

CANADA / JUDGMENT

## R. v. Chen

2021 BCSC 697

COURT

Supreme Court of British Columbia

DECIDED

7 April 2021

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2021 BCSC 697 R. v. Chen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Chen,

2021 BCSC 697

Date: 20210407

Docket: 27277-1

Registry: Vancouver

Regina

v.

### Stephen Hai Chen

Restriction on publication: A publication ban has been imposed under s. 486.5 of the Criminal Code restricting the publication, broadcasting or transmission in any way of evidence that could identify an undercover officer, referred to in this judgment by the initial W. This publication ban applies indefinitely unless otherwise ordered.

Corrected Judgement: The text of the judgement at paragraph 127 was corrected on June 22, 2021

Before: The Honourable Mr. Justice Schultes

Oral Reasons for Sentence and Charter Ruling

Counsel for the Crown:

M. Loda

Counsel for the Accused:

T.C. Paisana

C.V. van Wiltenburg

Counsel for the Attorney General of British Columbia

R.G. Garson, Q.C.

Place and Dates of Hearing:

Vancouver, B.C.

January 7-8, 2021

Place and Date of Judgment:

Vancouver, B.C.

April 7, 2021

## Introduction

- [1] On July 16, 2019, I found Mr. Chen guilty of a single count of trafficking in MDMA. The neutral citation for those reasons for judgment is 2019 BCSC 2292.
- [2] In addition to the usual sentencing proceedings resulting from that conviction, Mr. Chen is applying to strike down the provisions of the Criminal Code that would preclude the imposition of a conditional sentence on him - ss. 742.1 (c) and (e) (ii). That application relies in part on the recent decision of the Ontario Court of Appeal to strike down those sections in *R. v. Sharma*, 2020 ONCA 478, leave to appeal to granted [2020] S.C.C.S. No. 311.

## Circumstances of the Offence

- [3] The indictment was framed as a continuing offence, alleging nine incidents of trafficking in MDMA between February and August 2015.
- [4] Mr. Chen's involvement arose as a result of an RCMP investigation into trafficking activities by Tarsem Jawanda. An undercover officer, W., formed a relationship with Mr. Jawanda, representing himself as a person who had significant connections in the illicit drug trade. The full range of activities that they engaged in as part of the undercover operation was broader than the one involving Mr. Chen, and resulted an additional conviction for Mr. Jawanda. What matters for present purposes is that after receiving smaller samples of MDMA from Mr. Jawanda, W. began to purchase that drug from him in kilogram amounts.

- [5] The evidence in Mr. Chen's trial consisted mainly of the purchase requests by W. to Mr. Jawanda; intercepted telephone conversations between Mr. Jawanda and a person whom I found was Mr. Chen, apparently referring to imminent or recently concluded deliveries, including on the issue of payment; and surveillance of contact between them at residences associated to Mr. Chen and other locations, at times that corresponded to the deliveries in question.
- [6] I was satisfied beyond a reasonable doubt that for six of the nine transactions alleged - on February 14, July 7, and August 14, 18, 21, and 26 - Mr. Chen was the person who supplied the MDMA to Mr. Jawanda to be sold to W. Except for February 14, in which one kilogram was supplied, the other purchases all involved two kilograms, for a total of 11. The price paid to Mr. Jawanda was \$8000-\$8500 per kilogram, for a total of \$84,000, but the specific amounts that were passed on to Mr. Chen are unknown.

### **Circumstances of the Offender**

- [7] Mr. Chen is now 53 years old. He has a dated criminal record that is not being relied on by the Crown as having any relevance to this sentencing.
- [8] He was born in China and immigrated to Canada with his family when he was 11.
- [9] Although he was academically capable, he left school after Grade 11 to start his own auto detailing business, which he ran for three years. After that, he was involved in a variety of occupations, including selling pagers, cauliflower farming, woodworking, and running a store.
- [10] Since 2017, he has been a self-employed golf instructor for children and adults, and has provided letters of reference attesting to the quality of his teaching and the positive personal qualities that he has demonstrated in that capacity.
- [11] He has four children, from two previous relationships. Two adult children live in the United States, a 19-year old son lives with him and attends college, and a 15-year old son lives in China, I infer with the son's mother. To his credit, one of his letters of reference is from the mother of the two adult children. He maintains regular video contact with the children who live elsewhere. His counsel advises that his ability to visit them in person was severely restricted by the requirement that he surrender his passport as a condition of his release, although six exemptions permitting him to travel were granted over the course of the voir dire and the trial, and I expect that the travel restrictions arising from COVID-19 would also have had an impact over the last year.
- [12] He has been in a committed relationship with his current intimate partner for the past four years, which has included intermittent periods of them living together.

- [13] He contributes significantly to the care of his elderly parents. They are still living independently, but his mother's health has deteriorated and she is largely bedridden. They rely on him for support, such as delivering groceries and taking them to medical appointments.
- [14] Before his in-person attendance was precluded by the pandemic restrictions, he regularly attended, and donated to a Buddhist temple.
- [15] A common theme in all of the reference letters provided is Mr. Chen's caring nature which, according to the writers, manifests itself in his willingness to help others whenever required, in a variety of situations. This includes volunteer activities in the community, some of which were depicted in photos in the defence sentencing material, with an organization that provides support for recent immigrants.

#### Positions on Sentence

##### Crown

- [16] The Crown seeks a sentence of four years' imprisonment for Mr. Chen.
- [17] Crown counsel submits that the evidence that was accepted at trial shows him to have been a kilogram-level supplier of this drug, and that he acted in the essential role of a middleman to obtain it for Mr. Jawanda, who had no independent access to the supplier. The amounts sold and the duration over which his activity extended show his commitment to that role, which was clearly undertaken for profit, despite whatever friendship he may have had with Mr. Jawanda. His use of a payphone for one of the relevant calls demonstrates an awareness of the illegality of his actions and the steps needed to avoid the potential interception of his communications by the police.
- [18] A benchmark in this case, in the Crown's submission, is the sentence imposed on Mr. Jawanda for his involvement in the same offences. He was sentenced in February of 2019, following guilty pleas to the offences of trafficking in MDMA, arising out of these circumstances, and conspiracy to export that substance, which was the result of involvement in a transaction that had nothing to do with Mr. Chen. The neutral citation for those reasons is 2019 BCSC 1009.
- [19] On the MDMA trafficking count, Mr. Jawanda admitted to having carried out 10 sales to W., including the nine with which Mr. Chen was originally charged, involving at least two suppliers. The ultimate value of the MDMA was estimated as \$100,000-\$150,000.
- [20] The conspiracy count involved a plan that he entered into with W., as well as the former co-accused Anoop Garcha, to ship 12.5 kilograms of MDMA to Los Angeles and exchange it for 30-40 kilograms of cocaine. The MDMA was concealed in a secrete compartment of a truck operated by another undercover operator and a police agent, who were to be the couriers, and they were provided with detailed instructions about to contact the other party to make the exchange in California. A placebo was substituted for the MDMA and it was exchanged

for cocaine as planned, after which the California participants were also arrested. This specific transaction took place within the context of ongoing efforts by Mr. Jawanda to have the police agent take MDMA to the U.S. for cocaine exchanges, and to have W. utilize the transportation system that he claimed to control for the same purpose.

- [21] Mr. Jawanda was 55 years old at the time of sentence, had only one dated and unrelated previous conviction and, despite his involvement in these offences, continued to operate a successful concrete pumping business. He had been drawn into drug trafficking as a result of debts incurred through his gambling addiction. He was also abusing alcohol during the same period.
- [22] I characterized Mr. Jawanda's role in relation to the MDMA that was obtained for W. as "an effective but somewhat improvisational domestic trafficker, when pressed into action for that purpose by his well-heeled undercover associate." With respect to the conspiracy, I found that he was "a resource to be called on for transportation by suppliers, and not a formal part of any organization or playing a high-level role within it."
- [23] Important mitigating factors included his guilty plea, which involved forgoing any challenge to the authorizations to intercept his communications; his status as essentially a first offender; and the meaningful steps that he had taken since the offences to address his addictions to gambling and alcohol.
- [24] I imposed sentences of four years' imprisonment for the trafficking and six years for the conspiracy, to be served concurrently.
- [25] Crown counsel says that normally a higher sentence than four years would be appropriate for Mr. Chen, because the trial evidence shows him to have been higher up the MDMA supply chain than Mr. Jawanda, and he lacks the mitigating factor of a guilty plea.
- [26] She concedes that balanced against these considerations are the facts that the accompanying conspiracy count would have aggravated the seriousness of the trafficking; Mr. Jawanda admitted to more transactions than Mr. Chen was convicted of; Mr. Chen is being sentenced much longer after the commission of the offence; and his sentencing is taking place during a pandemic.
- [27] This all leads the Crown to the position that the same sentence that Mr. Jawanda received would be appropriate.
- [28] The Crown refers to two of the cases that were relied on in the Jawanda sentencing. First, quoting from the summary at para. 111 of the Jawanda reasons:

R. v. Higgins, 2018 BCSC 743 , involved an offender receiving a sentence of three years' imprisonment pursuant to a joint submission, following a guilty plea to conspiracy to traffic in MDMA. The offender had arranged for two kilograms of cocaine to be brought into Canada to be exchanged for 117,000 pills of ecstasy [as is well known, the popular name for MDMA] to go back to the U.S. The net weight of the actual controlled substance was 2.3 kilograms and its value was

\$70,000 to \$80,000. It was admitted that the operation was sophisticated. The 34-year-old offender had a conviction for possession of marihuana for the purposes of trafficking subsequent to this offence, for which he had received a fine. He had serious health problems due to a workplace accident. Other unusual factors were the offence itself was 10 years old and had taken almost six years to come to [a] resolution because of delays that were not caused in any respect by this offender, but rather by his co-accused.

[29] In particular, the Crown relies on the comments at paras. 14 and 15 of that decision, which explain that controlled substances "are organized into different schedules [under the Controlled Drugs and Substances Act] reflecting Parliament's assessment of the dangerousness of the substance in question" and that "while [MDMA] was still considered a pernicious substance [when it was under Schedule III, at the time of Mr. Higgins' offence] it was not treated as seriously as a Schedule I substance such as an opiate like heroin or cocaine."

[30] Next, quoting from paras. 114 and 115 of the Jawanda reasons:

R. v. Pabla, 2013 BCSC 1588 was a conviction after trial for conspiracy to produce MDMA and production of it. The offender was a worker at an ecstasy production facility which was found at the time of police seizure to contain 6.9 kilograms of ecstasy, as well as a substantial amount of other drugs that were described as controlled substances in powder form. However, the sentencing judge did not attribute control over these items to the offender.

He was 20 years old at the time of his involvement. He had no criminal record and had experienced a difficult childhood, which had caused him to become friends with someone with a serious gang involvement. The sentencing judge noted that:

46 But for Mr. Pabla's youth, mental health challenges, remorseful attitude, and associated excellent prospects for rehabilitation, I would have imposed a lengthier term of imprisonment to be served in a penitentiary . . .

[31] The judge imposed concurrent sentences of imprisonment of two years less a day, but then added a day to make it a federal sentence at the defence's request, in order to access more suitable programs in the federal system.

[32] As in Higgins, MDMA was still a Schedule III at the time of Mr. Pabla's offence. The sentencing judge reviewed at length the dangers posed by MDMA, which targets teenagers and young adults and can cause unanticipated health effects, occasionally serious or fatal ones. The judge concluded that although it is not as dangerous as cocaine or methamphetamine, it still poses a danger to the community, in particular to young people. She concluded that "an unambiguously serious consequence should flow" from such conduct, "in order to achieve sufficiently meaningful denunciation and deterrence". Crucially from the Crown's perspective, even a person who was described as "a youthful, naïve first offender unmotivated by greed, involved with a Schedule III drug" did not receive a conditional sentence in that case.

- [33] The Crown submits that the aggravating features in Mr. Chen's case are the ongoing nature of the offence; the quantities that were supplied; the presence of the profit motive (as opposed to simply funding an addiction, as seen in some cases); the elements of sophistication in avoiding detection; his higher and more trusted position when providing the MDMA; and the fact that it had become a Schedule I drug by the time he committed the offence.
- [34] The fact that this conduct required ongoing business decision-making and a cost-benefit analysis, in contrast to being a spur of the moment offence, increases his moral culpability, Crown counsel argues.
- [35] In the Crown's submission, the mitigating factors are not extensive. The effective absence of a criminal record is entitled to less weight in the context of his ongoing criminality. It would also not be accurate to describe his bail conditions as onerous, because the only restriction on his conduct was not being able to travel outside of Canada without court permission which, as I have already described, was readily granted.
- [36] As to the potential mitigating factor arising from the delay in completing this prosecution, Crown counsel acknowledges the principle that was explained in *R. v. Nasogaluak*, 2010 SCC 6 at paras. 53-55, to the effect that difficulties experienced by offenders, including delay, in the course of a prosecution that fall short of constituting actual Charter breaches can still be considered as mitigating factors for the purposes of sentence. However, she emphasizes the requirements that the offender must establish state misconduct and prejudice resulting from it, and argues that neither has been demonstrated by Mr. Chen in this case.
- [37] In particular, there has been no state misconduct leading to delay, she submits. The direct indictment that the Crown obtained resulted in the same trial dates being available in this court that had been set in provincial court. The voir dire for the review of the wiretap authorization was delayed by a month when previous defence counsel sought to raise a new argument on the first day of the hearing, but it otherwise proceeded without delay. The period between September 18, 2018 and April 3, 2019 when my voir dire ruling on the authorization was on reserve, is characterized by Crown counsel as "the time it took to render a complex and thorough decision" on that issue. A focused 10-day trial began on June 10, 2019 and reasons for judgment in it were rendered on July 16. Some delay resulted from Mr. Chen retaining new counsel after his conviction, and the sentencing date in April 2020, which had been set in January, had to be adjourned due to COVID. The new date in August was adjourned the day before so that the defence could make the Charter application based on the recently-released decision in *Sharma*.
- [38] In the Crown's submission, the majority of the delays were caused by defence actions, including two last-minute changes of position, and the balance were either inherent in the case or otherwise unavoidable.

