37 (emphasis in original).
[23] *Ipeelee,* para. 60.
[24] *Gladue,* para. 87.

12. This commitment to substantive equality for Indigenous peoples has become entrenched in Canada's criminal justice system. Not only has the meaning of s. 718.2(e) been elaborated in *Gladue* and *Ipeelee*; its methodology has also been extended beyond the sentencing context to inform approaches to bail, extradition, dangerous offender designations, review board hearings, parole, civil contempt, and professional discipline.[25]

13. This jurisprudential commitment to substantive equality has developed in unison with broader governmental initiatives. Since *Gladue*, Parliament has expanded the mandate of substantive equality for Indigenous peoples by enacting s. 718.2(e) analogues for youth justice, military justice, and corrections.[26] On the administrative side, Crown policy manuals are giving effect to *Gladue* principles outside of the sentencing context.[27] And as the voice of the legal profession, the CBA has passed several resolutions to promote the substantive equality of Indigenous peoples in the justice system.[28] By all accounts, s. 718.2(e)'s constitutional imperative of substantive equality has become entrenched in Canada's legal system.

14. Recognizing s. 718.2(e) as quasi-constitutional legislation as it applies to sentencing is not a revelatory step in this Court's jurisprudence. Judges and academics alike have noted the link between s. 718.2(e) and substantive equality under the *Charter*.[29] In *R. v. Leonard*, which applied

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[25] *R. v. Robinson,* 2009 ONCA 205, para. 13 and *R. v. Oakes,* 2015 ABCA 178 at para. 11 (bail); *United States v. Leonard,* 2012 ONCA 622, paras. 57, 60 [*Leonard*] (extradition); *Boutilier,* para. 63 (dangerous offenders); *R. v. Sim* (2005), 78 O.R. (3d) 183 at para. 12 (review board hearings); *Twins v. Canada (AG)* 2016 FC 537, paras. 57-58 (parole); *Frontenac Ventures Corp v. Ardoch Algonquin First Nation,* 2008 ONCA 534 at paras. 56-57 (civil contempt); *Law Society of Upper Canada v. Terence John Robinson.* 2013 ONLSAP 18, para. 74 (professional discipline).

[26] *Youth Criminal Justice Act,* SC 2002, c 1, s. 38(2)(d); *National Defence Act,* RSC 1985, c N-5, s. 203.3(a)(c.1); *Corrections and Conditional Release Act,* SC 1992, c. 20, s. 4(g); see also *Ewert v. Canada,* 2018 SCC 30, paras. 53-55.

[27] See for e.g. Ontario Crown Prosecution Manual, D. 20: Indigenous Peoples; British Columbia Prosecution Service, Crown Counsel Policy Manual, CHA 1 – Charge Assessment Guidelines at 4.

[28] See for e.g. Canadian Bar Association Resolution 11-12-A: Preserving Special Consideration for Aboriginal Offenders in the Criminal Justice System; Resolution 12-04-A: Mandatory Minimum Sentences.

[29] See for e.g. Jonathan Rudin and Kent Roach, "Broken Promises: A Response to Stenning and Roberts' 'Empty Promises'" (2002) 65:3 *Sask. L. Rev* 3 at 25; Asad G. Kiyani, "R. v. Lloyd and the Unpredictable Stability of Mandatory Minimum Litigation" (2017) 81 S.C.L.R. (2d) at 135.

Gladue to the extradition context, the Ontario Court of Appeal construed *Gladue* in a manner that gave effect to the principle of substantive equality:

> … *Gladue* factors must be considered in order to avoid the discrimination to which Aboriginal offenders are too often subjected and that so often flows from the failure of the justice system to address their special circumstances. Treating *Gladue* in this manner resonates with the principle of substantive equality grounded in the recognition that "equality does not necessarily mean identical treatment and that the formal 'like treatment' model of discrimination may in fact produce inequality: *R. v. Kapp,* 2008 SCC 41 at para. 15.[30]

The Saskatchewan Court of Appeal was even more explicit in its observation that "s. 718.2(e) requires sentencing courts to give effect to substantive equality concerns when crafting a fit sentence."[31]

15. Likewise, this Court has signalled that s. 718.2(e) gives legislative expression to s. 15(1) of the *Charter*. Although the Court was careful to note that *Gladue* was not a constitutional case, Cory and Iacobucci JJ. nonetheless gestured toward s. 718.2(e)'s ameliorative character under s.15(2):

> There is no constitutional challenge to s. 718.2(*e*) in these proceedings, and accordingly we do not address specifically the applicability of s. 15 of the *Charter*. We would note, though, that the aim of s. 718.2(*e*) is to reduce the tragic overrepresentation of aboriginal people in prisons. It seeks to ameliorate the present situation and to deal with the particular offence and offender and community…[32]

In this passage, the Court implied that s. 718.2(e) would qualify as a remedial scheme under s.15(2) of the *Charter*. This is relevant to a s. 15(1) analysis. In *R. v. Kapp,* the Court clarified that s. 15(2) is a "full expression of equality", rather than an exception to equality.[33] Put another way, an ameliorative law under s. 15(2) *gives effect* to equality rights under s. 15(1). By acknowledging the ameliorative character of s. 718.2(e), this Court recognized the provision's constitutional dimension under s. 15(1) of the *Charter*.

