# The Constitutionality of Classification

## Aboriginal Overrepresentation and Security Policy in Canadian Federal Penitentiaries

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## INTRODUCTION

The overrepresentation of First Nations, Métis, and Inuit people in Canada's prisons is a social crisis. The figures are stark: between 2007 and 2016 the total prisoner population increased by 5 percent while the Aboriginal prisoner population increased by 39 percent.[1] At the end of 2016, Aboriginal men represented 25.2 percent of federal prisoners,[2] and Aboriginal women represented 36.1 percent,[3] although Aboriginal peoples make up less than 5 percent of the Canadian population.[4]

These figures are historically very consistent. Aboriginal overrepresentation has increased over the past three decades,[5] and persists despite statutory and judicial remedial measures.[6]

This paper addresses one such remedial measure. Introduced by Parliament in 1992, section 81 of the Corrections and Conditional Release Act aimed to decrease Aboriginal overrepresentation in federal penitentiaries by allowing Aboriginal prisoners to serve their sentences in Aboriginal communities or Healing Lodges. [7]

Unfortunately, section 81 has not been effective. Aboriginal overrepresentation is getting worse, not better, and section 81 agreements remain underutilized, though they continue to offer

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[1] Annual Report of the Correctional Investigator 2016 – 2017 (2017) at p. 48 fn 28, online: http://www.oci-bec.gc.ca/cnt/rpt/pdf/annrpt/annrpt20162017-eng.pdf [*OCI 2017*].
[2] Corrections and Conditional Release Act Statistical Overview (2016) at p 53, online: <https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/ccrso-2016/ccrso-2016-en.pdf> [*CCRASO 2016*].
[3] At this time, Aboriginal women are the fastest growing prison population. See Annual Report of the Correctional Investigator (2016) p 51, online: < http://www.oci-bec.gc.ca/cnt/rpt/pdf/annrpt/annrpt20142015-eng.pdf> [*OCI 2016*]
[4] *OCI 2017 supra* note 1 at 48.
[5] See Royal Commission on Aboriginal Peoples, "Bridging the Cultural Divide" (Ottawa: Canada Communication Group, 1995); Michael Jackson, "Locking Up Natives in Canada" (1989) 23:2 UBC L Rev 215-300; The Corrections and Conditional Release Act Statistical Overview (2010-2016).
[6] See *R v Gladue*, [1999] 1 SCR 688 [*Gladue*]; *R v Ipeelee* 2012 SCC 13; *Corrections and Conditional Release Act*, SC 1992, c 20, s 4(g), ss.80 – 84, s 151(1) (3) [*CCRA*]; *Criminal Code*, RSC 1985, C 46, s 718(2)(e).
[7] *CCRA supra* note 6 s 81.

an important opportunity to enhance Aboriginal community control of, and participation in, prisoner's sentences.[8] That carrying out sentences in community or in Healing Lodges has been shown to decrease recidivism and promotes successful community reintegration is an important additional benefit.[9]

There are several barriers to realizing the intent of section 81, including underfunding and community acceptance.[10] The most significant barrier, however, is Correctional Service Canada's requirement that section 81 transferees have minimum security classifications.[11] This barrier is significant because Aboriginal people are not only overrepresented in prisons, but also overrepresented at higher security levels within prisons. In 2016, just 16.1 percent of the Aboriginal prisoner population was classified at minimum security, compared to 23.7 percent for non-Aboriginal prisoners.[12] Correspondingly, compared to non-Aboriginal prisoners, a higher percentage of Aboriginal prisoners were classified at medium security, at 67.6 percent versus 61.9 percent, and at maximum security, at 16.3 percent versus 14.5 percent respectively.[13] Like Aboriginal overrepresentation generally, this disproportionate classification in 2016 is consistent throughout Canadian history.[14]

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[8] See Office of the Correctional Investigator, *Spirit Matters: Aboriginal People and the Corrections and Conditional Release Act* (March 2013), online: http://www.oci-bec.gc.ca/cnt/rpt/pdf/oth-aut/oth-aut20121022-eng.pdf at pp 17-22 [*Spirit Matters*].

[9] 73 percent of minimum security prisoners released from Healing Lodges on parole successfully completed their supervision, against 63 percent of minimum security prisoners released from federal penitentiaries (2016 Fall Reports of The Auditory General of Canada – *Preparing Indigenous Prisoners for Release* (2016), online: http://www.oag-bvg.gc.ca/internet/English/parl_oag_201611_03_e_41832.html#p63 at para 3.65).

[10] *Spirit Matters supra* note 8 at 17 - 22.

[11] Corrections Service Canada, *Commissioners Directive* 710-2-1 (2017), online: http://www.csc-scc.gc.ca/politiques-et-lois/710-2-1-gl-eng.shtml at para 8(a) [*CD 710-2-1*].

