Court 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
(RESPONDENT)

- and -

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

RESPONDENT

- and -

CRIMINAL LAWYERS' ASSOCIATION (ONTARIO),
THE MENTAL HEALTH LEGAL COMMITTEE, THE WEST COAST PRISON JUSTICE SOCIETY and PRISONERS' LEGAL SERVICES (jointly), THE ABORIGINAL LEGAL SERVICES, THE CANADIAN HUMAN RIGHTS COMMISSION, THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION and THE UNION OF BRITISH COLUMBIA INDIAN CHIEFS (jointly), THE NATIVE WOMEN'S ASSOCIATION OF CANADA and ELIZABETH FRY SOCIETIES (jointly)

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FACTUM OF THE INTERVENER
THE CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)

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

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TABLE OF CONTENTS

Tab **Page**

PART I – OVERVIEW AND STATEMENT OF FACTS 1

A. Overview 1

B. Statement of Facts 2

PART II – QUESTIONS IN ISSUE 2

PART III – STATEMENT OF ARGUMENT 3

A. *Overview* 3

B. *The Impugned Tools Impact the Detention of Individuals in a Variety of Contexts Beyond the Specific Circumstances of this Case* 4

(i) The Impugned Tools Are Relied on in DO and Long-Term Offender ("LTO") Hearings 4

(ii) The Impugned Tools are Relied on in the Context of the Forensic Mental Health System 6

C. *Fairness and Accepted Common Law Evidentiary Principles Require the State to Bear the Onus of Establishing the Reliability of the Impugned Tools* 8

PART IV – SUBMISSIONS AS TO COSTS 10

PART V – ORDER SOUGHT 10

PART VI – TABLE OF AUTHORITIES 11

PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The public's perception of Canada's correctional services and, more broadly, the criminal justice system depends on the fair use of incarceration. Time in custody must be proportionate to the circumstances and only necessary to ensure public protection.[1] A system that perpetuates onerous, long-term – and even indeterminate – detention on the basis of inaccurate or untested science cannot be tolerated. It lacks legitimacy. Of course, no system is without flaws and this means that some sentences will be somewhat longer or somewhat shorter than ideal: the criminal law is often a blunt instrument. However, all participants in the justice system must remain vigilant to ensure people are only detained where necessary. In this regard, the words of Iacobucci J. in *R v Hall* are apt:

> Liberty lost is never regained and can never be fully compensated for; therefore, where the potential exists for the loss of freedom for even a day, we, as a free and democratic society, must place the highest emphasis on ensuring that our system of justice minimizes the chances of an unwarranted denial of liberty.[2]

2. This case raises the issue of the constitutionality of the Correctional Service of Canada's ("CSC") reliance on assessment/actuarial tools[3] for assessing the security risk posed by Aboriginal offenders. Extensive evidence was placed before the trial court that collectively established that these impugned tools were of unknown reliability in predicting recidivism for Aboriginals. The trial judge found that the use of these instruments to perpetuate the detention of Aboriginal offenders in potentially unnecessarily onerous security settings amounted to a breach of s. 7 of the *Canadian Charter of Rights and Freedoms* ("*Charter*"). Their use in this manner was both overbroad and arbitrary. These findings at trial were subsequently overturned on

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[1] *R v Lacasse*, 2015 SCC 64 at ¶3

[2] *R v Hall*, 2002 SCC 64 at ¶47

[3] The scientific assessment tools that were challenged by the appellant at the Federal Court of Canada are the Hare Psychopathy Checklist Revised ("PCL-R"), the Violence Risk Appraisal Guide ("VRAG"), the Sex Offender Risk Appraisal Guide ("SORAG"), the Static-99 and the Violence Risk Scale ("VRS-SO"). These assessment tools will be referred to collectively as the "impugned tools".

appeal. In allowing the appeal, the Federal Court of Appeal reasoned that, at first instance, the respondent had not met his onus of establishing on a balance of probabilities that the impugned tools were unreliable.[4]

