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# *Ewert v. Canada*: Shining Light on Corrections and Indigenous People

Emily Hill and Jessica Wolfe\*

## I. INTRODUCTION

In *Ewert v. Canada*,<sup>1</sup> the Supreme Court considered an Indigenous federal inmate’s claim that the continued use of actuarial tools to assess his risk was contrary to the *Corrections and Conditional Release Act*<sup>2</sup> and sections 7 and 15 of the Charter.<sup>3</sup> The case offers an important opportunity to consider issues of substantive equality; access to justice; and how Correctional Service Canada’s (CSC) current practices contribute to the larger problem of Indigenous alienation<sup>4</sup> from the criminal justice system. Given the opaque nature of the correctional system, it is only through cases like *Ewert* that we get a glimpse into this type of decision-making.

The Supreme Court’s decision that the CSC has significant statutory obligations to Indigenous offenders to ensure that its policies and practices are addressing their unique needs speaks to both the remedial goals of the *CCRA* and the increasing need for reform in a system where the situation for Indigenous people serving sentences — especially women and young people — is getting worse. Because the Court determined that these obligations arise not from the Charter, but from the legislation itself, all of CSC’s activities, not merely what risk-assessment

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<sup>1</sup> [2018] S.C.J. No. 30, [2018] 2 S.C.R. 165 (S.C.C.) [hereinafter “*Ewert*”].

<sup>2</sup> S.C. 1992, c. 20 [hereinafter “*CCRA*”].

<sup>3</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “*Charter*”].

<sup>4</sup> This word was used by the Supreme Court in *R. v. Gladue*, [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688, at para. 65 (S.C.C.) [hereinafter “*Gladue*”], to describe the relationship between Indigenous people and the criminal justice system.

tools it uses, are now open to challenge if they perpetuate rather than mitigate identifiable harms to Indigenous people.

The decision in *Ewert* also provides an opportunity to broaden the concept of “risk” as it relates to Indigenous people and the goals of the criminal justice system. The promise of a fair system of law designed to keep members of a community — especially vulnerable people — safe from harm has not been met for Indigenous people. The increased likelihood of violent victimization is demonstrated by the horrifying statistics about missing and murdered Indigenous women and girls and yet these dangers are often minimized or ignored. The decision in *Ewert* must be read in conjunction with the recent decisions in *R. v. Barton*<sup>5</sup> and the *Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*.<sup>6</sup> Such an approach leads to the conclusion that the greatest risk to the fair operation of the justice system is ignoring the pressing need for change and instead maintaining the *status quo*. Meaningful change would mean returning justice issues, including corrections, to the capable, willing hands of Indigenous Peoples, a recommendation articulated — and many times repeated — since the Royal Commission on Aboriginal Peoples.<sup>7</sup> This includes the inherent right of Indigenous Nations to establish and administer their own systems of justice pursuant to their inherent right of self-government, including the power to make and enforce laws, within their territory.

## II. BACKGROUND

### 1. Context

Given that *Ewert* concerns the circumstances of Indigenous people serving custodial sentences, it is necessary to consider both the current context and the legislative intent of the *CCRA*.

The crisis of Indigenous over-representation in the Canadian correctional system continues to get worse. In 2016 to 2017 Indigenous men accounted for 28 per cent of admissions to adult male custody. For Indigenous women and girls, the problem is even more acute. Indigenous women made up

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<sup>5</sup> [2019] S.C.J. No. 33, 2019 SCC 33 (S.C.C.) [hereinafter “*Barton*”].

<sup>6</sup> *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, online: <<https://www.mmiwg-ffada.ca/final-report/>>.

<sup>7</sup> Canada (Royal Commission on Aboriginal Peoples), *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: The Commission, 1996).

43 per cent of all women admitted to adult custody and 60 per cent of girls admitted to youth custody were Indigenous. In some provinces like Saskatchewan, Indigenous girls account for 98 per cent of admissions to youth custody. Indigenous people make up just 4.1 per cent of the Canadian adult population and eight per cent of the youth population.<sup>8</sup>

This is not only a problem of numbers. The experience of Indigenous people once they are inside the correctional system is also much worse than for other inmates. In its recent report, “Indigenous People in the Federal Correctional System”, the House of Commons Standing Committee on Public Safety and National Security stated that it “deplores that the situation of Indigenous people in the federal correctional system is still critical and urgent.”<sup>9</sup> In *Ewert*, the Supreme Court wrote:

... Recent reports indicate that the gap between Indigenous and non-Indigenous offenders has continued to widen on nearly every indicator of correctional performance. For example, relative to non-Indigenous offenders, Indigenous offenders are more likely to receive higher security classifications, to spend more time in segregation, to serve more of their sentence behind bars before first release, to be under-represented in community supervision populations, and to return to prison on revocation of parole.<sup>10</sup>

This is not the outcome intended by Parliament when it enacted the *CCRA*. The legislation arose out of a series of Working Papers produced by the Department of Justice’s Correctional Law Review.<sup>11</sup> The Working Papers proposed that legislation address the differential outcomes for Indigenous people who are incarcerated by recognizing them as a particularly disadvantaged offender group. They also proposed that codification and design of selected aspects of the correctional operations

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<sup>8</sup> Statistics Canada, *Adult and youth correctional statistics in Canada, 2016/2017*, Juristat Catalogue No. 85-002-X (Ottawa: Statistics Canada, 2018), online: <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2018001/article/54972-eng.htm>>.

<sup>9</sup> Indigenous People in the Federal Correctional System, The Honourable John McKay, Chair, “Report of the Standing Committee on Public Safety and National Security”, June 2018, 42nd Parliament, 1st Session, online: <[http://publications.gc.ca/collections/collection\\_2018/parl/xc76-1/XC76-1-1-421-22-eng.pdf](http://publications.gc.ca/collections/collection_2018/parl/xc76-1/XC76-1-1-421-22-eng.pdf)>.

<sup>10</sup> *Ewert v. Canada*, [2018] S.C.J. No. 30, [2018] 2 S.C.R. 165, at para. 60 (S.C.C.).

<sup>11</sup> Canada (Ministry of the Solicitor General), *Influences on Canadian correctional reform: working papers of the Correctional Law Review, 1986 to 1988* (Ottawa: Solicitor General Canada, 2002) [hereinafter “Working Papers”].

and programming be responsive to the unique needs of Indigenous people serving sentences.<sup>12</sup>

This recommendation was followed in 1992 when Parliament enacted the *CCRA* which specifically set out provisions related to Indigenous people in the correctional system. Section 4(g) states:

4. The principles that guide the Service in achieving the purpose referred to in section 3 are as follows:

(g) correctional policies, programs and practices respect gender, ethnic, cultural and linguistic differences and are responsive to the special needs of women, aboriginal peoples, persons requiring mental health care and other groups... .