[12] *CCRASO 2016* supra note 6 at p 55.

[13] *Ibid.*

[14] See Corrections and Conditional Release Act Statistical Overview 2010 – 2016; Canada Human Rights Commission, *Protecting Their Rights: A systematic Review of Human Rights in Correctional Services for Women* (2003), online: http://www.chrc-ccdp.gc.ca/sites/default/files/fswen.pdf at p 28 [*CHRC*]; La Prairie, *Examining Aboriginal Corrections in Canada* (1995), online: <https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/xmnng-brgnl-crrctns/xmnng-brgnl-crrctns-eng.pdf> at 72.

These figures show that Aboriginal prisoners are overwhelming denied relief under section 81 because they do not have a minimum security classification. My thesis is that this limitation violates the *Canadian Charter of Rights and Freedoms.*[15]

I proceed as follows. In Part I, I argue that the Corrections Service Canada ("CSC") policy that establishes how prisoners are assigned security classifications violates sections 7 and 15 of the *Charter*.[16] This policy, *Commissioner's Directive 705-7* ("Security Classification policy") implements section 30(1) of the Corrections and Conditional Release Act ("*CCRA*").[17] Section 30(1) of the *CCRA* prescribes that "[t]he Service shall assign a security classification of maximum, medium or minimum to each inmate."[18] I argue that the Security Classification policy is law for the purposes of *Charter* review and that it violates s. 7 and s. 15 of the *Charter* because it mandates the use of an invalid actuarial tool – The Custody Rating scale – to assign security classifications. Using CSC's data, I show that the Custody Rating scale arbitrarily and systematically overclassifies Aboriginal prisoners into higher security classifications, diminishing their residual liberty and their likelihood of being granted parole, thereby prolonging their incarceration. I conclude that these effects are both overbroad under s. 7 and discriminatory under s. 15 and cannot be justified under s. 1 of the *Charter.*

Another policy, *Commissioner's Directive 720-2-1* ("Community Release policy") implements section 81 of *CCRA*, which, as stated, provides that Aboriginal prisoners can enter into agreements with the Minister of Public Safety and Emergency Preparedness for release into the

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[15] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11 [*Charter*].
[16] *Ibid.* ss 7, 15.
[17] Corrections Service Canada, *Commissioners' Directive* 705-7, *Security Classification and Penitentiary Placement* (2018), online: http://ww w.csc-scc.gc.ca/acts-and-regulations/705-7-cd-eng.shtml [*CDO 705-7*];
[18] *CCRA supra* note 6 s 30.

care and custody of Aboriginal communities to serve the duration of their sentences.[19] In Part II, I argue that the Community Release policy violates s. 7 of the *Charter*. In limiting eligibility for section 81 transfers to minimum security prisoners, the Community Release policy employs the unconstitutionally assigned security classifications issued by the *Charter* non-compliant Custody Rating Scale (discussed in Part I) to deny release to a Healing Lodge or Aboriginal community.[20] I show how such denials constitute liberty deprivations for medium and maximum security prisoners for the purposes of s. 7 and s. 10(c) of the *Charter* through an analysis of recent *habeas corpus* case law.[21] I conclude that those effects are arbitrary and overbroad under s. 7. Finally, I show that in the event a prisoner was denied a section 81 application based on their security status, they should be entitled to relief by way of *habeas corpus.*

## PART 1: THE SECURITY CLASSIFICATION POLICY

The Security Classification Policy requires the use of an objective, statistical instrument to make security classification recommendations.[22] That instrument, the Custody Rating Scale ("CRS"), assesses prisoners relative to two distinct subscales: the Institutional Adjustment Rating Scale ("IARS"), and the Security Risk Scale ("SRS").[23] While both subscales are meant to predict "risk," that construct is operationalized differently for each subscale. The IARS is meant to predict the likelihood that a prisoner will be involved in institutional incidents, and therefore also the

[19] Corrections Service Canada, *Commissioners' Directive 710-2-1, Section 81: Transfers* (2017), online: http://www.csc-scc.gc.ca/politiques-et-lois/710-2-1-gl-eng.shtml [*CDO 710-2-1*]; *CCRA*, *supra* note 6, s 81.
[20] *CDO 710-2-1*, *supra* note 3, at para 8(a).
[21] s 10(c) of the *Charter* guarantees that everyone has the right to have the legality of their detention determined by way of *habeas corpus*: that is, to petition a Court to require the custodian to prove the lawfulness of the detention.
[22] *CDO 707-5*, *supra* note 17, at paras 10 - 15.
[23] *Ibid* at Annex B, Part I – II. Although final security classification decisions are made in light of other assessments and information, such as psychological evaluation and professional judgement, the CRS recommendation is followed 77 percent of the time, and in 12 percent of the cases where it is not followed, the security rating is increased for Aboriginal men (Renee Gobeil, "The Custody Rating Scale as Applied to Male Offenders" (2011), online: https://www.publicsafety.gc.ca/lbrr/archives/cn21484-eng.pdf [*Gobeil*] p 16).

