manitoba**LawJournal**

2021 Volume 44(5), Special Issue

Criminal Law Edition (Robson Crim)

PUBLICATION INFORMATION

Cite as (2021) 44:5 Man LJ
Printed in Canada on recycled and acid-free paper.
Published annually on behalf of the Faculty of Law, University of Manitoba.
Annual Subscription Rate: Canada: $35.00 CDN; Foreign: $35.00 U.S.
Back issues available from: Manitoba Law Journal
4th Floor Robson Hall, Faculty of Law
University of Manitoba
Winnipeg, Manitoba R3T 2N2
E-mail: lawjournal@umanitoba.ca

ACKNOWLEDGEMENTS

Production of this issue has been supported by a major grant from the Social Sciences and Humanities Research Council program for Aid of Scholarly Journals.

The Manitoba Law Journal gratefully acknowledges the family of Shelley Weiss for the endowment of the Shelley Weiss Publications Office, which houses its ongoing operations at Robson Hall Law School at the University of Manitoba, and for the annual Shelley Weiss scholarship that is awarded to one or more student editors in their second year of our program.

We acknowledge the assistance and peer review administration of the editors and collaborators of www.robsoncrim.com/. For a list of our collaborators please visit: https://www.robsoncrim.com/collaborators.

We would also like to thank the *Manitoba Law Journal* Executive Editors for providing their endless support, constant encouragement, and expert editorial advice.

THE LEGAL RESEARCH INSTITUTE OF THE UNIVERSITY OF MANITOBA promotes research and scholarship in diverse areas.

REFEREE AND PEER REVIEW PROCESS

All of the articles in the *Manitoba Law Journal Robson Crim Edition* are externally refereed by independent academic experts after being rigorously peer reviewed by Manitoba faculty editors, as well as reviewed by student staff. Usually 3 external peer reviewers assess each piece on a double-blind basis.

INFORMATION FOR CONTRIBUTORS

The editors invite the submission of unsolicited articles, comments, and reviews. The submission cannot have been previously published. All multiple submissions should be clearly marked as such and an electronic copy in Microsoft Word should accompany the submission. All citations must conform to the *Canadian Guide to Uniform Legal Citation*, 9th Edition. Contributors should, prior to submission, ensure the correctness of all citations and quotations. Authors warrant that their submissions contain no material that is false, defamatory, or otherwise unlawful, or that is inconsistent with scholarly ethics. Initial acceptance of articles by the Editorial Board is always subject to advice from up to three (or more) external reviewers.

The Editorial Board reserves the right to make such changes in manuscripts as are necessary to ensure correctness of grammar, spelling, punctuation, clarification of ambiguities, and conformity to the *Manitoba Law Journal* style guide. Authors whose articles are accepted agree that, at the discretion of the editor, they may be published not only in print form but posted on a website maintained by the journal or published in electronic versions maintained by services such as Quicklaw, Westlaw, LexisNexis, and HeinOnline. Authors will receive a complimentary copy of the *Manitoba Law Journal* in which their work appears.

Manuscripts and communications should be directed to:
Criminal Law Special Edition (Robson Crim)

Richard Jochelson
Manitoba Law Journal
466 Robson Hall, Faculty of Law
University of Manitoba
Winnipeg, Manitoba R3T 2N2

Phone: 204.474.6158
Fax: 204.480.1084
E-mail: info@Robsoncrim.com

Regular MLJ

Editors-in-Chief
Manitoba Law Journal
466 Robson Hall, Faculty of Law
University of Manitoba
Winnipeg, Manitoba R3T 2N2

Phone: 204.474.6136
Fax: 204.480.1084
E-mail: lawjournal@umanitoba.ca

manitoba**LawJournal**

2021 Volume 44(5), Special Issue

Criminal Law Edition (Robson Crim)

CONTENTS

Part 1: Indigenousness and Sentencing

Part 2: Mandatory Minimum Sentences

CALL FOR PAPERS: Closes February 1, 2022
Manitoba Law Journal – Robson Crim, Special Issue

The Manitoba Law Journal in conjunction with Robsoncrim.com are pleased to announce our annual call for papers in Criminal Law. We invite scholarly papers, reflection pieces, research notes, book reviews, or other forms of written or pictorial expression. 44(4), 44(5), and 44(6) are the most recent Robsoncrim volumes published by the Manitoba Law Journal, and we have published papers from leading academics in criminal law, criminology, law and psychology, and criminal justice. We welcome academic and practitioner engagement across criminal law and related disciplines.

We invite papers that relate to **issues of criminal law and cognate disciplines** as well as papers that reflect on the following sub-themes:

- Intersections of the criminal law and the *Charter*
- Interpersonal violence and crimes of sexual assault
- Indigenous persons and the justice system(s)
- Gender and the criminal law
- Mental health and the criminal law
- Legal issues in youth court, bail, remand, corrections, and court settings
- Regulation of policing and state surveillance
- The regulation of vice including gambling, sexual expression, sex work and use of illicit substances

- Analyses of recent Supreme and Appellate court criminal law cases in Canada
- Comparative criminal law analyses
- Criminal law, popular culture, and media
- Empirical, theoretical, law and society, doctrinal and/or philosophical analyses of criminal law and regulation

We also invite papers relating to evidentiary issues in Canada's criminal courts including:

- Reflections on Indigenous traditions in evidence law (including possibilities)
- New developments in digital evidence and crimes
- Evidentiary changes in the criminal law
- Evidence in matters of national security
- Thresholds of evidence for police or state conduct
- Evolutions of evidence in the law of sexual assault or crimes against vulnerable populations
- Evidence in the context of mental health or substance abuse in or related to the justice system
- Use of evidence in prison law and administrative bodies of the prison systems
- Understandings of harms or evidence in corporate criminality
- Historical excavations and juxtapositions related to evidence or knowing in criminal law
- Cultural understandings of evidence and harm
- Discursive examinations of evidence and harm and shifts in understandings of harms by the justice system

Last but not least, we invite general submissions dealing with topics in criminal law, criminology, criminal justice, urban studies, legal studies and social justice that relate to criminal regulation.

SUBMISSIONS

We will be reviewing all submissions on a rolling basis with final submissions due by February 1, 2022. This means, the sooner you submit, the sooner we will begin the peer review process. We will still consider all submissions until the deadline.

Submissions should generally be under 20,000 words (inclusive of footnotes) and, if possible, conform with the Canadian Guide to Uniform Legal Citation, 9th ed. (Toronto: Thomson Carswell, 2018) – the "McGill Guide". Submissions must be in Word or Word compatible formats and contain a 250-word or less abstract and a list of 10–15 keywords.

Submissions are due February 1, 2022 and should be sent to info@robsoncrim.com. For queries, please contact Professors Richard Jochelson or David Ireland, at this email address.

THE JOURNAL

Aims and Scope

The Manitoba Law Journal (MLJ) is a publication of the Faculty of Law, University of Manitoba located at Robson Hall. The MLJ is carried on LexisNexis Quicklaw Advance, WestlawNext, and Heinonline. It is also included in the annual rankings of law journals by the leading service, the Washington and Lee University annual survey. The MLJ operates with the support of the SSHRC aid to scholarly journal grants program.

Peer Review

We generally use a double-blind peer review process to ensure that the quality of our publications meets the requisite academic standards. Articles are anonymized and then, after editorial review, reviewed by anonymous experts. Occasionally, the identity of the author is intrinsic to evaluating the article (e.g., an invited distinguished lecture or interview)

and the reviewers will be aware of it. Articles are accepted with revisions, encouraged to revise and resubmit, or rejected.

This is an open access journal, which means that all content is freely available without charge to the user.

Making an 'ASH' out of *Gladue*: The Bowden Experiment[1]

JANE DICKSON *

ABSTRACT

The *Gladue* requirements have been an active element of the criminal law in Canada for over two decades, yet Indigenous incarceration rates have continued to rise precipitously and established approaches to risk management in sentencing and corrections have relegated many Indigenous offenders to longer sentences served predominantly in higher security institutions. In 2006, Correctional Service Canada "incorporated the spirit and intent of Gladue [into] case management practices both in the institutions and in the community," stressing that *Gladue* provided 'direction' and that Indigenous "social history must be taken into consideration in developing policies and in decision-making impacting on the individual offender." This paper analyzes CSC's adoption of *Gladue* principles in its practices, focussing on the use of the 'Aboriginal Social History' and its impacts on Indigenous case management, especially with regard to security classifications and overrides. A comparison of *Gladue* reports and Aboriginal Social Histories informs of the troubles in the trickle-down from *Gladue* principles to practice in CSC.

Keywords: *Gladue*; Indigenous; Corrections; Incarceration; Risk

[1] This research project was reviewed and cleared by the Carleton University Research Ethics Board (CUREB A). **Ethics Clearance ID: Project #114540.** Please note that CSC has recently revised 'Aboriginal Social Histories' to 'Indigenous Social Histories'.

* Ph.D. (Law), Carleton University.

I. INTRODUCTION

In the early 1990s, the federal government undertook the most comprehensive revision of the sentencing provisions of the *Canadian Criminal Code*[2] to date. Inspired by the rise of restorative justice principles, the revisions directed courts to focus on decarceration and alternatives to imprisonment wherever reasonable. To this end, s. 718.2(e) directed courts that "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders."[3] The paragraph's emphasis on Indigenous offenders reflected a longstanding problem of over-incarceration of Indigenous people that saw them imprisoned at rates grossly disproportionate to their percentage in the general Canadian population. In 1996, the year the changes took effect, Indigenous people comprised approximately 3% of the total Canadian population but constituted 15% of federal admissions to custody nationally, and 16% of those admitted to provincial and territorial institutions.[4]

Three years later, the Supreme Court of Canada breathed life into s. 718.2(e) through its decision in *R v Gladue*, and henceforth courts sentencing an Indigenous person were required to consider not only "[t]he unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts", but also "the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage and connection."[5] The stated goal of these strategies was clear: s. 718.2(e) and the Gladue requirements were intended to "remedy" the over-incarceration of Indigenous men, women, and youth in Canadian

---

2 RSC 1985, c C-46 [*Criminal Code*].

3 *Ibid*, s 718.2(e).

4 The admissions rate at the provincial and territorial level masked considerable, troubling numbers across the provinces and territories. As noted by Roberts and Reid, in 1996–97, Indigenous offenders accounted for 74% of admissions to custody in Saskatchewan, 65% in the Yukon, 58% in Manitoba, and 39% in Alberta. In contrast, Indigenous peoples accounted for 11% of Saskatchewan's population, 20% of Yukon's, 12% of Manitoba's, and 5% of Alberta's. Indigenous offenders accounted for 5% or less of admissions in Nova Scotia, New Brunswick, and Quebec. See Julian V. Roberts & Andrew A. Reid, "Aboriginal Incarceration Since 1978: Every Picture Tells the Same Story" (2017) 59:3 Can J Corr 313 at 313.

5 [1999] 1 SCR 688 at para 66, 171 DLR (4th) 385 [*Gladue*].

correctional facilities. To this end, a series of cases decided in the wake of *Gladue* determined that the requirements apply to any context in which an Indigenous person is facing a possible loss of liberty[6] and throughout the entire criminal justice process,[7] including, for example, at bail hearings,[8] hearings before the mental health review board,[9] Dangerous and Long-term Offender hearings, and parole hearings.[10]

What we do with *Gladue* in the courts has a direct impact on whether and how *Gladue* shapes the correctional experiences of Indigenous offenders. While it falls largely to defence counsel to further the requirements within the courts, advocates should be no less concerned with what becomes of their Indigenous clients and their '*Gladue* rights' whilst serving the sentences championed by legal counsel. The realization of *Gladue*'s remedial goals depends greatly on the vindication of the healing needs and sentencing options promoted through the *Gladue* requirements, and to the realization of healing and reintegration, rather than recidivism and a return to the system, post-sentence. If *Gladue* is vindicated in the courts, but not within correctional facilities, it will likely fall to the same legal counsel that defend Indigenous clients to press for the meaningful integration of *Gladue* and Indigenous interests within the correctional settings.

This paper will analyze the approach to the *Gladue* requirements adopted by Correctional Service Canada (CSC), whereby *Gladue* information provided in offender files is summarized in "Aboriginal Social Histories" (ASH) compiled by Institutional Parole Officers guided by CSC's Aboriginal Social History tool.[11] ASH appears to be the mechanism through which CSC integrates "the spirit and intent of Gladue"[12] into case

---

6 *R v Ipeelee*, 2012 SCC 13 [*Ipeelee*].

7 *R v Sim*, [2005] 78 OR (3d) 183, [2005] OJ No 4432 (Ont CA) [*Sim*].

8 *R v Robinson*, 2009 ONCA 205; *R v Hope*, 2016 ONCA 648 [Hope]; *Rich v Her Majesty the Queen*, 2009 NLTD 69; Jillian Rogin, "Gladue and Bail: The Pre-Trial Sentencing of Aboriginal People in Canada" (2017) 95:2 Can Bar Rev 325.

9 *Sim*, *supra* note 7.

10 *Twins v AG Canada*, 2016 FC 537.

11 Correctional Services Canada, *Evaluation Report: The Strategic Plan for Aboriginal Corrections. Correctional Service Canada Evaluation Division*, File 394-2-49 (Ottawa: Correctional Services Canada, Policy Sector, 2012) at 33–37 [CSC, *Evaluation Report*].

12 Correctional Services Canada, "Aboriginal Social History and Corrections" (Violence and Aggression Symposium at the University of Saskatchewan, June 2014) at 7 [CSC, "Aboriginal Social History and Corrections"].

management and such important determinations as security classifications, institutional placements, segregation, and access to programming, as well as discretionary release.[13] Given the importance of ASH in the case management of Indigenous offenders and thus, to their healing path, it is important to query CSC's ASH policies and practices for evidence of the degree to which they respect the *Gladue* requirements and further *Gladue*'s remedial goals. To this end, we will explore the evolution of ASH through CSC's Aboriginal Continuum of Care to what appears to be the current approach to ASH in case management, elucidating the training and support for CSC staff to compile ASH and incorporate ASH information into Assessments for Decision. As an illustration of CSC's approach, the paper will discuss the Bowden Institution Experiment in which the security classifications of 15 Indigenous offenders were reconsidered with greater attention to *Gladue* and *Gladue*-relevant information in the offenders' court files and CSC's Offender Management System.

Central to the elucidation of the Bowden experiment and CSC's approach to *Gladue* and ASH is a comparison of a small sample of redacted ASH and Gladue reports included in the Bowden experiment. These materials as well as related, supporting documents, were described in detail by three confidential sources (referred to hereafter as 'Confidential Source A,' 'Confidential Source B,' and 'Confidential Source C') recruited through purposive convenience sampling. The sources share a combined experience of over 40 years in CSC and direct involvement with the Services' Indigenous programming, *Gladue*, and ASH through front line work in CSC institutions and Healing Lodges, as well as senior positions shaping and reviewing CSC's Indigenous policies and programs. They are well-situated to speak to the latter and thus to the role and impact of *Gladue* in CSC.

While the sources are well-placed to provide a 'reality check' on CSC's approach to *Gladue*, it is acknowledged that the information provided by such a small number of insiders must be treated cautiously and consistent with the limitations dictated by the sample size. It should be further noted that the Bowden experiment was a modest one, and the term 'experiment' must be used cautiously. The sample of 15 cases is obviously small and limits the inferences that can be drawn from the information about the

---

13 Correctional Services Canada, *Research Report: Aboriginal Social History Factors in Case Management,* by Leslie A. Keown et al, Report No R-356 (Ottawa: CSC, 2015) [CSC, *Research Report*].

experiment provided by the confidential sources. These limitations acknowledged, it remains the case that what happened at Bowden Institution between 2013 and 2016 was important and it, along with the knowledge shared by those with hands-on experience with CSC's approach to *Gladue* and ASH, can provide important insights into the limitations of that approach and thus to the remedial potential of *Gladue* in federal corrections.

This paper relies extensively on the 'insider knowledge,' expertise, and determination of the confidential sources. Although they will remain anonymous throughout the analysis, without their commitment to justice for Indigenous people and their willingness to share their knowledge, this paper would not have been possible. It is hoped that the discussion that follows will shed some light on the role of *Gladue* in CSC and encourage greater attention to Indigenous stories in charting the healing paths of federally sentenced Indigenous peoples.

II. The Context for CSC's Response to *Gladue*: The 'Aboriginal Continuum of Care' and the Rise of ASH

At the core of CSC's Indigenous programming is the Aboriginal Continuum of Care model (ACC)[14] that was adopted by CSC in 2003 and which spans all facets of Indigenous programming from intake to warrant expiry.[15] The ACC builds on the spiritual/cultural[16] approach to Indigenous programming taken by CSC since the early 1960s and is premised on a belief that a loss or lack of cultural roots and Indigenous

---

14 See Correctional Service Canada, *Strategic Plan for Aboriginal Corrections 2006-07 to 2010-11: Innovation, Learning and Adjustment* (Ottawa: CSC) at 11, online: <www.csc-scc.gc.ca/aboriginal/092/002003-1000-eng.pdf> [perma.cc/Y5GQ-HMJV]. See also Correctional Service Canada, *Commissioner's Directive 702 Aboriginal Offenders* (Ottawa: CSC, 2013), online: <www.csc-scc.gc.ca/lois-et-reglements/702-cd-eng.shtml#s5> [perma.cc/68MS-3J8N].

15 CSC, "Aboriginal Social History and Corrections", *supra* note 12.

16 This programming appears to have been premised upon a "belief that unique solutions are required to reflect the unique cultural backgrounds of aboriginal inmates, and that loss or lack of cultural roots and identity are the primary causes of involvement in the criminal justice system." See Ministry of the Solicitor General, *Aboriginal People in Federal Corrections*, by Carol LaPrairie, Phil Mun & Bruno Steinke (Ottawa: Ministry of the Solicitor General, 1996) at iii, online: <www.publicsafety.gc.ca/cnt/rsrcs/pblctns/xmnng-brgnl-crrctns/xmnng-brgnl-crrctns-eng.pdf> [perma.cc/LH7R-2QK3].

identity are the primary causes of involvement with the criminal justice system.[17] As such, and like its precursors, the ACC is comprised primarily of programming that emphasizes (re)connection with culture through ceremony, spirituality, Elder support, and indigenization of CSC staff working with Indigenous offenders. The Continuum has remained at the core of CSC's Indigenous policies as expressed in the 2006 Strategic Plan for Aboriginal Corrections and more recently in the 2017 National Plan for Aboriginal Corrections.[18]

ASH are integral to the Aboriginal Continuum of Care and Indigenous case management. It is the policy of CSC that an Indigenous offender's Aboriginal Social History must be actively considered in case management and decision-making for Indigenous inmates "when written decisions/recommendations are made."[19] This approach is underscored by the Corrections and Conditional Release Act which, in ss. 79.1(1)–(2),

---

17 *Ibid.*

18 According to CSC documents, the "*Strategic Plan for Aboriginal Corrections* (SPAC) was developed in 2006 to promote integration across the Service, establish service standards and foster shared accountability in meeting the needs of, and improving results for, Indigenous offenders. Specifically, the SPAC sought to expand the *Aboriginal Continuum of Care* services to all institutions, for both men and women; to promote horizontal collaboration so that Aboriginal specific services were integrated into the fabric of CSC; and, to eliminate systemic barriers through policy and by providing training. Accountability for reducing the gap in correctional results between Indigenous and non-Indigenous offenders across the Service was strengthened and CSC identified, as one of its key priorities, '[e]ffective, culturally appropriate interventions and reintegration support for First Nations, Métis and Inuit offenders.'" See Correctional Services Canada, *The National Indigenous Plan: A National Framework to Transform Indigenous Case Management and Corrections* (Ottawa: CSC, 2006) <www.csc-scc.gc.ca/002/003/002003-0008-en.shtml> [perma.cc/BCZ3-RR3B]. Most recently, in 2017, CSC launched its National Plan for Aboriginal Corrections as a "national framework designed to transform Indigenous case management and corrections." "The National Indigenous Plan was developed in 2017 and incorporates advice and guidance from the Office of the Auditor General (OAG) and the National Aboriginal Advisory Committee (NAAC). The Plan is the foundation of the collective renewal of CSC activities at all levels to respond to the OAG's recommendations, as outlined in the 2016 audit report, *Preparing Indigenous Offenders for Release*, and is a national framework designed to transform Indigenous case management and corrections."

19 Memorandum from Anne Kelly, Senior Deputy Commissioner, CSC, to Regional Deputy Commissioners (unclassified) (1 December 2015), *Consistency and clarification when referencing an offender's Aboriginal Social History in CSC decision-making documentation*, File No. SDCEI-PC-2015-277886, as described by Confidential Source A) [Kelly, "Memorandum"].

directs CSC to inform decision-making with respect for Indigenous culture, identity, and systemic and background factors that have impacted Indigenous people:

> 79.1 (1) In making decisions under this Act affecting an Indigenous offender, the Service shall take the following into consideration:
>
> (a) systemic and background factors affecting Indigenous peoples of Canada;
>
> (b) systemic and background factors that have contributed to the overrepresentation of Indigenous persons in the criminal justice system and that may have contributed to the offender's involvement in the criminal justice system; and
>
> (c) the Indigenous culture and identity of the offender, including his or her family and adoption history.
>
> (2) The factors described in paragraphs (1)(a) to (c) are not to be taken into consideration for decisions respecting the assessment of the risk posed by an Indigenous offender unless those factors could decrease the level of risk.[20]

While the public record tracing the development of ASH as a formal element of CSC's Indigenous policy is unclear, it appears that around 2005, Elders, who by this time had been a fairly consistent presence in CSC institutions for over four decades, were asked to complete Elder Assessments Aboriginal History for incoming Indigenous inmates. The addition of this administrative task to their ongoing role as spiritual advisors was queried by some staff who were troubled by potential conflicts between the Elders' traditional role and their new involvement with what was, in effect, risk assessment.[21] There were also concerns about a lack of ASH training for Elders, whose preparation for the role was a two-page list of questions and talking points to guide a compilation of the Initial Elder Assessment Social History and the Initial Elder Assessment Healing Plan. The putative logic behind this approach was that Elders were hired as 'contractors' on the assumption that they would know how to do the work they were contracted to complete, thus training was not necessary.[22] It is not

---

20 RSC 1992, c 20, s 79 [*CCRA*].

21 Personal Communication with Confidential Source A, May 28, 2020.

22 Beyond the two-page list of questions or talking points, there is no publicly available information outlining how Elders were trained or supported, and anecdotal evidence suggests that CSC actively resisted providing any sort of training for Elders. The latter were apparently hired as 'contractors' and with the expectation that they would know how to do the work they were contracted to complete, thus training was unnecessary.

surprising that this initial approach to ASH foundered, as CSC staff increasingly indicated issues with the Elder Assessments. CSC's own evaluations indicated that while 88% of CSC staff felt Elder Reviews were 'somewhat' to 'very' important to their work, close to two-thirds of staff rated the quality of those reviews to be 'poor' to 'fair'.[23] Elders also indicated discomfort with their involvement with Assessments and only 22 percent felt they were "fully aware of the purpose or use of Elder Reviews within offender case management."[24] There were also documented concerns about the timeliness of Elder assessments, which were generally deemed to be 'insufficient'. This is not terribly surprising given apparent problems in CSC in the hiring and retaining of Elders, which would have necessarily affected the speed with which assessments were completed.[25]

While an apparent commitment to involving Elders in the intake and assessment components of the ACC seems to have been a tactical response to the CCRA direction and, after 1999, *Gladue*, CSC does not seem to have conspicuously connected their Aboriginal Programming to these developments until 2006 – roughly a decade after the implementation of the CCRA and seven years post-*Gladue.* In that year, the Strategic Plan for Aboriginal Corrections (SPAC) reportedly "incorporated the spirit and intent of Gladue into CSC's Commissioner's Directives that dealt with case management practices both in the institutions and in the community."[26] Under the banner of 'integrating the Aboriginal Continuum of Care,' CSC stressed that *Gladue* provided "direction" and that Indigenous "social history must be taken into consideration in developing policies and in decision-making impacting on the individual offender."[27] In this latest incarnation, responsibility for Reviews was taken from Elders and given to

---

Furthermore, many contracts with Elders were reported to contain specific clauses directing staff not to train Elders, as training could lead to an employer-employee relationship and possibly to a requirement that CSC would have to hire them as staff. It thus appears Elders were simply expected to arrive and complete their assigned tasks without any training or supports, and absent the status or security provided to CSC staff undertaking similar tasks (Personal communication from Confidential Source A, 28 May 2020).

23 CSC, *Evaluation Report*, *supra* note 11 at 39.

24 *Ibid.*

25 Confidential Source A recalls that, "[w]e had 2 Elders for general population, 1 for Pathways, and 1 for Minimum-security... The ratio for Elders is 50:1, and then 100:2, so quite a limited resource." Personal communication, May 28, 2020.

26 CSC, "Aboriginal Social History and Corrections", *supra* note 12 at 7.

27 CSC, *Strategic Plan for Aboriginal Corrections 2006-07 to 2010-11*, *supra* note 14 at 11.

Aboriginal Liaison Officers while completion of ASH was added to the duties of the Institutional Parole Officers, with the option of working with Elders in compiling the report.[28]

While CSC does not appear to have provided training to Elders to support their involvement with reviews and assessments, ASH training was provided to 93 Institutional Parole Officers (IPO) nationally in March and April of 2012. This reportedly "consisted of information regarding the social history of Aboriginal Peoples, the details of the Gladue decision, and information on Aboriginal offenders" as well as "workshops that allowed staff to practice identifying Aboriginal Social History factors and writing decisional recommendations."[29] This was subsequently "expanded and implemented as a two-day component of the 2012–2014 mandatory Parole Officer Continuous Development Training sessions."[30] This training was delivered nationally throughout the latter half of 2012–13 to all community and institutional parole officers employed by CSC.[31]

The IPO appear to be guided in their work by CSC's Aboriginal Social History Tool, which is intended to guide "consideration of ASH in case management practices, recommendations and decisions for Aboriginal offenders."[32] The ASH Tool consists of six pages of intimidatingly tiny print qualified with repeated reminders that the "examples and prompts provided here are not to be considered exhaustive"; it divides the ASH research process into four stages: (1) Examine; (2) Analyze; (3) Options; and (4) Document.[33] The first step directs the IPO to "examine the direct and indirect systemic factors and family history that may have impacted the individual," which appear to include not only their Indigenous heritage and connection to community, but also the "potential impacts of colonization and the establishment of the *Indian Act*, residential schools, the sixties scoop and foster care, and the socio-economic circumstances of Indigenous communities," among others. Having gathered this information, the second stage directs IPO to analyse "how the systemic and background factors have impacted the individual's actions or behaviours," and then to move on to

---

28 Personal communication from Confidential Source A, May 28, 2020.

29 CSC, *Research Report*, *supra* note 13 at 3.

30 *Ibid* at 4.

31 *Ibid* at 4.

32 Correctional Services Canada, "Aboriginal Social History Tool", undated, as described by Confidential Source A.

33 *Ibid.*

"options" and the identification of "culturally appropriate and/or restorative options [that] could contribute to reducing, addressing, and managing overall risk."[34] The latter include "resolution circles,"[35] "increased engagement with an Elder," "engagement with the Aboriginal Continuum of Care and Aboriginal Services as alternatives to mainstream services," and "healing lodges." Finally, the author of the ASH is instructed to "document" the "rationale used in recommendations and decisions including culturally appropriate and/or restorative options." The ASH Tool concludes with a reminder that the purpose of the ASH is to "inform a risk management plan for the offender" and "ensure compliance with CD 702, *Aboriginal Offenders*.[36]

While it is not clear precisely how the Aboriginal Social History Tool fits into CSC's ASH training for IPO, the initial 'piloted training' was the subject of an evaluation in 2013 of whether, how, and to what degree ASH is incorporated into assessments for decisions. The initial evaluation, which does not appear to be publicly available, indicated that IPO were more likely to consider the ASH factors once they completed the piloted training than prior to it.[37] In the absence of more information, it is impossible to know what this finding actually means. It is notable that between September 2012 and March 2013, CSC Prairie Region conducted a review of all assessments for decision and CSC Board Reviews to determine whether ASH was being considered in decision making as per Commissioner's Directive 702. Like the 2013 evaluation, this review confirmed that ASH was, in fact, documented in assessments for decision, but with an important caveat:

> An analysis of the data indicates that facts related to an offender's ASH were usually documented in the Assessment for Decision however the impact of the facts relating to OSL [Offender Security Level] was not outlined in the recommendation made by the Parole Officer. Results of the review also indicate that Managers of Assessment and Intervention normally made reference to ASH in the CSC Board Review but via comments such as "ASH was considered" or that

---

34 *Ibid.* All information in this section of the paper is taken from the description of the ASH Tool provided by Confidential Source A, unless otherwise indicated.

35 The ASH Tool reportedly does not contain any definition of a "restorative circle" but refers to it as appropriate for "disciplinary considerations to gather information and potentially identify other restorative and culturally appropriate options" (Confidential Source A, May 28, 2020).

36 *Ibid.*

37 *Ibid.* See also S. Gotschall, "Incorporating Aboriginal Social History in Offender Case Management: An Evaluation of Correctional Staff Pilot Training" (2013) [unpublished, archived at Carleton University].

> "Gladue factors are applicable" but no other information was documented regarding the meaning of these statements. As well, decision-makers often indicated that "ASH was considered" when rendering their decision; however it was unclear how the ASH was considered when making a final decision without additional detail having been provided by the Parole Officer.... Overall, while comments in CSC Board Reviews indicated "ASH was considered" there was little evidence of how ASH translated into the formulation of the recommendation and therefore it is unclear how the information was considered in making an override in the security level decision.[38]

This would seem to suggest that ASH was not taken seriously in assessments for decisions or reviews, whether owing to a lack of understanding of its role, purpose, or possibly its importance. CSC did provide its IPO with *Gladue* training in its Parole Officer Continuing Training in 2013–2014, but this seems to have had limited impacts: A Briefing Note on "Applying Gladue to decision-making processes in CSC" circulated in 2016 confirmed that "other than generic statements like 'Gladue principles and/or Aboriginal Social History has been considered,' there is little evidence of how *Gladue* was applied or the impact of Gladue on a case."[39]

An evaluation of the SPAC in 2012 evinced further problems respecting the spirit and intent of *Gladue* in CSC practice. In its section on ASH, the evaluation notes that its findings were hampered by the absence of any mechanism in CSC's Offender Management System "to ensure that the social history of Aboriginal offenders had been documented"[40], which meant no, or very limited, data was available to confirm the frequency with which ASH information was actually collected or used in assessments for decision. Focussing their attention on CSC staff and their knowledge of *Gladue* and ASH, the evaluation found that 82% of staff reported that they "were either moderately or very familiar" with the *Gladue* principles, while a further 89% "often or always consider Aboriginal offenders' social history when making decisions concerning these offenders."[41] While this was a promising finding, it was soon undermined by the discovery that:

---

38 Memorandum from [redacted] Prairie Region to [redacted] Bowden Institution Prairie Region (undated), Correctional Services Canada, as described by Confidential Source A.

39 Correctional Services Canada, *Briefing Note: Applying Gladue to decision-making processes in CSC* (Ottawa: CSC, 2016), as described by Confidential Source A.

40 CSC, *Evaluation Report*, *supra* note 11 at 34.

41 *Ibid.*

> [W]hen further examining the practical application of Aboriginal social history, multiple sources indicated discontinuity between the collection of this information and its subsequent use within decision making. They indicated that once the collection process is completed, the information is not consistently being used in case management and therefore does not respect the intent of the Gladue principles. Over half (50%; *n*= 3) of the [Assistant Wardens of Intervention] agreed that improvements could be made with respect to the amount and consistency of training provided to ALOs, Elders and other staff members on the collection and integration of social history information.[42]

CSC undertook a far more extensive evaluation of the incorporation of ASH factors into case management in 2015. This evaluation included and analyzed 618 assessments for decisions completed for Indigenous offenders in CSC before 2014; the focus was on two case management decision points: security classifications and discretionary release, and whether and how ASH factors impacted and were integrated into those decisions.[43] Given the proximity of this evaluation to the 2013–2014 IPO Continuing Training, it is reasonable to expect that the training would be fresh in the minds of the IPO and they would actively incorporate it in their work with Indigenous offenders.

Given the focus of the evaluation, a distinction was made between decisions that simply "mention" a factor and those in which a factor was given consideration (meaning the factors were "directly tied to the recommendation").[44] Of the 16 factors included in the ASH tool, the evaluation notes the "median number of [ASH] factors mentioned was 6, and the median number of factors linked to a decision was 4."[45] Across all

---

42 *Ibid.*

43 CSC, *Research Report*, *supra* note 13 at 3–4. The evaluation focused on three questions: (1) To what extent are Aboriginal social history factors documented and linked to recommendations in assessments for decision focused on security classifications and discretionary release? (2) Is the inclusion of Aboriginal social history factors associated with decisional recommendations? and (3) How do offenders for whom Aboriginal social history factors were considered differ from those for whom they were not?

44 For example, by a statement such as "after considering the effects of residential school placement, the following is being recommended." See CSC, *Research Report*, *supra* note 13 at 9.

45 CSC, *Research Report*, *supra* note 13 at 9. It is not possible to determine the range for use of the 16 factors as the categories used to communicate the number of ASH factors 'mentioned' and 'linked to recommendation' were zero, one to three, four to five, and six or more. The latter category lacks an outside margin and thus, range cannot be determined. In the absence of the range, it is not possible to determine whether the average would have been more informative than the median in understanding trends in use of ASH factors in assessments for decision.

618 assessments for decisions included in the evaluation, 2% did not mention any ASH factors while 55% mentioned six or more, 26% did not consider any ASH factors, and a further 29% linked six or more factors to the decision.[46] The evaluators thus concluded that "virtually all coded assessments for decision included a mention of at least one factor; about three quarters... had at least one factor linked to the recommendation."[47] This would seem to indicate that IPO were using the ASH tool, although it does appear that IPO were generally more likely to merely mention ASH factors than to link them directly to the recommendation in the assessment for decision.[48] This overall finding lead the CSC evaluators to conclude that there "may be room for improvement regarding the extent to which [IPO] move beyond merely mentioning to linking these factors to their recommendations."[49] "Documenting a factor is not necessarily the same as considering it when formulating a recommendation."[50]

When focussing on the two types of assessments for decision included in the evaluation, a distinction was observed between the degree of consideration of those factors in assessments for decision in regard to security classification and those related to discretionary release, with ASH factors significantly more likely to be considered in assessments to determine security classification than those related to discretionary release.[51] In this regard, it was found that a "greater proportion of those [assessments for decision recommending assignment] to maximum security than to minimum security were linked to at least one factor"; "[a]mong security reviews...the reverse pattern was found."[52] This is interesting given the direction in s. 79.2 of the *CCRA*, which directs that the systemic background, culture, and identity of Aboriginal offenders are "not to be taken into consideration for decisions respecting the assessment of the risk posed by an Indigenous offender unless those factors could decrease the level of risk."[53] If mention or consideration of an ASH factor was more likely in assessments for decision resulting in maximum security classifications as

---

46 CSC, *Research Report*, *supra* note 13 at 9.
47 *Ibid.*
48 *Ibid.*
49 *Ibid* at 18.
50 *Ibid* at 19 [emphasis in original].
51 *Ibid.*
52 *Ibid* at 12.
53 *CCRA*, *supra* note 20, s 79.2 [emphasis added].

opposed to those for minimum security, the concern is raised that the current approach to ASH by IPO in CSC goes against the *CCRA* requirements for use of Indigenous social context evidence in assessments for decisions with regard to security classifications.

The evaluation also revealed discrepancies in the application of ASH across different Indigenous groups: while "almost all" assessments for decisions for offenders identifying as First Nations or Inuit mentioned ASH factor(s), roughly 57% of assessments for decision for Metis offenders contained no mention of ASH factor(s). Similarly, First Nations and Inuit offenders were significantly more likely than Metis offenders to have ASH factors considered in their assessments for decision.[54] Where Metis offender's assessments did include consideration of ASH factors, these were observed to be "relatively short."[55] While more research is necessary, the differential use of ASH across Indigenous groups in CSC is troubling and may reflect value judgements by IPO about who 'qualifies' as Indigenous and, thus, for the consideration of ASH factors in assessments for decision. If this is the case, it would signal, at a minimum, the need for a more committed approach to training IPO in ASH and *Gladue*, with regard to the complexity and diversity within the Indigenous populations they are intended to serve.

The 2015 evaluation also repeated ongoing concerns about the lack of training and support for CSC staff tasked with implementing the ASH policy. As early as 2009, CSC was aware of low compliance rates within the collection and integration of ASH in offender assessments – a lapse that was acknowledged by the Office of the Federal Correctional Investigator. In its annual reports for 2010 and 2011, the Office expressed concern about CSC's lack of transparency around the consideration of the *Gladue* principles in decision making, and that CSC "staff members continue to struggle with operationalizing the "practical intent of the [Gladue] principles."[56] The 2015 CSC evaluation repeated these concerns, stating that CSC policies provide "no clear direction of how to incorporate these [ASH] factors in correctional decisions. Although CD705-2: Information Collection states that staff should consider the social history of Aboriginal offenders within decision making…no detailed guidelines current exist on

---

54 CSC, *Research Report*, *supra* note 13 at 10.

55 *Ibid* at 15.

56 CSC, *Evaluation Report*, *supra* note 11 at 35.

how to objectively integrate and operationalize this information into any decision-making process."[57]

The failings noted in the 2015 evaluation are all that more troubling given CSC's historic approach to *Gladue*, which was strange and confusing. Despite the clear overlap between the ASH factors CSC openly integrated into its policies and the *Gladue* requirements, CSC brass consistently seemed to push back against acknowledging the relevance or importance of the *Gladue* requirements and *Gladue*'s remedial goals in correctional practice. CSC has consistently taken the position that *Gladue*'s "intent is directly related to the work of the courts," with the implication that it is somehow irrelevant to CSC practices.[58] This position is apparent in an unclassified memorandum distributed to Regional Deputy Commissioners by Senior Deputy Commissioner Anne Kelly in 2015, and which briefly recounts CSC's position on s. 718.2(e) and the *Gladue* decision. In that document, Kelly directs CSC staff not to mention *Gladue* "when references are made in decision-making processes to the consideration of the offender's Aboriginal social history." Instead, staff were directed to "follow the wording of CSC policies" – meaning no mention of *Gladue* in favor of ASH,[59] implying that CSC's ASH policy did not reflect any legal obligation on their part, but was rather one element of CSC's Aboriginal Continuum of Care and a reflection of CSC's putative commitment to its Indigenous inmates.[60] There is also some indication that some senior CSC staff understood CSC's position to simply be one of not using *Gladue*[61] – a concern that resonates with the limited and partial approach to ASH evidenced in evaluations of CSC's ASH and Indigenous policies for at least a decade.

There seems little doubt that CSC has struggled to incorporate the spirit and intent of *Gladue* in its decision-making and case management of Indigenous offenders, and to train and support those tasked with implementing CSC's response to *Gladue*: The Aboriginal Social History. The resistance to *Gladue* and its potential as means for supporting healing and reintegration is curious given CSC's mandate to "correct and rehabilitate" and the potential benefits of *Gladue* to this end. It also seems

---

57 *Ibid* at 34.
58 Kelly, "Memorandum", *supra* note 19.
59 *Ibid.*
60 *Ibid.*
61 Personal communication with Confidential Source A, September 6, 2020.

to be an odd approach to require IPO, and potentially Elders and ALO, to replicate the work already completed by *Gladue* Writers and probation officers in aid of the sentencing process: if a *Gladue* report or a PSR with *Gladue* content or perspective follow an Indigenous offender into CSC, why not enlist those documents to address the *Gladue* factors in assessments for decisions? While there may be a place for ASH in those cases when an offender enters CSC without any *Gladue* information, where a *Gladue* report or PSR with *Gladue* content exists, why not rely on that in assessments for decisions? As observed by the Office of the Correctional Investigator:

> If a *Gladue* lens was fully and consistently applied to decision making affecting security classification, penitentiary placement, segregation, transfers and conditional release for Aboriginal offenders, then one could reasonably expect some amelioration of their situation in federal corrections. The fact that they are almost universally classified "high needs" on custody rating scales, the fact that nearly 50% of the maximum security women offender population is Aboriginal, the fact that statutory release now represents the most common form of release for Aboriginal offenders and the fact that there is no Aboriginal-specific classification instrument in use by CSC all suggests that *Gladue* has not yet made the kind of impact one would hope for in the management of Aboriginal sentences.[62]

III. MAKING AN ASH OUT OF *GLADUE*: THE BOWDEN EXPERIMENT

The *Gladue* requirements are set in motion by Indigeneity and a possible loss of liberty. Thus, unless the Indigenous person before the courts clearly waives the requirements, the likelihood of a jail sentence (or similar deprivation of liberty) will require the court to hear and consider Indigenous social context evidence in determining an appropriate sentence.[63] Given that CSC is the likely landing point for those found guilty of serious offences punishable by a jail sentence of two years or more, all

---

62 Canada, *Annual Report of the Office of the Correctional Investigator, 2009-2010* (Ottawa: Office of the Correctional Investigator, 2010) at 45, online: <www.oci-bec.gc.ca/cnt/rpt/pdf/annrpt/annrpt20092010-eng.pdf> [perma.cc/JG7R-9ZG7].

63 *Ipeelee* set a standard of loss of liberty as a key consideration triggering the *Gladue* requirements, although some lower courts have stressed that all Indigenous persons before the courts should benefit from the requirements as a way of supporting rehabilitation and reconciliation. See *R v CJHI*, 2017 BCPC 121; *R v Jensen*, 2005 CanLII 7649, (2005) 74 OR (3d) 561 (Ont CA); *R v Parent*, 2019 ONCJ 523 [*Parent*]; *R v Abraham*, 2000 ABCA 159

those Indigenous persons who do not waive the *Gladue* requirements should come to CSC with a court file that includes a sufficient amount of *Gladue* information to meet the legal threshold of the requirements. What is implied in the latter is largely determined on a case-by-case basis, guided by the direction provided by *Gladue*[64] and *Ipeelee*[65] whereby the court must determine whether it is in possession of sufficient *Gladue* information to inform a fit sentence. As a rule, *Gladue* requires a court receive comprehensive, case-specific information pertaining to the unique background and circumstances of the Indigenous offender as well as options for sentencing that can further *Gladue's* remedial goals and the healing of the Indigenous offender. What this information looks like in a specific case will be impacted by many things, but it is clear that the information provided to the court must be sufficient to permit the court to accurately assess the moral blameworthiness of the offender and craft a fit and proportionate sentence.

