SCC File No. 37233

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

B E T W E E N:

JEFFREY G. EWERT

APPELLANT

-and-

HER MAJESTY THE QUEEN
(THE COMMISSIONER OF THE CORRECTIONAL SERVICE OF CANADA, THE WARDEN OF KENT INSTITUTION and THE WARDEN OF MISSION INSTITUTION)

RESPONDENT

-and-

ABORIGINAL LEGAL SERVICES, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, CANADIAN HUMAN RIGHTS COMMISSION, CRIMINAL LAWYERS' ASSOCIATION (ONTARIO), MENTAL HEALTH LEGAL COMMITTEE, NATIVE WOMEN'S ASSOCIATION OF CANADA, PRISONERS LEGAL SERVICES,

INTERVENERS

FACTUM OF THE INTERVENER ABORIGINAL LEGAL SERVICES

(Pursuant to Rule 42 of the Rules of the Supreme Court of Canada)

ABORIGINAL LEGAL SERVICES
211 Yonge Street, Suite 500
Toronto, Ontario M5B 1M4

Emily Hill, LSUC #46899Q
Jessica Wolfe, LSUC #54682J
Tel: (416) 408-4041 ext. 225
Fax: (416) 408-1568
Email: e_hill@lao.on.ca

Counsel for the Intervener

COMMUNITY LEGAL SERVICES OTTAWA CENTRE
1 rue Nicholas Street, Suite 422
Ottawa, Ontario K1N 7B7

Charles McDonald
Tel: (613) 241-7008
Fax: (613) 241-8680
Email: a_turcotte@lao.on.ca

Ottawa Agent for the Intervener

TO: **The Registrar**
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0J1

AND TO: **Jason B. Gratl**
Gratl & company
601-510 West Hastings Street
Vancouver, B.C. V6B 1M1
Tel: (604) 694-1919
Fax: (604) 608-1919
E-mail: jason@gratlandcompany.com
Counsel for the Appellant

AND TO: **Michael J. Sobkin**
331 Somerset Street West
Ottawa, ON K2P 0J8
Tel: (613) 282-1712
Fax: (613) 288-2896
E-mail: msobkin@sympatico.ca

Agent for Counsel for the Appellant

AND TO: **Anne Turley**
Attorney General of Canada
Department of Justice
50 O'Connor Street, Suite 500, Room 558
Ottawa, ON K1P 6L2
Tel: (613) 670-6291
Fax: (613) 954-1920
E-mail: anne.turley@justice.gc.ca

Counsel for the Respondent

AND TO: **Christopher M. Rupar**
Attorney General of Canada
50 O'Connor Street, Suite 500, Room 557
Ottawa, ON K1A 0H8
Tel: (613) 670-6290
Fax: (613) 954-1920
E-mail: christopher.rupar@justice.gc.ca

Agent for Counsel for the Respondent

AND TO: **Mary Eberts**
Virginia Lomax
95 Howland Avenue
Toronto, ON M5R 3B4
Tel: (416) 923-5215
Fax: (416) 595-7191
E-mail: eberts@ebertslaw.ca

Counsel for the Intervener
Native Women's Association of Canada, Canadian Association of Elizabeth Fry Societies

AND TO: **Pamela J. MacEachern**
Nelligan O'Brien Payne LLP
1500 - 50 O'Connor St.
Ottawa, ON K1P 6L2
Tel: (613) 231-8276
Fax: (613) 788-3681
E-mail: pam.maceachern@nelligan.ca

Agent for Counsel for the Intervener
Native Women's Association of Canada, Canadian Association of Elizabeth Fry Societies

AND TO: **Mercedes Perez**
Karen A. Steward
Perez Bryan Procope LLP
43 Front Street East, Suite 400
Toronto, ON M5E 1B3
Tel: (416) 320-1914 Ext: 101
Fax: (416) 320-1914
E-mail: mperez@pbplawyers.com

Counsel for the Intervener
Mental Health Legal Committee

AND TO: **Matthew Estabrooks**
Gowling WLG (Canada) LLP
2600 - 160 Elgin Street
P.O. Box 466, Stn. A
Ottawa, ON K1P 1C3
Tel: (613) 786-0211
Fax: (613) 788-3573
E-mail: matthew.estabrooks@gowlingwlg.com
Agent for Counsel for the Intervener
Mental Health Legal Committee

