

TOP FIVE 2023

Each year at OJEN's Toronto Summer Law Institute, a leading jurist identifies five cases that are of significance in the educational setting. The 2023 cases were selected and discussed by Mr. Justice Lorne Sossin of the Court of Appeal for Ontario. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.

R v. Sharma, 2022 SCC 39

Date released: November 4, 2022

<https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/19540/index.do>

Note

A “conditional sentence” is one form of sentence that is permitted to be served in the community with strict conditions.

Facts

Cheyenne Sharma was a 20-year-old Indigenous woman living with her infant daughter. Ms. Sharma was struggling to pay her rent and faced eviction. Her partner at the time offered her a deal; to travel to Suriname to collect a suitcase, and return to Canada with the suitcase in exchange for \$20,000. The suitcase contained almost two (2) kilograms of cocaine, worth about \$130,000. Ms. Sharma pleaded guilty to importing drugs and was sentenced to 18 months' imprisonment.

Procedural History

According to the case of *R v. Gladue*, there are specific factors that must be considered when sentencing Indigenous offenders. As

a woman of Ojibwa ancestry and a member of the Saugeen First Nation, Ms. Sharma requested a *Gladue* report and sought a conditional sentence. The Trial Judge sentenced Ms. Sharma to 18 months' imprisonment, citing s. 742.1(c) of the *Criminal Code* which prohibited conditional sentences for certain offences, including importing drugs. Ms. Sharma challenged the constitutionality of s. 742.1(c), arguing that s. 742.1(c) violated her s. 7 and s. 15 rights under the *Canadian Charter of Rights and Freedoms (Charter)*.

The Court of Appeal accepted Ms. Sharma's arguments, and declared s. 742.1(c) and 742.1(e)(ii) of the *Criminal Code* as unconstitutional because the provisions discriminated against Indigenous offenders and frustrated the *Gladue* framework, violating s. 7 of the *Charter*. The Court of Appeal was of the opinion that this was not a serious crime, considering Ms. Sharma has



no criminal background and was merely a courier to import the drugs into Canada, violating s. 15 of the *Charter*.

The Section 7 Analysis:

Everyone has the right to life, liberty and security of the person and the right not to be denied thereof except in accordance with the principles of fundamental justice. The s. 7 analysis involves three (3) aspects:

(1.) Arbitrariness:

- a. 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?
- b. There must be a rational connection between the object of the measure that causes the s. 7 deprivation, and the limits it imposes on the life, liberty or security of the person.

(2.) Overbreadth:

- a. A law that is so broad in scope that it includes some conduct that bears no relation to its purpose.
- b. There is some rational connection between the purpose of the law and some, but not all, of its impacts.

(3.) Gross Disproportionality:

- a. The law's effects on the life, liberty or security of the person are so grossly disproportionate to its purposes that they cannot rationally be supported.
- b. Where the seriousness of the deprivation is totally out of sync with the objective of the measure.
- c. Balance the negative effect on the individual against the purpose of the law, not against the societal benefit that might flow from the law.

The Section 15 Analysis:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

The s. 15 analysis requires one to establish discrimination. To do so, there are two (2) questions that must be answered:

1. Does the law create a distinction based on an enumerated or analogous ground?
2. Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?



Issue

- Whether Ms. Sharma was eligible for a conditional sentence?
- Whether s. 742.1(c) of the *Criminal Code* violated s. 7 and s. 15 of the *Charter* and therefore, was unconstitutional?

The Decision

Brown and Rowe JJ (Wagner C.J. and Moldaver and Côté JJ. concurring)

In a 5-4 split decision, the Supreme Court of Canada (SCC) reversed the Court of Appeal's decision, upheld the constitutionality of s. 742.1(c) and s. 742.1(e)(ii), and restored the Trial Judge's sentence of 18 months' imprisonment.

Ratio

An offence with a maximum sentence imposed indicates the seriousness of the offence and therefore, does not deprive individuals of their liberty.

Reasons

The majority of the Supreme Court of Canada concluded the provisions were constitutional and did not violate s. 7 or s. 15 of the *Charter*.

Section 7

With regard to s. 7 of the *Charter*, the majority of the SCC concluded, it is not the role of judges to decide which crime is serious and which crime is not serious; that is Parliament's role. By designating certain crimes as unavailable for conditional sentences, Parliament has determined that these crimes are serious. The provisions are not overbroad, and achieve their intended purpose of ensuring that serious crimes receive consistent sentences.

Section 15

With regard to s. 15 of the *Charter*, the majority of the SCC found no evidence that the provisions created a disproportionate impact on Indigenous offenders in comparison to non-Indigenous offenders. Ms. Sharma failed to prove a direct connection between the harm she suffered, and the fact that conditional sentences are not available for the crime of importing drugs.

Overall, the provisions were upheld as valid.