degree of control and supervision that prisoner will require within the penitentiary.[24] The IARS correlates risk with five subscale items: number of institutional incidents, escape history, street stability, alcohol and drug use, and age at the time of sentencing.[25] The SRS, on the other hand, assesses the risk a prisoner poses to public safety in the event of an escape, as a correlate of seven subscale items: number of prior convictions, most severe outstanding charge, severity of current charge, sentence length, street stability,[26] prior parole/statutory release, and age at the time of first federal admission.[27] Each scale item corresponds to a range of potential "points," ranging from 0-6 for alcohol and drug use to 12-69 for severity of current charge. Individual prisoner will be assigned points within the range according to their criminal history or drug use, etc. Point ranges are subdivided into predetermined possible scores. For example, there are three possible scores for "severity of current charge": 12, 36, and 69, corresponding to minor or moderate charges, serious or major charges, or extreme charges. The assigned points are then summed, and a security classification is assigned according to cut-off values corresponding to the different security classifications. [28] Essentially, the more points one receives, the more likely one is to be assigned a higher security classification.

Crucially, if there is a difference between the security classifications recommended by either of the subscales, the CRS will assign the higher classification.[29] I show that this critical fact renders the use of the CRS unconstitutional under s. 7. The reason is that the subscales are not equally predictive, and the least predictive subscale overwhelmingly recommends a higher security

[24] *See CDO 705-5* supra note 17.
[25] *Ibid* at Annex B, see fn. 26.
[26] "Street stability" refers to factors like education level, employment history, family/marriage, interpersonal relationships and living arrangements *ibid* at Part I.
[27] *Ibid* at Annex B.
[28] *Ibid*.
[29] *Ibid* at para 26.

classification. So, because the CRS assigns the higher recommended classification, and the least predictive subscale makes that recommendation, the classification prisoners are ultimately assigned in the majority of cases does not accurately reflect the risk they pose to security in the prison. In other words, the CRS overclassifies prisoners because the least predictive subscale is used to determine the security classification in the majority of cases.

This is crucially important for Aboriginal prisoners. Aboriginal prisoners disproportionately present the characteristics that correspond to non-predictive individual subscale items, as well as high score ranges for those items. Moreover, these subscale items are concentrated in the least predictive subscale: the subscale that determines the security classification in the majority of cases. Moreover, several of those items are the most heavily weighted of the subscale items, so a higher score on such an item contributes significantly to the likelihood of being classified at a high level. In what follows I show that these facts are legally significant under s. 7 and s. 15 of the *Charter* because they render the use of the subscale arbitrary and overbroad under the former, and discriminatory under the latter.

**Section 7**

Section 7 guarantees everyone in Canada the right to life, liberty, and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice.[30] To prove a s. 7 violation, one must show on the balance of probabilities that there is 1) a deprivation of life, liberty or security of the person that is caused by the state and 2) that the deprivation is not in accordance with the principles of fundamental justice.[31] I argue that the CRS

[30] *Charter*, *supra* note 15, s 7.
[31] *Bedford v Canada*, 2013 SCC 72 at paras 58, 78, 93 [*Bedford*].

results in liberty deprivations, is law for the purposes of *Charter* scrutiny and is not in accordance with the principles of fundamental justice that a law must not be arbitrary or overbroad.

***The Deprivation***

Security classification results in two kinds of liberty deprivations.[32] The first relates to the conditions of confinement within the penitentiary and the second to the length of incarceration.

Firstly, minimum, medium and maximum security designations correspond to increasing degrees of restrictiveness within the penitentiary. Freedom of movement and freedom of association become more limited as security classifications increase.[33]

Secondly, a prisoner's security classification can result in a longer incarceration. Studies from the Parole Board of Canada and the Auditor General of Canada show that prisoners with higher security classifications are less likely to be granted day or full parole and more likely to be released at their statutory release date.[34] The vast majority of parolees are minimum security prisoners. The following data can be used to identify trends these trends. [35]