At the present time in Canada, *Gladue* information is presented to the court in a variety of ways, including through a full, 'standalone' *Gladue* report, a presentence report with '*Gladue* content' or 'perspective', or through oral representations[66] from appropriately situated and knowledgeable persons. The approach to the *Gladue* requirements in lower courts generally appears to elevate substance over form[67] and, in most provinces, what appears to be foremost in the mind of the courts is that they have the necessary *Gladue* information and explicitly incorporate that information into their rationale for sentencing and in the sentence ultimately imposed on the offender.[68] Where the court feels the information before it is inadequate to meet the requirements, the court is obligated to make further inquiries, where appropriate and practical, to secure the necessary additional information to satisfy the Gladue requirements.[69] What all of this means is that most, if not all, Indigenous peoples receiving

---

64 *Gladue*, *supra* note 5.

65 *Ipeelee*, *supra* note 6.

66 *Parent*, *supra* note 63 at para 52: *Gladue* information may be provided through "viva voce testimony from extended family, elders, historians, academics and sentencing option experts."

67 See for example, *R v Doxtator*, 2013 ONCJ 79; *R v HGR*, 2015 BCSC 681; *R v Mattson*, 2014 ABCA 178; *R v Florence*, 2013 BCSC 194; *R v Corbiere*, 2012 ONSC 2405; *R v Blanchard*, 2011 YKTC 86; *R v Lawson*, 2012 BCCA 508; *R v Sand*, 2019 SKQB 123.

68 *R v Napesis*, 2014 ABCA 308; *R v Doxtator*, 2013 ONCJ 79.

69 *R v Wells*, 2000 SCC 10.

a federal sentence should arrive at a CSC institution accompanied by a court file that includes a *Gladue* report or PSR with *Gladue* content that met the threshold set by the courts.[70] The logic would thus follow that if the *Gladue* information met the legal standards of the courts, it should be adequate to provide a sufficient 'Aboriginal Social History' to inform CSC Intake Assessments, as well as Assessments for Decision and the case management of Indigenous offenders more generally.

It will necessarily be the case that some Indigenous offenders will arrive at CSC institutions without *Gladue* reports or a PSR with *Gladue* content, whether due to a waiver or perhaps because *Gladue* information was provided as part of defence counsel's oral submissions on sentence.[71] It is also important to acknowledge that some courts seal *Gladue* reports, which would likely deny CSC access to its contents.[72] In such cases, the necessity

---

70 Confidential Source B notes: "the Gladue reports make into the institution with the court documents. The Intake Assessment report is completed on an offender using these reports; all other reports come from this report and court documents. These and all other documents are used when completing criminal profile, Assessments for Decision and so on. At this time, all these documents from court (court transcripts, victim impact statements, Gladue, judge's reasons for sentencing, etc.), PSR, go to the Aboriginal Intervention Centers, whereby they are supposed to have a dream team who works on case management. All information on an inmate that comes into the institution are used to complete the Intake Assessment and Correctional Plan, the *Gladue* report (if there is one) is also used in this report. The most important doc is the Intake Assessment, Correctional Plan, Criminal Profile."

71 In fact, Confidential Source A recalls not seeing a *Gladue* report prior to 2010, and in Alberta, in particular, no reports were provided before 2013. Personal Communication from Confidential Source A, May 28, 2020.

72 Sealing is something pressed by some *Gladue* service providers who doubt CSC's commitment to respecting the confidentiality of offender's stories and records. While there is little doubt that the contents of many, if not most, *Gladue* reports will contain very personal and traumatic memories and experiences, the move to seal is curious. There does not seem to be any public record of grounded concerns about confidentiality of offender information at CSC and, indeed, guarding access to records seems to be something to which CSC is strongly committed. It is also curious that a *Gladue* report in particular, which, when well-researched and written, can provide important information relevant to the offender's healing needs and path, would be seen as something to be withheld from CSC. This is certainly an issue deserving of more research and consideration, perhaps within the context of a much-needed national conversation about best practices and standards of practice with regard to *Gladue* reports, training, and writers, as per the recent report on Missing and Murdered Indigenous Women and Girls, which included among its calls to justice the following: "5.15 We call upon federal, provincial, and territorial governments and all actors in the justice system to consider Gladue reports as a right and to resource them appropriately,

of gathering some background information for an Indigenous offender that can address the spirit and intent of *Gladue*, and ASH in case management decisions, would be necessary and important (again, unless the offender does not claim Indigenous heritage or does not wish for their heritage to inform their case management). As noted above, CSC does seem to have provided for this possibility in the creation of its ASH tool and in the training provided to IPO in using ASH in Assessments for Decision. Where an Indigenous offender lacks good *Gladue* information, it appears that IPO are both trained and instructed to ensure relevant ASH information is gathered and used in the case management of Indigenous offenders.

While it makes sense for IPO to compile an ASH where there is no *Gladue* information in an Indigenous offender's file, it is less obvious why an ASH would be necessary where adequate and sufficient *Gladue* information is provided in a *Gladue* report or PSR. The question is a good one, given the depth and quality of information in *Gladue* reports, in particular, as well as the duplication of work implicit in reducing a *Gladue* report to an ASH. The average *Gladue* report runs anywhere from 15–50 pages and should include detailed assessments of healing needs and appropriate interventions.[73] The reports are also distinct from both ASH and PSR with *Gladue* content insofar as "*Gladue* Reports are generally drafted following several extensive meetings between the offender and an 'empathic peer'... and provide the offender with the opportunity to 'critically contemplate his or her personal history and situate it in the constellation of family, land and ancestry that informs identity and worth'."[74] This would seem to suggest that, where a full, standalone *Gladue* report is available, it can provide an excellent alternative to ASH, which are compiled by an IPO whose empathy should not be assumed, who is likely to be non-Indigenous, and whose ASH will tend to be no more than one to two pages in length. The trickle-down from a 20–30-page *Gladue* report to a

---

and to create national standards for Gladue reports, including strength-based reporting." Canada, *Reclaiming Power and Place: The Final Report of the Inquiry into Missing and Murdered Indigenous Women and Girls*, vol 1b (Ottawa: Publications Canada, 2019) at 185, online: <www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1b.pdf> [perma.cc/J68L-VBQR].

73 See, for example, J. Dickson, *Gladue in Saskatchewan: Phase I Evaluation of the Gladue Pilot Project: Evaluation & Report Completed for Legal Aid Saskatchewan* (August 2015).

74 *R v Sand*, 2019 SKQB 123 at para 47.

one-to-two-page ASH may be one part of the reason why the ASH appears to receive merely reflexive attention in Assessments for Decision in CSC.[75]

While there are undoubtedly a number of factors that feed into the lax attention to ASH in Assessments for Decision, and we should not assume that more information would necessarily be more seriously considered, it is important to query whether full *Gladue* reports would be more effective in relating an Indigenous offender's Aboriginal social history than an ASH, and whether Assessments for Decision might be different if informed by *Gladue* reports as opposed to CSC's ASH. It was really for the answering of these questions that the Bowden Experiment was undertaken in 2013.

Bowden Institution is located midway between the communities of Innisfail and Bowden in southern Alberta. Technically classified as a medium-security institution, Bowden is also a clustered institution, whereby a "group of separate units of different security levels administered by one Institutional Head"[76] – so, in effect, Bowden houses maximum, medium, and minimum-security inmates. As such, it is a good location to analyze *Gladue*, ASH, and their effects, if any, on security classifications in particular; it is also an institution where adherence to the ASH process was standard practice but also reflective of the problematic approach documented across CSC in their 2012[77] and 2015[78] reviews of ASH in Case Management.

Bowden's approach to ASH was laid bare in a CSC regional audit that tracked the use of ASH in security overrides completed between September 2012 and March 2013.[79] The audit found a total of 84 relevant security

---

75 Correctional Service Canada, *Memorandum (Protected) from Paul Umson, ADCIO Prairie Region, to Dave Pelham, Warden, Bowden Institution Prairie Region, July 15, 2013*, as described by Confidential Source A; CSC, *Research Report*, *supra* note 13.

76 "The difference between a clustered institution and a multi-level institution is related to maintaining the distinction and separation of the various security levels, normally in relation to accommodation, structured activities and inmate movement." See Correctional Service Canada, *Commissioner's Directive 702: Classification of Institutions* (Ottawa: CSC, 2018), online: <www.csc-scc.gc.ca/politiques-et-lois/706-cd-en.shtml> [perma.cc/F6Q4-Z54R].

77 CSC, *Research Report*, *supra* note 13.

78 CSC, *Evaluation Report*, *supra* note 11 at 34.

79 Memorandum (protected) from Paul Umson, ADCIO Prairie Region, to Dave Pelham, Warden, Bowden Institution Prairie Region (15 July 2013), Site results of the CRS/ASH review for Bowden Institution; Override of CRS in decision for OSL and where ASH was considered in the override- Bowden Institution, as described by Confidential Source A [Umson, "Memorandum"].

overrides and included 79 in their final sample; of those 79 cases,[80] seven occurred at Bowden. Of those seven cases, five offenders received rises in security classification from minimum to medium while the remaining two offenders saw their security classification reduced from medium to minimum. Among these seven Assessments for Decision, it was found that two had no mention of ASH and the remaining five showed no analysis of ASH in the initial Assessment. As the cases moved up the decision-making process, it was noted that two of the Assessments for Decision had no comments from the MAI; two had comments that did not reference ASH while another three had MAI comments that did reference ASH. When the seven Assessments reached the Warden, five received comments from the Warden indicating 'consideration' of ASH, two had no such comments, and none of the Assessments for Decision had any comments about ASH in relation to the final decision. It is also notable that, consistent with the findings about differential use of ASH across Indigenous groups discussed earlier, the single Metis offender had "no ASH in A4D, MAI and Warden comments do not reflect any information about ASH" whilst the remaining six offenders' Assessments all included either mention of ASH information or that "ASH was considered" at some point in the review process, if not with regard to the final decision.[81]

While the documentation of the use of ASH at Bowden at this juncture is too sparse to permit firm conclusions, it is notable that five of the seven override decisions in which ASH was considered prompted a rise in security ratings. If the ASH policy was undertaken to ensure respect for the spirit and intent of *Gladue* in CSC and address the direction in s. 79(1) of the *CCRA* to this end, Bowden's approach was not only problematic but also in direct contravention of s. 79(2) of the *CCRA*. The latter directs that the s. 79(1) factors – which overlap very clearly with the *Gladue* factors and those considerations integral to ASH – are "not to be taken into consideration for decisions respecting the assessment of the risk posed by an Indigenous

---

80 Confidential Source A indicated that five cases were dropped from the audit because the overrides occurred prior to September 2012.

81 Umson, "Memorandum", *supra* note 79. Site results of the CRS/ASH review for Bowden Institution. The results for Bowden in the audit set this institution firmly within what appears to be the standard practice of all those CSC institutions included within the regional audit, which found that "ASH was not considered in the majority of the 79 cases considered for security overrides between September 2012 and March 2013."

offender unless those factors could decrease the level of risk."[82] While it is impossible to be certain that the overrides were directly due to the inclusion of ASH information in the decision-making process, the coincidence of ASH and higher security classifications is certainly worrisome.

The Confidential Sources shared their experiences with regard to three *Gladue* reports and their respective ASH reports reviewed by the administration of Bowden between 2013 and 2016 over the duration of what has come to be known as the Bowden Institution Experiment. As described by Confidential Source A and Confidential Source B, all the *Gladue* reports were produced in Alberta, two reports were completed by writers contracted by Native Counselling Services of Alberta, and the origins of the third report are not discernible. The Confidential Sources referred to the *Gladue* reports and their corresponding ASH as Gladue1 and ASH1; Gladue2 and ASH2; Gladue3 and ASH3.

As described by the Confidential Sources, the differences between the *Gladue* and ASH reports were significant and stark. In terms of length, the three ASH reports were all just over one page, single-spaced: ASH1 was comprised of eight paragraphs, ASH2 had ten paragraphs, and ASH3 had seven paragraphs. Their respective Gladue reports were considerably more robust: Gladue1 was 32 pages,[83] Gladue2 was 11 pages, and Gladue3 was 16 pages. The *Gladue* reports were reportedly based on interviews with at least three people, and Gladue1 and Gladue3 listed the sources consulted for the report. Gladue1 was based on interviews with the offender, his grandmother, his mother, and one of his siblings. Gladue3 similarly drew upon interviews with the offender, his younger sibling, his maternal grandmother, and his mother. Gladue2 did not indicate clearly who was interviewed, but Confidential Source A indicated that the report itself indicated that interviews were conducted with the offender, his father, and his mother.

While there is no standardized set of best practices for *Gladue* writers or reports, all three reports, based on the descriptions provided by the Confidential Sources, included both contextual and case-specific

---

82 CCRA, *supra* note 20.

83 Confidential Source A indicated that the case specific *Gladue* information followed 6 pages of discussion of s. 718.2(e), *R v Gladue*, and broad contextual information – all of which are firmly within information a court is expected to know and thus, subject to judicial notice.

information on what are generally understood as key *Gladue* factors.[84] That is, to varying degrees, all three reports included information about the offender's community contemporarily and at least touched upon issues of poverty, rates of employment and education, and experiences of, or estrangement from, culture, spirituality, and traditional activities. Gladue1 and Gladue2 reportedly contained historical background on the community. Gladue3, however, contained the most extensive historical information, elucidating the community's treaty history and involvement with the Riel Rebellion, as well as information about residential schools that took children from the community.

As indicated by the Confidential Sources, all three reports also provided extensive information about the offender's family, commonly over three generations (grandparents, parents, and present) and spoke of residential school involvement and intergenerational effects resulting therefrom, including addictions, disorganized relationships, exposure to substance abuse and violence in the home and community, injuries, foster care, school-leaving, loss due to accidental deaths as well as completion of suicide, and experiences of neglect, and physical and sexual abuse. All reports spoke about experiences of racism and discrimination, as well as identity confusion and social marginalization.

Most reports also related past criminal activities and involvement with the criminal justice system. Gladue2, while speaking about estrangement from culture, dedicated roughly half of the report to detailing the criminal and incarceration experiences of the offender; Gladue1 and Gladue3 dedicated two to three paragraphs to this subject. Building on this 'social context' information, Gladue1 provided an extensive list of what appear to be addictions treatment and concurrent disorders programs, CSC institutions, and healing lodges as sentencing options, but with no apparent elucidation or connection of these different options with specific healing needs documented in the report or why these are appropriate for the

---

[84] Taken together, *Gladue* and *Ipeelee* indicate that the following experiences are relevant *Gladue* factors that should be considered by the courts in addressing the *Gladue* requirements: low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness, and community fragmentation, systemic and direct discrimination, and, more generally, those unique background and systemic factors which may have played a part in bringing the particular offender before the courts.

offender. Gladue2, on the other hand, provided no sentencing options while Gladue3 provided targeted, detailed sentencing options related to addressing the offender's specific needs with regard to addictions, cultural renewal, wellness counselling, and academic upgrading.

So how did the relatively lengthy and detailed *Gladue* reports fare in their translation to ASH? As described by the Confidential Sources, two of the three ASH reports acknowledged their reliance on the Gladue reports, only ASH3 did not make this acknowledgement, and notwithstanding the variation in the length of the *Gladue* reports, as indicated above, all three were condensed into just over one page of ASH information. All the ASH identified the offender's community of origin, but none contained information about the culture or history of the community.[85] On the offender's specific connection to culture, ASH1 reportedly concluded with a single sentence noting the offender's lack of experience with and exposure to his culture, while ASH2 included three sentences on the offender's connection to culture in a paragraph focused on his incarceration history. ASH3 included one paragraph on the offender's experience of and connection to culture. Two of the three reports were disproportionately concerned with the offender's exposure to violence and substance abuse: ASH1 and ASH3 dedicated over half of the report to relating the offender's exposure to violence and substance abuse as a child while ASH2 summarized this in two of its 11 paragraphs. Where the *Gladue* reports indicated sexual abuse and/or foster care, this is acknowledged in the respective ASH; similarly, where the *Gladue*-related experiences of residential school attendance over the generations were included in the *Gladue* reports, these too were included in the ASH. The offender in ASH2 is a survivor and the ASH related his experiences at the school. Confidential Source A described ASH1 as recounting that the offender's grandmother attended Residential School and that "the influence of the school's legacy would have impacted him, as well." There is no elucidation of that legacy or its impacts on the offender.

---

[85] As described by Confidential Source A, ASH3 states that "it is not uncommon in Cree families, for the grandparents to care for their grandchildren and raise them as their own." This is important insofar as it communicates the different understanding of family and childrearing among Indigenous versus non-Indigenous peoples, something that shows a measure of insight and sensitivity to the family arrangements traditional to many Indigenous peoples.

As described by the Confidential Sources, all three ASH spoke to the offender's relationships with siblings and parents growing up. ASH1 and ASH3 included additional information about the offenders' current romantic relationships and children, if any, while ASH2 noted that the offender has spent most of his adult life in prison. ASH3 also reportedly spoke to cultural experiences the offender had with his grandfather, while both ASH1 and ASH2 noted an absence of any significant connection to, or experience of, culture by the offender.

Perhaps most importantly, and as observed by the Confidential Sources, while ASH1 specifies healing needs related to "addictions to gambling, alcohol and drugs," none of the program themes or healing approaches related to the sentencing options provided in the *Gladue* report are included in the ASH. ASH3 apparently identified "relevant factors" – including residential school attendance by a grandparent, school leaving, addictions, unemployment, and incarceration as a youth – but there was reportedly no mention of the *Gladue* report's relation of previous program experience, periods of abstention from alcohol use, or the sentencing options or approaches that reflect this information. As previously noted, Gladue2 provided no sentencing options. While the failure to include sentencing options in the ASH reports may seem unimportant and consistent with CSC's position that *Gladue* is for the courts, the oversight matters. The *Gladue* report's sentencing options could provide CSC with some insight into healing opportunities that could benefit the offender and are thus worth including in an ASH report.

The description of this small sample of *Gladue* reports and their respective ASH from the Bowden experiment suggest that, while they are imperfect, *Gladue* reports clearly contain far more information relevant to the risks and needs presented by an Indigenous offender than ASH. They also should provide relevant information on healing needs and, as importantly, previous experience with treatment. As noted by Confidential Source A in sharing the experience with *Gladue* and ASH at Bowden, the presence of a *Gladue* report in eight files greatly expedited the review of those files as compared to the review of the seven files that did not include *Gladue* reports. While all the offenders whose files were reviewed with reference to *Gladue* considerations received a security override to a lower security classification, *Gladue* reports expedited the process and provided greater confidence in the Assessment for Decision – not small considerations especially in "a big institution like Bowden, there were

maybe 15–20 decisions per week or more (not all security decisions)" that could take "1–2 weeks" of 10–12 hour days "to make the decision."[86] The ability to rely on a full, standalone *Gladue* report may thus not only ease the administrative burden, but these reports may also inform greater confidence in administrative decisions.

The OCI reviewed the approach taken in the Bowden Experiment and followed up on the eight offenders who were reclassified on the basis of their *Gladue* reports, confirming that all "eight have adapted well and at the time of writing this report, were reportedly safely integrated at the lower security level."[87] Source A stated that the offenders' success in minimum security persisted, and only one offender was sent back to medium-security – "but for tobacco, not for drugs or violence (tobacco is considered an unauthorized item and it is of high value with the prison system) – again, totally against our traditional practices, but the Commissioner didn't ask [Indigenous staff] when that was implemented."[88] The OCI report went further in its praise of the Bowden experiment, asserting that this initiative was evidence of the importance of *Gladue* reports to CSC, Indigenous case management, and healing:

> The approach taken by Bowden Institution is important because correctional authorities used the original ***Gladue*** sentencing report (often upwards of 50 pages or more when comprehensively completed). Correctional staff have access to a wealth of information through these reports. While some institutions prepare Aboriginal Social History reports that are based on the ***Gladue*** report, these are typically very short (often only a page in length) and contain primarily high-level information. The original ***Gladue*** report, where it exists, is a much more complete source of information. Bowden Institution also provided a comprehensive analysis and evidence as to how the ***Gladue*** report impacted a decision, something my Office has identified as missing in most purportedly ***Gladue***-informed correctional decisions to date.[89]

IV. CONCLUSION

The Bowden Experiment was a small spark of light illuminating the limited reach of *Gladue* in CSC and what can happen when *Gladue* is

---

86 Personal communication with Confidential Source A, May 28, 2020.

87 Canada, *Office of the Correctional Investigator Annual Report 2015-16* (Ottawa: Office of the Correctional Investigator, 2016) at 45, online: <www.oci-bec.gc.ca> [perma.cc/ME28-C5RN] [Correctional Investigator, *Annual Report*].

88 Personal communication with Confidential Source A, May 28, 2020.

89 Correctional Investigator, *Annual Report*, *supra* note 87 at 45.

seriously integrated into the security classification of Indigenous offenders. Not only is *Gladue* a receptacle of Indigenous knowledge and experience, but it can also temper the impact of current approaches to risk assessment and case management by ensuring more informed decisions are made and the remedial goals of *Gladue* are furthered within CSC. The challenge of course resides in the reach of *Gladue*: Source A described the paucity of reports over her tenure at CSC, acknowledging that she did not see a *Gladue* report in her capacity at CSC before 2010; it is also notable that of the 15 offenders considered for security overrides at Bowden, nearly half did not have a *Gladue* report. This is problematic and reflects a failure on the part of most governments in Canada to commit to full, standalone *Gladue* reports and to demonstrate that commitment through greater resources and oversight of *Gladue* writers, training, and reports. CSC cannot be faulted for failing to embrace *Gladue* when the essential vehicle for *Gladue* information – the *Gladue* report – is only rarely part of an offender's file. In short, then, *Gladue* reports could go some distance to assisting Indigenous offenders to locate a healing path and to CSC's efforts to pave the way to that path, but only if governments step up and make that possible.

In an echo of the OCI, where CSC has access to a *Gladue* report, CSC is encouraged to rely on those reports and resist summarizing these into ASH wherever possible. Surely more information is better than less, especially if it informs a more accurate security classification that enhances the healing potential of an offender and reduces the workload of CSC staff. To ensure that the sacred stories carried within *Gladue* reports are received with the respect and consideration they deserve, all CSC personal involved with case management should receive comprehensive, foundational training in *Gladue* and Indigenous culture and history. With proper training, a fuller understanding of Indigenous lives as well as the spirit and intent of *Gladue* could and should become the lens through which all materials in an Indigenous offender's file are considered. This training should include concrete, practical skills in integrating *Gladue* information into Assessments for Decision so that staff feel supported and capable of completing and communicating a full *Gladue* analysis in their Assessments for Decision, as opposed to simply noting that "ASH was considered."

While those of us who believe in *Gladue* and its remedial potential continue to press and wait for governments to commit fully and meaningfully to the spirit and intent of *Gladue* and its remedial goals, where a good *Gladue* report accompanies an offender into CSC, those working

with that offender should take it seriously in charting their healing path. The results of the Bowden Institution Experiment suggest that when CSC staff take the *Gladue* factors seriously – whether fully detailed in a *Gladue* report or as the filter for reviewing an offender's entire file – those factors have the potential to positively impact case management and Assessments for Decision, and thus access to healing opportunities and early release for Indigenous offenders.

Constitutionalizing Gladue Rights: Critical Perspectives and Prospective Paths Forward

HARDIE RATH-WILSON*

ABSTRACT

While remedial sentencing practices for Indigenous accused in Canada have often been described in rights-based terms, Canadian jurisprudence has been reluctant to characterize s. 718.2(e) of the *Criminal Code* as an actual "right." At the same time, front-line judges who are witnesses to — and complicit in — the systemic overincarceration of Indigenous people have created something more out of *Gladue* than a *Criminal Code* sentencing guideline. Indeed, they have followed our apex Court's direction that "application of the *Gladue* principles is required in every case involving an Aboriginal offender." Following a few recent expansions of *Gladue* into yet more spheres of the administration of colonial justice, this paper investigates whether there is utility in reconceiving *Gladue* as a *Charter* right. While the substantive and theoretical criticisms of the legal policy mechanism of *Gladue* are valid, binding judicial and administrative decision-makers with a *Charter* responsibility to consider the particular circumstances of Indigenous realities when liberty interests of an accused

* Hardie Rath-Wilson is an articling student and graduate of the University of Ottawa's Common Law program in 2020. The author is above all grateful to the entire staff at Grand Council Treaty #3 who welcomed him into their community in the summer of 2019, but especially the team at Kaakewaaseya, including Arthur Huminuk, Rob Nelson, Beverly Williamson, Crystal Swain, and Alicia McLeod. This paper was originally prepared for coursework in Professor Kyle Kirkup's Advanced Charter Rights class and benefitted from his generous feedback. The author is also thankful for the helpful comments of the anonymous peer reviewers, the invaluable work of the editors at the Manitoba Law Journal, and the keen revisions of Simcha Walfish and Rachel Danesin. This paper was written prior to the commencement of the author's judicial clerkship at the BC Supreme Court and reflects his views alone.

are at stake can serve to strengthen the check on colonial maladministration of justice.

I. INTRODUCTION: *GLADUE*'S "FUTURE TENSE"[1]

Twenty-four years ago, Parliament fundamentally reshaped sentencing in Canada. In s. 718.2(e), Parliament was responding to a slew of reports[2] and commissions[3] that reminded the administrators of the colonial justice system of the horrors of systemic, targeted Indigenous overincarceration.[4] Parliament's response folded an attempt to address this systemic issue into a broader, and more ambitious, reformulation and elucidation of the fundamental principles of sentencing – a novel scheme that would now include explicit consideration for Indigenous accused.[5]

In *R v Gladue*, the Supreme Court was asked to interpret the provision for the first time and, more specifically, whether the provision codified existing common law sentencing principles, or if Parliament intended, and created, something more.[6] Resoundingly, the Court ruled that the provision created a new judicial duty to consider: (1) the unique systemic factors that

---

1 "Like verbs, constitutions position us in time; they have a past, present and future tense." John Borrows, "(Ab)Originalism and Canada's Constitution" (2012) 58 SCLR (2d) 351 at 351.

2 See e.g. House of Commons, *Taking Responsibility: Report of the Standing Committee on Justice and Solicitor General on its Review of Sentencing, Conditional Release and Related Aspects of Corrections* (August 1988) (Chair: David Daubney).

3 See e.g. The Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (Ottawa: Minister of Supply and Services Canada, February 1987) at 364.

4 We are often cautioned by critics to respect the fact that the full magnitude of horrors has only come to light recently. But the systemic over-incarceration of Indigenous people has long been known, and discussed, by the settler-colonial state. An example of this will be discussed below. See Canadian Committee on Corrections, *Toward Unity: Criminal Justice and Corrections* (Ottawa: Queen's Printer, 1969) ("An additional striking factor in the situation on the prairies is the extremely high proportion of women incarcerated in provincial jails who are of Indian or Métis origin. These factors, taken together, underline the close relationship between a position of social deprivation and disadvantage and the likelihood of conviction for this type of 'criminal' activity" at 394–395) [*Toward Unity*].

5 Indeed, when Bill C-41 was first introduced, it attracted more controversy for its provisions that sought to extend greater rights to victims of sexual orientation hate crimes. See Tu Thanh Ha, "Bill C-41 Bill much more than same-sex clause", *The Globe and Mail* (19 November 1994) A12.

6 [1999] 1 SCR 688 at para 34, 171 DLR (4th) 385 [*Gladue*].

brought the person before the court and (2) culturally appropriate alternative sentencing procedures and sanctions for the particular Indigenous person and their connection to their Indigenous heritage.[7] From this relatively sparse description, the duty on judges to consider *Gladue* 'factors' and remedial sentences has grown considerably in the two decades since the decision.[8]

Yet, while these practices for Indigenous accused in Canada have often been described in rights-based terms, Canadian jurisprudence has been reluctant to characterize s. 718.2(e) as an actual 'right.' At the same time, front-line judges who are witnesses to — and complicit in — the systemic overincarceration of Indigenous people have created something more out of *Gladue* than a sentencing guideline;[9] indeed, they have followed our apex Court's direction that "application of the *Gladue* principles is required in every case involving an Aboriginal offender."[10]

Following a few recent expansions of *Gladue*[11] into yet more spheres of the administration of colonial justice, this paper investigates whether there is utility in reconceiving *Gladue* as a *Charter* right. While the substantive and

---

7 *Ibid* at para 66.

8 Aboriginal Legal Services (ALS) recently argued at the Supreme Court of Canada that *Gladue* considerations should be embedded in the doctrine of collateral attack as it applies to Indigenous offenders in respect of a residency condition in a long-term supervision order. While the argument did not make it into the final case, it is an example of how far *Gladue*, and ALS specifically, have gone to argue the intricacies of the doctrine. See *R v Bird*, 2019 SCC 7 (Factum of the Intervener Aboriginal Legal Services at paras 25–26).

9 Jonathan Rudin, *Indigenous People and the Criminal Justice System: A Practitioner's Handbook*, (Toronto: Emond, 2019).

10 *R v Ipeelee*, 2012 SCC 13 at para 87 [emphasis added] [*Ipeelee*].

11 I italicize *Gladue* (hopefully) consistently throughout this paper even when referring to '*Gladue* principles' and 'factors' because I want to emphasize that they are connected to the legal case *R v Gladue* and not to Jamie Gladue herself. It is, as far as I can tell, unknown what Jamie Tanis Gladue thinks of being the namesake for a whole sub-system of colonial justice. A colleague who mooted at the 2020 Kawaskimhon Law Moot, whose subject was Gladue rights, shared that some teams advocated for the profession to stop referring to them as "Gladue" rights. I wholeheartedly support this submission, and while I do not explicitly advocate for it in this paper, I would quickly change the language of this term to decouple this difficult topic from the name of a woman whose legacy is undoubtedly much more than the criminal case attached to one of the most difficult moments of her life.

theoretical[12] criticisms of the legal policy mechanism of *Gladue* are valid, binding judicial and administrative decision-makers with a *Charter* responsibility to consider the particular circumstances of Indigenous realities when liberty interests of an accused are at stake may serve to strengthen the check on colonial maladministration of justice. This would be especially effective if the conception of a *Gladue Charter* right occurs through a lens that both acknowledges the difficulties of achieving systemic remedies through individualized rights and recognizes the particularly problematic current state of *Gladue* as seen through a critical race theory lens.

Looking to the future of *Gladue* as a *Charter* right requires a few analytical and doctrinal exercises. In this paper, I will attempt to locate an approach to *Charter* expansion that recognizes challenges in addressing systemic policy issues in Canada. Without it, a *Gladue* right might only serve to further enable systemic overincarceration. I will then turn to the substance of my analysis in Part III: investigating whether ss. 7, 12, or 11(e) of the Charter can accommodate *Gladue* rights. In Part IV, I step back to ask more critical questions about a constitutional *Gladue* as a tool for achieving three goals: s. 718.2(e)'s twin purposes of describing Indigenous circumstances and prescribing appropriate sanctions, as well as its underlying, fundamental purpose, the excarceration and decarceration of Indigenous people from the colonial penal system.

II. CREATING NEW *CHARTER* RIGHTS: CRITICAL REFLECTIONS ON THE *CHARTER* AS A TOOL TO COMBAT SYSTEMIC MALADMINISTRATION OF JUSTICE

Discussion of the form and function of *Charter* rights inherently involves discussion of policy. This is not unique to any particular right.[13] But in the judicial development of particular rights, the Court gets it wrong as often as it gets it right, largely because effective public policy is often not

---

[12] Carmela Murdocca, "Ethics of Accountability: *Gladue*, Race, and the Limits of Reparative Justice" (2018) 30:3 CJWL 522. Generally regarding rights-based discourses, see Sherene H Razack, *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms* (Toronto: University of Toronto Press, 1998).

[13] Peter Hogg, *Constitutional Law of Canada* (Toronto: Thomson Reuters, 2016) at 36-5. In this section, I am attempting to establish a framework to evaluate effective prudential arguments for individual *Charter* rights as a solution for systemic maladministration. For more on prudential arguments, see below Part IV.

achievable through the pronouncement of individual rights. I want to take this opportunity to reflect in a comparative and purposive way on recent efforts to tackle systemic policy problems through *Charter* rights; specifically, the Court's approach in *Antic*,[14] directed at the systemic obstacles of pre-trial incarceration, and *Jordan*,[15] where the Court has attempted to rein in trial delays in an overextended and underfunded system. Recognizing that it is still quite early to draw firm conclusions, the Court is most effective at checking maladministration — which I define here as systemic, recurring, and pernicious public policy problems involving multiple actors within an institution[16] — where it recognizes the true scope of the problem, identifies the appropriate actors responsible for the problem, and frames the right in terms of clear, enforceable guarantees that do not require strenuous individualized tests for their application.

In *Jordan*, the Court attempts to locate the true scope of trial delay. Twinning a doctrinal and policy problem, the Court notes that the *Morin* framework is flawed because the "interests in a trial within a reasonable time does not necessarily turn on how much suffering an accused has endured."[17] *Jordan* joins the micro-effects of untimely trials with the macro, and in so doing, acknowledges that the scope of the problem with trial delays goes beyond mere inconvenience. In *Antic*, the Court alludes to the "the stakes" of pre-trial custody and that it "affects the mental, social, and physical life of the accused and his family."[18] But there is no serious engagement with evidence pointing to the realities of pre-trial detention.

The Court in *Jordan* spares no institutional actor responsibility for lengthy trial delays. It explicitly names who causes the culture of complacency: police, Crown counsel, defence counsel, courts, and policymakers all have their role to play.[19] By contrast, *Antic* focuses too

---

14 *R v Antic*, 2017 SCC 27 [*Antic*].

15 *R v Jordan*, 2016 SCC 27 [*Jordan*].

16 I use 'maladministration' as a term of art, but I do not want to suggest that the overincarceration of Indigenous people has been somehow accidental or as a result of benign negligence. Explicit colonial policies have targeted and intended to produce overincarceration.

17 *Jordan*, *supra* note 15 at para 34 [emphasis added].

18 *Antic*, *supra* note 14 at para 66. The appellant, Antic, was in pre-trial custody for over one year. Nothing is mentioned about the impact this had on him or on his family.

19 *Jordan*, *supra* note 15 at para 41.

narrowly on bail review justices:[20] by ignoring the possibility that the *Code* itself lacks coherence and merits review, Parliament is let off the hook. And while *Antic* discusses the history and importance of the principle of bail,[21] it entirely sidesteps any meaningful conversation about why the diverse array of actors who are responsible for administering the machinery of the massive bail system so routinely fail to do so in a manner that accords with the basic principles of bail. Too much weight in *Antic* is placed on inducing actors to behave "consistently and fairly" through exhortations to conform to "hallowed principles" rather than through substantive procedural protections.[22]

Constitutional obligations give rise to the Court's desire to see them met.[23] To this end, *Jordan*'s ceilings are by far its most controversial recent scheme. Yet, without clear guarantees, how can the Court send effective signals to downstream Courts about what to prioritize? Finding *Gladue* in the *Charter* would elevate, protect, and secure it.[24] *Jordan* told actors to respond, and they did.[25] Mandatory minimums and preliminary inquiries

---

20 The most direct 'naming and shaming' done in *Antic* is directed at "some judges and justices [in Alberta] are improperly imposing cash bail without seeking the consent of the Crown even though doing so is prohibited by the *Code*." *Antic*, *supra* note 14 at para 65.

21 *Ibid* at paras 21–31.

22 *Ibid* at para 66. In *Antic*, no explicit direction is made to Crowns to change their behaviour with respect to bail. The only mention of the Crown in *Antic*'s guidelines comes in the form of a simple restatement of the ladder principle's requirements that the Crown show cause for why an alternative form of release is required (*ibid* at para 67).

23 As the Court said in *R v Morin*: "The Court cannot simply accede to the government's allocation of resources and tailor the period of permissible delay accordingly. The weight to be given to resource limitations must be assessed in light of the fact that the government has a constitutional obligation to commit sufficient resources to prevent unreasonable delay which distinguishes this obligation from many others that compete for funds with the administration of justice." See *R v Morin*, [1992] 1 SCR 771 at 795, 53 OAC 241.

24 Hogg, *supra* note 13 at 36-7.

25 Albeit largely through the hiring of additional Crowns, judges, and general investments into the criminal justice system. See the list of investments described in Maxime Charron-Tousignant, "Unreasonable Delays in Criminal Trials: The Impact of the Jordan Decision" (11 December 2017), online: *Hill Notes* <hillnotes.ca/2017/12/11/unreasonable-delays-in-criminal-trials-the-impact-of-the-jordan-decision> [perma.cc/4LS8-G7GB]. There have been other questionably relevant reforms that have been attempted under the rubric of complying with *Jordan*, including the potentially unconstitutional

have also been identified as areas for reform, however ill-advised the latter may be.[26] By contrast, the Court's strong words in *Antic* have not led to significant policy movement whatsoever.[27] The proper definition of *Charter* rights and remedies is essential to create rights capable of being instrumentalized beyond the hyper-personalized cases of well-resourced accused. Whatever message is being sent must be cognizable to other institutional actors.

Jordan is not without its critics. Much can be learned from these criticisms. Most relevant to *Gladue* is the notion that *Jordan* erred in its setting of descriptive, rather than prescriptive, ceilings.[28] By doing so, the Court not only set the 11(b) bar too high but ensured that it would likely not be lowered in the near future. By choosing a standard that reflected the average delay in the 'real world,' the Court ensured that that world would never be required to significantly change. In setting Constitutional parameters for *Gladue*, it would be a significant mistake to imagine only within the scope of what currently exists. For this reason, I will argue in Part IV of this paper that, for a *Charter* right to be effective, it should be more ambitious and prescriptive, guided by a purposive interpretation of what *Gladue* was intended to accomplish: decarceration.

---

amendments proposed in the recently passed Bill C-75. See Jillian Williamson, "Breaking Bail" (2019) 24:1 Can Crim L Rev 131 at 139.

26 See Doug Beazley, "Will the Jordan ruling speed up reform of our justice system?" (22 June 2017), online: *CBA/ABC National* <nationalmagazine.ca/articles/law/in-depth/2017/will-the-jordan-ruling-speed-up-reform-of-our-just> [perma.cc/876V-LP2X].

27 In fact, quite the opposite, as Canada's largest jurisdiction has since substantially decreased funding for legal aid for bail hearings. See Mike Crawley, "Legal aid cuts will clog Ontario's already crowded courts, lawyers warn", *CBC News* (12 June 2019), online: <cbc.ca/news/canada/toronto/legal-aid-ontario-cuts-bail-clinic-1.5172329> [perma.cc/67PM-XQYG]. The judiciary itself has taken up repeating to bail justices the importance of *Antic*. See e.g. *R v Tunney*, 2018 ONSC 961. See also Thomas Surmanski, "How *Antic* Changed Everything for Bail in Canada: The Case of *R. v. Tunney*" (13 February 2018), online (blog): *Robichaud Law* <robichaudlaw.ca/antic-tunney-di-luca-bail-decision> [perma.cc/BC8C-AZL3].

28 See Keara Lundrigan "*R v Jordan*: A Ticking Time Bomb" (2018) 41:4 Man LJ 113 at 122.

III: ENTRENCHING *GLADUE*: POSSIBILITIES AND PITFALLS IN SECTIONS 7, 11(E), AND 12 OF THE *CHARTER*

As Borrows argues, Canada's highest Court adopts an anomalously originalist approach to interpreting the rights of "Aboriginal" people.[29] Manikis writes compellingly on conceiving *Gladue* as a principle of fundamental justice (PFJ).[30] I was inspired by and draw on her work and attempt to continue to expand it by surveying a few different avenues for how *Gladue* could be constitutionalized. In doing so, I advance mostly doctrinal, prudential, and structural arguments for *Gladue* as a constitutional feature, over historical and textual arguments, though there is space for these as well.[31] Ultimately, this theoretical exercise is itself not the reason for incorporating *Gladue* into the *Charter*, but rather its potential utility. Consequently, in each section, I briefly touch on the potential usefulness of novel rights for Indigenous claimants.

This analysis omits many other potential constitutional dimensions of s. 718.2(e), but I would like to highlight two immediately promising ones that exceeded the scope of this analysis. First, the s. 15 dimension of *Gladue* recently used by the Ontario Court of Appeal to invalidate Harper-era legislative provisions barring conditional sentences in *R v Sharma*[32] is worthy of its own direct engagement. Secondly, *R v Morris*[33] is currently under reserve following arguments at the Ontario Court of Appeal. To what extent the issues raised in this paper map onto Black offenders is too complex of a question to address here, though to paraphrase an argument from the Black

---

29 J Borrows, *supra* note 1 at 358. Borrows is referring specifically to the jurisprudence regarding s. 35 of the Constitution, but I think this argument is relevant to the interaction between Aboriginal people and the *Charter* more broadly, as I will explain.

30 Marie Manikis, "Towards Accountability and Fairness for Aboriginal People: The Recognition of *Gladue* as a Principle of Fundamental Justice that Applies to Prosecutors" (2016) 21 Can Crim L Rev 173.

31 I draw, as does Borrows, on the theoretical argumentative distinctions described by Bobbitt: historical, textual, structural, doctrinal, prudential, and ethical. See Philip Bobbitt, "Methods of Constitutional Argument" (1989) 23:3 UBC L Rev 449. Prudential refers to modes of constitutional argumentation that rely on practical costs and benefits: effectively, policy reasons. Bobbitt attributes their introduction into American legal jurisprudence to Louis Brandeis (*ibid* at 454).

32 2020 ONCA 478, rev'ing 2018 ONSC 1141 [*Sharma*].

33 2018 ONSC 5186 [*Morris*].

Legal Action Centre and the Canadian Association of Black Lawyers, [34] the question is not if anti-Black racism will be considered during sentence hearings, but how. Many of the considerations I address here about the purpose, effects, and nature of *Gladue* as a legal and policy tool are relevant to that ongoing conversation.[35]

A. Section 7

This paper takes up Manikis' argument that the *Gladue* principle meets the three-step test laid out by the Supreme Court for recognizing a PFJ:[36] it is a well-established binding legal principle that applies across the whole criminal justice system;[37] it has enjoyed repeated affirmations from the Supreme Court that it is a principle fundamental to achieving fairness in the criminal justice process;[38] and its contemporary application is proof that it is has sufficient precision to yield a manageable standard.[39] I would like to expand on Manikis' doctrinal arguments that *Gladue* could function as a stand-alone PFJ, and grapple with some potential problems.

1. The Doctrinal Argument for Gladue as a Stand-Alone Principle of Fundamental Justice

Any discussion of iterating PFJs starts with *Re BC Motor Vehicle Act*, [40] where the Court described them as being found in "basic tenets of our legal system."[41] Yet, Justice Lamer provided no discrete legal test for uncovering

---

34 *R v Morris*, 2021 ONCA (Factum of the Interveners BLAC and the CABL at para 4), online: *BLAC* <www.blacklegalactioncentre.ca/wp-content/uploads/2021/03/C65766.FOI-BLACCABL.pdf> [perma.cc/DF7E-NA8S].

35 The inevitable appellate direction from the Supreme Court on these two decisions is sure to develop the law as it relates to *Gladue*, as well. As Maria C. Dugas writes, there is nothing inherent to s. 718.2(e) that makes it inapplicable to the unique historical experience of Black Canadians: Marie C Dugas, "Committing to Justice: The Case for Impact of Race and Culture Assessments in Sentencing African Canadian Offenders" (2020) 43:1 Dal LJ 103 at 148.