AND TO: **Avnish Nanda**
Nanda & Company
3400 Manulife Place
10180- 101 Street N.W.
Edmonton, AB T5J 4K1
Tel: (780) 801-5324
Fax: (587) 318-1391
E-mail: avnish@nandalaw.ca

Counsel for the Intervener
West Coast Prison Justice Society, Prisoners' Legal Services

AND TO: **Dylan C. McGuinty**
McGuinty Law Offices
1192 Rockingham Avenue
Ottawa, ON K1H 8A7
Tel: (613) 526-3858
Fax: (613) 526-3187
E-mail: dylanjr@mcguintylaw.ca

Agent for Counsel for the Intervener
West Coast Prison Justice Society, Prisoners' Legal Services

AND TO: **Fiona Keith**
Sasha Hart
344 Slater Street, 9th Floor
Ottawa, ON K1A 1E1
Tel: (613) 995-9151
Fax: (613) 993-3089
Email: fiona.keith@chrc-ccdp.gc.ca

Counsel for the Intervener
Canadian Human Rights Commission

AND TO: **Valerie Phillips**
344 Slater Street, 9th Floor
Ottawa, ON K1A 1E1
Tel: (613) 943-9357
Fax: (613) 993-3089
E-mail: valerie.phillips@chrc-ccdp.gc.ca

Agent for Counsel for the Intervener
Canadian Human Rights Commission

AND TO: **Jill R. Presser**
Presser Barristers
116 Simcoe Street, Suite100
Toronto, ON M5H 4E2
Tel: (416) 586-0330
Fax: (416) 596-2597
E-mail: presser@presserlaw.ca

Counsel for the Intervener
Criminal Lawyers' Association (Ontario)

AND TO: **Marie-France Major**
Supreme Advocacy LLP
100- 340 Gilmour Street
Ottawa, ON K2P 0R3
Tel: (613) 695-8855 Ext: 102
Fax: (613) 695-8580
E-mail: mfmajor@supremeadvocacy.ca

Agent for Counsel for the Intervener
Criminal Lawyers' Association (Ontario)

AND TO: **Paul Champ**
Bijon Roy
Champ and Associates
43 Florence Street
Ottawa, ON K2P 0W6
Tel: (613) 237-4740
Fax: (613) 232-2680
E-mail: pchamp@champlaw.ca

Counsel for the Intervener
British Columbia Civil Liberties Association, Union of British Columbia Indian Chiefs

TABLE OF CONTENTS

PART I – OVERVIEW AND STATEMENT OF FACTS

1. Sections 4(g) and 24(1) of the *Corrections and Conditional Release Act* ("*CCRA*")[1] and the application of the Gladue principles mandate a different process for addressing the needs of Aboriginal inmates. This includes ensuring that actuarial risk assessment tools are reliable and responsive to the needs of Aboriginal inmates. The Correctional Service of Canada ("CSC"), rather than the Appellant, bears the burden of demonstrating the reliability of its assessment tools.
2. Aboriginal Legal Services (ALS) adopts the position of the Appellant on the facts of the case.

PART II – OVERVIEW OF ALS' POSITION

3. ALS makes three arguments with respect to the case at bar:
   a) The *CCRA* is remedial legislation. It contains reference to the unique needs and circumstances of Aboriginal inmates in federal corrections and is intended to ameliorate over-representation of Aboriginal people in federal penitentiaries and address long-standing differential outcomes for Aboriginal offenders.
   b) This Court gave guidance in the cases of *R v Gladue*[2] and *R v Ipeelee*[3] on how remedial legislation directed at the needs of Aboriginal people should be applied. Direction was given to adopt a different methodology when dealing with questions that relate to the liberty interests of Aboriginal people. CSC has acknowledged that the Gladue principles apply to decisions made pursuant to the *CCRA* but has failed to implement them.
   c) In this case, the Federal Court correctly interpreted the remedial legislation as imposing a positive duty on CSC to demonstrate that its policies and practices, including the risk assessment tools it employs, do not perpetuate systemic discrimination faced by Aboriginal inmates. The Federal Court of Appeal in this case erred by applying a strict burden of proof and requiring the Appellant to demonstrate that the actions of CSC pursuant to the *CCRA* are discriminatory.