- [39] Turning to the extent that Mr. Chen's rehabilitation should be considered as a mitigating factor, the Crown points out that the letters of support for him, positive as they may be, do not describe any change in his behaviour as a result of these events, which is the essence of rehabilitation. He remains the same person the letter writers have known throughout their acquaintance. Nor is there any indication of the presence of remorse, which is closely linked to rehabilitation, whether demonstrated by a guilty plea or in some other manner.
- [40] Finally, there is the question of the impact on Mr. Chen's sentence of the COVID-19 pandemic. Crown counsel submits that this factor was correctly characterized by the Ontario Court of Appeal in *R. v. Morgan*, 2020 ONCA 279, as a collateral consequence, which is relevant to the extent that it causes the sentence imposed to have a more significant impact than it would otherwise. This is to be distinguished from a mitigating factor, which diminishes the offender's moral blameworthiness or renders the offence less serious. While the likely effects of COVID on the conditions of Mr. Chen's incarceration "factor in to what is a fit sentence in all the circumstances it cannot justify reducing the sentence to a point where it is not proportionate to the gravity of the offence or the blameworthiness of the offender": *R. v. Brown*, 2020 ONSC 6355 at para. 42, citing *R. v. Suter*, 2018 SCC 34 at para.56.
- [41] The Crown also cites my reasons for sentence in *R. v. Zhao*, 2020 BCSC 1552 at paras. 135-136 in which I adopted the analysis of Justice Crabtree in *R. v. Greer*, 2020 BCSC 1131 at paras. 51-54, and declined to give any specific credit for the effect of COVID on the offender's incarceration, either on remand to that point or prospectively when serving his sentence. As Crabtree J. found in his decision, I had no evidence of the nature or expected duration of the future impact of COVID in the correctional setting or, more importantly, of any particular vulnerabilities on the offender's part. As a result, I concluded, as Crabtree J. had, that the situation was best addressed by the parole authorities, who could take the actual impact into account in their release decision.
- [42] The Crown submits that therefore its sentencing position already factors in these effects to the appropriate extent.

## Defence

- [43] Mr. Chen's counsel seeks a conditional sentence of two years less a day, to be followed by three years' probation. The conditional nature of the sentence is obviously contingent on the success of the Charter application.
- [44] Counsel provided an appendix of 12 B.C. and Ontario decisions, including cases in which sentences of two years or less were imposed on offenders for offences involving trafficking or possession for the purposes of trafficking MDMA, including conditional sentences when they were still available. They range in dates from 2005 to 2017. (MDMA became a Schedule I drug, and thus ineligible for a conditional sentence under the legislation in question here, in November 2012.) They are intended to support the defence position that a sentence in the maximum range of provincial time to be served conditionally, followed by a substantial

period of probation, will address all of the most important sentencing objectives that arise here.

- [45] In addition to Mr. Jawanda's sentence, Mr. Chen's counsel also referred to the sentences of two other former co-accused, who were convicted for their roles in the conspiracy to export MDMA.
- [46] Gurchet Manhas was convicted by Justice Warren following a trial, and on June 28, 2019, she received a suspended sentence and three years' probation.
- [47] Mr. Garcha, to whom I referred when describing Mr. Jawanda's actions, entered a guilty plea, and on July 31, 2019, received a sentence of four years' imprisonment on a joint submission. That sentence was imposed by me.
- [48] The defence argues that Mr. Chen's provable role in the MDMA transactions is less significant than Mr. Jawanda's admitted one. It arises from circumstantial evidence and thus gives rise to more restricted inferences. In particular, counsel suggests that Mr. Chen mainly facilitated Mr. Jawanda's purchases from suppliers, was present for only two of the handoffs of drugs (on August 14 and 26) and was part of the physical chain of transportation only once (on August 14). Further, the intercepted phone calls show only arrangements for Mr. Chen and Mr. Jawanda to meet and then, after Mr. Jawanda provided the drugs to the undercover officer, arrangements for Mr. Chen to be paid. The defence submits that it is equally likely that Mr. Chen simply liaised with Mr. Jawanda to provide information about where to meet the supplier as it is that Mr. Chen provided the drugs himself. The former possibility is supported by one of his intercepted comments, in which he speaks of bringing Mr. Jawanda to a place where he would pick "it" up.
- [49] Counsel also suggests that the evidence does not establish that Mr. Chen profited significantly from these transactions. In response to a joke by Mr. Jawanda about using the proceeds of one of the sales to the undercover officer for another purpose, Mr. Chen spoke of having to pay his "buddy". To the extent that inferences can be drawn that Mr. Chen received any money in these transactions, they go no farther than to show that he was being reimbursed. To proceed beyond that would be speculative.
- [50] In addition to Mr. Chen's more limited role in these transactions - essential as a facilitator in the defence's characterization - his counsel submits that I should not put excessive emphasis on the total amount of MDMA involved. In addition to being a lesser amount than Mr. Jawanda admitted selling, there is no evidence showing Mr. Chen's knowledge of the specific amount that Mr. Jawanda was requesting in each transaction.
- [51] Caution should also be exercised when, as in this case, the number of transactions that are ultimately carried out is completely under control of a police undercover operation. As pointed out in *R. v. Grant*, (2007) 216 Man R. (2d) 219 (Q.B.); *aff'd* without reference to this point (2009) 240 C.C.C. (3d) 462 (C.A.), leave to SCC refused [2009] S.C.C.A. No. 94: it is the moral culpability involved in dealing in drugs at a particular level that matters most for

sentencing purposes, rather than the number of purchases that the undercover operation decides to make. In this case, the transactions in which Mr. Chen participated were for one or two kilograms, grouped within a relatively short period.

- [52] As the Crown fairly conceded, to the extent that Mr. Jawanda's additional involvement in the conspiracy to export may have aggravated his overall conduct and supported the four year sentence on the trafficking count, that factor is absent in Mr. Chen's case.
- [53] Mr. Chen's counsel also argues that his case exhibits unique factors which weigh in favour of a lower sentence than was imposed on Mr. Jawanda and Mr. Garcha.
- [54] The first unique factor in Mr. Chan's case is said to arise from the delays that he has experienced from being charged to the completion of his trial, and from the imposition of a conviction on him to the present sentencing hearing. The delay from the approval of the charges to the completion of the trial was approximately 37 months, and the defence suggests that at least 24 of those months are attributable to state conduct. To aggravate matters, there has been the approximately 18 month delay between the conviction and this sentencing hearing. As a basis for comparison, the Ontario Court of Appeal has held that post-conviction delay becomes presumptively unreasonable after five months: *R. v. Charley*, 2019 ONCA 726 at para.87. Factors referred to by counsel as contributing to the excessive delay here include the period during which the voir dire ruling was on reserve and the amount of time that was required to obtain a transcript of the oral reasons for judgment on the trial, which they say was requested on July 31, 2019 and not provided until January 22, 2020.
- [55] In concluding that delay that is excessive but does not reach the level of a s. 11(b) breach can be considered as a mitigating factor in sentence, the Supreme Court of Canada in *Nasogaluak* confirmed the relevance to the sentencing process of the prolonged uncertainty and prejudice that such delay causes. Among the specific impacts of the delay on Mr. Chen have been the duration of the restrictions imposed by his bail conditions, and of the uncertainty and anxiety about their future that he and his partner have experienced. On the latter point his counsel cites the description of the charged person living "in suspense, uncertain of his or her fate, unable to get on with his or her life, and faced with all the stress and anxiety that this entails" in *R. v. MacDougall*, [1998] 3 S.C.R. 45 at para. 63.
- [56] Besides their relevance as a feature of the delay, the bail conditions are cited as a stand-alone mitigating factor, because of the collateral consequence of restricting his contact with his out-of-town children. His long compliance with his conditions also confirms his trustworthiness for the purposes of a community-based sentence, counsel argues.
- [57] Finally from the defence perspective, there is the question of the impact of COVID-19 on the appropriate sentence.

- [58] Mr. Chen's counsel begins with the frequently-cited decision in *R. v. Hearn*, 2020 ONSC 2365, which held that the pandemic may affect sentences by "soften[ing] the requirement of parity with precedent" in light of the unprecedented current conditions, and also by moderating the length of what might previously have been a fit sentence, in recognition of the harsh conditions under which it will now be served due to prevention measures within institutions. This specific approach has been adopted in several B.C. decisions, and counsel submits that even when it has not been applied to reduce the sentence in the case - such as in the Greer decision that I cited in Zhao - its general proposition that "the evolving circumstances of the pandemic are an important part of the sentencing equation when determining a fit sentence" remains valid.
- [59] In B.C. courts have shown a willingness to take judicial notice of the effects of the pandemic generally (*R. v. McKibbin*, 2020 BCCA 337 at para. 24) and specifically on the risks to prisoners (*R. v. Duncan*, 2020 BCSC 590 at para.42). More specifically, the Court of Appeal has declined to find any error in principle in a sentencing judge taking the pandemic and the heightened risk of infection in a custodial setting into account as collateral factors on sentencing even without evidence of the accused's specific vulnerabilities: *R. v. El-Kaaki*, 2020 BCCA 183, at paras. 19 and 22.
- [60] While it builds upon this kind of analysis, the argument by Mr. Chen's counsel is ultimately a different one - rather than seeking a numerical reduction in sentence, counsel submits that the court should reflect the risks arising from the pandemic by permitting the sentence to be served in the community. This approach avoids the unquantifiable risks of incarceration, while still giving proper emphasis to the principles of deterrence and denunciation. This has been the approach in some Ontario cases since Sharma made conditional sentences available for previously-prohibited offences there. It has included situations in which the sentence judge has explicitly stated that a conditional sentence would not have been appropriate except for the exceptional circumstances created by COVID (see *R. v. K.K.*, 2020 ONSC 7198, in which sexual offences against a child resulted in such a sentence because of the age and vulnerable health of the offender). Such an approach has been taken without specific health-related evidence, based on the overall finding that a conditional sentence was "a better, safer alternative to incarceration" (*R. v. K.D.*, 2020 SKPC 14 at para. 65), as well as on the principle that having fewer offenders in jails, and therefore subject to the spread of COVID, is a benefit to society that can balance out factors weighing in favour of actual imprisonment (*R. v. Leclair*, 2020 ONCJ 260 at para. 102).
- [61] Counsel also refers to various reliable publicly available sources to show the increasing number of COVID infections and deaths in recent months, its rampant spread in various custodial settings, and the rising concern with more infectious variants arriving in B.C.

- [62] According to the defence, the question is ultimately one of achieving a balance between the requirements of the administration of justice and the risk in human terms to incarcerated people: *R. v. T.K.*, 2020 ONSC 1935 at para.74. As Hearn suggests at para. 24, this may not be a perfect balance and may properly err on the side of the humanity of the situation.
- [63] Assuming the constitutionality of the sections prohibiting a conditional sentence in this case is successfully challenged, the defence says that the other requirements for such a sentence have been satisfied. The current unique circumstances justify a sentence of less than two years, and Mr. Chen's positive background, limited criminal history and stellar performance on bail show that the safety of the community would not be adversely affected in any way by his presence.
- [64] As to the consistency of a conditional sentence with the fundamental purpose and principles of sentencing, I am asked to keep in mind the very strong weight that rehabilitation must be given in the analysis, given Mr. Chen's many attributes that support that likelihood. Most importantly, other than those that have been validly statutorily precluded, no type of offence is automatically removed from consideration from a conditional sentence. As the foundational authority of the Supreme Court of Canada in *R. v. Proulx*, [2000] 1 S.C.R. 61 makes clear, a significant amount of deterrence and denunciation can be achieved by such a sentence, and it can be tailored to meet both those objectives and restorative ones.
- [65] In this case, strict conditions, such as a lengthy period of house arrest followed by a curfew and the performance of the maximum number of community work service hours could achieve significant deterrence, while Mr. Chen's ability to remain in the community would recognize the current unique public health risks, and allow him to fulfil his important obligations in the community, especially to his ailing parents. To assist me in devising such a sentence, the defence has included a detailed list of conditions that it could well include.

## Discussion

- [66] A threshold factual issue is whether the circumstances of the offences as I found them at trial support the defence contention that Mr. Chen has not been proven to have had a role beyond a mere facilitator of the transactions.
- [67] In the February 14 transaction, the person I found was Mr. Chen told Mr. Jawanda that he had to "go get it", in response to Mr. Jawanda's request to "come and see you". Mr. Chen suggested that they meet in the Broadway and Nanaimo area at around 7:15 pm that evening. Shortly after the transaction with W. at 8:00 pm, Mr. Jawanda called Mr. Chen and asked him if he wanted to "grab that paperwork", which I found was a reference to money. Mr. Chen declined and said that he would "hook up" with Mr. Jawanda the next morning. The following morning Mr. Chen called and said "Okay, the guy need it" and asked Mr. Jawanda to drop "it" off at his house and to "come in the front". (There was no surveillance in relation to this incident.)

- [68] Similarly, the July 7 transaction was preceded by a call between Mr. Jawanda and Mr. Chen the previous evening, in which Mr. Jawanda said he would grab "it" the next morning. They then arranged for the drop-off to take place at the home of Mr. Jawanda's friend, who would be told to "come out and grab it from you" instead. A few minutes after that call, Mr. Chen called again and said "tell your friend to come out". After some confusion about where the friend was Mr. Chen said, "I see him" and the call ended. The MDMA was then supplied to W. on July 7. On July 8, Mr. Jawanda told Mr. Chen that he could drop "it" at Mr. Chen's house, and they ultimately agreed that he would meet Mr. Jawanda on a street behind the Costco in Richmond.
- [69] In relation to the August 14 transaction, Mr. Jawanda and Mr. Chen spoke the day before, with Mr. Chen advising that he was using a payphone. Mr. Chen said "Uh listen, I don't have the sandy ones, I only got the powder ones, but it's the same strength You know, same chef, same people working, right, but they made it only powder instead of sandy". He rebuffed Mr. Jawanda's request to "get a little bit just to show it" by explaining "because once I grab it, it's you know, that's where, I gotta grab it, right". Later that day Mr. Chen was observed by surveillance officers accompanying a male to a home on East 5th, at which Mr. Chen had been previously observed while under surveillance. He loaded a black suitcase (along with an unrelated item) into the other male's vehicle and they drove in that male's vehicle to an apartment building in Richmond, where Mr. Chen brought a black suitcase and the unrelated item into the building.
- [70] The next morning Mr. Jawanda was seen leaving his own home and putting a black suitcase in his vehicle. Later that morning, during their usual transaction, Mr. Jawanda gave W. the MDMA in a black suitcase, for which he supplied the key. Immediately after this transaction, Mr. Jawanda called Mr. Chen and asked him when he wanted the paperwork. They also had a joking exchange in which Mr. Chen referred to taking Mr. Jawanda's house, or his wife, if Mr. Jawanda spent or gambled away the paperwork. Mr. Chen then told Mr. Jawanda to meet him at 1:30 pm at Home Depot, adding that "I already arranged with them". During a call at around 12:30 pm, just before they met for lunch at a Vietnamese restaurant in Richmond, Mr. Jawanda joked about having doubled "your money" to which Mr. Chen replied "make sure you bring my fucking money I gotta pay my buddy". They were next seen at 1:45 pm parking beside each other in a shopping centre parking lot elsewhere in Richmond, and then meeting with two other unidentified males there, all shaking hands in a seemingly friendly manner.
- [71] On August 18 Mr. Chen was observed entering the same Richmond apartment building carrying a bag, and 15 minutes later leaving it with a different kind of bag. Then after calls with Mr. Jawanda, during the second of which he clarified his location, their vehicles were seen beside each other, with Mr. Chen in conversation with the driver of the Jawanda vehicle. Mr. Jawanda then went to the parking lot of a shopping centre. A male emerged from the same vehicle that Mr. Chen had been seen riding in on August 14 and appeared to place a white plastic bag in Mr. Jawanda's vehicle. Mr. Jawanda carried out an MDMA sale

with W. about an hour later. When he called Mr. Chen 15 minutes after the sale, Mr. Chen answered the phone by asking, "It's ready?", which Mr. Jawanda confirmed. After originally arranging to meet at a supermarket, Mr. Chen said he would see Mr. Jawanda behind Mr. Jawanda's house, where he was seen arriving a few minutes later. He parked next to Mr. Jawanda's vehicle in the driveway, with their driver's sides facing each other, before both vehicles left.