36 Manikis, *supra* note 30.

37 *Ibid* at 183.

38 *Ibid*.

39 *Ibid*.

40 [1985] 2 SCR 486, 24 DLR (4th) 536 [*Re BC Motor Vehicle Act*].

41 *Ibid* at 503. Alluding to concerns that would be developed by subsequent jurisprudence, discussed below, Lamer J held that they go beyond mere "general public policy" but are "in the inherent domain of the judiciary as guardian of the justice system" (*ibid*).

PFJs. After years of turbulence,[42] the Court finally prescribed the test in *Malmo-Levine*.[43] That case and subsequent jurisprudence provide semi-useful signposts to determine what criteria the Court is looking for when applying the three-step test that helps to inform our analysis here.

At the first step, the Court is alive to one primary concern: avoiding stepping too lightly into policy debates. Legal principles must be distinguished from "generalizations about what our society considers to be ethical or moral."[44] Any argument for a novel *Gladue* PFJ should strike the right balance between recognizing a greater scope for a *Gladue* constitutional remedy, but not so great a scope as to open the floodgates to requiring the Court to intervene on behalf of *Gladue* considerations in every government decision-making process as it relates to Indigenous peoples.[45]

In *Malmo-Levine*, the Court rejected the harm principle as a novel PFJ. Suggesting it did not meet the second step of the test, the majority pointed to criminal laws that might run afoul of the "harm principle" and why they were still justified.[46]

Malleability is a concern at the third step as well. In rejecting the harm principle as a manageable standard, the Court pointed to the wide diversity of submissions from both sides of the case as to what constitutes "harms."[47]

---

42 Hogg points to the years before *R v Malmo-Levine* and particularly the five distinct definitions of PFJ offered in *Thomson Newspapers Ltd v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 SCR 425, 67 DLR (4th) 161. Hogg, *supra* note 13 at 47-23–47-28.

43 A PFJ is a "[1] legal principle about which there is [2] significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and [3] it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person." *R v Malmo-Levine*, 2003 SCC 74 at para 113 [*Malmo-Levine*].

44 *Rodriguez v British Columbia*, [1993] 3 SCR 519 at 591, 107 DLR (4th) 342 [*Rodriguez*].

45 This would likely raise concerns about s. 7 getting too mired in "policy adjudication." *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4 at para 9 [*Canadian Foundation*].

46 *Malmo-Levine*, *supra* note 43 at para 118. The Court also rejected the argument that the decriminalization by Parliament of suicide could be described as supporting a consensus "by Parliament or by Canadians in general" (*ibid* at para 123). The majority was quoting Justice Sopinka in *Rodriguez*. In another case that failed at step 2 of the test, while found to be "widely supported in legislation and social policy," the best interests of the child were not a "foundational requirement for the dispensation of justice." *Canadian Foundation*, *supra* note 45 at para 10.

47 "In the present appeal, for example, the respondents put forward a list of 'harms' which they attribute to marihuana use. The appellants put forward a list of 'harms' which they attribute to marihuana prohibition. Neither side gives much credence to the 'harms'

In *Canadian Foundation*, the best interests of the child (BIOC) was also found to fail the third step of the test due to its application being "highly contextual and subject to dispute" among "reasonable people [who] may well disagree about the result that its application will yield… particularly in areas of the law where it is one consideration among many, such as the criminal justice system."[48]

In pointing to concerns over malleability and subordination,[49] the Court is really concerned about the scope and content of any rights created out of a novel PFJ. If established, how would the Court apply it? In order to better meet the test for a novel PFJ, the argument for a *Charter Gladue* right must contend with this specific difficulty. As will be discussed below, the Court's sentencing jurisprudence recognizes the importance of *Gladue* alongside other sentencing principles. It is frequently subordinated at the expense of other principles and applied incredibly inconsistently among sentencing judges.[50] The Ontario Court of Appeal recently grappled with this idea and developed its own – slightly clearer – test for how *Gladue* applies at sentencing,[51] but this uncertainty will undoubtedly be a concern in establishing a stand-alone PFJ.

The answer to these concerns about *Gladue* also lies in the Court's own flexible understanding of the test for novel PFJs. In deciding the principle of a constitutional entitlement to a presumption of diminished moral culpability for young offenders at sentencing had sufficient precision, the Court pointed to "decades" of administration and application to

---

listed by the other. Each claims the 'net' result to be in its favour." *Malmo-Levine*, *supra* note 43 at para 128.

48 *Canadian Foundation*, *supra* note 45 at para 11.

49 The Court's reasoning suggested that the BIOC being "subordinated to other concerns in appropriate contexts" was crucial in a failure at step 2 of the test. *Ibid at* para 10.

50 See Marie-Andrée Denis-Boileau & Marie-Ève Sylvestre, "*Ipeelee* and the Duty to Resist" (2018) 51:2 UBC L Rev 548.

51 "The correct approach may be articulated as follows. For an offender's Aboriginal background to influence his or her ultimate sentence, the systemic and background factors affecting Aboriginal people in Canadian society must have impacted the offender's life in a way that (1) bears on moral blameworthiness, or (2) indicates which types of sentencing objectives should be prioritized in the offender's case." *R v FHL*, 2018 ONCA 83 at para 40 [*FHL*]. The Court, after finding the trial judge had misapplied the factors, ultimately upheld the original sentence. This frequent failure of *Gladue* to achieve substantive differences in sentencing outcomes is a worthy subject of further analysis that unfortunately is outside the scope of this paper.

proceedings against young people.[52] Past practice — with no mention of whether, and to what extent, the principle had been subject to any controversy — was found to be sufficient. Undermining the majority's precise point about manageability were the dissenting reasons of Justice Rothstein, supported by as large of a minority as there can be in a Supreme Court decision. Justice Rothstein agreed that there was a principle of fundamental justice but disagreed about how it applied to the facts at bar, particularly what guarantees flowed from the principle.[53]

More recently, *Ewert* not only confirmed the test in *Malmo-Levine*,[54] but also presents a case in point for why a novel PFJ is required to combat systemic overincarceration. Mr. Ewert, a Métis federal prisoner, launched a s. 7 claim challenging the arbitrariness of the Correctional Service of Canada's (CSC) risk assessment tools as they were never properly tested to ensure they did not disproportionately label Indigenous offenders higher risk.[55] While the majority at the Supreme Court rejected his s. 7 claim, they ultimately agreed that CSC had done something wrong and provided Mr. Ewert with a declaration that the CSC had violated an obligation under its own statute to take "all reasonable steps to ensure that any information about an offender… is as accurate… and complete as possible."[56] The Court infused the obligation with principles from *Gladue* to reach its conclusion that CSC owed a duty to Mr. Ewert, but in their reasons for providing declaratory relief, they made it clear that should Mr. Ewert wish to instrumentalize his 20-year legal battle to Canada's apex Court, he would have to return to the legal starting line: using his declaratory relief to launch a judicial review of the initial decision.[57]

---

52 *R v DB*, 2008 SCC 25 at para 69 [*DB*].

53 Justice Rothstein, joined in dissent by Justices Bastarache, Deschamps, and Charron. *Ibid* at para 106.

54 *Ewert v Canada*, 2018 SCC 30 at para 76 [*Ewert*].

55 Mr. Ewert, a Métis man, has spent over 30 years in custody. He challenged five CSC tools and submitted, admittedly weak, expert evidence which the trial judge nevertheless accepted as fact that (1) the tools had been used to affect key aspects of Ewert's incarceration, (2) that the CSC had known about concerns about the validity of the tools with respect to Indigenous offenders since 2000, and (3) that the tools could not be "in and of themselves" relied upon for classifying Indigenous offenders. *Ibid* at paras 14–18.

56 *Corrections and Conditional Release Act*, SC 1992, c 20, s 24(1) [*CCRA*].

57 "[A] declaration… does not invalidate any particular decision made by the CSC, including any decision made in reliance on the impugned assessment tools. Should Mr.

In an article on the proposed unconstitutionality of CSC's offender classification scale, Leitch argues that the application of s. 81 of the *CCRA* — a remedial provision that allows Indigenous prisoners to serve their sentences in the community or at healing lodges — is arbitrary and overbroad and violates s. 7.[58] While the evidence marshalled by Leitch is compelling, much like in *Ewert*, I have concerns that the Court could: a) set the evidence threshold high for findings of arbitrariness, especially in the carceral context and b) side-step arbitrariness claims by pointing to law, or legislation working through Parliament, to provide statutory (and ultimately ineffective) relief. In fact, with the recently passed amendments to the *CCRA*, the government has done just that: anticipating challenges to their risk assessment schemes and requiring that any *Gladue*-type considerations only be considered in risk assessment where they reduce the level of risk.[59] A constitutionalized *Gladue*, by contrast, might provide swift and substantive remedies to claimants seeking to infuse *Gladue* considerations across a broad array of specific administrative contexts, rather than launching an extensive and evidence-based arbitrariness claim. The Supreme Court may currently be more amenable to using s. 7 of the *Charter* to guarantee instrumental rationality,[60] but fashioning a substantive *Gladue* PFJ may provide a more elastic and useful paradigm for Indigenous litigants.

There remains an important doctrinal obstacle to address for a novel *Gladue* PFJ. Manikis' original argument sought to respond to *R v Anderson*, where the Supreme Court explicitly rejected a proposed PFJ "that Crown prosecutors must consider the Aboriginal status of the accused prior to making decisions that limit a judge's sentencing options."[61] The Court found that it failed to meet the second requirement, consensus, because it was contrary to "long-standing and deeply rooted" prosecutorial independence.[62] Manikis addresses the Court head-on, and argues that

---

Ewert wish to challenge the validity of any such decision, he must do so through an application for judicial review of the relevant decision." *Ewert*, *supra* note 54 at para 88.

58 D'Arcy Leitch, "The Constitutionality of Classification: Indigenous Overrepresentation and Security Policy in Canadian Federal Penitentiaries" (2018) 41:2 Dal LJ 411.

59 See *An Act to amend the Corrections and Conditional Release Act and another Act*, SC 2019, c 27, cl 2.

60 See Andrew Menchynski & Jill R Presser, "A Withering Instrumentality: The Negative Implications of R. v. Safarzadeh-Markali and other Recent Section 7 Jurisprudence" (2017) 81 SCLR (2d) 75.

61 2014 SCC 41 at para 29 [*Anderson*].

62 *Ibid* at para 30.

Gladue considerations are in fact deeply compatible with the constitutional role and duties of prosecutors.[63] But even where *Anderson* may have wrongly decided the law on this point, it is also distinguishable as the Court was quite specific in the language of the PFJ it rejected: that prosecutors be bound by *Gladue* factors, not judges. And while Manikis may also believe that the social consensus argument is unlikely to bind a future Court, in my view what the Court is really talking about when it invokes conflicting legal principles at the second stage of the test is concerns about how a substantive legal principle would operate in the real world.[64] The procedural considerations I discuss in Part IV are crucial in both alleviating judicial concerns of how *Gladue* could operate, while also challenging the Court to meet the enormity of the crisis its rhetoric acknowledges exists with appropriate *status quo*-altering tools.

B. Disproportionality: The Consequences of Ignoring *Gladue* Can be Cruel and Unusual and Violate the Principles of Fundamental Justice

Gross disproportionality is one of three "failures of instrumental rationality" that have repeatedly been recognized by the Supreme Court as constituting principles of fundamental justice and grounding successful constitutional invalidation of impugned legislation.[65] Gross disproportionality equally grounds a claim that a given punishment is unconstitutional under s. 12 of the *Charter*. Their overlap has been resolved through the Court's preferred application of s. 12 at criminal sentencing and s. 7 to when laws pursuing legitimate state interest are grossly disproportionate to that state interest.[66]

The basic problem of a s. 12 and s. 7 disproportionality *Gladue* right comes from the Court's repeated assertions that proportionality in sentencing is not a constitutional obligation, but merely a fundamental legislative one. The Court in *Safarzadeh-Markhali* writes:

---

63 Manikis, *supra* note 30 at 184–86.

64 Justice Moldaver J. wrote in *Anderson* that Mr. Anderson's submissions, if accepted, would "enormously expand the scope of judicial review of discretionary decisions made by prosecutors" and would "hobbl[e] Crown prosecutors in the performance of their work." *Anderson*, *supra* note 61 at para 31.

65 Hogg, *supra* note 13 at 47–59.

66 *R v Safarzadeh-Markhali*, 2016 SCC 14 at para 72 [*Safarzadeh-Markhali*].

> The principles and purposes for determining a fit sentence, enumerated in s. 718 of the Criminal Code and provisions that follow—including the fundamental principle of proportionality in s. 718.1—do not have constitutional status. Parliament is entitled to modify and abrogate them as it sees fit, subject only to s. 12 of the Charter.[67]

This passage underlies the crucial importance of a *Gladue* dimension to s. 12: without it, Parliament could do away with the entire requirement, and all of the other requirements that flow from it, with simple legislative amendment.[68] Making a compelling case that the failure to consider *Gladue* factors at sentencing can result in grossly disproportionate punishments is therefore crucially important to safeguarding 20 years of *Gladue* jurisprudence. A constitutionalized *Gladue* right in s. 12 is also desirable because of its reach: beyond fines and imprisonment, many types of carceral and non-carceral forms of punishment become reviewable through a *Gladue* lens.[69]

So, would failure to consider *Gladue* factors ground a s. 12 claim? Given that *Gladue* would likely be invoked in the context of something considered as "punishment" (meeting the first step of the s. 12 test), the bulk of any doctrinal analysis will have to take place in the second step: proving that failing to consider *Gladue* creates punishment that is "cruel and unusual."[70] The most recent jurisprudence on s. 12 lays out the test: more than excessive, but a high bar rarely surpassed.[71]

---

67 *Ibid* at para 71. The Court explicitly rejected Lebel Js comments from *Ipeelee*, writing: "To say that proportionality is a fundamental principle of sentencing is not to say that proportionality in the sentencing process is a principle of fundamental justice for the purpose of determining whether a deprivation of liberty violates s. 7 of the Charter, notwithstanding the *obiter* comment of LeBel J. in *Ipeelee*" (*ibid*). The Court repeated this point in *Anderson*, *supra* note 61.

68 Parliament has indeed already amended these provisions, though with little yet discernible effect. See *An Act to enact the Canadian Victims Bill of Rights and to amend certain Acts*, SC 2015, c 13.

69 A non-exhaustive list from *Charterpedia* shows the reach of s. 12: imprisonment, monetary fine, victim surcharge, non-punitive detention, prisoner transfer and solitary confinement, other conditions of prison detention, prohibition and forfeiture of firearms, and the taking of DNA samples. See Department of Justice, "Charterpedia: Section 12 – Cruel and unusual treatment or punishment", online: *Department of Justice* <justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art12.html > [perma.cc/P3ST-BTKE].

70 The preliminary test for s. 12 is to ensure that the state action at issue constitutes "punishment." See *R v Boudreault*, 2018 SCC 58 at paras 37–44 [*Boudreault*].

71 The Court writes: "As this Court has stated many times, demonstrating a breach of section 12 of the Charter is 'a high bar'... The impugned punishment must be more

In *Boudreault*, the Court, when applying this test to the mandatory victim surcharge, ruled that a sentence that "elevates… one objective above all other sentencing principles" cannot save a sentence from evading s.12 scrutiny.[72] Specifically, the mandatory surcharge undermined s.718.2(e). The Court made the rather strong statement that:

> [A]ny criminal sanction that falls disproportionately on the marginalized and vulnerable will likely fall disproportionately on Indigenous peoples… Just as Indigenous peoples remain overrepresented in Canada's prisons, so may we expect them to be overrepresented at committal hearings for defaulting on a surcharge order.[73]

Effectively invoking a presumption of the criminal justice system's uneven impact on Indigenous people, *Boudreault* might set the stage for a finding that disproportionate impact, without any mitigating attempts, might ground a s. 12 claim. There are innumerable examples of the devastating impacts on sentencing not considering *Gladue*.[74] It may also be an indicator of how the Court primarily conceives of *Gladue* as a tool of equity in sentencing, bolstering a s. 15 conception of *Gladue*.[75]

Boudreault also solidifies the notion that the principles of sentencing, to operate constitutionally, cannot operate to the exclusion of all principles over the application of one. This cuts both ways for making the argument for a constitutional aspect of *Gladue*. It both entrenches the importance of the principles working in harmony, while simultaneously discouraging the elevation of s. 718.2(e) above the others.[76]

---

than merely disproportionate or excessive. Rather, '[i]t must be 'so excessive as to outrage standards of decency' and 'abhorrent or intolerable' to society'… It is only on 'rare and unique occasions' that a sentence will infringe s. 12, as the test is '"very properly stringent and demanding."' *Ibid* at para 45.

72 *Ibid* at para 81.

73 *Ibid* at para 83.

74 See Denis-Boileau & Sylvestre, *supra* note 50 for examples.

75 See discussion in *Sharma*, *supra* note 32.

76 *Gladue*, unlike the mandatory victim surcharge, actually enhances and supports the application of other sentencing principles. "Systemic and background factors, however, do not operate as an excuse or justification for an offence: *Ipeelee*, at para 83. They are only relevant to assessing the "degree of responsibility of the offender", and to considering whether non-retributive sentencing objectives should be prioritized. Accordingly, *Gladue* and *Ipeelee* do not detract from the "fundamental principle" that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender." *R v FHL*, *supra* note 51 at para 47.

C. Section 11(e): The Right to Reasonable Bail Includes Consideration of *Gladue*

Gladue rights in the bail process have largely failed Indigenous accused.[77] I will advance a model for including *Gladue* principles in the right to reasonable bail, as defined in *Antic*. I will then briefly make the case for why *Gladue* content in the right to reasonable bail is a desirable remedy for Indigenous accused.

1. The Doctrinal Test for the Right to Reasonable Bail

In interpreting the s. 11(e) guarantee of the "right… not to be denied reasonable bail without just cause"[78] the Court has described two discrete aspects of s. 11(e): the right to not be denied "reasonable bail" and the right not be denied bail "without 'just cause.'"[79] Requiring bail to be reasonable means that the "quantum of any monetary component and other… restrictions" must be reasonable.[80] While the types of legal bail are circumscribed by the *Code*, it is ultimately the judicial decisionmaker who orders specific terms of release.[81] These terms, if unreasonable, can be unconstitutional. Requiring bail not be denied without just cause creates a "constitutional standard that must be met for the denial of bail to be valid,"[82] namely that it is (1) narrow, and (2) "necessary to promote the proper functioning of the bail system and is not undertaken for any purpose extraneous to the bail system."[83]

Some form of *Gladue* at bail is essential. The vast majority of accused persons plead guilty through plea bargains,[84] often to avoid remand.

---

77 Jillian Rogin, "Gladue and Bail: The Pre-Trial Sentencing of Aboriginal People in Canada" (2017) 95:2 Can Bar Rev 325 at 343, n 83.

78 *Canadian Charter of Rights and Freedoms*, s 11(e), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

79 *Antic*, *supra* note 14 at para 36.

80 *Ibid* at para 41.

81 *Ibid* at para 42.

82 *Ibid* at para 40.

83 *R v Pearson*, [1992] 3 SCR 665 at 693, 144 NR 243 [*Pearson*].

84 Between 2008–2009, 59% of accused appearing before Canadian adult courts pleaded guilty. See Marie Manikis & Peter Grbac, "Bargaining for Justice: The Road towards Prosecutorial Accountability in the Plea Bargaining Process" (2017) 40:3 Man LJ 85 at 86–87. Plea bargaining "is not some adjunct to the criminal justice system; it is the criminal justice system." See Robert E Scott & William J Stuntz quoted in Palma

Indigenous peoples represent 21% of those in remand custody, despite only representing 3% of the general population.[85] And yet, the caselaw on *Gladue* and bail is a mess, or as Rogin describes: "sporadic, contradictory, and… misguided."[86] *Gladue* factors are largely ignored at bail, and where they are considered, they are used to place an inappropriate emphasis on rehabilitation and restorative justice, over constitutionally guaranteed principles.[87] In an attempt to ensure bail provisions are applied "consistently and fairly," *Antic* provides further "principles and guidelines" that are to be adhered to that include stand-alone principles such as the interwovenness of s. 11(e) and the right to the presumption of innocence and that terms of release on bail "must not be imposed to change an accused person's behaviour or to punish an accused."[88] An entrenched *Gladue* analysis in s. 11(e) might help mitigate against harmful applications of the principle at the bail stage.

Gladue can inform both aspects of the s. 11(e) right. If restrictions in bail release orders are to be reasonable, they must be informed by *Gladue* factors to avoid *Charter* scrutiny. Interpreting the right to reasonable bail within the context of Gladue as a constitutional facet of s. 11(e) would better mitigate against interpretations of *Gladue* at bail that conflict with the presumption of innocence that "cloaks" all accused until the end of their trial.[89] This is especially relevant to the Constitutional right to reasonable bail, as it is so intimately intertwined with the other Constitutional legal rights, particularly the presumption of innocence, protection against unreasonable and invalid detention (*habeas corpus*), and the other two legal rights that form the subject of this paper.[90]

Further, *Gladue* could ensure that bail is not denied in a manner that upsets the second aspect of s. 11(e): that it is for a purpose extraneous to the bail system. The purposes of the bail system have been rather widely

---

Paciocco, "Seeking Justice by Plea: The Prosecutor's Ethical Obligations during Plea Bargaining" (2017) 63:1 McGill LJ 45 at 47.

85 Rogin, *supra* note 77 at 326.

86 *Ibid* at 327. For a comprehensive list (up to 2017) of *Gladue* cases at Bail, see *ibid* at 332, nn 26–27.

87 *Ibid* at 334. Another approach may be to argue that *Gladue* consideration is required through the lens of prosecutorial ethics in the plea bargaining process. See Paciocco, *supra* note 84 at 64.

88 *Antic*, *supra* note 14 at paras 66–67.

89 Rogin, *supra* note 77 at 329.

90 *Ibid*.

interpreted by the Court to include the cessation of further behaviour and the risk of abscondment.[91] *Gladue* can be used to shed light on both of these facets of the s. 11(e) analysis.

Suffusing s. 11(e) of the *Charter* with *Gladue* principles might have the corollary impact that *Gladue* considerations can be better considered at the charge bargaining and plea negotiation stages of the criminal justice process. A recent study on joint recommendations strongly indicated that *Gladue* rights are frequently waived in an attempt to accelerate the plea process.[92]

D. *Gladue*'s Doctrinal Hurdles

Simply arguing that *Gladue* meets these doctrinal tests will not be enough. While a fragmented approach may have the potential to stall reform, all of these constitutional dimensions of *Gladue* can and should complement and reinforce each other, like in other areas of the *Charter*.[93] There will be other intra-constitutional hurdles as well. The carving out of a constitutional right that attracts resource investment must also consider the way that s. 1 is interpreted, particularly in light of recent jurisprudence.[94] But our Constitution's text has other elements that encourage a *Charter* with *Gladue* components: primarily the relationship between s. 35, s. 25, and the legal rights in the *Charter*. These topics go beyond the scope of this analysis, but they vitiate in favour of Indigenous-specific *Charter* rights. Beyond constitutional barriers to *Gladue*, there are theoretical and practical problems with the administration of *Gladue* that require consideration alongside the development of a *Charter* right. Effectively, if there is a *Charter* right to *Gladue*, what should it protect? This is where the policy analysis performed in Part II can inform the doctrinal exercise in Part III to ensure

---

91 See *Pearson*, *supra* note 83.

92 See David Ireland, "Bargaining for Expedience: The Overuse of Joint Recommendations on Sentence" (2015) 38:1 Man LJ 273 at 317.

93 In the right to be tried within a reasonable time, for example, the Court has acknowledged that pre-trial and appellate delay are not themselves included in the s. 11(b) right, but excessive delay at those stages is protected by a supplementary s. 7 protection. Hogg, *supra* note 13 at 47-29–47-30.

94 The Assembly of Manitoba Chiefs filed an intervener factum in a case before the Supreme Court, *Conseil scolaire francophone de la Colombie-Britannique, Fédération des parents francophones de Colombie-Britannique, et al v Her Majesty the Queen in Right of the Province of British Columbia, et al*, 2020 SCC 13 [*Conseil scolaire*]. In it, they write about the case's potential to dilute the s. 1 analysis. See Factum of the Intervener Assembly of Manitoba Chiefs at para 39.

that any remedies flowing from a *Charter Gladue* do as little further harm as possible. It is very possible that the magnitude of the crisis exceeds meaningful judicial law reform, but, in my view, this area of the law has for too long lacked appropriate purposive intention.

IV: APPLYING LESSONS LEARNED TO *GLADUE*: WHAT DOES AN EFFECTIVE *CHARTER* REMEDY LOOK LIKE?

We must be ambitious about the scope of *Gladue* and its potential remedies, given the crushing scale of the permanent crisis of Indigenous overincarceration. The efficacy of *Gladue* should not rely upon sympathetic judges and under-funded (or not funded at all) provincial government programs. Creating an effective remedy will necessarily involve sketching out a greater scope for what a "right" to *Gladue* actually means.

Gladue is a "complex set of legal and bureaucratic interpretations, arrangements, and discourses"[95] described by Murdocca as "racial governance."[96] A *Charter* definition and judicially prescribed requirements have the potential to harmonize and improve the scattered approach of all the myriad policy actors that make up its diffuse implementation. But it also has the capacity to create deep harm. As Sylvia McAdam reminds us, the "typologies of genocide have been described as the bureaucratic apparatus of the systems." [97] In an effort to mitigate the potential for a constitutional *Gladue* to replicate the harmful ways *Gladue* has already been instrumentalized, I advocate for an expansive, purposive model of *Gladue*. It should focus on three basic components: (1) the *Gladue* report, whose purpose is to make Indigenous personal realities cognizable to the common law; (2) *Gladue* remedies, that are intended to make justice more effective for Indigenous accused through the recognition of Indigenous legal mechanisms; and (3) an ethic of decarceration – the ultimate goal of *Gladue*.

---

95 Murdocca, *supra* note 12 at 524.

96 *Ibid* at 525.

97 Sylvia McAdam (Saysewahum), *Nationhood Interrupted: Revitalizing nêhiyaw Legal Systems* (Saskatoon, SK: Purich Publishing, 2015) at 82.

A. *Gladue* as Report: "it hurts to be a story."[98]

There is an inherent power imbalance in storytelling, between the teller and the listener;[99] between its subject and its author. Indigenous accused who recount versions of their life story to a *Gladue* writer, who then have their submissions summarized by a defence counsel, cross-examined by a Crown, and ultimately heard by a statistically white judge, are stories inevitably constructed before the court asymmetrically. We must critically examine the interpretive structures of the formalized storytelling of marginalized groups to understand their power and their potential to compound oppression.[100] As Murdocca argues, even the most compelling *Gladue* sentencing decisions are dependent on "genealogies of colonial racism"[101] that nest in the way *Gladue* reports are funded and written — particularly when they subjectivize the Indigenous accused they are intended to help. Creating clear, enforceable procedural protections for how *Gladue* reports are written and funded is one way a *Charter* right to *Gladue* could ameliorate the present situation.

Given how essential the report is to appropriate judicial consideration of *Gladue* factors, one would anticipate it would form the basis of much judicial consideration. It has not. *Gladue* reports have been largely ignored by the judiciary.[102] Guidance, where it exists, on the form and function of *Gladue* reports comes from organizations that write them,[103] which run the gamut from Legal Aid BC, to Aboriginal Legal Services, to the Alberta

---

98 "Gay Incantations" in Billy-Ray Belcourt, *This Wound is a World* (Calgary, AB: Frontenac House, 2017) at 11.

99 Razack, *supra* note 12 at 36.

100 *Ibid* at 37.

101 Murdocca, *supra* note 12 at 527.

102 This is, in part, due to their continued rarity. Denis-Boileau and Sylvestre's analysis of nearly 635 sentencing decisions revealed that a substantial majority made no reference to a *Gladue* report. See Denis-Boileau & Sylvestre, *supra* note 50 at 587.

103 See Legal Services Society BC, *Gladue Report Guide* (1 March 2018), online (pdf): *Legal Aid BC* <lss.bc.ca/publications/pub/gladue-report-guide> [perma.cc/37QB-4HF3]. These guides can be extremely useful for report writers in jurisdictions that are underfunded, but they can also contribute to the pan-indigenization of *Gladue* reports. The forthrightness with which Legal Aid BC defines *Gladue* rights and the ease of access of their materials was one of the impetuses for writing this paper. For their conceptualization of *Gladue* rights, see Legal Services Society BC, "Gladue principles", online: *Aboriginal Legal Aid in BC* <aboriginal.legalaid.bc.ca/courts-criminal-cases/gladue-rights> [perma.cc/W2LJ-94LT].

Government. Judicial guarantees for such reports could be structured into two types: form or content.

Form guarantees could look like this: *Gladue* reports should, where possible, be written by report writers that share the same community as the person who is the subject of the report. During my summer spent interning at Grand Council Treaty #3 (GCT#3),[104] it became evident that the specificity of the organization's focus on Anishinaabe culture in Treaty #3 territory informed every facet of its work. As explained to me by Beverly Williamson, GCT#3's Lead Gladue Writer, Anishinaabe stories do not have headings, so why should *Gladue* reports? For lawyers and judges, it may seem like an infuriating distraction, but as a storytelling tool, it is essential.[105] Storytelling in law can only be useful for the upending of ordinary oppression where it "is an interrogation of how courts come to convert information into fact, how judges, juries and lawyers come to 'objectively' know the truth: 'Those whose stories are believed have the power to create fact.'"[106]

A content guarantee could look like this: *Gladue* reports should also endeavour to locate more than the person's Indigeneity in their scope. Critical race theory asks us to always question when a part of a person is being represented as a whole. *Gladue* reports that only represent the Indigenous subject and not their gender expression or sexual orientation, for example, risk merely constructing another "autonomous liberal self… another abstraction."[107] Put in terms of this *Charter* exercise: any recognition of *Gladue* as a *Charter* right should update the list provided in *Gladue* and

---

104 Grand Council Treaty #3 is the traditional government of the Anishinaabe Nation in Treaty #3. Its mandate is to protect, preserve and enhance Treaty and Aboriginal Rights. I am enormously grateful for the patience and grace of its staff, especially those in the Justice Department, or Kaakewaaseya. See Grand Council Treaty #3, online: <gct3.ca> [perma.cc/PJA6-G8NS].

105 As Maurutto and Hannah-Moffat argue, contextualized Indigenous knowledges in courts allow legal professionals to raise novel arguments and have the potential to truly reconstitute and alter outcomes for Indigenous accused. See Paula Maurutto & Kelly Hannah-Moffat, "Aboriginal Knowledges in Specialized Courts: Emerging Practices in Gladue Courts" (2016) 31:3 CJLS 451.

106 Razack, *supra* note 12 at 37.

107 *Ibid* at 41, 55. As Razack argues, adopting the responsibility to "trace the other in self" must become central to the legal practice in the courtroom, through "maintaining a … vigilance about how we know what we know."

Ipeelee to reflect that the social factors of colonization occurred along broader lines than just Indigeneity.[108]

As Woolley writes of the "seek justice ethic," the simple exhortation that is supposed to define the complex ambit of a Crown prosecutor's duties, attempting to incorporate "undefined moral concepts into legal duties" fails both in providing guidance and unwittingly contributes to undesirable prosecutorial behaviour.[109] We are far better served when scoping duties to identify the norms and functions of the desirable behaviour and create obligations that flow from those functions — essentially a purposive approach.[110] More than a simple requirement to produce a *Gladue* report, a *Charter* right to *Gladue* should more rigorously define form and content guarantees to ensure the efficacy of such a report in achieving its ultimate goal: revealing the circumstances of the accused. Effective reports should not depend upon the pen of a fortunately well-trained writer[111] or the ear of a particularly sympathetic judge.

B. *Gladue* as a Remedial Sentence: "building a politics of refusal that is generative"[112]

Something about *Gladue* reports makes judges wax poetic. At their core, applying the *Gladue* principles makes judicial actors grapple with complex questions of inter-cultural understandings of justice, something featured in many justice's decisions.[113] While this analytical exercise is crucial, it is

---

108 "To be queer and native and alive is to repeatedly bear witness to worlds being destroyed, over and over again." Billy Ray-Belcourt quoted in Leanne Betasamosake Simpson, *As We Have Always Done: Indigenous Freedom through Radical Resistance* (Minneapolis: University of Minnesota Press, 2017) at 119. The quote precedes Simpson's chapter on "Indigenous Queer Normativity" that discusses the specific ways colonization disrupted queer narratives (*ibid* at 119–44).

109 Alice Woolley, "Reconceiving the Standard Conception of the Prosecutor's Role" (2017) 95:3 Can Bar Rev 795 at 833.

110 *Ibid*.

111 It should be noted, and persistently repeated, that there are functionally no *Gladue* reports written in Manitoba and Saskatchewan. See Keith Fraser, "Gladue reports play key role in sentencing Aboriginal offenders, but program off to slow start", *Vancouver Sun* (9 September 2018), online: <vancouversun.com/news/local-news/gladue-reports-play-key-role-in-sentencing-aboriginal-offenders-but-program-off-to-slow-start> [perma.cc/59W5-BF3K].

112 Simpson, *supra* note 108 at 177.

113 See e.g. Gibson J in *R v Suggashie*, 2017 ONCJ 67. Describing the effect of s. 718.2(e) as creating a "contact zone within which the legal systems can intersect with a view to

entirely unhinged from Indigenous academic scholarship on multi-juridical relationships. The Supreme Court itself was guilty of this in *Gladue*.[114] Despite meriting inclusion in the Supreme Court's description of the British Columbia Court of Appeal (BCCA) decision, little was discussed in the decision about the fact that Jamie Gladue maintained contact with Mr. Beaver's mother, also Cree, who was, in fact, helping Jamie with her status applications at the time of the release of the BCCA decision and had already secured status for one of her and Mr. Beaver's daughters.[115] The decision to include some information about the extent of the reconciliation between Ms. Gladue and the mother of Reuben Beaver indicates that the judges at the Court of Appeal and the Supreme Court had some visceral understanding that that information was relevant to a determination of appropriate justice in the circumstances. But they displayed appalling ignorance at not placing that information within its appropriate context — relevant Cree laws.

Sentencing decisions can be read as "repositor[ies] of ethical responses to histories of colonial racism in the criminal justice process."[116] They are individual judges wrestling with the realities of hundreds of years of colonial justice with the consequences elaborately laid in front of them. The result is, confusingly, often the reverse of its intent. As Patricia Monture-Angus describes her experience as an Indigenous female legal scholar: "[a]nd when I speak and the brutality of my experience hurts you, you hide behind the

---

achieving greater internormativity" see Denis-Boileau & Sylvestre, *supra* note 50 at 554–55.

114 Drawing on Sheehy's work on wrongful conviction, Roach argues that Ms. Gladue should be considered among the many wrongfully convicted Indigenous women in Canada. Kent Roach, "The Wrongful Conviction of Indigenous People in Australia and Canada" (2015) 17:2 Flinders LJ 203 at 218–20. The Court of Appeal refused to admit fresh evidence that Ms. Gladue may have had a valid self-defence claim despite pleading guilty to manslaughter at trial and the trial judge's finding that Ms. Gladue was not a "battered woman." In addition to being errors of law, they can also be considered through the lens of failure of *Gladue* consideration, errors that are still made today.

115 *Gladue*, *supra* note 6. In the Court of Appeal decision, we learn that this information comes from deposition testimony from Ms. Gladue that her connection to Mr. Beaver's mother, Mary Yellowknee, stems in part from securing Cree status for herself and her children. The record in the case indicates she was seeking status with the Atikameg First Nation, located just two hours from where Reuben Beaver is reported to have been born. *R v Gladue*, [1999] 2 CNLR 231 at para 79, 119 CCC (3d) 481 [*Gladue* CA].

116 Murdocca, *supra* note 12 at 526.

hurt. You point the finger at me and you claim that I hurt you."[117] It is important to recognize that it is not only judges that are being told to engage with Indigenous legal orders: in plea negotiations and remand proceedings – truly the bulk of the criminal justice system – Crown prosecutors and defence lawyers are working to identify and refer Indigenous accused to community-based remedial mechanisms.

Divorcing constitutionalizing *Gladue* from any substantive reconsideration of the relationship between colonial and Indigenous law is an error of first principles. As many commissions[118] and scholars have concluded, Indigenous overincarceration and colonial hostility to valid, existing, and workable Indigenous legal mechanisms are fundamentally interconnected. Murdocca tells us that looking for justice in unjust reparative justice processes is to recognize the inherent limits of the colonial criminal justice system in providing justice for Indigenous people. She calls on us to specifically attend to the way Indigenous experience is relayed and instrumentalized through the *Gladue* process.[119]

Humility is a core component of inter-legal discourse.[120] *Gladue* relies on the recognition of remedial processes, but it does not create them.[121] In

---

117 Razack, *supra* note 12 at 40, citing Patricia Monture-Angus, *Thunder in My Soul: A Mohawk Woman Speaks* (Halifax: Fernwood, 1995) at 35.

118 See Royal Commission on Aboriginal Peoples (RCAP), Aboriginal Justice Inquiry of Manitoba.

119 Murdocca, *supra* note 12 at 539.

120 See Lindsay Borrows, "Dabaadendiziwin: Practices of Humility in a Multi-Juridical Legal Landscape" (2016) 33:1 Windsor YB Access Just 149.

121 "If we began this exercise by imagining that the Canadian state and its courts engage in braiding laws the way we might imagine a single person braids a rope out of materials on hand, we would then have to begin with the notion the state has control over Indigenous law. To think of the state as having control over Indigenous law is, however, to think of Indigenous law as being bits and pieces, constituting no more than articulated rules and principles. This effectively removes Indigenous law from the landscape. There can only be such a thing as Indigenous law if there are Indigenous legal and political authorities, those entities that determine the nature and functioning of legal orders under contemplation. To cut away the possibility these legal and political authorities exist and exercise their authority through their laws and policies is to move directly into a world where the colonial project has been completed." Gordon Christie, "Indigenous Legal Orders, Canadian Law and UNDRIP" in *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws, Special Report* (Waterloo, ON: Centre for International Governance Innovation, 2017) 48 at 49, online (pdf): *Centre for International Governance Innovation* <cigionline.org/sites/default/files/documents/UNDRIP%n20Implementation%20Special%20Report%20WEB.pdf> [perma.cc/2V65-N

light of this analytic lens, any instrumentalization of *Gladue* through the *Charter* has to grapple with this concern. More than simply asking can the *Charter* receive *Gladue* rights, it should ground itself in whether and how the reception of *Gladue* rights into the *Charter* can be conceived *ab initio* in a way that respects the way Indigenous legal orders presently imprint on the doctrine and ensure that it recognizes and reflects back fundamental principles of Indigenous self-determination. For example, diversion programs that require volunteer community service hours — even where they take place in an Indigenous community — are not true Indigenous legal orders. The difference, as Hewitt points out, is that "[r]estorative justice is a location of decolonization in that Indigenous models of justice assist in revitalizing Indigenous laws through practice."[122]

C. *Gladue* as Effective Decarceration and Excarceration: Abolitionist-Informed Perspectives

Fundamentally, *Gladue* rights are intended to be remedial: they exist to combat overincarceration. To deny this purposive approach to *Gladue* is to unnecessarily limit the true scope of the problem of contemporary maladministration of the criminal justice system with respect to Indigenous peoples. An abolitionist informed perspective calls on us to critically examine all reforms through Mathiesen's positive or negative typology: positive reforms by their effect improve the carceral system, whereas negative reforms "abolish or remove parts of the system on which it is dependent."[123]

Why is an abolitionist perspective important? Take, for example, decarceration strategies at the pre-trial stage. Some strategies are more effective than others because they involve an explicit motivation of limiting the reach of the carceral state. *Gladue* factors, properly identified, can be inappropriately instrumentalized at bail with a "rehabilitative" focus and have harmful effects, up to and including incarceration. A typical 'positive' example is a bail justice, attempting to rehabilitate someone's substance

---

UE3].

122 Jeffery G Hewitt, "Indigenous Restorative Justice: Approaches, Meaning & Possibility" (2016) 67 UNBLJ 313 at 317.

123 Liat Ben-Moshe, "The Tension Between Abolition and Reform" in Mechthild E Nagel & Anthony J Nocella II, eds, *The End of Prisons: Reflections from the Decarceration Movement* (Amsterdam: Brill, 2013) 83 at 87, citing Thomas Mathiesen, *The Politics of Abolition* (New York: Halsted Press, 1974).

abuse disorder, revealed through a *Gladue* report, binding them with an order to enter into treatment, or not drink, leading to a subsequent breach of these conditions and re-incarceration.[124]

More productive abolitionist reforms should be open to excarceration as well as decarceration. Excarceration strategies might include holding police accountable to using their discretionary powers to arrest in non-discriminatory ways[125] or applying *Gladue* considerations to police during their interactions with Indigenous people during interrogations.[126] Better *Gladue* reports are themselves a form of excarceration. But equal attention should be paid to investing in remedial sentencing programs. Without adequate resources for community programs, no amount of excellent *Gladue* reports could rectify overincarceration.[127] With a *Charter* right comes the potential for compelling significant government resources for both.[128] Additionally, applying this lens to the constitutional exercise herein, approaches that include a *habeas corpus* remedy and immediate decarceration might be preferred over others.

---

124 For a detailed study of how punitive processes actually operate in the bail context through unjust bail conditions, see Marie Manikis & Jess De Santi, "Punishing While Presuming Innocence: A Study on Bail Conditions and Administration of Justice Offences" (2019) 60:3 C de D 873.

125 Ss. 495, 498 and 599 of the *Criminal Code* confer discretionary power on police to not arrest and release accused persons with conditions, which should be used more frequently. Rogin, *supra* note 77 at 343, n 83.

126 Kerry G Watkins, "The Vulnerability of Aboriginal Suspects When Questioned by Police: Mitigating Risk and Maximizing the Reliability of Statement Evidence" (2016) 63:4 Crim LQ 474 at 477.

127 See Truth and Reconciliation Commission, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015) at 173, online (pdf): *National Centre for Truth and Reconciliation* <ehprnh2mwo3.exactdn.com/wpcontent/uploads/2021/01/Executive_Summary_English_Web.pdf> [perma.cc/GJJ2-5ZSP]. The TRC's 31st recommendation calls for "sufficient and stable funding to implement and evaluate community sanctions that will provide realistic alternatives to imprisonment for Aboriginal offenders and respond to the underlying causes of offending" (*ibid*).

128 Funding *Gladue*'s can and should be the number one priority. Where *Gladue*'s are not properly funded, it falls on probation officers and other government entities to provide *Gladue* considerations to the courts—a function they are institutionally incapable of performing. See Kyle Edwards, "Why Gladue has not lived up to its promise for Indigenous justice", *Maclean's* (18 October 2017), online: <macleans.ca/news/canada/why-gladue-has-not-lived-up-to-its-promise-for-indigenous-justice> [perma.cc/3DNF-VYAJ].

