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Eighteen Years of Inmate Litigation Culminates with Some Success in the SCC's *Ewert v Canada*

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Case Commented On: *Ewert v Canada*, 2018 SCC 30 (CanLII)

On June 13, 2018, the Supreme Court of Canada (SCC) issued its decision in *Ewert v Canada* (*Ewert* SCC), in which the majority held that the Correctional Service of Canada (CSC) breached its statutory duty to Jeffrey G Ewert, a Métis inmate, when it used five actuarial risk assessment tests that were not proven to be accurate when applied to Indigenous offenders. CSC uses these tests to assess inmates' risk of recidivism, and the test results can impact liberty-related processes such as security classification, parole hearings, and eligibility for escorted temporary absences (ETAs). Mr. Ewert had rather slim positive evidence for the presence of cultural bias in the tests; his argument was, instead, that his and others' legitimate concerns about the possibility of bias should require CSC to produce research confirming the tests' validity. He was initially successful at the Federal Court in 2015, overturned at the Federal Court of Appeal in 2016, and ultimately prevailed at the SCC. His lengthy litigation efforts resulted in a total of five written decisions and spanned eighteen years. In this post, I will review the long history of Mr. Ewert's efforts, the progression of his case through the courts, and the significance of the remedy he received.

2000-2008: Mr. Ewert's Grievances

The subject matter of Mr. Ewert's 18-year undertaking was five actuarial psychological assessment tools used by CSC to assess the likelihood that an inmate will reoffend violently or sexually if released. They are:

- the Hare Psychopathy Checklist Revised, which measures personality factors and past behaviours to assess psychopathy and recidivism risk (*Ewert v Canada*, 2015 FC 1093 (CanLII) (*Ewert* FC 2015) at paras 13-19);
- the Violence Risk Appraisal Guide and Sex Offender Risk Appraisal Guide, which assess percentage of risk "that an offender will commit a new violent offence or sex offence within a specific period of community access" (*Ewert* FC 2015 at paras 20-21);
- the Static 99, which assesses long-term risk of "sexual and violent recidivism among adult males who have been convicted of at least one sexual offence" (*Ewert* FC 2015 at para 22);
- the Violence Risk Scale, Sexual Offender version, which measures probability of sexual recidivism following sex offender treatment (*Ewert* FC 2015 at para 23).

Mr. Ewert argued that all of these tests lacked predictive value for Indigenous offenders due to cultural bias.

2000-2005: The CSC Grievance Process

Mr. Ewert's efforts to challenge the tests' validity began in April of 2000, when he filed a series of grievances (*Ewert* SCC at para 85) using the statutory grievance mechanism available to him under the *Corrections and Conditional Release Act*, SC 1992, c 20 (*CCRA*) (ss 90-91.2) and the *Corrections and Conditional Release Regulations*, SOR/92-620 (ss 74-82). (The relevance of his use of the statutory grievance system will become apparent when discussing the SCC judgment.) His first grievance alleged that the tests were "'normed' for the general prison population only" and should not be applied to specific ethnic groups, such as Indigenous persons (*Ewert v Canada (Attorney General)*, 2007 FC 13 (CanLII) at para 7; (*Ewert* FC 2007)). That grievance was dismissed in June 2000 "pending further investigation" (*Ewert* FC 2007 at para 8).

Mr. Ewert immediately filed another grievance repeating the same allegations, also in June 2000. CSC similarly dismissed that grievance in August 2000, noting in its written response to Mr. Ewert that at least one of the tests had involved Indigenous test subjects when it was developed. Although another of the tests had not involved Indigenous test subjects, CSC explained that it had consulted a psychologist (a Dr. Rice, who would later testify for CSC) who could "see no particular reason why [the test] would be invalid for Native men"; it also pointed out that Mr. Ewert's score on this test had been comparatively low, and thus there were "no logical grounds for removal of such information" from his file (*Ewert* FC 2007 at para 9).

