

Ewert v Canada: Supreme Court of Canada decides that systemic racism doesn't make you a riskier offender

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FROM THE VERY FIRST ENCOUNTER WITH POLICE, contact with the criminal justice system for Indigenous people is loaded with disproportionate penalties. Racial profiling by police means greater scrutiny. Greater scrutiny can mean criminalization. Criminalization, coupled with systemic discrimination can mean harsher sentences. Harsher sentences mean harsher prison conditions and in federal penitentiaries flawed risk assessments can lead to even further “high-risk” designations. High-risk designations mean longer confinement, fewer liberties like outdoor time and visits with loved ones, limited opportunities for healing, and less chance of being granted parole. The long-term consequence of each stage of the system disproportionately compounds against Indigenous people, whose liberty diminish with each subsequently restrictive confinement to which they are assigned.

These confinements are not simply the literal cages they are locked in, but also the labels that classify Indigenous individuals as risky offenders.

A recent Supreme Court of Canada decision of *R v Ewert* finally recognized the critical role played by Correctional Service Canada – in particular, through their risk assessment and classification processes – that may be unjustly keeping Indigenous peoples behind bars for longer, under far worse conditions than their non-Indigenous incarcerated counterparts.

The *Ewert* case is about the psychological tools used in federal prisons to assess risk and whether those tools are accurate in assessing risk of Indigenous inmates. The case was brought by Mr. Jeffrey Ewert who is 56-year old Métis man who was convicted of murder and attempted murder for strangling and sexually assaulting two women in 1984. He is serving two life sentences at the same time. He has spent over 30 years in federal custody in medium and maximum security.

Correctional Services Canada (“Corrections”) is responsible for all inmates in federal custody - anyone sentenced for a criminal offence for more than two years – which includes Mr. Ewert.

Mr. Ewert has been allowed to apply for day parole since 1996 and full parole since 1999. Mr. Ewert has chosen not to apply for parole.

Inmates apply for parole which, if granted, means they are released from custody by Corrections with a number of conditions. Corrections provides reports about whether someone is suitable for parole by relying on a number of factors, some of which are determined using psychological tests or assessments. Corrections uses those same tests to

decide whether someone serves their time in a minimum, medium or maximum-security prison, and where they go determines whether they are able to access Indigenous-focused programming in custody. The tests are said to assess and predict risk – risk of future criminal behaviour by the inmate, risk of safety to the inmate and risk to other inmates and the public.

Mr. Ewert initially complained about the improper use of these risk assessment tools back in April 2000, 18 years before his case made it to the Supreme Court. At that time Mr. Ewert filed formal complaints about five of the assessment tools used to assess if someone has a psychopathic personality disorder and whether someone is likely to commit violent and sexual offences in the future.

In response to his complaint, Corrections admitted there were concerns regarding the use of the tools to assess the risk of Indigenous offenders. Corrections said they would ask for an opinion from an independent outside body, but never did. Corrections closed the complaint in 2005 and told Mr. Ewert that it would review its intake assessment tools. In 2007, a judge and an appeal court both relied on this “review” to dismiss his case.

In the hearing of the case that finally ended at the Supreme Court, eight years after his original complaint, the Court found that in fact Corrections had never completed the research it said it would do in 2005.

Almost two decades have passed since Mr. Ewert launched his complaint and finally in 2018 the Supreme Court of Canada has declared Corrections was wrong. The Supreme Court agrees with Mr. Ewert, noting that assessment tools were developed and tested on “predominantly non-Indigenous populations and there was no research confirming that they were valid when applied to Indigenous persons” (para 12) and therefore Corrections’ continued reliance on these tools represents “a failure by [Corrections] to ensure the accuracy of information about offenders that it uses” (para 12), in particular when making decisions about the liberty of Indigenous offenders.

As a result, the Supreme Court of Canada found that Corrections failed to follow the law by using those assessments to make decisions about Indigenous inmates without ensuring that those assessments were accurate when applied to Indigenous inmates. Corrections failed to meet its legal responsibility to use accurate information about inmates because *for nearly two decades* Corrections was aware that there were questions about whether the assessments properly address the circumstances of Indigenous inmates and continued to use the tests to make significant decisions about Indigenous inmates anyway.

The Supreme Court found that Corrections’ actions posed “clear danger” to Indigenous offenders who are “already disadvantaged” (para 65) because the use of the assessments may overestimate the risk they pose, continue to cause discrimination, and contribute to unfair prison sentences for Indigenous offenders.

As for Mr. Ewert, the Supreme Court agreed that Corrections relied on information derived from these improper assessment “tools in making decisions that affected key aspects of Mr. Ewert’s incarceration” (para 16), including recommending Mr. Ewert not be released from custody, in determining his level of security classification (which affects where he is placed in custody and what programming he can access) and in deciding not to grant him escorted temporary absences.

The Supreme Court held that any decision Corrections made about Mr. Ewert using these tools is not automatically invalid, but Mr. Ewert can challenge the decisions in court as being discriminatory and rely the Supreme Court’s forceful opinion. As for Corrections’ responsibilities now, the Supreme Court decision requires that, at the very least, if Corrections wants to continue using these assessments it must ensure that research is conducted to determine whether the tools result in improper cross-cultural differences when applied to Indigenous offenders. Depending on the results of that research, Corrections may have to stop using these assessments on Indigenous offenders altogether or Corrections may need to justify or modify the assessments in a way to ensure Indigenous inmates are not prejudiced by their use.

For now we wait for the results of the court-ordered research. If the research shows the assessments weren't accurate for Indigenous inmates, this raises questions about the validity of every decision Corrections made about Indigenous inmates which relied on the tools.

In my view, this research result requires Corrections to reassess those inmates still in custody who were subject to such a decision. Otherwise, how can Corrections justify maintaining the status quo?

On the other hand, even if the research shows that the tests don't result in cross-cultural bias, the Supreme Court's strong words about Corrections' obligations to Indigenous offenders is helpful to inmates who challenge decisions made about them by Corrections. The Supreme Court said that Corrections must do better to meet Indigenous inmates' unique needs. Corrections' response to new research will be an opportunity for Corrections to show whether they intend to take this direction seriously.