

**DANGEROUS OFFENDER PROCEEDINGS:**  
**The Relevance of *Gladue* and Possible Charter Challenges**

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## **Introduction**

Part XXIII of the *Criminal Code of Canada* (*Criminal Code*) enunciates principles that all judges must consider when sentencing an offender. With the growing crisis of aboriginal over-representation in Canadian prisons in 1996, Parliament enacted s. 718.2(e) of the *Criminal Code*.<sup>1</sup> That subsection directs sentencing judges to consider “all available sanctions other than imprisonment...with particular attention to the circumstances of aboriginal offenders.”<sup>2</sup> As set out by the Supreme Court of Canada in *R. v. Gladue*<sup>3</sup> and affirmed thirteen years later in *R. v. Ipeelee*,<sup>4</sup> trial judges have a duty to “apply all of the principles mandated by ss. 718.1 and 718.2(e) of the *Criminal Code*.”<sup>5</sup> *Gladue* and *Ipeelee* attempt to give sentencing judges specific direction when applying s. 718.2(e) of the *Code*, which was specifically enacted to quell the overrepresentation of aboriginals in Canadian prisons. As the Supreme Court Stated:

...the aim of s. 718.2(e) is to reduce the tragic overrepresentation of aboriginal people in prisons. It seeks to ameliorate the present situation and to deal with the particular offence and offender and community.<sup>6</sup>

Despite this ameliorative provision, the rate of aboriginal incarceration has failed to abate in the twenty-one years since the enactment of s. 718.2(e).<sup>7</sup> Furthermore, despite direction from the Supreme Court in *Gladue* in 1999 and later *Ipeelee* in 2012, the rates of incarceration for

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<sup>1</sup> *Criminal Code* RSC 1985, c C-46 [*Criminal Code*]

<sup>2</sup> *R v Gladue* [1999] 1 SCR 688 at para 36 [*Gladue*]

<sup>3</sup> *Ibid.*

<sup>4</sup> *R v Ipeelee* [2012] 1 SCR 433 [*Ipeelee*]

<sup>5</sup> *Ibid* at para 51.

<sup>6</sup> *Supra* note 2 at para 87.

<sup>7</sup> Nate Jackson, ‘The Substantive Application of *Gladue* in Dangerous Offender Proceedings; Reassessing Risk and Rehabilitation for Aboriginal Offenders’ (2015) 20 Can Crim L Rev 77.

aboriginal peoples continue to rise.<sup>8</sup> Furthermore, aboriginal people are disproportionately designated as ‘high-risk’ or violent offenders under the Dangerous Offender Provisions in Part XXIV of the *Criminal Code*.<sup>9</sup>

According to s. 718 of the *Criminal Code*, the ‘fundamental’ purpose of sentencing is ‘to contribute...to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions.’<sup>10</sup> This is congruent with the purpose of Part XXIV Dangerous Offenders and Long-term Offenders section of the *Criminal Code*. Historically,

...habitual criminal legislation and preventative detention [were] primarily designed for the persistent dangerous criminal...the dominant purpose is to protect the public when the past conduct of the criminal demonstrates propensity for crimes of violence against the person, and there is a real and present danger to life or limb.<sup>11</sup>

The primary purpose of the dangerous offender provisions today is the ‘protection of the public’<sup>12</sup> and to separate those offenders who “continue to pose a threat to society.”<sup>13</sup> A dangerous offender designation, if handed down, occurs in the context of a sentencing hearing on special application by the Crown prosecutor.<sup>14</sup> A dangerous offender designation often results in the individual being sentenced to a period of indeterminate incarceration.<sup>15</sup> To support a dangerous offender application, the Crown prosecutor may lead evidence that includes character

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<sup>8</sup> Public Safety Canada, *Corrections and Conditional Release Statistical Overview* (Ottawa: Public Safety Canada, 2014).

<sup>9</sup> Terry Nicholaichuk et al, ‘Correctional Careers of Dangerous Offenders’ (2013) 59 CLQ 488; *Supra* note 1.

<sup>10</sup> See *Criminal Code* *ibid*, ss.752.1(1), 757.

<sup>11</sup> *Hatchwell v the Queen* [1976] 1 SCR 39 at 43.

<sup>12</sup> *R v Armstrong* [2014] BCCA 174 (CanLII) at para 72.

<sup>13</sup> Library of Parliament, *The Dangerous Offender and Long-term Offender Regime* (Ottawa: Legal and Legislative Affairs Division, 2008) at 1.

<sup>14</sup> See *Criminal Code* *supra* note 1, ss. 752.1(1), 753(2)(a), 753(2)(b).

<sup>15</sup> See *Criminal Code* *ibid*, s 753(4)(a).

evidence, criminal record, and psychiatric assessments conducted by mental health professionals.<sup>16</sup>

Psychiatric tests known as actuarial risk assessment instruments are commonly used in assessments for dangerous offender applications. These tests include the Hare Psychopathy Checklist-Revised (PCL-R), Violence Risk Appraisal Guide (VRAG), Sexual Offender Risk Appraisal Guide (SORAG), Static-99, and Violence Risk Scale (VRS-SO).<sup>17</sup> All of these tests are utilized to “estimate the probability that individuals will engage in future violence.”<sup>18</sup>

As recent as 2015, questions have been raised regarding the appropriate usage of actuarial risk assessment instruments in Canadian courtrooms.<sup>19</sup> Though it focuses on the use of actuarial risk assessment instruments in the context of National Parole Board hearings, the case of *Ewert v. Canada*<sup>20</sup> raises pertinent questions about the accuracy of the psychiatric tests for aboriginal offenders within the broader Canadian criminal justice system. *Ewert* raises concerns of cross-cultural bias that is implicitly built into actuarial risk assessment instruments, which then translate into inaccurate scores for aboriginal offenders. Psychiatric testing forms an integral component of the dangerous offender hearing; indeed, it is a legislative requirement.<sup>21</sup>

This paper addresses the use of psychiatric testing in the context of dangerous offender hearings for aboriginal persons. In light of s. 718.2(e), the principles enunciated by the Supreme Court in *Gladue* and *Ipeelee*, and the concerns raised around actuarial risk assessments in *Ewert*,

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<sup>16</sup> See *Criminal Code* *ibid*, ss 752.1(1).

<sup>17</sup> John Howard Society of Alberta, “Offender Risk Assessment” online: John Howard Society <<http://www.johnhoward.ab.ca/pub/C21.htm#actu>>.

<sup>18</sup> Stephen D. Hart, Christine Michie, & David J Cooke, “Precision of Actuarial Risk Assessment Instruments: Evaluating the ‘margins of error’ of group v individual predictions of violence” 190:49 *British Journal of Psychiatry* 60 at 60.

<sup>19</sup> *Ewert v Canada* [2015] FC 1093 (CanLII); *supra* note 7.

<sup>20</sup> *Ibid*.

<sup>21</sup> See *Criminal Code* *supra* note 1, ss 752.1(1).

there is new opportunity to challenge the constitutional compliance of the dangerous offender sections in Part XXIV of the *Criminal Code*.

Part I of this paper begins with a brief overview of the Dangerous Offender provisions in the *Criminal Code*. Pertinent historical developments are highlighted within this section. Part II discusses the history of aboriginal over-incarceration. The most readily-available statistics of the current dangerous offender population in Canadian prisons is also provided. The enactment of s. 718.2(e), *Gladue*, *Ipeelee* and their relevance in dangerous offender hearings is discussed. A closer look at actuarial risk assessment instruments is provided in Part III. An overview of actuarial risk assessment instruments is provided, along with three major critiques regarding their accuracy and validity. Part IV looks to the use of actuarial risk assessment instruments in the context of dangerous offender hearings. Arguments around the constitutionality of the current dangerous offender provisions and the use of actuarial risk assessment instruments are provided.

## **Part I: Canada's Dangerous Offender Provisions**

### ***A. Legislative History***

#### ***i. Early Legislation***

The roots of the current dangerous offender regime began in the first half of the 20<sup>th</sup> century. On recommendation by the Archambault Commission, the first enactment of dangerous offender-like legislation occurred in 1947 with *An Act to amend the Criminal Code*.<sup>22</sup> The purpose of the “habitual offender” legislation was to “remove the persistent, chronic offender from society for a significant period of time.”<sup>23</sup> It was not meant to be primarily punitive or

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<sup>22</sup> *Criminal Code* SC 1947, c 55, s. 18; *supra* note 4; *supra* note 13.