---

[1] *Corrections and Conditional Release Act*, SC 1992, c. 20.
[2] *R v Gladue*, [1999] 1 SCR 688 [*Gladue*].
[3] *R v. Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433[*Ipeelee*].

PART III – LEGAL ARGUMENT

a) The *CCRA* is Remedial Legislation

4. In order to correctly interpret the *CCRA*, it is important to consider its history and context. The *CCRA* has its origins in Department of Justice's 1982 publication *The Criminal Law in Canadian Society.*[4] Along with this publication, the Department of Justice launched the Criminal Law Review, one component of which was the Correctional Law Review ("CLR").[5]

5. Over the course of several years, the CLR published a series of working papers which addressed the need for new correctional legislation. In Working Paper No. 7, "Correctional Issues Affecting Native Peoples" [6], the CLR focused on the problems faced by Aboriginal people in the penitentiary system. These included difficulties for non-Aboriginal correctional workers in understanding the social, cultural and spiritual backgrounds of Aboriginal inmates, lack of participation of Aboriginal inmates in mainstream correctional programming and lack of representation in correctional staffing. It confirmed that Aboriginal inmates were more likely to participate in educational or counselling programs that had Aboriginal staff or content.[7]

6. The CLR also noted troubling differences between Aboriginal and non-Aboriginal inmates in relation to the parole system. Specifically, it reported that Aboriginal inmates tend to waive their rights to a parole hearing more often than non-Aboriginal inmates, are less familiar with parole regulations than their non-Aboriginal counterparts, and in some regions of the country, Aboriginal inmates received full parole at a significantly lower rate than non-Aboriginal offenders.[8] The CLR provided this insight:

> Some Native representatives claim that parole criteria or the assessments made about individuals in preparation for parole hearings are inappropriate to Natives. It is also claimed that there is little input from Native communities into the parole

---

[4] Canada, Department of Justice, *The Criminal Law in Canadian Society* (Ottawa: Government of Canada, 1982).
[5] Canada, Ministry of the Solicitor General, *Influences on Canadian correctional reform: working papers of the Correctional Law Review, 1986 to 1988* (Ottawa: Solicitor General Canada, 2002) [Working Papers].
[6] *Ibid.*
[7] *Ibid* at 355-357.
[8] Working Papers, *supra* note 5 at 356.

> preparation process and the development of an aftercare plan for Native offenders.[9]

7. The CLR proposed that legislation address the differential outcomes for Aboriginal inmates by recognizing them as a particularly disadvantaged offender group. They also proposed that codification and design of selected aspects of the correctional operations and programming be responsive to the unique needs of Aboriginal inmates.[10]

8. In 1992, Parliament enacted the *CCRA* which for the first time[11] codified the purpose of corrections.[12] It also specifically set out provisions related to Aboriginal inmates including section 4(g) which states:

> 4. The principles that guide the Service in achieving the purpose referred to in section 3 are as follows:
>
> (g) correctional policies, programs and practices respect gender, ethnic, cultural and linguistic differences and are responsive to the special needs of women, aboriginal peoples, persons requiring mental health care and other groups.

9. The goal of ensuring that correctional legislation is responsive to Aboriginal over-representation is even more pressing today. In 1988, a study prepared for the Canadian Bar Association, titled "Locking Up Natives in Canada" reported that almost 10% of the federal penitentiary population was Aboriginal despite being only 2% of the national population. In the decade between "Locking up Natives" and the decision in *Gladue*, the overrepresentation had worsened. This Court noted that "by 1997, aboriginal peoples constituted closer to 3 percent of the population of Canada and amounted to 12 percent of all federal inmates".[13] Eighteen years later, the percentage has almost doubled: Aboriginal adults accounted for 22% of federal admissions to sentenced custody in 2014/2015.[14]

---

[9] Michael Jackson, "Locking up Natives in Canada" (1988-1989) 23:2 UBC L Rev 215 at 283-4.
[10] Working Papers, *Supra* note 5 at 371-381.
[11] *Corrections and Conditional Release Act*, SC 1992, s. 3.
[12] Canada, Correctional Service Canada, *Corrections and Conditional Release Act 1992* (Canada: Correctional Service Canada, 1992).
[13] *Gladue*, *supra* note 2 at 58.
[14] Julie Reitano, "Adult Correctional Services in Canada, 2014/2015" in Statistics Canada, Juristat (Ottawa: Ministry of Industry, 2016) at 3, online <http://www.statcan.gc.ca/pub/85-002-x/2016001/article/14318-eng.htm>.