- [72] On August 21, after a call in which he had told Mr. Jawanda to go to Mr. Jawanda's house, he called again to say that he would be there at 1:45. When Mr. Jawanda asked if it could be a bit earlier, because he was meeting "buddy" at 2:00 (the time of his meeting with W.), Mr. Chen replied, "No, I gotta meet that buddy at two as well". He then said he would come to Mr. Jawanda's house at 1:45 and "I'll bring you somewhere, and that's where you're gonna pick it up". Mr. Chen called him at 1:42 and in response to Mr. Jawanda's indication that he was "in the back" described his own location en route. At 2:30 Mr. Chen called to ask Mr. Jawanda if he was on his way. Mr. Jawanda explained that the transaction had not taken place yet, and that W. was running a little bit late. The transaction with W. took place at 2:33. At 2:48 Mr. Chen called Mr. Jawanda and asked where he was, adding, "C'mon man". When Mr. Jawanda said he would be there in a minute, Mr. Chen said he was "fucking at the back, burning". In fact, Mr. Chen's van was observed by the police in the lane at the rear of Mr. Jawanda's house between 2:42 and 2:50, and when Mr. Jawanda's vehicle arrived they were "window to window", with an exchange of words between the vehicles.
- [73] On August 25, Mr. Chen phoned Mr. Jawanda and asked "Do you see him yet?". On hearing that Mr. Jawanda did not see this person and was "still sitting at the same spot", Mr. Chen, after a brief hesitation, said he was on his way. It was admitted that nine minutes later, Mr. Chen drove into a parking lot in Richmond where Mr. Jawanda's vehicle was already parked. He eventually parked next to Mr. Jawanda's vehicle and was seen conversing with its occupant. A minute later another vehicle arrived, and its occupant loaded a box into the back of Mr. Jawanda's vehicle, after which Mr. Jawanda left the parking lot. Mr. Chen then had a conversation with the driver of this third vehicle.
- [74] An MDMA transaction between Mr. Jawanda and another undercover officer posing as Mr. Jawanda's associate took place at 9:20 am the next morning. The officer provided the payment in a Starbucks bag. Twenty minutes later Mr. Jawanda was observed with Mr. Chen at a mall in Richmond. Mr. Chen had a Starbucks bag, but it differed in its appearance from the one the undercover officer had described. Mr. Chen was then seen walking towards the entrance of his own apartment. That afternoon Mr. Chen was seen in his vehicle in the parking lot outside of a restaurant. A male walked over to his vehicle and spoke to him. The trunk of Mr. Chen's vehicle opened and the male retrieved a boutique bag from it, closed the trunk and left in his own vehicle.

- [75] The reasonable doubt I had on the remaining three counts arose from the insufficiency of the circumstantial evidence to identify Mr. Chen as the person who had provided the MDMA to Mr. Jawanda, especially in light of statements by Mr. Jawanda to W. that potentially contradicted Mr. Chen's involvement. There was no evidence pointing to any specific alternative supplier.
- [76] For the transactions on February 14, July 7 and August 14, the evidence points to Mr. Chen having physically obtained the MDMA from his supplier and then provided it to Mr. Jawanda himself. For August 18 and 25, he accompanied Mr. Jawanda at a location where a third party apparently supplied the drugs and for August 21 he described to Mr. Jawanda that he would be doing the same thing. He was involved in calls dealing with arrangements for the transactions in advance of, and spoke about and/or engaged in actions related to receiving payment from Mr. Jawanda for, all six transaction. I would characterize him as having been integrally involved in providing the MDMA in all of them, and would not assign him to a peripheral role in the three in which a third party physically provided the drugs, nor find that his overall moral blameworthiness is thereby diminished. He was clearly the person who made these transactions with Mr. Jawanda happen.
- [77] I agree that the aggravating factors in this case are the repeated nature of the transactions; the relatively large amount of drugs involved and their significant value; the degree of sophistication involved in the exchanges, which while not at the high end of the scale still involved a fair amount of stealth; Mr. Chen's trusted position and direct connection with the producer of the drugs, in contrast, for example, with a street-level trafficker; and the fact that MDMA had become a Schedule I drug by the time of these transactions, indicating Parliament's contemporaneous view of its seriousness.
- [78] I take the defence's point that the number of transactions was ultimately driven by the investigators, but that does not detract from Mr. Chen's repeated willingness to fulfil the requests.
- [79] As to the existence of the profit motive, as alleged by the Crown, this may be more accurately characterized as the absence of the mitigating factor of trafficking in drugs to fuel an offender's own addiction.
- [80] The evidence makes it clear that Mr. Chen was required to repay a supplier, and was keen to receive the money from the transactions with W. shortly after they occurred. There is no specific evidence of Mr. Chen's level of compensation for his involvement, but I feel comfortable drawing the inference from the proven facts that he would not have engaged in trafficking on this scale, with all the attendant risks, without some form of compensation. It does not diminish his culpability to any great degree, given the specific role he carried out, if the most significant portion of the payment went to the actual supplier, which seems most likely.

- [81] The mitigating factors are Mr. Chen's lack of any meaningful or related criminal record; his history of lawful employment; the strength of his family and community support and involvement; and his full compliance with his bail conditions for a lengthy period.
- [82] I do not agree with Crown counsel that the ongoing nature of this offences diminishes the weight to be attached to his effective lack of a record - its status as a mitigating factor arises in relation to the imposition of this conviction, in light of his virtually nonexistent history as a past offender. Put another way, an effective first offender still gets the benefit of the lack of prior convictions, regardless of the duration of the offence underlying their first conviction (although true historical offences, which are not present here, obviously undermine any claim by an offender to have been of good character while they were being committed). Repeated considered decisions to engage in criminal conduct also impact an offender's moral blameworthiness of course.
- [83] The reference to family and community support and involvement leads me to address the Crown's concern that none of Mr. Chen's reference describe any degree of rehabilitation, in the sense of a recognition of his wrongdoing and a corresponding effort to alter his lifestyle. Instead they describe him simply carrying on positively in the same vein. I am unable to agree with this submission. As he is entitled to do, Mr. Chen maintains his innocence with respect to these convictions, and while his references acknowledge the fact of those convictions, it is understandable that neither he nor they have described any rehabilitative steps to deal with offences that he maintains were not committed by him. This deprives him of the potentially mitigating effects of demonstrating such steps, but it does not undermine the positive effects of the support that his references demonstrate. It also does not diminish the prospects for future rehabilitation that are implied by this support, in the sense that there are positive and law-abiding parts of his life that can be given greater emphasis in the future.
- [84] Leaving aside the issue of delay for now, although no restrictions on liberty should be taken lightly I am unable to agree that the bail conditions were particularly onerous, as his counsel has suggested. The repeated exemptions that were granted to allow him to travel makes it hard to accept that they interfered to any meaningful degree with the connection with those of his children who live outside of Canada. Their status as a mitigating factor relates instead to his high level of compliance with them over an extended period.
- [85] Considering the elements of a proportionate sentence here, the gravity of the offence, while not at the highest end of the scale, is significant in its own way; and Mr. Chen's willingness to engage in commercial transactions in a potentially dangerous drug on an ongoing basis, in this routine and businesslike manner, shows that he chose to persist in serious criminal activity despite ample opportunities to reflect on the nature and consequences of his conduct. This is quite morally blameworthy. While it is correct to say, as the defence has pointed out, that the number of requests made by Mr. Jawanda on behalf of W. was in the hands of the investigators, Mr. Chen still had to be willing to fulfil them repeatedly, which is essential to his moral blameworthiness.

- [86] As has been said repeatedly in the cases, drug trafficking at this level requires an emphasis on denouncing the conduct and deterring both the specific offender involved and others who might otherwise engage in it. However, Mr. Chen has family and community support, a history of lawful employment and a currently marketable skill, so the reasonable prospects of his rehabilitation that arise from them should moderate deterrence and denunciation somewhat in the overall analysis.
- [87] Parity with other similar offences and offenders is not just a stand-alone sentencing objective - it must also be reconciled with the necessary individualization of the sentence to the particular circumstances of offence and offender, in order to achieve the overall necessary proportionality. However, while parity is part of the analysis of proportionality, as a governing principle it is ultimately secondary to it: *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089 at paras. 53-54.
- [88] Starting with the sentences that were imposed on the former co-accused, Ms. Manhas's and Mr. Garcha's sentences are not of much assistance. Both were convicted in relation to the conspiracy to export MDMA to the U.S. in return for cocaine. Ms. Manhas, who was convicted after a trial, was found by Warren J. to have played an ancillary and non-essential role in the scheme, which mitigated the impact of the seriousness of the offence. I sentenced Mr. Garcha on a joint submission following his guilty plea. Mitigating factors included his family support, a potentially serious health condition that had not yet been definitively diagnosed, and the well-paying job he had waiting for him upon his release.
- [89] The sentence that Mr. Jawanda received for his involvement in the MDMA sales to W. is obviously more informative. I have previously summarized the facts to which he admitted in relation to the MDMA sales to W., including the additional transactions he admitted to beyond those for which Mr. Chen was convicted, and my characterization of his role in the offences. I agree with the Crown that Mr. Chen's more trusted role in the chain of distribution, closer to the original supplier than Mr. Jawanda, offsets to a degree the fact that he was convicted of four fewer transactions, and of course he lacks the mitigating effect of the guilty plea that was present in Mr. Jawanda's case.
- [90] Higgins and Pabla, the other two sentencing cases cited by the Crown, are not as useful as comparators because one involved convictions for conspiracy to traffic in MDMA; and the other for conspiracy to produce, and the actual production of that drug. Higgins in particular featured a sophisticated operation that had a cross-border importation component. Despite these differences, they do demonstrate that even offenders with sympathetic personal circumstances - especially the youthful Mr. Pabla, who dealt with significantly less MDMA than Mr. Chen supplied, still received significant sentences of imprisonment. Even though he was eligible for one at the time, Mr. Pabla did not receive a conditional sentence, and his sentencing judge stressed that an offender without his array of mitigating factors would have received a penitentiary term. These results inferentially support a higher sentence for Mr. Chen.

- [91] With respect to the defence cases, I accept the general proposition that they support: that even in cases involving the production, possession for the purposes of trafficking and trafficking in relatively significant amounts of MDMA, sentences in the provincial range, including conditional sentences when they were still available, have been imposed.
- [92] Their usefulness of many of them as comparators to Mr. Chen's situation is reduced by the fact that the majority resulted from guilty pleas, several involved youthful or otherwise very sympathetic offenders, and none involved the overall amount of MDMA in powder form that he supplied (although in some cases a large number of individual MDMA pills were trafficked, which has its own implications for public safety because of the ease of further distribution). In addition, as I have previously noted, while MDMA was still in Schedule III, sentencing judges also explicitly recognized the lesser degree of dangerousness connoted by that status - for example, *R. v. Egorov*, 2006 BCPC 516 at para. 16.
- [93] The most helpful of these cases involved offences and convictions that arose after MDMA was placed in Schedule I, although cases in which sentence was imposed after the change in relation to conduct before it are also somewhat informative where the degree of offending and/or the amounts involved are at least roughly comparable.
- [94] *R. v. Khan*, 2016 BCPC 168, is a Schedule I case that involved a conviction after trial, for possession of MDMA for the purposes of trafficking. A search warrant executed as a result of an undercover investigation found about 1 kilogram of the drug in the offender's home, partly in pill and partly in powder form. There was a wide range of estimates of its value because of the various forms in which it could have been sold. MDMA had become a Schedule I drug two months before the search warrant was executed. The offender was 25, had strong family support and regular employment, was expecting a child with his partner, and had been on bail largely without incident for three years. On the negative side, he had a conviction for possession for the purposes of trafficking in cocaine, which had been imposed nine months before he committed the current offence, and for which he had received a conditional sentence. This time he received a sentence of 22 months of actual imprisonment.
- [95] Although it had the mitigating factor of a guilty plea, *R. v. Yang*, 2017 BCPC 286, is a post-Schedule I case. It featured the production and possession for the purposes of trafficking of fairly substantial amounts of MDMA - 5.86 kilograms of pure MDMA within a larger amount of packaged powder, and 20.2 litres of it in liquid form, with the liquid containing other substances as well. He also pleaded guilty to possessing marihuana for the purposes of trafficking, based on 40 lbs of dried marihuana and shake that was also present. A search warrant had been executed and revealed a lab for production in the offender's garage. He was 46 years old, had no criminal record, was in a committed relationship and had a newborn child, and was working at two part-time jobs. He provided letters attesting to his remorse, kind nature and the help he provided to his elderly parents. The sentencing judge imposed 30 months' imprisonment for the MDMA offence, with one year concurrent for the marihuana. An aggravating feature that is not present in Mr. Chen's case was the danger

caused by MDMA production in a residential neighbourhood.