<sup>23</sup> Canada, Canadian Committee on Corrections, *Report of the Canadian Committee on Corrections Toward Unity: Criminal Justice and Corrections* (Ottawa: Solicitor General of Canada, 1969) [Ouimet Report]; Shereen Hassan,

reformatory in nature.<sup>24</sup> If designated as a habitual offender under the *Code* provisions, individuals were subject to an indeterminate sentence. Each habitual offender's case was reviewed annually.<sup>25</sup>

The enactment of section 662 in 1948<sup>26</sup> added an additional category of designation. The dangerous sexual offender section, which targeted

...persons who by his conduct in any sexual matter, has shown a failure to control his sexual impulses, and who is likely to cause injury, pain or other evil to any person, through failure in the future to control his sexual impulses or is likely to commit a further sexual offence.<sup>27</sup>

Just as a habitual offender could receive a preventative indeterminate sentence, so too could the dangerous sexual offender.<sup>28</sup> The new provisions required that any dangerous sexual offender application had to be supplemented with testimony from a minimum of two psychiatrists. One had to be approved by the Attorney General, and the other by the offender.<sup>29</sup>

The habitual offender and dangerous sexual offender regimes remained unchanged until 1960. In response to difficulties around meeting the legal standard of proof and a lack of clear direction regarding the definition of a dangerous sexual offender,<sup>30</sup> the provisions were amended. Changes to the legislation included eliminating the “determinate component of sentencing that

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*The Long-Term Offender Provisions of the Criminal Code: An Evaluation* (PhD Thesis, School of Criminology Simon Fraser University 2010) [unpublished] [Hassan].

<sup>24</sup> *R v Lyons* [1987] 2 SCR 309 at 321-22.

<sup>25</sup> Hassan *supra* note 23.

<sup>26</sup> Public Safety Canada, *Dangerous Offender Designation* online: Public Safety Canada <<https://www.publicsafety.gc.ca/cnt/cntrng-crm/crrctns/protctn-gnst-hgh-rsk-ffndrs/dngrs-ffndr-dsgntn-eng.aspx>>.

<sup>27</sup> *Criminal Code* 1960-61, c 43, s 32, s. 659(b); Ouimet Report *supra* note 23 at 253.

<sup>28</sup> *Criminal Code*, *ibid*.

<sup>29</sup> Hassan *supra* note 23.

<sup>30</sup> M Petrunik, *Models of dangerousness: A cross jurisdictional review of dangerousness legislation and practice* (Ottawa: University of Ottawa, Criminology Department 1994) as cited in Hassan *supra* note 23.

had been permitted under s. 660 of the *Criminal Code*.<sup>31</sup> The legislation also clarified that an offender could be found to be a dangerous offender after only one conviction.<sup>32</sup>

ii. Calls for Reform: The Ouimet Report & the Goldenberg Report

In spite of the 1960 amendments, concern around Part XXI of the *Criminal Code* continued into the 1980s. In particular,

...these critiques were based primarily on the findings of social science research, which drew attention to the errors made by mental health experts in accurately diagnosing mental disorder, [particularly] psychopathy.<sup>33</sup>

During this time period, two government committee reports were generated by the federal government.

In 1969 the Report of the Canadian Committee on Corrections found that the habitual offender legislation had not been applied uniformly in a rational manner across the country.<sup>34</sup> Better known as the Ouimet Report, the committee wrote that because it had not been applied consistently, the deterrent effect of the habitual offender and dangerous sexual offender legislation was ‘insignificant.’ The committee recommended in their report that the legislation be repealed.<sup>35</sup> It was ‘found to be too broad in scope and was being applied to non-dangerous offenders.’<sup>36</sup>

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<sup>31</sup> Hassan *supra* note 23 at 8.

<sup>32</sup> D MacAlister, ‘Use of risk assessments by Canadian judges in the determination of dangerous and long-term offender status, 1997-2002’ (2005) in Law Commission of Canada (ed), *Law and Risk* as cited in Hassan *supra* note 23.

<sup>33</sup> Hassan *supra* note 23 at 9.

<sup>34</sup> Ouimet Report, *supra* note 23.

<sup>35</sup> Hassan *supra* note 23.

<sup>36</sup> *Ibid* at 10.



The Report of the Standing Senate Committee on Legal and Constitutional Affairs (more widely known as the Goldenberg Report) came five years after the Ouimet Report. Released in 1974, the mandate of the Committee was to “examine and report upon all aspects of the parole system in Canada.”<sup>37</sup> The Standing Senate Committee “accepted the conclusion that this legislation was capable of – and was in fact - being applied against sexual offenders who were not dangerous.”<sup>38</sup> Recommendation 71 of the Report’s findings advised that

‘The present legislation on habitual criminals and dangerous sexual offenders should be repealed and replaced by dangerous offender legislation which would set criteria for identification of dangerous offenders and a mechanism for the assessment of persons alleged to be dangerous.’<sup>39</sup>

The Report also recommended that any new dangerous offender legislation should “provide for preventative detention for an indeterminate period as [is] now provided for dangerous sexual offenders and habitual criminals.”<sup>40</sup>

### ***B. Part XXIV of the Criminal Code: Dangerous Offender and Long-term Offender Provisions***

The current dangerous offender scheme first came into force in 1977 and has been significantly amended twice since then, first in 1997 and then in 2008. These amendments have resulted in broadening the application of the current dangerous offender provisions. What follows is a brief highlight of the main points in the 1997 and 2008 amendments followed by a review of the current legislation.

#### ***i. 1977: Laying the Framework of Part XXIV***

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<sup>37</sup> Canada, The Standing Senate Committee on Legal and Constitutional Affairs, *Parole in Canada* (Ottawa: Senate Committee), (The Honourable H. Carl Goldenberg, Chairman) at 1 [Goldenberg Report].

<sup>38</sup> Hassan *supra* note 23 at 12.

<sup>39</sup> *Supra* note 37 at 12.

<sup>40</sup> *Ibid.*

The *Criminal Amendment Act, 1977*<sup>41</sup> still forms the basis of the current scheme used by courts when declaring an individual a dangerous offender. Applications were initiated by Crown counsel after obtaining the consent of the Attorney General.<sup>42</sup> An application was then filed with the court.<sup>43</sup> Similar to the 1960 amendments, two psychiatrists were required to give evidence, while a criminologist was optional.<sup>44</sup> If all criteria provided for in the statute were met, the court declared the offender to be a dangerous offender and the court had the discretion to pass an indeterminate sentence.<sup>45</sup> Any indeterminate sentence was subject to review after three years from the date of sentence. If the offender was not released after the initial three years, their imprisonment was subject to review by the National Parole Board every two years after that.<sup>46</sup>

ii. 1997: Introduction of the Long-term Offender Regime

Amendments were made to the dangerous offender regime in 1997. Though it was not a complete overhaul of the framework, the amendments resulted in “very significant changes to the preventative detention regime, including the introduction of a new designation, the long-term offender.”<sup>47</sup>

Modifications were also made to the requirement for psychiatric testimony. Rather than the court hearing the evidence of two separate psychiatrists nominated by each party, only one assessment was ordered.<sup>48</sup> That change was based on a recommendation of the Task Force on High-Risk Violent Offenders, which recommended one multi-disciplinary neutral assessment team as existed in the Netherlands. That recommendation was aimed at avoiding an inevitable

<sup>41</sup> *Criminal Code* SC 1976-66, c 53 (Note: Came into force on 15 October, 1977).

<sup>42</sup> Hassan *supra* note 23.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

<sup>45</sup> *Supra* note 32.

<sup>46</sup> C Connelly & S Williamson, “A review of the research literature on serious violent and sexual offenders” (2000) The Scottish Executive Central Research Unit: University of Glasgow in Hassan *supra* note 23.

<sup>47</sup> Allan Manson, *Essentials of Canadian Law: The Law of Sentencing* (Toronto: Irwin Law, 2001) at 320.

<sup>48</sup> *Criminal Code*, *supra* note 1, s. 752.1; MacAlister in Hassan *supra* note 32.