b) Interpreting Remedial Legislation: Three Lessons from *Gladue*

10. Section 718.2(e) of the *Criminal Code of Canada*[15] and s. 4(g) the *CCRA* are both remedial and are both aimed at addressing Aboriginal overrepresentation in the criminal justice and corrections systems. The principles set out in *R v Gladue*[16] and affirmed in *R v Ipeelee*[17] have been held to apply in every situation where an Aboriginal person's liberty interests are engaged.[18] For this reason, *Gladue* and *Ipeelee* are directly applicable to the way CSC addresses the unique needs of Aboriginal inmates and provide three important lessons to be applied in this case.

11. First, these cases held that by making particular reference to Aboriginal people, Parliament was directing courts to recognize that systemic discrimination exists in the criminal justice system and that this has been a significant contributor to Aboriginal alienation from, and over-representation in, that system. Significantly, for the case at bar, in *Gladue* this Court held this discrimination extends into the correctional system, noting that:

> [A]boriginal offenders are, as a result of these unique systemic and background factors, more adversely affected by incarceration and less likely to be "rehabilitated" thereby, because the internment milieu is often culturally inappropriate and regrettably discrimination towards them is so often rampant in penal institutions.[19]

12. Second, *Ipeelee* highlighted that Aboriginal people's experience in the criminal justice system is tied to colonialism. This Court held:

> The overwhelming message emanating from the various reports and commissions on Aboriginal peoples' involvement in the criminal justice system is that current levels of criminality are intimately tied to the legacy of colonialism. As Professor Carter puts it, "poverty and other incidents of social marginalization may not be unique, but how people get there is. No one's history in this country compares to Aboriginal people's [citations removed].[20]

---

[15] *Criminal Code of Canada*, RSC 1985, c. C-46.
[16] *Gladue*, *supra* note 2.
[17] *Ipeelee*, *supra* note 3.
[18] *United States of America v Leonard*, 2012 ONCA 622, [2012] OJ No. 4366 at 53,55; Affirmed by the SCC in *R v Anderson*, 2014 SCC 41, [2014] 2 SCR 167 at paras 26-27; *R v Sim* [2005] O.J. No. 4432, 2005 CanLII 37586 at paras 16, 19.
[19] *Gladue*, *supra* note 2 at 725.
[20] *Ipeelee*, *supra* note 3 at 77.

13. Third, *Gladue* and *Ipeelee* assist in the interpretation of the CSC's obligations under the *CCRA* because they explain how the problems of over-representation and differential outcomes for Aboriginal inmates must be addressed. In *Ipeelee*, this Court confirmed that a different methodology is required for Aboriginal people.[21]

14. This methodology is important, because as this Court has emphasised, addressing systemic discrimination requires processes that lead to substantive, rather than formal, equality.[22] In *United States v Leonard,* the Ontario Court of Appeal held:

> Gladue stands for the proposition that insisting that Aboriginal defendants be treated as if they were exactly the same as non-Aboriginal defendants will only perpetuate the historical patterns of discrimination and neglect that have produced the crisis of criminality and over-representation of Aboriginals in our prisons…. That approach was soundly rejected by the Supreme Court in both Gladue and Ipeelee, which emphasize that consideration of the systemic wrongs inflicted on Aboriginals does not amount to discrimination in their favour or guarantee them an automatic reduction in sentence. Instead, Gladue factors must be considered in order to avoid the discrimination to which Aboriginal offenders are too often subjected and that so often flows from the failure of the justice system to address their special circumstances.[23]

15. The CSC has a duty to address the systemic discrimination that Aboriginal inmates face as a consequence of colonialism. This requirement for substantive equality requires the CSC to take a different approach for Aboriginal inmates.

c) CSC's Positive Duty

16. By recognizing Aboriginal inmates as a particularly disadvantaged offender group deserving of special consideration in decision-making, Parliament imposed on CSC a positive duty to address the unique needs of Aboriginal offenders.[24] Section 4(g) gave CSC the legislative authority to meet this duty by using a different methodology in the way CSC provides programs to Aboriginal inmates and facilitates their reintegration into the community. This includes the way CSC collects, analyses and uses information about Aboriginal inmates. Section 24 of the *CCRA* states:

---

[21] *Ipeelee*, *supra* note 3 at para 72.
[22] *Quebec (Attorney General) v A*, 2013 SCC 5, [2013] 1 SCR 61 at para 137.
[23] *United States v Leonard*, 2012 ONCA 622, [2012] OJ No 4366 at para 60.
[24] *Gladue*, *supra* note 2 at para 50.