[32] Security of the person deprivations may also arise, if it is the case that medium and maximum security prisons are less safe than minimum security prisons. This important question, however, is beyond the scope of the current paper.
[33] Corrections Service Canada, *Commissioners Directive* 706 (2016), online <http://www.csc-scc.gc.ca/lois-et-reglements/706-cd-eng.shtml#E_Security_Requirements>; Corrections Service Canada, "*Security Levels and What They Mean", online: <http://www.csc-scc.gc.ca/publications/lt-en/2006/31-2/4-eng.shtml>;* Annual Report of the Correctional Investigator, 2014-2015 (2015) at 45 and 47, online: <http://www.oci-bec.gc.ca/cnt/rpt/pdf/annrpt/annrpt20142015-eng.pdf>; *CHRC supra* note 14.
[34] See *Spring Reports of the Auditor General of Canada – Preparing Male Prisoners for* Release (2016) at paras 6.12 – 6.74; *Fall Reports of the Auditor General of Canada – Preparing Indigenous Prisoners for* Release (2016), online:< http://www.oag-bvg.gc.ca/internet/English/parl_oag_201611_03_e_41832.html>; Parole Board of Canada Performance Monitoring Reports, online: <https://www.canada.ca/en/parole-board/corporate/transparency/reporting-to-canadians/performance-monitoring-report.html>.
[35] Thanks to Marie Kingsley, Executive Director of the OCI for sharing this table with me.

| | 2016-2017 | | | 2016-2017 Total | 2017-2018 | | | 2017-2018 Total |
|---|---|---|---|---|---|---|---|---|
| Actual Sec Level | DAY PAROLE | FULL PAROLE | STAT RELEASE | | DAY PAROLE | FULL PAROLE | STAT RELEASE | |
| MAX. | | 1 | 321 | 322 | 2 | | 504 | 506 |
| MED. | 463 | 35 | 1046 | 1544 | 676 | 32 | 1801 | 2509 |
| MIN. | 1216 | 84 | 160 | 1460 | 1670 | 152 | 395 | 2217 |
| Total | 1679 | 120 | 1527 | 3326 | 2348 | 184 | 2700 | 5232 |
| | | | | | | | | |

***The Source of the Deprivation***

To attract *Charter* protection, a deprivation of liberty must be caused by the state.[36] State conduct, legislation, or legislative policy is subject to *Charter* review.[37]

Prior to *Greater Vancouver Transit Authority*, the Court did not review policy, as early *Charter* jurisprudence restricted *Charter* application to laws, regulations, and conduct by state actors.[38] Under this early jurisprudence, administrative policy was understood as an exercise of the state's prerogative to choose how to administer a matter in the public interest.[39] Administrative policies were characterized as informal and inaccessible agency-internal aids for interpreting the law and regulations that a given agency administers.[40]

I argue that the Security Classification policy is what the Supreme Court in *Greater Vancouver Transit Authority* called "legislative policy," that is, policy with the character of law, and as such reviewable under the *Charter*.[41] It is important that the Security Classification policy

[36] *Charter supra* note 15 s.32(1)(a); *RWDSU, Local 580 v Dolphin Delivery Ltd*, [1986] 2 SCR 573 at para 196 [*Dolphin Delivery*].
[37] *Ibid; Great Vancouver Transport Authority v Canadian Federation of Students – British Columbia Component*, 2009 SCC 31 at para 53 [*GVTA*].
[38] *Dolphin Delivery supra* note 36.
[39] See *Little Sisters Book & Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69 at para 85.
[40] *Ibid; GVTA supra* note 37 at para 58 – 68.
[41] *GVTA supra* note 37 at para 53; the following argument is adapted from Adelina Iftene, "Employing Older Prisoner Empirical Data to Test a Novel s. 7 Charter Claim" forthcoming, where the author takes the position that certain commissioners directives are law for the purposes of *Charter* review.

lends itself to this characterization, because otherwise the policy would be immune from *Charter* review,[42] leaving over-classified prisoners without a constitutional remedy.[43]

In *Greater Vancouver Transit Authority,* the Supreme Court formulated the test for determining whether a policy is legislative: the policy must originate from an agent empowered by statute to make policies regulating activities within the agency; the policy must be of general application and binding on those to whom it applies; and the policy must be sufficiently accessible and precise.[44] Essentially, where the policy functions like law by (1) delineating a sufficiently precise zone of "risk" to inform those to whom it applies as to how to conform their conduct to its standards, and (2) by creating criteria to govern decision making and prevent arbitrary state action, it is to be treated as law for the purposes of *Charter* review.[45]

The Security policy satisfy this test. The *CCRA* delegates to the Commissioner the authority to make policies that are binding on staff and prisoners[46] and provides the further authority to designate which policies are binding and which are not, thereby implicitly distinguishing between legislative policies and interpretive guidelines.[47] The requirement of accessibility is satisfied because the policy is available online and by request to prisoners and staff and the public. Precision is satisfied almost by definition: the CRS is an objective, actuarial tool, and the policy is clear about how it is applied.