Mr. Ewert took this grievance to the second level of the CSC process, this time citing academic sources to support his position; that grievance was again denied in December 2000. This time, CSC noted that the impugned tests were only a few of the tools in the recidivism assessment process, "a process that includes provision for Native Elder assessment when necessary" (*Ewert* FC 2007 at para 10). At this point, none of its responses involved any assurances that it was in the process of researching or assessing the tests or that it took concerns like Mr. Ewert's seriously, though that was about to change.

Two years later in November 2002, Mr. Ewert took his grievance to the third level of the process, arguing that the tests "were designed by and for western people", and their use produced a discriminatory and racist effect against Indigenous persons, contributing to Indigenous overrepresentation in the penal system (*Ewert* FC 2007 at para 11). CSC initially, in February 2003, indicated that the complaint required investigation and advised Mr. Ewert that it had sought advice from the Alberta Board of Psychologists regarding "the validity of applying the assessment tools to Aboriginal inmates" (*Ewert* FC 2007 at para 12). (In the later Federal Court decision, the court noted that such advice had never actually been obtained—see *Ewert* FC 2007 at para 61.) However, it subsequently dismissed the grievance in June 2003 and advised that it had "undertaken a review of assessment tools for Aboriginal offenders and modifications would occur if necessary" (*Ewert* FC 2007 at para 12). This was the first time CSC referenced an internal review of the tests for cultural bias.

Mr. Ewert submitted another grievance in September 2004, this time adding allegations about *Charter* violations (*Ewert* FC 2007 at para 13). In June 2005, CSC responded, dismissing the grievance and informing Mr. Ewert that the "initiative being undertaken by the Research Branch to review the appropriateness of CSC intake assessment tools for Aboriginal offenders . . . is currently ongoing". When this evaluation was complete, CSC explained, it would determine whether any changes or modifications to the tests would be required (*Ewert* FC 2007 at para 17). Although it began by dismissing Mr. Ewert's concerns outright earlier in the grievance process and later in the process seems to have taken them more seriously, at this point five years had passed, and the relevant psychological research had not been performed.

2007: Judicial Review at the Federal Court

Mr. Ewert made a subsequent application for judicial review, which resulted in a 2007 Federal Court decision dismissing his claims. In that decision, Justice Michel Beaudry quoted from some of Mr. Ewert's sources, which indicated that there is academic and internal CSC support for his concerns. One, written by Dr. Menzies, a Humanities professor at Simon Fraser University with a PhD in Sociology, concluded that none of the tests had "received the rigorous cross-validation testing that would be necessary to assess their relevance to the subpopulation of Indigenous people serving time in Canadian federal penitentiaries". Dr. Menzies continued, "a significant likelihood exists that the deployment of these highly fallible and under-analyzed risk assessment instruments has had a direct and discriminatory impact on the rights and freedoms of Indigenous prisoners" (*Ewert* FC 2007 at para 36).

Even more germane to Mr. Ewert's argument was an internal CSC email which read:

> This is timely in that we have already flagged this issue as a concern. In fact, the Research Branch (NHQ) has already begun some work on this – if only in a preliminary capacity. I suspect that the inmate will win his case and that this will force our hand as a Service. And rightly so! It has always been our position that the inappropriate use of actuarial scales and measures adversely affects our Aboriginal population. In fact, we contend that the use of these measures artificially inflates need and risk ratings. (*Ewert* FC 2007 at para 37)

CSC responded by noting again, as it had in response to one of Mr. Ewert's first grievances in December 2000, that the impugned tests were only part of its recidivism assessment process. It also led as evidence an expert psychologist's opinion and an affidavit from the Director General of Research at CSC, both of which explained that the tests had been validated and were relatively accurate (*Ewert* FC 2007 at paras 51-53). The court preferred CSC's expert evidence, described the email as merely "an internal e-mail from an employee sharing his view with another colleague", and ruled in CSC's favour, dismissing the application for judicial review (*Ewert* FC 2007 at para 67). It disposed of Mr. Ewert's constitutional arguments in two paragraphs, rejecting his argument of racial discrimination and instead characterizing the issue as differential treatment "not on the basis of race but largely on the basis of the inmate's past course of conduct" (*Ewert* FC 2007 at para 68). However, the court "strongly suggest[ed] that CSC should explain to the Applicant the initiative undertaken by the Research Branch and the results

obtained, if any" (*Ewert* FC 2007 at para 67). There is no evidence to suggest that the Research Branch of CSC ever completed this initiative.