> 24 (1) The Service shall take all reasonable steps to ensure that any information about an offender that it uses is as accurate, up to date and complete as possible.

i) Assessment Tools and Aboriginal Inmates

17. Specific to the issues of this appeal, 24(1) of the *CCRA* requires that the information about Aboriginal offenders be as accurate as possible. The trial judge found that "actuarial tests are not good predictors of recidivism in Aboriginals".[25] He held that "[i]n relying on questionable tests and in failing to ensure that the tests are reliable, CSC has not taken 'all reasonable steps' to ensure that that information about Ewert (or potentially other Aboriginal prisoners) is accurate, up-to-date and as complete as possible."[26] This analysis is consistent with what this Court stated in *Gladue*[27]and *Ipeelee*[28] about addressing systemic discrimination in the criminal justice and correctional systems.

18. This Court has held that the circumstances of colonialism may result in differential and adverse outcomes for Aboriginal people and provides the necessary context for evaluating case-specific information. In particular, this Court stated that judges must:

> [T]ake judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. 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.[29]

It is submitted that, similarly, CSC must evaluate and understand Aboriginal inmates' backgrounds of trauma and criminality within this context, given the implications for Aboriginal inmates in assessments of their security levels.

19. Currently inmate security levels are informed by various assessment tools which rely heavily on static factors. Static factors, such as criminal history and substance abuse,

---

[25] *Ewert v Canada*, 2015 FC 1093, [2015] FCJ No 1123 at para 53 [*Ewert*].
[26] *Ibid* at para 81.
[27] *Gladue*, *supra* note 2 at paras 67-69, 80-81.
[28] *Ipeelee*, *supra* note 3 at pgs 60, 73, 77.
[29] *Gladue*, *supra* note 2 at para 60.

are not contextualized in a way that is consistent with the remedial purpose of the *CCRA* or the Gladue principles. Professor David Milward explains how this contributes to systemic discrimination:

> Some research has indeed concluded that criminal history is a reliable risk predictor for both Aboriginal and non-Aboriginal inmates (citation removed). These studies, however, ignore that colonial oppression and the enduring social conditions that it has left behind continue to play a critical role in Aboriginal over-incarceration. To the extent that oppressive social conditions do much to bring Aboriginal peoples into contact with the justice system, the emphasis on static factors tied with criminal history may represent a form of systemic discrimination."[30]

20. The current assessment tools also fail to give sufficient weight to dynamic factors, like engagement in cultural programming, which have demonstrated success in Aboriginal inmates' rehabilitation.[31] The consequence of relying on static rather than dynamic factors is that Aboriginal inmates are routinely classified as higher needs/higher risk.[32] The higher the security classification, the less eligible an inmate is for correctional programming and parole.[33] Far from ameliorating systemic disadvantage, the underlying purpose for mandating consideration of the Gladue factors, CSC's undue reliance on static factors in correctional risk assessment compounds and perpetuates that disadvantage.

21. An example of a Gladue-informed methodology is discussed in the Office of Correctional Investigator's 2015-16 Annual Report:

> As part of the Aboriginal Strategy at Bowden Institution, a number of files of Indigenous offenders were reviewed to include a thorough examination of the original Gladue report used for sentencing decisions, with a view to reconsidering security classifications (maximum to medium or medium to minimum) of Indigenous offenders where appropriate. The institution was able to identify eight offenders who could be reclassified on the basis of factors identified in the Gladue reports… Bowden Institution also provided a comprehensive analysis and evidence as to how the Gladue report impacted a decision, something my Office