- [96] R. v. Zhai, 2016 BCSC 2495, dealt with trafficking in MDMA, but while the conviction was imposed after MDMA was in Schedule I, the offences had been committed in 2009, while it was still in Schedule III. This was coincidentally a trial that was heard by me, and that also involved W. as the undercover officer. In four main transactions that took place over slightly less than two months, the offender sold W. 2,700 pills, for a total of \$7,100. I found that the evidence showed that "at the outset of their relationship, he conducted himself as a retail level trafficker in small amounts, within the setting of a night club in which ecstasy is consumed by the patrons, but that as the relationship developed and [W.] expressed an interest in purchasing amounts large enough for commercial distribution and resale, Mr. Zhai was able to fulfill those requests." He did not contest that there should be convictions on that trafficking count, or one dealing with his subsequent sale of ketamine to another officer. He put forward an entrapment defence on his sale of a handgun to W., which was unsuccessful. Because I found that the various sales were part of a linked series of acts within a single endeavour, I imposed concurrent sentences, with the highest being the mandatory minimum of three years for selling the handgun. Mr. Zhai was 51 years old, had no criminal record, and faced possible deportation. Situating his actions within a range of case provided that ran from a conditional sentence to three years, I imposed a sentence of eighteen months' imprisonment on that count, less a large amount of credit for presentence custody that reduced it to time served.
- [97] In R. v. Choi, 2013 ONSC 5082, a search warrant executed at the offender's home yielded three different controlled substances, including 1.7 kilograms of MDMA, as well as stolen property. Once again, MDMA was in Schedule I by the time of sentencing but had been in Schedule III when the offences were committed. Following a guilty plea, the offender received a conditional sentence of two years less a day. He was 29, and a talented fashion designer who had no criminal record and who had not been in any further trouble since the offences had occurred three years before. He was remorseful and had made meaningful efforts towards rehabilitation.
- [98] R. v. Prevost, 2013 BCSC 1974, involved the more serious context of possession for the purposes of exportation to Australia (of 7.87 kilograms of MDMA), and this factor might be seen as balancing out somewhat Mr. Chen's domestic trafficking of a significantly larger amount, although once again the offences were committed while it was still in Schedule III. In fact, the sentencing judge observed at para. 20 that "those contemplating engaging in the trafficking, importing, or exporting of ecstasy in the future must know that the applicable range of sentence will move upwards in response to this legislative change". The offenders, who were convicted following a trial, received three year sentences. They had community support, positive rehabilitation prospects, and no related convictions.
- [99] I conclude that the cases do not support a sentence of less than two years for repeated acts of trafficking in the very large amount of MDMA that was involved here, carried out after the change to Schedule I, even following a guilty plea and in the presence of other strong

mitigating factors. In the absence of additional considerations that are capable of individualizing his sentence to subordinate the effects of parity even further, beyond the personal circumstances and the circumstances of offence that have already been taken into account, I think Mr. Chen is looking at a sentence in the range of three to four years' imprisonment here.

- [100] The first of these potential additional individualizing considerations is the effect of the delay in completing this case, which Nasogaluak indicates can have a moderating effect on sentence.
- [101] The Crown and defence have cooperated on a timeline of the significant events in the progress of this case, with Crown counsel indicating her position on the characterization of certain specific events within it.
- [102] I cannot identify anything amounting to excessive delay -state-caused or otherwise -in setting the matter for trial. The voir dire and trial dates in provincial court were set later than the Crown said they could be available, because of the unavailability of Mr. Chen's counsel; the same dates were then made available in Supreme Court after the direct indictment was filed; and after Mr. Chen changed counsel his new counsel was able to accommodate those existing dates.
- [103] From there, the voir dire was delayed by a month when Mr. Chen's counsel sought to raise a new argument. Final arguments on the voir dire were made on September 20, 2018 and I rendered by voir dire ruling on April 3, 2019. The trial then proceeded in an expedited manner based on significant admissions, over 10 days in June. The oral reasons for conviction were delivered on July 16, 2019. Sentencing was originally scheduled for October 15, 2019. At some point following his conviction Mr. Chen changed to his current counsel.
- [104] On October 2, 2019 the defence applied to adjourn the sentencing because they had not yet received the transcribed version of the oral reasons for judgment on the trial (which, according to the defence submissions, had been ordered on July 31). They waived any delay arising from the adjournment and the sentencing was rescheduled for January 30, 2020. The transcribed version of the oral reasons for judgment on the voir dire was released on December 22, 2019 and the transcribed version of the oral reasons for judgment on the trial was released on January 22, 2020. On January 24, the defence applied to adjourn the sentencing due to what was characterized as the late delivery of the latter transcribed reasons. It was adjourned to April 17, 2020. That sentencing date was adjourned due to the COVID restrictions on in-person court attendance. It was re-set to August 6. The day before, the defence applied to adjourn it, in light of the recently-released decision in Sharma, in order to make the current constitutional application, which then proceeded on its scheduled dates. The joint timeline indicates that the Crown and defence would have been available as early as October for that application, but that "the Court" was not available until January.

[105] It will be helpful to consider this issue in light of the actual analysis in *Nasogaluak*, focusing on the specific issue that is said to arise here:

53 It is important to note that a sentence can be reduced in light of state misconduct even when the incidents complained of do not rise to the level of a Charter breach [T]he Ontario Court of Appeal held in *R. v. Bosley*, (1992), 18 C.R. (4th) 347, that the trial [page240] judge had properly considered excessive but not unconstitutional delay as a mitigating factor in his determination of a fit sentence (see also *R. v. Leaver*, (1996), 3 C.R. (5th) 138 (Ont. C.A.)). And in *R. v. Panousis*, 2002 ABQB 1109, 329 A.R. 47, the Alberta Court of Queen's Bench treated the delay in the proceedings as a relevant mitigating factor that led to a reduced sentence for the offence of trafficking in cocaine. Although the delay did not amount to a s. 11(b) violation, the court held that it had caused prejudice to the accused that was relevant and probative to the sentencing process. The majority of the Alberta Court of Appeal, in brief oral reasons (2004 ABCA 211 (CanLII)), reversed the trial judge's decision and imposed a sentence of incarceration of two years less a day and a heavy fine. The majority did not state whether it disagreed with the trial judge's finding that delay was a relevant mitigating circumstance, but it is notable that its final sentence went below the trial judge's appreciation of the usual sentences for serious drug offences.

54 To be certain, the concept of recognizing harm or prejudice caused to the offender as a mitigating circumstance upon sentencing did not originate with the Charter. Excessive delay attributable to the prosecution or police has also been considered a mitigating factor in a number of pre-Charter cases (*R. v. Cooper*, (No. 2), (1977), 35 C.C.C. (2d) 35 (Ont. C.A.); *R. v. Simon*, (1975), 25 C.C.C. (2d) 159 (Ont. C.A.)). Likewise, delay arising out of strategically delayed charges in respect of contemporaneous offences has led to reduction of the sentences (*R. v. Parisien*, (1971), 3 C.C.C. (2d) 433 (B.C.C.A.); *R. v. Burke*, [1968] 2 C.C.C. 124 (Ont. C.A.); *R. v. Fairn*, (1973), 12 C.C.C. (2d) 423 (N.S. Co. Ct.)).

55 Thus, a sentencing judge may take into account police violence or other state misconduct while crafting a fit and proportionate sentence, without requiring the offender to prove that the incidents complained of amount to a Charter breach. Provided the interests at stake can properly be considered by the court while acting within the sentencing regime in the Criminal Code, there is simply no need to turn to the Charter for a remedy. However, if a Charter breach has already been alleged and established, a trial judge should not be prevented from reducing the sentence accordingly, so long as the incidents giving rise to the breach are relevant to the usual sentencing regime. Of course, as we shall see, as a general rule, a court cannot reduce a sentence below a mandatory minimum or order a reduced sentence that is not provided for by statute. That said, circumstances of a Charter breach or other instances of state misconduct, in exceptional circumstances, do allow a court to derogate from the usual rules to which its decisions are subject.

[106] In *Bosley*, about six months of the 17 months of post-conviction delay was attributed on appeal to an excessive amount of time that the judge required to complete his reasons for judgment on the trial (he had given his verdict with reasons to follow, but there was then a delay in providing them). Although Justice Doherty found the situation to be "close to the line between unwarranted delay and constitutionally unreasonable delay", the accused's s. 11(b) application on appeal did not succeed. However Doherty J.A. added that:

excessive delay which causes prolonged uncertainty for the appellant but does not reach constitutional limits can be taken into consideration as a factor in mitigation of sentence [citing *Cooper*, which was also referred to in *Nasogaluak*]. The trial judge expressly held that the delay occasioned in this case served as a mitigating factor in his determination of the appropriate sentence. The sentence he imposed reflected that mitigation.

[107] In my opinion, nothing in the general progress of this case can be characterized as involving excessive delay caused by any state misconduct. As I have said, it proceeded to trial in an appropriately prompt way, especially given the number of accused who were then jointly charged, and the Crown ensured that the direct indictment had no effect on its progress.

[108] The first period that deserves scrutiny is the amount of time that the voir dire ruling was on reserve. The voir dire dealt with a challenge to the sufficiency of grounds for the granting of an authorization to intercept private communications, both according to the usual statutory criteria and the provisions governing interceptions with respect to criminal organizations. The ruling required a close analysis of the supporting affidavit, both in itself and in light of the amplification evidence about some of its assertions. Without equating length with quality, I would say that the evidence and arguments that were put forward required, and received, a thorough consideration. That said, in an ideal world, something in the range of three to four months, rather than six months and 13 days, would have been a preferable period within which to provide a decision. Rendering the ruling sooner would not have preserved the original trial dates, because the submissions on the voir dire were not completed until September 2018, when the trial was originally scheduled to begin, but it is reasonable to believe that the trial could have been heard somewhat earlier in 2019 than June, with beneficial effects on the subsequent chronology. To that extent, it deserves to be taken into account as a mitigating factor, as part of the overall circumstances.

[109] I am referring to delay that can mitigate the sentence in a general sense, because there is no evidence of specific prejudice to Mr. Chen caused by the delay in concluding this matter, beyond that which is recognized in the cases and what I would infer from the circumstances.

[110] The timing of the release of the transcribed oral reasons for judgment on the trial is more difficult to assess. Unlike the delivery of the voir dire ruling, which can be dealt with on the basis of the trial record alone, the submissions of counsel that set out the timing and circumstances are incomplete and ultimately ambiguous. First of all, if the absence of the

transcribed reasons was the reason for the adjournment of the October 2019 sentencing date, one would not have expected experienced defence counsel to have waived the resulting period of delay for s. 11(b) purposes. Second, it has not been explained why the eight days between the delivery of the transcribed reasons on January 22, 2020 and the scheduled sentencing on January 30 were not sufficient to incorporate them into the defence submissions, and why an adjournment needed to be sought instead. The answers to these questions may lie in the comments of counsel during the respective adjournment applications, but those comments have not been placed before me, and I do not think it would be appropriate to in effect create my own evidentiary record by accessing recordings that counsel have not seen fit to present. Accepting as a general proposition that judges should edit and release transcribed oral reasons as promptly as possible in light of their other duties, I am unable to find on the basis of the current record that this particular timing had any meaningful effect on the progress of the matter and should serve to mitigate the sentence.

[111] That leads me to the effect of COVID. I think that the best synthesis of the current law in this province was provided by Justice Ker in *R. v. Milne*, 2020 BCSC 2101. Specifically, considering the McKibbin decision that cited by the defence here, as well as Greer and Zhao, which were cited by Crown counsel, Ker J. concluded:

134 The import of McKibbin is that, in the absence of concrete evidence of significant risk to an offender's physical health, the fact of COVID-19 on its own does not result in a reduction of the length of a custodial sentence to be imposed, or count as a factor in reducing a sentence below the range otherwise supported by the case authorities. Rather, the matter is best left to the parole authorities to assess as outlined in Greer and Zhao.

[112] Read in their entirety, Justice DeWitt-Van Oosten's remarks in *El-Kaaki* do not endorse any different approach:

22 The judge was not dismissive of the appellant's COVID-19 concerns. He was prepared to take judicial notice of the pandemic, as well as a heightened risk of infection arising from close confinement in a custodial setting. He furthermore accepted that this was an appropriate "collateral" factor to consider in the determination of quantum, even without an evidentiary foundation on health vulnerabilities specific to the appellant. Whether this was the correct legal approach to the issue is not necessary for the Court to decide, as the judge gave the appellant the benefit of his conclusions. He imposed a prison term of shorter duration than requested by the Crown, even though acknowledging that the Crown's position appropriately accommodated COVID-19 considerations. The judge also directed that all of the appellant's sentences run concurrent.

[113] To the extent that judicial notice of the emerging conditions of the pandemic should inform this analysis, I will supplement the publicly available information that has been relied on by the defence by noting that, federal inmates are being given priority for COVID vaccination, which is likely a recognition of the risks referred to in the cases and other material that

have been cited. Early access to vaccination would of course offer a meaningful counterbalance to those risks, but it is impossible to say for certain how these various considerations will play out.

- [114] Thus, in the absence of specific evidence of vulnerability on Mr. Chen's behalf, I would not moderate his sentence by reference to the pandemic, and would leave those considerations to the parole authorities, as suggested in Greer and endorsed in Milne.
- [115] Therefore the only additional individualized factor that should be added to Mr. Chen's personal circumstances and those of the offence when the usual range of sentence is considered, is the effect of the delay in releasing the voir dire reasons, which I conclude had a limited overall effect on the delay he experienced.
- [116] Balancing that factor along with the ones I have previously identified, and considering the circumstances of offence and offender in light of the applicable principles of sentencing and the comparable decisions, I conclude that a sentence of three years and eight months is the appropriate one. That is what I will be imposing on Mr. Chen when the time comes to do so.
- [117] I will also impose the following ancillary orders, which are not disputed:
- [118] There will be a prohibition against possessing any of the items set out in s. 109(2)(a) of the Criminal Code for 10 years following his release from custody, and any of the items set out in s. (b) for life.
- [119] This is a secondary designated offence and so, pursuant to s. 487.051(3) of the Code, having considered the nature of the offence, the circumstances surrounding its commission and the impact such an order would have on the Mr. Chen's privacy and security of the person, in light of the principles outlined in *R. v. Awasis*, 2009 BCCA 134 at paras. 56-59, I conclude that it is in the best interests of the administration of justice that the number of samples of bodily substances that are reasonably necessary for the purposes of forensic DNA analysis be taken from him.
- [120] Pursuant to s. 490.1(1)(b) of the Code the items seized from him pursuant to the investigation will be forfeited to her majesty in right of Canada in accordance with an order to be drawn up by the Crown and approved by his counsel.
- [121] Finally, pursuant to s. 737(2) he will pay a victim fine surcharge of \$200.