‘battle of the experts.’ However, Manson notes two problems with incorporating a single assessment into Canadian law:

...transplanting the mechanism of a single overarching multi-disciplinary assessment into Canadian processes ignores two factors. First, it cannot be said that there is a comparable multi-disciplinary clinic in every Canadian jurisdiction. Secondly, it seems that, in general, the Dutch penal attitudes in the post-World War II era have been particularly tolerant and very concerned about deprivations of liberty...Canadian psychiatrists and psychologists with institutional positions often exhibit guarded and conservative responses.<sup>49</sup>

*iii. 2008: Broadening Dangerous Offender Legislation to Protect the Public*

Stephen Harper’s Conservative government made further amendments to the dangerous offender provisions in 2008, citing a “primary objective...to protect the public from offenders who have committed serious sexual or violent offences (except murder) and continue to pose a threat to society.”<sup>50</sup> The new provisions further “tightened the rules that apply to dangerous offenders.”<sup>51</sup> Dangerous offender applications became much more prevalent. On conviction of a third designated offence, Crown prosecutors are required by law to make a declaration in court as to whether or not a dangerous offender application had been considered.<sup>52</sup>

A presumption of dangerousness was also introduced with respect to certain repeat offenders. Now, any offender convicted for a third time of a primary designated offence<sup>53</sup> (of which for each the term of imprisonment was at least two years) is presumed to be a dangerous

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<sup>49</sup> *Supra* note 47 at 321-22.

<sup>50</sup> *Supra* note 13 at 1.

<sup>51</sup> *Ibid* at 2.

<sup>52</sup> *Criminal Code supra* note 1, s. 752.01.

<sup>53</sup> *Ibid*, s. 752.

offender by the court.<sup>54</sup> The offender may rebut this presumption by leading evidence to prove on a balance of probability that the offender is not dangerous.<sup>55</sup> Judicial discretion around findings of dangerousness and sentencing was also limited by the 2008 amendments.<sup>56</sup>

#### iv. 2016: The Dangerous Offender Framework

As noted above, the current dangerous offender framework is contained in Part XXIV of the *Criminal Code*. Section 752 of the *Code* defines “serious personal injury offence” as:

**“serious personal injury offence” means**

- a) an indictable offence, other than high treason, treason, first degree murder or second degree murder, involving
  - i. the use or attempted use of violence against another person, or
  - ii. conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage upon another person,
 and for which the offender may be sentenced to imprisonment for ten years or more, or
- b) an offence or attempt to commit an offence mentioned in section 271 (sexual assault), 272 (sexual assault with a weapon, threats to a third party or causing bodily harm) or 273 (aggravated sexual assault).<sup>57</sup>

On conviction of a serious personal injury offence, the Crown may initiate a dangerous offender hearing.<sup>58</sup> There must be “reasonable grounds to believe that the offender might be found to be a

<sup>54</sup> *Ibid*, s. 753(1.1); *Supra* note 13.

<sup>55</sup> *Criminal Code*, *ibid*.

<sup>56</sup> See Section *iv. The Current Dangerous Offender Framework*

<sup>57</sup> *Supra* note 1.

<sup>58</sup> *Criminal Code supra* note 1, s. 753(2)(b); See also *supra* note 13 at 2: ‘A Crown attorney may present a dangerous offender application after an offender has been found guilty, but before sentencing. However, if new evidence comes to light, an application can be made up to six months after sentencing.’

dangerous or long-term offender.”<sup>59</sup> As mentioned above, in cases where it is the third conviction of a designated offence, the Crown is required to consider the applicability of Part XXIV and make a declaration in court.<sup>60</sup> Once consent of the Attorney General is given and the offender has been given notice,<sup>61</sup> the offender may be remanded in custody for a mandatory assessment report that will not initially exceed sixty days.<sup>62</sup> The completed assessment is filed with the court, and as noted above, only one expert is required. The two-expert approach was abandoned in favour of a single assessment, which has been “described as being potentially more neutral and less contentious than the previous model.”<sup>63</sup>

Conviction of a serious personal injury offence is not the end of the dangerous offender hearing; rather, it is the trigger. As the court noted in *R. v. Currie*,

...there remains a second stage...at which point the trial judge must be satisfied beyond a reasonable doubt of the likelihood of future danger that an offender presents to society before [they] can impose the dangerous offender designation and an indeterminate sentence.<sup>64</sup>

There are two branches under which the court may declare an offender dangerous; these are encapsulated in s. 753(1) CC. The provisions contain the notion that the dangerous offender is an individual who is “unable to control his impulses, with normal standards of behavioural constraints being ineffective.”<sup>65</sup> Other than in cases where a presumption of dangerousness

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<sup>59</sup> *Supra* note 47 at 321.

<sup>60</sup> *Criminal Code*, *supra* note 1, s. 752.01.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*, s. 752.1.

<sup>63</sup> *Supra* note 32 at 18.

<sup>64</sup> *R. v. Currie* [1997] 2 SCR 260 at para 275.

<sup>65</sup> *Supra* note 23 at 17.

applies, the Crown bears the burden of proof beyond a reasonable doubt that the “offender presents a high risk of recidivism.”<sup>66</sup>

Under the first branch (found in s. 753(1)(a) of the *Code*), an offender may be found dangerous if the court finds that the individual “constitutes a threat to the life, safety or physical or mental well-being of other persons.”<sup>67</sup> Evidence must be led by the Crown to establish one of the following:

1. A pattern of repetitive behaviour by the offender that demonstrates “a failure to restrain [their] behaviour and a likelihood of causing death or injury to other persons, or inflicting severe psychological damage on other persons, through failure in the future to restrain [their] behaviour,”<sup>68</sup>
2. A pattern of persistent aggressive behaviour “showing a substantial degree of indifference on the part of the offender respecting the reasonably foreseeable consequences to other persons of [their] behaviour,”<sup>69</sup> or
3. Any behaviour “that is of such a brutal nature as to compel the conclusion that the offender’s behaviours in the future is unlikely to be inhibited by normal standards of behavioural restraint.”<sup>70</sup>

In each instance the offence for which the offender is undergoing sentencing should form a part of the patterned behaviour.<sup>71</sup>

The second branch analysis also takes place after conviction of a serious personal injury offence. Here the Crown must prove that the offender’s behaviour (including the offence for

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<sup>66</sup> *Criminal Code supra* note 1, s. 754(2); *Supra* note 13.

<sup>67</sup> *Criminal Code ibid*; Manson, *supra* note 47 at 322.

<sup>68</sup> *Criminal Code ibid*, s. 753(1)(a)(i).

<sup>69</sup> *Ibid* s. 753(1)(a)(ii).

<sup>70</sup> *Ibid* s. 753(1)(a)(iii).

<sup>71</sup> *Supra* note 47.

which they are undergoing sentencing) shows “a failure to control his or her sexual impulses and a likelihood of causing injury, pain or other evil to other persons through failure in the future to control his or her sexual impulses.”<sup>72</sup>

If the offender meets the statutory criteria enunciated under either branch in s. 753(1) of the *Code*, the court *shall* find the individual to be a dangerous offender.<sup>73</sup> Insertion of the word ‘shall’ in the 2008 amendment served to limit judicial discretion in dangerous offender hearings.

Once declared dangerous, there are three possible outcomes under s. 753(4) of the *Code*. The court may:

1. Impose a sentence of detention in a penitentiary for an indeterminate period,<sup>74</sup>
2. Impose a sentence for the conviction sentence which is a minimum of two years and thereafter be subject to a long-term supervision order not exceeding ten years,<sup>75</sup> or
3. Impose a sentence for the offence for which the offender has been convicted.<sup>76</sup>

Section 753(4.1) of the *Code* mandates that an indeterminate sentence must be given to a dangerous offender “unless it is satisfied by the evidence...that there is a reasonable expectation that a lesser measure under paragraph 4(b) or (c) will adequately protect the public.”<sup>77</sup> Due to this section, reasonable prospects of rehabilitation and community management of the offender and their behaviour becomes vital in the sentencing phase of a dangerous offender hearing. As will be discussed below, this is a major area where psychiatric testing may sway judicial decision-making.

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<sup>72</sup> *Criminal Code supra* note 1, s. 753(1)(b).

<sup>73</sup> *Ibid* s. 753(1.1).

<sup>74</sup> *Ibid*, s. 753(4)(a).

<sup>75</sup> *Ibid*, s. 753(4)(b).

<sup>76</sup> *Ibid*, s. 753(4)(c).

<sup>77</sup> *Ibid*.

In cases where individuals are given an indeterminate sentence, no statutory release date is set.<sup>78</sup> After four years of imprisonment, an offender with an indeterminate sentence is eligible to apply for day parole and ordinary parole after seven.<sup>79</sup> However, as long as the offender continues to “present an unacceptable risk for society, they will stay in prison for life.”<sup>80</sup>

## **Part II: The Over-Incarceration of Aboriginal Offenders**

### ***A. Overview of the Incarceration of Aboriginal Offenders***

#### ***i. The Problem of Over-Incarceration***

Canada has a long and well-documented history of the over-incarceration of its aboriginal peoples. Described by the Supreme Court of Canada in 1999 as a “crisis in the Canadian Justice system,”<sup>81</sup> it is a phenomenon that manifested in the mid-20<sup>th</sup> century. Prior to World War II, aboriginal peoples were no more overrepresented than other ethnic groups in Canadian prisons.<sup>82</sup> However, by the 1980s, a much different trend had emerged,<sup>83</sup> prompting Parliament and the courts to act.