V. CONCLUSION: *GLADUE*'S FUTURE PERFECT

I must finish by acknowledging that I am a white settler law student, and this is a speculative constitutional exercise. This analysis springs from a summer spent working in the *Gladue* space with incredible Indigenous front-line workers. Bobbitt describes ethical modes of argument in the constitutional arena as the most "ineluctable element" in jurisprudence. They are arguments that appeal to our ethos: "not necessarily what we are, but perhaps what we think we are,... what we would like to be, or in some cases what we know we are and what we are no longer willing to abide."[129]

In January 1966 in Kenora, Ontario — where I worked in the summer of 2019 — 266 of the 281 women in detention in the local jail were Indigenous.[130] Today, the exact same proportion of prisoners at that same jail are Indigenous, as are 40% of federally incarcerated women.[131] We have known, and continue to know, that the situation is an intolerable crisis.

---

129 Bobbitt, *supra* note 31 at 455. Bobbitt points to a particularly consequential submission made in *Brown v Board of Education* that ended up in the final Supreme Court decision. The famous "doll" study asked African American children to identify which dolls they preferred amongst an array of racially diverse dolls: most picked the white dolls, and assigned positive characteristics to them. The study was used by the Court to concretize the negative consequences that segregation had on young children. For their part, Drs. Kenneth and Mami Clark, the African American psychologists who designed and conducted the cited research, were dismayed that the Supreme Court had missed two of their other findings: that racism was a uniquely American institution, and the effect segregation had on inhibiting the development of white children. See "The Significance of the 'The Doll Test'" (4 March 2019), online: *NAACP Legal Defence and Education Fund* <naacpldf.org/ldf-celebrates-60th-anniversary-brown-v-board-education/significance-doll-test> [perma.cc/3D2T-M8NF].

130 See *Toward Unity*, *supra* note 4 at 403, 404. The Committee's report calls "for special programs in these institutions designed to meet the particular needs of these Indian or Métis women. The importance of involving the general community in corrections has been stressed throughout this report. The need to involve members of the Indian and Métis communities in programs designed to help these Indian and Métis women offenders seems particularly acute." Logan Turner, "As Ontario eyes correctional expansions in the north, skepticism, alternatives to incarceration emerge", *CBC News* (17 October 2020), online: <cbc.ca/news/canada/thunder-bay/jail-expansions-nwo-alternatives-1.5764182>.

131 *Sharma*, *supra* note 32 (Factum of the Intervener LEAF and the David Asper Centre for Constitutional Rights at para 8), online (pdf): <aspercentre.ca/wp-content/uploads/2019/07/R-v-Sharma-Court-File-No-C66390-Factum-of-the-Interveners-LEAF-and-the-Asper-Centre-01328633x7A7FA.pdf> [perma.cc/KD5Q-ME8L].

Front-line workers deserve sharper tools at their disposal for checking the voracious Canadian colonial carceral state.

The notion of *Charter* rights that belong specifically to one part of Canadian society no doubt will raise the ire of those whose ire is ordinarily raised by such a prospect. Other parts of the Constitution have partial answers to these concerns: s. 35 jurisprudence explains why Aboriginal peoples have a distinct relationship to the Constitution compared to other rights holders, and s. 15 jurisprudence demonstrates the Canadian desire to achieve substantive, over formal, equality.[132] That being said, there is no reason why the expression of s. 718.2(e), as it applies with "particular attention" to Indigenous people,[133] cannot find formulation in Constitutional principles for other rights holders.[134]

---

[132] Rudin, in a 2008 paper, was cautious about the interaction between s. 15 and *Gladue*. His criticisms of a s. 15 *Gladue* are relevant here, though there is not sufficient space to address them: "The problem, of course, is that a successful challenge would require that the courts compel governments to direct resources to address this issue. As recent s. 15 jurisprudence has shown, courts are increasingly reluctant to embark on such a road. Making matters more difficult is that empirical evidence does not yet exist to show precisely what governments should do to address the problem. While the lack of definitive solutions is not a bar to innovation, indeed it should spur on new approaches, the fact that there are no easy-to-describe, inexpensive, off-the-shelf responses to the problem would likely inhibit courts from moving to require government action in this area." Jonathan Rudin, "Aboriginal Over-representation and R v Gladue: Where We Were, Where We Are and Where We Might Be Going" (2008) 40 SCLR (2d) 687 at 713.

[133] I note a small difference in translation between the French and English versions of s. 718.2(e). In English, the provision reads: "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders." In French, it reads: "l'examen, plus particulièrement en ce qui concerne les délinquants autochtones, de toutes les sanctions substitutives qui sont raisonnables dans les circonstances et qui tiennent compte du tort causé aux victimes ou à la collectivité." See *Code criminal*, LRC 1985, c C-46, art 718.2(e). In my view, in the English version the "particular attention" applies to the circumstances of Indigenous offenders, whereas in the French version the "plus particulièrement" modifies the consideration of alternative sanctions where Indigenous offenders are concerned.

[134] Specifically, the line of cases that hold that the provision requires the consideration of the circumstances of Black accused and their distinct history of systemic overincarceration. See *R v Jackson*, 2018 ONSC 2527 and *R v Morris*, *supra* note 33, where Justice Nakatsuru applied *Gladue*-like considerations to the Black Canadian experience.

Gladue has had dubious reception in the Canadian public and the legal system.[135] There are many hurdles to establishing new *Charter* rights, especially so in the Indigenous context. But, as someone who has already had the privilege of working in Indigenous spaces early in my legal career, I feel a responsibility to do more than be a "comfortable carrier of no."[136] The inevitability of continuing Indigenous overincarceration by the Canadian settler carceral state is comorbid with legal and constitutional *status quo*. By entrenching *Gladue* principles in the *Charter*, perhaps more cognizable tools will allow all decision-makers to do better on the front lines of the crisis, securing Indigenous accused "the full benefit of the *Charter*'s protection."[137] And perhaps, someday, it will be said that *Gladue*'s branch, like any other part of the *Charter*'s living tree, will have borne just fruit.

---

135 The *Gladue* case's reception in the national news media was swiftly racist. One reporter was quick to point to an over-dramatized recounting of the facts and a summary of the case completely denuded of Canada's role in the overincarceration of Indigenous people. See Kirk Makin, "Top court appalled as natives fill Canada's jails", *The Globe and Mail* (24 April 1999) A1.

136 L Borrows, *supra* note 120 at 159, quoting lawyer Leslie Pinder, who participated in the *Delgamuukw* trial. "What knowledge can be found to sustain us when we have destroyed the stories. Lawyers assemble the evidence with words cut from the environment; they hold up as evidence, hacked up pieces of meaning. Lawyers don't have to take responsibility to construct a world. We charge ourselves only to destroy. We say no. We are the civilized, well-heeled, comfortable carriers of no."

137 *R v Big Drug Mart Ltd*, [1985] 1 SCR 295 at 344, 18 DLR (4th) 321 (Justice Dickson). Chief Justice Lamer quotes this passage in *Re BC Motor Vehicle Act* which he describes as being "[t]he task of the Court" when approaching s. 7, while trying to avoid adjudicating on the merits of public policy. *Re BC Motor Vehicle Act*, *supra* note 40 at 499.

The Devil's Playground: A Case Study of Elgin-Middlesex Detention Centre (EMDC) Demonstrating the Systemic Failings of the Ontario Corrections Regime

NICOLE KELLY*

ABSTRACT

Despite numerous calls to action from news outlets, prison activists, and incarcerated individuals themselves, the Ontario corrections regime continues to operate in an unlawful and inhumane manner. The last decade has seen the publication of several prison reform recommendations that are yet to be meaningfully implemented. This paper spotlights four serious issues that plague Ontario correctional institutions through the lens of one of the worst: Elgin-Middlesex Detention Centre. Through its discussion of death in custody, drugs in custody, inhumane conditions, and understaffing, this paper seeks to highlight the profound gap between our democratic aspirations and the lived reality of working and living in Ontario jails. This case study urges us to finally take action and implement the roadmap for reform that has already been provided.

I. INTRODUCTION

"Dignity. Respect. Legality. These values are integral to the delivery of correctional services."[1] Or at least theoretically these should be integral values in Ontario correctional institutions. Unfortunately, these values are not the reality for the lived experiences of many incarcerated individuals. News outlets, members of the public, and the Ontario Human Rights Commission (OHRC) have all decried the inhumane conditions of Ontario correctional institutions.[2] Despite this call for better treatment and living conditions, individuals incarcerated in Ontario correctional institutions continue to face terrible atrocities with limited avenues for relief.

An exploration of the issues at a specific Ontario jail, Elgin-Middlesex Detention Centre (EMDC), provides a concrete example of the disorder and corruption commonly experienced in Ontario correctional institutions. There have been sporadic reports about aspects of life at EMDC and more system-wide reports about the prison system in Ontario. This paper seeks to expose the magnitude of the needs of both prisoners and workers at EMDC by bringing those sporadic reports together into one case study. It reveals the profound gap between our democratic aspirations and the lived reality of Ontarians who work and live in EMDC. And it argues that the roadmap for reform has already been provided: this paper urges that we finally take action.

Before beginning this journey into the depths of EMDC, it is important to underscore that this paper does not advance a claim about whether EMDC is better or worse than other Ontario jails in terms of the experiences of incarcerated people. Instead, this paper uses the EMDC case

---

* Many thanks to Dr. Adelina Iftene and Dr. Kim Brooks for their continual advice and assistance on the project.

1 Independent Review of Ontario Corrections, *Corrections in Ontario: Directions for Reform* (Toronto: Ministry of the Solicitor General, September 2017) at 1 [Ministry, *Directions for Reform*].

2 OHRC, *A bold voice: Annual report 2016-2017: Ending cruel and inhuman treatment in correction* (Toronto: OHRC, 23 June 2017), online: <www.ohrc.on.ca> [perma.cc/58Q6-JX9X]; Jacques Gallant, "'Inhumane' conditions at Toronto South Detention Centre amount to 'deliberate state misconduct,' judge says", *Toronto Star* (14 January 2020), online: <www.thestar.com> [perma.cc/28CS-S9T4] (last accessed 10 January 2021); CBC News, "About 100 inmates to stage hunger strike at Lindsay jail over inhumane conditions", *CBC News* (15 June 2020), online: <www.cbc.ca/news> [perma.cc/J95T-KKRA].

study to raise the kinds of questions we should be asking about all prison complexes, and it urges us to use this case study as a wake-up call for change.

This paper proceeds as follows: Part II describes the history of EMDC and the departure from its original purpose of housing up to 190 prisoners awaiting trial. Parts III to VI highlight four main aspects of EMDC that are in particular need of attention: death in custody, drugs in custody, inhumane conditions, and understaffing. Part VII concludes with a discussion on the lessons learned from the continuous scandal and corruption at EDMC and steps that should be taken to address the systemic failings of the Ontario corrections regime.

II. The Establishment of EMDC as a Lower Capacity Remand Centre

In Canada, the prison system is divided between federal and provincial institutions, with individuals serving less than two years' imprisonment housed in provincial institutions.[3] Thus, remand centres fall under provincial jurisdiction. Provincial and territorial correctional institutions are not uniformly regulated, as each province and territory has its own corrections system and legislation. In Ontario, correctional services are governed by the Ministry of the Solicitor General (the "Ministry") and the *Ministry of Correctional Services Act*.[4]

EMDC is an Ontario detention centre for individuals on remand[5] that is located in London, Ontario. EMDC was built in 1977 with an original operational capacity of 190 individuals in single cells, but it now has a capacity of 452 prisoners.[6] EMDC houses both men and women who are admitted under a variety of warrants and detention orders. Sojourns at

---

3 *Criminal Code,* RSC 1985, c C-46, s 743.1(3).

4 RSO 1990, c M 22, s 5 [MCSA].

5 Remand is the process of detaining a person who has been arrested and charged with an offence until their trial or sentencing. A person who is held on remand is legally innocent.

6 Note that there have not been any significant structural changes to EMDC to create this more than two-fold increase in capacity. Instead, inmates are double, triple, or quadruple bunked in these cells that were intended for single capacity. Ontario, Ministry of the Solicitor General, *Community Advisory Board Annual Report 2015* (Toronto: Ministry of the Solicitor General, 11 March 2016), online: <www.mcscs.jus.gov.on.ca> [perma.cc/3UB2-LZHP] [Ministry, *Community Advisory*].

EMDC range from hours to years.[7] There are ten detention units at EMDC, organized under seven main groupings: protective custody, general population, intermittent prisoners, women, workers, special needs, and segregation.[8] The facility does not have an infirmary, but it does have a "Health Care Unit" staffed by a health care manager and nurses.[9]

As a provincial remand centre that has been frequently criticized for its inhumane conditions,[10] EMDC is the perfect candidate for a case study on the systemic failings of the Ontario prison regime. The conditions at EMDC were pronounced as amongst the worst seen by the OHRC during their tours of Ontario jails.[11] "[O]vercrowded, unsanitary and dangerous" were the words used by the Chief Commissioner to describe the institution after her tour of the facility.[12]

There have been eighteen publicized deaths in EMDC in the past ten years, with the majority of these deaths attributed to suicide or drug overdoses.[13] EMDC has been plagued by violence, understaffing, overcrowding, drug abuse, and poor labour relations for decades, leading to its recurrent spotlight in the news by local media outlets.[14] Former prisoners

---

7 *Johnson v Ontario*, 2016 ONSC 5314 at para 10 [*Johnson*].

8 *Ibid* at para 11.

9 *Ibid* at para 12.

10 *Ibid* at paras 3, 6, 47–67, 126–28. See also Marek Sutherland, "Another inmate death at EMDC, another plea for change", *CTV News* (29 November 2020), online: <london.ctvnews.ca> [perma.cc/P8R6-5A6J] (last accessed 25 January 2021); Letter from Renu Mandhane, Chief Commissioner OHRC to Solicitor General Jones (17 May 2019), online: *OHRC* <www.ohrc.on.ca> [perma.cc/M2CY-ZPCE] [OHRC, "Letter to Solicitor General Jones"].

11 OHRC, "Letter to Solicitor General Jones", *supra* note 10.

12 *Ibid*.

13 Sebastian Bron, "'Outrageous': Inmate death makes 15 in past decade at London's troubled Elgin-Middlesex Detention Centre", *The London Free Press* (25 June 2019), online: <www.lfpress.com> [perma.cc/UPR9-R5ZJ]; Randy Richmond, "London man, 41, dies at Elgin-Middlesex Detention Centre", *The Londoner* (27 November 2020), online: <www.thelondoner.ca> [perma.cc/3ABT-429D]; Matthew Trevithick, "Second inmate death in three days reported at EMDC, ministry confirms", *Global News* (24 March 2021), online: <globalnews.ca> [perma.cc/9467-CK8L].

14 See e.g. Jess Brady, "Death of another inmate at Elgin-Middlesex Detention Centre under investigation", *Global News* (1 April 2019), online: <www.globalnews.ca> [perma.cc/JSB2-D9NJ]; Colin Butler, "What a guard's key and 'unknown pills' tell us about the Elgin Middlesex Detention Centre", *CBC News* (14 August 2018), online: <www.cbc.ca/news> [perma.cc/FSQ4-U6VC]; Randy Richmond, "Disturbing video released by court appears to show one cellmate killing another in London jail", *National Post* (12 October 2017), online: <nationalpost.com> [perma.cc/Q8FP-LD4X].

of EMDC have commenced dozens of actions against the Ministry asserting that EMDC is overridden with issues of overcrowding, understaffing, systemic negligence, assault, battery, and breaches of fiduciary duty.[15]

EMDC can be described as the devil's playground where the sinners are winners.[16] In the sections that follow, I will describe some of these common "sins" and how they are connected to the lack of meaningful Ministry policies and the serious corruption that exists within the facility. The next four sections (Parts III-VI) will discuss some of the most prevalent "sins" at EMDC, namely the issues surrounding avoidable deaths, the systemic drug problem, inhumane conditions, and understaffing.

III. Eighteen Deaths at EMDC Since 2009

Over 150 people have died in Ontario's correctional institutions over the past decade, and the majority of these deaths have not been subjected to a thorough, fully arms-length review.[17] In 2018 alone, 26 individuals died while in the custody of Ontario correctional institutions, with only six dying from natural causes.[18] Of note, 18 of these incarcerated individuals were legally innocent.[19] It is statutorily mandated in Ontario that the death of any incarcerated individual be investigated by a coroner, and if the investigation determines the death was not by natural causes, an inquest must be held.[20] There have been 72 coroner's inquests into prisoner deaths in Ontario correctional facilities in the last five years alone.[21]

---

15 *Johnson*, *supra* note 7 at paras 4, 14.

16 Selena Zabian, "'The devil's playground': Elgin-Middlesex Detention Centre", *The Gazette* (7 December 2018), online: <westerngazette.ca> [perma.cc/9ARU-PUX9].

17 Ministry, *Directions for Reform*, *supra* note 1 at 4.

18 "2019 Data release: Review of all inmate deaths within all facilities during 2018" (last modified 12 November 2019), online: *Ministry of the Solicitor General* <www.mcscs.jus.gov.on.ca> [perma.cc/NK8P-LZ9R].

19 *Ibid*.

20 *Coroners Act*, RSO 1990, c C-37, s 10(4.3).

21 The Ministry's website identifies 69 coroner's inquests involving "custody" between 2014 and 2020, 64 of which concerned Ontario jails. In addition, there were 8 inquests into the deaths of Timothy Lloyd Elliott, Jeffrey Kellar, Dexter Robert Laface, Louis Unelli, William Acheson, Trevor Burke, Martin Tykoliz, Stephen Neeson, David Gillan, Julien Walton, Peter McNelis, Paul Stevens, Jeffrey Sutton, Diane Lisle, Jamie High, and Jonathan Dew which occurred in Ontario correctional facilities but were not identified as "custody" deaths. "Office of the Chief Coroner: Verdicts and

The next section of this paper highlights all of the coroner's inquests in the last decade that have arisen from a prisoner's death at EMDC. This section will be followed by a discussion of the circumstances surrounding another incarcerated individual's death that did not result in an inquest, yet significantly impacted the lives of all who witnessed it. In comparing these differing circumstances, this paper hopes to highlight the inconsistencies in how deaths are addressed and the avoidable circumstances under which many occur.

A. Coroner's Inquests into Deaths at EMDC

Of the 18 publicized deaths at EMDC in the past decade, five inquests have been held for the deaths of prisoners from non-natural causes: Laura Straughan, Kenneth Randall Drysdale, Jamie High, Michael Fall, Floyd Sinclair Deleary, and Justin William Thompson. Laura Straughan died of bacterial pneumonia overnight, as there was no on-site health care available between 11:00 p.m. and 7:00 a.m.[22] Kenneth Randall Drysdale died from blunt trauma that resulted from seizures caused by methadone withdrawal when he was refused treatment by EMDC nurses.[23] Jamie High died from alcohol withdrawal when he was placed in segregation on suicide watch.[24] Michael Fall, Floyd Sinclair Deleary, and Justin William Thompson died from fentanyl toxicity in separate incidents (with the inquests for the latter held together).[25] The causes of death for the other twelve publicized EMDC deaths in the past decade include homicide, suicide, delirium, overdoses, medical conditions, and unknown causes.[26]

While these inquests took place over ten years, there are many similarities in the juries' recommendations. Each inquest recommended

---

Recommendations" (last modified 8 January 2021), online: *Ministry of the Solicitor General* <www.mcscs.jus.gov.on.ca> [perma.cc/YV98-49B4].

22 *Re Straughan*, 2011 CarswellOnt 19311 at paras 8, 10 (WL Can) [*Coroner's Verdict – Straughan*].

23 *Re Drysdale*, 2011 CarswellOnt 19340 at paras 4-9 (WL Can) [*Coroner's Verdict – Drysdale*].

24 *Re High*, 2016 CarswellOnt 22010 at paras 6, 9 (WL Can) [*Coroner's Verdict – High*].

25 *Re Fall*, 2019 CarswellOnt 22370 at para 8 (WL Can) [*Coroner's Verdict – Fall*]; *Re Deleary*, 2020 CarswellOnt 7982 at paras 3, 5 (WL Can) [*Coroner's Verdict – Deleary & Thompson*].

26 Trevithick, *supra* note 13; London Free Press Staff, "Coroner's inquest into 2017 London jailhouse death of inmate Michael Fall begins", *The London Free Press* (23 September 2019), online: <www.lfpress.com> [perma.cc/GMA5-4J8F] [Free Press Staff, "Coroner's inquest"].

implementing a comprehensive communications policy for correctional officers to ensure open communication between different shifts and staff. The inquests were also concerned with the lack of an infirmary at EMDC: the 2011 inquests recommended that an infirmary be opened, and the same recommendation was repeated nine years later.[27] Many of the inquests commented on the lack of training and emergency equipment available for correctional staff,[28] and the juries recommended equipping correctional officers and nurses with naloxone and first aid kits.[29]

Of particular note is a jury recommendation from the most recent inquest: the jury recommended that EMDC be torn down and a new facility be "designed to adequately accommodate, with dignity, the inmate population and to provide an environment with suitable space in which inmates may achieve rehabilitation and reintegration."[30] This recommendation implies that the concerns surrounding EMDC run so deep that the Ministry would be better off starting from scratch with an entirely new infrastructure.

These inquests highlighted issues that plague most Ontario correctional institutions (e.g., understaffing, lack of medical equipment, deficient policies, inadequate monitoring, etc.)[31] and provided meaningful recommendations on how to best address these issues at EMDC. Unfortunately, the Ministry is slow to act and selective in the recommendations it attempts to implement.

---

27 *Coroner's Verdict – Straughan, supra* note 22 at paras 11–12; *Coroner's Verdict – Drysdale, supra* note 23 at paras 13–14; Coroner's *Verdict – Deleary & Thompson, supra* note 25 at paras 33–34.

28 *Coroner's Verdict – Straughan, supra* note 22 at paras 13–14, 21–30; *Coroner's Verdict – Drysdale, supra* note 23 at paras 16–27; *Coroner's Verdict – High, supra* note 24 at paras 25–51.

29 *Coroner's Verdict – Fall, supra* note 25 at paras 38–40, 44–46; *Coroner's Verdict – Deleary & Thompson, supra* note 25 at paras 85–101.

30 *Coroner's Verdict – Deleary & Thompson, supra* note 25 at para 31.

31 "Independent Review of Ontario Corrections" (last modified 5 February 2020), online: *Ministry of the Solicitor General* <www.mcscs.jus.gov.on.ca> [perma.cc/9FYP-GWBC] [Ministry, "Independent Review"]; Justice David P Cole, *Final Report of the Independent Reviewer on the Ontario Ministry of the Solicitor General's Compliance with the 2013 "Jahn Settlement Agreement" and the Terms of the Consent Order of January 16, 2018 Issued by the Human Rights Tribunal of Ontario* (Toronto: Ministry of the Solicitor General, 25 February 2020), online: *Ministry of the Solicitor General* <www.mcscs.jus.gov.on.ca> [perma.cc/SR6W-UMYM] [Justice Cole, *Final Report*].

As an example, it took 18 months for the Ministry to address the recommendations from the 2014 inquest into Jamie High's death and, even then, the policies it implemented fell short of the jury's directions.[32] After receiving the same recommendation from multiple inquests, the Ministry has still not installed real-time monitoring in all segregation cells, a very basic request that could save the lives of many individuals.

The Ministry is also slow to react on recommendations made by its own advisors. On February 28, 2019, Justice David P. Cole, the appointed Independent Reviewer for the Ministry's compliance with the Jahn Settlement,[33] delivered an interim report with recommendations for the Ministry on institutional discipline and improving linkages between courts and corrections.[34] One year later, Justice Cole delivered his final report, in which he noted that the Ministry had failed to operationalize any of his recommendations and had only committed to considering implementing some of them.[35]

The recommendations prepared by Howard Sapers, the appointed Independent Advisor on Corrections Reform, received a similar fate. Sapers prepared three interim reports and two final reports, including the detailed outline in the *Directions for Reform* for the Ministry in 2017 and 2018.[36] As a response to these reports, Ontario passed the *Correctional Services and Reintegration Act*[37] in May 2018, which was intended to improve conditions, increase transparency, and promote the rehabilitation and reintegration of

---

32 *High, Re,* 2018 CarswellOnt 23060. A London Free Press article highlighted many lawyer's criticisms of the Ministry's lacklustre response: Randy Richmond, "Pain and hope: Province finally responds to jail inquest", *The London Free Press* (2 June 2018), online: <lfpress.com> [perma.cc/2GAJ-CCJV].

33 The Jahn settlement was reached between the Ministry and OHRC in 2013 to implement ten public interest remedies in Ontario correctional institutions, targeted at the use of segregation and treatment of prisoners: "Segregation and mental health in Ontario's prisons: Jahn v. Ministry of Community Safety and Correctional Services", online: *OHRC* <www.ohrc.on.ca> [perma.cc/B4TZ-JR99].

34 Justice David P Cole, *Interim Report of the Independent Reviewer of the Ontario Ministry of Correctional Services' Compliance with the 2013 Jahn Settlement Agreement and the Terms of the Consent Order of January 16, 2018, Issued by the Human Rights Tribunal of Ontario* (Toronto, Ministry of the Solicitor General, 28 February 2019), online: <www3.ohrc.on.ca> [perma.cc/TE4N-999C].

35 Justice Cole, *Final Report*, *supra* note 31.

36 Ministry, *Directions for Reform*, *supra* note 1.

37 SO 2018, c 6, Sched 2.

individuals in custody.[38] Despite receiving royal assent on May 7, 2018, this new legislation never came into force and Sapers was not reappointed.[39]

The Ministry has consistently, and almost without exception, failed to meaningfully and adequately implement recommendations for reform. Many of these recommendations are not controversial and require minimum effort on the Ministry's part.[40] The Ministry's lacklustre response to recommendations made by its appointed advisors and Coroner's inquest juries is quite disappointing. What is of even more concern is the Ministry's failure to address or respond to other shocking events that have occurred in Ontario correctional institutions, such as the murder of Adam Kargus.[41]

B. The Murder of Adam Kargus at EMDC

At 7:56 p.m. on October 31, 2013, Adam Kargus was choked, punched, kicked, and stomped on by his cellmate, Anthony George, and was murdered at approximately 8:53 p.m. in their shared cell. Between this time and 9:50 a.m. on November 1, correctional officers conducted regular security rounds without taking notice of what had happened in their cell. At 8:16 a.m., Anthony George dragged Adam Kargus' body, wrapped in bloody sheets, from their cell, across the unit, and into the shower area. Anthony George then engaged in various activities, attempting to clean up and dispose of the evidence related to the murder, with the assistance of other individuals. At 9:50 a.m., a correctional officer conducting regular rounds discovered Adam Kargus' body in the shower area. All of these events were captured by a security camera whose field of view captured the inside of their shared cell.[42]

---

38 Ministry of the Community Safety and Correctional Services, *Ontario Passes Legislation to Transform Adult Correctional System: Improving Conditions and Increasing Transparency to Create Better Outcomes* (News Release) (Ottawa: Ministry of the Solicitor General, 3 May 2018), online: <www.news.ontario.ca> [perma.cc/3QR2-UU7Z].

39 Patrick White, "Ford government to dismiss Ontario's prison reformer Howard Sapers", *The Globe and Mail* (17 December 2018), online: <www.theglobeandmail.com> [perma.cc/X4WX-E4CH].

40 See e.g. Justice Cole, *Final Report*, *supra* note 31 at "Ministry responses to Independent Reviewer's Interim Report" where he outlines the Ministry's response to all of his recommendations and outlines the steps required to implement them.

41 A Coroner's inquest was not held for Adam Kargus.

42 *Ontario Public Service Employees Union (Langford et al) v Ontario (Community Safety and Correctional Services)*, 2017 CanLII 30327 (ON GSB) at paras 4–7 [*Langford et al*].

Not surprisingly, these horrific events at EMDC resulted in multiple lawsuits. Anthony George was charged with second-degree murder and ultimately pled guilty.[43] Prisoners David Cake and Bradley Mielke were charged with being accessories to murder after the fact for helping Anthony George attempt to cover up the murder. Cake pled guilty to obstruction of justice,[44] and the charges against Mielke were withdrawn in September 2015.[45] Two correctional officers, Leslie Lonsbary and Greg Langford, were charged with failing to provide the necessaries of life, along with EMDC operational manager Stephen Jurkus. The charges against Langford were withdrawn and he was subsequently called as a witness in the trial against Lonsbary and Jurkus.[46] Ultimately, Jurkus was declared not guilty and a mistrial was declared for Lonsbary.[47]

1. Correctional Officers' Grievance Against the Ministry for Reprimands Related to Adam Kargus' Death

Outside of these court battles, EMDC terminated five correctional officers (including Lonsbary and Langford) and gave written reprimands to two correctional officers for their various failures in performance on the evening and morning in question. These seven correctional officers filed grievances against the discipline imposed, which were heard by the Ontario Grievance Settlement Board (the "Board"). To resolve this dispute, the Board conducted an intensive review of the policies and procedures at EMDC as a result of the Ministry's assertion that the correctional officers had failed to perform many fundamental and core requirements of their jobs.

The Ministry argued that the correctional officers had violated specific employer policies and it was irrelevant that the correctional officers had performed their jobs in the way they "always had."[48] The union representing the disciplined correctional officers responded to these allegations with conclusive evidence that the Ministry's written policies had been

---

43 *R v Jurkus and Lonsbary*, 2018 ONSC 4766 at para 2 [*Jurkus and Lonsbary*].

44 *R v Cake & Mielke & George & Sun Media,* 2014 ONSC 3413 at paras 2–3.

45 London Free Press Staff, "Correctional officer and manager at London's jail face trial in death of inmate Adam Kargus", *The London Free Press* (11 January 2016), online: <lfpress.com> [perma.cc/93UH-BZ2R].

46 *Jurkus and Lonsbary*, *supra* note 43 at para 3.

47 CBC News, "Jury delivers mixed decisions in trial of former EMDC employees", *CBC News* (6 February 2019), online: <www.cbc.ca/news> [perma.cc/US6Z-BC63].

48 *Langford et al, supra* note 42 at para 17.

"universally ignored for decades at EMDC," and several tenures of superintendents and managers were fully aware of these improper practices.[49]

After reviewing EMDC's policies and procedures, the Board held it was indisputable that EMDC's supervisors knew about the improper practices, yet had not brought a disciplinary action against correctional officers for these discrepancies before Adam Kargus' death.[50] Some of these improper practices included correctional officers refraining from performing tours at certain hours, irregular shift changeover policies, conducting poor quality tours at rapid paces, allowing individuals to cover the lights in their cells, and failing to check for live bodies.[51]

The evidence demonstrated that the typical tour was 40–60 seconds, with the correctional officers walking at a medium to brisk walking pace, not pausing in front of cells, and sometimes even failing to turn their heads during the tours.[52] While the Board's conclusions on the quality of work performed at EMDC were alarming, the Ministry had no justification for reprimanding these correctional officers as there was no evidence that their job performance was different in quality than the accepted practices at EMDC.

The Board's investigation and ultimate findings on the standard operating procedures at EMDC provide a perfect example of the inadequate policies and enforcement measures at the facility. The Ministry has policies in place that were specifically developed to ensure prisoner safety and structure at Ontario correctional institutions. These policies are blatantly ignored at EMDC with the absence of reprimands and accompanied by a failure to provide basic equipment (such as "mandatory" flashlights that were not available at EMDC on October 31, 2013), with the full knowledge of managers who review the logbooks/security footage.[53]

This lack of direct supervision and enforcement of policies is not an EMDC-specific issue. In the Toronto South Detention Centre, incarcerated individuals raised concerns about the unlawful use of "sanctions" by correctional officers that were unpredictable and inconsistent in practice as

---

49 *Ibid* at para 21.
50 *Ibid* at para 31.
51 *Ibid* at paras 35–36, 47–49, 56–60, 66–71.
52 *Ibid* at para 70.
53 *Ibid* at para 61.

"every guard has their own rules."[54] The OHRC followed up with the Ministry on the legal authority for these sanctions and learned that the policy governing sanctions stated "if you break a rule, the Unit Officer will determine the consequences."[55] There are no due process protections for incarcerated individuals and correctional officers are encouraged to "be creative" in determining punishments.

This is not a new phenomenon that the Ministry is slow or even absent in addressing complaints and concerns about questionable practices in its correctional facilities. In 2013, the Ontario Ombudsman released a report on the overuse of force and violence by correctional officers in Ontario correctional institutions.[56] In this report, the Ombudsman criticized the Ministry for denying the Ombudsman's findings until there was incontrovertible evidence of wrongdoing, and even then, enacting slow-moving policies that did little to hold correctional officers accountable.[57]

To address some of these concerns about the lack of oversight, Howard Sapers' *Directions for Reform* include establishing a fair and expeditious inmate complaints process and aligning policy and operational practices with the presumption of innocence.[58] Similarly, Justice Cole's final report recommended the establishment of a unit or branch within the Ministry that was exclusively focused on ensuring province-wide operational compliance with the Ministry's obligations under the Jahn settlement.[59] Implementation of either or both of these recommendations would surely improve the Ministry's ability to ensure the on-the-ground compliance and enforcement of its policies.

2. Incarcerated Individuals' Response to Adam Kargus' Death

The Ministry's (unsuccessful) attempt to reprimand correctional officers for the events surrounding Adam Kargus' death is a prime example of the Ministry's problematic prioritization of its public appearance rather than on

---

54 OHRC, *Report on conditions of confinement at Toronto South Detention Centre* (Toronto: OHRC, 30 March 2020), online: <www.ohrc.on.ca> [perma.cc/Q7DL-RSM6].

55 *Ibid*.

56 Ombudsman Ontario, *The Code: Investigation into the Ministry of Community Safety and Correctional Services' response to allegations of excessive use of force against inmates* (Toronto: Office of the Ombudsman of Ontario, June 2013), online: <www.ombudsman.on.ca> [perma.cc/BCU3-9E2E].

57 *Ibid* at 6.

58 Ministry, *Directions for Reform*, *supra* note 1 at 80–81, 97.

59 Justice Cole, *Final Report*, *supra* note 31, Recommendation 3.2.

making meaningful changes inside correctional facilities. It is apparent that the Ministry was more concerned with disciplining its correctional officers than reviewing the practices at EMDC that allowed this horrific murder to occur and the effect witnessing such events had on the surrounding prisoners.

At Jurkus' and Lonsbary's criminal trial, a nearby prisoner testified that he could hear "excessive banging" from the floor below and that Adam Kargus had repeatedly screamed for help, but no correctional officers came to investigate.[60] During the wrongful dismissal grievance, Lonsbary admitted that he closed the office door to "dull the sound" coming from Adam Kargus' unit as he assumed the excessive noise was caused by a sporting event.[61] The prisoners in the unit were not as fortunate and had nothing to muffle the horrendous sounds coming from the cell.

As a result of these events, six prisoners filed a $15-million lawsuit against the Ministry for being trapped in their cells while they were forced to helplessly watch and listen to Adam Kargus' brutal torture and murder. In their claim, the prisoners recounted seeing the look of terror on Adam's face and hearing his cries for help for an hour. Not only were these individuals forced to witness these horrific events, but they also had to endure George's boasting about the murder and see the bloody evidence as the body was dragged to the shower the following morning.

Some of these individuals were locked in their cells for two weeks or more after witnessing the murder. None of these individuals were offered or received adequate counselling, and they continue to suffer from psychological damage and post-traumatic stress, including lasting nervous shock with difficulty sleeping, continued depression, anxiety, and panic attacks. In their statement of defence, the Ministry denied liability for any problems the prisoners experienced and stated that Adam Kargus' death did not result in any psychological or psychiatric illnesses for any incarcerated individuals.[62]

One of these individuals, James Pigeau, was 27-years old at the time of this murder and suffered from bipolar disorder. Following Adam Kargus' death, he was diagnosed with post-traumatic stress disorder and treated at a

---

60 *R v Jurkus*, 2018 ONCA 489 at para 1.

61 *Langford et al, supra* note 42 at paras 174–80.

62 London Free Press Staff, "Inmates at London jail sue province for $15M after seeing, hearing fellow prisoner killed", *The London Free Press* (1 December 2017), online: <lfpress.com> [perma.cc/9PRY-PRBM].

correctional psychiatric centre. James Pigeau became an activist for improving the terrible conditions at EMDC. He kept track of the frequent lockdowns and wrote letters to local news outlets describing the horrific conditions he experienced. In August 2017, he informed the London Free Press that he was attacked by a correctional officer, and, in fall 2017, he was jumped by multiple prisoners.[63] James Pigeau was beaten so badly that he was left in a wheelchair.[64] On January 7, 2018, he died of a suspected fentanyl overdose while on remand at EMDC. James Pigeau is one of many people whose deaths could have been prevented with the implementation of well-known, recommended, better practices at EMDC.[65]

C. Final Thoughts on Deaths in Ontario Correctional Institutions

The deaths of Laura Straughan, Kenneth Randall Drysdale, Jamie High, Michael Fall, Floyd Sinclair Deleary, Justin William Thompson, Adam Kargus, James Pigeau, and the other eight individuals who died at EMDC in the last decade were likely avoidable. With a proper infirmary, Laura Straughan's bacterial pneumonia could have been properly diagnosed and Kenneth Randall Drysdale's seizures could have been properly treated. Sufficient training of staff for treating individuals with addictions likely could have prevented the deaths of Jamie High, Michael Fall, Floyd Sinclair Deleary, Justin William Thompson, and James Pigeau's substance abuse-caused deaths. Adam Kargus' death may have also been avoidable, as it is suspected that Anthony George was intoxicated that evening and had been refused medical treatment by a nurse earlier that day.[66]

While correctional officers are provided with basic mental health training, it is insufficient to equip them to appropriately respond to individuals with mental health disabilities and provide sufficient assistance.[67] With the proper training, staffing, funding, and oversight of

---

63 *Ibid.* See also Paula Duhatschek, "EMDC inmate who died Sunday had been assaulted before", *CBC News* (8 January 2019), online: <www.cbc.ca/news/canada/london/emdc-inmate-who-died-sunday-had-been-assaulted-before-1.4477981>.

64 Maryam Mirza, "Did a corrections system in crisis turn jail time into a death sentence for James Pigeau?", *Brampton Guardian* (25 June 2019), online: <www.bramptonguardian.com> [perma.cc/K8C4-TBNG].

65 Also note that the Ministry did not perform an inquest into James Pigeau's death despite the fact that he clearly did not die of natural causes.

66 *Langford et al*, *supra* note 42 at para 5.

67 OHRC, "Letter to Solicitor General Jones", *supra* note 10.

correctional officers, these terrible events could have been avoided. With more than 150 deaths in Ontario correctional institutions in the last decade, it is imperative that the Ministry amend its policies, provide counselling for incarcerated individuals and correctional officers alike, and take responsibility for so many of these avoidable deaths.

IV. Systemic Prevalence of Drugs in Custody

Studies in Canada have consistently connected high rates of overall drug use and injection drug use to incarceration in provincial and federal institutions. For instance, one study found that 68% of 597 prisoners surveyed in an Ontario correctional institution had used drugs, with 51% of prisoners admitting to using drugs other than cannabis, and 17% admitting to injecting drugs before incarceration.[68] Another study of 500 prisoners in an Ontario correctional facility reported that more than half of prisoners had used opioids, crack, cocaine, or methamphetamine in the previous year, and 12.2% had injected drugs.[69] Substance abuse issues do not end when an individual enters prison, and there are numerous ways for drugs to end up in Ontario correctional institutions.

The Ontario *Ministry of Correctional Services Act* ("MCSA") allows the superintendent of a jail to authorize searches of any person or prisoner in correctional institutions, as well as the property of any person on the institution's premises.[70] The MCSA also permits the seizure and disposal of any contraband found during a search.[71] Contraband includes anything a prisoner is not authorized to have, or anything a prisoner is authorized to have but is not authorized to have in the place, quantity, or for the purpose it is being used.[72] Contraband searches are a routine aspect of prison life, and incarcerated individuals have found creative ways to protect their

---

68 Liviana M. Calzavara et al, "Prior opiate injection and incarceration history predict injection drug use among inmates" (2003) 98:9 Addiction 1257 at 1259.

69 Fiona G. Kouyoumdjian et al, "Drug use prior to incarceration and associated socio-behavioural factors among males in a provincial correctional facility in Ontario, Canada" (2014) 105:3 Can J Pub Health e198 at e199–20.

70 MCSA, *supra* note 4, s 23.1(1).

71 *Ibid*, s 23.1(2).

72 *Ibid*, ss 23.1(3)(a)–(d).

contraband. The consequences of being caught are severe, and disputes over the ownership of contraband can lead to conflict between individuals.[73]

There is an undeniable systemic drug problem in Ontario correctional facilities, and the frequent overdoses at EMDC highlight some of these concerns. Overdoses at EMDC are reported in the news all too often. In March 2018, four female prisoners overdosed in one night.[74] On August 9th, 2018, seven individuals simultaneously overdosed on opioids and were rushed to the hospital.[75] On July 26, 2020, during a global pandemic when access to drugs is more difficult, an incarcerated individual was rushed to the hospital for a suspected overdose.[76]

Fortunately, no prisoner died in any of these instances. Unfortunately, this is not the case for all individuals who overdose at EMDC, as demonstrated by the deaths of Michael Fall, Floyd Sinclair Deleary, Justin William Thompson, and James Pigeau (as discussed above). The inquests into these deaths illustrate the need for better training and equipment for personnel to ensure they are prepared to recognize and react to overdoses. Based on the continuous and recent reports of overdoses at EMDC, it seems unlikely that these recommendations have been implemented in an effective manner.

A. Prisoners Smuggling Narcotics into EMDC

The quantity and types of black-market drugs available in EMDC are shocking. Between 2015 and 2016, EMDC guards found "unknown pills" 70 times, while the next most common contraband seized was disposable lighters (found 64 times) and extra laundry (found 57 times).[77] Other drugs found during this time period included: known pills such as anti-psychotics and opioids (found 20 times), unknown powders (found 8 times), marijuana (found 21 times), the butts of marijuana cigarettes known as roaches (found 12 times), and crystal meth (found once).[78]

---

73 *Langford et al*, *supra* note 42 at para 115.

74 Dan Brown & Randy Richmond, "Seven inmate drug overdoses found simultaneously at London's jail", *The London Free Press* (10 August 2018), online: <lfpress.com> [perma.cc/PVL7-2XSW].

75 *Ibid*.

76 Justin Zadorsky, "Woman taken to hospital after suspected overdose at EMDC", *CTV News* (27 July 2020), online: <london.ctvnews.ca> [perma.cc/Y6QR-3AQ2].

77 Butler, *supra* note 14.

78 *Ibid*.