### Whether to Decide the Charter Application

- [122] The position of Crown counsel and counsel for the Attorney General of British Columbia is that I do not need to decide this application, given that the availability of a conditional sentence if it is successful will have no impact on Mr. Chen's situation.

[123] Because so many of the relevant cases on this issue deal with the question of whether a provision constituted cruel and unusual punishment contrary to s. 12 of the Charter, it may be helpful to keep in mind the process that must be undertaken in a s.12 review, which was explained in *R. v. Nur*, 2015 SCC 15, and summarized in *R. v. J.L.M.*, 2017 BCCA 258:

16 In *Nur*, the majority set out the questions to be answered when a mandatory minimum sentence is challenged. First, the court must determine what constitutes a proportionate sentence for the offence, having regard to the objectives and principles of sentencing in the Code (at para. 46). Secondly, it must decide whether the mandatory minimum will result in a grossly disproportionate sentence for the offender before the court (at para. 46). If the sentence is not grossly disproportionate for that offender, the court must then consider whether the "provision's reasonably foreseeable applications" will result in grossly disproportionate sentences for others (at para. 77). If the answer is yes, then the mandatory minimum is inconsistent with s. 12 and "will fall unless justified under s. 1 of the Charter" (at paras. 46, 105-106).

[124] Counsel for the Attorney General begins with the general assertion that as a matter of "accepted constitutional doctrine" courts should refrain from making constitutional pronouncements when it is unnecessary for the disposition of a case: *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97 at paras. 6-13.

[125] In *J.L.M.* at para. 14 Justice Bennett summarized the conclusions of the Supreme Court of Canada in *R. v. Lloyd*, 2016 SCC 13 at para. 18, that "while judicial economy and scarce resources dictate that a judge is not obliged to consider the constitutionality of a mandatory minimum sentence where it will not impact the offender before them, they may do so."

[126] Counsel also referred to cases in which judges of this court have declined to embark on such challenges because it would have had no effect on the offender they were sentencing: *R. v. McMath*, 2015 BCSC 440 at para. 109, and *R. v. Alphonse*, 2020 BCSC 1882 at para. 173.

[127] In *McMath*, Justice Ross's conclusion that the appropriate sentence for the offender before her was the mandatory minimum for committing manslaughter with a firearm made it unnecessary to decide whether that minimum violated s. 12 of the Charter. (However, Justice J. relied on the Court of Appeal's decision in *Lloyd*, which was then the governing authority, and its application of judicial economy was more stringent than the one that ultimately prevailed in the Supreme Court of Canada.)

[128] In *Alphonse*, the defence sought a conditional sentence order and in order to obtain it, applied to strike down the mandatory minimums attaching to the firearms-related offences of which he had been convicted, as well as s. 742.1(c), one of the sections in issue here.

[129] Justice Winteringham noted first that the mandatory minimum that was the focus of the argument had previously been upheld by our Court of Appeal, and in other provinces. While *Nur* held open the possibility of revisiting a s. 12 determination based on new specific circumstances or reasonable hypotheticals, this was not such a case.

- [130] More importantly, Winteringham J.'s conclusion that the appropriate sentence for this offender was the mandatory minimum meant that it was not necessary to consider the Charter challenge. She referred to the paragraph in Lloyd that was summarized in J.L.M., which also includes the comment that "[j]udicial economy dictates that judges should not squander time and resources on matters they need not decide [although] a formalistic approach should be avoided."
- [131] In reaching that conclusion, Winteringham J. noted that the concerns raised by our Court of Appeal, sitting as the Yukon Territory Court of Appeal, in *R v. E.O.*, 2019 YKCA 9, that there may be "circumstances where the sentencing judge may wish to engage in the analysis regardless of the effect on the individual before the court, particularly where the superior court of inherent jurisdiction has an opportunity to prevent "leaving unconstitutional provisions on the books" (a reference to the passage from Nur that I have previously cited), did not arise on the circumstances before her, I infer because the mandatory minimum in question had been upheld in B.C.
- [132] Perhaps most importantly for our purposes, dealing with the challenge to the unavailability of a conditional sentence, Winteringham J. also referred to the then- recently released decision in Sharma. In light of her conclusion about the appropriate sentence, she explained that:
- 182 As demonstrated in Sharma, Mr. Alphonse has raised an important constitutional issue. However, in my view, and based on my earlier findings, a proper analysis of these Charter provisions is best left for another day.
- [133] Counsel for the Attorney General also candidly noted an example of a sentencing judge in this province exercising her discretion to engage in the s. 12 analysis despite the lack of an impact on the specific offender's sentence. In *R. v. Robertson*, 2018 BCSC 521 at paras. 7-22, Justice Watchuk, in a careful analysis, reviewed the following comments of the Supreme Court of Canada in Nur:
- [51] ... Section 52 of the Constitution Act, 1982 entrenches not only the supremacy of the Constitution but also commands that "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect". If the only way to challenge an unconstitutional law were on the basis of the precise facts before the court, bad laws might remain on the books indefinitely. This violates the rule of law. No one should be subjected to an unconstitutional law: *Big M*, at p. 313. This reflects the principle that the Constitution belongs to all citizens, who share a right to the constitutional application of the laws of Canada.
- [64] Refusing to consider an impugned law's impact on third parties would also undermine the prospect of bringing certainty to the constitutionality of legislation, condemning constitutional jurisprudence to a wilderness of single instances. Citizens, the police and government are entitled -- and indeed obliged -- to know what the criminal law is and whether it is constitutional. Looking at whether the mandatory minimum has an

unconstitutional impact on others avoids the chilling effect of unconstitutional laws remaining on the statute books.

- [134] Watchuk J. concluded that this analysis cast doubt on earlier decisions of this Court, which had held that it was not necessary to embark on a consideration of reasonable hypotheticals in the s. 12 analysis if the accused before the court was not impacted by the mandatory minimum.
- [135] Counsel for the Attorney General ultimately fairly summarized the question of whether to hear this application as being a matter involving the exercise of the Court's discretion.
- [136] In also taking the position that this issue need not be decided in light of the appropriate sentence for Mr. Chen, Crown counsel cites the comments in Lloyd and the outcome in Alphonse.
- [137] Mr. Chen's counsel submits that it would be inappropriate to accede to these arguments at this point. At the time that the previous sentencing was adjourned and the application was scheduled, the Attorney General originally choose not to participate in it, and only indicated its intention to do so in November, relatively late in the process. Its position now invites the Court to disregard the entire purpose for the adjournment. Similarly, Crown counsel did not seriously oppose the adjournment in order to bring the application, and I am said to have endorsed it at that time, thus "reflecting a collective recognition that adjudicating this issue would be worthwhile", as counsel put it. There has been significant delay already in the case, and counsel stresses that the decision to delay it further to raise this issue was not made lightly.
- [138] Adding to the value of determining the issue, we now have the opportunity to clarify the law for both of the trial courts, and make the continuation of other applications unnecessary. Counsel has been advised of numerous such applications that are being held in abeyance pending this ruling.
- [139] Most significantly, it is argued that it would be consistent with the rule of law to address this Charter issue. As Lloyd made clear, an impugned law does not have to affect the offender's sentence before its validity can be determined - such a requirement would impose artificial constraints on the process. The following passage from E.O. distils the reasoning on which the defence relies here:

38 When a court does have the ability to declare legislation unconstitutional, as long as the application is properly argued, it will not offend principles of judicial economy to engage in the analysis regardless of the effect on the individual before the court. Unlike a provincial court judge, a superior court of inherent jurisdiction or court with appropriate statutory authority can issue an order that invalidates the legislation. In *R. v. Ferguson*, 2008 SCC 6 at para. 73, and in *Nur* at para. 51, the Court frowned on leaving unconstitutional provisions "on the books", as it violates the rule of law to allow unconstitutional laws to remain in force indefinitely and deprives the legislature of the important signal that a law does not pass constitutional muster. In short, it is an

appropriate use of judicial resources to strike down unconstitutional mandatory minimum sentences even where the offender before the court will be unaffected by that ruling.

(Implicitly, counsel suggests this analysis applies equally to challenges to provisions that preclude the imposition of conditional sentences.)

- [140] In short, Lloyd makes it clear that no one should be sentence under an invalid statute, and when the issue has been properly placed before the court, preventing such an outcome is a valid reason for the court to take on a Charter challenge.
- [141] E.O., which is the strongest authority in favour of adjudicating these issues, explicitly deals with challenges to mandatory minimum sentences based on s. 12. It is quite understandable that the cases dealing with s. 12 challenges of mandatory minimums lean towards deciding applications that do not affect the accused before the court. As I have summarized, a key step in the analysis, if the offender's circumstances would not result in a grossly disproportionate sentence based on the minimum, is to go on to consider other reasonable hypothetical circumstances in which it would. Thus, consideration of cases beyond the offender's circumstances is an essential part of the process. For example, Bennett J.A. used the conclusion of the territorial court judge in E.O. that a sentence above the mandatory minimum should be imposed on the appellant, which caused the judge to decide not to embark on the s.12 analysis, as the equivalent of the first step in that analysis for the Court of Appeal's purposes. Similarly, in Robertson the question of whether to embark on the analysis was not decided by the finding of the court that the fit sentence for the offender was equal or greater than the mandatory minimum. In fact Watchuk J. cited the decision of the court of appeal in R. v. Al-Isawi, 2017 BCCA 163 at para. 20, for the proposition that once the court finds the minimum would not be grossly disproportionate for the individual officer it "must" go on to the consideration of reasonable hypotheticals.
- [142] As a result, there is a real danger of conflating a decision about judicial economy, in light of the fact that the specific offender would not be affected, and the first stage of the s. 12 analysis required by Nur. Indeed, it is not entirely clear to me how the two can be distinguished on a practical basis. Of course a provincial court judge, who cannot declare a law of no force and effect pursuant to s. 52 of the Constitution Act and can only decline to enforce a law that breaches the Charter against the particular offender in front of them, might well decide to stop the s. 12 analysis once they have determined that it would not affect that offender, an approach endorsed by Lloyd and E.O., but superior courts and courts of appeal have no such clear boundary available to them.
- [143] Here we are dealing with a challenge based on s. 7. It will not involve reasonable hypotheticals, but rather an analysis of the effects of the legislation in light of its purpose. Despite the fact that hypotheticals are unnecessary however, it is not an offender-specific analysis and it can be undertaken regardless of the fact that the person before the court is not entitled to the remedy, as explained in para. 51 of Nur. In addition, the policy considerations that subordinate judicial economy to hearing properly argued challenges

under s. 12 are likely equally relevant under s. 7.

- [144] At the end of the day, what tips the balance in favour of hearing this application, despite the fact that it will not benefit Mr. Chen, is that it has been fully prepared and argued by all of the necessary participants (without objection by the Attorney General of B.C. or Crown counsel until their actual submissions were provided), and the previously scheduled sentencing date was adjourned to accommodate it.
- [145] The reality is that as soon as Sharma was decided its applicability in this province would need to be resolved in some sentencing venue. Given the thoroughness of the submissions that have been provided I am likely as in as good a position to decide the issue as any other trial court judge in this province, and while the strategic considerations of other defence counsel in awaiting this decision are not something I can take responsibility for, disrupting the scheduling of other cases by declining to decide the application at this late stage is highly undesirable.
- [146] Finally, given the amount of time that it will likely take the Supreme Court of Canada to decide the appeal of Sharma, it is not responsible to seek to avoid the issue until then, even at the risk of reaching an outcome that the Supreme Court ultimately does not agree with.

### **Sharma and Elaboration on Its Analysis**

- [147] The defence argument has two components under s. 7 - overbreadth, which was the successful aspect of the s. 7 argument in Sharma, and arbitrariness, which did not succeed but which the defence says I should nonetheless consider here. There was a separate finding in that case of a violation of s. 15, based on the discrimination of the legislation in question against Indigenous offenders, which does not arise here.
- [148] The argument on overbreadth tracks the reasoning in Sharma, so that aspect of the decision needs to be summarized.
- [149] The appellant was a young indigenous woman who had pleaded guilty to importing cocaine and received a sentence of 17 months' imprisonment. The sentencing judge struck down the two year mandatory minimum sentence for the offence pursuant to s. 12, although the Crown had by then altered its position to seek a sentence below the minimum in any event.
- [150] The appellant had unsuccessfully applied to strike down s. 742.1 (c) before the sentencing judge. Through inadvertence she had not included a challenge to s. 742.1(e)(ii) at that stage, but was permitted to add it to her grounds of appeal.
- [151] These provisions were enacted in 2012, as part of package of legislation titled the Safe Streets and Communities Act. The amendments dealing with conditional sentences, among other changes, removed the term "serious personal injury offence" as a means of defining offences that were precluded from eligibility, and introduced a different means of identifying ineligible offences.

[152] They provide that:

742.1 If a person is convicted of an offence and the court imposes a sentence of imprisonment of less than two years, the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the conditions imposed under section 742.3, if

...

- (b) the offence is not an offence punishable by a minimum term of imprisonment;
- (c) the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 14 years or life; [and]...
- (e) the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is ten years, that

...

(ii) involved the import, export, trafficking or production of drugs[.]

[153] On appeal, Justice Feldman for the majority applied the following definitions of overbreadth and arbitrariness under s. 7:

140 These two principles were explained by the Supreme Court in *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at paras. 111 and 112, as follows:

Arbitrariness asks whether there is a direct connection between the purpose of the law and the impugned effect on the individual, in the sense that the effect on the individual bears some relation to the law's purpose. There must be a rational connection between the object of the measure that causes the s. 7 deprivation, and the limits it imposes on life, liberty, or security of the person ([*Hamish Stewart, Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms*, 1st ed. (Toronto: Irwin Law, 2012)], at p. 136). A law that imposes limits on these interests in a way that bears no connection to its objective arbitrarily impinges on those interests. Thus, in [*Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791], the law was arbitrary because the prohibition of private health insurance was held to be unrelated to the objective of protecting the public health system.

Overbreadth deals with a law that is so broad in scope that it includes some conduct that bears no relation to its purpose. In this sense, the law is arbitrary in part. At its core, overbreadth addresses the situation where there is no rational connection between the purposes of the law and some, but not all, of its impacts. For instance, the law at issue in [*R. v. Demers*, 2004 SCC 46, [2004] 2 S.C.R. 489] required unfit accused to attend repeated review board hearings. The law was only disconnected from its purpose insofar as it applied to permanently unfit accused; for temporarily unfit accused, the effects were related to the purpose

141 I note at the outset that the Supreme Court has held that challenges to sentencing legislation from the perspective of proportionality ought generally to rely on the gross disproportionality standard that developed in the jurisprudence under s. 12, the Charter's guarantee against cruel and unusual punishment: *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130, at paras. 40-42.