3. The Criminal Lawyers' Association ("CLA") position is that the Federal Court of Appeal's decision is erroneous. Reliance on purported scientific instruments that are either unreliable, or of unknown reliability, to restrict individual liberty amounts to a s. 7 violation. Further, where the State relies on scientific data to support more onerous detention or the loss of liberty, the interests of justice and the ordinary rules of evidence require that the government establish its reliability. The impugned tools are not merely limited to security classifications, as was the issue in the case at bar. Their use is common and multifaceted within the criminal justice and forensic mental health systems. To the extent that there are concerns that these tools are an inaccurate predictor of the future behaviour of Aboriginals – risking unsupported, harsher or prolonged detention of individuals belonging to this historically disadvantaged group – the breadth of their use throughout the criminal and quasi-criminal justice system exacerbates their negative impact on both individual liberty and the repute of the administration of justice as a whole.

B. Statement of Facts

4. The CLA takes no position with respect to the facts as advanced by the parties and defers to the parties on the factual record.

PART II – QUESTIONS IN ISSUE

5. The appellant raises two issues on appeal. Both relate to the constitutionality of the CSC's reliance on test scores generated by the impugned tools to support the continued detention of Aboriginal offenders, in circumstances where the reliability of the tools in predicting recidivism of Aboriginal offenders may be unknown. Specifically, the appellant raises the following issues:

[4] *Canada v Ewert*, 2016 FCA 203 at ¶¶27 & 31

Issue 1: Does the CSC's reliance on the test scores produced by the impugned tools in respect to Aboriginal offenders infringe s. 7 of the *Canadian Charter of Rights and Freedoms*?

Issue 2: Does the CSC's reliance on the test scores produced by the impugned tools in respect to Aboriginal offenders infringe s. 15 of the *Canadian Charter of Rights and Freedoms*?

6. The CLA advocates that scientific tools of unknown or of questionable reliability, as they relate to a particular segment of the population, should not be used in whole or in part to support any loss of liberty. The CLA agrees with the appellant and the Federal Court of Canada that the CSC's use of the impugned tools violates s. 7 of the *Charter*.[5] Any burden of establishing reliability must be borne by the State. The CLA's submissions focus on the breadth and depth of the impact of the impugned tools on the detention of Aboriginal offenders in the criminal justice and forensic mental health systems.

PART III – STATEMENT OF ARGUMENT

A. Overview

7. Whether the impugned tools used by the State are reliable has a broad impact on the liberty of Canadians. This impact goes beyond the limited scope of security classifications immediately at issue in this appeal. Risk assessment tools are used in a variety of other contexts, in both criminal and quasi-criminal proceedings. As a result, this Court's decision will have significant precedential impact in numerous areas of the criminal justice and forensic mental health regimes. More specifically, this Court's determination of the constitutionally-permissible uses of the impugned tools in the instant appeal will impact, *inter alia*, on dangerous offender proceedings ("DO"), sentencing for sex offenders and those convicted of child exploitation offences, the assessment of whether not criminally responsible ("NCR") accused continue to represent a significant threat to public safety (such that they must remain under Review Board jurisdiction), and the determination of appropriate dispositions for those NCR accused who remain under Review Board jurisdiction. Given the far-ranging impact of the impugned tools on

[5] Given that neither the Federal Court of Canada or the Federal Court of Appeal addressed the issue of a breach of s. 15 of the *Charter*, the CLA takes no position on this issue.

individual liberty interests, the CLA's position is that the State must have the obligation of establishing their reliability.

B. The Impugned Tools Impact the Detention of Individuals in a Variety of Contexts Beyond the Specific Circumstances of this Case

(i) The Impugned Tools Are Relied on in DO and Long-Term Offender ("LTO") Hearings

8. With respect to DO and LTO applications, reliance on the impugned tools raises concerns at the sentencing stage as to the appropriateness of dispositions imposed on Aboriginal offenders.[6] Part XXIV of the *Code* creates a regime to designate offenders as either DO or LTO. If so designated, offenders face penal consequences ranging from long-term supervision orders to indeterminate custodial sentences.[7] Importantly, offenders who are caught under this regime are subjected to expert assessments as to their risk of long term dangerousness. These expert assessments almost always involve the use of the impugned tools to help courts determine whether an offender ought to be designated as a DO or LTO.[8]