However, the action taken to date has not resulted in a reduction of that overrepresentation. The most recent statistics indicate that the incarcerated aboriginal population is growing. Over an eleven year period, ‘the federal Aboriginal inmate population...increased by

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<sup>78</sup> *Corrections and Conditional Release Act* SC 1992 c 20, s. 127.

<sup>79</sup> *Ibid*, s. 119(1)(b).

<sup>80</sup> *Supra* note 13 at 6; *Ibid*, ss. 101, 102.

<sup>81</sup> *Supra* note 2 at para 64.

<sup>82</sup> Jonathan Rudin, “Aboriginal Over-representation and *R. v. Gladue*: Where we were, Where We Are and Where We Might Be Going” (2008) 40 *Supreme Court L Rev* 687.

<sup>83</sup> Michael Jackson, ‘Locking up Natives in Canada’ (1989) 23:2 *UBC L Rev* 215.



56.2%, increasing from 17% in 200-01 to 23.2% in 2010-11.<sup>84</sup> In February 2013, 23.2% of the total federal inmate population was aboriginal.<sup>85</sup> As of 2014, aboriginal people (including First Nations, Metis and Inuit peoples) comprised 24% of the total custodial admissions in the provinces and territories. At this same time, Aboriginal peoples accounted for 3-4% of the general Canadian population.<sup>86</sup> In January 2016, Canada's Correctional Investigator Howard Sapers acknowledged that for the first time in history more than 25% of inmates in Canadian federal prisons are of aboriginal descent.<sup>87</sup> As noted by the Supreme Court, citing Professor Ruden, "if aboriginal over-representation was a crisis in 1999, what term can be applied to the situation today?"<sup>88</sup>

#### ii. Causes of Over-Incarceration

Several causes of aboriginal over-incarceration have been identified. As pointed out by the Office of the Correctional investigator,

...the high rate of incarceration for Aboriginal peoples has been linked to systemic discrimination and attitudes based on racial or cultural prejudice, as well as economic and social disadvantage, substance abuse and intergenerational loss, violence and trauma.<sup>89</sup>

A self-reported study of 316 Aboriginal offenders enrolled in the Aboriginal Offender Substance Abuse Program corroborated the above statement. The study, though limited, found that contact with the child welfare system, familial history of involvement with the residential school system (18% reported that they themselves were survivors), family history of imprisonment, and family

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<sup>84</sup> Office of the Correctional Investigator, 'Backgrounder: Aboriginal Offenders: A Critical Situation' online <<http://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20121022info-eng.aspx>>.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Supra* note 8.

<sup>87</sup> CBC News, 'Prison Watchdog says more than a quarter of federal inmates are aboriginal people' 'CBC News' (January 14 2016) <<http://www.cbc.ca/news/aboriginal/aboriginal-inmates-1.3403647>>.

<sup>88</sup> *Supra* note 4 at para 62.

<sup>89</sup> *Supra* note 84.

history of addictions was not uncommon.<sup>90</sup> Those serving sentences in federal prisons are younger, and are also more likely to have a personal history of mental illness and/or substance abuse.<sup>91</sup>

Criminal justice legislation under the Harper government in the past eight years has further exacerbated the problem of over-incarceration. The *Safe Streets and Communities Act* (Bill C-10) has been criticized for aggravating this problem by increasing reliance upon and expanding the use of imprisonment in sentencing.<sup>92</sup> Mandatory minimums is one example of this, as they deny judges the ability to pay attention to the unique circumstances of aboriginal offenders when imposing a sentence as required by s. 718.2(e). In application, mandatory minimums,

...impose disparate burdens on First Nations individuals who are often required to serve their sentences far from their home communities, perpetuating the colonial pattern of family disruption and alienation of Aboriginal peoples from their culture.<sup>93</sup>

Much like the mandatory minimums impose a disparate burden on aboriginal peoples, it can be argued that so too does the dangerous offender provisions. As noted by the British Columbia Court of Appeal in their interpretation of s. 753(1)(a)(ii) in *R. v. George*:

The dangerous offender provisions may fall more heavily on the poor and disadvantaged members of society if their childhood misconduct is counted against them. This appellant had to face school as an aboriginal foster child living in a non-aboriginal culture... it is

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<sup>90</sup> Canada, 'Annual Report of the Office of the Correctional Investigator 2013-2014' online: <<http://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20132014-eng.aspx#sIV>>.

<sup>91</sup> *Ibid.*

<sup>92</sup> Ryan Newell, 'Making matters Worse: The Safe Streets and Communities Act and the ongoing Crisis of indigenous over-incarceration' (2013) 51:1 Osgoode Hall LJ 199.

<sup>93</sup> *R v Lloyd* 2014 BCCA 224 (CanLII) on Appeal to the Supreme Court of Canada (Factum of the Intervenor PIVOT) at para 20.

understandable that any child with this background would get into a lot of trouble by lashing out aggressively when challenged...<sup>94</sup>

While this sentiment informed the scope of allowable evidence within the context of the *Criminal Code* section, it is easy to draw the parallels between the systemic factors faced by aboriginal peoples and their over-representation in Canadian gaols generally, and specifically as dangerous offenders.

### iii. Dangerous Offender Aboriginal Over-representation

According to Statistics Canada, there is a “disproportionate number of Aboriginal people in custody [that is] consistent across all provinces and territories.”<sup>95</sup> Aboriginal peoples are overrepresented in every facet of prison life. They are

...more likely to be serving a sentence for violence, stay longer in prison before first release, and more likely to be kept at higher security institutions. They are more likely to be gang-affiliated, over-involved in the use of force interventions and spend disproportionate time in segregation. Aboriginal offenders are more likely [to be] denied parole, revoked and returned to prison more often.<sup>96</sup>

The dangerous offender population in Canada is relatively small. Over a twenty-nine year period (1978 to 2007), 427 individuals received dangerous offender designations.<sup>97</sup> As of 2014, 528 offenders in federal penitentiaries were serving an indeterminate sentence resulting from a

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<sup>94</sup> *R. v. George* [1998], 126 CCC (3d) 384 BCCA in Manson *supra* note 46 at 323.

<sup>95</sup> *Supra* note 84.

<sup>96</sup> *Supra* note 90.

<sup>97</sup> *Supra* note 26.

dangerous offender designation.<sup>98</sup> Aboriginal peoples are significantly overrepresented in the dangerous offender population, accounting for 26.7% of 486 dangerous offenders in 2012.<sup>99</sup> In 2011, Aboriginal people made up only 4.3% of the general Canadian population.<sup>100</sup>

As astutely noted by Justice Murray Sinclair in the Truth and Reconciliation Summary, [violence] and criminal offending are not inherent in Aboriginal people. They result from very specific experiences that aboriginal people have endured, including the intergenerational legacy of residential schools. It should not be surprising that those who experienced and witnessed very serious violence against Aboriginal children in the schools frequently became accustomed to violence in later life.<sup>101</sup>

Though Justice Sinclair's observations came nineteen years after Parliament took action to alleviate the over-representation of aboriginal peoples in gaol, his sentiment undeniably would have rang true in 1996 with the enactment of s. 718.2(e).

## ***B. Criminal Justice Response***

### ***i. Section 718.2(e) CC***

In an attempt to combat the rising number of incarcerated aboriginals, Parliament took action in 1996 as part of a general sentencing reform.<sup>102</sup> Section 718.2(e) of the *Code* reads as follows:

#### **Other Sentencing Principles**

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<sup>98</sup> *Supra* note 8.

<sup>99</sup> Public Safety Canada, *Corrections and Conditional Release Statistical Overview*. (Ottawa: Public Safety Canada, 2012).

<sup>100</sup> Statistics Canada, "Aboriginal Peoples in Canada: First Nations People, Metis and Inuit" online: <<https://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-011-x/99-011-x2011001-eng.cfm#a2>>.

<sup>101</sup> Canada, Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future* (Ottawa: Library and Archives Canada Cataloguing in Publication) at 171.

<sup>102</sup> Renee Pelletier, "The Nullification of Section 718.2: Aggravating Aboriginal Over-representation in Canadian Prisons" (2001) 39:2 Osgoode Hall LJ 469;

718.2 A court that imposes a sentence shall also take into consideration the following principles:

...