Nevertheless, sentencing legislation remains vulnerable to a s. 7 challenge on the basis of overbreadth or arbitrariness, as the court accepted in a decision released on the same day as *Lloyd*: *R. v. Safarzadeh-Markhali*, 2016 SCC 14, [2016] 1 S.C.R.

[154] Feldman J.A. undertook the analysis of these issues using the tools that were described in *Safarzadeh-Markhali* at para. 31: statements of purpose in the legislation; the text, context, and scheme of the legislation; and extrinsic evidence such as legislative history and evolution.

[155] While previous courts had identified the broad purposes of the Safe Streets and Communities Act, including a comprehensive statement in *R. v. Neary*, 2017 SKCA 29, at para.35, Feldman J.A. stressed *Safarzadeh-Markhali*'s requirement that the purpose of the specific challenged provisions be identified, not just the overall package of legislation.

[156] Turning to the available sources of information about purpose, the preamble of the Act does no more than describe the forthcoming legislative changes of making conditional sentences unavailable by means of the subsections in question.

[157] However, Feldman J.A. found assistance in some of the speeches in the House of Commons during the introduction of the legislation:

146 On September 21, 2011, at second reading, Mr. Robert Goguen, the Parliamentary Secretary, stated that in drafting the Safe Streets and Communities Act, "This government is addressing the concerns of Canadians who no longer want to see conditional sentences used for serious crimes, whether they are violent crimes or property crimes": House of Commons Debates, 41-1, vol. 146, No. 17 (21 September 2011), at 1755. On October 6, 2011, the Minister stated:

[A]s you can see by the bill before you, the bill is very specific that with the most serious offences within the Criminal Code, you will not be eligible to go home afterward. There are and will continue to be serious consequences.

Again, I think this helps people's confidence in the criminal justice system. We all have a stake in seeing that people have confidence in our justice system, and also in our political system.

[Emphasis added.] (House of Commons, Standing Committee on Justice and Human Rights, Evidence, 41-1, No. 4 (6 October 2011), at 0910)

147 Subsequently, on March 6, 2012, during consideration of Senate amendments to the bill, the Minister expressed the purpose of the legislation in the House of Commons in the following terms:

As Minister of Justice and Attorney General of Canada, it is my responsibility to maintain the integrity of the justice system. We need legislation that is responsive to what is happening on our streets and meets the expectations of Canadians in the 21st century. The proliferation of drugs and violent crime is, unfortunately, a reality in this day and age and it is our job as parliamentarians to deal with criminals, to protect society and do whatever we can to deter crime.

...

The bill deals also with conditional sentences, usually referred to as house arrest. Our legislation would ensure that serious crimes such as sexual assault, kidnapping and human trafficking would not result in house arrest. Conditional sentences would continue to be unavailable for any offence with a mandatory minimum penalty. In addition, a conditional sentence would never be available for offences with a maximum of 14 years or life imprisonment; or for offences with a maximum penalty of 10 years that result in bodily harm or involve the import, export, trafficking or production of drugs or involve the use of a weapon; nor for a range of other offences including kidnapping, theft over \$5,000 or motor vehicle theft. Our act would ensure that serious offences, including serious property offences like arson, would also not result in house arrest. This would ensure that jail sentences for such offences are served in jail.

[Emphasis added.] (House of Commons Debates, 41-1, vol. 146, No. 90 (6 March 2012), at 1025, 1035)

[158] This led her to the following conclusions:

From the context of the amendments and statements by the Minister about the intent and purpose of the legislation, I discern that the purpose of the two impugned provisions is to maintain the integrity of the justice system by ensuring that offenders who commit serious offences receive prison sentences. The means by which the legislation implements Parliament's purpose is by removing the availability of a conditional sentence for offences where the maximum penalty is 14 years or life or 10 years in the case of offences involving the import, export, trafficking or production of drugs.

[Emphasis added]

[159] In identifying this purpose she noted, drawing on *Safarzadeh-Markhali*, at para. 27 and *R. v. Moriarity*, 2015 SCC 55 at para. 28, the importance of maintaining the distinction between the purpose of the law and the means chosen to achieve it. A narrow articulation that essentially repeats the challenged provision may erode the "distinction between ends and means" and "foreclose any separate inquiry into the connection between them".

[160] Feldman J.A. concluded that the provisions in question violated section s. 7 for their overbreadth, due to the fact that there was no rational connection between their purpose and some of their effects. The essential points of her analysis were as follows:

- The Crown's argument that Parliament's purpose was to remove the conditional sentence option for serious offences, and that the provisions are therefore rationally connected with its purpose, incorrectly conflates the purpose of the legislation with the means used to accomplish it;
- Parliament was not "entitled to use the maximum sentence to determine the seriousness of the offence in the generic sense regardless of the underlying conduct of any particular offender". The practical impact of the legislation was to "alter the landscape" by denying conditional sentences to those charged with an offence with a high maximum penalty who nonetheless deserved sentences at the low end of the range. Offenders who would have received sentences for such offences exceeding two years, the amendments had no effect, because they could not have received conditional sentences anyway in light of the length of imprisonment they were facing.
- Feldman J.A. drew an analogy to the finding of overbreadth in *Safarzadeh-Markhali*, in which enhanced credit for pre-sentence custody was denied to offenders who had received an endorsement on their record that they were not granted bail because of their past convictions. Such an endorsement was found to be an "inexact proxy" for offenders who pose a threat to public safety and security, and since the purpose of the legislation was identified as being to enhance public safety and security by increasing violent and chronic offenders' access to rehabilitation programs, and it captured offenders who might be detained for their previous convictions but posed no such threat, it violated s. 7 due to overbreadth.
- The sections in issue here were found to be even less tailored to the legislative purpose than in *Safarzadeh-Markhali*, given the many cases in which offenders at the low end of seriousness would now receive actual sentences of imprisonment.
- Feldman J.A. rejected the Crown's contention that Parliament's intent was to impose consequences "to serious offences in the abstract, regardless of whether the offence, as committed in any particular case, involves serious criminality". This contention was belied by the stated purpose of ensuring that offenders convicted of serious crimes served their sentences in prison. Further, "the intent of the amendments was to promote the integrity of the administration of justice and the public's confidence in it by ensuring that serious crimes are punished with a sufficiently strong sentence, which Parliament deems to be a sentence of incarceration."
- She also rejected the Crown's reliance on the decision of *R. v. Hamilton*, (2004) 72 O.R. (3d) 1 (C.A.), to support the assertion that the potential penalty for an offence reflects its seriousness in the generic sense. Read in context, that observation "was tempered significantly by [Justice Doherty's] concurrent observation that the actual circumstances in which a specific offender committed a specific offence will play a critical role in the determination of seriousness." In other words, the seriousness of an offence is not solely determined by its maximum penalty.

- The decision of the Supreme Court of Canada in *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711, in which a provision of immigration act that made a conviction of an offence with a maximum penalty of five years or more a proxy for "serious criminality" so as to bar a permanent resident from remaining in Canada did not violate s. 7, was also distinguished, on the basis that the current test for overbreadth - comparing legislative purpose to the legislation's effects - had not yet crystallized at the time of that decision. The case actually turned on the finding that it was not unfair to deport a non-citizen for failing to adhere to a known requirement for remaining in Canada, namely not having been convicted of such an offence. Crucially, the current version of the legislation also refers to the length of the prison term that was actually imposed, and it is that aspect that has been found to be the proxy for serious criminality.
  - Finally, Feldman JA rejected the suggestion that one could justify certain of the offences covered by the legislation on the basis that their need for denunciation and deterrence are particularly acute. This was to mischaracterize conditional sentences as being incapable of providing denunciation and deterrence, contrary to Proulx. The effort to justify some of the sections' effects also ignored the conclusion in *Bedford* that an over broad effect on even one person is sufficient to establish a breach of s. 7.
- [161] Acknowledging the principle that s. 7 breaches are difficult to justify, although not impossible, the Crown advanced no substantive s. 1 arguments, and the provisions were not saved by that section.
- [162] In a comparatively brief analysis, Feldman J.A. rejected the argument that the provisions also breach s. 7 due to the arbitrariness of their effects, by creating a gap in the sentencing range where conditional sentences would previously have been imposed, leading to sentences that are either too high or too low. This was described by the appellant as the "missing middle". The argument was based on comments in the dissenting reasons of the Supreme Court in *Nur*, to the effect that the gap created by the one year minimum sentence for offences contrary to s. 95 of the Code when it was prosecuted summarily, and the three year minimum by indictment, might raise s. 7 concerns. She explained that "to the extent that Parliament would view a conditional sentence as the middle of the sentencing range, its purpose was to remove that middle option with the intent that judges will impose a more stringent, denunciatory, and deterrent sentence. The effect of removing the conditional sentence option is not arbitrary because it coincides with Parliament's purpose."
- [163] The dissenting reasons of Justice Miller were mainly focused on the s. 15 breach. While he substantially agreed with Feldman's J.A.'s framing of the s. 7 issue, and her characterization of the objective of the legislation, he disagreed with her finding on overbreadth. He reasoned that:

The purpose of the impugned provisions is to ensure that offenders who commit serious crimes receive fit sentences, deemed to include a period of incarceration. What constitutes a serious crime is of course debatable. But Parliament has sought to make the law determinant by

reference to offences punishable by maximum periods of incarceration of 10 years and 14 years. It adopts, as the rough indicia of seriousness, the classifications previously made by Parliament in assigning maximum sentences. I would not subordinate Parliament's assessment of the seriousness of these offences to my own.

- [164] In addition to the aspects of the Sharma analysis that are captured by my summary, Mr. Chen's counsel elaborated on the harm caused by the gap between the type of offence and the seriousness of the offender's actual conduct within it. For example, it includes offences such as fraud, which can be committed in a wide range of circumstances, including levels of dishonesty that overlap with those that are dealt with civilly. Similarly, there are many offences for which the imposition of anything approaching the maximum sentence would be unprecedented. The excessive reach of this approach is said to be especially harsh when dealing with the CDSA offences addressed by s. 742.1e (ii), because of the already broad concept of trafficking. In addition, marginalized street-level traffickers who are supporting an addiction are denied access to the conditional sentence regime under this structure.
- [165] Counsel elaborated that the provisions have also unintentionally interfered with the fundamental sentencing principle of proportionality, as well as those of rehabilitation and restraint. Limitations on conditional sentences have removed a key restorative sentencing tool, one that is fundamentally different from suspended sentences and which can achieve both punitive and rehabilitative purposes. The result has been the "missing middle" that Sharma referred to in the context of arbitrariness - a choice between actual incarceration and a suspended sentence which, the authorities make clear, is fundamentally different from a conditional sentence and should not be tortured into replacing it. Once again, a significant burden falls on marginalized offenders, who previously might have remained in the community under conditional sentences that were structured to achieve both punitive and rehabilitative aspects. That absence has been repeatedly lamented by sentencing judges, who express their frustration at their inability to craft appropriate sentences without it. And, as Sharma makes clear, quite aside from s. 15 concerns these restrictions make it more difficult to impose sentences that achieve the rehabilitation and reintegration of indigenous offenders that is required under the Gladue framework, and thereby to address systemic discrimination.
- [166] A further serious consequence of overbreadth, in counsel's submission, is an undermining of transparency in the justice system, as prosecutors and defence counsel struggle to achieve just sentencing outcomes despite the unavailability of conditional sentences in many appropriate situations, by such practices as pleas to lesser included offences, or consent to the relaying of charges for which the sentences are available. An empirical canvass of this phenomenon is not available, but counsel refers to several example of such plea resolution practices in action in decided cases. To the extent that prosecutors and defence counsel, and ultimately even judges, are required to treat the facts of the offences in a creative manner in order to make the proper range of sentence available despite the legislation, the restrictions put a level of stress on the administration of justice that raises

serious concerns.

- [167] This of course is all contrary to the legislation's intended purpose of preserving the integrity of the justice system, as counsel points out. It also represents a rejection of various approaches to the legislative objective that would not have affected less serious conduct and offenders in this overreaching manner, such as simply narrowing the availability of conditional sentences in cases of identified seriousness, or allowing judicial discretion to relieve offenders from the restrictions in identified circumstances, both options that were noted in Sharma.
- [168] Mr. Chen's counsel also advances and elaborates on the arbitrariness argument that did not succeed in Sharma, submitting that it too reveals a basis on which the legislation breaches s. 7. The legal framework for this inquiry is the definition of an arbitrary law as one that bears no relation to or is inconsistent with the objective that lies behind it: *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 at p.619-20. There must be a connection between the impugned provision and the legislative goal that is more than theoretical. It will be arbitrary if it bears no real relation to the goal and hence is "manifestly unfair". Crucially, the more serious the intrusion on liberty and security the provision causes, the clearer the connection between that effect and the purpose must be: *Chaoulli*, at para. 131.
- [169] The arbitrariness here is that provisions enacted with the stated purpose of enhancing the integrity of the justice system have the practical effect of undermining it. As was considered under overbreadth, the participants in the justice system are being encouraged by the removal of conditional sentences from consideration in appropriate cases to do things to achieve just outcomes that undermine the system's integrity, in the absence of which the sanctions will either be too lenient or too harsh for a significant group of offenders, due to the missing options. Among other undesirable effects, offenders' acts are frequently being addressed under charges of and pleas to offences that do not accurately describe them.
- [170] The desire on the part of prosecutors to achieve just outcomes despite this situation by reframing charges to allow eligibility for conditionals sentences can bring them into conflict with their ethical duties not to mislead the court about the facts of the offences. In addition, when judicial discretion is fettered in this manner, too much power then devolves on the prosecutor to decide whether and how to relay charges, and offenders are under undue pressure in the plea negotiation process to plead guilty in return for a sentence that allows them to remain in the community. Beyond the general unfairness of this inequality, it also raises the spectre of wrongful convictions arising from coerced guilty pleas. In addition to citing legal academic analysis of the reality of these risks, Mr. Chen's counsel notes that in *Nur* the Supreme Court explicitly warned, in the context of the power conferred on prosecutors by mandatory minimum sentences, of the "increased possibility" of such wrongful convictions occurring.

- [171] To quote counsel's concise description of the problem directly: "by forcing parties to choose between inapposite charges and excessively harsh penalties, the impugned provisions divest judges of the discretion to shape the sentencing outcomes, and download the discretion to the Crown. That disrupts the delicate balance of power upon which the integrity of our justice system is founded." Such a disconnection between their effects and their stated objects amounts to arbitrariness in these circumstances, counsel submits, and further breach of s. 7.