9. Given the widespread use of the impugned tools in DO and LTO contexts (as well as the potential extraordinary impact of such designations on an offender's liberty interests), the CLA's position is that the prosecuting Crown must establish their reliability. This is especially the case for Aboriginal offenders. Whereas Parliament's intent is generally to avoid the use of

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[6] Since the Federal Court's decision in this case, Aboriginal offenders in the context of DO proceedings have also raised concerns regarding the applicability of the impugned assessment tools (see for example: *R v Awasis*, [2016] BCJ NO 1574 (Prov Ct), at ¶¶88 - 99; *R v Haley*, [2016] BCJ No 1347 (BCSC), at ¶¶ 32 – 59, 254 – 275; *R v Gardner*, [2016] OJ No 448 (OCJ), at ¶¶80 - 83). More generally, in the context of DO and LTO applications, the following are examples of cases where the impugned tools are relied upon: *R v George*, 2016 ONCA 464 at ¶¶72 – 79; *R v Smith*, 2010 ONCA 612 at ¶¶38-53; *R v Little*, 2007 ONCA 548 at ¶¶15 – 27; *R v JKL*, 2012 ONCA 245 at ¶¶123-134; *R v Grayer*, 2007 ONCA 13 at ¶¶15-33, 37-39 & 56.

[7] The LTO and DO regime is set out at ss. 752-761 of the *Code*.

[8] See *e.g.* the cases outlined in footnote 6.

incarceration for Aboriginal offenders wherever possible,[9] there is a real and persisting danger that the impugned tools of questionable reliability achieve the opposite result by facilitating potential "false positive" DO and LTO designations for this group of offenders. In addition, with the use of the impugned tools both at the front end (whether the offender meets the statutory DO/LTO designation) and on the back end (in determining security classifications and parole eligibility), Aboriginal offenders may be "doubly" impacted by the results of these tools of unknown reliability.[10] The CLA's position is that this is an untenable practice. The danger of using unreliable tools in the above-noted manner cannot be reconciled with the efforts advocated by this Court and Parliament to reduce the problem of the overrepresentation of Aboriginals in custody.[11]

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[9] To the extent that the impugned tools are unreliable for Aboriginals, any court's reliance on them to determine the term of any custodial disposition appears to run contrary to Parliament's intention in enacting s. 718.2(e) of the *Criminal Code*. This provision is aimed at reducing over-incarceration of Aboriginal offenders and, more generally, requires that the Court consider "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders." Using tools of questionable reliability to justify imprisonment, or lengthier imprisonment, runs contrary to Parliament's intentions in passing s. 718.2(e).

[10] In the 2015 Annual Report produced by Public Safety Canada, it was determined that at the end of fiscal year 2014-15, there were a total of 3,553 offenders in custody with a life/ indeterminate sentence. Of these, 847 (23.8%) were Aboriginal and 2,706 (76.2%) were non-Aboriginal (Public Safety Canada, "2015 Annual Report: Corrections and Conditional Release Statistical Overview," (February 2016) at Figure C13.)

[11] *R v Gladue*, [1999] 1 SCR 688, at ¶¶58 – 65; *R. v. Ipeelee*, [2012] 1 SCR 13 at ¶¶56 – 63.

(ii) The Impugned Tools are Relied on in the Context of the Forensic Mental Health System

10. The same impugned tools play a significant role for accused found NCR and some accused found unfit to stand trial ("unfit").[12] Where accused are found to be NCR or unfit to stand trial, they are transferred to the jurisdiction of provincial Review Boards. Under Part XX.1 of the *Code*, Review Boards determine whether NCR and unfit accused remain under the Board's jurisdiction and the appropriate disposition for them (if they are to remain under the Board). Generally, this will result in accused being placed in a psychiatric facility rather than a jail.[13] Once an accused is under the auspices of Part XX.1, Review Boards are tasked with

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[12] Pursuant to ss. 16 and 672.34 of the *Criminal Code*, accused with mental disorders that render them incapable of understanding the nature and quality of their actions or incapable of knowing that their conduct was wrong are exempt from criminal liability. Similarly, accused who have been charged with an offence but, on account of a mental disorder, are unable to meaningfully participate in the criminal justice process or instruct counsel may be found unfit pursuant to ss. 2 and 672.22 of the *Code*. Unlike traditional criminal "defences" that result in an acquittal, where accused are found NCR or unfit, they are transferred from the jurisdiction of the criminal court and fall under the jurisdiction of provincial Review Boards.