The contrast between the reality of the broken correctional system for Indigenous people and the remedial goals and of the *CCRA* is central to the Supreme Court's decision in *Ewert*.

## 2. History of the Case

This case was 18 years in the making. Mr. Ewert, a Métis man serving two life sentences, first raised a concern about the use of the actuarial tools in an inmate complaint in 2000.<sup>13</sup> In the following years, he filed a number of similar grievances and internal appeals of the decisions of those grievances. They all essentially made the same point, that (as described by Beaudry J. in a 2007 decision of the Federal Court):

[T]hese risk assessment instruments were designed by and for western people and when they are used in assessing Aboriginal offenders they produce a discriminatory effect that places Aboriginal prisoners in a disadvantaged position in the federal correctional system. [Mr. Ewert] characterised these assessment tools as racist and a contributing factor

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<sup>12</sup> Canada (Ministry of the Solicitor General), *Influences on Canadian correctional reform: working papers of the Correctional Law Review, 1986 to 1988* (Ottawa: Solicitor General Canada, 2002), at 371-81.

<sup>13</sup> The actuarial tools in question are the Hare Psychopathy Checklist — Revised (PCL-R), Violence Risk Appraisal Guide (VRAG), Sex Offender Risk Appraisal Guide (SORAG), Static-99, and Violence Risk Scale — Sex Offender (VRS-SO). Some academics have argued that over-reliance on risk technologies is problematic and that clinical assessments are still vitally important to mitigate potentially discriminatory effects of risk assessment tools. See, for example: Kelly Hannah-Moffat, Paula Maurutto and Sarah Turnbull, “Negotiated Risk: Actuarial Illusions and Discretion in Probation”, *Canadian Journal of Law and Society*, Volume 24, Issue 3, December 2009, 391-409.

to the over representation of Aboriginal peoples in Canadian correctional institutions.<sup>14</sup>

All of the grievances and appeals were dismissed by CSC which defended the tools as valid predictors of risk. CSC also stated that its research branch was working on a research project to “review the appropriateness of CSC intake assessment tools for Aboriginal offenders.”<sup>15</sup> Eventually, Mr. Ewert brought a judicial review of the six grievances. The Federal Court held that CSC’s decisions to dismiss the grievances were not patently unreasonable and noted the CSC’s commitment to ongoing research.<sup>16</sup> Mr. Ewert appealed the decision and, while the Federal Court of Appeal declined to interfere with the decision of Beaudry J., the Court noted:

[T]hese reasons are not to be understood as being a rejection of the *Charter* arguments raised by the appellant. Some of the arguments raise legitimate concerns and depending on the course of events it may be that a full examination of these arguments will be warranted in a proper procedural setting and with up to date evidence.<sup>17</sup>

In 2015, Mr. Ewert started a new action in the Federal Court about the ongoing use of the same assessment tools with a claim for damages and Charter relief, which he eventually narrowed to focus only on the statutory and Charter claims.<sup>18</sup> He argued that CSC’s continued use of the tools breached not only the requirement of the *CCRA* to consider the “special needs” of Indigenous offenders, but also the requirement set out in section 24(1) that CSC use reliable information to make decisions. Section 24(1) states: “The Service shall take all reasonable steps to ensure that any information about an offender that it uses is as accurate, up to date and complete as possible.”

The Court heard from two experts who provided conflicting evidence about whether the tests accurately predicted risk for Indigenous people serving sentences. Ultimately, Phelan J. relied on the conclusion of the expert called by Mr. Ewert and held that the “actuarial tests are susceptible to cultural bias and therefore are unreliable.”<sup>19</sup> He determined that CSC’s continued use of the test despite legitimate concerns breached

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<sup>14</sup> *Ewert v. Canada (Attorney General)*, [2007] F.C.J. No. 31, 2007 FC 13, at paras. 7-11 (F.C.).

<sup>15</sup> *Id.*, at para. 63.

<sup>16</sup> *Id.*, at para. 66.

<sup>17</sup> *Ewert v. Canada (Attorney General)*, [2008] F.C.J. No. 1371, 2008 FCA 282, at para. 12 (F.C.A.).

<sup>18</sup> *Ewert v. Canada (Correctional Service)*, [2015] F.C.J. No. 1123, 2015 FC 1093 (F.C.).

<sup>19</sup> *Id.*, at para. 75.

section 24(1) of the *CCRA* and section 7 of the Charter. He concluded the facts were “not sufficiently developed to usefully engage in the nuanced analysis” which section 15 requires.<sup>20</sup>

Justice Phelan adjourned the matter to hold a hearing focused on crafting “a final order enjoining the use of the assessment tools in respect of the Plaintiff and other Aboriginal inmates until, at minimum, the Defendant conducts or has conducted a study that confirms the reliability of those tools in respect to adult Aboriginal offenders.”<sup>21</sup> The CSC appealed the decision to the Federal Court of Appeal before that remedies hearing could be held.

The Federal Court of Appeal reversed the Federal Court’s decision. It concluded that Mr. Ewert had not met his burden to establish on a balance of probabilities that “the assessment tools produce or are likely to produce false results and conclusions”<sup>22</sup> and therefore the Federal Court had been wrong to conclude that the *CCRA* and the Charter had been breached. Mr. Ewert appealed to the Supreme Court and the case was heard in October 2017.

### 3. The Tools

Each of the five actuarial risk assessment tools in question is used by CSC to assess an inmate’s psychopathy and predict risk of violent and sexual recidivism.<sup>23</sup> The scores derived from these assessments are taken into account in determining an inmate’s overall security classification which, in turn, influences placement decisions, access to rehabilitative and educational programs, decisions about visitors and ultimately whether parole is granted. For Indigenous women serving sentences, Professor Debra Parkes has found that, “risk assessment and security classification tools translate needs (experiences of trauma and abuse, mental health and addictions, perceived deficits in parenting and relationships) into risk factors which have gendered impacts for women generally and, in particular, lead to disproportionately higher security classification for Indigenous women.”<sup>24</sup>

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<sup>20</sup> *Id.*, at para. 109.

<sup>21</sup> *Id.*, at para. 114.

<sup>22</sup> *Ewert v. Canada (Correctional Service)*, [2016] F.C.J. No. 853, 2016 FCA 203, at para. 21 (F.C.A.).

<sup>23</sup> *Ewert v. Canada*, [2018] S.C.J. No. 30, [2018] 2 S.C.R. 165, at para. 11 (S.C.C.).

<sup>24</sup> Debra L. Parkes, “Women in Prison: Liberty, Equality, and Thinking Outside the Bars”, *Journal of Law & Equality*, Vol. 12, 2016, at 14.