(e) 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*.<sup>103</sup>

By enacting this provision, it was the hope of legislators that s. 718.2(e) would alleviate “over-reliance on incarceration and over-representation of Aboriginal people in Canadian prisons.”<sup>104</sup>

Minister of Justice Allan Rock remarked when testifying before the House of Commons

Standing Committee on Justice and Legal Affairs that, “...what we’re trying to do...is to

encourage courts to look at alternatives where it’s consistent with the protection of the public –

alternatives to jail – and not simply resort to that easy answer in every case.”<sup>105</sup> These comments

undoubtedly had effect on the Supreme Court when they considered the provision in the case of

*R. v. Gladue* in 1999.

#### ii. *R. v. Gladue*

The release of *R. v. Gladue* in 1999 was meant to bring clarity to the application of s.

718.2(e). The Supreme Court acknowledged the huge overrepresentation of Aboriginals in

Canadian prisons and expressly declared that s. 718.2(e) was designed to remedy that

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<sup>103</sup> *Criminal Code supra* note 1.

<sup>104</sup> *Supra* note 102 at 472.

<sup>105</sup> Canada, *First Report on Progress for Federal/Provincial/Territorial Ministers Responsible for Justice: Corrections Population Growth* (Fredericton: Federal/Provincial/Territorial Ministers Responsible for Justice, February 1997).

overrepresentation by greater reliance on sanctions other than imprisonment.<sup>106</sup> When sentencing aboriginal offenders, the Supreme Court of Canada directed that judges had two duties.

First, the Court emphasized the importance of taking note of the special circumstances faced by aboriginal offenders. Sentencing of aboriginal offenders was meant to be undertaken via a ‘holistic’ approach.<sup>107</sup> The Court directed that it would be “necessary for the judge to take judicial notice of the systemic or background approach to sentencing, which is relevant to aboriginal offenders.”<sup>108</sup> Any proper sentencing of an aboriginal offender must “proceed with sensitivity to and understanding of the *difficulties aboriginal people have faced with both the criminal justice system and society at large.*”<sup>109</sup> Background factors deemed relevant included, the

...years of dislocation and economic development [which] translated...into low incomes, high unemployment, lack of opportunities and options, lack of irrelevance of education, substance abuse, loneliness and community fragmentation. These and other factors contribute to a higher incidence of crime and incarceration.’<sup>110</sup>

Secondly sentencing judges were directed to consider all other appropriate sentences before imposing a sentence of imprisonment. This was to be considered in conjunction with the offender’s aboriginal heritage and circumstances.<sup>111</sup> Incarceration was meant to be the last resort when no other punishment was fit. Unfortunately *Gladue* brought confusion rather than clarity to the application of s. 718.2(e).

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<sup>106</sup> *Supra* note 2.

<sup>107</sup> *Ibid* at para 81.

<sup>108</sup> *Ibid* at para 83.

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid* at para 67.

<sup>111</sup> *Ibid* at para 93.

*iii. R. v. Ipeelee & Application to Dangerous Offender Hearings*

In the years after *Gladue*, confusion around its application existed. In 2012, the Supreme Court again attempted to clarify its position with the release of *R. v. Ipeelee*.<sup>112</sup> In so doing, the Court attempted to address some of the criticism and confusion that had met *R. v. Gladue*. One major point of contention amongst many Canadian judges was with respect to the assumed requirement that there must be an actual connection between the offender's aboriginal identity, the offence, and the systemic factors faced by aboriginal people in general.<sup>113</sup> The Court reattempted to make its position in abundantly clear:

Courts have, at times, been hesitant to take judicial notice of the systemic and background factors affecting aboriginal people in Canadian society. To be clear, courts *must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course, higher levels of incarceration for aboriginal peoples.*<sup>114</sup>

In particular the court emphasized the urgency and necessity that *Gladue* be applied in every single sentencing hearing involving an aboriginal offender. One passage in *Gladue* in particular, as noted by Jackson, created hesitancy in sentencing judges faced with an offender who was guilty of a serious offence:

...even where an offence is considered serious, the length of the term of imprisonment must be considered. In some circumstances the length of the sentence of an aboriginal offender may be less and in others the same as that of any other offender. Generally the more violent and serious the offence, the more likely it is as a practical reality that the

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<sup>112</sup> *Supra* note 4.

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid* para 60.

terms of imprisonment for aboriginals and non-aboriginals will be close to each other or the same, even taking into account their different concepts of sentencing.<sup>115</sup> [Emphasis added]

Many judges took this to mean that *Gladue* had little to no application at all in cases where ‘serious’ crimes were commissioned. The Court in *Ipeelee* soundly refuted this. *Ipeelee*, along with its companion case of *R. v. Ladue* involved two aboriginal individuals who were subject to a long period of imprisonment under a long-term offender designation.<sup>116</sup> The offender in *Gladue* had herself pled guilty to manslaughter; there was, in the Court’s opinion, no sentencing that *Gladue* considerations did not apply to. In addressing the application of *Gladue* to serious offences, the Court directed attention again to the contextual analysis required by *Gladue*:

...these matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders. Rather, they provide the necessary *context* for understanding and evaluating the case-specific information presented by counsel. Counsel have a duty to bring that individualized information before the court in every case.<sup>117</sup>

*Gladue* and *Ipeelee* call on judges, in arriving at a “truly fit and proper sentence” for aboriginal offenders, to consider the circumstances of aboriginal offenders. In so doing they fulfill the fundamental duty of a sentencing judge – “*Gladue* affirms this requirement and recognizes that, up to this point, Canadian courts have failed to take into account the unique circumstances of Aboriginal offenders that bear on the sentencing process.”<sup>118</sup>

The Court in *Ipeelee* definitely refuted the ‘unwarranted’ emphasis that had been placed on the seriousness of the offence and the applicability of *Gladue*, stating that “numerous courts

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<sup>115</sup> *Supra* note 4 at 79 as cited in *supra* note 7.

<sup>116</sup> *Ipeelee* *ibid.*

<sup>117</sup> *Ibid* para 60.

<sup>118</sup> *Ibid* para 75.



have erroneously interpreted this generalization as an indication that the Gladue principles do not apply to serious offences.”<sup>119</sup> Judges, according to *Ipeelee*, have a duty to apply s. 718.2(e) – each case is unique, and “in each case, the sentencing judge must look to the circumstances of the aboriginal offender.”<sup>120</sup>

With this clear direction from the Supreme Court, it is difficult to argue that *Gladue* has no place in the context of dangerous offender hearings. *Ipeelee* was the subject of a long-term offender designation under the same Part of the *Criminal Code* that contains the dangerous offender provisions. The Saskatchewan Court of Appeal has developed a line of cases in keeping with *Gladue* that stand for the principle that *Gladue* applies in the context of dangerous offender hearings:

Crown counsel, defence counsel, and sentencing judges must pay more than lip service to *Gladue* considerations. For s. 718.2(e) to serve any purpose, there must be more than a review of the offender’s personal circumstances...

...in Mr. Moise’s case, there was ample evidence of his background and personal circumstances to warrant taking *Gladue* considerations into account as required by s. 718.2(e) of the *Criminal Code*. The sentencing judge’s failure to address those considerations when deciding whether Mr. Moise should be designated a dangerous or long-term offender constitutes an error in law.<sup>121</sup>

It is arguable that the consideration of *Gladue* should take place throughout the entirety of the dangerous offender hearing, as “the proper application of s. 718.2(e) during a dangerous offender

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<sup>119</sup> *Ibid* para 84

<sup>120</sup> *R. v. Wells* [2000] 1 SCR 207.

<sup>121</sup> *R. v. Moise* [2015] SKCA 39 (CanLII) at para 26-27.

hearing should involve an assertive, substantive infusion of the *Gladue* considerations into the heart of the assessment process.”<sup>122</sup>

### **Part III: Psychiatric Testing and Dangerous Offender Hearings**

#### ***A. Psychiatric Tests***

##### **i. Actuarial Risk Assessment Instruments**

As noted in Part I of this paper, Part XXIV of the *Criminal Code* posits that on application by a Crown prosecutor, the court must order an initial maximum 60 day risk assessment. While there is no set criteria as to what is contained within the assessment or standardized format, there are a number of commonly used psychiatric assessment tools, including include the Hare Psychopathy Checklist-Revised (PCL-R), Violence Risk Appraisal Guide (VRAG), Sexual Offender Risk Appraisal Guide (SORAG), Static-99, and Violence Risk Scale (VRS-SO) that are used in the assessment.<sup>123</sup>

All of these tests are known within the forensic psychology world as actuarial risk assessment instruments. They are used to “estimate the probability that an individual will engage in future violence.”<sup>124</sup> Through interviews or other means of obtaining information, these tests collect data on factors about the offender such as education level, employment record, history of mental illness, and extent/existence of a criminal record.<sup>125</sup>

Actuarial risk assessment instruments are different from other psychological tools in that they are “predictive or prognostic; designed solely to forecast the future.”<sup>126</sup> Actuarial risk

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<sup>122</sup> *Supra* note 7 at 77.