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[42] The policy must also cause the deprivation. That is, there must be a relationship of sufficient causation between the liberty infringements and the law. This standard is met by a reasonable inference on the balance of probabilities, and it does not require the law to be the only source of the deprivation. I take that standard to be met in this case: the deprivations are a direct consequence of the application of the policy in issue; but for the policy, they would not exist (*Bedford supra* note 31 at paras 75 – 76).
[43] A remedy under federal human rights legislation may be available, but that is beyond the scope of this paper.
[44] *GVTA supra* note 37 at para 50.
[45] Ibid at para 53.
[46] *CCRA, supra* note 6, ss 96–98.
[47] *Ibid* s 88; *GVTA* tells us that "an interpretive guideline or policy is not intended to establish individuals rights and obligations or to create entitlements" at para 64. The content of the policies themselves show how individual rights, obligations, and entitlements are implicated because they limit or create the same.

***The Principles of Fundamental Justice***

The principles of fundamental justice represent the minimum constitutional standards that any law must satisfy if it infringes the right to life, liberty, or security of the person. Since the entrenchment of the *Charter*, the court has articulated both substantive and procedural protections of life, liberty and security of the person as principles of fundamental justice.[48] The former are related to the content or character of laws, and the latter to the demands of fairness in legal procedure.[49] My argument relies on the former: the principles that any law that violates s. 7 rights must not be arbitrary or overbroad.[50]

Arbitrariness and overbreadth are purpose-based, relational norms that concern the relationship between the objective of the law and its effects.[51] If a law infringes life, liberty, or security of the person, the principles demand that that effect must not be arbitrarily related to the objective of the law. In other words, the rights-infringing effects must be rationally connected to the objective. That is the minimal constitutional standard that liberty infringing laws must satisfy.[52]

The goal is then to determine whether the effects are rationally connected to the law's objective. Where there is no rational connection between the objective of the law and its effects, the law is arbitrary because the rights-infringing effects are unnecessary for or inconsistent with the law's objective.[53] Overbroad laws are arbitrary in part, in that some of the law's effects are not rationally connected to the law's objective.[54]

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[48] I note that more than the two principles of fundamental justice that I consider could be applicable in this context. However, they are beyond the scope of this paper to address. For other principles of fundamental justice, see Robert J Sharpe and Kent Roach, *The Charter of Rights and Freedoms*, 6th ed (Toronto: Irwin Law, 2017).
[49] *Ibid* chapter 13.
[50] *R v Moriarity*, 2015 SCC 55 at para 24 [*Moriarity*]; *Bedford, supra* note 31 at paras 93 – 119;
[51] *Bedford supra* note 31 para 111.
[52] *Ibid.*
[53] *Ibid* at paras 118 – 119.
[54] I*bid* at paras 111, 113.

The effectiveness of the law or whether it is on balance good for society are not relevant questions under s.7: "[t]he analysis is qualitative, not quantitative. The question under s.7 is whether *anyone's* life, liberty or security of the person has been denied by a law that is inherently bad; [an] overbroad, or arbitrary effect on one person is sufficient to establish a breach of s. 7."[55]

To test for arbitrariness and overbreadth, the law's objective and effects must be identified and then compared. The analysis begins by identifying the objective.[56] Precision is required because arbitrariness and overbreadth are objective-dependant, so if the purpose of the law is conceived too broadly, it becomes easy to rationally connect the purpose to the effects. Conversely, if the purpose of the law is conceived too narrowly, it becomes harder to identify a rational connection between the purpose and effects:[57]

> [t]he appropriate level of generality, therefore, resides between the statement of an "animating social value" — which is too general — and a narrow articulation, which can include a virtual repetition of the challenged provision, divorced from its context — which risks being too specific...[t]he statement of purpose should be both a precise and succinct articulation's of the law's objective.[58]

The analysis assumes that the objective is both "lawful and appropriate,"[59] and that it must be identified in its full context. To that end, the text, the context, and scheme of the Act are relevant, as well as extrinsic evidence of legislative history.[60]

*Objective of the Security Classification Policy*

The objective of the Security Classification policy must therefore be determined in light of the overall objectives of the *CCRA* as well as the particular purpose of the policy. The *CCRA* states that the fundamental objective of all correctional policy is to carry out sentences in a safe and

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[55] *Ibid* at para 123
[56] *Carter v Attorney General of Canada*, 2015 SCC 5 at para 73 [*Carter*]; *Bedford supra* note 31 at para 123; I use "objective" and "purpose" and "goal" interchangeable in this paper.
[57] *Carter* supra note 56 at para 77.
[58] *Moriarity*, *supra* note 50 at paras 26, 28.
[59] *Ibid* at para 30.
[60] *Ibid* at para 29, 31.

humane fashion, and to assist with the rehabilitation and community reintegration of prisoners through the provision of programs in penitentiaries and in the community.[61] The *CCRA* further states that the protection of society is the paramount consideration in the provision of correctional services.[62] Section 4 identifies the principles that must guide the CSC in administering the *CCRA*.[63] Most pertinent are the requirements that CSC only use relevant information in decision making, that only the least restrictive measures necessary be used, and that the CSC must be responsive to the unique needs of Aboriginal prisoners.[64]