These tools rely heavily on static factors. Static factors, such as the person's age at the time of the offence, work and educational history, marital and family status, criminal history and past substance abuse are fixed and can result in a higher risk score, even if a person has made significant changes in their life. Using tools that rely primarily on static factors also ignores the reality — recognized by the Supreme Court in *R. v. Ipeelee*<sup>25</sup> — that the circumstances of colonialism contribute to differential and adverse outcomes for Indigenous people. This is the kind of contextual analysis necessary, but markedly absent, for evaluating case-specific information in correctional decision-making. In particular, the Court stated in *Ipeelee* that, in the sentencing context, judges must:

[T]ake judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples.<sup>26</sup>

Because the impugned assessment tools fail to account for Indigenous peoples' significantly unique backgrounds of trauma and criminality within this context, their reliability is suspect and their use can lead to systemic discrimination. Professor David Milward, explains:

Some research has indeed concluded that criminal history is a reliable risk predictor for both Aboriginal and non-Aboriginal inmates (citation removed). These studies, however, ignore that colonial oppression and the enduring social conditions that it has left behind continue to play a critical role in Aboriginal over-incarceration. To the extent that oppressive social conditions do much to bring Aboriginal peoples into contact with the justice system, the emphasis on static factors tied with criminal history may represent a form of systemic discrimination.<sup>27</sup>

Given that the scores derived from the tests are not contextualized in this way, the tests themselves are prone to cultural bias. The fact that CSC had not conducted the necessary research to establish they were free from cultural bias, particularly given it was within their mandate and a known concern, was central to Mr. Ewert's application. CSC had conducted research into the validity of other assessment tools for

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<sup>25</sup> [2012] S.C.J. No. 13, [2012] 1 S.C.R. 433 (S.C.C.) [hereinafter "*Ipeelee*"].

<sup>26</sup> *Id.*, at para. 60.

<sup>27</sup> David Milward. "Sweating it Out: Facilitating Corrections and Parole in Canada Through Aboriginal Spiritual Healing" (2011) 29 Windsor Y. B. Access Just., at 4.



Indigenous people serving sentences and, as a result of the research, stopped using the tools for Indigenous people in federal corrections.<sup>28</sup>

### III. THE DECISION

In its decision, the Supreme Court found that the concerns that Mr. Ewert had been raising since 2000 were valid. Writing for the majority, Wagner J. determined that, contrary to the position of CSC, the test results were “information” as described in section 24. As a result, CSC had a statutory obligation to take “all reasonable steps” to ensure that information generated by the tools is accurate as it is applied to Indigenous people in the correctional system.<sup>29</sup> The Court held that CSC was required to “take seriously the credible concerns that have been repeatedly raised according to which information derived from the impugned tools is of questionable validity with respect to Indigenous people because the tools fail to account for cultural differences.”<sup>30</sup> It found that the CSC “fell short” of this obligation. Given the exceptional circumstances of the case, the Court decided it would grant the discretionary remedy of issuing a declaration that CSC had failed to meet its obligation under section 24(1) of the *CCRA*.<sup>31</sup> While failing to acknowledge that it is the imposition of colonial and conventional correctional practices that harm and disadvantage Indigenous people, and ignoring the critique of the “culture clash” argument for understanding the roots of Indigenous over-representation,<sup>32</sup> the declaration was still a significant admonishment of the State for its failure to live up to its own legislated obligation.

This finding was significant given the serious consequences of CSC’s failure to meet this obligation for Indigenous people serving sentences. The Court, wrote:

Thus, the clear danger posed by the CSC’s continued use of assessment tools that may overestimate the risk posed by Indigenous inmates is that it could unjustifiably contribute to disparities in correctional outcomes in areas in which Indigenous offenders are already

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<sup>28</sup> *Ewert v. Canada*, [2018] S.C.J. No. 30, [2018] 2 S.C.R. 165, at para. 49 (S.C.C.).

<sup>29</sup> *Id.*, at para. 45.

<sup>30</sup> *Id.*, at para. 66.

<sup>31</sup> *Ewert v. Canada*, [2018] S.C.J. No. 30, [2018] 2 S.C.R. 165, at para. 62 (S.C.C.).

<sup>32</sup> Jonathan Rudin, *Aboriginal Peoples and the Criminal Justice System* (Toronto, ON: Ipperwash Inquiry, 2005). Online: <[http://www.archives.gov.on.ca/en/e\\_records/ipperwash/policy\\_part/research/pdf/Rudin.pdf](http://www.archives.gov.on.ca/en/e_records/ipperwash/policy_part/research/pdf/Rudin.pdf)>.

disadvantaged. For example, if the impugned tools overestimate the risk posed by Indigenous inmates, such inmates may experience unnecessarily harsh conditions while serving their sentences, including custody in higher security settings and unnecessary denial of parole. Overestimation of the risk may also contribute to reduced access to rehabilitative opportunities, such as a loss of the opportunity to benefit from a gradual and structured release into the community on parole before the expiry of a fixed-term sentence.<sup>33</sup>

With regard to the Charter claims, the Court determined that Mr. Ewert had “not established that CSC’s reliance on the tools violated the principle of fundamental justice against arbitrariness or that against overbreadth.”<sup>34</sup> Similarly, because the evidence at trial did not establish that the impugned tools, in fact, overestimate the risk posed by Indigenous people in the correctional system, the section 15 claim also failed.

In a dissent, Côté J. and Rowe J. agreed with the majority decision on the Charter questions, but held that section 24(1) of the *CCRA* did not require CSC to undertake research on the tools in question. They also held that this was not an appropriate case for declaratory relief.<sup>35</sup>

## 1. Substantive Equality

While not decided on section 15 grounds, the decision in *Ewert* provides important direction about the role of substantive equality when considering claims concerning the experiences of Indigenous people serving federal sentences. The Court commented not only on the unique history and needs of Indigenous people within the correctional system, but the requirement that CSC respond by changing its practices to respond to those needs.

This approach to substantive equality is consistent with the guidance the Supreme Court has provided to the interpretation of section 718.2(e) of the *Criminal Code of Canada*, which requires judges to consider the circumstances of Indigenous people before them for sentencing.<sup>36</sup> Both section 718(2)(e) and section 4(g) of the *CCRA* are remedial and aimed at addressing Indigenous over-representation in the criminal justice and

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<sup>33</sup> *Ewert v. Canada*, [2018] S.C.J. No. 30, [2018] 2 S.C.R. 165, at para. 65 (S.C.C.).

<sup>34</sup> *Id.*, at para. 70.

<sup>35</sup> *Ewert v. Canada*, [2018] S.C.J. No. 30, [2018] 2 S.C.R. 165, at para. 91 (S.C.C.).