<sup>123</sup> John Howard Society of Alberta *supra* note 17.

<sup>124</sup> *Supra* note 18 at 1.

<sup>125</sup> *Supra* note 7.

<sup>126</sup> *Supra* note 18 at 1.

assessments are a form of inductive logical reasoning. Dr. Hart provides an instructive example of inductive logical reasoning which these tests are based upon:

1. **Major Premise:** In the samples used to construct Test X, 52% of individuals with scores in category Y were known to have committed violence during the follow-up period;
2. **Minor Premise:** Jones has a score on Test X that falls into category Y;
3. **Conclusion:** Therefore, the risk that Jones will commit violence is similar to the risk of people in category y.<sup>127</sup>

Actuarial risk assessment instruments are based on specific criteria that are relatively consistent across all individuals. They are undoubtedly preferable than assessments that involve unstructured clinical judgement; research has indicated that “predictions of violence made using unaided (i.e. informal, impressionistic or intuitive) judgements are seriously limited with respect to both inter-clinician agreement and accuracy. This...motivated the development of [these tests].”<sup>128</sup> The information gathered within these risk assessments are compiled and amalgamated into a score for that particular offender.

In general actuarial decisions and scores “are based on specific assessment data, selected because they have been demonstrated empirically to be associated with violence and coded in a predetermined manner.”<sup>129</sup> The goal of the tests is to measure risk; and there is certainly a comfort in assessing risk by pinpointing it on a numerical basis. However its strength is arguably also its weakness.

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<sup>127</sup> *Ibid.*

<sup>128</sup> *Ibid.*

<sup>129</sup> Stephen D Hart, “The Role of Psychopathy in Assessing Risk for Violence: Conceptual and Methodological Issues” *Legal and Criminal Psychology* (1998) 3 121 at 124.

Described as “mechanical” and “algorithmic,” it is important to acknowledge that “the actuarial approach also has limitations.”<sup>130</sup> Particularly in the context of dangerous offender hearings, where there is a risk of indeterminate imprisonment, it is very wise to be cognizant of those limitations, and how those limitations may operate within the context and application of the law.

### 1. Problem 1: Generalizability

As noted by Hart, there are two major errors that are relevant in the context of actuarial risk assessment instruments when predicting risk of violent recidivism. The first is group error. As Hart notes,

The construction samples for test X...[are] samples drawn from a larger population. The findings from the samples are used to draw inferences about...the true rate of violence for the entire population of people who have scores in category Y. We need to know the margin of error...for the estimated violence risk associated with category Y in the original construction samples.<sup>131</sup>

The second error commonly made is individual error, and in the context of dangerous offender hearings, more problematic:

Moving the focus of analysis from groups to individuals changes the way in which risk is conceptualized. According to actuarial risk assessment instruments, violence risk is defined as the probability of violence. When considering groups, probability is defined in frequentist terms as the proportion of people who will commit violence...and the margin

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<sup>130</sup> *Ibid.*

<sup>131</sup> *Supra* note 18 at 1.

of error is the uncertainty regarding the proportion of people who will commit violence.<sup>132</sup>

When refocusing the analysis on individual probability rather than group probability, “these definitions do not make sense for individuals, who either will or will not commit violence.”<sup>133</sup>

The margin of error for the individual changes; it is much larger than the margin of error for predicting group violence.<sup>134</sup> It would be like trying to predict whether or not the particular individual S prefers chocolate or vanilla ice cream. Even though we know that (for example) 60% of the group prefers chocolate, it is impossible to predict with certainty using that group information and margin of error whether or not individual S will prefer chocolate or vanilla.

The margin of error grows when focus shifts from the group to the individual. Hart’s mathematical analysis of two assessments found that they had “poor precision. The margins of error for risk estimates using the tests were substantial, even at group level; at the individual level, the margins of error were so high as to render the results virtually meaningless.”<sup>135</sup> Hart recommended caution in using these types of tests when attempting to infer an individual’s risk of committing future acts of violence; “at best...professionals should be extremely cautious when using [these tests] to estimate inferences about an individual’s risk for violence...at worst, they suggest that professionals should avoid using [these tests] altogether.”<sup>136</sup> Hart suggests that risk assessment should not take place on a single quantity basis.<sup>137</sup>

Some professionals argue that such tests may be used appropriately as long as “professional judgment or discretion is used to modify or override test-based decisions in the

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<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid* at 2.

<sup>134</sup> *Ibid* at 2.

<sup>135</sup> *Ibid* at 4.

<sup>136</sup> *Ibid* at 5.

<sup>137</sup> *Ibid.*

presence of relevant rare, case-specific or dynamic risk factors.”<sup>138</sup> This has been pointed out by experts as sounding “amicable, tolerant and even-handed, but it’s actually stupid.”<sup>139</sup> It does not “make sense to fudge the results of a statistically derived estimate on the basis of personal preference; in addition there is simply no empirical evidence that this improves the accuracy of predictions.”<sup>140</sup>

## 2. Problem 2: Static vs. Dynamic Factors

Another problem of actuarial risk assessment instruments is the factors upon which scores are based. As a whole, the evaluations focus on a ...small number of risk factors that are thought to predict violence across individuals and settings, thus ignoring factors that may be important but idiosyncratic to the case at hand...[and] tend to focus attention on (relatively) static or stable features of individuals, such as demographics and criminal history.<sup>141</sup>

These factors are known as static factors – they are characteristics that formed a pattern of past behaviour.<sup>142</sup> As David Milward notes,

Some studies have found Static-99 to have predictive accuracy. Some studies have found PCL-R to be moderate to highly accurate in predicting future recidivism. Higher PCL-R scores have also been found to correlate with higher drop-out rates from treatment programs. What is interesting to note is that both instruments place a premium on static

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<sup>138</sup> *Ibid* at 5.

<sup>139</sup> *Ibid*.

<sup>140</sup> *Ibid*.

<sup>141</sup> *Supra* note 129 at 124.

<sup>142</sup> David Milward, “Locking up those Dangerous Indians for Good: An Examination of Canadian Dangerous Offender Legislation as Applied to Aboriginal Persons” (2014) 51:3 Alberta Law Review 619.

predictors of risk, those tied with past misbehaviour, instead of dynamic predictors that emphasize current circumstances or progress with behaviour.<sup>143</sup>

These assessments base their results on an offender's life history, and even "dramatic changes in behaviour during treatment would be unlikely to influence [scores for] PCL-R ratings because of the relatively short time span of correctional treatment programs."<sup>144</sup> Hare, the creator of the PCL-R (which measures psychopathy) has argued that the test was "designed to assess a personality disorder, rather than to be used to predict violent recidivism."<sup>145</sup> This factor has great significance in the application of the current law.

### 3. Problem 3: Cross Cultural Bias

Directly related to the issue of assessing static factors is that of cross-cultural bias. As Dr. Hart testified in *Ewert*, actuarial tests are susceptible to four types of cross-cultural bias. Specifically for Aboriginal offenders, cultural differences are "more likely than not to be cross culturally variant."<sup>146</sup> Hart testified in *Ewert* that "he would not apply the scores derived from [various assessment tests] to aboriginal persons" on the basis of the pronounced cultural differences between aboriginal and non-aboriginal populations.<sup>147</sup>

All actuarial instruments "compare an accused's score to a statistical baseline... because these baselines have been determined on the premise of ethnic and racial neutrality, researchers have questioned their applicability to minority populations including Aboriginal peoples in Canada."<sup>148</sup> Actuarial tests were developed on non-aboriginal populations. Due to the unique systemic background factors faced by aboriginal peoples in Canada, it is arguable that the

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<sup>143</sup> *Ibid* at 651.

<sup>144</sup> *Ibid* at 652.

<sup>145</sup> *Ibid*.

<sup>146</sup> *Supra* note 19 at para 27-28.

<sup>147</sup> *Ibid* at para 31.

<sup>148</sup> *Supra* note 7 at 86.

inductive logical reasoning applied in actuarial risk assessment tests may not be applicable or accurate for aboriginal Canadians.