The purpose of the Security Classification policy is to determine prisoners' security classification and penitentiary placement, while having regard to the overall objective of the *CCRA* and its guiding principles. Equally, the distinct objective of the CRS must be understood in context. It is reasonable to assume that the CSC introduced the scale – an objective, statistical instrument – to eliminate subjectivity from the classification process, to ensure that the appropriate restrictions are imposed on prisoners while ensuring safety to the public, staff and prisoners within the institution. Indeed, this is apparent from the logical framework of the CRS. The scale attempts to predict the likelihood of institutional incidents and returns to custody <u>for the further purpose of assigning the correct security classification</u>. That is, the purpose of the Security Classification policy is to ensure safety by assigning a security classification that is <u>proportionate to predicted risk</u>.[65] This is the objective against which the effects are to be compared.

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[61] *CCRA supra* note 6 s 3.
[62] *Ibid* s 3.1.
[63] *Ibid* s 4.
[64] *Ibid* ss 4(a), 4(c), 4(g).
[65] *CDO 705 – 7supra* note 17 Annex A – Definitions.

*The Effects of the Security Classification Policy*

The effects of the Security Classification policy on Aboriginal prisoners are well documented.[66] As previously outlined, Aboriginal prisoners are disproportionately represented at higher security levels. The Corrections and Conditional Release Act Statistical Overview reported in 2015 that "[c]ompared to non-Aboriginal offenders, a lower percentage of Aboriginal prisoners are classified as minimum security risk (17.0% vs. 23.2%) and a higher percentage were classified as medium (65.3% vs. 62.1%) and maximum (17.7% vs. 14.6%) security risk."[67] In 2016 the differences between Aboriginal and non-Aboriginal prisoners increased: "compared to non-Indigenous offenders, a lower percentage of Indigenous prisoners were classified as minimum security risk (16.1% vs. 23.7%) and a higher percentage were classified as medium (67.6% vs. 61.9%) and maximum (16.3% vs. 14.5%) security risk."[68] Put simply, the effect of the CRS is to cause Aboriginal overclassification and the associated liberty deprivations, both in terms of conditions of confinement and length of incarceration. If these effects are unnecessary for or inconsistent with the objectives of the Security Classification policy and the CRS, having regard to the overall purpose of the *CCRA* and its guiding principles, it is arbitrary or overbroad for some prisoners.[69]

*Disconnect between Objective and Effects*

Arbitrariness and overbreadth are both concerned with the disconnect between the objective of the law and its effects. The required analysis compares the purpose of the adopted

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[66] *CCRASO supra* note 2; *supra* note 13.
[67] *Ibid.*
[68] *Ibid.*
[69] In referencing "some" prisoners, I am relying on the notion of a reasonable hypothetical, which focuses the analysis on whether the Security Classification policy would result in arbitrary liberty infringements in reasonably foreseeable cases. The question is, what is the reasonably foreseeable impact of the law? (*R v Nur*, 2015 SCC 15 at paras 57, 61).

measure with "what it actually does" by asking whether and to what extent the effects of the chosen measure advances its purpose, or whether the rights-infringing effects are unnecessary or inconsistent with that purpose.[70] Here, I compare the objective of the Security Classification policy and the CRS with the identified effects and in each case I conclude that the effect is either arbitrary or overbroad.

Whether there is a disconnect between the objective of the CRS and the effect of overclassification is equivalent to the question of whether that overclassification is justified. In other words, are Aboriginal prisoners *accurately* classified at higher security levels because they are in fact higher risk prisoners who require more control and supervision? The latter question is just to ask: does the CRS fulfill its purpose? Is it a valid tool? Does it measure what it is supposed to measure (risk as a function of the individual subscale items)? In what follows I use CSC's data from a recent study to show that the answer to these questions is no.

It is important to point out at this stage that the s. 7 analysis does not ultimately assess the wisdom or effectiveness of the law.[71] The means chosen by the state to achieve an objective are not for the Court to assess: the usefulness, accuracy or ability of the CRS to achieve its goal is not in itself material to the analysis. What is relevant to the constitutional analysis is whether, in attempting to achieve its goal, the CRS has caused arbitrary or overbroad effects on Aboriginal prisoners by depriving them of liberty in a manner that is not rationally connected to the goal of using the CRS. Thus, although I will show that the CRS is an invalid and non-predictive tool, that does not make it unconstitutional. Rather, the point is that in applying it, Aboriginal prisoners who pose a low risk to safety are deprived of their liberty by being classified as medium when they

[70] *Moriarity surpa* note 50 at para 24.
[71] *Ibid* at para 30; *Carter supra* note 56 at para 79; *Bedford supra* note 31at para 123.

ought to be classified as minimum, or as maximum when they ought to be classified as minimum or medium, and that these effects are not rationally connected to the objective of the CRS. They are thus arbitrary and overbroad for some prisoners.