<sup>36</sup> R.S.C. 1985, c. C-46.

correctional systems. The principles set out in *Gladue*,<sup>37</sup> and affirmed in *Ipeelee*<sup>38</sup> have been held to apply in every situation where an Indigenous person's liberty interests are engaged.<sup>39</sup> For this reason, *Gladue* and *Ipeelee* are directly applicable to the way CSC addresses the unique needs of Indigenous people in the correctional system since their decisions obviously engage liberty interests.

These cases held that by making particular reference to Indigenous people, Parliament was directing courts to recognize that systemic discrimination exists in the criminal justice system and that this has been a significant contributor to Indigenous alienation from, and overrepresentation in, that system. In *Gladue* the Supreme Court held this discrimination extends to the correctional system, noting that:

[A]boriginal offenders are, as a result of these unique systemic and background factors, more adversely affected by incarceration and less likely to be 'rehabilitated' thereby, because the internment milieu is often culturally inappropriate and regrettably discrimination towards them is so often rampant in penal institutions.<sup>40</sup>

*Gladue* and *Ipeelee* assist in the interpretation of CSC's obligations under the *CCRA* because they explain how the crisis of over-representation and differential outcomes for Indigenous people must be addressed. In *Ipeelee*, the Supreme Court confirmed that a different methodology is required for Indigenous people.<sup>41</sup>

This methodology is important, because as courts have repeatedly emphasized, addressing systemic discrimination requires analysis focused on substantive, rather than formal, equality.<sup>42</sup> Substantive equality is a long-standing principle in Canadian law which acknowledges that "identical treatment may frequently produce serious inequality" for equity seeking groups.<sup>43</sup> In *United States v. Leonard*, the Ontario Court of Appeal held:

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<sup>37</sup> *R. v. Gladue*, [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.).

<sup>38</sup> *R. v. Ipeelee*, [2012] S.C.J. No. 13, [2012] 1 S.C.R. 433 (S.C.C.).

<sup>39</sup> *United States of America v. Leonard*, [2012] O.J. No. 4366, 2012 ONCA 622, at paras. 53, 55, *aff'd* by the SCC in *R. v. Anderson*, [2014] S.C.J. No. 41, [2014] 2 S.C.R. 167, at paras. 26-27 (S.C.C.); *R. v. Sim*, [2005] O.J. No. 4432, 203 O.A.C. 128, at paras. 16, 19 (Ont. C.A.).

<sup>40</sup> *R. v. Gladue*, [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688, at para. 68 (S.C.C.).

<sup>41</sup> *R. v. Ipeelee*, [2012] S.C.J. No. 13, [2012] 1 S.C.R. 433, at para. 72 (S.C.C.).

<sup>42</sup> *Quebec (Attorney General) v. A*, [2013] S.C.J. No. 5, [2013] 1 S.C.R. 61, at para. 137 (S.C.C.).

<sup>43</sup> *Law Society of British Columbia v. Andrews*, [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143, at 164-65, *aff'd* in *Ewert v. Canada*, [2018] S.C.J. No. 30, [2018] 2 S.C.R. 165, at para. 54 (S.C.C.).

... *Gladue* stands for the proposition that insisting that Aboriginal defendants be treated as if they were exactly the same as non-Aboriginal defendants will only perpetuate the historical patterns of discrimination and neglect that have produced the crisis of criminality and over-representation of Aboriginals in our prisons.<sup>44</sup>

Clearly, CSC has a duty to address the systemic discrimination that Indigenous people in federal corrections face as a consequence of colonialism. The principle of substantive equality requires CSC to take a different approach for Indigenous people. This was acknowledged by the Court in *Ewert* when it found that section 4(g) “can only be understood as a direction from Parliament to the CSC to advance substantive equality in correctional outcomes for, among others, Indigenous offenders.”<sup>45</sup>

The context for that conclusion is that discrimination faced by Indigenous persons in the Canadian correctional system is a “long-standing concern, and one that has become more, not less, pressing since s. 4 (g) was enacted.”<sup>46</sup> At paragraphs 55 to 56 of the decision, the Court reviews the legislative history of the *CCRA* and determines that research considered by Parliament identified the “shortcomings” within the correctional system in meeting the needs of incarcerated Indigenous people (among others) and concluded these shortcomings call “into question the very effectiveness, fairness and even-handedness of the corrections system”. It was for this reason that section 4(g) was a necessary and notable part of the *CCRA*; it is a specifically remedial section within legislation that is also broadly remedial in that it codified principles of restraint to remedy what was an increasing reliance on incarceration. The Court held that the “mischief” section 4(g) was intended to address is the “troubled relationship between Canada’s criminal justice system and its Indigenous peoples” which is long-standing and pervasive, extending to all parts of the criminal justice system, including the prison system.<sup>47</sup>

CSC has a positive duty to apply special considerations in decision-making as it relates to how it collects, analyzes and uses information about Indigenous people. Substantive equality requires understanding the remedial purpose of the *CCRA* as a mechanism with which to ameliorate

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<sup>44</sup> *United States of America v. Leonard*, [2012] O.J. No. 4366, 112 O.R. (3d) 496, 2012 ONCA 622, at para. 60 (Ont. C.A.).

<sup>45</sup> *Ewert v. Canada*, [2018] S.C.J. No. 30, [2018] 2 S.C.R. 165, at para. 53.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*, at para. 57.

negative correctional outcomes for Indigenous people and to ensure CSC is not complicit in ongoing systemic discrimination.

The challenge, discussed in more detail below, is how incarcerated Indigenous people can ensure that the *CCRA*'s obligation to substantive equality is met. The barriers to gathering the kind of evidence necessary to demonstrate systemic discrimination combined with the courts' reluctance (at every level in this case) to consider the arguments in the framework of section 15 mean that the promise of responsive policies and programs, while embraced by the Supreme Court, is difficult to enforce.

## 2. Access to Justice

While the decision and resulting declaration was a victory for Mr. Ewert, the decision highlights a troubling lack of access to justice for inmates who face systemic barriers to bringing their circumstances to the court's attention. Most obvious is the length of time it took for this case to proceed to a hearing that brought a result to Mr. Ewert. Using the grievance process — the internal review mechanism in place for persons incarcerated in the federal correctional system and codified in section 90 of the *CCRA* — Mr. Ewert persistently raised his concerns about cultural bias in these actuarial tools. Each time CSC dismissed the concerns. Self-represented and remarkably determined, he was twice able to have these decisions reviewed by the Federal Court. In the first trial and appeal decision, the Court noted that the claim seemed to have some merit, but dismissed his case partly based on CSC's promise of ongoing research.<sup>48</sup> Despite these commitments, as the Supreme Court noted,<sup>49</sup> the research was never completed.