2008: Unsuccessful Appeal to the Federal Court of Appeal

Mr. Ewert unsuccessfully appealed Justice Beaudry's decision to the Federal Court of Appeal (*Ewert v Canada (Attorney General)*, 2008 FCA 285 (CanLII) (*Ewert* FCA 2008)). Justice Robert Décary disposed of the appeal in a brief 12 paragraphs but included a few key remarks in support of Mr. Ewert's efforts. He accepted Justice Beaudry's assessment that CSC "was not yet in a position to fully answer the complaints of the appellant" due to insufficient research but included a note that "counsel for the respondent informed the Court that some explanation would be given to the appellant during the fall" (*Ewert* FCA 2008 at paras 8, 10). As Justice Phelan recognized much later in the 2015 FC decision, there is no evidence that CSC ever provided such an explanation (*Ewert* FC 2015 at para 72). Justice Décary agreed with Justice Beaudry that Mr. Ewert's constitutional argument failed because his comparator group was "not that of Aboriginal inmates *per se* but that of Aboriginal inmates having the same past course of conduct as that of non-Aboriginal inmates" but made it clear that "these reasons are not to be understood as being a rejection of the *Charter* arguments raised by the appellant. Some of the arguments raise legitimate concerns" (*Ewert* FCA 2008 at paras 9, 12). Justice Wagner later pointed out in his 2018 SCC judgment that CSC's assurances that the research was in the process of being performed were an important factor in both the 2007 FC and 2008 FCA decisions. However, by the time the SCC issued its 2018 decision, the research CSC had promised in 2007 and 2008 still did not exist.

2015-2018: Mr. Ewert Goes to the Supreme Court

Having attempted to use the statutory grievance process to challenge the tests' validity, brought an unsuccessful application for judicial review and appealed it with a similar lack of success, and attempted to reframe his concerns as constitutional issues, Mr. Ewert's next series of challenges to the tests were more effective.

2015: Federal Court, Round Two

This brings us to the 2015 Federal Court decision that ultimately led to the recent SCC ruling. In *Ewert* FC 2015, Mr. Ewert refined his strategy, abandoning the grievance process he had attempted to use beginning in 2000 and instead making an application for relief in respect of *Charter* ss 7 and 15 violations and breach of fiduciary duty. Justice Michael L Phelan of the Federal Court ruled in Mr. Ewert's favour, finding that CSC had violated Mr. Ewert's s 7 *Charter* rights as well as its statutory duty under s 24(1) of the *CCRA*.

Justice Phelan included a brief biography of Mr. Ewert in his decision, noting that he was adopted by a white family at 6 months old, he experienced racism and discrimination from his adopted siblings, his adoptive father was an alcoholic, and his adoptive mother was "psychologically ill" (*Ewert* FC 2015 at para 6). While he recognized that Mr. Ewert experienced disadvantage as a result of his ethnicity, "Ewert's cultural connection with his Aboriginal roots was also influenced by his largely Caucasian suburban Surrey upbringing – significantly

different from an Aboriginal person brought up largely in an Aboriginal milieu" (*Ewert* FC 2015 at para 29). Justice Phelan also noted, "Ewert's life sentence offences were brutal crimes. In the first offence, he strangled and sexually assaulted the victim, leaving her dead in the river. The second offence similarly involved strangulation and sexual assault, and the victim was left brain damaged and crippled" (*Ewert* FC 2015 at para 5). Indeed, Justice Phelan referred to Mr. Ewert as "no poster person for Aboriginal people" (*Ewert* FC 2015 at para 4) and "a bit of a jail-house lawyer", though he did also acknowledge that Mr. Ewert "had few, if any, serious valid institutional charges" (*Ewert* FC 2015 at para 11). He refused to accept Mr. Ewert's "self-serving statements or attempts to blame others for his predicaments" (*Ewert* FC 2015 at para 8).