In 2012, an individual serving an intermittent sentence at EMDC was caught smuggling in prescription drugs on six occasions and was given a misconduct by staff on each occasion.[79] On one such occasion, this individual was caught sneaking in 213 OxyNeo and 7 Cesamet pills located in the collar of her coat and tucked in her underwear.[80] It is reassuring that EMDC staff were able to stop these 220 pills from entering EMDC, but it is apparent that many other incarcerated individuals have been more cunning and successful with their smuggling techniques.

Aside from voluntary drug smuggling concerns, there are also concerns about the blackmail used against incarcerated individuals to smuggle in drugs. One such individual testified that she was approached by thugs before her drug treatment court attendance and was threatened with violence against herself and her daughter if she did not sneak drugs into EMDC.[81] She was charged with possession of hydromorphone during a search at EMDC and testified that she was told she would "get her face punched and head kicked" and stated they were "going to get me and my daughter."[82] Other prisoners at EMDC informed OHRC of similar experiences, and these incarcerated individuals who fail to smuggle in contraband drugs face serious threats or actual violence.[83]

In early 2018, EMDC installed a full-body scanner to search for external and internal contraband as an attempt to fight the systemic drug problem.[84] EMDC also has a canine unit to "serve as a deterrent to contraband" and is hoping to get new ion scanners that can identify trace elements of drugs on individuals' mail.[85] On February 8th, 2018, a prisoner was caught attempting to smuggle in 20 matches, rolling papers, 167 grams of marijuana, 1 gram of marijuana shatter, 1 gram of cocaine, 2 grams of crystal methamphetamine, and 3 grams of fentanyl into EMDC by the electronic

---

79 *R v Fitzsimmons*, 2016 ONCA 107 at para 2.

80 *Ibid* at para 3.

81 *R v Kynock*, 2014 ONCJ 251 at para 25.

82 *Ibid*.

83 OHRC, "Letter to Solicitor General Jones", *supra* note 10.

84 "Elgin-Middlesex Detention Centre Enhancement Initiative" (last modified 2 May 2018), online: *Ministry of the Solicitor General* <www.mcscs.jus.gov.on.ca> [perma.cc/MT 8P-FT78] [Ministry, "EMDC"]

85 "Another tense weekend at EMDC after multiple drug overdoses", *CBC News* (23 April 2019), online: <www.cbc.ca/news> [perma.cc/P7QZ-85UQ] [CBC News, "Another tense weekend"].

body scanning device.[86] This prisoner's story highlights the sheer volume of drugs being smuggled in by one person and raises concerns about other similar quantities of drugs that are not caught by the full-body scanner.

B. Correctional Officers Smuggling Narcotics into EMDC

Incarcerated individuals are not the only drug mules smuggling narcotics into EMDC. On the morning of February 14th, 2015, prisoner Nelson Moran called Tanya Zavitz (a correctional officer at EMDC) and asked her to pick up and deliver some items to the jail. Zavitz arrived at EMDC at 8:30 a.m. and went straight to Moran's unit. Video surveillance showed Zavitz passing Moran two white envelopes and Moran tucking these envelopes in his pants. Moran then went to the shower area where there were no cameras.[87]

A "veritable conga line" of prisoners headed in and out of the shower area, and sometime later correctional officers testified that they could smell marijuana. Between 12:45 and 1:15 p.m., three cells in Moran's unit were searched, and the following narcotics were confiscated: 17 grams of marijuana, 1 gram of hash, and 28 grams of hash oil. Zavitz was charged with three counts of drug trafficking, and Moran was charged with three counts of trafficking and three counts of possession.[88]

At trial, the Honourable Justice John Skowronski held that because drugs were so prevalent at EMDC and searches were so sporadic, there was no way of proving that the suspicious transaction between Zavitz and Moran had led to the treasure trove of narcotics found.[89] Justice Skowronski also noted that "[t]he existence of drugs in EMDC is seemingly epidemic," and searches that might locate contraband are sometimes not carried out for weeks. Ultimately, Zavitz and Moran were acquitted of all counts.

It is interesting to note that Tanya Zavitz was one of the correctional officers who received a written reprimand for Adam Kargus' murder. She witnessed Anthony George choking Adam Kargus earlier on the day of the murder, after she complimented Anthony George on his shirt, and failed to address and report the altercation properly.[90] It may be a coincidence that

---

86 *R v Doxtator*, 2019 ONCJ 26 at paras 8–10.

87 "Officer, inmate cleared of trafficking weed because drug use in their jail is 'seemingly epidemic,' says judge", *National Post* (14 June 2016), online: <www.nationalpost.com> [perma.cc/JSR9-GYCS].

88 *Ibid*.

89 *Ibid*.

90 *Langford et al*, *supra* note 42 at para 96.

one correctional officer was involved in two highly publicized incidents in such a short period of time, or it may be an indication of the numerous horrifying incidents that regularly occur at EMDC. While Zavitz's behaviour may seem questionable at best from an outside perspective, questionable conduct is the best way, if not the only way, to survive the constant threats and corruption at EMDC.

C. Contraband Alcoholic Beverages at EMDC

Another major substance-related issue in Ontario correctional institutions is contraband alcoholic beverages. "Brew" is an improvised alcoholic concoction made by incarcerated individuals by using sugar and fermented fruit. In 2003, a total of 8,732 litres of alcohol/brew were seized in Canadian federal prisons.[91] While it is clear that drug overdoses are an ongoing concern at EMDC, one correctional officer acknowledged that there is an even greater risk of alcohol poisoning.[92] Between 2015 and 2016, correctional officers reported finding brew 42 times at EMDC.[93] Brew is known to have dangerous impacts on individuals, causing mood swings, depression, aggression, and suicidal thoughts.[94] Anthony George was believed to be drunk on brew the day that he murdered Adam Kargus.[95]

D. Final Thoughts on the Drug Problem at Ontario Correctional Institutions

In 2018, Ontario's Chief Coroner held an inquest into the overdose of eight men in custody between March 2012 and 2016 at another Ontario correctional institution for individuals on remand.[96] The jury recommendations included requiring weekly audits of prisoner admissions by the Ministry, designating a liaison officer from the local police department to meet with representatives at the detention centre, and

---

91 "Substance Abuse in Corrections FAQs" (2004) at 4, online (pdf): *Canadian Centre on Substance Use and Addiction* <www.ccsa.ca/substance-abuse-corrections-faqs> [perma.cc/5ZR5-ME72].

92 *Langford et al*, *supra* note 42 at para 115.

93 Butler, *supra* note 14.

94 *Langford et al*, *supra* note 42 at para 115.

95 *Ibid* at para 116.

96 *Unelli Re*, 2018 CarswellOnt 23166 at para 3 (WL Can).

creating a working group to further improve health care services to individuals at the detention centre.[97]

Implementation of any or all of these oversight mechanisms at EMDC and other Ontario correctional institutions would be a game-changer for fighting the systemic drug problem. Similarly, implementation of some of the recommendations from EMDC-related inquests would be of great assistance. These recommendations included improving communication policies between correctional officers at shift changes to ensure there is awareness of individuals who have recently been found in possession of contraband and equipping staff with naloxone kits.[98] As discussed above, the Ministry is slow to act on any of these recommendations and very selective on the recommendations they do choose to implement.

While this paper is primarily concerned with reform recommendations targeting prison infrastructures, it is also important to consider other avenues of reform for combatting the drug crisis. One such avenue is the decriminalization of personal-use drug offences and the implementation of non-criminal penalties (e.g., fines).[99] The decriminalization of these offences could decrease the drug-using prison population, unsafe drug consumption practices, and the stigma associated with drug use.[100]

As decriminalization requires legislative action on behalf of the federal government, it is outside the Ministry's jurisdiction. As such, the remaining discussion will focus on drug reform mechanisms that are within the Ministry's capabilities, namely harm reduction mechanisms that target the health, social, and economic consequences of the drug crisis. These interventions include opioid substitution therapy, needle and syringe programs, overdose prevention and reversal, and testing for treatment of HIV and Hepatitis C.[101]

Harm reduction measures have been endorsed by the World Health Organization ("WHO") and United Nations ("UN") as essential public

---

97 *Ibid* at paras 41, 59, 121.

98 See e.g. *Coroner's Verdict – Fall, supra* note 25 at paras 26–28, 38–40.

99 Rebecca Jesseman & Doris Payer, "Decriminalization: Options and Evidence" (June 2018) at 1, online (pdf): *Canadian Centre on Substance Use and Addiction* <www.ccsa.ca> [perma.cc/FB23-TMFN].

100 Matthew Bonn et al, "Addressing the Syndemic of HIV, Hepatitis C, Overdose, and COVID-19 Among People Who Use Drugs: The Potential Roles for Decriminalization and Safe Supply" (2020) 81:5 J Stud Alcohol & Drugs 556 at 557.

101 Gen Sander, Sam Shirley-Beavan & Katie Stone, "The Global State of Harm Reduction in Prisons" (2019) 25:2 J Correct Health Care 105 at 107.

health measures both in the community and prison environment.[102] They are widely recognized as a legally binding human rights obligation[103] and captured under *Mandela Rule* 24, which requires that prisoners have access to equivalent health care to that in the community.[104] The Ministry has failed to implement many of these measures meaningfully.

EMDC does not have equivalent health care to that in the community. It still does not have an infirmary, despite the numerous calls for action and the overdoses and deaths that continue to occur. It is clear that the Health Care Unit is not sufficient for meeting incarcerated individuals' needs. Even when nurses or social workers are available at EMDC, there is an inadequate space for them to meet with their patients confidentially.[105]

While EMDC has methadone and suboxone programs available, the programs are realistically inaccessible to individuals unless they were already prescribed methadone before their arrest. It is also not reassuring that naloxone kits are only sometimes available and, even then, only sometimes successfully administered.[106] There have been at least seven deaths reportedly caused by overdose in the past decade,[107] with four of these deaths occurring since June 2017, and at least sixteen individuals rushed to hospitals for fentanyl overdose in 2018 alone.[108]

When questioned about the drug epidemic, Greg Flood, the spokesperson for EMDC, stated that "[s]taff are trained to be vigilant" for drugs, including "frequent and thorough searches of any suspected

---

102 "Policy Brief: HIV prevention, treatment and care in prisons and other closed settings: a comprehensive package of interventions" (Austria: UNODC, June 2013) at 1, online: <www.who.int> [perma.cc/HFB7-539V].

103 Dainius Pūras, "Open Letter by the Special Rapporteur on the right of everyone to the highest attainable standard of mental and physical health, Dainius Pūras, in the context of the preparations for the UN General Assembly Special Session on the Drug Problem (UNGASS), which will take place in New York in April 2016" (Geneva: OHCHR, 7 December 2015) at 5, online: <www.ohchr.org> [perma.cc/Z6H6-JFZF].

104 *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, GA Res 70/175, UNGAOR, 70th Sess, UN Doc A/RES/70/175 (2015) 12 [*Mandela Rules*].

105 OHRC, "Letter to Solicitor General Jones", *supra* note 10.

106 *Ibid*.

107 Free Press Staff, "Coroner's inquest", *supra* note 26.

108 Brown & Richmond, *supra* note 74; Solicitor General, "News Release: Enhancing Security Measures and Improving Safety at Elgin-Middlesex Detention Centre," *Ontario* (28 September 2018), online: <news.ontario.ca/en/release/50110/enhancing-security-measures-and-improving-safety-at-elgin-middlesex-detention-centre>.

contraband."[109] These statements were made after three individuals overdosed in one weekend in April 2019, causing correctional officers to administer naloxone and hurriedly transport the individuals to a hospital.[110] It is obvious that these "vigilant" efforts are insufficient, and there will continue to be frequent drug-related deaths and overdoses until the Ministry makes drastic changes.

Harm reduction mechanisms are not captured by the Ministry's current approach to the systemic drug issues as it continues to be punitive rather than targeted at risk management. Incarcerated individuals do not immediately master their addictions, and the challenges associated with drug and alcohol addictions continue to endure while in prison.[111] Implementing prison needle and syringe programs can help reduce many of the associated risks with drug use and reduce drug overdoses.[112] While the federal prison system has started to roll out safe injection programs,[113] the Ontario correctional system has not followed suit.

V. INHUMANE AND UNSANITARY CONDITIONS AT EMDC

It is well established that incarcerated individuals in Ontario correctional institutions are subjected to inhumane and unsanitary conditions.[114] Some of these unacceptable conditions interfere with prisoners' freedom of movement and right to meaningful contact through the inappropriate and excessive use of lockdowns and segregation. Other conditions fail to comport with basic standards of human decency, such as

---

109 CBC News, "Another tense weekend", *supra* note 85.

110 *Ibid*.

111 James Gacek & Rosemary Ricciardelli, "Constructing, Assessing, and Managing the Risk Posed by Intoxicants within Federal Prisons" (2020) 43:3 Man LJ 273 at 288.

112 "A Public Health Failure: Former Prisoner and HIV Groups in Court Suing the Government of Canada for Failing to Provide Access to Effective Prison Needle and Syringe Program" (9 December 2019), online: *HIV/AIDS Legal Network* <www.hivlegal network.ca> [perma.cc/YAE4-HQK8].

113 "The Prison Needle Exchange Program" (last modified 28 August 2019), online: *Correctional Services Canada* <www.csc-scc.gc.ca> [perma.cc/8WU2-WVFJ].

114 "Joint submission to Ontario's consultation on the 2020 budget: Necessary investments in Ontario's correctional system" (21 January 2020), online: *OHRC* <www.ohrc.on.ca> [perma.cc/6UV4-22TZ]; Office of the Auditor General of Ontario, *2019 Annual Report*, vol 3, ch 1, "Adult Correctional Institutions" (Toronto: Office of the Auditor General, 4 December 2019), online: <www.auditor.on.ca> [perma.cc/C8FR-H8HX] [Auditor General, *2019 Annual Report*].

forcing prisoners to use the toilet in full view of other prisoners and preventing access to telephones, showers, and fresh air for up to a week.[115] Incarcerated individuals are given clothing, bedding and towels that are stained with urine, blood and feces, suffer through bedbug infestations, and are forced to use unclean shared nail clippers that may result in untreatable fungal infections.[116]

In 2019–2020, the Ontario Office of the Ombudsman received 6,000 complaints about correctional facilities, with many of them signalling systemic issues involving lack of access to services, persistent lockdowns, or overcrowding.[117] Of these complaints, 2,429 were health-related, 186 related to methadone, 78 related to prisoner-on-prisoner assaults, 75 related to the lack of Indigenous services, 118 related to excessive use of force by correctional officers, and 162 related to segregation.[118] These 162 complaints were a decrease from the previous year (266 in 2018–2019)[119] as a result of the Ministry's attempts to reform its use of administrative segregation. Despite this attempt at reform, the Ministry's use of segregation remains habitual, continual, and the Ministry "has fallen short in fulfilling the promises or undertakings it made, to do better."[120]

Unsurprisingly, the conditions at EMDC are just as unacceptable as other Ontario correctional institutions. In early 2019, OHRC visited EMDC as part of their monitoring of the Jahn settlement.[121] Although the institution was cleaned for OHRC's visit, there was still a "noticeable smell" throughout the institution coupled with poor air quality and concerns of

---

115 *R v Persad*, 2020 ONSC 188 at para 9 [*Persad*]. This case was concerned with conditions at the Toronto South Detention Centre but is reflective of the experiences of incarcerated individuals at every Ontario correctional institution.

116 *Ibid* at para 12.

117 Ombudsman Ontario, *2019–2020 Annual Report* (Toronto, Office of the Ombudsman of Ontario, 30 June 2020) at 33, online (pdf): <www.ombudsman.on.ca> [perma.cc/U9LX-QHRC] [Ontario Ombudsman, *2019-2020*].

118 *Ibid* at 33–36.

119 Ombudsman Ontario, *2018–2019 Annual Report* (Toronto: Office of the Ombudsman of Ontario, 25 June 2019) at 24, online (pdf): <www.ombudsman.on.ca> [perma.cc/T9TX-G5RB] [Ontario Ombudsman, *2018–2019*].

120 *Francis v Ontario*, 2020 ONSC 1644 at para 581 [*Francis*]. See also Ministry, "Independent Review", *supra* note 31; Justice Cole, *Final Report, supra* note 31.

121 "Jahn Settlement: Special Advisors Appointed for Adult Corrections" (24 October 2019), online: *Ministry of the Solicitor General* <www.mcsc.jus.gov.on.ca> [perma.cc/TN9T-V3TK].

mould.[122] OHRC described the conditions as "dehumanizing, antithetical to rehabilitation and reintegration, and pose a serious risk to the health and safety of prisoners and correctional officers."[123] The plethora of safety concerns observed at EMDC violates numerous international human rights conventions, including *Mandela Rules* 12, 14, 15, 17, 23 and 35, which provide minimum standards for the sanitation, maintenance, hygiene, clothing, pre/postnatal care, and information made available for incarcerated individuals.[124]

The following sections will highlight some of the worrisome conditions at EMDC as a representation of the systemic issues surrounding the living conditions in Ontario correctional institutions.

A. Overcrowding of Individuals at EMDC

When it was built in 1977, EMDC had a capacity of 190 individuals in single cells.[125] These original sleeping accommodations were compliant with the *Mandela Rules*, which state that it is "not desirable to have two prisoners in a cell or room," even where administration must make an exception to single-occupancy cells.[126] The institution now hosts four to five individuals per cell, and the program rooms in the units have been converted into cells.[127] Not only does this create limitations on the rehabilitative programming that can be offered to incarcerated individuals,[128] but these converted rooms also fall outside the visibility of correctional officers and security cameras, creating considerable security concerns.[129]

An incarcerated individual who had been in EMDC on remand illustrated exactly what it was like to live in such conditions. He described his cell as very small, dirty, and suffering from a bed bug infestation.[130] He was the third man in the cell and was required to sleep on a mattress on the floor in the two-and-a-half-foot space between the two beds.[131] Not only are these living conditions uncomfortable, but this overcrowding of cells creates

---

122 OHRC, "Letter to Solicitor General Jones", *supra* note 10.
123 *Ibid.*
124 *Mandela Rules, supra* note 104 at 10–12 (Rules 12, 14, 15, 17, 23 and 25).
125 Ministry, *Community Advisory*, *supra* note 6.
126 *Mandela Rules*, *supra* note 104 at 10 (Rule 12).
127 OHRC, "Letter to Solicitor General Jones", *supra* note 10.
128 Ministry, *Directions for Reform*, *supra* note 1 at 7.
129 Mirza, *supra* note 64.
130 *R v Sabatine*, 2012 ONCJ 310 at paras 11–12 [*Sabatine*].
131 *Ibid.*

increased stress and anxiety for vulnerable individuals, especially those with mental health disabilities or youthful individuals. This increased level of stress and anxiety can lead to "voluntary" admissions to segregation, use of intoxicants, violence, or other harmful behaviours.[132] It is also the prime environment for the uncontrollable spread of disease and infections.

B. Overuse of Segregation as "Treatment" for Incarcerated Individuals

EMDC has two segregation units known as the "Special Needs Unit" and "Special Care Unit." When asked how they differ from segregation, the management and staff at EMDC were unable to clearly identify how the conditions differed. [133] As there is no infirmary at EMDC, ill individuals are placed in segregation cells in proximity to the Health Care Unit. These cells are not dedicated to ill individuals.[134] For example, when Kenneth Randall Drysdale was discovered having a seizure in the washroom/shower area, he was assessed by nurses and placed in segregation for observation.[135]

Only half of the segregation cells have continuous video monitors, causing incarcerated individuals to prioritize which cells they are placed in.[136] During the OHRC tour of EMDC, one correctional officer casually mentioned that an individual had been kept in segregation for "a couple of years" and that there was no significant plan to address this long-term placement problem.[137]

This systemic use of segregation is not limited to EMDC. In 2017, Howard Sapers reported that 1,300 men and women spent 60 or more aggregate days inside an Ontario correctional services segregation cell.[138] While the Ministry policy states that segregation is "an area designated for the placement of inmates who are to be housed separate from the general

---

132 OHRC, "Letter to Solicitor General Jones", *supra* note 10.

133 *Ibid.*

134 *Coroner's Verdict – Straughan*, *supra* note 22 at para 12.

135 *Coroner's Verdict – Drysdale*, *supra* note 23 at paras 4–6.

136 *Coroner's Verdict – High*, *supra* note 24 at para 51.

137 OHRC, "Letter to Solicitor General Jones", *supra* note 10.

138 Independent Review of Ontario Corrections, *Segregation in Ontario* (Toronto: Ministry of the Solicitor General, March 2017) at 1, online: <www.mcscs.jus.gov.on.ca> [perma.cc/Q5C6-P8QL] [Ministry, *Segregation in Ontario*].

population,"[139] segregation is realistically used as a place to house individuals with special needs. The fact that some of these cells do not have security monitoring and that prisoners can be housed there "for a couple of years" without a plan to fix the problem is a serious concern.

A group of incarcerated individuals successfully brought a class action against the Ministry for its excessive use of segregation and were awarded $30 million in aggregate *Charter* damages in April 2020. Justice Paul Perell of the Ontario Superior Court of Justice described the Ministry's justifications as embarrassing and stated that "neither television, books, magazines, radio, telephones, or computers, negates the effects of being confined in a small cell for twenty-two to twenty-four hours a day without meaningful human contact and without adequate health care."[140]

One would hope that the significant monetary consequence of this action would motivate the Ministry to take action. At EMDC specifically, the Ministry's *EMDC Enhancement Initiative* is increasing the hours and numbers of medical staff available and completing a health care review to determine other areas of improvement for health care at EMDC.[141] Hopefully, similar changes will be made at other correctional institutions, resulting in a decrease in the use of segregation as a form of medical treatment.

C. Inappropriate Use of Lockdowns due to Understaffing

The Ministry defines lockdowns as "strict limitation on the movement of inmates in all or part of an institution," with the Ontario Office of the Ombudsman receiving 483 complaints about lockdowns in 2018–2019.[142] These numbers increased to 668 in 2019–2020, an increase to about 10% of the total number of complaints made by incarcerated individuals.[143] Lockdowns may occur as a result of a violent incident at EMDC, such as the murder of Adam Kargus, but more often than not, they occur as a result of staff shortages. This means that lockdowns are, for the most part, avoidable.

---

139 Ontario, Ministry of Community Safety and Correctional Services, *Institutional Services Policy and Procedures Manual: Placement of Special Management Inmates* (Toronto: Ministry of Community Safety and Correctional Services, 6 December 2016), s 4.1.

140 *Francis, supra* note 120 at para 589.

141 Ministry, *EMDC*, *supra* note 84.

142 Ontario Ombudsman, *2018–2019*, *supra* note 119 at 23.

143 Ontario Ombudsman, *2019–2020*, *supra* note 117 at 33.

An individual on remand at EMDC from September 26, 2011, to February 17, 2012, was on lockdown on approximately five occasions during this time period.[144] During these lockdowns, individuals were confined to their cells 24 hours a day, and all privileges were suspended, including the usual 20 minutes allowed outside in the yard. The only exception was a shower and 20-minute phone call that was permitted every third day. Each "lockdown" lasted four to seven days, with the longest lockdown lasting approximately 20 days. This particular individual's behaviour was never the cause of the lockdown, and he had no behaviour issues at EMDC.[145] Long periods of lockdown are harmful to the mental health of prisoners, as they are deprived of basic necessities and the ability to contact loved ones and lawyers.[146]

The conditions of lockdown are the same as segregation or solitary confinement. Segregation is not determined by where an inmate is confined or what the unit is called; rather it is how they are confined. Lockdowns involve individuals being locked in their cells for 24 hours a day, with the periods of confinement being entirely arbitrary and unpredictable. The Ministry's use of sustained periods of frequent, unpredictable lockdowns due to staff shortages violates s. 12 of the *Charter*.[147] The Ministry has been aware of the issues arising out of understaffing since at least 2002, and it is entirely within their control to ensure sufficient staff is available.[148]

Studies have shown the negative effects of segregation include psychological distress, anxiety, insomnia, hallucinations, depression, suicide, self-harm, violent ruminations, institutional violence, and increased reoffending.[149] Further, particular individuals and groups are differentially impacted by segregation, such as the young and elderly, individuals with mental illness, women, racialized, and Indigenous persons.[150] Individuals confined in lockdowns are likely to experience the same consequences and have no control over the frequency, length, or timing of their isolation.

---

144 *Sabatine*, *supra* note 130 at para 13.

145 *Ibid.*

146 Ontario Ombudsman, *2018–2019*, *supra* note 119 at 23; Auditor General, *2019 Annual Report*, *supra* note 114 at 48-50; OHRC, "Letter to Solicitor General Jones", *supra* note 10.

147 *Ogiamien v Ontario*, 2016 ONSC 3080 at para 269 [*Ogiamien*].

148 *Ibid* at paras 253–54.

149 Ellie Brown, "A systematic review of the effects of prison segregation" (2020) 52 Aggress Violent Behav 1 at 1–2.

150 Ministry, *Segregation in Ontario*, *supra* note 138 at 3.

D. The Violent Environment at EMDC

Prisoner-on-prisoner violence and excessive use of force by correctional officers are a routine aspect of living in Ontario correctional institutions. This constant fear of violence, combined with a lack of adequate medical equipment and staff, causes individuals to live in a state of hyper-vigilance.[151] This culture of violence feeds directly into the lawlessness and corruption of the prison atmosphere, and it creates a social order where the strong prey on the weak (or where the sinners are winners).

Violent events are so common at EMDC that they are rarely appropriately identified or addressed. For example, when Anthony George put Adam Kargus in a chokehold in front of multiple correctional officers, it was described as "horseplay."[152] A misconduct/sanction was not issued against Anthony George. Despite the situation clearly being an act of bullying where a strong individual engaged in a one-sided physical exchange, one correctional officer felt that "if [Kargus] did not say he was in fear, how was I supposed to know."[153] It is up to the correctional officer's discretion whether or not to file an Occurrence Report following a violent incident, and these reports are rarely filed.

The number of weapons available in EMDC is also of concern. Between 2015 and 2016, contraband or improvised weapons were found 33 times, including a sharpened tile, metal wire, razors, screws, nunchucks, a four-inch jack knife, and many more weapons.[154] Prisoners speak of the "near constant threat of violence" and how a "prison subculture has taken root where more dangerous prisoners are able to control the range and prey on weaker individuals."[155] This high level of violence also has negative impacts on the mental health of correctional officers. Correctional officers report high levels of violence and abuse from prisoners, which the Ministry has done nothing to address.[156] Correctional officers describe their work as stressful and EMDC as a violent jail.[157]

---

151 *Persad*, *supra* note 115 at para 11.

152 *Langford et al*, *supra* note 42 at para 96.

153 *Ibid* at para 104.

154 Butler, *supra* note 14.

155 OHRC, "Letter to Solicitor General Jones", *supra* note 10.

156 "Human Rights Commissioner slams EMDC as 'overcrowded, unsanitary and dangerous'", *CBC News* (21 May 2019), online: <www.cbc.ca/news> [perma.cc/E2L4-A5X7].

157 *R v Roman*, 2018 ONCJ 344 at para 31.

A former correctional officer, Don Roman, experienced PTSD and had to take off work for an extended period after having a breakdown while working at EMDC.[158] During his leave from work, Roman was "very angry, full of rage, and he expressed thoughts of suicide and homicide."[159] His rage was mostly associated with his interactions with prisoners at EMDC, and his wife stated that "if he saw an inmate driving or at the park, he didn't know what he would do to him."[160] Roman himself stated that he associated his PTSD with prisoners at the jail and that his mental health made him "think of harming people, including inmates at the jail."[161] The violent acts and dangerous conditions occurring at EMDC negatively affect all individuals involved: incarcerated individuals, correctional officers, and staff.

The stressful conditions associated with working in correctional institutions are not a new phenomenon. In a 2011 survey of 200 correctional officers in British Columbia, it was determined that in the previous year, 90% of correctional officers had been exposed to blood, more than 75% had been exposed to feces, spit and urine, and 90% had responded to requests for staff assistance and medical emergencies.[162] Numerous studies have demonstrated that correctional officers frequently experience traumatic stressors, demanding social interactions, low organizational support, harsh physical environments, and repeated direct and indirect exposures to violence, injury, and death events.[163]

There is no excuse for the Ministry's failure to improve the conditions at Ontario correctional institutions, for prisoners and correctional officers alike.

---

158 *Ibid* at para 16.

159 *Ibid* at para 17.

160 *Ibid*.

161 *Ibid* at para 42.

162 Ministry, *Directions for Reform, supra* note 1 at 18, citing Neil Boyd, *Correctional Officers in British Columbia, 2011: Abnormal Working Conditions* (Burnaby, BC: Simon Fraser University, November 2011) at i.

163 *Ibid*, citing Michael D Denhof, Caterina G Spinaris & Gregory R Morton, *Occupational Stressors in Corrections Organizations: Types, Effects and Solutions* (Washington DC: Department of Justice, National Institute of Corrections, July 2014) at 7–8.

VI. THE EFFECT OF UNDERSTAFFING ON CORRECTIONAL OFFICERS AND PRISONERS

Understaffing is another major issue in Ontario correctional institutions, as reflected in the discussion about deaths in custody, drugs in custody, lockdowns, and segregation. There have been specific incidents at EMDC that highlight this issue, such as the situation in January 2016 where 50 staff called in sick on the same day.[164] EMDC remained operational through the assistance of management, but the correctional officers who did arrive at work that day stated that there was insufficient staff to operate the institution safely.[165]

These understaffing issues result from a lack of funding from the Ministry, as well as the terrible working conditions that staff are forced to face. There is an elevated use of sick leave amongst staff at EMDC, which creates a vicious cycle of persistent understaffing at the institution. It ultimately makes the job more difficult for on-duty staff due to lockdowns and increased security threats in the prison environment.[166]

The first things to be cancelled due to staffing shortages are life skills, education, and rehabilitative programs at Ontario correctional institutions.[167] Correctional officers observed that EMDC houses a particularly dangerous population, and there is a lack of meaningful access to programming to address their criminogenic factors or meaningful tools to engage individuals proactively.[168]

Those correctional officers that do show up do not have adequate training or support.[169] These systemic issues with understaffing also cause institutions to rely primarily on indirect supervision of prisoners and static security. Studies have shown that direct supervision is preferable in detention centres, as it maintains personal contact with prisoners, tends to

---

164 *Lynda Kathleen Gough v Elgin-Middlesex Detention Centre*, 2016 CanLII 74661 (OLRB) at paras 3–4.

165 *Ibid.*

166 OHRC, "Letter to Solicitor General Jones", *supra* note 10.

167 Ministry, *Directions for Reform*, *supra* note 1 at 125.

168 OHRC, "Letter to Solicitor General Jones", *supra* note 10.

169 *Ibid.*

offer prisoners more physical amenities, and can allow trained staff to detect and defuse potential problems.[170]

There are also understaffing issues with the health services at EMDC, which result in the misuse of segregation as a means to protect vulnerable and ill individuals. In 2010, the Ontario Public Services Employees Union came to an agreement with the Ministry to increase staffing and funding in the EMDC Health Care Unit.[171] Despite these apparent increases, at least six individuals have died due to inadequate health care at EMDC (Laura Straughan, Kenneth Randall Drysdale, Jamie High, Michael Fall, Floyd Sinclair Deleary, and Justin William Thompson). It is clear that promises by the Ministry to increase funding and staffing are not enough to solve these systemic issues.

VII. Conclusion

This paper has highlighted specific issues at Ontario correctional institutions that are in drastic need of attention and care from the Ministry. These issues include the concerning number of deaths, overdoses, and violent incidents in custody, as well as the overall unsanitary and inhumane conditions of detention centres. These are not new issues. These same complaints can be traced back to 1835, when the first penitentiary was built in Canada.[172] At EMDC, complaints were made shortly after it was built

---

170 "FORUM on Corrections Research: Direct versus Indirect Supervision in Correctional Institutions" (last modified 5 March 2015), online: *Correctional Services Canada* <www.csc-scc.gc.ca> [perma.cc/8G9W-5V93].

171 *Ontario Public Services Employees Union v Ontario (Community Safety and Correctional Services)*, 2010 CanLII 38786 (ON GSB) at para 2.

172 "History of the Canadian Correctional System" (25 April 2019) at 2, online (pdf): *Correctional Services Canada* <www.csc-scc.gc.ca > [perma.cc/2GLP-4ZK3].

regarding the verbal and physical abuse of incarcerated individuals[173] as well as the unacceptable working conditions for correctional officers.[174]

The issues highlighted in this paper are just one small snapshot of the horrific conditions that prisoners and staff are forced to endure. They must work and live in this unsanitary, unconscionable, and unforgiving environment where survival of the fittest is a prisoner's bible. "Correctional institutions control the most basic aspects of an individual's life."[175] This environment can also dictate the rest of their lives. This phenomenon is experienced by prisoners and correctional officers alike, such as James Pigeau, who never recovered from witnessing Adam Kargus' murder and Don Roman, who still lives with PTSD from his experiences working at EMDC.

It is unacceptable that in Canada, a free and democratic country known for its high quality of living, individuals are forced to live and work in conditions like this. It is absurd that in a country that recognizes the rule of law as the foundation of our society, there are government-run facilities in Ontario that operate entirely outside its bounds. As discovered during the investigations into deaths at EMDC, there are very few rules in Ontario correctional institutions and no one to enforce their compliance.

The Ministry needs to take meaningful action and actively work to implement the numerous recommendations from coroner's verdicts and academic scholars writing on prison reform. How many fires does the

---

173 See *Simpson v Ontario*, 2010 ONSC 2119. In February 1996, 40 youth were transferred to EMDC during a riot at the Bluewater Youth Centre in Goderich, Ontario. These youth were "subjected to excessive force and intimidation under a number of circumstances: during the admission process, they were verbally and physically intimidated, prodded, struck, kicked, humiliated, many of them sustaining injuries" (*ibid* at 326). The Chief Advocate in the Office of Child and Family Advocacy for Ontario conducted a report on the experiences of the youth and released a report describing the youth's treatment. Rather than dealing with the underlying issues at the facility, the Ministry successfully sued for defamation for releasing the report to the media. Fifteen years later, the Ministry provided a similar response in their response to the death of Adam Kargus.

174 *Elgin Middlesex Detention Centre v Ontario (Ministry of Labour)*, 1995 CarswellOnt 5124 at paras 6–7. An Occupational Health and Safety Officer was called to EMDC to investigate a work refusal by a correctional officer. During this hearing, it was determined that the chairs that EMDC staff were expected to use were broken, soiled or very worn, and the superintendent ordered new chairs that caused back pain for this correctional officer. Also of note is that even in the 1990s, EMDC was stated to have an inmate capacity of 500.

175 Ministry, *Directions for Reform*, *supra* note 1 at 2.

Ministry need to put out before it realizes its errors? How many more avoidable prisoner deaths must occur before the Ministry finally begins its work for change? The Ontario government made the first steps towards addressing some of these issues when they hired an independent advisor on corrections reform.[176] Yet, his reports sit on shelves collecting dust, and the legislation they inspired will never come into force.[177]

There are many practices at Ontario correctional institutions that violate international conventions, the *Charter,* and the *Human Rights Code*[178]. The Ministry's use of prolonged segregation or placement of individuals with mental illness in segregation is a cruel and unusual punishment contrary to s. 12 of the *Charter*.[179] The frequency and duration of lockdowns due to staff shortages similarly violate s. 12.[180] The overcrowding, unsanitary/dangerous conditions, failure to accommodate individuals with mental health concerns, and overuse of segregation and lockdowns violate the *Mandela Rules*.[181] The Ministry's failure to accommodate the unique needs of prisoners with mental health disabilities or addictions, as well as religious and cultural practices, are human rights violations.[182] The Ministry is aware of these violations, yet it has failed to take meaningful steps towards addressing them.

The first essential steps for reform were clearly laid out by the independent review team on Ontario corrections in September 2017.[183] This report included 62 recommendations that focused on five themes: human rights and correctional operations; corrections and the presumption of innocence; evidence-based correctional practice; Indigenous people and Ontario corrections; and health care services and governance in corrections.[184] Overall, these recommendations were focused on the Ministry devoting financing, hiring, and training to create policies and

---

176 Ministry, *Independent Review*, *supra* note 31.

177 The PC Government dismissed Howard Sapers in December 2018, and the *Correctional Services and Reintegration Act, 2018,* SO 2018, c 6 received royal assent, but the Lieutenant Governor never declared the day for it to come into force. See White, *supra* note 39.

178 RSO 1990, c H.19.

179 *Francis*, *supra* note 120 at paras 327–47.

180 *Ogiamien*, *supra* note 147 at para 245.

181 OHRC, "Letter to Solicitor General Jones", *supra* note 10.

182 *Ibid.*

183 Ministry, *Directions for Reform*, *supra* note 1.

184 *Ibid* at 2.

programs to improve the quality of life and care of Ontario's prison population.[185] While providing rights in Ontario correctional institutions is "an essential component of a healthy and safe Ontario,"[186] the Ministry has made very few efforts to act on these recommendations.

The same can be said about the Ministry's apathetic attempts to act on juries' recommendations for reform at EMDC. In March 2020, a coroner's verdict clearly laid out the steps that need to be taken.[187] First, EMDC needs to be replaced with a modern facility with its own infirmary and adequate space for incarcerated individuals to achieve rehabilitation and reintegration.[188] Next, the Ministry should install electronic monitoring devices[189] and ensure that correctional officers comply with the Ministry's operational procedures.[190] Finally, to assist in the battle against drugs in custody, the Ministry should install more scanning equipment, ensure officers perform both regular and thorough searches for contraband, and create policies to restrict staff from bringing anything but essential items into EMDC.[191] The Ministry has not responded to this verdict.

While the creation of a modern facility would be a drastic improvement for the lived experience of incarcerated individuals and EMDC staff, it will not be enough to sustain Ontario's ever-growing prison population. As briefly discussed above in the "Final Thoughts on the Drug Problem in Ontario Correctional Institutions" section, Ontario's policy reform should be focused on implementing and funding community-based alternatives to incarceration.

As Ontario's remand population comprises approximately 63% of all incarcerated individuals,[192] decreasing this population is imperative for addressing the overcrowding, double-bunking, and understaffing that plague Ontario correctional facilities. Parliament's introduction of Bill C-75 attempted to address some of these concerns with its amendment of the

185 *Ibid* at 219–20.
186 *Ibid* at 220.
187 *Coroner's Verdict –Deleary & Thompson, supra* note 25.
188 *Ibid* at paras 31–34.
189 *Ibid* at paras 37–38.
190 *Ibid* at para 57.
191 *Ibid* at paras 39, 53–56.
192 Statistics Canada, *Adult admissions to correctional services*, Table 35-10-0014-01 (Ottawa: Statistics Canada, last modified 16 May 2021), online: <www150.statcan.gc.ca> [perma.cc/JYR7-S42V].

Criminal Code bail provisions and affirmation of the ladder principle.[193] While these amendments are an important step in depopulating Ontario jails, they are but one of many steps required to address the systemic failings of Ontario correctional institutions.

Until the Ministry begins its work towards meaningful change, prisoners of Ontario correctional institutions will be forced to rely on litigation and class actions to receive compensation for their horrible experiences. One such class action has been filed by a group of prisoners at EMDC, alleging they endured threats, assaults, inadequate medical attention, and overcrowding and that their experiences were shared by a host of other individuals.[194] Another former-EMDC prisoner reached an out-of-court settlement with the Ministry after being beaten within inches of his life during his 40-day sentence at EMDC in 2004.[195]

While it is hopeful that class actions and civil litigation will provide a form of justice for some incarcerated individuals, there are still many other incarcerated individuals that deserve retribution. As a free and democratic society, Canada has a duty to protect the rights of all citizens, whether or not they are incarcerated. Correctional institutions are secluded by their very nature and are not accessible to the public eye. Therefore, it is up to the state to protect the rights of incarcerated individuals.

There is little hope that the rule of law will implement itself without assistance from Parliament and courts,[196] and one cannot simply wait for corrections' oversight mechanisms to transform.[197] Meaningful changes need to happen in both the development of Ontario corrections policies, as

---

193 Department of Justice, "Legislative Background: *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, as enacted (Bill C-75 in the 42nd Parliament)" (Ottawa: DOJ, 9 September 2019), online: <www.justice.gc.ca> [perma.cc/4GLM-8D8P].

194 "The EMDC Class Proceeding – Update" (2 December 2019), online: *McKenzie Lake Lawyers* <www.mckenzielake.com> [perma.cc/RUS7-BXZ6].

195 Bryan Bicknell, "Former EMDC inmate reaches settlement over jailhouse beating", *CTV London* (22 November 2019), online: <london.ctvnews.ca> [perma.cc/S9SW-ZEZV].

196 Canada, *Commission of inquiry into certain events at the Prison for Women in Kingston* (Report), Catalogue No JS42-73/1996E (Ottawa: Public Works and Government Services of Canada, 1996) (Louise Arbour, Commissioner), online: <publications.gc.ca/pub?id=9.831714&sl=1> [perma.cc/KF3J-LECZ].

197 Adelina Iftene, *Punished for Aging: Vulnerability, Rights, and Access to Justice in Canadian Penitentiaries* (Toronto: University of Toronto Press, 2019) at 144.

well as the correct and meaningful implementation of these policies. This paper demonstrates, through the prism of one institutional setting, why change is so vitally needed and that the roadmap for that change is so readily available.

Decades in Crisis: A Critical Analysis of the Underuse of Sections 81 and 84 of the *Corrections and Conditional Release Act* and its Role in the Systemic Neglect of Indigenous Rehabilitation and Reintegration

MADISON PARKER

I. Introduction & Statistics

When studying law and the criminal justice system as a whole, academics and practitioners alike are faced with applying the principles of fairness and equality while determining the best way to preserve these principles within their roles. Offenders should be treated with fairness and equality, a principle that seems elementary on its face, but administering fair and equal justice does not mean that all offenders should be treated the same; far from it in fact. Indigenous people have faced racial, religious, and cultural persecution since the time that Europeans began to colonize Canada. When settlers arrived, they were accompanied by their own legal system which was then forced onto the Indigenous people that had already been occupying this land for thousands of years, without surrender or consent.[1] The trauma experienced resides not only within the individual offender but also intergenerationally and at the societal, communal, and cultural levels.[2]

As a society, we should be consistently seeking change in the pursuit of true reconciliation and reparation with Indigenous Canadians, as well as

1 Jeffery G Hewitt, "Indigenous Restorative Justice: Approaches, Meaning & Possibility" (2016) 67 UNBLJ 313 at 324.

2 David Milward, "Sweating It Out: Facilitating Corrections and Parole in Canada through Aboriginal Spiritual Healing" (2011) 29:1 Windsor YB Access Just 27 at 32.

effective rehabilitation and reintegration of Indigenous offenders. The following paper will highlight the extent of the continued marginalization of Indigenous peoples within the sentencing process, as well as other custodial means of rehabilitation, while bringing into question why Correctional Services Canada (CSC) has failed to utilize ss. 81[3] and 84[4] of the *Corrections and Conditional Release Act* (*CCRA*) to the extent intended in order to combat the problem of Indigenous overrepresentation in custody. Currently, the application of the relevant sections of the *CCRA* become available only after sentencing as they fall within the jurisdiction of CSC. For effective change, the conversation regarding alternative custodial sentencing for Indigenous offenders should begin with the prior to and at the sentencing stage of proceedings. In addition, it is necessary that government funds are redirected from other sources in order to build and fund these alternative means of custodial rehabilitation.