In response to academic, empirical, and institutional critique of the CRS, CSC undertook to validate the tool.[72] A 2011 study concluded that it is valid for security classification purposes.[73] It seems that the notion of validity the tool is taken to satisfy is that of "discrimination validity":[74] the tool accurately discriminates between minimum, medium, and maximum security classification in terms of increasing proportions of institutional incidents and returns to custody: the operationalized outcomes of "risk" that the scale is meant to predict.[75] Institutional incidents and returns to custody do increase as a function of security classification levels: there are fewer incidents at minimum than at medium or maximum security. However, the CRS remains defective in terms of its predictive validity for Aboriginal prisoners.[76] This fact is legally significant. To be *Charter* compliant, I show that the CRS must be both valid in terms of the predictions it makes and in terms of its capacity to discriminate between classifications, because without predictive validity the CRS produces arbitrary liberty infringements.

The following comparison of the predictive validity of each subscale demonstrates that for a hypothetical prisoner, it is reasonably foreseeable that their security classification is going to be

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[72] See Cheryl Marie Webster; Anthony N. Doob, "Classification without Validity or Equity: An Empirical Examination of the Custody Rating Scale for Federally Sentenced Women Prisoners in Canada*" Canadian Journal of Criminology and Criminal Justice 395* (2004) at 46; Cheryl Marie Webster; Anthony N. Doob, "Taking Down the Straw Man or Building a House of Straw – Validity, Equity, and the Custody Rating Scale" *Canadian J. Criminology & Crim Just.* 631 (2004) at 62; Renee Gobeil, The Custody Rating Scale as Applied to Male Prisoners (2011), online: https://www.publicsafety.gc.ca/lbrr/archives/cn21484-eng.pdf

[73] *Gobeil supra* note 23.

[74] *Ibid* at p 20.

[75] This fact appears to be the basis upon which the CSC concludes that CRS is valid: For Aboriginal and non-Aboriginal offenders, the rate of involvement in minor and major incidents increased linearly with security classification, both when CRS recommendation and actual security classification were considered (*Ibid* at p 20).

[76] In fact, the tool is also invalid for non-Aboriginal prisoners, but less so as can be seen from the data below.

increased from minimum to medium security or above on arbitrary grounds because of the contribution in "points" from non-predictive subscale items.

Table 1, 2, and 3 below show the extent of the association between the individual subscale items and the predicted outcomes. The Security Risk subscale is the least predictive of the subscales for Aboriginal prisoners for each of the outcomes of interest. As of 2011, 5 of the 7 scale items were not significant: there was no statistically significant correlation between 5 individual scale items and the outcomes of interest. Street stability and age at first federal admission did predict. But number of prior convictions, most significant outstanding charge, severity of current charge, sentence length, and prior parole/statutory release *did not predict involvement in institutional incidents or charges.*

Not only do these items not predict, but Aboriginal prisoners disproportionately present those very characteristics that then qualify them as higher "risk" on what are in fact non-predictive criteria.[77] Furthermore, the characteristics that Aboriginal prisoners are more likely to present are

[77] Compare the following differences between Aboriginal and non-Aboriginal prisoners from the Corrections and Conditional Release Statistical Overview 2016 at p 62:

- "A greater proportion of Indigenous prisoners than non-Indigenous prisoners were serving a sentence for a Schedule I offence (60.1% versus 45.7%, respectively): Schedule I is comprised of sexual offences and other violent crimes excluding first and second-degree murder (see the Corrections and Conditional Release Act).
- Schedule II is comprised of serious drug offences or conspiracy to commit serious drug offences.
- 9.9% of Indigenous prisoners were serving a sentence for a Schedule II offence compared to 20.4% of non-Indigenous offenders.
- At the end of fiscal year 2015-16, there were a total of 3,591 prisoners in custody with a life/indeterminate sentence. Of these, 3,465 (96.5%) were men and 126 (3.5%) were women; 900 (25.1%) were Indigenous and 2,691 (74.9%) were non-Indigenous.
- At the end of the fiscal year 2015-2016, Indigenous prisoners were more likely to be serving a sentence for a violent offence (78.2% for Indigenous versus 45.7% for non-Indigenous; 71.9% of Indigenous women prisoners were serving a sentence for a violent offence compared to 46.3% of non-Indigenous women offender; of those serving a sentence for Murder, 4.5% were women and 20.5 were Indigenous"

itemized under the most heavily weighted criteria (See Table 4 and 5) such as severity of current charge and sentence length – which are negatively correlated with some of the outcomes of interest.