Nevertheless, Justice Phelan held that CSC led "no substantive witness evidence to rebut Ewert's narrative" about the questionable validity of the tests and, further, "there is evidence supporting his contention that the actuarial tests' results did have an adverse effect on his incarceration conditions" (*Ewert* FC 2015 at paras 8 and 9). Both sides led expert evidence. Justice Phelan strongly preferred Mr. Ewert's expert witness, Dr. Hart, over CSC's expert and main witness, Dr. Rice. Justice Phelan held that Dr. Rice's evidence was "so infirmed, so inconsistent with the role of CSC and so infused with a singular narrow view that it was not helpful to the Court or even to the Defendant" (*Ewert* FC 2015 at para 24). During Mr. Ewert's attempts to grieve the use of the tests in the early 2000s, the same Dr. Rice had expressed her opinion that there was "no particular reason why [one of the tests] would be invalid for Native men" (*Ewert* FC 2007 at paras 53, 9). The court considered her reliability to be further undermined by her failure to disclose that she had participated in creating two of the impugned tests and her dismissive attitude toward rehabilitative programs for inmates (*Ewert* FC 2015 at paras 45, 47). She cited studies to support her position, which Dr. Hart did not, but the court found that these were of limited use due to a lack of Aboriginal data points or results that in fact showed that the tests were flawed (*Ewert* FC 2015 at paras 49-50). As a result, Justice Phelan did not rely strongly on her evidence that the test scores were reliable and determinative.

Dr. Hart, in contrast, testified that he himself would not apply scores from the impugned tests to Indigenous inmates, given the "pronounced differences" between them and other prisoners (*Ewert* FC 2015 at para 31). However, he suggested that if the test scores were to be applied, "the better approach was to have a structured clinical assessment of an Aboriginal offender which would include some consideration of the information derived from the actuarial tests in the totality of the circumstances of what is known about the offender" (*Ewert* FC 2015 at para 32). The court found that Dr. Hart's approach was more helpful than Dr. Rice's.

Ultimately, Justice Phelan concluded from Dr. Hart's testimony and the testimony of another CSC witness, Dr. Motiuk, that no analysis had been done of the tests to prove their accuracy, and that the most appropriate way to obtain such analysis was to have CSC perform it (*Ewert* FC 2015 at paras 35-36). Importantly, Justice Phelan pointed out that CSC typically refrains from using a particular actuarial test (known as the General Statistical Information on Recidivism Scale) on Aboriginal offenders because of concerns about cultural bias (*Ewert* FC 2015 at para 73). Therefore, it was at least aware of the possibility that cultural bias could affect test results. Justice Phelan also noted that according to Dr. Motiuk, countries such as the UK, the USA, and Australia have all conducted assessments to ensure lack of bias in their actuarial tests (*Ewert* FC 2015 at para 74). Justice Phelan referenced Justice Beaudry's earlier urging in 2007 that CSC

disclose the results of its research to Mr. Ewert, noting that there was no evidence CSC had completed the research referred to (*Ewert* FC 2015 at para 72), despite the passage of 15 years since Mr. Ewert's first grievance.

Having preferred Dr. Hart's evidence, Justice Phelan reviewed Mr. Ewert's various test scores and the impact those scores had on his term in prison. He compared the scores to "branding", calling them "hard to overcome" based on evidence that the Parole Board relied on the scores to conclude that Mr. Ewert presented an undue risk to society and to deny him parole (*Ewert* FC 2015 at paras 58, 60). In addition, Mr. Ewert's security classification (medium/maximum throughout his incarceration) was partially based on the test scores, as well as, on at least three occasions, decisions to deny him escorted temporary absences from prison (*Ewert* FC 2015 at paras 62, 64, 65). He concluded that Mr. Ewert had established both the unreliability of the tests with respect to Aboriginal offenders and CSC's partial reliance on the test scores in making decisions that had "an adverse impact on his incarceration" (*Ewert* FC 2015 at para 75).