To understand the scope of the overrepresentation of Indigenous people in the criminal justice system, it is necessary to define some of the terms that will be continuously referred to in this paper as well as ground the analysis in quantitative data. Recidivism rates are consistently referred to in academic literature, but despite the importance of understanding these figures, there has yet to be a consensus on the exact definition of recidivism.[5] CSC defines recidivism as "an individual's return to criminal behaviour after receiving a sanction or intervention for previous criminal behaviour."[6] CSC notes that when defining recidivism and measuring correctional outcomes, federal custody is the key outcome measured, but it is important to keep in mind that different definitions, measurements, and reporting practices are employed across Canada.[7]

In early 2020, a press release from the Office of the Correctional Investigator reported that Indigenous peoples account for upwards of 30% of the Canadian prison population – a population that has been steadily growing for the last several decades. That number may not seem shocking on its own, but when juxtaposed with the fact that Indigenous peoples only

---

3 *Corrections and Conditional Release Act*, SC 1992, c 20, s 81 [*CCRA*].

4 *Ibid*, s 84.

5 Sarah Runyon, "Correctional Afterthought: Offences Against the Administration of Justice and Canada's Persistent Savage Anxieties" (2020) 43:5 Man LJ 1 at 1.

6 Correctional Service of Canada, *A Comprehensive Study of Recidivism Rates among Canadian Federal Offenders*, by Lynn A Stewart et al, No R-426 (Ottawa: Correctional Service of Canada, August 2019) at 1.

7 *Ibid* at 1–2.

make up roughly 5% of the Canadian population, the overrepresentation becomes blatantly clear.[8]

Further to that point, the population of non-Indigenous offenders has been steadily declining since 2010 at a rate of 13.7%, while the Indigenous population has risen by 43.4%.[9] The office of the Correctional Investigator notes that the "rising numbers of Indigenous people behind bars offset declines in other groups, giving the impression that the system is operating at a normal or steady state."[10] In theory, if the system were working correctly — with no implicit bias or discrimination — the imprisoned population would reflect the whole population of Canada. This may not be a viable goal given the intricacies of race politics, capitalism, and marginalization, but the goal of reducing the overrepresentation of Indigenous offenders needs more systemic attention.

Although these statistics need to be processed carefully (keeping in mind that there may be different definitions of recidivism and different measurements of success), it is without a doubt a dire problem. In *R v Gladue*, Justices Cory and Iacobucci writing for the majority court,[11] somewhat infamously, said that "[t]he figures are stark and reflect what may fairly be termed a crisis in the Canadian criminal justice system."[12] How is it possible that the Supreme Court of Canada labelled this as a "crisis" 21 years ago, and the numbers continue to increase annually? One scholar suggested that crisis is no longer an appropriate description of the phenomenon. Crisis implies that the issue of Indigenous mass imprisonment is a phenomenon that is "unstable" and "unique,"[13] and although this label may serve as an alert to the importance of the situation, it is a mischaracterization. The issue of Indigenous overrepresentation, like colonialism itself, is embedded in the fabric of the Canadian legal system.[14]

---

8 Office of the Correctional Investigator, News Release, "Indigenous People in Federal Custody Surpasses 30% Correctional Investigator Issues Statement and Challenge" (21 January 2020), online: *Office of the Correctional Investigator* <www.oci-bec.gc.ca/cnt/comm/press/press20200121-eng.aspx> [perma.cc/J7MU-JFX2] [Office of the Correctional Investigator, "Indigenous People in Federal Custody Surpasses 30%"].

9 *Ibid.*

10 *Ibid.*

11 Justices Cory & Iacobucci writing for the majority.

12 *R v Gladue*, [1999] 1 SCR 688 at para 64, 171 DLR (4th) 385 [*Gladue*].

13 Efrat Arbel, "Rethinking the "Crisis" of Indigenous Mass Imprisonment" (2019) 43:3 CJLS 437 at 438–39.

14 *Ibid.*

II. FACTORS CONTRIBUTING TO OVERREPRESENTATION

So, logically the question follows: what factors are behind this issue? Colonialism is a broad and far-reaching term that encompasses most of the systems put in place in Canada, so it is necessary to dive deeper and identify more specific factors that are resulting in the steady increase of Indigenous Canadians in both provincial and federal custody. There are several factors that will be touched upon to create a more comprehensive picture of this complex systemic problem.

One of the most prominent issues resulting in overrepresentation is something that academics have termed the Revolving Door Syndrome, which is the constant re-institutionalizing of the same offenders, or an individual's inability to stay out of the criminal justice system. One of the main factors contributing to this "syndrome" of the system is so-called "offences against the administration of justice" or "breach offences."[15]

The Canadian Department of Justice has recognized that these types of offences make up a substantial proportion of the caseload of police, prosecutors, and custodial facilities, with a large amount of these offences being "committed" (for lack of a better word) by Indigenous peoples.[16] Offences against the administration of justice are categorized loosely as offences not involving behaviour that is considered "criminal" and were committed only after another offence has been committed.[17] More plainly, when offenders are released on parole, placed on probation, or released on an order of their own recognizance and subsequently offend some part of the agreement of that order, they are charged with a breach. These breaches create a revolving door effect due to many of the factors that make Indigenous peoples more likely to be arrested in the first place; this intersection makes it extremely difficult for them to adhere to conditional release orders. One academic concisely articulates the issue as follows:

> The goal of reducing Indigenous over-incarceration by employing non-custodial measures is thwarted as these segments of the population become further marginalized, both socially and economically, through the criminal prosecution of their administrative offences. I argue that efforts to reduce over-incarceration will

15 Runyon, *supra* note 5 at 2.
16 *Ibid.*
17 *Ibid.*

> fall short if the justice system and its participants continue to ignore the devastating impact that administrative court orders have on the accused.[18]

As stated earlier, many of the same factors affect the inability to adhere to conditional releases and the inability to adhere to the laws in the first place. Offenders that are released into poverty, who may suffer from substance abuse issues, cognitive issues, and/or may be transient, can find it nearly impossible to adhere to these release orders or report to a parole officer, thus perpetuating the vicious cycle of the custodial revolving door. These factors of marginalization often make it extremely difficult for an individual to live within prescribed geographic restrictions, or comply with demanding reporting requirements.[19] Traditionally, probation has been seen as a rehabilitative tool much preferred to a custodial sentence, but is it preferred if the conditions of the probation are unrealistic in the state that the offender is being released? This is just one of the confounding questions seemingly neglected by those who should be working tirelessly on a sustainable solution to the problem. The lack of attention given to resolving the issue of offences against the administration of justice directly opposes the Canadian government's effort over the last several decades to reduce the rates of Indigenous incarceration.[20]

The prevalence of these offences fit into the statistical picture explored in a *Maclean's* article that noted that Canada's crime rates were lower in 2016 than they had been in 45 years, yet the number of incarcerated Canadian's is at an all-time high.[21] These 'breach offences' account for the discrepancy between incarceration numbers and crime rates. The same research showed that in Manitoba courtrooms, 85% of offenders are Indigenous, with even higher rates in the Headingley Women's prison, where nine out of ten women held are Indigenous. At Stony Mountain, 65% of the population is Indigenous, with many incarcerated for failing to comply with various forms of release.[22] More specifically, Statistics Canada reported that in 2018/2019, there were 226,048 admissions to custody in

---

18 *Ibid* at 3.

19 *Ibid*.

20 *Ibid*.

21 Nancy Macdonald, "Canada's prisons are the 'new residential schools'", *Maclean's* (18 February 2016), online <www.macleans.ca/news/canada/canadas-prisons-are-the-new-residential-schools> [perma.cc/ZF9Y-CUQ6].

22 *Ibid*.

Canada, and of those admissions, 68,814 were Indigenous Canadians.[23] Focusing on Manitoba, it was reported in 2018/2019 that of the 28,141 admissions into custody, 21,046 of those were Indigenous – meaning that 74% of individuals incarcerated in Manitoba are Indigenous, a number grossly disproportionate to the total provincial population.[24]

Multiple factors have resulted in the marginalization of Indigenous peoples in Canada. Some of them are ingrained in the justice system, such as over-policing of Indigenous peoples (and areas highly-populated by Indigenous individuals), inadequate access to legal representation and basic legal education for those yet to be convicted, followed by lack of access to rehabilitative programs for Indigenous peoples once in the system.[25] Other factors are more broad, stemming from the effect of colonialism and discrimination over generations that result in socio-economic factors like poverty, substance abuse, and Fetal Alcohol Spectrum Disorder.[26] The devastating effect of the residential school system has created penetrating and unending grief that is held in the hearts of Indigenous Canadians; the extent and details of this horror is now coming to light with the catastrophic discovery in May 2021 of 215 children in a mass grave on the grounds of the Kamloops Indian Residential School.[27] Two months later that number has risen to more than 1300[28] as Indigenous Canadians and allies call for each former residential school site to be searched. This unthinkable genocide has resulted in enduring mourning and loss of culture, often resulting in a lack of positive self-esteem and substance abuse as a means of coping with firsthand and intergenerational trauma.

---

23 Statistics Canada, "Adult custody admissions to correctional services by aboriginal identity: Provinces and territories" (last modified 6 June 2021), online: <www150.statcan.gc.ca> [perma.cc/4BQL-7DEC].

24 Statistics Canada, "Adult custody admissions to correctional services by aboriginal identity: Manitoba" (last modified 6 June 2021), online: <www150.statcan.gc.ca> [perma.cc/2Z8K-R9DE].

25 Celeste McKay & David Milward, "Onashowewin and the Promise of Aboriginal Diversionary Programs" (2018) 41:3 Man LJ 127 at 128.

26 *Ibid*.

27 Brooke Taylor, "'We do not want this to be hidden': Remains of 215 children discovered on site of former residential school", *CTV News* (28 May 2021), online: <www.ctvnews.ca/> [perma.cc/STP7-Q5NC].

28 Adam Kovac, "Children's remains found at residential school has some Catholics thinking of leaving the church", *CTV News* (4 July 2021), online: <montreal.ctvnews.ca> [perma.cc/7WHN-H3SL]

Another factor hampering Indigenous offenders' ability to experience rehabilitative sentences or be granted alternative sentences is the consistent issue of security classification. Scholarly studies consistently report that Indigenous offenders are disproportionately placed in stricter security classifications compared to non-Indigenous offenders. This issue is even more prevalent in the classification of female offenders, who were even more likely to receive a higher security classification than their non-Indigenous counterparts.[29] Security classification impacts whether or not an offender can access education and rehabilitative programming while incarcerated, which can impact the conditions of their release. The higher the security classification, the more likely an offender is to return to custody on a breach offence.

The CSC has implemented a tool for the classification of female offenders, taking into account the unique range of factors that impact women in the prison system.[30] Some of the factors considered are positive contact with family members and current progress in the correctional programs. This may seem to be an effective classification tool, but the 2017 *Auditor General*'s Report found that when classifying incarcerated women, CSC staff frequently overrode or ignored the results that the tool indicated and classified women as higher risk.[31]

III. Efforts to Combat Indigenous Over-Incarceration

The systemic obstacle of Indigenous over-incarceration has not been completely neglected – although the numbers do not reflect that effort. There have been efforts to reduce the length and severity of Indigenous sentences, as well as efforts to sentence those offenders to more healing and rehabilitative programming. Some of these efforts are written into

---

29 Milward, *supra* note 2 at 40–41.

30 Correctional Service of Canada, *The Security Reclassification Scale (SRSW) for Shorter Review Periods among Federal Women Offenders* (Research at a glance), by Lysiane Paquin-Marseille, No R286 (Ottawa: CSC, March 2013), online (pdf): <www.csc-scc.gc.ca/005/008/092/005008-0286-eng.pdf> [perma.cc/4RT9-A5C3].

31 Leah Combs, "Healing Ourselves: Interrogating the Underutilization of Sections 81 & 84 of the *Corrections and Conditional Release Act*" (2018) 41:3 Man LJ 163 at 177, citing Office of the Auditor General of Canada, *Report 5 – Preparing Women Offenders for Release - Correctional Service of Canada* (Ottawa: Office of the Auditor General, 21 November 2017) at 5.25.

legislation, while some of them come from Supreme Court of Canada case law.

A. Section 718.2 of the Criminal Code

In September 1996, new provisions of the *Criminal Code* came into force that codified the principles and fundamental purposes of sentencing. Provision 718.2[32] codified the principles that should be taken into consideration in terms of aggravating and mitigating factors in sentencing. One of those factors is "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal[33] offenders."[34] This was the first time that Indigenous background and lived experience was codified as a factor in the sentencing process but not the first time it had been federally recognized.

B. *R v Gladue*

The case of *R v Gladue* went to the Supreme Court in 1999, three years after the codification of s. 718.2. Gladue was convicted at the trial level, and an application to the British Columbia Court of Appeal was dismissed.

Gladue was the child of a Cree mother and a Métis father. She lost her mother at a young age and became a mother herself at the age of 19.[35] She had substance abuse problems and, at the time of her crime, had only completed a grade nine education. In 1995, while five months pregnant with their second child, Gladue got into an altercation about infidelity with her partner and the father of her children, and she subsequently stabbed him to death. A neighbour, Mr. Gretchin, saw the incident and had observed Gladue stabbing her partner, Reuben Beaver.[36]

On June 3, 1996, Gladue was charged with second degree murder and entered a plea of manslaughter. Seventeen months passed between the

---

32 *Criminal Code*, RSC 1985, c C-46, s 718.2.

33 Legislation often still employs the use of the word "Aboriginal" due to the fact that our current Constitution uses that language. The current accepted language referring to the first people of Canada is "Indigenous," but "Aboriginal" may be used when discussing legislative language, intent, and interpretation.

34 *Criminal Code*, *supra* note 31, s 718.2(e).

35 *Gladue*, *supra* note 12 at para 2.

36 *Ibid* at paras 5–6.

charges being laid and the sentencing trial. During that time, Gladue lived peacefully with her father, attended counselling for substance abuse, completed grade ten, and began grade 11. She was also diagnosed and subsequently prescribed medication for an overactive thyroid.[37] At the sentencing hearing, Gladue showed remorse and apologized to the court and to the victim's family. The problem arose when, at the sentencing trial, Gladue's counsel did not ask that Gladue's indigeneity be taken into consideration during sentencing. This may have stemmed from what we now acknowledge as one of the many "*Gladue* Myths," that:

> [T]he seriousness or violent nature of the offence, and/or the presence of significant aggravating factors, especially a prior record for the same kind of offence for which the accused is being sentenced, will denude *Gladue* of any meaningful practical value during a sentencing hearing.[38]

Her counsel did not draw on the proper legislation but did request a suspended or conditional sentence. Ultimately, Gladue was sentenced to three years imprisonment as well as a ten-year weapons prohibition.[39] She appealed the sentence to the British Columbia Court of Appeal (BCCA), and it was dismissed. Justice Rowles, writing the dissent of the BCCA, stated that:

> [S]. 718.2(*e*) invites recognition and amelioration of the impact which systemic discrimination in the criminal justice system has upon aboriginal people. She referred to the importance of acknowledging and implementing the different conceptions of criminal justice and of appropriate criminal sanctions held by many aboriginal peoples, including, in particular, the conception of criminal justice as involving a strong restorative element.[40]

Following the dismissal from the BCCA, the case ended up before the Supreme Court, at which time the now renowned "*Gladue* Principles" became binding case law. The Supreme Court laid out a framework for sentencing that shed light on what is meant by "circumstances of Aboriginal offenders" in the legislation, what should be taken into account in terms of background and systemic factors, as well as clarified the definition of who

---

37 *Ibid* at para 10. Suffering from a hyperthyroid condition had a side effect of exaggerated emotional reactions – presumably a factor in her violence on the night of the attack.

38 David Milward & Debra Parkes, "*Gladue*: Beyond Myth and Towards Implementation in Manitoba" (2011) 35:1 Man LJ 84 at 92.

39 *Gladue*, *supra* note 12 at para 13.

40 *Ibid* at para 21.

is Aboriginal for the purposes of the legislation.[41] It was decided that those that come into the purview of s. 718(2)(e) of the *Criminal Code* would be the same individuals that fall under the jurisdiction of s. 35 of the *Constitution Act*.[42]

These clarified principles for assisting in applying s. 718.2 of the *Criminal Code* when sentencing were meant not to be a form of "reverse discrimination,"[43] but to help correct the staggering injustices currently experienced by Indigenous peoples within the criminal justice system and address the fact that Indigenous peoples are often alienated from the system in a way that does not reflect their specific needs or understanding of an appropriate sentence.[44]

The addition of *Gladue* factors — now commonplace in Canadian sentencing courts — was meant to combat the rising numbers of incarcerated Indigenous peoples. Since 1999 when *Gladue* came out of the Supreme Court, the Indigenous prison population has steadily risen from the 17% it was in 1999[45] to over 30% today.[46]

C. *Corrections and Conditional Release Act*, Sections 81 and 84

Beginning in the late 1980s and into the early 1990s, the systematic failures resulting in the over-incarceration of Indigenous peoples were under the microscope. Consultations were conducted as a part of the 1998 Task Force on Aboriginal Peoples in Federal Corrections, and discovered that offenders were often being released into their communities without

---

41 *Gladue*, *supra* note 12. This determination broadened the scope of the classification from that of the trial judge who had restricted the application to merely those crimes that took place in rural/reserve Indigenous communities.

42 *Ibid* at para 90; *Constitution Act, 1982*, s 35, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 (Rights of the Aboriginal Peoples of Canada).

43 *Gladue*, *supra* note 12 at para 86. This term is used explicitly in the wording of the Supreme Court decision in *Gladue*. I would like to note that I do not believe that there can be reverse discrimination, especially while in pursuit of reconciliation and reparation.

44 *Ibid* at para 88.

45 Statistics Canada, *Adult Correctional Services in Canada, 1999-00*, by Charlene Lonmo, Catalogue No 85-002-XIE, vol 21, no 5 (Ottawa: Statistics Canada, June 2001) at 8, online (pdf): *Statistics Canada* <www150.statcan.gc.ca/n1/en/pub/85-002-x/85-002-x2001005-eng.pdf?st=UvriKtGd> [perma.cc/MDK9-P434].

46 Office of the Correctional Investigator, "Indigenous People in Federal Custody Surpasses 30%", *supra* note 8.

giving the communities notice, information on the offender and their time in custody, or the ability to prepare conditions to ensure that community members felt safe.[47]

Further, in 1991, the Aboriginal Justice Inquiry of Manitoba concluded that the principles and procedures of the Canadian justice system were both inadequate and incompatible with Indigenous custom and traditional law. The Inquiry recommended that there be legislation to empower Indigenous communities to establish their own Indigenous-controlled justice system. Due to the unique circumstances and life experience that accompany Indigenous identity in Canada, the Law Reform Commission of Canada stated that "the justice system should not be a uniform system, but one which Aboriginal people themselves have shaped and moulded to their particular needs and that there should be community-based and controlled correctional facilities."[48]

The *CCRA* was enacted in 1992 in response to these Federal recommendations. In keeping with the direction of this analysis, the focus will remain on two provisions of the *Act*: ss. 81 and 84, enacted with the purpose of decreasing the number of incarcerated Indigenous offenders.

S. 81 reads as follows:

> **Agreements**
>
> **81(1)** The Minister, or a person authorized by the Minister, may enter into an agreement with an Indigenous governing body or any Indigenous organization for the provision of correctional services to Indigenous offenders and for payment by the Minister, or by a person authorized by the Minister, in respect of the provision of those services.
>
> **Scope of Agreement**
>
> **(2)** Notwithstanding subsection (1), an agreement entered into under that subsection may provide for the provision of correctional services to a non-Indigenous offender.
>
> **Placement of offender**
>
> **(3)** In accordance with any agreement entered into under subsection (1), the Commissioner may transfer an offender to the care and custody of an appropriate

---

47 Canada, Office of the Correctional Investigator, *Spirit Matters: Aboriginal People and the Corrections and Conditional Release Act: Final Report* (Ottawa: Correctional Investigator Canada, 22 October 2012) at para 14, online (pdf): *Office of the Correctional Investigator* <publications.gc.ca/collections/collection_2013/bec-oci/PS104-6-2013-eng.pdf> [perma.cc/HX8V-PG6W] [Office of the Correctional Investigator, *Spirit Matters*].

48 *Ibid* at para 23.

> Indigenous authority, with the consent of the offender and of the appropriate Indigenous authority.[49]

This section is meant to address the care and custody of Indigenous offenders through the delivery of a wide variety of Canadian custodial and community services. Applying statutory interpretation, ambiguity regarding the form of these agreements has been found to include, among other options, the placement of Indigenous offenders in healing lodges instead of provincial and federal prisons and, more generally, release into the care and custody of Aboriginal communities.[50] When reading this statute, s. 81 is given the broadest interpretation when subsections (1) and (3) are read together. Read this way, the statute allows Indigenous communities the power to negotiate whether they want to enter an agreement, the number and security classification[51] of offenders that they wish to accept, and the risks that they are willing to assume when accepting offenders into the community.[52]

It is important to note that s. 81 is not intended to, and does not, transfer jurisdictional responsibility for corrections onto the communities. That responsibility remains with the Federal government. It is meant for the allowance of services and programming, including care and custody, to be agreed upon and delivered by Indigenous peoples and communities "for payment by the Crown."[53]

S. 84 provides for:

> **Release into Indigenous Community**
>
> **84** If an inmate expresses an interest in being released into an Indigenous community, the Service shall, with the inmate's consent, give the community's Indigenous governing body
>
> **(a)** adequate notice of the inmate's parole review or their statutory release date, as the case may be; and
>
> **(b)** an opportunity to propose a plan for the inmate's release and integration into that community.[54]

---

49 CCRA, *supra* note 3, ss 81(1)–(3).

50 Combs, *supra* note 30 at 174.

51 Office of the Correctional Investigator, *Spirit Matters*, *supra* note 46 at para 11. Initially, the CSC intended that s. 81 arrangements would be available to any security classification but acknowledged that building up trust between the CSC and the communities would take time.

52 *Ibid* at para 10.

53 *Ibid* at para 13.

54 CCRA, *supra* note 3, ss 84(a)–(b).

The purpose of s. 84 is to collaborate with Indigenous communities in the correctional planning of Indigenous offenders and is built on the notion that adequate notice will allow the community in question to create a plan for that individual and provide a support network for offenders upon their release. The thinking is that if offenders are released into their communities with their cultural and familial support systems, they will be less likely to reoffend or breach a release order, thereby increasing the overall rehabilitative and restorative purpose of our justice system and working to address the issue of overrepresentation.[55] This regime was introduced with the optimistic view that over time, their alternative custodial and community sentences would, by reducing offences against the administration of justice, allow more Indigenous Canadians to remain in the community and out of the criminal justice system through renewed connection with their land and people.[56]

These provisions are a natural and progressive extension of s. 35 of the *Constitution Act*, respecting existing treaty rights of Indigenous peoples in Canada and their traditions, customs, and cultures.[57] These provisions have been derived from extensive work of federal task forces and commissions to involve Indigenous peoples in developing and delivering this type of programming to Indigenous offenders.

IV. Current Section 81 Facilities

Since the enactment of the *CCRA* in 1992, there have been several funding agreements entered into with Indigenous Communities regarding the organization, establishment, and maintenance of the healing lodges. Healing lodges, in this context, are custodial facilities where the specific needs of the offender are addressed through purposeful contact with Elders, traditional teachings and ceremonies, as well as meaningful interaction with nature.[58] Facilities under s. 81 have a combined total of 189 beds, 131 for men and 58 for women.[59]

---

55 Combs, *supra* note 30 at 175.

56 *Ibid* at 164.

57 Office of the Correctional Investigator, *Spirit Matters*, *supra* note 46 at para 8.

58 "Indigenous healing lodges" (last modified 22 March 2021), online: *Correctional Services Canada* <www.csc-scc.gc.ca> [perma.cc/7B6C-VXVE].

59 Office of the Correctional Investigator, *Spirit Matters*, *supra* note 46 at para 30.

The first, *Prince Albert Grand Council Spiritual Healing Lodge*, located on the Wahpeton First Nation in Saskatchewan, opened in 1995.[60] The capacity of this lodge has fluctuated, opening with 25 beds in 1995, then reopening in 2014 after a two-year closure with 12 beds. The closure followed a failure of the government to renew its portion of the s. 81 agreement, forcing the lodge to close its doors. The agreement was eventually renewed, and the doors reopened.[61] This healing centre is a minimum security facility for male offenders and, as the name suggests, is managed by the Prince Albert Grand Council.[62]

In 1999, a s. 81 agreement was signed with the O-Chi-Chak-Ko-Sipi First Nation to open a healing lodge in Crane River, Manitoba. After two years of operations, financial difficulties were experienced, and residents of the healing lodge were transferred out. The lodge had a grand reopening in May 2004 following the implementation of financial control procedures.[63] *O-Chi-Chak-Ko-Sipi Healing Lodge* is managed wholly by the First Nation and is a minimum-security facility for men, currently with 24 beds.[64]

The 73-bed *Stan Daniels Healing Centre* in Edmonton, Alberta opened in 1999 as both a minimum-security facility for men and a residential facility for offenders on community conditional release.

Located an hour from Montreal near the Laurentian mountains, the *Waseskun Healing Centre* opened in 1999 in Quebec with 22 beds. Similar to the *Stan Daniels Healing Centre*, it is both a minimum-security facility for men and a facility for men on conditional release. [65]

In addition to the four healing lodges for men, there are two for women. The first, *Buffalo Sage Wellness House*, opened in 2011 under the management of the Native Counselling Services of Alberta. The facility has 28 beds and houses minimum and medium security women, as well as some on conditional release.[66]

---

60 *Ibid.*

61 "Spiritual Healing Lodge" (2014), online: *Prince Albert Grand Council* <www.pagc.sk.ca/spiritual-healing-lodge> [perma.cc/68U9-PAZB].

62 "About the different lodges", *supra* note 58.

63 Correctional Service Canada, *Evaluations Report: Section 81 Agreement between the O-Chi-Chak-Ko-Sipi First Nation and the Correctional Service of Canada - The O-Chi-Chak-Ko-Sipi Healing Lodge*, No 394-2-70 (November 2007) at 3, online (pdf): *Correctional Service Canada* <www.csc-scc.gc.ca/text/pa/ev-ohl/ev-ohl-eng.pdf> [perma.cc/Z7PF-LZCQ].

64 "About the different lodges", *supra* note 58.

65 *Ibid.*

66 *Ibid.*

Lastly, and most recent, is the *Eagle Women's Lodge* in Winnipeg, Manitoba, which opened in September 2019. This facility has 30 beds for multi-security level women and is managed by Indigenous Women's Healing Centre Inc.[67] It is the first of its kind for Indigenous Manitoban women, giving them the opportunity to experience this kind of rehabilitative sentencing while staying close to family and friends.

Other agreements were entered into under s. 81 but did not involve the establishment of a healing lodge. Rather with community custody agreements providing that First Nations would assume the responsibility of transferring offenders onto the First Nation land. In this kind of agreement, an offender can be accommodated by a community and confined to the boundaries of the reserve unless granted permission to leave temporarily.[68]

S. 81 agreements are required to provide a schedule detailing where the offender will be in the community and when, allowing affected individuals to be aware of the offender's location. The First Nation is also required to calculate a budget *per diem* for keeping the offender in the community and submit it to the CSC.[69]

V. Programming & Structure of Section 81 Facilities

The structure and focus of programming can vary within each facility, but all the facilities share the goal of moving away from the Eurocentric hierarchical approach of our prisons. The goal of these practices is to increase restoration and rehabilitation within the program and focus on restorative justice. Restorative justice, in this instance, is "a location of decolonization in that Indigenous models of justice assist in revitalizing Indigenous laws through practice."[70] These facilities are based on the recognition that Indigenous offenders should be dealt with in a culturally meaningful way, while trying to draw together all the parties affected by the harm of the crime in order to restore harmony within the community. Indigenous peoples have their own laws that were not accepted by the colonial settlers when they were establishing the justice system in Canada.

---

67 *Ibid.*

68 Office of the Correctional Investigator, *Spirit Matters*, *supra* note 46 at para 32.

69 *Ibid* at para 33.

70 Hewitt, *supra* note 1 at 317.

Healing lodges are a step towards formal recognition of Indigenous law in the correctional planning of Indigenous offenders.

The *Stan Daniels Healing Centre*, for example, seeks to provide a safe, structured environment for both the offenders and their families. The program focuses on holistic healing and re-centering Indigenous identity in an effort to restore self-esteem. The programming focuses on "relationships, loss and recovery, family, relapse prevention, healing, and substance abuse."[71] Another way by which the lodges seek to heal the connection between the offenders and their culture is by encouraging participation in traditional ceremonies such as the Sundance Ceremony, smudging, and sweat lodges.

At the *O-Chi-Chak-Ko-Sipi Healing Lodge*, the objective is the same, with a focus on mental, physical, and spiritual healing, as well as tradition. An Indigenous architect designed the "Earthen Spiritual Centre" in the facility, which has a tipi-inspired central lodge, four residences, and a place for visitors. The program also encourages healthier lifestyle choices, including "nutrition, exercise, stress relief, anger management, parenting, and sexual/health issues."[72]

The *Buffalo Sage Wellness House*, a women's facility, has programs that were developed with the Task Force on Federally Sentenced Women in order to provide programs focused on the specific and diverse needs of women. The lodge is founded on a caring attitude towards self, family, and community; programs also highlight the transitory aspects of Indigenous life. An important feature of the structure of these lodges is that the programs are delivered in a non-hierarchical fashion – a structure that has proven to be more effective in the rehabilitation of Indigenous offenders. This structure focuses more on the exchange of learning rather than on individuals in power.[73] Residents are guided by the in-house Elders through the lens of an "interconnected, Indigenous worldview."[74] This organization helps to reconnect with cultural roots lost through the colonial foundation of our current prison system. Statistics show that being involved with these programs[75] can help with recidivism by fostering the offenders' relationships, not only with their traditions and culture, but by reinforcing

---

71 "About the different lodges", *supra* note 58.

72 *Ibid.*

73 Combs, *supra* note 30 at 174.

74 *Ibid* at 175.

75 Milward, *supra* note 2 at 37.

their sense of self, which is often buried by the trauma — both firsthand and vicarious — many of Indigenous Canadians have suffered since childhood.

VI. UNDERUTILIZATION OF SECTIONS 81 & 84 OF THE *CCRA*

Recall that this legislation was introduced in 1992, so you may be wondering – why are the numbers consistently rising? The research shows that it is not due to the legislation being ineffectual, but simply to the legislation not being utilized to the extent that it was intended by the legislators and the various federal task forces.

The literature on Indigenous over-incarceration is clear on several facets highlighted in the previous pages, specifically that it is a devastating issue — even a "crisis" — and that the numbers are consistently rising, notwithstanding the efforts of the justice system to decrease the blatant problem. So, with this in mind, what logical reason could there be for the near neglect of these provisions in practice? Disappointingly, in the case of s. 84, lack of sufficient knowledge has been cited as one of the major reasons for its underutilization.[76] Individuals at all levels of involvement in the justice system have stated that there is a lack of awareness and understanding about the kind of agreements that these sections refer to, and, in turn, application of the sections is avoided. This inadequate knowledge of the legislation results in confusion surrounding who is responsible for implementing these releases.[77]

This preliminary explanation seems to follow a pattern of diffusing responsibility with regard to the efforts of the system to repair the damage done to Indigenous communities primarily through over-incarceration of their people.

A major hurdle in the application and utilization of s. 84 is the isolation of many communities and the absence of proper transportation, creating a geographical barrier between the offenders and the officers and programs required for those individuals to complete programs put in place by s. 84. Isolated communities are deeply affected by intergenerational trauma and often the resulting violence, making it difficult to build the programs and infrastructure for the facilitation of the agreements.[78]

---

76 *Ibid* at 181.

77 *Ibid.*

78 *Ibid* at 181–82.

These factors are intensified by the fact that many Indigenous communities are already deficient in many resources, particularly financial resources, leaving them without the capacity to provide the services necessary for conditionally released offenders to reintegrate into their communities successfully.[79] Although that may seem like a valid argument on its face, it becomes less persuasive due to the fact that in 2000, an agreement was entered into in which $11.9 million dollars was to be given to the CSC over five years under Public Safety Canada's *Effective Corrections and Citizen Engagement Initiative.* These funds were meant to aid with the construction of alternative rehabilitation facilities (healing lodges), for the specific application of s. 81, as well as aid in helping with community programming outside of the incarceratory environment.[80]

In the 20 years since, only one stand-alone Healing Lodge has been constructed – the *Waseskun Healing Centre* in Edmonton. Recall that two other healing lodges were opened for women in 2011 and 2019, but these facilities were converted for the purposes of complying with s. 81 and were not constructed using the initiative funds. It is also necessary to note that when an individual is in the care of the First Nation within one of these facilities, the government gives them a *per diem* allowance based on how many offenders are in the facility each day.[81]

During the process of delving into the issue of where these funds were being directed, as the $11.9 million had clearly not been used to aid in s. 81 agreements and facility construction, documents from 2002 were found detailing that the *Effective Corrections* money had been diverted to cover other institutional costs.[82] Some of the funds were used for Pathways Healing Units – Indigenous healing units in medium-security prisons. Other funds were used to hire and train more Indigenous community development officers and support a National Aboriginal Working Group and an Aboriginal Gangs initiative at Stony Mountain Institution in Manitoba.[83] Although these initiatives and programs appear helpful, necessary, and backed by noble intentions within the prisons, the problem still stands – the funds were redirected to better accommodate the large population of Indigenous offenders in prison when their purpose was to

---

79 *Ibid* at 181.
80 *Ibid* at 176.
81 Office of the Correctional Investigator, *Spirit Matters*, *supra* note 46 at para 33.
82 *Ibid* at paras 36–37.
83 *Ibid.*

reduce the number of Indigenous inmates by increasing alternative custodial centres and enhancing reintegration programming. The money had been diverted away from solving, or at least decreasing the issue, to mere accommodation of the issue – an unacceptable substitute for change.

When the CSC was asked to explain the policy changes that resulted in the change towards institutional priorities for the funds, they said that the programs they were funding would inevitably prepare the offenders for the move into the healing lodge environment.[84] Although it seems plausible that this could be the truth for some offenders in need of a more structured correctional approach before a transition, it fails to address the fact that the funds were directed away from their intended purpose and the numbers of incarcerated Indigenous offenders continues to rise.

VII. Over-Classification of Indigenous Offenders

A major issue contributing to the underutilization of these sections of the *CCRA* is the over-classification of Indigenous offenders. Not only does classifying Indigenous offenders as higher risk than necessary exclude them from being eligible to participate in some incarceratory programming, but it also often excludes them from being eligible to be transferred to s. 81 facilities. As previously noted, all of the male healing lodges are for minimum security offenders; the women's lodges allow medium and high security classifications on a case-by-case basis. This arguably excludes many offenders from even having the opportunity to be released to one of these facilities at sentencing or transferred there at a later date. The over-classification of these offenders makes the pool of eligible offenders even smaller.[85]

This issue was explored in the 2018 case of *Ewert v Canada*, a case dealing with assessment tools used by the CSC to help determine security classification. The facts of Ewert's case are not applicable to the discussion surrounding s. 81 facilities as Mr. Ewert was charged and convicted with the sexual assault and murder of two women on two separate occasions.[86] There is likely no scenario in which he would have been considered for a healing lodge under s. 81 given the violence, cruelty, and nature of his crimes. That

---

84 Combs, *supra* note 30 at 176.

85 *Ibid* at 177.

86 *Ewert v Canada*, 2018 SCC 30 at para 9 [*Ewert*].

said, the case he brought to the Supreme Court dealing with the use of particular risk assessment tools will undoubtedly have an impact on many Indigenous peoples in the system moving forward.

Ewert challenged the CSC's reliance on certain "psychological and actuarial risk assessment tools"[87] because there is no solid empirical research regarding their effectiveness when applied to Indigenous offenders, the validity of the tools is in question. He argued that the tools had been developed and tested on predominantly non-Indigenous people, and their effectiveness had not been confirmed in the case of an Indigenous inmate. He sought a declaratory remedy that the CSC had, by using these tools, failed to uphold its legal obligation under s. 24(1) of the *CCRA*, which states: "[t]he 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."[88]

Ewert also made an argument that the reliance on the tools offended s. 4(g) of the *CCRA*[89] and that correctional policies and practices have to respect cultural differences and be "responsive to the special needs of women, Indigenous persons, visible minorities, persons requiring mental health care and other groups."[90]

During the trial, an expert witness testified to the phenomenon of cross-culture or variance bias in the application of assessment tools, claiming that the reliability of an assessment tool can vary greatly, depending on the cultural background of the test subject. He further noted that due to the significant cultural differences between non-Indigenous and Indigenous Canadians, the impugned tools were more likely to experience a cross-cultural variance in results.[91] The doctor did not provide evidence on the magnitude of the variance, only stating that the variance could be on a spectrum from subtle to profound.[92]

Based on the testimony of one of the Crown's witnesses, a former head of research at the CSC, the trial judge found that the CSC had been aware of concerns from researchers about the cross-cultural validity of the assessment tools at issue since 2000.[93]

---

87 *Ibid* at para 4.
88 *CCRA*, *supra* note 3, s 24(1).
89 Combs, *supra* note 30 at 178–79.
90 *CCRA*, *supra* note 3, s 4(g).
91 *Ewert*, *supra* note 84 at para 13.
92 *Ibid*.
93 *Ibid* at para 17.

Writing for the majority, Justice Wagner (as he then was) noted in his conclusion that the question of validating the impugned tools is more than a theoretical query, but a real question that has been subject to proceedings that began two decades ago. The CSC indicated that they would obtain an opinion on the validity of the tools from an objective outside source but failed to do so. The Court then concludes that the CSC breached its duty under s. 24(1) of the *CCRA*.[94]

It is important to note that the *Ewert* case did not decide whether or not risk assessment tools are valid assessment tools for Indigenous offenders. The reach of the case holds that the CSC has a legal obligation under s. 24(1) to take all the reasonable steps necessary to determine the accuracy of the results when dealing with Indigenous offenders – and it was determined that they had not fulfilled this obligation.

Following *Ewert*, the Correctional Investigator called for change and innovation and asked the CSC to respond publicly to the gaps identified in *Ewert* and reassure the public that more culturally applicable indicators would be used in future assessments. Another recommendation called for the CSC to acquire independent external expertise to conduct empirical research assessing the validity of all existing risk assessment tools used to inform the correctional path of Indigenous offenders.[95]

If the cross-cultural variance of the assessment tools used in institutions in Canada had the effect of classifying an inmate at a higher security level, this failure by the CSC has a direct impact on the overrepresentation of Indigenous inmates in Canadian correctional facilities. As stated, over-classification means that inmates may not be eligible for programming while in prisons, s. 81 facilities, or the earliest possible parole opportunities. In 2016–2017 it was reported that compared to non-Indigenous offenders, Indigenous inmates served a higher portion of their sentence before being released on their first day parole: 40.8% versus 49.0%, respectively.[96]

The House of Commons Standing Committees on Public Safety and National Security and Status of Women committees concluded studies on Indigenous peoples in the federal correctional system and Indigenous

---

94 *Ibid* at paras 82–85, 90.

95 Canada, Office of the Correctional Investigator, *2018-2019 Annual Report*, by Ivan Zinger (Ottawa: Office of the Correctional Investigator, 25 June 2019) at 70 [Office of the Correctional Investigator, *Annual Report*].

96 *Ibid* at 65.

women's experience of federal corrections, respectively.[97] Their suggestions aligned with those of the Office of the Correctional Investigator, who called for the validation of existing risk assessment tools and/or the development of tools more applicable to the histories and realities of Indigenous peoples in custody.[98] In response to these recommendations, the CSC did identify several "potentially promising initiatives,"[99] including Aboriginal Intervention Centres and contracts with Indigenous communities for reintegration services. Unfortunately, the majority of these responses were vague and non-committal and seemed to express intention to maintain the current procedures.

Another issue briefly touched upon in the introductory pages is that even when assessment tools are used, the assessment is often ignored, and liberties are taken with regard to the placement of offenders – often female offenders. After initial placement in a facility, there is a Security Reclassification Scale for Women (SRSW), a tool used to determine where a female inmate should be more permanently placed. A study was conducted by the CSC regarding the operational value of the classification system in shorter review periods. Findings from the study found that the majority of the SRSW recommendations were to a medium-security level. Although few of the scales fell between discretionary ranges, more than half of those were placed in high security when they did. Furthermore, final decisions that overrode the SRSW results happened in 29% of cases, and the majority of those (76%) were also to higher security, claiming to be based on measures of current behaviour and attitude.[100]

The scope of over-classification is broad and has many implications for the type of rehabilitative programming available to offenders and their length of time in custody before conditional release. Misclassification is one of the major factors which results in the underutilization of s. 81 provisions, so many offenders do not qualify due to their security classification, which would be a fair principle, in theory, if the classifications were based on reliable assessment measures.

All factors considered, this legislation is not being applied readily enough and should be considered in court at the sentencing hearing of every Indigenous individual, alongside pre-sentence reports and formal *Gladue*

---

97 Office of the Correctional Investigator, *Annual Report*, *supra* note 93 at 64.

98 *Ibid* at 66.

99 *Ibid* at 67.

100 Paquin-Marseille, *supra* note 29.

reports. These provisions of the *CCRA* are meant to be remedial and cannot achieve their objective if they are not being used to aid in the judicial process. The *CCRA* is a piece of legislation that should be interpreted in a "fair, large and liberal manner" to ensure that it will achieve the intent, meaning, and spirit of its systematic goal.[101] Its underutilization is not only an injustice, but causes continued harm to the First Nations people in Canada by the government, in addition to the ongoing failure to achieve reconciliation. It is not just the freedom of Indigenous peoples that hangs in the balance, but their physical safety, and for some, it is a matter of life and death. Indigenous inmates in Canada account for a disproportionate number of self-inflicted injuries while in custody. In 2018–2019, while making up just 29% of the overall population of inmates, they accounted for 52% of self-injury incidents.[102] This statistic illustrates the pain, trauma, and hardship, both physical and mental, flowing from this failure to act. These avenues are in place to give Indigenous offenders the type of rehabilitation that our government themselves have said needs to be provided, and yet the provisions remain underutilized and underfunded.