Instead CSC argued that the results of the tests were not really “information” and that the obligation in section 24(1) related only to information-gathering and record-keeping. CSC said it was only required to ensure that information about an offender is accurately recorded, not to take steps to ensure that the content of the information produced by the actuarial tools is, in fact, accurate.<sup>50</sup> Although this proposal was accepted by the two judges who dissented, it was strongly rejected in the

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<sup>48</sup> *Ewert v. Canada (Attorney General)*, [2007] F.C.J. No. 31, 2007 FC 13, at para. 66 (F.C.) and *Ewert v. Canada (Attorney General)*, [2008] F.C.J. No. 1371, 2008 FCA 285, at paras. 7 and 12 (F.C.A.).

<sup>49</sup> *Ewert v. Canada*, [2018] S.C.J. No. 30, [2018] 2 S.C.R. 165, at paras. 48-50 (S.C.C.).

<sup>50</sup> *Id.*, at para. 42.

majority decision. The Court held that “[o]n its face, the obligation imposed by s. 24(1) of the *CCRA* appears to apply to information derived from the impugned tools” and that this interpretation was supported by the “relevant statutory context.”<sup>51</sup> The Court also noted that while Mr. Ewert’s specific concern was that the tools overestimated his risk of re-offending, having accurate information about inmates’ psychological needs and the risk they pose is crucial for the system’s broader purpose to maintain a safe society and assist with inmates’ reintegration into the community.<sup>52</sup>

The accuracy of the tools is important because they are used to “assess an inmate’s psychopathy or risk of violence, and that the scores derived from these assessments were required to be taken into account in determining an inmate’s overall security rating.”<sup>53</sup> The Court’s decision supported the trial judge’s conclusion that:

... The score is like a branding — hard to overcome. This is unsurprising, since all types of institutions in society use testing scores that have the tendency to follow the test subject throughout their life in the relevant institution. An apt parallel can be found in the example of early school IQ testing in which a child is identified as ‘special needs’ or ‘gifted’, and these results or classifications follow the child throughout their institutional educational experiences. In this case, marks matter.<sup>54</sup>

Given the importance of the results of the impugned tools and the subtle ways in which apparently “neutral” factors can work against Indigenous people — and given the growing over-representation of Indigenous people in the correctional system — the position of the CSC that there is no obligation to ensure that the information is accurate is extremely troubling.

CSC made one additional argument: that Mr. Ewert’s claims should be rejected because he failed to show that the impugned tools produced results which showed higher levels of risk for Indigenous people serving sentences. This, of course, would be the exact question addressed by the research promised, but never delivered, by CSC’s own research branch.

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<sup>51</sup> *Id.*, at paras. 33, 34.

<sup>52</sup> *Id.*, at para. 38.

<sup>53</sup> *Id.*, at para. 16.

<sup>54</sup> *Ewert v. Canada (Correctional Service)*, [2015] F.C.J. No. 1123, 2015 FC 1093, at para. 58 (F.C.).

This argument was accepted by the Federal Court of Appeal,<sup>55</sup> but rejected by the Supreme Court, which held that, pursuant to the *CCRA*, the obligation to ensure that the results generated by the tools was accurate lay with CSC and not Mr. Ewert.<sup>56</sup> This is a significant finding because as noted by Professor Parkes, “the kind of evidence that would be required to prove systemic discrimination against, for example, Aboriginal prisoners ... is substantial and would be expensive to gather” and is ordinarily commissioned by CSC or its provincial counterparts as part of their mandate.<sup>57</sup>

This case, and others before it, highlight the problems with the internal grievance process.<sup>58</sup> While section 90 of the *CCRA* requires: “a procedure for fairly and expeditiously resolving offenders’ grievances”, the Office of the Correctional Investigator (OCI) has found “egregious delays and mounting backlogs” in the CSC’s “broken and dysfunctional” grievance system.<sup>59</sup> Most disputes are resolved through an internal review process, meaning there is very little opportunity for outside scrutiny of CSC’s decisions. The OCI found that “in nearly every aspect of correctional performance, CSC’s internal monitoring mechanisms and review frameworks are nowhere as transparent, rigorous or effective as they should be” and that “[n]ational reviews [of grievances] maintained the institutional decision in 97.9% of all cases.”<sup>60</sup>

While the OCI operates as an independent ombudsman for federally sentenced offenders, the role is limited since the OCI only has the power to make non-binding recommendations. Many of the recommendations of the OCI have not been followed. For example, in the 2017 to 2018 report, Dr. Ivan Zinger, the Correctional Investigator of Canada, explains

<sup>55</sup> *Ewert v. Canada (Correctional Service)*, [2016] F.C.J. No. 853, 2016 FCA 203, at para. 27 (F.C.A.).

<sup>56</sup> *Ewert v. Canada*, [2018] S.C.J. No. 30, [2018] 2 S.C.R. 165, at paras. 66-67 (S.C.C.).

<sup>57</sup> Debra Parkes, “A Prisoners’ Charter?: Reflections on Prisoner Litigation Under the Canadian Charter of Rights and Freedoms” (2007) 40 U.B.C. L. Rev. 629-676, at 667.

<sup>58</sup> See, for example, *May v. Ferndale Institution*, [2005] S.C.J. No. 84, [2005] 3 S.C.R. 809 (S.C.C.) [hereinafter “*May*”] and *Mission Institution v. Khela*, [2014] S.C.J. No. 24, [2014] 1 S.C.R. 502 (S.C.C.), where the applications for *habeas corpus* were granted after involuntary transfers were made. In *May*, the Court further held (*id.*, at para. 63) that the grievance procedure was problematic since “in a case where the legality of a Commissioner’s policy is contested, it cannot be reasonably expected that the decision-maker, who is subordinate to the Commissioner, could fairly and impartially decide the issue.”

<sup>59</sup> Office of the Correctional Investigator, *Annual Report 2016-2017* (Ottawa: Minister of Public Safety, 2017), online: <<https://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20162017-eng.aspx#s4>>.

<sup>60</sup> Office of the Correctional Investigator, *Annual Report 2017-2018* (Ottawa: Minister of Public Safety, 2018), online: <<https://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20172018-eng.aspx>>.

that he notified the Minister on three separate occasions of the inadequacy of CSC's responses to his recommendations<sup>61</sup> and later in the Report described CSC's response to the OCI's report, *Missed Opportunities: The Experience of Young Adults Incarcerated in Federal Custody* as "thoroughly discouraging and dismissive."<sup>62</sup>

One obvious solution to the problem of effective, independent oversight is to increase incarcerated peoples' access to counsel to assist with independent review of CSC decisions through judicial review applications to the Federal Court. This would ensure timely judicial oversight so others do not wait 18 years like Mr. Ewert did. It would also ensure that if CSC commits to further take steps such, as in this case, conducting further research to defend itself from Charter or statutory breach claims, that those to whom those commitments matter most have a remedy if CSC does not follow through.