### Attorney General's Response[1]

- [172] Counsel for the Attorney General frames his response within the history of the conditional sentence legislation. From their inception, conditional sentences have included statutory restrictions on their availability, which were expanded on by the exclusion of serious personal injury offences and other specified types of offences, before the serious personal injury definition was replaced by the changes that are in issue here. It was also recognized in the early consideration of the nature and purpose of conditional sentences in Proulx that "Parliament could easily have excluded specific offences" from eligibility (Para. 79).
- [173] In addition to the changes in issue here, the Safe Streets and Communities Act eliminated conditional sentences for a list of offences when they are proceeded with by indictment. However, hybrid offences, which due to subsequent legislation have increased significantly, remain eligible if the Crown proceeds summarily. Thus, counsel advises, conditional sentences remain available for most offences in the Criminal Code.
- [174] The other broad preliminary consideration is where Sharma fits into the Charter jurisprudence concerning conditional sentences. Counsel argues that it is an "outlier", a status that is emphasized by Mr. Chen's counsel's own concession that it would have been open to parliament to eliminate conditional sentences altogether, and the conclusion in *R. v. Serov*, 2016 BCSC 636 at para. 35, that there is no constitutional right to a conditional sentence. More broadly, counsel canvasses a variety of decisions that have rejected challenges, including under s. 7, to legislative restrictions on the availability of conditional sentences, in particular the previously existing restriction in relation to serious personal injury offences. In doing so, courts have been careful to distinguish between the wisdom of politically-driven choices to amend the legislation in this restrictive manner and the presence of a Charter violation (*R. c. Perry*, 2013 QCCA 212 at para. 152); and to recognize Parliament's ability to limit judicial sentencing discretion (*R. v. Sawh*, 2016 ONSC 7797 at para. 95). Section 742.1(c) has also survived a recent challenge in this province that was based purely on s. 12: *R. v. Mollon*, 2019 BCSC 423. [Mr. Chen's counsel points out that most of these cases did not involve challenges to the provisions in question here, several involved only brief analysis of the issue, and others advanced different constitutional arguments than the ones being made here. Sharma is the only one to have zeroed in on the purpose of these specific sections.]

- [175] As a threshold issue, counsel for the Attorney General concedes that s. 7 is engaged in this case, but that the liberty interest contended by the defence - that ineligibility for a conditional sentence increases the risk of imprisonment - is inaccurate. The provisions in question limit judicial discretion that may or may not impact upon the form in which the sentence is served, bearing in mind that a conditional sentence is a form of imprisonment that only gets considered after non-custodial sanctions have been determined to be unsuitable. He emphasizes that liberty interests are more circumscribed after a conviction, which is of course when the issue of a conditional sentence arises, and that as a result the potential impact on liberty interests here is "indirect and limited". This distinction matters, he submits, because the extent of the restriction on liberty interests is a relevant contextual consideration when I am deciding whether these provisions went further than they needed to achieve the legislative purpose. [Mr. Chen's counsel submits that the Attorney General's analysis relies on a decision of the Supreme Court of Canada (*Cunningham v. Canada*, [1993] 2 SCR 143) that predates the conditional sentence regime. More recently, the Supreme Court of Canada has recognized the meaningful difference between conditional sentences and institutional incarceration: *Tran v. Canada* (Public Safety and Emergency Preparedness), 2017 SCC 50. He stresses the significant liberties that still can be exercised when a conditional sentence is imposed, as well as the seriousness, from the point of view of liberty interests, of the loss of such an opportunity.]
- [176] The other point that I am asked to keep in mind before descending into the core of the argument is that, contrary to the strong focus of the defence submissions on the penological effects of the legislation, the overbreadth analysis does not evaluate the appropriateness of the objective. Rather, it "assumes a legislative objective that is appropriate and lawful" *Moriarty* at para. 30.
- [177] Turning to the purpose of the provisions, counsel submits that I should reject Sharma's characterization of it.
- [178] First of all, it departs from the characterization of the broad purposes of the entire Safe Street and Communities Act that were identified in *Neary* at para. 35:
- (a) providing consistency and clarity to the sentencing regime;
  - (b) promoting of public safety and security;
  - (c) establishing paramountcy of the secondary principles of denunciation and deterrence in sentencing for the identified offences; and
  - (d) treating of non-violent serious offences as serious offences for sentencing purposes.
- [179] It is also helpful when determining the purpose of the specific provisions being challenged to consider where they fit into the overall changes that were made to the conditional sentence regime, which are described in the Attorney General's written argument as :

- a. The definition of "serious personal injury offence" was repealed and "bodily harm" was introduced into subsection 742.1(e)(i);
- b. the restriction in s. 742.1(c) was introduced which is the only provision that relies exclusively upon the maximum sentence to limit the availability of a CSO;
- c. Subsections 742.1(d) and s. 742.1(e) of the Code combine the maximum sentence with offence characteristics (eg, bodily harm, terrorism, narcotics, weapon);
- d. Subsection 742.1(f) enumerates a list of offences where CSOs are unavailable.

[180] In counsel's submission, the collective effect was to overhaul the structure of the regime, "from a qualitative restriction ("serious personal injury offence") to a bright line or categorical approach." The benefits were clarity and certainty, at the cost of a reduction in discretion and case-specific considerations.

[181] Perhaps the most significant flaw being alleged in Sharma's analysis is said to be its selective and incomplete legislative history, which is of course a key tool in determining legislative purpose. In particular, the excerpts relied on from the debates introducing the Safe Street and Communities Act fail to acknowledge that the provisions in question were part of a word-for-word reintroduction of a bill called the Ending House Arrest for Property and Other Serious Crimes by Serious and Violent Offenders Act (Bill C-16), which had "died on the order paper" after the dissolution of the previous parliament, and was one of a number of such previous bills that were combined in the new Act. Therefore, one must go back to the speeches that originally introduced the conditional sentence amendments, and in particular certain portions of the remarks on second reading of the Ending House Arrest bill by the Hon. Brent Rathgeber (Canada, Parliament, House of Commons Debates, 40th Parliament, 3rd Session (May 3, 2010)):

What these cases illustrate is that there is considerable uncertainty about how the existing conditional sentences will be interpreted and applied. However, this bill would provide the needed clarity and the certainty to say which offences are not eligible for a conditional sentence. This would, in turn, prevent the need to wait for these issues to be finally resolved by the appellant courts.

Another concern is that the definition of serious personal injury offences does not cover other serious property crimes which would still be eligible for a conditional sentence.

It is my view that the current conditional sentencing regime still fails to categorically make conditional sentences ineligible for many very serious crimes. Greater clarity and greater consistency is needed to limit the availability of conditional sentences and to protect Canadians from serious and violent offenders.

In order to address these concerns, this bill proposes to eliminate the reference to serious personal injury offences in section 742.1 and make all offences punishable by 14 years, or life, ineligible for a conditional sentence. This would make the offences of fraud, robbery and many other crimes ineligible for conditional sentences.

While this element of the legislation would significantly limit the ambit of the conditional sentencing regime, the addition of these categories would not capture all serious offences prosecuted by indictment and punishable by a maximum of 10 years.

To resolve this, this bill also proposes a list of 11 specific offences prosecuted by indictment and punishable by a maximum sentence of 10 years that, upon passage of this legislation, would become ineligible for a conditional sentence. These offences are: prison breach, luring a child, criminal harassment, sexual assault, forcible confinement, trafficking in persons, abduction, theft over \$5,000, breaking and entering a place other than a dwelling house, being unlawfully in a dwelling house, and arson for fraudulent purposes.

Conditional sentences are an appropriate sentencing tool, in many cases. However, access to them does need to be restricted when it comes to serious property and serious violent offences.

This government shares the common sense belief of all Canadians, that the punishment should fit the crime, especially when it comes to serious and violent offences, and serious and violent offenders.

This legislation, when passed by this House, would make it clear to the courts that those who commit serious property and violent offences will serve jail time and that house arrest will no longer be an available sentencing option.

[Emphasis added.]

[182] When the Safe Streets and Communities Act was introduced both the Minister of Justice and his parliamentary secretary had confirmed the provenance of the conditional sentence amendments in the previous bill. Relevant to the determination of the purpose of those amendments, the Minister explained that (Canada, Parliament, House of Commons Debates, 41st Parliament, 1st Session (21 September 2011):

[T]hese proposals seek to make it explicitly clear that a conditional sentence is never available for: offences punishable by a maximum of 14 years or life; offences prosecuted by indictment and punishable by a maximum penalty of 10 years that result in bodily harm, involve the import-export, trafficking and production of drugs or involve the use of a weapon; or listed serious property and violent offences punishable by 10 years and prosecuted by indictment, such as criminal harassment, trafficking in persons and theft over \$5,000.

[183] Finally in terms of remarks shedding light on the legislative purpose, there are these further elaborations from the parliamentary secretary (Canada, Parliament, House of Commons Debates, 41st Parliament, 1st Session (21 September 2011):

In particular, I would like to elaborate on clause 34 of Part 2 of the bill, which seeks to curtail the use of conditional sentences for some property crimes and other serious crimes.

As I mentioned earlier, these amendments were contained in a previous bill, Bill C-16, which died on the order paper with the dissolution of the third session of the 40th Parliament. However, there are some technical differences, which I will discuss later.

Another issue with the definition of serious personal injury is that it only targets violent offences. The definition of serious personal injury cannot ensure that a conditional sentence will not be used in the case of serious fraud or theft over \$5,000.

The amendments in this bill will ensure that certain non-violent serious offences will still be treated as serious offences, thus avoiding the use of conditional sentencing. The amendments to the conditional sentencing regime proposed in this bill aim to establish clear benchmarks to allow for consistent use of conditional sentencing in order to respect Parliament's intention when it created this sentence.

That is why the bill proposes eliminating the reference to serious personal injury offences and restricting the availability of conditional sentences for all offences for which the maximum term of imprisonment is 14 years or life.

The same will apply to indictable offences punishable by a maximum of 10 years' imprisonment when they result in bodily harm, involve the import, export, trafficking or production of drugs or involve the use of weapons.

When an offence is committed under these circumstances, it is even more important to deter the offender and denounce the crime. This justifies restricting the availability of conditional sentences in such cases. It is possible however that the limits I just described do not cover all offences prosecuted by way of indictment and punishable by a maximum of 10 years in prison.

[Emphasis added.]

[184] In counsel's submission, this record refutes any suggestion that the challenged provisions do not reflect Parliament's intentions. In particular, Neary's encapsulation of the amendments as a whole is more faithful to this expressed purpose than what was described in Sharma. He submits that it intended to remedy the following deficiencies in the conditional sentence regime, as perceived by Parliament:

- a. The lack of certainty and consistency arising from, among other things, the definition of "serious personal injury offence" introduced in 2007;
- b. The underinclusivity of "serious personal injury offence[s]", which did not apply to other violent offences;
- c. The exclusion of property offences from the restrictions in s. 742.1; and

- d. The exclusion of other specific offences involving other forms of violence that might not be captured by restrictions based upon maximum sentences alone.

[185] A "compendious restatement" of the purpose of the 2012 amendments offered by counsel is that they were intended to "provide consistency and clarity with respect to the unavailability of CSOs for serious property offences and offences involving forms of violence." [Mr. Chen's counsel responds that the statement in Neary dealt with the broad purposes of the Act, whereas Sharma targeted the specific provisions in issue, which is what the Supreme Court of Canada required courts to do in Safarzadeh-Markhali. In addition, he says that the Attorney General's position ignores the explicit statements during the introduction of the Act that it was intended to target serious offences and offender (May 3, 2010 at 2282-2283):

Unfortunately, sentencing courts have interpreted the availability of conditional sentences in an inconsistent fashion because of the lack of clear parameters, allowing in some instances violent and serious offenders to serve their sentences under a conditional sentence of imprisonment.

This unfortunately has resulted in criticism of the sanction and a loss of public confidence in the administration of justice and, I would submit, in the justice system overall.

Another concern is that the definition of serious personal injury offences does not cover other serious property crimes which would still be eligible for a conditional sentence .

It is my view that the current conditional sentencing regime still fails to categorically make conditional sentences ineligible for many very serious crimes.

[Emphasis added]

Flowing from this, Mr. Chen's counsel submits that an emphasis on clarity in targeting serious offences must lead to the inverse that non-serious offences were not to be targeted. By not eliminating such sentences, Parliament was indicating its intention that they remain available in non-serious circumstances. The categorical prohibitions based on maximums represents an unintentional elimination of that unavailability in some circumstances. Finally, the Attorney General's stated legislative purpose conflates the means for achieving the purpose (creation of categorical unavailability) with those purposes.]

[186] Counsel for the Attorney General submits that if I accept his characterization of purpose, I am bound to reject the defence argument, because the legislation aligns with this stated purpose. In contrast, the essence of a finding of overbreadth, as the decisions of the Supreme Court of Canada in this area make clear, is reaching conduct that has no connection with what Parliament intended. More specifically, overbreadth targets unintended consequences - not the intentionally categorical restrictions that have been brought into effect here. In this regard, I am reminded that bright line rules imposed by Parliament are not prohibited in such circumstances: see for example *R. v. A.B.*, 2015 ONCA 803 at para. 39.