Furthermore, where these s. 81 agreements have been entered into, the statistics from the Auditor General Reports show that they have been highly successful, resulting in lower recidivism rates while achieving more positive community reintegration.[103] The need for more s. 81 agreements is not unknown to the judicial actors in the criminal justice system. Following the Annual Report, which noted an increase of 1,423 Indigenous inmates, while only a 174 inmate increase overall,[104] the Office of the Correctional Investigator implored the increased use of ss. 81 and 84, also suggesting increased *Gladue* factor training, training on Aboriginal social history, and how that knowledge should be applied in the decision making and sentencing process.[105]

All these issues discussed thus far impact the underuse of s. 81 are overshadowed by the main problem, lack of beds as a result of underfunding. In 2017, roughly 40,000 people were incarcerated in

---

101 Combs, *supra* note 30 at 185.

102 Office of the Correctional Investigator, *Annual Report*, *supra* note 93 at 65.

103 Combs, *supra* note 30 at 182.

104 Office of the Correctional Investigator, *Annual Report*, *supra* note 93 at 65.

105 Office of the Correctional Investigator, *Spirit Matters*, *supra* note 46 at para 81.

Canada, and of those, an estimated 11,000 are Indigenous.[106] As stated, there are currently only 189 beds available in s. 81 facilities. Whether these agreements are being advocated for or sought after is one issue, but at the current capacity rates, most offenders — regardless of their security classification, assessment tools, culture, or individual needs — will not find themselves in a s. 81 facility.

VIII. RECOMMENDATIONS

The viable solution to applying these provisions of the *CCRA* in the way they were intended, in order to lower the overrepresentation of Indigenous inmates in Canadian custody, is through the redirection of government funds to the construction of numerous additional s. 81 facilities and programs on Indigenous land and in Indigenous communities. The government may not have excess money at their disposal, but funds can be redirected from departments and from issues that pose less of a risk to Indigenous peoples and, in turn, create opportunities for reconciliation between the Canadian Government and Indigenous Canadians. In the same way that the funds from the *Effective Corrections and Citizen Engagement Initiative* were redirected to incarceratory programs, those funds should be directed back to the purpose for which they were intended.

Many social justice activist groups in 2020 have been calling for the redirection of funds from police departments across the country. Just as one of the issues relating to the over-incarceration of Indigenous peoples is the over-policing of primarily Indigenous neighbourhoods, so too is the funnelling of government money into the enhancement of the police departments, rather than the rehabilitation of the individuals and communities affected by societal marginalization. In May and June of 2020, activist groups, allies, and citizens across the country — and throughout North America — gathered to march in solidarity with the Black Lives Matter movement and to call for defunding police departments around the continent. The Winnipeg Police budget has almost doubled in the last 12

---

106 The John Howard Society of Canada, "Data on Canada's prison system" (25 January 2020), online (blog): *The John Howard Society of Canada* <johnhoward.ca/blog/data-on-canadas-prison-system> [perma.cc/LW2N-9VHC].

years, from about $170 million in 2008 to over $305 million in 2020.[107] The comparison of these numbers to the $11.9 million given to aid in the construction of s. 81 facilities highlights the discrepancy in governmental priorities; the funding allocated to the s. 81 initiative over two decades is equivalent to approximately 4% of the funding given to the Winnipeg Police Force in a single fiscal year.

Furthermore, for the 2019/2020 Fiscal Year ending on March 31, 2020, the Manitoba Government cited that their expenditure on Indigenous and Northern Relations was $35 million compared to the $114 million funnelled into Sport, Culture and Heritage.[108] This money covers Le Centre Culturel Franco-Manitobain, Manitoba Arts Council, Manitoba Combative Sports Commission, Manitoba Film and Sound Recording Development Corporation, and Sport Manitoba Inc.[109] The Indigenous and Northern Relations money is meant to provide "funding for projects and initiatives led by Indigenous and non-Indigenous organizations and communities to engage in new and innovative approaches to advance reconciliation in the province."[110] That there is such a disparity between the funding for sport and art-related programming compared to the provincial funding of programs related to reconciliation is a stark illustration of the priority imbalance within the Manitoba Provincial Government. To add to this bleak picture, the budget for 2020/2021 cites a two million dollar increase in the funding for Sport, Culture and Heritage and a two million dollar decrease in funding for Indigenous and Northern Relations, allowing for $116 million and $33 million, respectively.[111]

All of this is to illustrate that the funding is there and accessible, but it is being allocated to departments deemed more important by the same government decision-makers who constantly pledge their allegiance to Indigenous peoples, communities, and land, while upholding the systems that continue to marginalize them.

---

107 Michael D'Alimonte, "Advocates ask why Winnipeg Police Service is getting more when community groups are getting less", *CTV News* (28 September 2020), online: <winnipeg.ctvnews.ca> [perma.cc/ZPB4-KFM5].

108 Government of Manitoba, *Manitoba Budget 2020*, (19 March 2020) at 3, online (pdf): *Government of Manitoba* <www.gov.mb.ca/asset_library/en/budget2020/budget.pdf> [perma.cc/6ZET-4AF2].

109 *Ibid* at 9.

110 *Ibid* at 79.

111 *Ibid* at 6.

The departments mentioned above are just two examples of overfunded government departments that could be even marginally defunded in order to provide more support to reconciliation initiatives by the government. Even decreasing funding to some other departments by one to two percent each fiscal year could make a difference in the resources available for the implementation of ss. 81 and 84 agreements. There is no reason that s. 81 facilities (one of many extra-incarceratory programs that lack funding) should be struggling when the "crisis" of Indigenous overrepresentation has persisted for over 40 years.

Lastly, within the scope of sentencing, these programs are somewhat on the periphery. It is not currently within the power of the judiciary to sentence an Indigenous inmate directly to a s. 81 facility at a sentencing disposition in the way they might with other correctional or conditional release orders. That said, if the budget were expanded to facilitate a drastic increase in the number of beds in these facilities, then it would be plausible to advocate for a change in the current procedure, putting the power of s. 81 sentences in the hands of the judiciary, instead of solely in the jurisdiction of the CSC. This type of change would make it plausible for s. 81 facilities and agreements to be a factor included in future sentencing submissions. At the very least, it could be taken under advisement; judges should have the discretion to render the sentence most conducive to a relatively seamless transition into one of these programs, soon after the sentence has been passed.

Finally, it bears acknowledging the apparent contradiction between the goal of reducing Indigenous Canadians in custody and the means suggested herein – alternative forms of custody. Although it may seem irreconcilable, the answer lies in the effect that healing lodges and alternative, culturally-centred forms of incarceration and rehabilitation have on recidivism. The statistical success of this type of programming is staggering – Indigenous offenders who participated in cultural and traditional activities as a central focus of their correctional plan saw a 28.9% drop in recidivism. Further, the recidivism rate for Indigenous offenders who participated in spiritual ceremonies and spent time with Elders during their time in custody saw recidivism rates dropping by roughly 40%.[112] Theoretically, over time, by increasing s. 81 and s. 84 *CCRA* agreements, there will be a reduction in the overall number of Indigenous Canadians behind bars; this will be

[112] Milward, *supra* note 2 at 36–37.

achieved through successful rehabilitation of these individuals achieved by way of meaningful connection with their heritage and community.

IX. Conclusion

There is no magic solution to the systemic tragedy of Indigenous over-incarceration, but there is something better – extensive empirical, anthropological, academic, and cultural-historical research that paints a clear picture of what can and will make a difference if properly implemented. The *Ewert* case and countless others have illustrated that, among other things, the system cannot treat Indigenous offenders and non-Indigenous offenders the same way and expect a uniform outcome. As legal professionals, we must demand that the system recommits to directing funds into reconciliation, meaningful programming, and the overall well-being of our Indigenous Canadians. Indigenous peoples have a rich history and culture, with their own laws and theories of rehabilitation and growth. It is the job of the government to find a way to fund these programs because a crisis that has persisted for decades is no longer a crisis: it is a flaw embedded in the foundation of our system. We must not allow another decade to pass without a collective demand for change.

Reconsidering *Luxton* in the Post-*Nur* Revolution: A Brief Qualitative and Quantitative Analysis of Recent Challenges to Mandatory Minimums and Other Sentencing Provisions

STACEY M. PURSER*

ABSTRACT

In the 1990 decision of *R v Luxton*, the Supreme Court of Canada (SCC) upheld the mandatory minimum for first-degree murder as constitutional in large part because of the existence of the Faint Hope Clause Regime, which was abolished in 2011. Since then, Parliament has also codified proportionality as the fundamental principle of sentencing. Similarly, the SCC has rendered the *Gladue* line of cases. These changes suggest that the reasons for upholding *Luxton* may no longer be as valid now as they were back then. Recognizing that legal argument is as much a sociological phenomenon as it is about the law, the thesis of this article is that it is only recently that challenges to mandatory minimums have gained sufficient momentum to give a challenge to *Luxton* a fighting chance. *Nur* sent a strong signal to lower courts that unjustified constraints on their ability to impose proportionate sentences would no longer be tolerated. To quantitatively and qualitatively test this theory, the inventory of cases from

* Stacey M. Purser is a Criminal Trial and Appeal Lawyer with Purser Law in Edmonton, Alberta (www.criminalappeals.net). The research for this article was made possible by Osgoode Hall Law School's Criminal Law and Procedure LLM. Special thanks are due to Justice Kim Crosbie and Justice Melvyn Green, both of the Ontario Court of Justice, for taking time out of their busy schedules to teach "The Theory and Practice and Sentencing," for which this paper was written. Additional thanks to the three anonymous peer-reviewers for their comments on earlier drafts of this article. The views expressed within this article are my own, and all remaining errors are mine.

MMS.watch will be analyzed to show that *Nur* sparked a revolution that has not only seen an increase in the number of challenges brought against mandatory minimums, but an increase in their success rate and reach. Then, using three key 2020 decisions from three different Appellate Courts, recent trends in judicial thinking that demonstrate both a boldness that is finally ready to take on *Luxton,* as well as support for some of the reasons for overturning *Luxton,* will be highlighted.

Keywords: Mandatory Minimum; First-Degree Murder; Faint Hope Clause; *Luxton*; *Nur*; *Hilbach*; *Sharma*; *Bissonnette*; MMS.watch; Statistics

I. INTRODUCTION

Since 2011, one of the key reasons for upholding the constitutionality of the mandatory minimum for first-degree murder in the 1990 decision of *R v Luxton*,[1] the Faint Hope Clause Regime,[2] has ceased to exist. Additionally, several other changes to the *Criminal Code of Canada*[3] and developments in the common law have given rise to further compelling reasons to re-consider *Luxton.* Despite these changes suggesting that *Luxton* may no longer be good law, no such challenge to the Supreme Court of Canada's ruling has yet been launched.

Recognizing that legal argument is as much a sociological phenomenon as it is about the law, the thesis of this article is that it is only recently, in what the writer calls the post-*Nur*[4] revolution, that challenges to mandatory minimums have gained sufficient momentum to actually give a challenge to *Luxton* a fighting chance. While on its face the decision in *Nur* appeared to be a small and incremental development of the common law (and it was), *Nur* sent a strong signal to lower court judges that unjustified constraints on their ability to impose proportionate sentences would no longer be tolerated. This judicial head nod from the Supreme Court has since sparked a revolution that has not only seen an increase in the number of challenges brought against mandatory minimums, but an increase in their success rate

---

1 [1990] 2 SCR 711 [*Luxton*].

2 In this paper, "Faint Hope Clause Regime" refers to ss. 745.6 through 745.64 of the *Criminal Code*, which allow for an offender to bring an application for a reduction in the period of parole ineligibility after serving 15 years of his or her sentence.

3 RSC 1985, c C-46 [*Criminal Code*].

4 *R v Nur*, 2015 SCC 15 [*Nur*].

and reach. In addition to the first mandatory minimum for a serious violent offence being struck down, 2020 saw the demise of consecutive life sentences in Quebec[5] and the prohibition on the availability of Conditional Sentence Orders for offences carrying a 14 year or greater maximum sentence in Ontario.[6]

This brief paper will quantitatively and qualitatively demonstrate the existence of a post-*Nur* revolution and argue that this revolution has now finally gained enough momentum to give a renewed challenge to *Luxton* a fighting chance. To do so, the inventory of cases from MMS.watch[7] will be analyzed to show that *Nur* both inspired defence lawyers to bring challenges to mandatory minimum sentences and allowed judges to strike them down. Using three key 2020 decisions from three different Appellate Courts, recent trends in judicial thinking, that demonstrate both a boldness that is finally ready to take on *Luxton* as well as support for some of the reasons for overturning *Luxton*, will be highlighted.

II. THE DECISION IN *LUXTON*

In 1990, Mr. Luxton challenged the constitutionality of the mandatory minimum period of imprisonment of "Life-25"[8] for constructive first-degree murder.[9] Perhaps because it was one of many constitutional questions raised, or perhaps because the facts upon which Mr. Luxton was convicted

---

5 *Bissonnette c R*, 2020 QCCA 1585 [*Bissonnette*].

6 *R v Sharma*, 2020 ONCA 478 [*Sharma*].

7 MMS.watch is a free database, created by Matthew Oleynik and powered through rangefindr.ca, that monitors the constitutionality of mandatory minimum sentences found in both the *Criminal Code* and *Controlled Drugs and Substances Act*, SC 1996, c 19 [*CDSA*]. In relation to each offence provision that carries a mandatory minimum, decisions from all court levels that either considers the constitutionality of the provision or entertain a request for a constitutional exemption are listed. Matthew Oleynik, *Rangefindr: MMS.watch*, online: <mms.watch> [perma.cc/7BKU-E5XL].

8 "Life-25" in this paper refers to the mandatory minimum for first-degree murder being life imprisonment without the possibility for parole for 25 years.

9 *Luxton* considered then paragraph 214(5)(e) of the *Criminal Code*, now paragraph 231(5)(e) of the *Criminal Code*, *supra* note 3, which notes that "Irrespective of whether a murder is planned and deliberate on the part of any person, murder is first degree murder in respect of a person when the death is caused by that person while committing or attempting to commit an offence under one of the following sections: (e) section 279 (kidnapping and forcible confinement)."

were hardly sympathetic,[10] with little thought or legal analysis the Court upheld Life-25 as constitutional. In doing so, Chief Justice Lamer made the following observations:

> In my view, the combination of [s. 231(5)(e)] and [s. 745(a)] does not constitute cruel and unusual punishment. These sections provide for punishment of the most serious crime in our criminal law, that of first degree murder. This is a crime that carries with it the most serious level of moral blameworthiness, namely subjective foresight of death. The penalty is severe and deservedly so. The minimum 25 years to be served before eligibility for parole reflects society's condemnation of a person who has exploited a position of power and dominance to the gravest extent possible by murdering the person that he or she is forcibly confining. The punishment is not excessive and clearly does not outrage our standards of decency. In my view, it is within the purview of Parliament, in order to meet the objectives of a rational system of sentencing, to treat our most serious crime with an appropriate degree of certainty and severity. I reiterate that even in the case of first degree murder, Parliament has been sensitive to the particular circumstances of each offender through various provisions allowing for the royal prerogative of mercy, the availability of escorted absences from custody for humanitarian and rehabilitative purposes and for early parole: see s. 672 (now s. 745), s. 674 (now s. 747) and s. 686 (now s. 751) of the *Criminal Code*…
>
> Therefore, I conclude that in the case at bar the impugned provisions in combination do not represent cruel and unusual punishment within the meaning of s. 12 of the *Charter*.[11]

In holding that Life-25 did not constitute "cruel and unusual punishment," it appears that significant emphasis was placed on the existence of three "exceptions:" 1) the availability of the royal prerogative of mercy; 2) the availability of escorted temporary absences (ETAs); and 3) the existence of the Faint Hope Clause Regime. The significance of the existence of the Faint Hope Clause Regime (without reference to the royal prerogative or ETAs) was also emphasized by the then Chief Justice at the beginning of his reasons:

> As a result of [s. 745(a)] the murderer is sentenced to life imprisonment without parole eligibility for 25 years. It is of some note that even in cases of first degree murder, [s. 745.6] of the *Code* provides that after serving 15 years the offender can apply to the Chief Justice in the province for a reduction in the number of years of imprisonment without eligibility for parole having regard for the character of

---

10 Mr. Luxton was convicted of stabbing a female cab driver, who was a 24-year-old mother of three, 15 times in the head and neck during the course of a robbery that included an unlawful confinement. Her body was found lying in a farmer's field. *Luxton*, *supra* note 1 at 715–16.

11 *Ibid* at 724–25 [emphasis added].

> the applicant, his conduct while serving the sentence, the nature of the offence for which he was convicted and any other matters that are relevant in the circumstances. This indicates that even in the cases of our most serious offenders, Parliament has provided for some sensitivity to the individual circumstances of each case when it comes to sentencing.[12]

In other words, from the few reasons that were given, Chief Justice Lamer appears to have heavily relied upon the existence of the Faint Hope Clause Regime to justify such a lengthy mandatory minimum. Since *Luxton* was decided, it has consistently been interpreted as upholding Life-25 sentences, generally.[13]

III. The Faint Hope Clause and its Abolition

In its original format, the Faint Hope Clause Regime permitted offenders who had served at least 15 years of their sentence to bring an application before a jury, as of right, for a reduction in their period of parole ineligibility. These applications were essentially character applications, the purpose of which was "to call attention to changes which have occurred in the applicant's situation and which might justify imposing a less harsh penalty."[14]

Over time, these applications were circumscribed and eventually eliminated. In 1996, after controversial serial killer and child rapist Clifford Olson brought an application, Parliament introduced a judicial screening requirement that required offenders to show a "reasonable prospect" of success before a jury would be empanelled.[15] In 2011, this judicial screening threshold was increased to require offenders to show a "substantial likelihood" of success before they would be permitted to appear before a jury.[16] This increase in threshold applied to individuals who had committed the offence prior to the amendments coming into force on December 2,

---

12 *Ibid* at 720 [emphasis added].

13 See e.g. *R v Hills,* 2020 ABCA 263; *R v Newborn,* 2020 ABCA 120; *Bissonnette, supra* note 5 at para 60.

14 *R v Swietlinski*, [1994] 3 SCR 481 at 493.

15 Bill C-45, *An Act to amend the Criminal Code (judicial review of parole ineligibility) and Another Act*, SC 1996, c 34, s 2.

16 Bill S-6, *An Act to amend the Criminal Code and another Act (Serious Time for the Most Serious Crime Act)*, SC 2011, c 2, s 4.

2011.[17] For individuals who committed offences after December 2, 2011, the Faint Hope Clause Regime was abolished in its entirety.[18]

Since 2011, a number of individuals have challenged either the retrospective introduction of the judicial screening mechanism or the retrospective increase in the threshold to be established at the judicial screening phase.[19] However, to date, no challenge to the abolition of the Faint Hope Clause Regime has been brought and can likely only be brought through a re-visitation of *Luxton*. The significance of this loss to those serving a life sentence cannot be understated. As noted in *R v Poitras*, "[a]ccording to the Library of Parliament Legislative Summary… juries granted relief in over 81% of the faint hope clause applications judges sent on to full hearings under the old threshold."[20]

IV. THE DECISION IN *NUR*

In the 2015 decision of *Nur*, the Supreme Court of Canada reiterated the test for finding a mandatory minimum sentence to be "cruel and unusual" pursuant to s. 12 of the *Charter*:[21]

> To recap, a challenge to a mandatory minimum sentencing provision on the ground it constitutes cruel and unusual punishment under s. 12 of the *Charter* involves two steps. First, the court must determine what constitutes a proportionate sentence for the offence having regard to the objectives and principles of sentencing in the *Criminal Code*. Then, the court must ask whether the mandatory minimum requires the judge to impose a sentence that is grossly disproportionate to the fit and proportionate sentence. If the answer is yes, the mandatory minimum provision is inconsistent with s. 12 and will fall unless justified under s. 1 of the *Charter*.[22]

The decision in *Nur* simply reiterated, in the context of s. 12 of the *Charter*, the longstanding principle that a challenge to the law "does not require that the impugned provision contravene the rights of the claimant."[23] It then built on the two-stage analysis from *R v Goltz*[24] and made

---

17 *Ibid*, s 7(2).
18 *Ibid*, s 7(3).
19 See e.g. *R v Dell*, 2018 ONCA 674; *R v Simmonds*, 2018 BCCA 205.
20 2012 ONSC 5147 at para 21.
21 *Canadian Charter of Rights and Freedoms*, s 12, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
22 *Nur*, *supra* note 4 at para 46.
23 *Ibid* at para 51.
24 [1991] 3 SCR 485.

several other minor but helpful changes to the s. 12 test. As Sarah Chaster points out in her article, "Cruel, Unusual, and Constitutionally Infirm: Mandatory Minimum Sentences in Canada:"

> *Nur* injected some much-needed flexibility into the section 12 analysis. After dissenting in both *Goltz* and *Morrisey*, Chief Justice McLachlin wrote for the majority in *Nur* and made four important alterations (or clarifications) to the reasonable hypothetical analysis:
>
> (i) The requirement of common or day-to-day generality from *Goltz* is displaced by a broader test based on "reasonable foreseeability";
>
> (ii) A ruling that a particular provision is not in violation of section 12 does not preclude future challenges to that provision;
>
> (iii) Reported cases should be considered in the reasonable hypothetical analysis; and
>
> (iv) Personal characteristics may be considered when constructing a reasonable hypothetical, as long as they are not tailored to create remote or far-fetched examples.[25]

What was most significant about *Nur*, however, was its strong denouncement of mandatory minimum sentences. Specifically, the Court stated that "it is the duty of the courts to scrutinize the constitutionality of [mandatory minimums]."[26] While Justice Lamer in *Smith*[27] had attempted to remind judges of their constitutional obligation to review mandatory minimums for compliance with the *Charter*, few lawyers and judges alike appear to have heard that direction as few mandatory minimums were declared unconstitutional prior to 2015.[28]

Returning to *Nur*, after finding that the provision in question violated s. 12 of the *Charter*, the Court then went on to consider whether it was saved by s. 1 and made the following comments:

> The government has not established that mandatory minimum terms of imprisonment act as a deterrent against gun-related crimes. Doubts concerning the effectiveness of incarceration as a deterrent have been longstanding...
>
> Empirical evidence suggests that mandatory minimum sentences do not, in fact, deter crimes: see, e.g., A. N. Doob and C. M. Webster, "Sentence Severity and Crime: Accepting the Null Hypothesis" (2003), 30 *Crime & Just.* 143; M. Tonry,

---

25 Sarah Chaster, "Cruel, Unusual, and Constitutionally Infirm: Mandatory Minimum Sentences in Canada" (2018) 23 Appeal 89 at 98.

26 *Nur*, *supra* note 4 at para 87.

27 *R v Smith*, [1987] 1 SCR 1045 [*Smith*].

28 This will be demonstrated in Section VI below.

> "The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings" (2009), 38 *Crime & Just.* 65. The empirical evidence "is clear: mandatory minimum sentences do not deter more than less harsh, proportionate, sentences" (A. N. Doob and C. Cesaroni, "The Political Attractiveness of Mandatory Minimum Sentences" (2001), 39 *Osgoode Hall L.J.* 287, at p. 291).[29]

While the Supreme Court of Canada had rendered at least one decision prior to *Nur* striking down a mandatory minimum,[30] they had never denounced mandatory minimums in such a strong fashion. Instead, they had previously maintained that it was "within the purview of Parliament … to treat our most serious crime with an appropriate degree of certainty and severity."[31]

The following year, in *R v Lloyd*,[32] the Supreme Court again struck down a mandatory minimum under the *Controlled Drugs and Substances Act*,[33] as being grossly disproportionate to the reasonably foreseeable future offender. The Court was split between a minority, arguing that mandatory minimums should only be struck down in rare cases,[34] and a majority, who took a wider view. Chief Justice McLachlin (as she then was), again for the majority,[35] made some very strong comments that because many mandatory minimum sentences apply to offences that "can be committed in many ways and under many different circumstances by a wide range of people"[36] they will "almost inevitably include an acceptable reasonable hypothetical for which the mandatory minimum will be found unconstitutional."[37]

V. METCALFE'S 2015 ARTICLE

Following the release of *Nur*, in her 2015 paper,[38] Laura Metcalfe[39] considered the constitutionality of s. 231(5)(e) of the *Criminal Code*, which

---

29 *Nur*, *supra* note 4 at paras 113–14.

30 *Smith*, *supra* note 27.

31 *Luxton*, *supra* note 1 at 724–25.

32 *R v Lloyd*, 2016 SCC 13 [*Lloyd*].

33 *CDSA*, *supra* note 7, s 5(3)(a)(i)(D).

34 *Lloyd*, *supra* note 32 at paras 57–72.

35 Recall Chief Justice McLachlin (as she then was) also wrote for the majority in *Nur*.

36 *Lloyd*, *supra* note 32 at para 3.

37 *Ibid* at para 35 [emphasis added].

38 It appears the paper was released in 2015 but officially published in 2016 (see citation below).

39 Laura Metcalfe, "Reconsidering the Constitutionality of Mandatory Minimum Sentences Under Section 231(5)(e) Post-Luxton" (2016) 6:2 UWO J Leg Stud 1, online

was challenged in *Luxton*. This "constructive" first-degree murder provision elevates second-degree murder to first-degree murder "when the death is caused… while committing or attempting to commit…" either kidnapping or forcible confinement.[40] Metcalfe made three main arguments to suggest that changes to both statute and the common law provide lower courts with the authority to depart from the decision in *Luxton*.

First, she argued that, because the Faint Hope Clause Regime had now been abolished, one of the conditions precedent to affirming the mandatory minimum in *Luxton* no longer existed.[41] As explained above, the removal of the Faint Hope Clause Regime, which was successful far more often than not, constitutes a significant loss for prospective offenders and hardens the sentence to a true 25 years without parole.

Second, she pointed out that, since *Luxton*, Parliament has enacted s. 718.2(e) of the *Criminal Code* and the Supreme Court of Canada has released the seminal decisions of *R v Gladue*,[42] and *R v Ipeelee*.[43] Both the principle of restraint and the *Gladue/Ipeelee* line of cases require sentencing judges to consider the systemic factors that bring Aboriginal Offenders before the Courts before imposing the least restrictive sanction that meets the principles of sentencing. Mandatory minimums, including the mandatory minimum for first-degree murder, do not permit Courts to give effect to *Gladue* factors by reducing or otherwise tailoring a sentence.[44] Indeed, the Supreme Court of Canada noted that under step one in the two-step *Nur* analysis, which requires judges to consider what constitutes a proportionate sentence in relation to the offender before them, regard must be had to the sentencing principles outlined in ss. 718, 718.1 and 718.2 of the *Criminal Code*, including s. 718.2(e).[45]

Lastly, Metcalfe argued that the s. 12 *Charter* jurisprudence, through *Nur*, changed (or at least clarified) the legal test for determining whether a mandatory minimum constitutes cruel and unusual punishment.[46] That is,

---

(pdf): *Western Libraries* <ojs.lib.uwo.ca/index.php/uwojls/article/view/5658/4752> [perma.cc/ETU2-D3TU].

40 *Criminal Code*, *supra* note 3, s 231(5)(e).

41 Metcalfe, *supra* note 39 at 4.

42 [1999] 1 SCR 688 [*Gladue*].

43 2012 SCC 13 [*Ipeelee*].

44 Metcalfe, *supra* note 39 at 10–11.

45 *Nur*, *supra* note 4 at paras 40–42.

46 Metcalfe, *supra* note 39 at 11–12.

prior to *Nur*, it was unclear whether Courts hearing a challenge to the constitutionality of a mandatory minimum were restricted to considering its application to the offender before them or whether recourse to the "reasonable hypothetical" was permissible. As we now know, recourse to the "reasonable hypothetical" is permitted, if not mandated, for the sake of judicial economy. As only Mr. Luxton's circumstances were considered, the constitutionality of the mandatory minimum for first-degree murder has not been considered against the reasonable hypothetical offender.

Despite the seemingly clear statement in *Nur* that all of the principles outlined in both ss. 718 and 718.1 of the *Criminal Code* are to be considered in the s. 12 analysis,[47] some academics have read *Lloyd* as precluding the use of *Gladue* factors within the reasonable hypothetical analysis. For example, Professor Kiyani has argued that "*Lloyd* may make it harder for courts to find a section 12 violation given the Chief Justice's explicit connection of *Lloyd* to *R. v. Lacasse*, which confirms that section 718.2(e) and *Gladue* principles are not part of the analysis under section 12."[48] While the writer respectfully disagrees with this reading of *Lloyd*, the writer would argue that successfully challenging the mandatory minimum for first-degree murder does not necessarily require that the "reasonable hypothetical" offender be Aboriginal with significantly mitigating *Gladue* factors.[49] That is, once Metcalfe's arguments have been used to successfully open the door to a reconsideration of *Luxton*, any reasonable hypothetical may then be put forth (e.g., a battered-wife convicted of first-degree murder).

The point in challenging *Luxton* is that because the mandatory minimum for first-degree murder is at once both the minimum and the maximum sentence allowed in law,[50] it does not allow the sentence to be tailored to account for any aggravating or mitigating factors for any offender. Thus, it overrides the fundamental principle of sentencing, "the *sine qua non*,"[51] that a sentence be proportional to the seriousness of the offence and the degree of responsibility of the offender in lieu of a "one size fits all" sentence. As noted in *Nur:*

---

47 *Nur*, *supra* note 4 at paras 40–42.

48 Asad G Kiyani, "R v Lloyd and the Unpredictable Stability of Mandatory Minimum Litigation" (2017) 81 SCLR (2d) 117 at 118.

49 For example, the mandatory minimum of Life-25 may be grossly disproportionate when applied to a battered woman who kills her husband after years of abuse with no way out.

50 This statement assumes that only one count of first-degree murder is being sentenced.

51 *Ipeelee*, *supra* note 43 at para 37.

> Mandatory minimum sentences, by their very nature, have the potential to depart from the principle of proportionality in sentencing. They emphasize denunciation, general deterrence and retribution at the expense of what is a fit sentence for the gravity of the offence, the blameworthiness of the offender, and the harm caused by the crime. They function as a blunt instrument that may deprive courts of the ability to tailor proportionate sentences at the lower end of a sentencing range. They may, in extreme cases, impose unjust sentences, because they shift the focus from the offender during the sentencing process in a way that violates the principle of proportionality. They modify the general process of sentencing which relies on the review of all relevant factors in order to reach a proportionate result. They affect the outcome of the sentence by changing the normal judicial process of sentencing.[52]

In addition to the arguments made by Metcalfe, which were confined to s. 231(5)(e) of the *Criminal Code*, each of these arguments could and ought to be applied to each of the enumerated ways in which one can ground a conviction for first-degree murder, including where planning and deliberation is found.[53] In other words, where the mandatory minimum is Life-25, each of the aforementioned arguments applies as to why it may be constitutionally infirm.

VI. Challenges to Mandatory Minimums Pre- and Post-*Nur*

A. The Methodology

To test the theory that *Nur* sparked a revolution overthrowing mandatory minimums, the writer analyzed the MMS.watch[54] database to assess whether the hypothesis that there has been an increase in the volume and success of challenges since 2015 was correct.[55] To do so, first, the total number of challenges between 2011 and 2019 (i.e., the four years before and after *Nur* was decided) were tallied to assess whether an increase in the number of challenges had occurred. Next, these decisions were categorized

---

52 *Nur*, *supra* note 4 at para 44.

53 In other words, all of ss. 231(2) through to and including 231(6.2) of the *Criminal Code* should be re-examined.

54 Oleynik, *supra* note 7.

55 Mr. Oleynik advises that the database is kept by programmatically monitoring CanLII's new cases using a collection of search strings and citation patterns that are used to generate a list of new judgments that likely deal with MMSs. A researcher then reviews the cases on this list to see whether they should be included on MMS.watch. As such, while it can be expected to be reasonably accurate, it may not be perfect.

as being "successful" or "unsuccessful," with success being defined as the mandatory minimum either having been struck down or not applied in the case before the Court. Because the challenges to mandatory minimums listed in MMS.watch include both formal challenges to the legislation brought in Superior Courts as well as individual *Charter* challenges (i.e. requests not to apply the minimum in a particular case) brought in lower courts, a large number of cases were able to be analyzed (N= 248).[56] The year 2020 was not used in this quantitative analysis as the data would undoubtedly be impacted by court closures due to the COVID-19 pandemic and, in the view of the writer, assessing four years before and after *Nur* was enough to determine the presence or absence of a trend. To assess any trends over a longer period of time, cases up to and including 2014 were amalgamated (due to low numbers) and assessed against the years 2015 through 2019, inclusive. Again, 2020 was not used as the data would invariably be problematic due to widespread court closures across the country.

B. Results

In relation to the number of challenges between 2011 and 2019, as shown below, there was a slight increase in the number of challenges to mandatory minimums between 2012 and 2015. This rise is likely attributable to the significant increase in the number of mandatory minimums that were introduced under the Harper government.[57] As Sarah Chaster notes, "By the end of 2012, between the *Criminal Code* and *Controlled Drugs and Substances Act* (*CDSA*), there were nearly one hundred MMS."[58] After 2015, however, there is an undeniable spike in the number of challenges, with about three times as many challenges in 2016, four times in 2017, five times in 2018 and about six times in 2019, when compared to 2015; this consistent linear increase supports the existence of a post-*Nur* revolution. In theory, this chart will eventually peak and begin to fall again as once each mandatory minimum has been struck down in each province or territory (or by the Supreme Court) there will be no need to bring future

---

56 There are more than 286 cases on MMS.watch. However, as 2020 cases were not included, this sample size is slightly smaller.

57 Isabel Grant, "Cleaning up the mandatory minimums mess" (8 May 2018), online: *Policy Options* <policyoptions.irpp.org/magazines/may-2018/cleaning-up-the-mandatory-minimums-mess> [perma.cc/6EEA-SJKU].

58 Chaster, *supra* note 25 at 92.

challenges. However, it appears that as of 2019 we had not yet reached that peak.

Table 1: Number of Challenges to Mandatory Minimums across Canada by Year

Year	*N*
2011	0
2012	2
2013	8
2014	8
2015	12
2016	37
2017	48
2018	59
2019	74

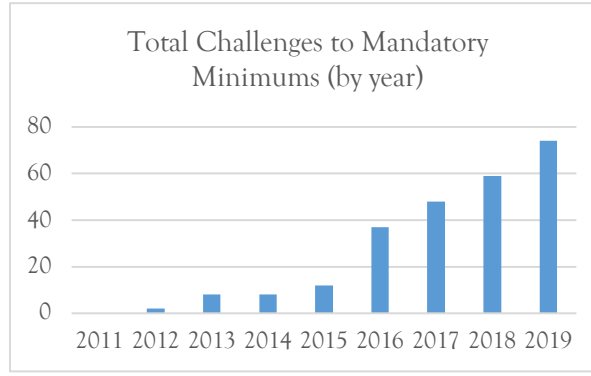

Figure A: Number of Challenges to Mandatory Minimums across Canada by Year

For the 2011-to-2019-time frame, the success rate of these challenges was also tracked by year, as shown below. As you can see, these figures also increased slightly prior to 2015 and then continued to substantially increase thereafter. While the table and chart below show a slight spike in 2015, this can be attributed to the relatively low number of challenges that year (compared to subsequent years) combined with the fact that both *Nur* and *R v Vu*,[59] are "double counted" for having struck down two different provisions in the same decision thereby accounting for four of the 12 successful challenges that year.

[59] 2015 ONSC 5834.

Table 2: Percent Success Rate of Challenges to Mandatory Minimums across Canada by Year

Year	%
2011	0
2012	0
2013	37.5
2014	37.5
2015	75.0
2016	56.76
2017	56.25
2018	72.88
2019	85.14

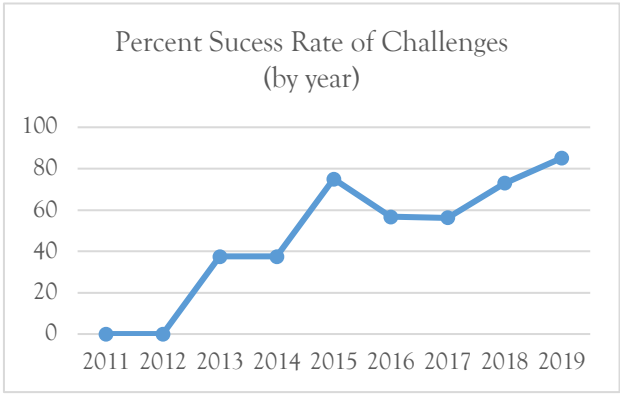

Figure B: Percent Success Rate of Challenges to Mandatory Minimums across Canada by Year

When we look at the total number of challenges brought to mandatory minimums between 1985[60] and 2019, with the years 1985-2014 being grouped together due to the relatively low numbers, we can see that relatively few challenges were brought prior to 2015. Over the 29 years between 1985 and 2014, only 56 challenges were brought for an average of fewer than two challenges per year.[61] In contrast, in the years 2015 through 2019, inclusive, a total of 12, 37, 48, 59 and 74 challenges were brought.

60 The year 1985 was chosen as that is the first challenge identified by MMS.watch, being *R v Laviolette*, 55 Nfld & PEIR 10, 1985 CanLII 175, which upheld the mandatory minimum for second-degree murder.

61 56 challenges divided by 29 years equals an average of 1.93 challenges per year between 1985 and 2014.

Table 3: Number Challenges to Mandatory Minimums across Canada by Year (with 1985-2014 amalgamated)

Year	N
1985-2014	56
2015	12
2016	37
2017	48
2018	59
2019	74

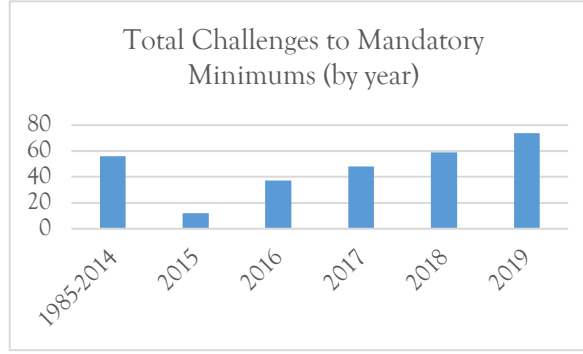

Figure C: Number of Challenges to various Mandatory Minimums across Canada by Year (with 2014 and prior amalgamated)

Similarly, when we look at the success rates for each year, only 3.57% of challenges brought between 1985 and 2014 were successful. By 2019, 85% of challenges were successful. The writer would suggest that this trend is even stronger evidence of a post-*Nur* revolution.

Table 4: Percent Success Rate of Challenges to Mandatory Minimums across Canada by Year (with 1985-2014 amalgamated)

Year	%
1985-2014	3.57
2015	75.00
2016	56.76
2017	56.25
2018	72.88
2019	85.14

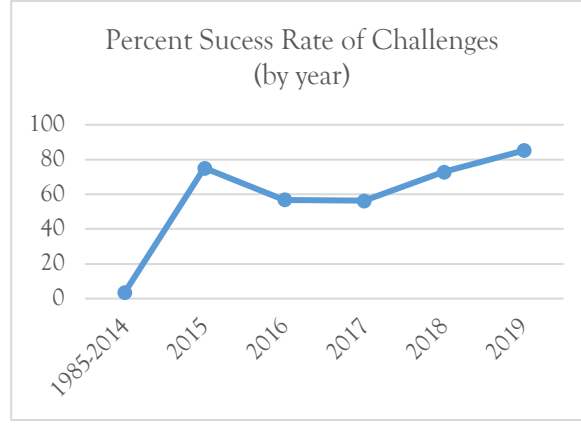

Figure D: Percent Success Rate of Challenges to various Mandatory Minimums across Canada by Year (with 2015 and prior amalgamated)

In conclusion, the above figures show a marked departure from the observation made by Professor Debra Parkes in 2014 (pre-*Nur*) that "the Supreme Court's approach has been decidedly deferential to Parliament"[62] and has given s. 12 "little substantive content or application."[63] Given the figures above, it would appear that neither the Supreme Court nor lower courts following *Nur* and *Lloyd* feel the need to be as deferential to Parliament as compared to years past.

VII. 2020 HIGHLIGHTS AND TRENDS IN CONSTITUTIONAL CHALLENGES

While just over 200 challenges to various mandatory minimums have been launched since *Nur*,[64] the writer would argue that not only have they been increasing in number and success rate, but the decisions appear to be getting bolder. As indicated above, not only did 2020 see an Appellate Court uphold the unconstitutionality of a mandatory minimum for a serious violent offence for the first time in *Hilbach* (i.e., robbery with a firearm), but also the striking down of consecutive life sentences in Quebec in *Bissonnette* and the prohibition on the availability of Conditional Sentence Orders for offences carrying a 14 year or greater maximum sentence in Ontario in *Sharma*. Note that while the year 2020 was not used for the quantitative analysis, for the reasons cited above, as there is no reason to suggest that the pandemic had any effect on the quality of the decisions rendered 2020 cases were used in the qualitative analysis. The existence of a global pandemic was not used (or even mentioned) in any of the examined cases to justify striking down the mandatory minimums at issue.

Hilbach is significant because it represents the only case in Canada that has struck down a mandatory minimum for a serious violent offence.[65] At issue were the mandatory minimums for robbery with a restricted/prohibited firearm, being five years for a first offence and seven years for a second offence pursuant to s. 344(1)(a) of the *Criminal Code*, as

---

62 Debra Parkes, "The Punishment Agenda in the Courts" (2014) 67 SCLR (2d) 489 at 598.

63 *Ibid* at 599.

64 See Table 1. The total number of challenges between 2016 and 2019, inclusive, is 218.

65 See Oleynik, *supra* note 7 under "other offences" for a list of all the challenges to violent offences.

well as robbery with a firearm, being four years pursuant to s. 344(1)(a.1) of the *Criminal Code*. Technically, *Hilbach* represents two cases of mandatory minimums for serious violent offences being struck down as, by consent, the crown appeals of *Hilbach* and *R v Zwozdesky*,[66] were heard together.

Mr. Hilbach pleaded guilty to robbery with a prohibited firearm, contrary to s. 344(1)(a)(i) of the *Criminal Code*, while the possession of the firearm was prohibited, contrary to s. 117.01(1) of the *Criminal Code*.[67] The facts were summarized by the Court of Appeal as follows:

> [O]n June 9, 2017, Mr Hilbach, age 19, and a 13-year-old accomplice robbed a convenience store in Edmonton with an unloaded sawed-off rifle. Mr Hilbach covered his face with his shirt and pointed the gun at two employees demanding cash. His accomplice punched one of the employees and kicked the other. They fled with $290 in lottery tickets and were apprehended a short time later.[68]

Mr. Zwozdesky pleaded guilty as a party to the offence of using a firearm during the course of a robbery, contrary to s. 344(1)(a.1) of the *Criminal Code*. He also plead guilty to a second offence of being a party to a second robbery, contrary to s. 344(1)(b) of the *Criminal Code*, committed just one week after the first offence.[69] The facts were summarized by the Court of Appeal as:

> On September 13, 2016, Mr Zwozdesky and two others robbed a convenience store in Caslan, Alberta. Mr Zwozdesky was the driver of the 'getaway vehicle.' He went into the store immediately before the robbery and purchased a lighter. He was not in the store during the robbery. The other two individuals were masked, and one of them carried a sawed-off shotgun, pushed the store clerk and pointed the gun at her. A shot was fired into a shelf but no one was injured. One week later, on September 20, 2016, Mr Zwozdesky and two others robbed another rural convenience store at Beaver Lake, Alberta. Once again, Mr Zwozdesky was the driver and he did not at any time enter the store. During this robbery the two others were masked, one of the other persons brandished a shotgun and the clerk was sprayed with pepper spray.[70]

In both *Hilbach* and *Zwozdesky*, the sentencing judges found that the applicable mandatory minimums were grossly disproportionate to reasonably foreseeable cases; in the case of *Hilbach*, the sentencing judge found that the mandatory minimum would be grossly disproportionate as

---

66 2019 ABQB 322.