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[30] *Leonard,* para. 60 (emphasis added).
[31] *R. v. Whitehead,* 2016 SKCA 165, para. 32; see also *R. v. Ratt,* 2021 SKCA 7, para. 88.
[32] *Gladue,* para. 87 (emphasis added).
[33] *R. v. Kapp,* 2008 SCC 41, para. 37.

iii. The Conditional Sentence Order Gives Effect to s. 718.2(e)

16. Section 742.1 is intimately tied to the realization of substantive equality codified in s. 718.2(e). Parliament made clear that s. 718.2(e) is not merely aspirational; it must be given real effect through community-based sentencing initiatives. As noted by the Minister of Justice at the House of Commons Standing Committee on Justice and Legal Affairs:

> [T]he reason we referred specifically [in s. 718.2(e)] to aboriginal persons is that they are sadly overrepresented in the prison populations of Canada…
>
> What we're trying to do, particularly having regard to the initiatives in the aboriginal communities to achieve community justice, is to encourage courts to look at alternatives where it's consistent with the protection of the public – alternatives to jail – and not simply resort to that easy answer in every case.[34]

17. The innovation of the conditional sentence did not coincidentally mitigate the crisis of Indigenous overincarceration. On the contrary: this was an animating purpose behind the enactment of s. 742.1. In *Gladue,* the Court drew a direct connection between s. 718.2(e) and 742.1, noting that "[t]he general principle expressed in s. 718.2(e) must be construed and applied" in light of the desire, reflected in the creation of the conditional sentence, to reduce the use of incarceration.[35] Put simply, ss. 718.2(e) and 742.1 were enacted together to respond to the disproportionate incarceration of Indigenous peoples.

18. As a matter of statutory interpretation, the interrelationship between s. 718.2(e) and 742.1 is readily evident. The text of s. 718.2(e) itself calls for the use of alternative sanctions to imprisonment:

> (e) 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.[36]

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[34] *Gladue* at para. 47, citing *Minutes of Proceedings and Evidence*, Issue No. 62, November 17, 1994, at p. 62:15.
[35] *Gladue* at para. 40; see also *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61 at para. 92 [*Proulx*].
[36] *Criminal Code* (emphasis added).

In *Proulx,* this Court held that the phrase "other than imprisonment" includes "the decision as to whether to impose a conditional sentence".[37] The very text of s. 718.2(e) indicates that its principal aim was not to lessen the *length* of punishment, but its form.

19. Contrary to the appellant's suggestion, this case does not turn on whether s. 742.1 should be "constitutionalized."[38] The analysis should proceed by assessing whether the restrictions on conditional sentences impair the operation of s. 718.2(e), which gives legislative expression to the imperative of substantive equality in the Indigenous sentencing context. This approach recognizes Parliament's pivotal role in shaping the content of *Charter* rights*;* as Rowe J. observed, courts and the legislature "remain 'partners and not rivals in the total process of delivering justice under the rule of law to the people'".[39] The object of equality in sentencing Indigenous offenders was not invented by Cory and Iacobucci JJ. in *Gladue*; it was grounded in s. 718.2(e), a legislative imperative. Just as judges give meaning and effect to the rights enshrined in our Constitution, so too does Parliament.

20. Understanding s. 718.2(e)'s quasi-constitutional status centers its role in the s. 15 analysis. There is an ongoing debate about the degree to which *Charter* rights impose positive versus negative obligations on the state.[40] One difficulty with this dichotomy is its premise: it views *the courts* as the principal constitutional actor, in the sense that the courts either set limits or impose obligations on the legislature. The courts are not, however, the sole arbiter of the scope and content of *Charter* rights. As Prof. MacDonnell notes, "politicians are important constitutional actors," despite the fact that "constitutional scholarship continues to focus disproportionately on courts."[41] The constitutional dimension of s. 718.2(e) was a collaborative product of Parliament and the

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[37] *Proulx,* para. 94.
[38] Factum of the Appellant, para. 62.
[39] *Chouhan,* para. 134 *per* Rowe J. (concurring), citing W.R. Lederman, "Democratic Parliaments, Independent Courts, and the Canadian Charter of Rights and Freedoms" (1985) 11 Queen's L. J. 1 at 2 [*Chouhan*].
[40] See for e.g. *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux,* 2018 SCC 17 at para. 65 *per* Côté, Brown, and Rowe JJ. (dissenting) [*Alliance*]; *Toronto (City),* paras. 16-20 *per* Wagner C.J. and Brown J., paras. 152-155 *per* Abella J (dissenting).
[41] Vanessa MacDonnell, "A Theory of Quasi-Constitutional Legislation", 53.2 *Osgoode Hall Law Journal* (2016) 508 at 511.

judiciary. For over 25 years, the methodology of s. 718.2(e) has grounded Canada's commitment to substantive equality in the Indigenous sentencing context.