- [187] Counsel for the Attorney General also argues that maximum sentences are a constitutionally acceptable proxy for seriousness. If a list of specific offences could have been excluded from eligibility for a conditional sentence, then there is no logical difference in categorizing the exclusions by reference to maximum sentences. It also amounts to a tautology to make seriousness a matter that is determined by judicial criteria - in other words, that a case is only serious if judges find that it is. If conditional sentences are not constitutionally required to be available, then it is Parliaments' responsibility to determine the circumstances under which they are.
- [188] In any event, it has been long established, including in repeated decisions of the Supreme Court of Canada that maximum sentences help establish the relative seriousness of offences for sentencing purposes, specifically an offence's gravity as part of the assessment of a proportional sentence: *R. v. C.A.M.*, [1996] 1 S.C.R. 500 at para. 36; *R. v. St-Cloud*, 2015 SCC 27 at para 60, and *R. v. Friesen*, 2020 SCC 9. *R. v. Sanatkar*, (1981) 64 C.C.C. (2d) 325 (Ont. C.A.) at para. 7, called the maximum "the most important indicator of Parliament's evaluation of the gravity of the offence". Further, an increase in the maximum sentence is a signal to the courts that higher sentences must be imposed: *Lacasse*, at para. 7. Maximum sentences are also a proxy for the right to a jury trial under the Charter and for rights arising under other legislation, such as the Immigration and Refugee Protection Act.
- [189] The frequency with which maximum sentences are imposed is not a helpful consideration in this aspect of the analysis, it is argued, because it ignores the separate functions of Parliament and the courts - the former signalling its view of the seriousness of the offence and defining its upper boundary, and the latter arriving at an appropriate sentence within those parameters. An offence is not rendered less serious for the lack of frequent maximum sentences, and the judiciary's view of an offence's seriousness cannot be the frame of reference for assessing the Charter- compliance of legislation. Courts define the outer limits of legislative action, but not parliament's priorities within it: *R. v. Malmo-Levine*; *R. v. Caine*, 2003 SCC 74, [2003] 3 S.C.R. 571 at para. 140.
- [190] On this issue, counsel notes that a further flaw in the reasoning in *Sharma* is that it fails to distinguish between the basis on which the two challenged sections categorize ineligible offences - only s. (c) relies purely on maximum sentences, whereas (e) (ii) is conditioned by factors than bring it closer to the types of targeted restrictions that *Sharma* suggested might have been acceptable.
- [191] Addressing other aspects of the defence argument, counsel for the Attorney General submits that the restriction on the availability of conditional sentences has no effect on the application of the principles of sentencing, which operate within the parameters of whatever types of sentencing are legislatively available. Those principles are themselves subject to legislative modification, rather than being immutable aspects of fundamental justice.

[192] In addition, quite aside from the absence of any reliable evidentiary basis to suggest that the absence of conditional sentences in certain situations is driving prosecutors and defence lawyers to creatively undermine those restrictions, counsel says there is nothing inherently wrong, provided that it is carried out ethically, in using "any lawful means to temper the sharp edge of the law". The wide range of permissible sentences for many offences is a recognition of the variety of human behaviour that can be captured within them, and it is proper for the prosecutor and the defence counsel to then seek to individualize them accordingly. It is neither accurate to suggest that the will of Parliament is being subverted due to the restrictions in issue, particularly when one considers that plea resolutions took place before conditional sentences even existed, nor tenable to argue that such subversion, if it is actually occurring, offers a basis to strike the provisions down. [Mr. Chen's counsel responds that the case authorities and academic articles provided, which he supplemented in his reply by excerpts from Department of Justice and Statistics Canada analyses on the comparable effects of mandatory minimum sentences, offer an ample evidentiary basis for drawing the conclusions that are being sought. In any event, courts, including the Supreme Court of Canada in *Nur*, have taken a practical approach to assessing the dangers posed by impugned legislation. Counsel also clarifies that the indication of overbreadth here is not that prosecutors and defence counsel are seeking to thwart Parliament's will, but that they have been saddled with the reduced availability of conditional sentences in a manner that is inconsistent with their duty to achieve proportionate - that is, just - outcomes.]

[193] Turning to the issue of arbitrariness, counsel for the Attorney General emphasizes the high bar that must be met before legislation will be found to demonstrate it, as explained in *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331:

83 The principle of fundamental justice that forbids arbitrariness targets the situation where there is no rational connection between the object of the law and the limit it imposes on life, liberty or security of the person: *Bedford*, at para. 111. An arbitrary law is one that is not capable of fulfilling its objectives. It exacts a constitutional price in terms of rights, without furthering the public good that is said to be the object of the law.

[194] He disputes that overall there is a total disconnection of the restrictions from the objectives here. In fact, the effects of the restrictions are directly connected the legislative purpose that has been identified. Even if one accepts the defence characterization of the purpose of these provisions, the second element of it - "ensuring that offenders who commit serious offences receive prison sentences" - is actually furthered by them. As counsel previously explained when dealing with overbreadth, there is no proof of an emerging movement of unethical behaviour driven by the restrictions, they have no effect on the principle of proportionality, and flexibility on the part of prosecutors and defence counsel in reaching resolutions is quite appropriate, provided it is done ethically. (On the last point, even if unethical behaviour was an outcome of the restrictions that would not make them arbitrary, as the authorities define it.) Finally, judicial discretion is always a matter of

degree, the extent to which is constrained by the unavailability of conditional sentences in certain situations does not threaten the integrity of the justice system.

[195] If I find that the sections do violate s. 7, counsel for the Attorney General asked for a short period within which to consider whether to make submissions on whether the provisions are saved by s. 1.

#### Crown Counsel's Response

[196] Crown counsel adopted the Attorney General of British Columbia's submissions, and added a few additional focused points:

- There are numerous examples of maximum offences marking the seriousness of offences: such as with respect criminal record suspensions, conditional and absolute discharges, analysis of bail under the tertiary ground, one of the reverse onuses on bail, and immigration consequences. [Mr. Chen's counsel submits that these examples are not useful for comparison - we do not know the legislative purpose underlying them, criminal records suspensions rely on additional criteria of the number of previous convictions and the sentence imposed; and the bail ineligibility is based on the "potential length" of the imprisonment to be imposed. More generally, it is not clear that those various provisions were meant as proxies for seriousness in the same manner that is being contested here.]
- Parliament actually draws distinctions between serious and less serious forms of behaviour that resemble each other, by imposing different maximum sentences - such as in relation to the value of property stolen, breaking and entering different kinds of places and trafficking in different schedules of drugs.
- There has always been a contrast between the objective seriousness of offences, as measured by the statutory criteria for eligibility for a conditional sentence, and the subjective moral blameworthiness of the offender as identified during the actual sentencing process.
- The list of offences meeting the criteria for exclusion pursuant to s. (e)(ii) is actually quite circumscribed, and
- As to the supposed subversion of other sentencing principles in the furtherance of denunciation and deterrence caused by these provisions, denunciation and deterrence are statutorily emphasized in various Code provisions, and the common law emphasizes it in serious drug offences. The equal treatment of the various principles of sentencing set out in ss. 718 and 718.1 of the Code is not a principle of fundamental justice in any case.

#### Discussion

[197] Dealing first with overbreadth, the central question is obviously what the legislative purpose of these specific provisions, as opposed to the Act as a whole, is, and whether some of its effects are not rationally connected to that purpose.

[198] As a preliminary comment, I would say that it does not end up mattering whether or not Sharma is an outlier decision in relation to other Charter challenges to the restrictions on the availability of conditional sentences, unless that status is due to some error in its reasoning.

[199] It will be useful in answering that question to refocus on how the Supreme Court of Canada says legislative purpose is to be determined. Chief Justice McLachlin summarized the correct approach, drawn from Justice Cromwell's reasons in *Moriarity*, in *Safarzadeh-Markhali*:

26 First, the law's purpose is distinct from the means used to achieve that purpose: *Moriarity*, at para. 27. A law's means may be helpful in determining its objective, but the two must be treated separately.

27 Second, the law's purpose should be characterized at the appropriate level of generality, which "resides between the statement of an 'animating social value' - which is too general - and a narrow articulation" that amounts to a virtual repetition of the challenged provision, divorced from its context: *Moriarity*, at para. 28.

28 Third, the statement of purpose should be both precise and succinct: *Moriarity*, at para. 29. Precision requires that courts focus on the purpose of the particular statutory provision subject to constitutional challenge: *ibid.*; see also *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 144.

29 Fourth, the analysis is not concerned with the appropriateness of the legislative purpose. The court must take the legislative objective "at face value" and assume that it is appropriate and lawful: *Moriarity*, at para. 30. The appropriateness of a legislative objective may be relevant to its constitutionality under other Charter provisions. But it has no place in the s. 7 analysis of overbreadth.

[200] Considering the sources from which this purpose can be identified, I agree with counsel for the Attorney General that the speeches introducing the identical predecessor legislation, proposed by the same government in the previous parliament, are properly considered as reflecting some of the purposes underlying its reintroduction, and which led to its enactment.

[201] Even when one does that though, I am not convinced that the statement of legislative purpose in *Sharma* is incorrect. The additional Hansard excerpts bring in concerns about clarifying that certain serious offences will never be eligible for a conditional sentence, including some non-violent offences, and link that to protecting Canadians from serious and violent offenders, but they are of a piece with the comments about public confidence in and the integrity of the system in the excerpts from the subsequent sessions relied on by Feldman J.A. Representatives of the government saying that it needs to be clear that certain offences should not receive conditional sentences is quite consistent with the later assertion that "the bill is very specific that with the most serious offences within the

Criminal Code, you will not be eligible to go home afterwards". I think that clarity, certainty and public safety as potential purposes described in the earlier introduction can be validly subsumed within the overall concept of the integrity of the justice system, without rendering the statement of purpose impermissibly general. Indeed, points (a) and (b) in the Neary list of the broad purposes of the entire legislation are not really inconsistent with integrity of the system as the organizing purpose of these sections either.

- [202] However, I do not think it actually matters if the statement of legislative purpose were to be modified to more explicitly take into account objectives of clarity and/or public safety. Even if the first part of Feldman J.A.'s identified purpose were expanded in that manner, the second part - "by ensuring that offenders commit serious offences go to jail" - still seems unquestionably correct on the legislative evidence.
- [203] At the end of the day, I think that the potential overbreadth of these specific provisions rests not on which of these particular values that have been identified were intended to be advanced by the legislation, but whether there was an overreach from what was intended by the expression "serious offences" in relation to them.
- [204] I agree with Mr. Chen's counsel that to the extent that drawing bright lines around excluded types of offences is suggested to have been part of the legislative purpose, that would be to conflate means with ends in an impermissible fashion. It is not open to me to find that Parliament's purpose was to be categorical and that therefore, it simply fulfilled its intentions in a constitutionally permissible manner. The comment about "categorically mak[ing] conditional sentences unavailable for many very serious offences" in relation to the earlier bill, is a statement of the means by which the purpose will be carried out, not the purpose. Parliament's use of maximum sentences as proxies for seriousness was a matter of the implementation of the legislative purpose, not a definition within that purpose.
- [205] The question is rather, having the purpose of ensuring those who commit "serious offences" go to jail to achieve certain beneficial goals, did the means they chose, namely the categories and bright lines, go beyond capturing those who commit "serious offences"? It begs the question, as I have said, to argue that by serious offences, Parliament must have intended Criminal Code categories, because that is how they chose to implement its purpose. The overall context of the debates that have been provided show clearly that they were focused on offences that are committed in a serious manner, or the references to safety and confidence of the public would not have been needed. I also agree with Feldman J.A. that the objective of actual incarceration, which Parliament deemed the appropriate outcome for a serious offence, would not have been required if Parliament's intention was to sentence serious offences "in the abstract", as it was described in Sharma.

- [206] In my opinion, in choosing the means that they did to achieve the legislative purpose, even if it is broadened somewhat in the manner I have referred to, Parliament chose a method that affected offenders who were unconnected with its purpose - specifically offenders who committed offences that have high maximums, but that involved circumstances in the lower range of seriousness. In doing so, they created effects that were overly broad and thereby breached s. 7.
- [207] In reaching this conclusion, I also agree with Feldman J.A. that standing alone maximum sentences are useful indicators of the gravity of the offence, but that unless they are coupled with an understanding of the circumstances of the specific offence and offender, they say nothing useful about the seriousness of the offence for the purpose of fulfilling the legislative purpose.
- [208] I do not think that this analysis amounts to arrogating to judges the sole right to decide what is serious, as counsel for the Attorney General warns in his submission. "Serious offences" must be ascribed some meaning in the interpretation of legislative purpose, and once the use of maximum sentences to reflect it is identified as the means by which the purpose was to be effected rather than part of the purpose, its usual meaning in the criminal justice system - the acts actually committed by the offender, not the offence categories into which they fall - seems the obvious one to apply.
- [209] I also do not see any meaningful distinction in overbreadth between the two sections in issue here - (e)(iii) has additional criteria for exclusion from eligibility, but still offers no means of distinguishing its application between serious and non-serious offenders within those slightly narrowed categories, the latter of whom could still meet the criteria.
- [210] This conclusion makes it strictly unnecessary to consider the other arguments in favour of a finding of overbreadth, but I will touch on them briefly.
- [211] I would not have been persuaded that overbreadth is manifested in any systemic problems with respect to the disposition of offences, either as a consequence of a missing middle ground of conditional sentences or in driving prosecutors and defence counsel into unprincipled resolutions.
- [212] I agree with counsel for the Attorney General that there is no entitlement to conditional sentences, so in itself their selective unavailability poses no Charter concerns, beyond the disconnection between the legislative purpose and the means chosen that I have identified as constituting overbreadth here.
- [213] I have no difficulty accepting on the current evidence, or even as a matter of common sense, that creative solutions have been employed to get around the exclusions from eligibility, but that will occur whenever the Crown and defence consider it appropriate to arrive at a disposition that the law does not strictly permit, and is probably more of an indication of the health and resiliency of the system than of any threat to it. Similarly, while it might be unwise to put too much power in the hands of prosecutors in the effects of their

charging decisions, that is a policy choice that Parliament is entitled to make, if it can do so without violating the Charter in the process.

[214] I also agree with counsel for the Attorney General that rendering certain offences ineligible for conditional sentences does not subvert any of the principles of sentencing, which must be fulfilled based on the range of sections that are made available to the sentencing judge in the Code from time to time, as properly determined by Parliament.

[215] Finally, I would not have found that s. 7 has been violated on the basis of arbitrariness here. As I have concluded, the means of achieving the legislative purpose captured non-serious offenders outside of its intended scope, but it cannot be said that there is no connection whatsoever between the purpose and the means chosen, nor do those means operate contrary to the purpose.

[Discussion re: date for counsel for the Attorney General to provide his position on s. 1]

[216] As requested, I will suspend the resulting declaration of invalidity until April 13, to permit counsel for the Attorney General to decide whether to seek to justify the violation under s. 1. In the absence of any further order the declaration of invalidity will take effect after that appearance. Mr. Chen's sentence will also be formally imposed on him at that time[2].

"Schultes J."

[1] For the sake of clarity I will interpolate the essential points made in reply by Mr. Chen's counsel where they arise within Counsel for the Attorney General's submissions.

[2] On April 13, counsel for the Attorney General advised that they would not be seeking to argue that the provisions were saved by s.1. Crown counsel made concise written submissions seeking to uphold the provisions, to which Mr. Chen's made an equally concise written reply. On that date, I held that the provisions were not saved by s. 1, and were therefore of no force and effect.

---

## Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE      <https://www.bccourts.ca/jdb-txt/sc/21/06/2021BCSC0697cor1.htm>

CASE PAGE              <https://chat.esheria.ai/case-law/canada/r-v-chen-2021>

Prepared on 26 October 2026 · Esheria