Although Mr. Ewert's claims were based on breach of the *Charter* and fiduciary duty to Aboriginal prisoners, Justice Phelan instead saw the situation primarily as a breach of statutory duty. Mr. Ewert attempted to argue that CSC's statutory breach of the *CCRA* functioned as a breach of fundamental justice and therefore a violation of his *Charter* rights, but Justice Phelan found that argument unnecessary to resolve because the remedy for *Charter* breach and statutory breach was the same (*Ewert* FC 2015 at para 108). He dismissed the fiduciary duty claim in a paragraph, focusing instead on CSC's breach of s 24(1) of the *CCRA* while also briefly discussing s 7 of the *Charter* (the *Charter* arguments were not ultimately successful and as such are not the focus of this post). He quoted ss 3 and 4 of the *CCRA*, noting that the foundational goals of the correctional system include policies, programs and practices that respect ethnic, cultural and linguistic differences and are responsive to the special needs of Aboriginal peoples. Based on these principles, Justice Phelan quickly concluded that CSC had breached s 24(1) of the *CCRA*, which obligates it to "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". Because of the supporting evidence and the longstanding lack of research from CSC on the tests, Justice Phelan held that Mr. Ewert had raised a reasonable challenge to the tests' accuracy based on s 24(1), and that was enough to justify a remedy.

Therefore, Justice Phelan issued an injunction against CSC's further use of the tests on Mr. Ewert until research had been performed to prove their reliability. He also intended to hold a hearing on remedies and issue a further injunction against the tests' use on *any* Aboriginal inmate (*Ewert* FC 2015 at para 114, *Ewert* SCC at para 21). While a more robust remedy than the SCC later ordered, this injunction did not represent an absolute ban on the tests' use, only a temporary restriction to underscore the importance of performing research CSC had already alleged to be ongoing and ensure that it produced the evidence necessary to validate the tests. However, Canada appealed.

Overturned at the Federal Court of Appeal

As I discussed two years ago in a post on *Canada v Ewert*, 2016 FCA 203 (CanLII) (*Ewert* FCA 2016), Justice Eleanor R Dawson of the FCA did not share Justice Phelan's approach to the

evidentiary standard applicable to Mr. Ewert. She overturned Justice Phelan's ruling, finding that he erred in law, because Mr. Ewert failed to establish his claims (both statutory and *Charter*) on a balance of probabilities—the civil standard of proof (*Ewert* FCA 2016 at paras 15, 19 and 22). Justice Phelan had only required that Mr. Ewert raise a reasonable challenge, not the more stringent balance of probabilities standard.

Before the FCA, Canada argued that Justice Phelan had interpreted s 24(1) of the *CCRA* (the requirement to use accurate information about an offender) too broadly by finding that it included a duty "to conduct scientific research or to investigate" (*Ewert* FCA 2016 at para 13). Justice Dawson did not find it necessary to address that argument because she dismissed the matter on different grounds. However, she stipulated that her judgment should not be seen as endorsing "the Federal Court's interpretation" of s 24(1).

Justice Dawson partially based her assessment of Mr. Ewert's claim on portions of evidence from Mr. Ewert's expert witness, Dr. Hart. While she generally disagreed with Justice Phelan's judgment, she shared his opinion that CSC's expert witness, Dr. Rice, was largely unhelpful (*Ewert* FCA 2016 at para 22). She noted that while Dr. Hart thought the tests were likely biased, he acknowledged the possibility of that bias being "subtle" or "relatively small and . . . tolerable" (*Ewert* FCA 2016 at para 25). Absent a more definitive statement on the tests' reliability or lack thereof, Justice Dawson found that Mr. Ewert had not presented enough evidence "demonstrating that cultural bias affected or is more likely than not to affect test usage or the reliability and validity of the resulting test scores in a material way" (*Ewert* FCA 2016 at para 27). Indeed, she characterized Justice Phelan's reliance on "the absence of evidence" as an error in law (*Ewert* FCA 2016 at para 31). (For an interesting argument regarding a proposed "sufficient causal connection" standard of proof applicable to prisoners making s 7 *Charter* claims who struggle to gather enough evidence, see the *Ewert* SCC intervenor factum of the West Coast Prison Justice Society and Prisoners' Legal Services.)