B. Restrictions on Conditional Sentences Impair the Operation of s. 718.2(e)

21. Sections 742.1(c) and (e)(ii) of the *Criminal Code* restrict the availability of conditional sentences in a manner that impairs the operation of s. 718.2(e). The impugned provisions categorically limit the use of conditional sentences for large swaths of offences, without regard for the circumstances of Indigenous offenders. This restriction on judicial discretion impairs the remedial purpose of s. 718.2(e), which aims to achieve substantive equality for Indigenous persons and redress their overincarceration through community-based approaches to sentencing. By frustrating the operation of a remedial scheme that is unique to Indigenous offenders, the impugned provisions disproportionately impact Indigenous people in a manner that exacerbates their historical disadvantage. This violates s. 15(1) of the *Charter*.

22. Not all amendments to s. 742.1, or even s. 718.2(e), will run afoul of s. 15. Put another way, modifications to the language of s. 718.2(e) or the availability of a conditional sentence do not automatically constitute a *Charter* violation. As noted in *Quebec (Attorney General) v. Alliance*, such an approach would "improperly shift… the focus of the analysis to the *form* of the law, rather than its effects".[42] The statutory language employed to implement s. 15 of the *Charter* may be subject to change. What *is* insulated from repeal, however, is the constitutional commitment *behind* s. 718.2(e): substantive equality for Indigenous peoples through combatting their overincarceration. The conditional sentence is the principal remedial tool to realize this objective in practice.

23. There are alternative routes for Parliament to generally limit the use of conditional sentences without impairing the remedial purpose of s. 718.2(e). Where criminal law provisions are made more stringent, the CBA has long advocated for residual judicial discretion, or a "safety valve", that empowers judges to avoid unconstitutional results. For example, the unavailability of conditional sentences could be a presumption, rather than a rule, and could be rebutted with proof of *Gladue* factors. But a blanket restriction on conditional sentences for broad ranges of offences

[42] *Alliance* at para. 33 (emphasis in original).

will violate s. 15(1) of the *Charter* where there is no residual discretion for judges to respond to the circumstances of Indigenous offenders and give effect to s. 718.2(e).

24. The issues raised in this appeal are directly related to those in the mandatory minimum sentencing context.[43] The principles of substantive equality and individualized proportionality are closely linked; a grossly disproportionate sentence for an Indigenous offender will also be an unequal one. Like the impugned provisions in this case, mandatory minimum sentences necessarily preclude a conditional sentence order, which can also impair the remedial object of s. 718.2(e).[44] Although Parliament must have "reasonable room to manoeuvre" when setting criminal justice policy,[45] it must not frustrate judges' ability to implement s. 718.2(e), which is a mandatory statutory imperative with a constitutional dimension. The solution of a safety valve would allow Parliament to set criminal justice policy in a manner that respects constitutional limits under both ss. 12 and 15(1) of the *Charter*.

C. Conclusion

25. Section 718.2(e) of the *Code* is unique in that it represents quasi-constitutional legislation. This legislative commitment to substantive equality is implemented through the innovation of the conditional sentence order in s. 742.1 of the *Code.* These two provisions, and their subsequent interpretation in *Gladue,* represent a groundbreaking collaboration between Parliament and the judiciary to promote substantial equality in the sentencing of Indigenous offenders. Upholding the majority's ruling would not, as the appellant suggests, impair Parliament's ability to legislate.[46] On the contrary, such a result recognizes Parliament's role as a constitutional actor, and Canada's longstanding commitment to substantive equality in the Indigenous sentencing context.

PARTS IV AND V – COSTS SUBMISSION AND NATURE OF ORDER SOUGHT

26. The CBA does not seek costs and respectfully requests that no costs be ordered against it.

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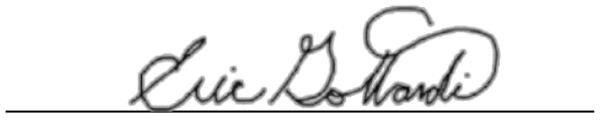
[43] See generally Factum of Canadian Bar Association in *Hills v. R,* (SCC File No. 39338); *R. v. Hilbach,* (SCC File No. 39438).
[44] See *Criminal Code,* s. 742.1.
[45] *Chouhan,* para. 84, citing *Andrews v. Law Society of British Columbia,* [1989] 1 S.C.R. 143, at p. 194.
[46] Factum of the Appellant, para. 1.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Vancouver, Province of British Columbia, this 1st date of March, 2022.



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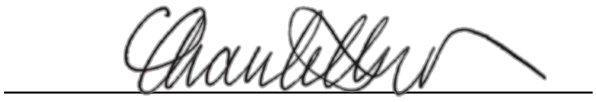

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PART VII – TABLE OF AUTHORITIES

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Loyer v. Air Canada, 2006 FC 1172	7
Mazraani v. Industrial Alliance Insurance and Financial Services Inc., 2018 SCC 50	6, 7
McCormick v. Fasken Martineau Dumoulin LLP, 2014 SCC 39	6
Ontario (Attorney General) v. G, 2020 SCC 38	3
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R. v. Beaulac, [1999] 1 S.C.R. 768	7
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