67 *R v Hilbach*, 2020 ABCA 332 at para 2 [*Hilbach*].

68 *Ibid* at para 8.

69 *Ibid* at para 3.

70 *Ibid* at para 19.

applied to him personally. As such, the mandatory minimums in s. 344(1)(a)(i) and s. 344(1)(a.1) of the *Criminal Code* were each struck down.[71]

In upholding the declaration of invalidity in *Hilbach*, the Alberta Court of Appeal noted the significant *Gladue* factors in the offender's personal circumstances. They further observed that the mandatory minimum of five (5) years imprisonment was so high as to over-emphasize denunciation and deterrence, to the detriment of other sentencing principles, such that sentencing judges would not be able to give any meaningful effect to mitigating factors:

> As to Mr Hilbach's particular characteristics, he is Indigenous, a member of the Ermineskin Cree Nation, and there are significant *Gladue* factors (See also *R v Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433, paras 72, 75, 87). Both of his parents were alcoholics and substance abusers, and they abandoned him when he was between six and eight months old. He was raised by paternal grandparents, both of whom had attended residential schools. He suffered from personal addiction, violence and poverty, and had gang affiliations in the past. He committed the robbery in question for the purpose of obtaining money to make his way home to Maskwacis.[72]
>
> [...]
>
> In this case, the five-year mandatory minimum is so high that many cases will attract the minimum sentence and even aggravated cases may frequently not result in a sentence higher than the minimum, such that mitigating factors are lost. The mandatory minimum also elevates the sentencing principles of denunciation and deterrence to such an extent as to minimize objectives of rehabilitation, the imposition of a just sanction, and special considerations for Indigenous offenders: *Boudreault*, paras 80-83.[73]

Similarly, in upholding the declaration of invalidity in *Zwozdesky*, recourse to the reasonable hypothetical was used. Ultimately, the Court found that the mandatory minimum of four years for robbery with a firearm would be grossly disproportionate to the many other real-life cases they compared it to.[74] In other words, the imposition of the mandatory minimum would be disproportionately greater than properly individualized sentences, after all the aggravating and mitigating circumstances were accounted for.

Hilbach is significant because it emphasizes the need for individualization and to give meaningful effect to *Gladue* factors, even with

---

71 *Ibid* at paras 80–82.
72 *Ibid* at para 43.
73 *Ibid* at para 53.
74 *Ibid* at paras 58–71.

respect to serious violent offences. It also shows a willingness on the part of the Court to strike down mandatory minimums beyond those that might affect "licensing type" offenders (as in *Nur*) or "drug sharing spouse" offenders (as in *Lloyd*), to include violent offenders as well. Many of the same arguments that would have to be accepted to overturn *Luxton* were accepted in *Hilbach.*

Next, *Bissonnette* did not deal with a mandatory minimum but, rather, dealt with the constitutionality of s. 745.51 of the *Criminal Code* that was introduced in 2011 (i.e., the same year the Faint Hope Clause Regime was abolished) through Bill C-48: *Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act.*[75] S. 745.51, in short, permits judges to impose consecutive periods of parole ineligibility for those convicted of "multiple murders."

Alexandre Bissonnette pleaded guilty to six counts of first-degree murder and six counts of attempted murder in relation to the shooting at the Quebec City Mosque on January 29, 2017. After eating dinner with his parents, he began searching the internet for information on suicide and mass killings. He left his parents' house, with firearms and ammunition in hand, at approximately 7:00 pm. Between 7:54 pm and 7:56 pm, he opened fire on worshippers present at the Mosque. He then proceeded to the Parc national des Grands-Jardins, with the intention of committing suicide. However, instead, he dialed 911, admitted what he had done, and was arrested by 9:00 pm that evening. He was 27 years old at the time of the shooting, had been on leave from work and school because of an anxiety disorder, and was under the influence of alcohol at the time the offence occurred.[76]

In sentencing Mr. Bissonnette, the sentencing judge read s. 745.51 of the *Criminal Code* as requiring consecutive life sentences to be imposed in 25-year increments of parole ineligibility (i.e., 25, 50, 75 or 100 years, etc.) and examined the provision in light of ss. 7 and 12 of the *Charter.* In consideration of the first step of the *Nur* test, he held that an appropriate sentence for Mr. Bissonnette would be life imprisonment without the possibility of parole for 35 to 42 years.[77] As such, the application of s. 745.51, as read, would result in a grossly disproportionate sentence that was

---

75 SC 2011, c 5.

76 *Bissonnette*, *supra* note 5 at paras 2, 8–11.

77 *Ibid* at paras 28–30.

"cruel and unusual,"[78] contrary to s. 12 of the *Charter*. Under s. 7 of the *Charter*, he also found that it infringed the right to life, liberty, and security of the person in a manner contrary to three principles of fundamental justice by its "overbreadth, grossly disproportionate negative impact and the protection of human dignity."[79] None of the infringements were saved by s. 1 of the *Charter*. However, instead of declaring the entire provision unconstitutional, the sentencing judge felt that where the infringement could be remedied through other means, such as reading in or reading down, those alternatives must be considered.[80] Ultimately, he read in new wording that would allow periods of parole ineligibility to be set between 25 and 50 years instead of 25 or 50 years.[81]

In finding that the approach used by the sentencing judge was wrong in law, the Quebec Court of Appeal ultimately agreed that the provision violated the *Charter* in a manner that was not saved by s. 1 of the *Charter*. However, rather than reading in or reading down the provision, they went a step further and declared it unconstitutional.[82]

Bissonnette is significant for a number of reasons. First, it highlights both the need to be able to individualize sentences and the need to show restraint, even in the most horrific of circumstances. Second, it strongly rejects the draconian sentences[83] often seen in our neighbours to the south and highlights the need for reviewability of the sentence at reasonable intervals.[84] As the Quebec Court of Appeal astutely pointed out, the reviewability of indeterminate sentences for dangerous offences was also a major factor in upholding the constitutionality of those provisions.[85] Again, the ability to review the offender's rehabilitative progress through the Faint Hope Clause Regime was one of the main reasons for upholding Life-25 in *Luxton*. This reviewability no longer exists for those who commit offences after December 2, 2011.

---

78 *Ibid* at para 31.

79 *Ibid* at para 34.

80 *Ibid* at para 36.

81 *Ibid* at para 38.

82 *Ibid* at para 187.

83 *Ibid* at paras 19–20. At the original sentencing, the Crown sought a sentence of 150 years, to which the sentencing judge suggested that if that were correct, another offender would have to be sentenced to 800 years, a grossly disproportionate sentence on any yardstick. The Court of Appeal agreed with the sentencing judge.

84 *Ibid* at para 110.

85 See *Steele v Mountain Institution*, [1990] 2 SCR 1385 at paras 58–60; *R v Lyons*, [1998] 3 SCR 45 at para 20.

Finally, *Sharma* dealt with the constitutionality of s. 742.1(c) of the *Criminal Code*, among others,[86] which prohibits the imposition of a Conditional Sentence Order (CSO) for offences prosecuted by indictment for which the maximum period of imprisonment is 14 years or more. Ms. Sharma was a young Aboriginal mother who was caught importing almost two kilograms of cocaine into Canada. In short, she committed the offence because she was facing eviction and did not want to let herself and her daughter become homeless.[87] Ms. Sharma pleaded guilty and challenged the constitutionality of s. 742.1(c) of the *Criminal Code* under ss. 7 and 15 of the *Charter*.

While the s. 7 argument was abandoned at the final argument before the sentencing judge and the s. 15 argument was dismissed, on appeal, the Ontario Court of Appeal (ONCA) permitted the s. 7 argument to be revived as all of the necessary evidence to decide the issue had been called. Ultimately, the ONCA held that the provision violated both ss. 7 and 15 of the *Charter*. In coming to this conclusion, Feldman, JA, writing for the majority, noted the strong link between s. 742.1 (i.e., the CSO provisions) and s. 718.2(e) of the *Criminal Code*, which directs sentencing judges to consider "all available sanctions, other than imprisonment, that are reasonable in the circumstances ... with particular attention to the circumstances of Aboriginal offenders."[88] The status of s. 742.1 of the *Criminal Code* as a remedial provision, introduced specifically for the purpose of addressing the problem of systemic racism and the overrepresentation of Aboriginal peoples in Canada, was noted by the Court to have been repeatedly recognized in the seminal cases of *Gladue*[89] and *R v Proulx*.[90]

---

86 The Court in *Sharma* also looked at the constitutionality of s. 742.1(e)(ii) of the *Criminal Code*, which precludes the availability of Conditional Sentence Orders for individuals convicted of an offence that is prosecuted by way of indictment, for which the maximum term of imprisonment is ten years that involved the import, export, trafficking or production of drugs. For the sake of convenience, only s. 742.1(c) will be referred to as the same reasoning and the same remedy was applied to each section of the *Criminal Code*.

87 *Sharma*, *supra* note 6 at para 6.

88 *Criminal Code*, *supra* note 3, s 718.2(e).

89 *Gladue*, *supra* note 42 at para 93.

90 2000 SCC 5 at para 92.

In 2012, the amendments brought by Parliament through the *Safe Streets and Communities Act*[91] significantly reduced the availability of CSOs, including by eliminating their availability for all offences prosecuted by way of indictment for which the maximum period of imprisonment is 14 years or more.[92] In finding that s. 742.1(c) of the *Criminal Code* violated s. 15 of the *Charter*, the majority of the Court of Appeal concluded that "[b]y removing that remedial sentencing option, the impact of the impugned provisions is to create a distinction between Aboriginal and non-Aboriginal offenders based on race."[93] They further went on to find that the effect of this provision was to "reinforc[e], perpetuat[e], or exacerbate[e] the disadvantage that Ms. Sharma face[d] as an Indigenous person."[94]

This decision is significant in that it suggests that a consideration of s. 718.2(e) of the *Criminal Code*, as a remedial provision, is mandatory and that Parliament cannot simply override its consideration for certain offences. The writer would argue that implicit in s. 718.2(e) of the *Criminal Code* is the notion that the shortest period of imprisonment that can be imposed to meet the purpose and principles of sentencing should be imposed. As such, where a mandatory minimum calls for a sentence that is greater than required to meet the purpose and principles of sentencing, the mandatory minimum will violate the *Charter*.[95] Like *Bissonnette*, this decision also signals a boldness that is willing to take on more than just mandatory minimums.

VIII. CONCLUSION

With the abolition of the Faint Hope Clause regime, the foundation for upholding *Luxton* begins to collapse. When further statutory and common law changes are considered, such as the introduction of s. 718.2(e) of the *Criminal Code* and the decisions in *Gladue*, *Ipeelee*, *Nur*, and *Lloyd*, the need to reconsider the ruling in *Luxton* becomes even more apparent. However, just because legal arguments can be made in favor of a certain

---

91 SC 2012, c 1.

92 *Ibid*, s 34; *Criminal Code*, *supra* note 3, s 742.1(c).

93 *Sharma*, *supra* note 6 at para 70.

94 *Ibid* at para 89.

95 One could argue that it would violate s. 15 of the *Charter* or s. 12 of the *Charter* if "grossly disproportionate." However, given the deference given to sentencing judges, practically speaking, a finding of gross disproportionality would likely be required to find a s. 15 violation when it is the length of sentence that is at issue and not the manner in which it is being served, as in *Sharma*.

outcome does not mean they will be accepted by a Court. As noted by Steve Coughlan, "it is important to be alert to the 'trends' in law, and to recognize that legal argument is as much a sociological phenomenon as anything else."[96]

Since the Supreme Court of Canada's seminal decision in *Nur*, challenges to mandatory minimums have increased significantly, with their success rate also climbing at an undeniable rate. This suggests that lower courts have taken note of former Chief Justice McLaughlin's strong comments in both *Nur* and *Lloyd* denouncing mandatory minimums and are less willing than they once were to accept Parliamentary constraints on their ability to impose proportionate sentences.

In order to overturn *Luxton*, a Court would have to accept that "Life-25" is grossly disproportionate to the reasonable hypothetical offender, after a proper consideration of the objectives and principles of sentencing. These principles include those found in the *Gladue* line of cases and as codified in s. 718.2(e) of the *Criminal Code*. *Hilbach* suggests that at least some Courts may now be willing to interfere with mandatory minimums for serious violent offences. *Bissonnette* similarly demonstrates a willingness to interfere with mandatory minimum type provisions, even for the most heinous of crimes, and highlights the need for the reviewability of sentences at reasonable intervals. Finally, *Sharma* emphasizes that s. 718.2(e) of the *Criminal Code* is not simply a principle of sentencing but a remedial provision aimed at addressing the over-incarceration of Aboriginals. As such, it cannot be ignored or have its consideration statutorily eliminated by Parliament. In the end, both the statistical trends and trends in judicial thinking suggest that the sociological climate has finally reached a place where striking down the mandatory minimum for first-degree murder may actually be possible, if not necessary.

---

[96] Steve Coughlan, "Threading Together Abuse of Process and Exclusion of Evidence: How it Became Possible to Rebuke Mr. Big" (2015) 71 SCLR (2d) 415 at 416.

A Tale of Two Countries: Constitutionalizing the Mandatory Minimum Sentence

BRYTON M.P. MOEN*

I. INTRODUCTION

Mandatory minimum sentences have always played a role in Canadian criminal law, and indeed, in the common law of the United Kingdom (UK). Parliament, especially in recent years, drastically expanded the use of mandatory minimum sentencing, calling for higher sentences to be imposed on offenders. This has resulted in a corresponding increase in challenges to the constitutionality of that legislation, specifically alleging that the impugned mandatory sentences infringe an individual's right to be free from cruel and unusual treatment or punishment. However, these challenges are often based on an imagined offender, or a reasonable hypothetical, rather than the offender before the court.

The UK also imposes mandatory minimum sentences, including for firearms offences. Moreover, the mandatory sentences in the UK call for significantly more severe sentences than the sentences that Canadian courts struck down as being cruel and unusual punishment. This article, therefore, looks at the firearms laws of the UK and how they have structured the mandatory minimum sentence for firearm offences. The provisions in the UK mandating minimum sentences for particular offences contain an "escape clause" which permits judges to deviate from the mandatory minimum sentence in "exceptional circumstances." As a result, judges in

* The author is a Crown Attorney with Manitoba Prosecution Service. He wishes to express his appreciation to Jonathan Avey, J.D., LL.M., for his insightful comments and to the staff of the Manitoba Law Journal for their patience and assistance in bringing this work to completion. The analyses, views, opinions, and conclusions expressed within are the author's alone and should not be construed as those of the Governments of Canada or Manitoba, or any of their departments.

the UK must deal with the offender and the facts of the case before them, rather than a reasonable hypothetical scenario. This article argues that Parliament's incorporation of similar language in Canadian sentencing provisions would have two salutary effects: (1) placing the emphasis on the offender before the court, thereby eliminating the reasonable hypothetical and (2) restoring the role of Parliament in providing guidance on sentences while preserving the role of the judiciary to craft a sentence for each offender which does not violate our constitutional principles.

II. MANDATORY MINIMUM SENTENCES IN CANADA

Mandatory minimum sentences have been a feature of Canadian criminal law since the very first *Criminal Code*.[1] Their use has expanded over time, and, notably under the government of Pierre Trudeau, mandatory minimum sentences were introduced for using a firearm while committing, attempting to commit or during flight after committing or attempting to commit an indictable offence.[2] In 1995, the Chrétien government further expanded the use of mandatory minimum sentences in the *Firearms Act*. This *Act* introduced higher mandatory minimum sentences for criminal negligence causing death, manslaughter, attempted murder, sexual assault, aggravated sexual assault, and other specific indictable offences while the offender is armed.[3] Following Jean Chrétien, in 2005, the Martin government further amended the *Criminal Code* by creating 19 new mandatory minimum sentences for a variety of sexual offences involving children.[4] The Harper government further expanded the use of mandatory minimum sentences through both the *Safe Streets and Communities Act*[5] and the *Protection of Communities and Exploited Persons Act*[6] by both increasing the minimum sentence for some pre-existing mandatory minimums and introducing approximately 40 new mandatory minimum sentences.

The purpose behind these mandatory minimum sentences was, in part, to increase consistency in sentencing – a laudable goal as disparate

---

1 *Criminal Code, 1982*, SC 1892, c 29, ss 94, 133, 136, 326, 327, 401. There were also mandatory minimum fines: ss 93, 95–96.

2 *Criminal Law Amendment Act, 1977*, SC 1976-77, c 53, s 3.

3 *Firearms Act*, SC 1995, c 39, s 139.

4 *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, SC 2005, c 32, ss 3, 4, 7, 9.1, 10.1.

5 SC 2012, c 1.

6 SC 2014, c 25, ss 18–20.

sentences have been a recognized problem since the 1970s.[7] As Professor Hogg starkly noted, "[s]tudies of sentencing practices uniformly show outrageous disparities in the sentences that judges impose in similar cases."[8] Through the imposition of mandatory minimum sentences, Parliament has imposed a floor that sentences cannot go below. Through the imposition of a mandatory minimum, Parliament has provided guidance to the courts as to how it views sentencing precedents and the criminal behaviour offenders engage in.

However, many of those mandatory minimum sentences have run afoul of the courts – which have found that many of the mandatory minimum sentences enacted contravene s. 12 of the *Canadian Charter of Rights and Freedoms*, which prohibits cruel and unusual treatment or punishment. Indeed, of all *Charter* challenges to mandatory minimum penalties in the last ten years, 69% of constitutional challenges to mandatory minimums for drug offences were successful. In that same time period, 49% of constitutional challenges to mandatory minimum penalties for firearms offences were successful.[9] Yet, many of the provisions have been struck down, not based on the individual before them, but rather on a "reasonable hypothetical."[10]

This concept was first introduced in *R v Smith*.[11] *Smith* involved an individual who pled guilty to importing seven and a half ounces of cocaine into Canada, an offence which carried with it a mandatory sentence of seven years in custody. Although that may have merited a seven-year sentence, the Supreme Court of Canada nevertheless struck down the

---

7 Sarah Krasnostein, "*Boulton v. The Queen*: The Resurrection of Guideline Judgments in Australia?" (2015), 27:1 Current Issues Crim Just at 41–42. "Since the 1970s, empirical research has repeatedly demonstrated that unregulated discretion is directly correlated with unwarranted inter-judge disparity in sentencing outcomes."

8 Peter Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Carswell, 2005) (loose-leaf updated 2019, release 1) at 53.5 [emphasis added].

9 Department of Justice Canada, "Mandatory Minimum Penalties and the Courts" (18 February 2021), online: *Government of Canada* <www.canada.ca/en/department-justice/news/2021/02/mandatory-minimum-penalties-and-the-courts.html> [perma.cc/7RUV-9FRC].

10 See e.g. *R v Nur*, 2015 SCC 15 [*Nur*]; *R v Robertson*, 2020 BCCA 65; *R v Serov*, 2017 BCCA 456; *R v Dickey*, 2016 BCCA 117; *R v Boulton*, 2016 ONSC 2979; *R v John*, 2018 ONCA 702; *R v Trottier*, 2020 QCCA 703; *R v Hood*, 2018 NSCA 18; *R v Charboneau*, 2019 ABQB 882; *R v Lalonde*, 2017 ONSC 2181.

11 [1987] 1 SCR 1045 [*Smith*].

legislation as it would be grossly disproportionate for a hypothetical youth returning to Canada with a small quantity of marijuana.[12]

In *R v Goltz*, the Supreme Court further developed the reasonable hypothetical jurisprudence. There it was held that:

> If the particular facts of the case do not warrant a finding of gross disproportionality, there may remain another aspect to be examined, namely a *Charter* challenge or constitutional question as to the validity of a statutory provision on grounds of gross disproportionality as evidenced in reasonable hypothetical circumstances, as opposed to far-fetched or marginally imaginable cases.[13]

Accordingly, courts are first to look to the individual before them when deciding if the impugned provision violates the *Charter*. If the section in question would not be cruel and unusual treatment or punishment for the individual before them, courts then can consider a reasonable hypothetical offender. Guidelines have developed around the application of a reasonable hypothetical:

1) A reasonable hypothetical example is one that is not far-fetched or only marginally imaginable as a live possibility.[14] It cannot be based on "remote or extreme examples."[15]

2) The reasonable foreseeability of a hypothetical scenario is not confined to situations that are likely to arise in the general day-to-day application of a law. Rather, the inquiry is targeted at what may reasonably arise.[16]

3) When construing hypotheticals, courts may be guided by real life cases, provided that the relevant facts are sufficiently reported.[17] However, courts are not bound to limit hypotheticals to the cases available to them.[18]

The use of the reasonable hypothetical and s. 12 of the *Charter* itself deserves its own paper, which is not the purpose of this article. Rather, with that foundational background established, the author proposes turning to a comparative analysis of UK and Canadian firearms laws, in particular the sentencing provisions related to s. 95 of the *Criminal Code*. S. 95 makes it an offence to possess either a loaded prohibited or restricted firearm, or a restricted or prohibited firearm with readily accessible ammunition. In May

---

12 *Ibid* at 1081–082.
13 *R v Goltz*, [1991] 3 SCR 485 at 505–06 [emphasis in original].
14 *Ibid* at 506.
15 *Ibid* at 515.
16 *Nur*, *supra* note 10 at paras 67–68.
17 *Ibid* at para 72.
18 *R v Morrisey*, 2000 SCC 39 at para 33 [*Morrisey*].

2008, Parliament passed legislation that mandated a three-year minimum sentence for a first offence, with a five-year minimum sentence for a second or subsequent offence.[19] Those provisions were subsequently challenged as violating s. 12 of the *Charter*, which the Supreme Court dealt with in the *Nur* decision.

The factual basis in *Nur* is that a man ran into a community centre in Toronto and told staff that he was afraid of someone waiting outside for him. Staff put the community centre on lockdown and called the police. When police arrived, they saw four men standing outside the community centre who scattered. Police observed Nur throw a loaded, .22-calibre semi-automatic firearm under a car. He was charged with possession of a loaded, prohibited firearm contrary to s. 95(1) of the *Criminal Code*.[20]

Those facts are provided because both the Ontario Court of Appeal and the Supreme Court of Canada upheld a 40-month sentence for a 19-year-old, with no criminal record, from a supportive, law-abiding family who came to Canada as refugees. At the time of the offence, the offender was going to high school. He was doing well in school and planned to go to university. He worked several part-time jobs and volunteered in the community. Teachers and past employers praised his performance and his potential. One teacher described him as "an exceptional student and athlete who excelled in the classroom and on the basketball court... an incredibly gifted youth with unlimited academic and great leadership skills."[21]

However, *Nur* is also the case that struck down the mandatory minimum. The law was struck down not based on the case before the Court but rather based on an imaginary case or, as the Court put it, a reasonable hypothetical. The Supreme Court held that s. 95 could capture behaviour closer to the regulatory end of the scale of gun offences.[22] An example of how s. 95 could capture behaviour closer to a regulatory breach may be found in the case of *R v Snobelen*.[23] In *Snobelen*, the accused had purchased a ranch in Oklahoma, including all equipment and contents. Included in those contents was a Colt .22 calibre semi-automatic handgun, along with ammunition. The accused never used the weapon. A couple years later, the

---

19 *Tackling Violent Crime Act*, SC 2008, c 6, s 8.
20 *Nur*, *supra* note 10 at paras 17–20.
21 *Ibid* at para 21.
22 *Ibid* at para 82.
23 [2008] OJ No 6021 (QL).

accused sold the ranch and had the belongings shipped to Canada. Three or four months after the move, the accused was unpacking the contents when he located the handgun and ammunition. He intended to dispose of them but left them in his night table.[24] The accused was 53 years of age with no criminal record and an excellent employment history, including serving as an Ontario cabinet minister.[25] In the circumstances, the judge imposed an absolute discharge.[26] Still, that individual, and that fact scenario, were encompassed in s. 95. If the mandatory minimum sentence were in play at that time, Mr. Snobelen could have been subject to a mandatory minimum sentence of three years incarceration. It is that type of offender, and that type of factual circumstance, that led the Supreme Court of Canada to hold that the moral blameworthiness of that behaviour, absent any real risk or harm to the public, would result in a three-year sentence being grossly disproportionate.[27]

The reasonable hypothetical has been subject to criticism, both in academia and in the judiciary.[28] As Peter Hogg noted, the reasonable hypothetical is a "relentless application of the most innocent offender principle."[29] The difficulty with the reasonable hypothetical is that the imagined impact on an imagined person may never occur in reality. As courts are not bound by real life cases,[30] they are limited only by counsel's and the judge's imagination and are ruling on cases without a full factual backing. As Justice Watt noted in *R v Levkovic*, "[i]t is difficult to understate the importance of a factual basis in constitutional challenges."[31] The Supreme Court has noted in other constitutional cases that absent a factual foundation to adjudicate the constitutional issue, courts should decline to rule on constitutional questions in the abstract.[32] This criticism dates back to the *Smith* decision itself where Justice McIntyre, dissenting, noted that "[u]nder s. 12 of the *Charter*, individuals should be confined to arguing that

---

24 *Ibid* at paras 3–10.

25 *Ibid* at para 18.

26 *Ibid* at para 46.

27 *Nur, supra* note 10 at para 83.

28 *R v Hills*, 2020 ABCA 263 at paras 120–292, per Justice Wakeling.

29 Hogg, *supra* note 8 at 53–57.

30 *Morrisey, supra* note 18 at para 33.

31 2010 ONCA 830 at para 28, aff'd 2013 SCC 25.

32 *Moysa v Alberta (Labour Relations Board)*, [1989] 1 SCR 1572, 60 DLR (4th) 1; *Danson v Ontario (Attorney General)*, [1990] 2 SCR 1086, 73 DLR (4th) 686; *MacKay v Manitoba*, [1989] 2 SCR 357, 61 DLR (4th) 385; *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 at paras 47–51.

their punishment is cruel and unusual and not be heard to argue that the punishment is cruel and unusual for some hypothetical third party."[33]

The concept of using an imaginary case to interpret the Constitution is also foreign to other countries and other areas of law. For instance, when dealing with an extradition case, the House of Lords noted that "one is concerned with whether in this case the sentence would be grossly disproportionate. The fact that it might be grossly disproportionate in other cases is irrelevant."[34] The United States judiciary has also noted that "[t]he process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency."[35]

III. Firearms Sentencing in the United Kingdom

At this point, we turn to jurisprudence in the UK, which also imposes mandatory minimum sentences for a variety of firearms offences – however, their legislation contains an important additional clause, which the author encourages our elected officials to incorporate into our *Criminal Code*. In so doing, the legislation would therefore gain compliance with the *Charter*, while still preserving the legislative intent behind the law.

When looking at sentencing in the UK, it is worth remembering that the ultimate question for sentencing in Canada is to craft a sentence that is proportionate to the gravity of the offence and the degree of responsibility of the offender.[36] The Sentencing Council of the United Kingdom instructs judges to weigh an offence by looking at: (1) the culpability of the offender and (2) the harm caused by the offending.[37] We therefore see significant similarities between the guiding principles in Canadian and UK laws – perhaps an unsurprising result given the close ties between the countries

---

33 *Smith*, *supra* note 11 at 1083–84 [emphasis in original].

34 *Wellington R, (On the application of) v Secretary of State for the Home Department*, [2008] UKHL 72 at para 35, [2009] AC 335, Lord Hoffman.

35 *New York v United States*, 326 US 572 at 583 (1946), per Justice Frankfurter. See also *Harmelin v Michigan*, 501 US 957, per Justice Scalia ("[b]ut for the same reasons these examples are easy to decide, they are certain never to occur" at 985–86).

36 *R v Friesen*, 2020 SCC 9 at para 30 [*Friesen*].

37 General guideline: overarching principle" (1 October 2019), online: Sentencing Council <www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/general-guideline-overarching-principles/> [perma.cc/9FGG-XNPD].

not only in their histories, but also in their legal frameworks. Given the common heritage Canada derives from the UK, the differing treatment towards mandatory minimum sentences becomes all the more interesting.

In the UK, the *Criminal Justice Act, 2003* mandates that when an offender is convicted of certain enumerated firearms offences, the court shall impose a sentence of at least five years for an offender aged 18 or over. If the offender is under the age of 18, the sentence is to be no less than three years. Those sentences are to be imposed "unless the court is of the opinion that there are exceptional circumstances relating to the offence or to the offender which justify its not doing so."[38]

The question then becomes, what offences do those sections actually refer to, and are there comparable sections in the Canadian *Criminal Code*? For ease of reference, I have included a table outlining the wording of the relevant portions of the legislation in the UK and included comparator sections from the *Criminal Code*. Importantly the Canadian legislation is framed slightly differently, as it outlines three different classes of firearms: (1) non-restricted; (2) restricted; and (3) prohibited. Prohibited firearms include certain types of handguns, modified rifles or shotguns where the barrel is reduced to a particular length, automatic firearms, and other prescribed firearms in the regulations. Restricted firearms include all handguns that are not prohibited, firearms with a specified length of barrel, and other firearms prescribed by the regulations. Non-restricted firearms are those which do not fall into the other categories or have been prescribed as non-restricted.[39]

This chart includes a direct comparison between the definitions in the Canadian legislation to the legislation in the UK. Immediately following is a discussion on the provisions in the Canadian *Criminal Code* which deal with that offence.

---

38 *Criminal Justice Act 2003* (UK) s 287(2).

39 *Criminal Code*, RSC 1985, c C-46, s 84(1) [*Criminal Code*].

Provision in the UK[40]: Section 5(1) A person commits an offence if he has in his possession, or purchases or acquires	**Definitions in the *Criminal Code*[41]**
(a) any firearm which is so designed or adapted that two or more missiles can be successively discharged without repeated pressure on the trigger;	Prohibited firearm (c) an automatic firearm, whether or not it has been altered to discharge only one projectile with one pressure of the trigger
(ab) any self-loading or pump-action other than one which is chambered for .22 rim-fire cartridges;	Restricted firearm (b)(iii) is capable of discharging centre-fire ammunition in a semi-automatic manner
(aba) any firearm which either has a barrel less than 30 centimetres in length or is less than 60 centimetres in length overall, other than an air weapon, a muzzle-loading gun or a firearm designed as a signalling apparatus	Restricted firearm (c) a firearm that is designed or adapted to be fired when reduced to a length of less than 660 mm by folding, telescoping or otherwise
(ac) any self-loading or pump-action smooth-bore gun which is not chambered for .22 rim-fire cartridges and either has a barrel less than 24 inches in length or is less than 40 inches in length overall;	Restricted firearm (b) (ii) has a barrel less than 470 mm in length, and (iii) is capable of discharging centre-fire ammunition in a semi-automatic manner
(ad) any smooth-bore revolver gun other than one which is chambered for 9mm. rim-fire cartridges	
(ae) any rocket launcher, or any mortar, for projecting a stabilised missile, other than a launcher or mortar designed for line-throwing or pyrotechnic purposes or as a signalling apparatus	
(af) any air rifle, air gun or air pistol which uses, or is designed or adapted for use with, a self-contained gas cartridge system	
(c) any cartridge with a bullet designed to explode on or immediately before impact, any ammunition containing or designed or adapted to contain any such noxious thing as is mentioned in paragraph (b) above [noxious liquid, gas or other thing] and, if capable of being used with a firearm of any description, any grenade, bomb (or other like missile), or rocket or shell designed to explode as aforesaid	

40 *Firearms Act 1968*, (UK) s 5 [*Firearms Act UK*].

41 *Criminal Code, supra* note 39, s 84(1).

s.5(1A) Subject to section 5A of this Act, a person commits an offence if, he has in his possession, or purchases or acquires (a) any firearm which is disguised as another object	

The offences in the Canadian *Criminal Code* then tie back to those definitions. As outlined above, ss. 5(1)(a), (ab), (aba) and (ac) of the UK law are directly analogous to what Canada has defined as being either a prohibited or restricted firearm. Accordingly, possession of those weapons in either Canada or the UK would be a violation of the law. Importantly, the provisions in the UK legislation impose those penalties for the mere possession of those firearms – even unloaded without readily accessible ammunition. Indeed, the UK legislation's most analogous comparison in Canadian law would be ss. 91 and 92 of the *Criminal Code*. Those provisions outlaw the unauthorized possession of prohibited or restricted weapons, much like the UK legislation does. S. 95 of the *Criminal Code* deals with offenders who are in possession of either a restricted or prohibited firearm that is either loaded or with readily accessible ammunition.[42]

However, whereas the simple possession provisions in the UK would carry a mandatory minimum sentence of five years for an individual over 18, in Canada, ss. 91 and 92 carry no mandatory minimum penalty for a first offence whatsoever. Rather, Canada imposed a mandatory penalty for s. 95, which not only requires a restricted or prohibited firearm, but also requires that firearm to be either loaded or have readily accessible ammunition. S. 95, therefore, deals with a more severe crime. As noted by the Supreme Court, s. 95 firearms present the most significant danger to public safety.[43]

Why then, given this comparison, was the mandatory minimum sentence struck down in *Nur* for what is a more serious crime? Indeed, the mere possession of that same gun, unloaded, in England would have brought a five-year sentence for an adult or three years for a youth. How then does Canada declare three years for an adult with a loaded gun to be cruel and unusual treatment or punishment? The answer lies in the use of the reasonable hypothetical. Rather than ruling on the case before them, the court instead ruled on an imaginary case. Defenders of this approach may assert that the judiciary is ensuring that mandatory minimum sentence

42 *Criminal Code*, *supra* note 39, ss 91, 92, 95.
43 *Nur*, *supra* note 10 at para 13.

is constitutional, regardless of the circumstances. An attempt to limit the use of the reasonable hypothetical could lead to criticism – namely, how can the judiciary properly maintain their role of ensuring that cruel and unusual punishment is not imposed? In response, we look to the UK legislation, which contains a clause that keeps the focus on the individual before the court:

> The court shall impose an appropriate custodial sentence (or order for detention) for a term of at least the required minimum term (with or without a fine) unless the court is of the opinion that there are exceptional circumstances relating to the offence or to the offender which justify its not doing so.[44]

If this wording were to be added to the mandatory minimum sentences in Canada, then there would have been no need for the courts to resort to the reasonable hypothetical. Rather, the analysis would have been restrained to the offender before the court and whether, in those specific circumstances, there were "exceptional circumstances related to the offence or to the offender" which would justify not imposing the sentence mandated by Parliament. This would have the benefit of restoring Parliament's proper role in crafting legislation and providing guidance, while preserving judicial independence and ensuring that the sentence imposed in any individual case does not conflict with the *Charter*.

Some may see this as analogous to a constitutional exemption, which the Supreme Court ruled was not available in *Ferguson*.[45] However, in *Ferguson*, the Court ruled that "[i]f a minimum sentence is found to be unconstitutional on the facts of a particular case,"[46] the law imposing the sentence would have to be struck down. That is precisely what the proposed "escape clause" utilized in the UK accomplishes. It keeps the focus on the facts of the offender, the case before the court, and whether the sentence is appropriate for that individual. Indeed, in *Ferguson*, the Supreme Court noted the attractiveness of the argument for introducing a constitutional exemption.[47] However, part of the reason the Court declined to read in a constitutional exception was because it would infringe on the role of Parliament. The clear wording of the section was that it was to apply to everybody and reading in otherwise would be contrary to the intent of

---

44 *Firearms Act UK*, *supra* note 40, s 51A(2) [emphasis added].
45 *R v Ferguson*, 2008 SCC 6.
46 *Ibid* at para 2 [emphasis added].
47 *Ibid* at para 40.

Parliament and introduce discretion when Parliament clearly intended to remove that discretion.[48] Rather than asserting that exceptions to mandatory minimum sentences could never be granted, the Court ruled that it was not the place of the courts to interfere in the legislative sphere.[49]

Moreover, in *R v Lloyd*, Chief Justice McLachlin (as she then was) expressly stated that if Parliament wished to maintain mandatory minimum sentences, they should construct a safety valve to allow judges to exempt outliers for whom the mandatory minimum sentence would constitute cruel and unusual punishment. She went on to note that this is commonly done in other countries and may require a sentencing judge to give reasons justifying the departure from the mandatory minimum. Importantly, for our purpose, McLachlin specifically cited the *Firearms Act* of the UK as an example of a judicial safety valve that could be a model for Canada.[50]

Introducing the wording of "unless the court is of the opinion that there are exceptional circumstances relating to the offence or to the offender which justify its not doing so" would directly address the issue the Supreme Court identified in *Nur*. As noted by the Court, firearms offences are serious crimes, and firearms are inherently dangerous.[51] However, the Court was concerned that the wording of s. 95 could capture "licensing offences which involve little or no moral fault and little or no danger to the public."[52] That specific concern is precisely what the legislation from the UK addresses. In those incredibly rare situations, like a licensing offence that involves little or no moral fault and poses little or no risk to the public, then the courts would be able to deviate from the mandatory minimum penalty and utilize the Parliamentary created "escape hatch" to impose a fit and proper sentence. Free from the burden of ruling on an imaginary case, courts would then be free to focus on the offender before them, rather than having to consider what penalty might be appropriate for an imaginary offender in an imaginary situation.

The author is aware that recently the Government of Canada has introduced Bill C-22, which proposes to repeal several mandatory minimum sentences, including some mandatory sentences related to

---

48 *Ibid* at paras 54–56.
49 *Ibid* at para 56.
50 2016 SCC 13 at para 36.
51 *Nur, supra* note 10 at paras 6, 83.
52 *Ibid* at para 83.

firearms.[53] As rationale for these changes, the government outlined that mandatory minimum sentences have resulted in "longer and more complex trials and a decrease in guilty pleas, which has compounded the impact for victims, who are more often required to testify."[54] Bill C-22 was introduced on February 18, 2021, and the backgrounder to the legislation outlines that it is to work together with Bill C-21 to ensure that courts are better equipped to impose sentences that keep communities safe.

As of the time of this writing, both bills are only at first reading before the House of Commons,[55] so it will remain to be seen if they are passed into law or what the final wording of the law will be. However, Bill C-21, as it is presently worded, proposes to increase the maximum available sentence for s. 95 offences from ten years to 14 years.[56] Although laudable, this proposed change appears to reflect a desire on the part of Parliament that sentences for those types of crimes should increase. As noted by the Supreme Court in *Friesen*, "[t]o respect Parliament's decision to increase maximum sentences, courts should generally impose higher sentences than the sentences imposed in cases that preceded the [statutory changes]."[57] However, that goal is not congruent with the backgrounder to reduce the impact on victims, "who are more often required to testify."[58] Indeed, by increasing the maximum penalty to 14 years, Parliament will be increasing the number of times a victim may have to testify. That is because a charge, which has a maximum penalty of 14 years or more, carries with it the option for a preliminary hearing, an option not currently available with the maximum penalty being ten years.[59]

---

53 Department of Justice Canada, "Bill C-22: Mandatory Minimum Penalties to be repealed" (last modified 18 February 2021), online: Government of Canada <www.canada.ca/en/department-justice/news/2021/02/bill-c-22-mandatory-minimum-penalties-to-be-repealed.html> [perma.cc/7YWZ-4ZYN] [Department of Justice, "Bill C-22"].

54 *Ibid.*

55 Bill C-21, *An Act to amend certain Acts and to make certain consequential amendments (firearms),* 2nd Sess, 43rd Parl, 2020–2021 (first reading 16 February 2021); Bill C-22, *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act,* 2nd Sess, 43rd Parl, 2020–2021 (first reading 18 February 2021).

56 Bill C-21, *supra* note 53, s 14.

57 *Friesen, supra* note 36 at para 100.

58 Department of Justice, "Bill C-22" *supra* note 5.

59 *Criminal Code*, *supra* note 39, s 536(2).

Moreover, with regards to the proper penalty to be imposed, Nur – a 19-year-old with positive supports in the community, no criminal record, and excellent prospects for rehabilitation – received a sentence of 40 months. In other words, Nur himself received a sentence higher than the mandatory minimum penalty. By increasing the maximum penalty, Parliament is, in fact, increasing the penalties which will be sought for that type of criminal activity.

Introducing the "escape clause" provision that has been included in UK legislation would provide for individuals in exceptional circumstances to receive a sentence below the mandatory minimum, while still preserving the Parliamentary intention that offenders on the true crime end of the spectrum receive significant penalties for their actions.

The question would then become, what are exceptional circumstances? Thankfully, although that is the term used in the UK legislation, it is not a term unknown to Canadian law. The Manitoba Court of Appeal has outlined that, in exceptional circumstances, sentencing judges may impose a community-based sentence for an offence that would ordinarily attract a lengthy period of incarceration.[60] As noted by the Court of Appeal, exceptional circumstances will only be found in the clearest of cases involving multiple mitigating factors or a highly unusual motive for committing the offence.[61] The Court of Appeal has noted that "[s]entencing courts must take care not to conflate 'sympathetic circumstances' with 'exceptional circumstances.'"[62] Rather, as noted by the New Brunswick Court of Appeal, exceptional circumstances likely will not exist where an offender was "driven solely by greed," and the offending conduct occurred over a "considerable period of time."[63] As noted by Drapeau, the former Chief Justice of New Brunswick, "fair warning to sentencing judges, it is a reversible error of principle to 'categorize the ordinary as exceptional.'"[64]

Importantly however, introducing the mandatory minimum sentence with an "escape clause" for exceptional circumstances would allow for the jurisprudence to develop based on the actual offender and actual situations before the courts, thereby further contributing to the development of the common law.

---

60 *R v Dalkeith-Mackie*, 2018 MBCA 118 at para 23.

61 *Ibid* at para 26. See also *R v Burnett*, 2017 MBCA 122 at para 29 [*Burnett*].

62 *Burnett*, *supra* note 59 at para 33.

63 *R v Chaulk*, 2005 NBCA 86 at para 8.

64 *Murdoch v R*, 2015 NBCA 38 at para 47, citing *R v Zenari*, 2012 ABCA 279 at para 8.

Parliament should consider the use of the "escape clause" wording,[65] as in the UK. This would restore the focus of the courts to the offender and the facts before the court, while ensuring that, in those truly rare and exceptional cases, cruel and unusual treatment or punishment is not imposed on those offenders to whom a mandatory minimum sentence would, in fact, be grossly disproportionate.

[65] The court shall impose an appropriate custodial sentence (or order for detention) for a term of at least the required minimum term (with or without a fine) unless the court is of the opinion that there are exceptional circumstances relating to the offence or to the offender which justify its not doing so.