---

[30] David Milward. "Sweating it Out: Facilitating Corrections and Parole in Canada Through Aboriginal Spiritual Healing" (2011) 29 Windsor Y B Access Just at 47 [Milward].
[31] *Ibid* at 36-37, 46-48.
[32] *Ibid* at 43.
[33] *Ibid* at 41.

has identified as missing in most purportedly Gladue-informed correctional decisions to date.[34]

It is clear from the above that there are risk assessment options which ensure that Aboriginal inmates receive the benefit of s. 4(g), but that CSC is failing to use such options in a comprehensive way. Instead, CSC continues to rely on assessment tools whose predictive reliability have long been questioned by practitioners and academics.[35]

ii) CSC is Not Meeting its Obligations

22. A number of measures indicate that CSC is failing to meet its obligations to act as a safeguard against systemic discrimination with regard to Aboriginal inmates. Statistics show the problems the *CCRA* was meant to address are getting worse, not better. The Office of the Correctional Investigator has concluded: "the gap between Aboriginal and non-Aboriginal offenders continues to widen on nearly every indicator of correctional performance".[36] Aboriginal offenders serve a higher proportion of their sentences before being released on parole[37] and are "less likely to be classified a minimum security risk than non-aboriginal offenders".[38]
23. The Auditor General found that overall, CSC "did not adequately consider Aboriginal social history factors in their case management decisions"[39] and that not only were Aboriginal inmates not given timely access to the programs and practices that CSC is required under the *CCRA* to provide, CSC did not document how participation in

[34] Howard Sapers, *Annual Report of the Office of the Correctional Investigator 2015-2016* (Ottawa: Office of the Correctional Investigator, 2016) at 45.
[35] Milward, *supra* note 30 at 650-656.
[36] Canada, Office of the Correctional Investigator, *Spirit Matters: Aboriginal People and the Corrections and Conditional Release Act: Section 4 Indigenous Corrections* (Ottawa: Office of the Correctional Investigator, 2012) at para xiii [Spirit Matters].
[37] Canada, Public Safety Canada Portfolio Corrections Statistics Committee, *2014 Corrections and Conditional Release Statistical Overview* (Canada: Public Safety Canada Portfolio Corrections Statistics Committee, 2015).
[38] *Ibid* at pg 55.
[39] Canada, Office of the Auditor General of Canada, *2016 Fall Reports of the Auditor General of Canada Report 3 – Preparing Indigenous Offenders for Release – Correctional Service Canada* (Canada, Office of the Auditor General of Canada 2017) at 3.72 [Report 3].

these programs contributed to Aboriginal inmates' potential for successful reintegration.[40]

24. CSC has also been criticized for inadequate training on how to implement Gladue principles into their decision-making.[41] In its interviews for the report *Spirit Matters*, the Office of the Correctional Investigator advised that background factors could be used to place inmates at a higher level of security classification, thereby limiting access to programming.[42] Timely participation in programming is critical to parole eligibility.[43]
25. The result is that a disproportionate number of Aboriginal inmates are being released from medium and maximum security facilities at statutory release, and directly into the community without the benefit of a gradual release supporting their successful reintegration.[44] This is not consistent with CSC's over-arching mandate to ensure public safety.

iii) The Burden of Proof for a Breach of a Statutory Duty Under Remedial Legislation

26. The trial judge concluded that by failing to ensure that the assessment tools are reliable, the CSC chose to not take the necessary steps to ensure that information about Aboriginal inmates is accurate, up-to-date and as complete as possible.[45] The consequence is that CSC is not meeting its statutory obligation to respect and respond to the unique needs of Aboriginal inmates.
27. That obligation requires CSC to use a different approach to the way information about Aboriginal inmates is acquired, understood and used. The failure of CSC to ensure that their assessment tools consider the impact of colonialism on Aboriginal inmates when assessing them for risk contributes to Aboriginal inmates' differential outcomes within the correctional system.

---

[40] *Ibid* at 3.38.
[41] Spirit Matters, *supra* note 36 at para 84, 96.
[42] *Ibid*.
[43] Report 3, *supra* note 39 at 3.52-3.54.
[44] *Ibid* at 3.11; Milward, *supra* note 30 at pgs 41-42.
[45] *Ewert*, *supra* note 25 at 80-82.