According to Justice Phelan, assessing the tests for cultural bias was "an activity more appropriately commissioned by CSC" (*Ewert* FC 2015 at para 35). Justice Dawson's judgment therefore left Mr. Ewert in the unenviable position of requiring evidence about the tests' validity that only CSC, his adversary, was in a position to provide.

Victory (?) at the SCC

The Majority

Happily, for Mr. Ewert, the SCC granted leave to appeal in March 2017. The decision, issued June 13, 2018 and written by now-Chief Justice Richard Wagner, was one of the last that former Chief Justice Beverley McLachlin signed onto before her retirement. The majority (Justices Côté and Rowe dissenting) found that s 24(1) of the *CCRA* required CSC to "base its decisions about inmates in its custody on sound information" (*Ewert* SCC at para 3), which included ensuring that it uses actuarial tests proven to be reliable for Aboriginal offenders. It dismissed Mr. Ewert's *Charter* arguments, finding, like Justice Dawson of the FCA, that Mr. Ewert had not met the required evidentiary onus. While the SCC agreed with Justice Phelan that CSC had breached its statutory obligations, it issued only a declaration that CSC had breached its statutory duty, rather

than echoing the more specific injunction against the tests' use that Justice Phelan issued in 2015.

Most of the SCC judgment dealt with the appropriate interpretation of s 24(1) of the *CCRA*. Mr. Ewert attempted to rely on the statutory breach as evidence for his *Charter* arguments, but the court preferred to focus on CSC's breach of its obligations under 24(1) as a cause of action by itself. It first considered the scope of the responsibilities encompassed by s 24(1), considering "whether results generated by the impugned tools are a type of information to which s. 24(1) applies" (*Ewert* SCC at para 30). Canada, as it had before the FCA, submitted that CSC's duty under s 24(1) was a narrow duty that extended only to gathering and recording correct information (*Ewert* SCC at para 31). The majority disagreed. Justice Wagner held that information CSC derived from the impugned psychological tools was a type of information to which s 24(1) applied. As part of its analysis, the majority considered the statutory provisions surrounding s 24(1), noting that ss 24 through 27 all dealt with various types of information that were enumerated or qualified where necessary (*Ewert* SCC at para 35). Because s 24(1) contained no qualification and referred to *any* information, the majority chose to interpret it broadly as including information gleaned from psychological assessment tools. Therefore, because CSC had not taken reasonable steps to ensure that the assessment tools were accurate with respect to Aboriginal offenders, it had not taken reasonable steps to ensure it used accurate information and was in breach of s 24(1).

The majority also considered the purpose of the correctional system, and whether that purpose was consistent with a broad interpretation of s 24(1). It noted that *CCRA* ss 3 and 4 require CSC to use necessary and proportionate measures to provide safe and humane custody and to assist inmates with rehabilitation and reintegration into the community. These measures include special sensitivity to equity-seeking groups (*Ewert* SCC at para 39). The SCC also noted that accurate tests were necessary for the protection of society, because if the results were inaccurate, a particular offender's risk could be underestimated instead of overestimated, "thereby undermining the protection of society" (*Ewert* SCC at para 40). Having interpreted s 24(1) broadly, the majority found that such an interpretation was consistent with the statutory context of the provision. It also ruled that if Parliament had intended to limit the scope of s 24(1), it could have done so quite easily (*Ewert* SCC at para 42).

Having found that the obligation to use accurate information about offenders included using accurate recidivism tests, the SCC next considered whether CSC had breached that obligation by failing to take all reasonable steps. Here, the majority explicitly agreed with Justice Phelan's assessment, in the 2015 Federal Court ruling, of the evidentiary standard that Mr. Ewert was required to meet. Mr. Ewert only needed to prove "that there was some reason for the CSC to doubt the accuracy of information in its possession"; he did not, as Justice Dawson had held, need to establish the tests' flaws on a balance of probabilities (*Ewert* SCC at para 47). Because s 24(1) required CSC to take "all reasonable steps" to ensure the tests' accuracy, Mr. Ewert merely needed to show that there were reasonable steps that had not been taken; and this, the majority held, was "amply supported by the record" (*Ewert* SCC at para 48).