There have been few studies around cross-cultural bias in actuarial testing. Only one study (the Olver study) has been conducted on cross-cultural bias for aboriginals in Canada. While the study suggested that there was valid predictability for aboriginal peoples who are given the PCL-R, the study was criticized by Hart as having a small sample size and a failure to examine “predictive variance” of one-half of the test. That half of the test was found to have little to no predictive value with respect to aboriginal peoples.<sup>149</sup> For aboriginal people who are administered the PCL-R, this results in grossly skewed scores, as found by the Court in *Ewert*.<sup>150</sup> Given what actuarial assessments measure and

given the harsh socio-economic realities facing Aboriginal communities (resulting from a unique colonial experience), it is hard to imagine any Aboriginal accused scoring ‘well’ on such tests. In sum, the predictive value of these assessments is questionable. Left unscrutinized by the courts, they place Aboriginal offenders at a distinctive disadvantage in the dangerous offender arena.<sup>151</sup>

It is incredibly important to take note of other systemic factors that may be at play in the process of administering the tests, and what other factors ultimately affect the results.

### ***B. Use of Psychiatric Tests in Courts***

As discussed above, psychiatric assessments play an integral role in dangerous offender hearings. Several studies have looked to how the courts utilize this evidence in their analysis of the law under Part XXIV.

#### ***i. How are Judges Using Psychiatric Tests?***

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<sup>149</sup> *Supra* note 19 at paras 37-39.

<sup>150</sup> *Ibid.*

<sup>151</sup> *Supra* note 7 at 86.



As Jackson notes, “psychiatric assessments feature prominently in the courts’ determination of whether an individual offender presents a high risk of recidivism...”<sup>152</sup> Indeed, many mental health experts feel confidence in relying on the static factors for assessing risk “...it is one often shared by judges as well”<sup>153</sup> In a review of case law Milward noted that there are “few cases where the expert witness for an Aboriginal accused explicitly questions the utility of standard instruments in assessing the risk posed by the aboriginal accused.”<sup>154</sup> One such case, *R. v. Wolfe*, noted that

The single most predictor of future behavior is one’s past behavior, it’s nature, it’s characteristic, and the way it was performed or done. There are vast amount(s) of literatures on predicting future violence but this is what is the single most predictor which I rely upon, courts rely upon, so do other forensic psychiatrists.<sup>155</sup>

Zinger and Forth (1998) reported that harsher dispositions usually follow when an expert testifies to an offender’s psychopathy.<sup>156</sup> A review of judgment discourse found that judges “tend to dedicate a large portion of their deliberations to the evaluation of expert testimony.”<sup>157</sup> Other academics have posited findings that indicate expert testimony around an offender’s actuarial risk assessment appears to form part of the decision making process for the judiciary.<sup>158</sup> A study that focused specifically on the PCL-R, psychopathy, and its implications in the courtroom found

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<sup>152</sup> *Ibid* at 85.

<sup>153</sup> *Supra* note 137 at 652.

<sup>154</sup> *Ibid* at 650.

<sup>155</sup> As cited in *supra* note 137 at 652-3.

<sup>156</sup> Christopher Doni, ‘Reconsidering the ‘new penology of risk management, dangerous and judicial decision-making’ (Master of Arts Criminology: University of Ontario) [unpublished].

<sup>157</sup> *Ibid* at 21.

<sup>158</sup> *Ibid* at 22.

that “psychopaths will receive longer sentences compared to their non-psychopathic counterparts.”<sup>159</sup>

Though the Supreme Court cautioned judges from handing over their decision-making power to the control of experts,<sup>160</sup> there is evidence that expert testimony is very influential in the designation of risk and declaration of dangerousness. Psychiatric testing also factors into an offender’s potential for rehabilitation, an important determinative aspect of sentencing once an offender is declared dangerous. If there is little to no prospect of rehabilitation or management in the community, the offender is sentenced for an indeterminate period of time. The importance that these tests play in dangerous offender hearings is nearly insurmountable.

#### **Part IV: Moving Forward**

With recognition of the potential problems of inherent bias within actuarial risk assessment instruments towards aboriginal peoples, there is potential for new legal arguments concerning these laws.

##### ***A. Constitutionality of Provision***

The dangerous offender provisions were first challenged on constitutional grounds in 1987 with the Supreme Court case of *R. v. Lyons*. Found constitutionally compliant, there had been no major challenges to the dangerous offender provisions until 2015.

In the British Columbia Supreme Court case of *R. v. Boutilier*,<sup>161</sup> the constitutionality of the current dangerous offender provisions were challenged and ruled unconstitutional on the grounds that the current dangerous offender framework under s. 753(1) CC breached s. 7 of the

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<sup>159</sup> Katie Davey, *Psychopathy and Sentencing: An Investigative Look into When the PCL-R is Admitted into Canadian Courtrooms and how a PCL-R Score Affects Sentencing Outcomes* (MEd Thesis, Western University, 2013) [unpublished] at 41.

<sup>160</sup> *Supra* note 24.

<sup>161</sup> [2015] BCSC 901

*Charter* on the basis of overbreadth. The provisions were ruled overbroad because “the s. 753(1) ‘designation’ stage of the process mandated the designation of certain offenders as ‘dangerous offenders’ based on specific and finite statutory criteria.”<sup>162</sup> Combined with the fact that some designations are now ‘automatic’ and the inability to consider future rehabilitative prospects of an offender in the process of designation may capture some offenders who are not dangerous.<sup>163</sup>

*R. v. Boutilier* is now on appeal to the British Court of Appeal. It is also important to note that *Charter* challenges may be realistically brought forward on the grounds that the current use of psychiatric testing for aboriginal offenders violates ss. 7, 15, and 12 of the *Charter*.

### ***B. Application of Gladue***

As discussed above, actuarial risk assessment instruments are assessed on background factors that, for aboriginal offenders, are intimately connected to the effects of colonialism. Aboriginal peoples have lower levels of education and economic opportunities, to be caught in the foster care system, more likely to have a criminal record, and more likely to suffer from mental illness and/or addiction.

*Gladue* is to apply in the context of all sentencing hearings of aboriginal people, regardless how serious the charges are that bring the offender before the court. Likewise it follows that dangerous offender hearings, which take place in the context of a sentencing hearing, are subject to *Gladue*, even though there is no case law to directly support this.

Defence counsel who have an aboriginal client facing a potential dangerous offender designation should lead evidence to ascertain the types of assessments administered to the offender; if it only involved actuarial risk assessment instruments (and not a clinical assessment), evidence can and should be led to challenge the reliability of those findings. Evidence should

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<sup>162</sup> *Ibid* at para 8

<sup>163</sup> *Ibid*.

also be led with to in respect to the tests themselves – their use of static rather than dynamic ‘risk factors,’ how the use of those factors may skew scores, and how those scores may or may not indicate a lack of rehabilitative prospects.

Above all, however, it must be emphasized that *Gladue* must and should apply throughout the dangerous offender hearing such that the judiciary is taking notice of aboriginal systemic factors throughout the dangerous offender hearing.

### ***C. Research and Reform***

Ultimately the only way that problems around actuarial risk assessment instruments can be resolved is if further research is done. Currently there are confluences of studies that contradict each other. Problematically, several of these studies are co-authored by individuals who have a personal interest in the tests they proclaim to be sound in cultural application.<sup>164</sup> Other tests are simply not large enough to be representative.<sup>165</sup>

As the law stands, dangerous offender hearings do depend upon and do use psychiatric assessment in deciding whether or not to declare an offender dangerous. The psychiatric evidence becomes even more compelling when deciding whether or not the offender is amenable to rehabilitation and can be safely monitored in the community.<sup>166</sup>

Currently Canada’s *Criminal Code* only requires one psychiatric assessment. This was, as discussed above, based on the recommendation of an independent team from the Netherlands. The Netherlands has a greater multi-disciplinary tradition than Canada; many places in Canada (particularly rural areas) do not have access to such psychiatric care. Serious consideration should be given to legislatively amending or supplementing the one psychiatric assessment approach.

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<sup>164</sup> See the Olver study as discussed in *Ewert v. Canada supra* note 1

<sup>165</sup> *Ibid.*

<sup>166</sup> *Supra* note 1, s. 754(4.1).

## **Conclusion**

As Charles Darwin wrote in the *Voyage of the Beagle*, “if the misery of our poor be caused not by the laws of nature, but by our institutions, great is our sin.”<sup>167</sup> While Darwin was writing to refute biological determinism in the context of slavery, the quote has ample consideration for the over-representation of aboriginal offenders in Canadian prisons.