Dissent

Karakatsanis J. (Martin, Kasirer and Jamal JJ. concurring)

The minority of the Supreme Court of Canada disagreed, deeming the provisions to be unconstitutional under both s. 7 and s. 15 of the *Charter*. The dissenting judges discussed the over-incarceration of Indigenous peoples in Canadian prisons and stated that further evidence is not necessary to prove the over-incarceration of Indigenous peoples.

Note

After this decision, Parliament passed Bill C-5, *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act*, which repealed the provisions that were at issue in this case. Now, conditional sentences are an option to consider when sentencing Indigenous offenders for a broader variety of offences, if other requirements are met (including that the sentence is less than two (2) years, and that serving the sentence in the community will not endanger the community).

Prior to Bill C-5, Ms. Sharma would have been eligible for a conditional sentence.



Discussion

1. According to *R v. Gladue*, what factors must be considered when sentencing Indigenous offenders?
2. What is a conditional sentence?
3. What is the difference between a conditional sentence and probation?
4. How do conditional sentences contribute to the rehabilitation of offenders?
5. Despite *R v. Gladue*, the over-incarceration of Indigenous offenders continues to be an issue. Do you think Bill C-5 will help to resolve this issue?
6. What are some alternative ways to address the issue of the over-incarceration of Indigenous offenders?

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R v. Kirkpatrick, 2022 SCC 33

Date released: July 29, 2022

<https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/19458/index.do>

Note

According to s. 265(1) of the *Criminal Code*, a person commits an assault, including sexual assault, when

- (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
- (b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or
- (c) while openly carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

According to s. 265(3) of the *Criminal Code*, no consent is obtained where the complainant submits or does not resist by reason of

- (a) the application of force to the complainant or to a person other than the complainant;

- (b) threats or fears of the application of force to the complainant or to a person other than the complainant;
- (c) fraud; or
- (d) the exercise of authority.

Facts

The complainant testified that she agreed to have sex with Mr. Kirkpatrick on the condition that he wear a condom.

Mr. Kirkpatrick wore a condom during their first episode of intercourse, but not during their second episode of intercourse.

Mr. Kirkpatrick was charged with sexual assault.

R v. Hutchinson, 2014 SCC 19

The Supreme Court of Canada referred to the case of Hutchinson. In *R v. Hutchinson*, the complainant agreed to have sex on the condition that the accused wear a condom. However, the accused poked holes in the condom without the complainant's



knowledge, and the complainant became pregnant.

R v. Hutchinson established a two (2) step process to analyze consent.

1. Whether the complainant consented to the sexual activity in question?
2. Whether there are any circumstances that vitiate the complainant's consent?

The SCC ruled that the complainant consented to sex, but that the accused obtained the complainant's consent by fraud since he poked holes in the condom.

Procedural History

Mr. Kirkpatrick sought to dismiss the charge, arguing that the Crown failed to prove the absence of the complainant's consent based on the two (2) step process in *Hutchinson*. The Trial Judge granted Mr. Kirkpatrick's motion, and dismissed the sexual assault charge.

The Court of Appeal allowed the Crown's appeal, set aside the acquittal and ordered a new trial. Mr. Kirkpatrick appealed to the Supreme Court of Canada.

Issue

- Whether sexual activity is consensual if the partner is asked to wear a condom, but they do not comply?

OR

- Whether a partner's failure to comply with the condition imposed by the complainant constitutes a lack of consent and therefore, sexual assault?

The Decision

Martin J. (Moldaver, Karakatsanis, Kasirer and Jamal JJ. concurring)

In a 5-4 split decision, the Supreme Court of Canada dismissed Mr. Kirkpatrick's appeal and concluded that when a person consents to sex premised on the condition that their partner wear a condom, but the partner does not comply, the sex is not consensual and constitutes sexual assault.

Ratio

When a person is required by their partner to wear a condom during sex, but they fail to comply, they may be guilty of sexual assault.

Reasons

The majority of the Supreme Court of Canada concluded that when condom use is a condition for sexual intercourse, a person did not consent to sexual intercourse without a condom, and that condom use is part of the sexual activity in question. The SCC found the complainant provided evidence that she would not have agreed to have sex with Mr. Kirkpatrick

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without a condom. The SCC distinguished this case from the case of Hutchinson by stating that Hutchinson addressed a situation where consent was vitiated by fraud, not situations of non-consensual condom removal and refusal.

The SCC recognized that condom use may form part of the sexual activity, and emphasized the importance of respecting a person's autonomy and boundaries.