Indeed, the majority referred specifically to evidence both that CSC had long been aware of the tests' potential bias and that it refrained from using other tests (not the ones at issue here) for

precisely that reason. As Justice Wagner wrote, "research by the CSC into the impugned tools, though challenging, would have been feasible" (*Ewert* SCC at para 50). Therefore, not only did s 24(1) obligate CSC to ensure the tests' accuracy, but CSC had been aware of the tests' potential cultural bias for several years. As Mr. Ewert's long litigation history has established, CSC took no steps to verify the tests' accuracy despite these legitimate concerns.

Furthermore, its obligation under s 4(g) of the *CCRA* to respect ethnic and cultural differences and to be responsive to the special needs of Aboriginal peoples intensified its responsibility to Indigenous inmates like Mr. Ewert. As this provision of the *CCRA* had never been considered at the SCC before, Justice Wagner took the opportunity to clarify its meaning, using the concept of substantive equality from *Andrews v Law Society of British Columbia*, 1989 CanLII 2 (SCC), [1989] 1 SCR 143: "this provision requires the CSC to ensure that its practices, however neutral they may appear to be, do not discriminate against Indigenous persons" (*Ewert* SCC at para 54). Justice Wagner described s 4(g) as an intended remedy to the "mischief" of Indigenous overrepresentation in the criminal justice system (*Ewert* SCC at para 57). He discussed this overrepresentation and CSC's responsibility for solving it at length, concluding,

> Although many factors contributing to the broader issue of Indigenous over-incarceration and alienation from the criminal justice system are beyond the CSC's control, there are many matters *within* its control that could mitigate these pressing societal problems . . . Taking reasonable steps to ensure that the CSC uses assessment tools that are free of cultural bias would be one. (*Ewert* SCC at para 61)

Accordingly, Justice Wagner issued a declaration, the text of which reads: "the Correctional Service of Canada breached its obligation set out in s. 24(1) of the *Corrections and Conditional Release Act*" (*Ewert* SCC at para 90). He discussed the narrow nature of declarations as a type of remedy, acknowledging that "declaratory relief should normally be declined where there exists an adequate alternative statutory mechanism to resolve the dispute or to protect the rights in question" (*Ewert* SCC at para 83). As noted earlier in this post, there did exist a statutory mechanism in this situation (namely, the grievance process under the *CCRA* which Mr. Ewert attempted to engage from 2000-2006), which "arguably provides an alternative means" for Mr. Ewert to challenge the tests (*Ewert* SCC at para 83). However, Justice Wagner felt that a declaration was nonetheless justified because of the protracted nature of Mr. Ewert's efforts (spanning nearly 20 years) and the demonstrated ineffectiveness of the statutory grievance mechanism. "In these exceptional circumstances," he wrote, "Mr. Ewert should not be required to begin the grievance process anew in order to determine whether the CSC's continued failure to address the validity of the impugned assessment tools is a breach of its duty" (Ewert SCC at para 87).

While Justice Wagner's decision represents a success long in coming for Mr. Ewert, it leaves the exact nature of CSC's responsibilities, moving forward, to be determined. He emphasized, "this Court is not restoring the Federal Court's order" and the declaration "does not invalidate any particular decision made by the CSC" (*Ewert* SCC at paras 89, 88). He explained further,

> Although this Court is not now in a position to define with precision what the CSC must do to meet the standard set out in s. 24(1) in these circumstances, what is required, at a

> minimum, is that if the CSC wishes to continue to use the impugned tools, it must conduct research into whether and to what extent they are subject to cross-cultural variance when applied to Indigenous offenders. Any further action the standard requires will depend on the outcome of that research. Depending on the extent of any cross-cultural variance that is discovered, the CSC may have to cease using the impugned tools in respect of Indigenous inmates, as it has in fact done with other actuarial tools in the past. Alternatively, the CSC may need to qualify or modify the use of the tools in some way to ensure that Indigenous inmates are not prejudiced by their use.

Given the lack of explicit instructions or deadlines for CSC in the SCC decision, Mr. Ewert can finally claim victory after 18 years, but it remains to be seen what action the correctional system will ultimately take to assess its actuarial recidivism tests for bias.