28. By requiring Mr. Ewert to prove the assessment tools actually generated false results rather than requiring the CSC to demonstrate the validity of their assessment tools, the Federal Court of Appeal misinterpreted Parliament's intention that CSC ensure its policies and practices do not contribute to ongoing systemic racial discrimination. In doing so, the Federal Court of Appeal made it practically impossible to ever challenge this kind of inequitable treatment.
29. Given the remedial nature of the *CCRA*, it is incumbent on CSC, which has the resources and mandate, to demonstrate that their methodologies do not further the mischief that this Court identified in *Gladue*. By virtue of s. 4(g) and the application of the Gladue principles, CSC is required to conduct research into the validity of standardized tools which they use on Aboriginal inmates prior to relying on them to deprive Aboriginal persons of their liberty.

PART IV – POSITION ON COSTS

30. ALS seeks no costs and respectfully requests that no costs be ordered against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 12th day of September, 2017.

Emily Hill
Counsel for the Intervener
Aboriginal Legal Services

Jessica Wolfe
Counsel for the Intervener
Aboriginal Legal Services

PART VI – TABLE OF AUTHORITIES

TAB	AUTHORITIES
Legislation	
1.	*Corrections and Conditional Release Act*, SC 1992, c.20 3, 4(d), 24 *Loi sur le système correctionnel et la mise en liberté sous condition*, *LC 1992, ch. 20* 3, 4(d), 24
2.	*Criminal Code of Canada*, RSC 1985, c. C-46 718 *Code criminal*, LRC 1985, ch. C-46 718
Cases	
3.	*Canada v Ewert*, 2016 FCA 203, [2016] FCJ No 853
4.	*Ewert v Canada*, 2015 FC 1093, [2015] FCJ No 1123
5.	*Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 SCR 61
6.	*R. v Anderson*, 2014 SCC 41, [2014] 2 SCR 167
7.	*R v Gladue*, [1999] 1 SCR 688, 1999 CanLII 679

8.	*R v Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433
9.	*R v Sim*, [2005] O.J. No. 4432, 2005 CanLII 37586 (ONCA)
10.	*United States of America v Leonard*, 2012 ONCA 622, [2012] OJ No 4366
Secondary Sources	
11.	Canada, Department of Justice, *The Criminal Law in Canadian Society* (Ottawa: Government of Canada, 1982)
12.	Canada, Correctional Service Canada, *Corrections and Conditional Release Act 1992* (Canada: Correctional Service Canada, 1992)
13.	Canada, Office of the Auditor General of Canada, *2016 Fall Reports of the Auditor General of Canada Report 3 – Preparing Indigenous Offenders for Release – Correctional Service Canada* (Canada: Office of the Auditor General of Canada, 2017)
14.	Canada, Office of the Correctional Investigator, *Spirit Matters: Aboriginal People and the Corrections and Conditional Release Act* (Ottawa: Office of the Correctional Investigator, 2012)
15.	Canada, Public Safety Canada Portfolio Corrections Statistics Committee, *2014 Corrections and Conditional Release Statistical Overview* (Canada: Public Safety Canada Portfolio Corrections Statistics Committee, 2015)
16.	Canada, Ministry of the Solicitor General, *Influences on Canadian correctional reform: working papers of the Correctional Law Review, 1986 to 1988: Working Paper No 7 Correctional Issues Affecting Native Peoples* (Ottawa: Solicitor General Canada, 2002)
17.	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 L Rev 619
18.	David Milward, "Sweating it Out: Facilitating Corrections and Parole in Canada Through Aboriginal Spiritual Healing" (2011) 29 Windsor Y B Access Just

19.	Howard Sapers, *Annual Report of the Office of the Correctional Investigator 2015-2016* (Ottawa: Office of the Correctional Investigator, 2016)
20.	Jena McGill, "An Institutional Suicide Machine: Discrimination against Federally Sentenced Aboriginal Women in Canada" (2008) 2:1 Race & Ethnicity 89
21.	Julie Reitano, "Adult Correctional Services in Canada, 2014/2015" in Statistics Canada, Juristat (Ottawa: Ministry of Industry, 2016) at 3
22.	Kelley Blanchette and Kelly Taylor, "Development and Validation of a Security Reclassification Scale for Women" (2004) 16:1 Forum on Corrections Research 28
23.	Michael Jackson, "Locking up Natives in Canada" (1988-19999) 23:2 UBC L Rev 215