Canada continues to face a crisis of over-incarceration of its aboriginal peoples. Aboriginals are overrepresented in every facet of the criminal justice system. They are also overrepresented as dangerous offenders. This characteristic of our correctional system has been pointed out by numerous professionals as a manifestation of systemic colonial factors.<sup>168</sup> There is, as Justice Sinclair wrote, nothing inherently violent about aboriginal peoples. And yet incarceration rates of aboriginals continue to rise, and aboriginal peoples are more likely than non-aboriginals to be labeled as dangerous, violent offenders.

While psychiatric assessment is but one small portion of the criminal justice system in the grander scheme, it is still worth considering in the context of *Gladue* and s. 718.2(e) CC. Particularly in dangerous offender hearings, consideration of these principles becomes paramount in the context of psychiatric evidence.

Several institutions must play a role if this problem is to be solved. There must be a better understanding of the fallibilities of these tests, in counsel and the judiciary. It is the duty of counsel as zealous advocates to lead evidence that ensures that their clients’ interests are represented and rights protected; this means leading and testing psychiatric evidence and making clear the limits of their capabilities.

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<sup>167</sup> As cited in Stephen Jay Gould’s book *The Mismeasure of Man* (WW Norton & Company: New York, NY, 1996).

<sup>168</sup> Robert Nichols, ‘The Colonialism of Incarceration’ 17:2 (2014) *Radical Philosophy Review* at 435.

Researchers must do more work to discover the extent of cross-cultural variance within actuarial risk assessment instruments. Further studies are necessary to discover limitations, and if these tests can be improved. The criminal justice system relies on mental health experts in dangerous offender hearings and other important contexts; they have yet, unfortunately “to grapple in earnest with important yet outstanding questions. Until that happens, it is probably unrealistic to expect judges to fully appreciate the complexities involved with managing the risk presented by Aboriginal accused who are subject to dangerous offender applications. Further research is certainly needed.”<sup>169</sup>

## **Bibliography**

### LEGISLATION

*Corrections and Conditional Release Act* SC 1992 c 20

*Criminal Code* SC 1947, c 55

*Criminal Code* 1960-61, c 43

*Criminal Code* SC 1976-66, c 53

*Criminal Code* RSC 1985, c C-46

### JURISPRUDENCE

*Ewert v Canada* [2015] FC 1093 (CanLII)

*Hatchwell v the Queen* [1976] 1 SCR 39

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<sup>169</sup> *Supra* note 137 at 652.

*R v Armstrong* [2014] BCCA 174 (CanLII)  
*R.v. Boutilier* [2015] BCSC 901  
*R. v. Currie* [1997] 2 SCR 260  
*R. v. George* [1998], 126 CCC (3d) 384 BCCA  
*R v Gladue* [1999] 1 SCR 688  
*R v Ipeelee* [2012] 1 SCR 433  
*R v Lloyd* 2014 BCCA 224 (CanLII)  
*R v Lyons* [1987] 2 SCR 309  
*R. v. Moise* [2015] SKCA 39  
*R. v. Wells* [2000] 1 SCR 207

#### SECONDARY MATERIALS: TEXTS

Stephen Jay Gould, *The Mismeasure of Man* (WW Norton & Company: New York, NY, 1996).  
 Allan Manson, *Essentials of Canadian Law: The Law of Sentencing* (Toronto: Irwin Law, 2001)  
 M Petrunik, *Models of dangerousness: A cross jurisdictional review of dangerousness  
 legislation and practice* (Ottawa: University of Ottawa, Criminology Department 1994)

#### SECONDARY MATERIALS: ARTICLES

Connelly, C & Williamson, S. “A review of the research literature on serious violent and sexual offenders” (2000) The Scottish Executive Central Research Unit: University of Glasgow.

Hart, Stephen D. “The Role of Psychopathy in Assessing Risk for Violence: Conceptual and Methodological Issues” *Legal and Criminal Psychology* (1998) 3 121.

Hart, Stephen D, Michie, Christine & Cooke, David J. “Precision of Actuarial Risk Assessment Instruments: Evaluating the ‘margins of error’ of group v individual predictions of violence” 190:49 *British Journal of Psychiatry* 60.

Jackson, Michael. ‘Locking up Natives in Canada’ (1989) 23:2 *UBC L Rev* 215.

Jackson, Nate. ‘The Substantive Application of *Gladue* in Dangerous Offender Proceedings; Reassessing Risk and Rehabilitation for Aboriginal Offenders’ (2015) 20 *Can Crim L Rev* 77.

- MacAlister, D. 'Use of risk assessments by Canadian judges in the determination of dangerous and long-term offender status, 1997-2002' (2005) in Law Commission of Canada (ed), *Law and Risk*.
- Milward, David. "Locking up those Dangerous Indians for Good: An Examination of Canadian Dangerous Offender Legislation as Applied to Aboriginal Persons" (2014) 51:3 Alberta Law Review 619.
- Newell, Ryan. 'Making matters Worse: The Safe Streets and Communities Act and the ongoing Crisis of indigenous over-incarceration' (2013) 51:1 Osgoode Hall LJ 199.
- Nicholaichuk, Terry et al. 'Correctional Careers of Dangerous Offenders' (2013) 59 CLQ 488.
- Nichols, Robert. 'The Colonialism of Incarceration' 17:2 (2014) Radical Philosophy Review at 435.
- Pelletier, Renee. "The Nullification of Section 718.2: Aggravating Aboriginal Over representation in Canadian Prisons' (2001) 39:2 Osgoode Hall LJ 469;
- Rudin, Jonathan. "Aboriginal Over-representation and *R. v. Gladue*: Where we were, Where We Are and Where We Might Be Going" (2008) 40 Supreme Court L Rev 687.

## SECONDARY MATERIALS: REPORTS

- Canada, *First Report on Progress for Federal/Provincial/Territorial Ministers Responsible for Justice: Corrections Population Growth* (Fredericton: Federal/Provincial/Territorial Ministers Responsible for Justice, February 1997).
- Canadian Committee on Corrections, *Report of the Canadian Committee on Corrections Toward Unity: Criminal Justice and Corrections* (Ottawa: Solicitor General of Canada, 1969)
- The Standing Senate Committee on Legal and Constitutional Affairs, *Parole in Canada* (Ottawa: Senate Committee), (The Honourable H. Carl Goldenberg, Chairman).
- Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future* (Ottawa: Library and Archives Canada Cataloguing in Publication) at 171.



Public Safety Canada, *Corrections and Conditional Release Statistical Overview*. (Ottawa: Public Safety Canada, 2012).

----- *Corrections and Conditional Release Statistical Overview* (Ottawa: Public Safety Canada, 2014).

#### SECONDARY MATERIALS: UNPUBLISHED

Davey, Katie. *Psychopathy and Sentencing: An Investigative Look into When the PCL-R is Admitted into Canadian Courtrooms and how a PCL-R Score Affects Sentencing Outcomes* (MEd Thesis, Western University, 2013) [unpublished].

Doni, Christopher. 'Reconsidering the 'new penology of risk management, dangerous and judicial decision-making' (Master of Arts Criminology: University of Ontario) [unpublished].

Hassan, Shereen. *The Long-Term Offender Provisions of the Criminal Code: An Evaluation* (PhD Thesis, School of Criminology Simon Fraser University 2010) [unpublished].

#### SECONDARY MATERIALS: WEBSITES

Canada, 'Annual Report of the Office of the Correctional Investigator 2013-2014' online: <<http://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20132014-eng.aspx#sIV>>.

CBC News, 'Prison Watchdog says more than a quarter of federal inmates are aboriginal people' 'CBC News' (January 14 2016) <<http://www.cbc.ca/news/aboriginal/aboriginal-inmates-1.3403647>>

John Howard Society of Alberta, "Offender Risk Assessment" online: John Howard Society <<http://www.johnhoward.ab.ca/pub/C21.htm#actu>>.

Public Safety Canada, *Dangerous Offender Designation* online: Public Safety Canada <<https://www.publicsafety.gc.ca/cnt/cntrng-crm/crctns/protctn-gnst-hgh-rsk-ffndrs/dngrs-ffndr-dsgntn-eng.aspx>>.

Office of the Correctional Investigator, 'Backgrounder: Aboriginal Offenders: A Critical = Situation' online <<http://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20121022info-eng.aspx>>.

Statistics Canada, "Aboriginal Peoples in Canada: First Nations People, Metis and Inuit" online: <<https://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-011-x/99-011-x2011001-eng.cfm#a2>>.

GOVERNMENT DOCUMENTS

Library of Parliament, *The Dangerous Offender and Long-term Offender Regime* (Ottawa: Legal and Legislative Affairs Division, 2008).