The Dissent

Justices Côté and Rowe disagreed with both the majority's assessment of the scope of s 24(1) and its chosen remedy. They were not persuaded that Parliament intended s 24(1) to refer to actuarial tests but would have held instead that it imposed a duty to accurately record information about inmates. As support for this interpretation, they noted that the tests' validity is open to challenge via the statutory grievance mechanism and, if necessary, judicial review of a particular decision. They also raised the issue of uncertainty with respect to the level of accuracy now required for actuarial testing, using the broader interpretation of s 24(1). Simple record-keeping of information like dates and events is either correct or incorrect, but actuarial tests provide less black and white results. "The assessment of human personality, by whatever means, they suggested, "remains imprecise" (*Ewert* SCC at para 116).

Justices Côté and Rowe identified similar concerns with the vagueness of Justice Wagner's remedy, including the unknown level of specificity now required for accurate actuarial testing, and whether CSC is now obligated to distinguish between Métis and other Indigenous offenders, on- and off-reserve offenders, male and female offenders, or those with various other cultural differences (*Ewert* SCC at para 124). The dissent acknowledged that CSC's delay in assessing the tests was unreasonable but suggested that s 24(1) did not provide the appropriate means for challenging the unreasonableness of its actions (*Ewert* SCC at para 125). It concluded with a determination that Justice Wagner's declaratory remedy represented an unwise departure from settled legal principles and could open the door to undue interference with matters delegated to administrative bodies (*Ewert* SCC at para 127).

Conclusion: Significance and Application

It is too early to determine what effect the majority SCC decision will have on CSC's internal practices with respect to recidivism assessments, and whether Mr. Ewert's litigation efforts will prompt a greater degree of sensitivity to the concerns of Indigenous offenders. Justice Wagner certainly took pains to emphasize the importance of taking steps to remedy Indigenous overrepresentation in the criminal justice system, mentioning s 718.2(e) of the *Criminal Code*, RSC 1985, c C-46, and the use of *Gladue* factors as one example of steps being taken to address this broader problem (*Ewert* SCC at para 58, citing *R v Gladue*, [1999] 1 SCR 688, 1999 CanLII

679 (SCC)). While Mr. Ewert certainly has cause to celebrate his victory, it remains to be seen whether CSC will follow through and produce the research it has been promising for almost two decades. Hopefully, the SCC's support for Mr. Ewert will provide the needed impetus for CSC's Research Branch to turn its mind to cultural bias in recidivism testing.

Addendum: *R v Wolfleg*

For those wondering about the precedential value of a decision like *Ewert v Canada* for other Indigenous inmates, one judgment to note is the Alberta Court of Appeal's decision in *R v Wolfleg*, 2018 ABCA 222 (CanLII), released June 14, the day after *Ewert* SCC. Mr. Wolfleg, who was appealing a 2009 decision designating him a dangerous offender and imposing an indeterminate sentence, attempted to rely on Mr. Ewert's arguments to support his contentions that CSC should not have diagnosed him as a "prototypical psychopath" who was "at, or near, the highest range for violent and sexually violent recidivism" (at para 143). Mr. Wolfleg had a lengthy criminal record of repeated and violent assaults on domestic partners, some with weapons, including one instance where he stabbed a pregnant woman with a screwdriver 16 times (at para 16). Mr. Wolfleg argued that if the SCC ruled in Mr. Ewert's favour, such a ruling would be evidence that by using the tests, CSC had also breached Mr. Wolfleg's rights. Justice Frederica Schutz dismissed this argument, holding that the two psychologists who assessed Mr. Wolfleg had based their opinions not only on the tests, but on observed clinical variables such as "a previous history of violence, violence at a young age and early maladjustment, prior failures at supervision, psychopathy, anti-social disorder, relationship instability, substance abuse, employment problems, lack of insight, impulsivity, negative attitude and unresponsiveness to treatment" (at para 152). Justice Schutz found that Mr. Wolfleg's dangerous offender designation and indeterminate sentence were both reasonable.

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