Because the vast majority of prisoners are poor and cannot afford to retain a lawyer, access to provincial legal aid plans is essential. Without such access "most prisoners cannot enforce any right they may have to legal representation."<sup>63</sup> Unfortunately, despite a section 7 right to representation by counsel and judicial oversight of important prison disciplinary proceedings,<sup>64</sup> a corresponding right to publicly-funded legal aid has not been codified. This is problematic since, in cases like *Sauvé v. Canada (Chief Electoral Officer)*, the Supreme Court has held (in the context of voting rights) that the State cannot make prisoners "temporary outcasts from our system of rights and democracy."<sup>65</sup> While the Charter applies inside prison walls,<sup>66</sup> "...[t]he reality is that without adequate legal aid funding, prisoners simply do not have meaningful access to the courts to enforce the Charter in Canada's prisons."<sup>67</sup> Failed Charter claims by unrepresented Indigenous litigants due to lack of evidence are

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Debra Parkes, "A Prisoners' Charter?: Reflections on Prisoner Litigation Under the Canadian Charter of Rights and Freedoms" (2007) 40 U.B.C. L. Rev. 629-676, at 647.

<sup>64</sup> *Howard v. Stony Mountain Institution*, [1985] F.C.J. No. 56, 57 N.R. 280 (F.C.A.). Appeal by Federal Government to Supreme Court of Canada quashed as moot: *Howard v. Stony Mountain Institution*, [1987] S.C.J. No. 91, [1987] 2 S.C.R. 687 (S.C.C.). Now codified in *Corrections and Conditional Release Regulations*, SOR/92-620, s. 31(2).

<sup>65</sup> [2002] S.C.J. No. 66, [2002] 3 S.C.R. 519, at para. 40 (S.C.C.).

<sup>66</sup> *Id.*

<sup>67</sup> Debra Parkes, "A Prisoners' Charter?: Reflections on Prisoner Litigation Under the Canadian Charter of Rights and Freedoms" (2007) 40 U.B.C. L. Rev. 629-676, at 648.



not new<sup>68</sup> and access to justice for Indigenous prisoners demands meaningful access to counsel.

In this case the remedy granted — a declaration — highlights the current problems with decision-making in the correctional system. The decisions that affected Mr. Ewert were not made in a transparent manner and the review mechanism was ineffective at addressing the problems that the Supreme Court ultimately found to be legitimate. The OCI recommended more than five years ago that decision-making within corrections that affects “significant life and liberty interests of Aboriginal offenders” should be reviewed to ensure that “*Gladue* principles” were being considered,<sup>69</sup> but there is no evidence that this recommendation has been followed. Mr. Ewert’s ability to ensure that he is no longer subject to decisions made based on the results of the impugned tools rests once again on his ability to bring the matter to the attention of the courts, likely without the benefit of counsel. Recently criticisms of CSC’s use of *Gladue* factors to increase an inmate’s level of risk rather than to identify appropriate services were raised in the House and Senate Committee hearings<sup>70</sup> on Bill C-83, *An Act to amend the Corrections and Conditional Release Act and another Act*, which purports to enshrine *Gladue* principles in correctional decision-making. While a specific prohibition of this practice<sup>71</sup> was added during the hearing process, it remains to be seen whether CSC will take the necessary steps to facilitate the use of these factors in a way that is consistent with the remedial nature of the *CCRA*.

The need for structural reform was included in the most recent report of the Office of the Correctional Investigator, the previously mentioned report from the House of Commons Standing Committee on Public Safety and National Security and most recently, the *Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*. Each has recommended the creation of a Deputy Commissioner

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<sup>68</sup> See, for example, *Crowe v. Canada*, [1993] F.C.J. No. 424, 63 F.T.R. 177 (F.C. T.D.).

<sup>69</sup> Office of the Correctional Investigator, *Annual Report 2012-2013* (Ottawa: Minister of Public Safety, 2013), online: <<https://www.oci-bec.gc.ca/ent/rpt/annrpt/annrpt20122013-eng.aspx>>.

<sup>70</sup> For example, see the evidence presented to the House of Commons Standing Committee on Public Safety and National Security on, November 22, 2018, online: <<https://www.ourcommons.ca/DocumentViewer/en/42-1/SECU/meeting-139/evidence>>.

<sup>71</sup> *An Act to amend the Corrections and Conditional Release Act and another Act*, S.C. 2019, c. 27, s. 79(2).

for Indigenous Corrections.<sup>72</sup> The CSC continues to insist the current structure is “appropriate to provide the leadership required to improve and sustain correctional results for Indigenous offenders”,<sup>73</sup> even though it is clear that without significant change, the correctional system will continue to operate in ways that deny access to justice for Indigenous people in federal corrections.

### 3. Indigenous People and Corrections: Broader Issues

*Ewert* also provides important direction to CSC about the way it conducts risk assessments specifically and collects information about Indigenous people serving sentences more generally. While some were disappointed that the Supreme Court found that the obligations of CSC arise from within the *CCRA* itself and not from the Charter, the decision points both decision-makers in CSC and potential litigants to review other processes undertaken through the operation of CSC and to analyze them with the Court’s direction on section 4(g) in mind. This includes, for example, the fact that Indigenous people remain under-represented in community corrections despite the express provisions of sections 81 and 84.<sup>74</sup>

The underuse of these sections was noted in House of Commons Report of the Standing Committee on Public Safety and National Security discussed above, which specifically recommended that the CSC increase the number of agreements with Indigenous communities under section 81; that the Government of Canada increase funding to

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<sup>72</sup> Indigenous People in the Federal Correctional System, The Honourable John McKay, Chair, *Report of the Standing Committee on Public Safety and National Security*, June 2018, 42nd Parliament, 1st Session, Recommendation 11 online: <[http://publications.gc.ca/collections/collection\\_2018/parl/x76-1/XC76-1-1-421-22-eng.pdf](http://publications.gc.ca/collections/collection_2018/parl/x76-1/XC76-1-1-421-22-eng.pdf)>; Office of the Correctional Investigator, *Annual Report 2017-2018* (Ottawa: Minister of Public Safety, 2018), Recommendation 12, online: <<https://www.ocibec.gc.ca/cnt/rpt/annrpt/annrpt20172018-eng.aspx>>; Canada (National Inquiry into Missing and Murdered Indigenous Women and Girls), *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, Calls for Justice 5.23, online: <<https://www.mmiwg-ffada.ca/final-report/>>.

<sup>73</sup> As reported by APTN, Mark Blackburn, “‘It’s disappointing’: Corrections maintains status quo as number of Indigenous women tops 40% of prison population”, online: <<https://aptnnews.ca/2019/06/10/its-disappointing-corrections-maintains-status-quo-as-number-of-indigenous-women-tops-40-of-prison-population/>>.

<sup>74</sup> *Corrections and Conditional Release Act*, S.C. 1992, c. 20, s. 81, provides that the Minister may enter into an agreement with an Indigenous community for the provision of correctional services to Indigenous offenders. Section 84 outlines how CSC shall work with an Indigenous community to plan for the inmate’s release and integration into that community.