Discussion

1. What does “consent” mean to you?

2. What are the broader implications of this interpretation of consent and sexual assault?

3. What are the legal effects of “forgetting” to put on a condom?

4. What steps can individuals take to ensure their understanding of their partner’s boundaries?

5. What role does the media play in consent?

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British Columbia v. Council of Canadians with Disabilities, 2022 SCC 27

Date released: June 23, 2022

<https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/19424/index.do>

Facts

The Council of Canadians with Disabilities (CCD), together with two individual plaintiffs, sought public interest standing to challenge the constitutionality of British Columbia's *Health Care (Consent) Act*, on the basis that its provisions allowed physicians to administer psychiatric treatment to patients with mental disabilities without their consent.

The two individual plaintiffs were no longer able to or willing to continue their involvement. The British Columbia Supreme Court dismissed the case, concluding that the CCD lacked public interest standing on its own.

Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society, 2012 SCC 45

This is the leading case on public interest standing. The test for public interest standing involves three requirements:

1. The case raises a serious justiciable issue;
2. The party bringing the action has a genuine interest in the matter; and
3. The proposed suit is a reasonable and effective means of bringing the case to court.

Procedural History

The CCD appealed to the British Columbia Court of Appeal (BCCA). The BCCA allowed the appeal and ordered a new hearing, concluding that courts must be flexible and generous when applying the public interest standing test.



The Attorney General of British Columbia appealed to the Supreme Court of Canada.

Issue

Whether public interest organizations, like the Council of Canadians with Disabilities, qualify for public interest standing on behalf of community members?

The Decision - Unanimous

Wagner C.J. (Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer and Jamal JJ. concurring)

The Supreme Court of Canada concluded, public interest organizations can seek public interest standing to bring cases on behalf of community members. The SCC confirmed the three-part public interest standing test, stating that each factor must be weighed purposively and with regard to the circumstances, to achieve greater access to justice.

The involvement of a directly affected plaintiff is not necessary, if a well-developed factual setting can be established.

Ultimately, the Court's decision to grant public interest standing is discretionary. A strict requirement poses barriers to access to justice. There must be a balance between the purposes that favour granting standing and purposes that favour limiting standing,

giving effect to the principle of legality and ensuring access to the courts, or more broadly, access to justice.

Ratio

To be granted public interest standing, a public interest litigant is not required to have a directly affected co-plaintiff as long as they can establish a concrete and well-developed factual setting. This could be determined by evidence from affected non-plaintiff witnesses and relevant experts.

Reasons

Serious Justiciable Issue

The SCC found that forced involuntary psychiatric treatment on patients was a serious issue to be discussed. The pleadings revealed facts and a cause of action that could support a *Charter* claim.

Genuine Interest In The Matter

The SCC found the CCD's experience in advocating for persons with disabilities was sufficient to demonstrate their interest in the issues and a link to the claim.

Reasonable and Effective Means

The SCC considered four factors when examining this requirement.

1. The plaintiff's capacity to bring the claim forward: The SCC was satisfied that the



CCD had the resources and expertise to advance the claim and present evidence from individuals directly affected.

2. Whether the case is of public interest and what impact it will have on access to justice: The SCC was satisfied that the claim raised issues of public importance that transcended CCD's immediate interests. By granting public interest standing, access to justice was promoted for a disadvantaged group - people with mental disabilities - who have historically faced serious barriers to bringing litigation.
3. Whether there are alternative means to bring the claim forward: The SCC was satisfied that there were no alternative means to bring the claim forward.
4. The potential impact of the proceedings on the rights of others: The SCC found that the fact that some people may support the *Health Care (Consent) Act* is not reason enough for the legislation to be immune to challenge.

Discussion

1. What is public interest standing?
2. How can public interest litigation influence legislative changes?
3. How does this decision have a profound impact on access to justice?

4. Are there any challenges associated with expanding the scope of public interest standing?

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***Murray-Hall v. Quebec (Attorney General)*, 2023 SCC 10**

Date released: April 14, 2023

<https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/19829/index.do>

Facts

Parliament passed the *Cannabis Act*, SC 2018, c. 16, which prohibits an individual from possessing or cultivating more than four (4) cannabis plants in their house.

The National Assembly of Quebec adopted the *Cannabis Regulation Act*, CQLR, c C-5.3, which regulates the possession, cultivation, use, sale and promotion of cannabis plants, regardless of the number of plants.

Mr. Murray-Hall filed an application before the Superior Court of Quebec seeking a declaration that the provisions of Quebec's *Cannabis Regulation Act* were ultra vires and of no force or effect.

The Superior Court of Quebec ruled in favour of Mr. Murray-Hall by declaring the provisions of Quebec's *Cannabis Regulation Act* invalid.

Procedural History

The Quebec Court of Appeal overturned the decision of the Superior Court of Quebec.

The Supreme Court of Canada upheld the decision of the Court of Appeal, ruling that Quebec's *Cannabis Regulation Act* does not frustrate Parliament's *Cannabis Act*, and can co-exist together.

Issue

- Whether two provisions, a Federal *Act* and a Provincial *Act*, can govern the same activity?
- Whether both Parliament and Quebec can regulate cannabis?