[13] Although psychiatric hospitals are intended to have a rehabilitative and treatment-focused environment, they nonetheless represent a significant restriction on an individual's liberty. In fact, many secure forensic facilities are more akin to a jail than a treatment center or hospital. In *Penetanguishene Mental Health Centre v Ontario (Attorney General)*, [2004] 1 SCR 498, at ¶¶29 & 31, for example, this Court characterized the conditions at Oak Ridge Mental Health Centre – Penetanguishene, a maximum secure facility at the time (now closed and re-opened as the Waypoint Centre for Mental Health Care) as follows:

> …The rooms are cell-like, with barred or solid steel doors, barred windows and attached steel fixtures (sink, toilet, bed). The use of privacy curtains is limited. Access to privileges and facilities is strictly controlled. In some ward areas of Oak Ridge, detainees are not allowed to keep soap, a toothbrush or a comb in their rooms, or in some [page512] cases to use a pen. Visits to the canteen may be escorted…

determining the accused's risk level at the time of the hearing (if any) and imposing the least onerous and least restrictive disposition while ensuring public safety.[14]

11. The use of the impugned tools in the context of the Part XX.1 regime to assess the risk posed by Aboriginal accused may result in unwarranted and significant deprivations of liberty for this group of individuals. The assessment of recidivism/risk plays a significant role in both the initial hearing (i.e. the placement of the accused in a particular hospital and forensic unit) and the annual review hearings that determine whether an accused is to remain under the Board's jurisdiction (and, if so, whether detained or in the community, under what conditions and with what privileges). The impugned tools figure prominently in such risk assessments, and are relied on heavily by Review Boards.[15] As a result, Aboriginal accused may be subject to unnecessary liberty restrictions based on unreliable data, both in terms of potentially unwarranted detentions in more highly secure forensic hospital units and continued – and potentially unwarranted – detentions on the basis that they pose a "significant risk" to the safety of the public.

> …choice of the type of hospital and level of security and conditions of detention will have a vital impact on the liberty interest of the detainee. Confinement to a cell-like room at Oak Ridge is a long way from a life of liberal access to the community at the Royal Ottawa Health Care Group facility at Brockville.

[14] It should be noted that the assessment of risk/dangerousness does not relate to the determination of whether an accused is unfit or NCR, but rather the security level of their detention once either designation has been made. In the case of NCR accused and "permanently unfit accused," risks assessments will impact the quality and length of their detention. Importantly, the latter group of "permanently unfit" accused are likely the most vulnerable group in the forensic mental health system, as they will never be in a position to stand trial for the allegations against them. The Review Board does not have the jurisdiction to issue an absolute discharge for these individuals; only a court may issue a stay of proceedings (see *R v Demers*, 2004 SCC 489).

[15] See for example: *Krivicic (Re)*, 2017 ONCA 379 at ¶¶24-30; *Gonzalez (Re)*, 2017 ONCA 102 at ¶11; *Issariotis (Re)*, 2014 ONCA 182 at ¶¶6-7; and *Everingham (Re)*, 2014 ONCA 743 at ¶¶6-7.

12. Additionally, following the enactment of Bill C-14[16] in April of 2014, Parliament has created a new designation of NCR accused known as the "High-Risk Accused." Pursuant to s. 672.64 of the *Code*, a High-Risk accused is statutorily mandated to remain in custody until the designation is revoked. Amendments to s. 672.81(1.31) of the *Code* allow for an extension of the period between review hearings of up to three years. No doubt the very same impugned instruments are going to be used to determine who is designated a "High-Risk" accused. As a result, given the significant impact of the impugned tools on the liberty interests of Aboriginal individuals subject to Part XX.1 of the *Code*, the CLA's position is that the State needs to establish the reliability of these tools with respect to this group of individuals.