Indigenous communities for such agreements; and to make greater use of agreements with Indigenous communities under section 84.<sup>75</sup> This was echoed in the recent *Report of the Standing Committee on the Status of Women* which recommended the Government of Canada partner with Indigenous organizations to offer services for Indigenous women serving federal sentences and that the Government of Canada ensure that barriers to the creation of additional section 81 community-operated healing lodges be eliminated, and that equal and adequate funding be provided.<sup>76</sup>

*Ewert* strengthens the operation of the *CCRA* beyond merely the responsibility to ensure reliability in risk assessment tools. Potential litigants should consider whether CSC's failure to utilize the other remedial sections is actionable because CSC is not fulfilling their statutory responsibilities. This is important because, as *Ewert* demonstrates, good legislation does not always make for good practice.

CSC's failure to properly apply the *Gladue* principles in correctional decision-making that impacts Indigenous people is a prime example of their failure to implement good practice. Since the duty to address the systemic discrimination experienced by Indigenous people in the correctional systems flows directly from the remedial obligations imposed by the *CCRA*, the CSC should be using (as suggested by the OCI) "a contextualized approach to Indigenous sentence management".<sup>77</sup> The "context" required is the history of colonization and *Gladue* Reports, typically used in sentencing hearings and which provide comprehensive and case-specific information contextualized within the larger experience of colonization, are well-situated to provide that information.<sup>78</sup>

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<sup>75</sup> Indigenous People in the Federal Correctional System, The Honourable John McKay, Chair, *Report of the Standing Committee on Public Safety and National Security*, June 2018, 42nd Parliament, 1st Session, online: <[http://publications.gc.ca/collections/collection\\_2018/parl/xc76-1/XC76-1-1-421-22-eng.pdf](http://publications.gc.ca/collections/collection_2018/parl/xc76-1/XC76-1-1-421-22-eng.pdf)>.

<sup>76</sup> Report of the Standing Committee on the Status of Women, Karen Vecchio, Chair, *A Call To Action: Reconciliation With Indigenous Women In The Federal Justice And Correctional Systems*, 42nd Parliament, 1st Session, June 2018, Recommendations 54-63, online: <<https://www.ourcommons.ca/DocumentViewer/en/42-1/FEWO/report-13/>>.

<sup>77</sup> Office of the Correctional Investigator, *Annual Report 2017-2018* (Ottawa: Minister of Public Safety, 2018), Recommendation 12, online: <<https://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20172018-eng.aspx>>.

<sup>78</sup> In the context of sentencing, in *Ipeelee*, the Supreme Court called *Gladue* Reports "indispensable to a judge in fulfilling his duties under s. 718.2(e) of the *Criminal Code*": *R. v. Ipeelee*, [2012] S.C.J. No. 13, [2012] 1 S.C.R. 433, at para. 60 (S.C.C.).

Unfortunately, though CSC has publicly committed to extend the application of *Gladue* to correctional decision-making,<sup>79</sup> the OCI has found that CSC has failed to do so consistently.<sup>80</sup> *Gladue* Reports are not used to their full extent to assist decision-makers to ameliorate systemic disadvantage, and instead CSC continues to rely on “redundant and secondary ‘Aboriginal Social History’ reports” which the OCI describes as “... [s]hort cuts and what appears to be a time-saving approach (template or checklist) [that] are not likely to lead to better outcomes or more informed *Gladue* decision-making.”<sup>81</sup>

*Gladue* principles have always required a different methodology, and as the Federal Court found in *Twins v. Canada (Attorney General)*,<sup>82</sup> must amount to more than a tallying of an Indigenous person’s historical trauma because “while considering the background of an Aboriginal offender must be *part* of the *Gladue* analysis, if that is all that is considered, then the *Gladue* principles are not being fully applied.”<sup>83</sup> The Auditor General found that part of the problem is that CSC “did not provide staff with sufficient guidance and training on how to consider an offender’s Aboriginal social history in case management decisions” and, ultimately that “greater proportions of Indigenous offenders were classified at maximum- and medium-security levels upon admission than were non-Indigenous offenders.”<sup>84</sup>

To rely on the Charter to challenge CSC practices requires that a person serving a sentence meet the high test of “arbitrariness, overbreadth, and gross disproportionality” required by section 7; or of “cruel and unusual punishment” in section 12; or demonstrate that a CSC policy or decision resulted in a discriminatory distinction contrary to section 15. The decision in *Ewert* reminds us that the bar for Indigenous

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<sup>79</sup> Correctional Service Canada, “CSC’s Response to the Office of the Correctional Investigator’s Report entitled ‘*Spirit Matters: Aboriginal People and the Corrections and Conditional Release Act*’” (Ottawa: CSC, 2013) online: <<https://www.csc-scc.gc.ca/publications/005007-1502-eng.shtml>>.

<sup>80</sup> Office of the Correctional Investigator, *Annual Report 2015-2016* (Ottawa: Minister of Public Safety, 2016), online: <<https://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20152016-eng.aspx>>.

<sup>81</sup> Office of the Correctional Investigator, *Annual Report 2017-2018* (Ottawa: Minister of Public Safety, 2018), Recommendation 12, online: <<https://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20172018-eng.aspx>>.

<sup>82</sup> [2016] F.C.J. No. 520, [2017] 1 F.C.R. 79 (F.C.).

<sup>83</sup> Jonathan Rudin, *Indigenous Peoples and the Criminal Justice System: A Practitioner’s Handbook* (Toronto: Emond Publishing, 2018), Chapter 6: Gladue Beyond Sentencing, at 183.

<sup>84</sup> 2016 Fall Reports of the Auditor General of Canada, *Report 3 — Preparing Indigenous Offenders for Release — Correctional Service Canada*, at 3.98 and 3.92, online: <[http://www.oag-bvg.gc.ca/internet/English/parl\\_oag\\_201611\\_03\\_e\\_41832.html](http://www.oag-bvg.gc.ca/internet/English/parl_oag_201611_03_e_41832.html)>.

people in corrections wishing to challenge CSC practices under the *CCRA* is not that high. Since the goal of the *CCRA* is remedial and section 4(g) requires a substantive equality approach, the focus of future challenges should be, in the words of the majority in *Ewert*, on whether the CSC's actions:

[U]ndermine the purpose of s. 4(g) of the *CCRA* of promoting substantive equality in correctional outcomes for Indigenous inmates and would also frustrate the correctional system's legislated purpose of providing humane custody and assisting in the rehabilitation of offenders and their reintegration into the community.<sup>85</sup>

This approach correctly places the focus — and the burden — on CSC to demonstrate that an approach where Indigenous people are treated the same as other inmates does not result in disparate and negative outcomes.