Decision - Unanimous

Wagner C.J. (Karakatsanis, Côté, Rowe, Martin, Kasirer and Jamal and O'Bonsawain JJ. concurring)

The Supreme Court of Canada ruled that Quebec, as well as other provinces, has the power to prohibit the personal possession and cultivation of cannabis.



The SCC applied the Double Aspect Doctrine, which allows Parliament's *Cannabis Act* and Quebec's *Cannabis Regulation Act* to co-exist at the same time.

When the Provincial and Federal legislation are in conflict, the Doctrine of Federal Paramountcy justifies the Federal legislation to prevail, and the Provincial legislation will be inoperative, only to the extent that it is necessary; only the provision will be inoperative, not the whole *Act*.

When both the Provincial provision and Federal provision are valid, and do not conflict, both levels of government can govern a different aspect of the same activity. In *Murray-Hall v. Quebec (Attorney General)*, both the provisions were deemed to be valid.

Ratio

Quebec is allowed to prohibit the possession and cultivation of cannabis plants.

Reasons

The purpose of Quebec's *Cannabis Regulation Act* is not to re-criminalize the use of cannabis and punish offenders. Instead, the purpose is to ensure the state's monopoly on the sale of cannabis in order to protect the health and safety of the public.

By passing the *Cannabis Regulation Act* and prohibiting any possession and cultivation of cannabis for recreational use, Quebec is acting in accordance with its objective to protect the health and safety of its public. This objective is within the provinces' authority over property and civil rights, and does not infringe upon Parliament's jurisdiction.

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Canadian Council for Refugees v. Canada (Citizenship and Immigration), 2023 SCC 17

Date released: June 16, 2023

<https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/19957/index.do>

Note

The principle of non-refoulement forbids a country receiving asylum seekers from returning to a country where they would be at risk of persecution.

Facts

Canada and the United States are parties to a bilateral treaty known as the Safe Third Country Agreement (STCA). Under this treaty, refugee claimants must seek protection in whichever of the two countries they first enter after leaving their country of origin.

An individual is ineligible to claim refugee status in Canada if they arrive at a land port of entry from a "safe third country."

The appellants are refugee claimants and public interest litigants who arrived in Canada from the United States to claim refugee status. The appellants feared

gender-based persecution and sexual violence committed by gangs or oppression in the United States. The individuals were ineligible to claim refugee protection in Canada because they arrived at a land port of entry from the United States, which is deemed a safe third country.

The appellants challenged the constitutionality of the Regulation designating the United States as a safe third country, arguing that it violated their s. 7 rights under the *Charter* because refugees are returned back to the United States without considering whether the United States will respect their rights. The appellants also argued, the Regulation designating the United States as a safe third country violated their s. 15 rights under the *Charter* because women who face gender-based persecution are often denied refugee status in the United States.



The Federal Court judge found that the Regulation did violate s. 7 of the *Charter* because the liberty and security of the person were threatened considering the risks of refoulement, detention, and the harsh conditions of detention.

Procedural History

The Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness appealed to the Federal Court of Appeal, which set aside the judgment of the Federal Court. The Federal Court of Appeal found that the *Charter* challenge should not have focused on the Regulation, but should have focused on Canada's action or inaction in reviewing the United States' designation as a safe third country. This decision was further appealed to the Supreme Court of Canada.

The Supreme Court of Canada allowed the appeal in part, focusing on s. 7 and returned the s. 15 claim back to the Federal Court.

Issue

Whether the Regulation designating the United States as a safe third country violates s. 7 and s. 15 of the *Charter*?

Decision - Unanimous

Wagner C.J. (Karakatsanis, Côté, Rowe, Martin, Kasirer and Jamal and O'Bonsawain JJ. concurring)

The Supreme Court of Canada ruled that the Regulation designation the United States as a safe third country did not violate s. 7 of the *Charter*.

Ratio

The designation of the United States as a safe third country does not infringe refugee claimants' rights to liberty and security of the person.

Reasons

Justice Kasirer agreed with the Federal Court, that the designation of the United States as a safe third country did engage liberty and security interests as there was a risk of detention and the mistreatment of refugee claimants when returned to the United States, practices that would be deemed inappropriate in Canada.

However, the SCC found there are "safety valves" that allow Canada to consider refugee status claims when their ineligibility could lead to the deprivation of liberty and security of the person.

These "safety valves" include exemptions on the basis of humanitarian and



compassionate grounds or public policy grounds, that exempt refugee claimants from being returned to their country of origin.



Discussion

1. What is the principle of non-refoulement?

2. Do you think the “safety valves” are sufficient to protect refugee claimants?

3. Do you think the STCA was based on a false assumption that both Canada and the United States are safe countries?

4. What further steps can Canada take to protect refugee claimants?