C. Fairness and Accepted Common Law Evidentiary Principles Require the State to Bear the Onus of Establishing the Reliability of the Impugned Tools

13. Ultimately, there are both fairness and well-established common law evidentiary principles that militate against requiring accused/offenders to disprove the reliability of the impugned tools.[17] At common law, it is the proponent of expert or scientific evidence who has the burden of demonstrating reliability on the basis of the test articulated in *R v Mohan*.[18] Concerns regarding reliability may result in expert evidence not being admitted. These common law rules prevent miscarriages of justice by keeping out inaccurate or questionable science (that may have the false appearance of reliability) from being considered by a trier of fact or arbiter.[19]

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[16] Bill C-14, An Act to amend the Criminal Code and the National Defence Act (mental disorder), 2nd Sess, 45th Parl, 2013-2014

[17] *Ewert v Canada*, [2016] FCJ No 853 (CA), at ¶¶16 – 22, 27, 30 - 32

[18] *R v Mohan*, [1994] 2 SCR 9. See also *White Burgess Langille Inman v Abbott and Haliburton Co.*, 2015 SCC 23 at paras. 16-25

[19] While Parliament has the ability to legislate the validity of a scientific procedure, it has not done so in the context of the impugned actuarial tools. See for example s. 254(3.1) of the *Criminal Code* in which Parliament recognized statutorily the expertise of drug recognition experts (see also *R. v. Bingley*, 2017 SCC 12). That said, reliance on statutorily approved science would still be subject to constitutional challenges if the validity of the science were to change. Likewise, in the case of approved screening devices and breathalyzers, Parliament has statutorily accepted the validity of these tools by virtue of s. 254 of the *Criminal Code*.

14. While the rules of evidence are more relaxed at sentencing hearings and administrative proceedings, there is no reason in principle not to adhere to the same evidential burdens. This is especially the case when it comes to vulnerable NCR accused. In *R v Winko*, this Court recognized the hardship of placing a burden to prove an absence of dangerousness on vulnerable mentally ill accused.[20] In fact, the constitutionality of the Part XX.1 regime was upheld by this Court precisely because, on a proper interpretation of the *Code*, NCR accused were not presumed to be dangerous or to have the "legal or evidentiary burden" of proving or disproving anything.[21] Accordingly, the CLA submits that it must ultimately be the "proponent" or "utilizer" of the evidence[22] that must establish the reliability of the scientific tools being relied on to facilitate, in some cases, very significant deprivations of liberty.

15. Similarly, placing the onus on the offender or accused to disprove the reliability of the impugned tools sets up a fundamentally inequitable situation where these tools become *de facto* accepted and relied on as authoritative. As recognized by this Court in cases like *R v Ipeelee*, many Aboriginals come from communities "traumatized through the residential school experience," resulting in high rates of poverty, alcohol abuse and violence.[23] It would be effectively impossible for many individuals from such communities to finances studies that definitively undermine the reliability of the impugned instruments. The CLA submits that it cannot be the case that the socioeconomic disadvantage of one of the parties to any given legal proceeding results in the *de facto* acceptance of potentially unreliable scientific evidence. As it is the State that produces and/or utilizes the impugned science to legitimize often significant

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[20] *Winko v British Columbia*, [1999] 2 SCR 625 at ¶¶52 -54

[21] *Ibid*.

[22] Under Part XX.1 of the *Code*, the Board would need to satisfy itself regarding the reliability of the impugned tools. This is because Part XX.1 of the *Criminal Code* does not contemplate an adversarial system. Review Boards across Canada are inquisitorial in nature. They must ensure that their decisions to detain individuals in the forensic mental health system are grounded in positive, reliable evidence. Similarly, in the circumstances of the present appeal, the CLA's position is that the interests of justice (as well as statute and the *Charter*) dictate that the CSC – as the "utilizer" of the impugned tools – must establish their reliability.

[23] *R v Ipeelee*, *supra* at ¶ 21.

deprivations of liberty, the interests of justice dictate that it must be the State that bears the burden, and the cost, of proving its reliability.

PART IV – SUBMISSIONS ON COSTS

16. The CLA makes no submissions as to costs.

PART V – ORDER SOUGHT

17. The CLA respectfully requests that this Court consider the CLA's submissions in deciding this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 14th DAY OF SEPTEMBER, 2017.



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