This is particularly true for Indigenous women who have the fastest growing over-representation in prison admissions. Indigenous women and girls have complex and challenging life circumstances which can and have been uniquely tied to racist and gendered colonial laws and practices. Failure to meet their unique needs is an extension of that same colonial violence.

In the dissent, Rowe J. expressed concern that requiring the CSC to study the validity of impugned tools could lead to more questions. He writes:

... If the CSC must study the impugned tools to ensure their validity and reliability with respect to Indigenous offenders, what level of specificity is required? Must it distinguish between Métis and other Indigenous offenders? Must it distinguish between Indigenous persons who live on reserve and those who live off reserve? Must it distinguish between male and female Aboriginal offenders?<sup>86</sup>

The approach of the majority that the legislative intent of the *CCRA* dictates that a multifaceted approach which indeed considers the unique circumstances of Indigenous women must be used was echoed in the recent Supreme Court decision of *R. v. Barton*, which held:

... Indigenous persons have suffered a long history of colonialism, the effects of which continue to be felt. There is no denying that Indigenous people — and in particular Indigenous women, girls, and

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<sup>85</sup> *Ewert v. Canada*, [2018] S.C.J. No. 30, [2018] 2 S.C.R. 165, at para. 65 (S.C.C.).

<sup>86</sup> *Id.*, at para. 124.

sex workers — have endured serious injustices, including high rates of sexual violence against women.<sup>87</sup>

In *Barton*, the Court noted that trials do not take place in a “historical, cultural, or social vacuum.”<sup>88</sup> This is equally true in corrections, where the manifestations of colonialism are pronounced and require the nuanced approach outlined in *Gladue* and *Ipeelee*. CSC must, in all its policies and practices, operate in a manner consistent with the goal of Parliament to reduce the system’s reliance on incarceration as a default. In its report *Spirit Matters*, the Office of the Correctional Investigator advised that Indigenous inmates’ background factors could be used improperly to place them at a higher level of security classification, thereby limiting access to programming.<sup>89</sup> This approach also falls short of CSC’s obligations by creating additional barriers to rehabilitation and reintegration since timely participation in programming is critical to parole eligibility.

This expansive view of the implications of *Ewert* does not seem to have been taken up by CSC. There has been no formal response to the decision and no indication that CSC has either completed the necessary research into whether the impugned tools overstate the risk of Indigenous persons in the correctional system or ceased using the tools. It is this lack of transparency combined with incarcerated Indigenous peoples’ lack of access to legal resources to pursue these issues that make the CSC’s actions evasive of review. This matters because as Justice Arbour stated in the *Report of the Commission of Inquiry into Certain Deaths at the Prison for Women in Kingston*, in corrections, “(t)he Rule of Law is absent, although rules are everywhere.”<sup>90</sup>

#### IV. RISK ASSESSMENT: CONSIDERING WHO IS REALLY AT RISK

The decision in *Ewert* highlights the problems with risk assessment tools that fail to account for the unique experiences of Indigenous people in Canada. These include: the experiences of physical and sexual abuse in residential school; the dislocation of families from communities; the removal of children through the ’60s Scoop and the ongoing removal of

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<sup>87</sup> [2019] S.C.J. No. 33, 2019 SCC 33, at para. 198 (S.C.C.).

<sup>88</sup> *Id.*

<sup>89</sup> Office of the Correctional Investigator, *Spirit Matters: Aboriginal People and the Corrections and Conditional Release Act — Final Report* (Ottawa, 2012), at para. 84.

<sup>90</sup> The Honourable Louise Arbour, *Report of the Commission of Inquiry into Certain Events at the Prison for Women in Kingston* (Canada: Public Works and Government Services, 1986), at 181.

children by child welfare agencies; and the sustained efforts to extinguish Indigenous languages, economies and governance systems. They also include dramatically increased rates of victimization, especially for Indigenous women and girls. Statistics Canada found that “when comparing Aboriginal and non-Aboriginal people with similar socio-demographic characteristics, the risk of victimization remained 58% higher for Aboriginal people than non-Aboriginal people” and that victimization of Aboriginal women is close to triple that of non-Aboriginal women.<sup>91</sup>

The recently released *Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* found that Indigenous women “experience some of the highest rates of poverty, homelessness, food insecurity, unemployment, and barriers to education and employment” and that this increases marginalization and “the violence that stems from it.”<sup>92</sup> The Commission concluded that “[i]nstitutions’ and governments’ clear desire to maintain the status quo and their lack of will to make real change also leads to violence for family members and survivors.”<sup>93</sup> In addition, the “testimonies heard by the National Inquiry engage the police, courts, correctional facilities, and other representatives of the criminal justice system as responsible or complicit in the violation of the rights to justice held by Indigenous women, girls, and 2SLGBTQIA people.”<sup>94</sup>

These realities highlight more than ever the need to factor in the unique experiences of Indigenous people in any discussion of risk assessment. Such an approach will highlight that much more needs to be done by CSC, but also by others who have responsibilities for community safety, including the police and community leaders.

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<sup>91</sup> Samuel Perreault, “Violent victimization of Aboriginal people in the Canadian provinces, 2009”, online: <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2011001/article/11415-eng.htm>>.

<sup>92</sup> Canada (National Inquiry into Missing and Murdered Indigenous Women and Girls), *Executive Summary of the Final Report National Inquiry into Missing and Murdered Indigenous Women and Girls*, online: <[https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Executive\\_Summary.pdf](https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Executive_Summary.pdf)>, at 22.

<sup>93</sup> *Id.*

<sup>94</sup> Canada (National Inquiry into Missing and Murdered Indigenous Women and Girls), *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, online: <<https://www.mmiwg-ffada.ca/final-report/>>, vol. 1a, at 625.

## V. CONCLUSION

*Ewert* not only provides direction on the steps necessary to “advance substantive equality in correctional outcomes”,<sup>95</sup> but provides an opportunity to consider solutions for the system as a whole. The Supreme Court pointed to “an evolving societal consensus” that the discrimination faced by Indigenous people throughout the criminal justice system must be addressed by “accounting for the unique systemic and background factors affecting Indigenous peoples, as well as their fundamentally different cultural values and world views.”<sup>96</sup> Meaningful commitment to substantive equality includes taking different approaches to everything from risk assessment to paths to parole for Indigenous offenders; consideration of the need for increased access to justice for people serving sentences; and acknowledgment of the failure of the system to protect Indigenous community members from violence. Only when this commitment has been realized will the criminal justice and correctional systems ameliorate the greatest risk faced by Indigenous people — that nothing will change.

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<sup>95</sup> *Ewert v. Canada*, [2018] S.C.J. No. 30, [2018] 2 S.C.R. 165, at para. 53 (S.C.C.).

<sup>96</sup> *Id.*, at para. 58.