The Correctional Investigator has reported that compared to non-Aboriginal prisoners, Aboriginal inmates are: more likely to present a history of drug and alcohol use and addictions, more likely to be incarcerated for a violent offence and more likely to have served previous youth and/ or adult sentences. [78]

*Association of CRS Items and Conviction of Institutional Charges (Table 1)*

| | Extent of Association ($r_\Phi$)[79] | | | |
|---|---|---|---|---|
| | Aboriginal | | Non-Aboriginal | |
| CRS Items | Minor Charge | Serious Charge | Minor Charge | Serious Charge |
| *Security Risk Subscale* | | | | |
| Number of prior convictions | -.07 | -.02 | .04 | .06** |
| Most serious outstanding charge | .03 | .05 | .06** | .09** |
| Severity of current charge | -.03 | -.03 | -.10** | -.03 |
| Sentence length | -.01 | .00 | -.08** | -.05* |
| Street stability | .10** | .08* | .11** | .11** |
| Prior parole/ statutory release | -.01 | .04 | .04* | .06** |
| Age at first federal admission | .18** | .19** | .15** | .21** |
| *Institutional Adjustment Subscale* | | | | |
| History of institutional incidents | .15** | .14** | .6** | .14** |
| Escape history | .05 | .06 | .03 | .06** |
| Street stability | .10** | .09** | .11** | .11** |
| Alcohol/drug use | .03 | .04 | .09** | .09** |
| Age at time of sentence | .20** | .20** | .15** | .21** |

Note: *p<.001(equivalent to p<.05 after application of Bonferroni correction). **p<.0002 (equivalent to p<.01 after application of Bonferroni correction)

[78] Annual Report of the Correctional Investigator, 2014-2015 (2015) at 37, online: http://www.oci-bec.gc.ca/cnt/rpt/pdf/annrpt/annrpt20142015-eng.pdf.

[79] Phi (Φ) is a statistical measure of strength of correlation. Its range extends from 0.00 to 1.00. The former signifies no relationship the latter signifies a perfect relationship.

*Association of CRS Items and Involvement in Institutional Incidents (Table 2)*

| | Extent of Association ($r_\Phi$) | | | |
|---|---|---|---|---|
| | Aboriginal | | Non-Aboriginal | |
| CRS Items | Minor Incident | Major Incident | Minor Incident | Major Incident |
| *Security Risk Subscale* | | | | |
| Number of prior convictions | .06 | -.02 | .09** | .07** |
| Most serious outstanding charge | .07 | -.03 | .07** | .07** |
| Severity of current charge | -.02 | .00 | -.03 | -.01 |
| Sentence length | .00 | .02 | -.02 | -.02 |
| Street stability | .08* | .02** | .08** | .08** |
| Prior parole/ statutory release | .07 | .02 | .05* | .04 |
| Age at first federal admission | .12** | .13** | .13** | .17** |
| *Institutional Adjustment Subscale* | | | | |
| History of institutional incidents | .17** | .15** | .13** | .12** |
| Escape history | .12** | .09* | .07** | .05** |
| Street stability | .08* | .10** | .08** | .09** |
| Alcohol/drug use | .05 | .05 | .05** | .08** |
| Age at time of sentence | .12** | .17** | .13** | .18** |

*Association of CRS Items and Returns to Custody (Table 3)*

| | Extent of Association ($r_\Phi$) | | | |
|---|---|---|---|---|
| | Aboriginal | | Non-Aboriginal | |
| CRS Items | Minor Incident | Major Incident | Minor Incident | Major Incident |
| *Security Risk Subscale* | | | | |
| Number of prior convictions | .01 | .01 | .14** | .07** |
| Most serious outstanding charge | .05 | .06 | .09** | .06** |
| Severity of current charge | .01 | -.07 | -.07** | -.07** |
| Sentence length | .01 | -.05 | .02 | -.01 |
| Street stability | .10 | .11* | .14** | .10** |
| Prior parole/ statutory release | .07 | .02 | .13** | .09** |
| Age at first federal admission | .16** | .09 | .10** | .09** |
| *Institutional Adjustment Subscale* | | | | |
| History of institutional incidents | .08 | .05 | .12** | .08** |
| Escape history | .08 | .00 | .11** | .06** |
| Street stability | .09 | .11* | .15** | .10** |
| Alcohol/drug use | .09 | .06 | .16** | .09** |
| Age at time of sentence | .14** | .10 | .07** | .07** |

*Distribution of High and Low Scores on CRS Items (Table 4)*

| | Percentage of Scores | | | |
|---|---|---|---|---|
| | Aboriginal | | Non-Aboriginal | |
| CRS Items | Low | High | Low | High |
| *Security Risk Subscale* | | | | |
| Number of prior convictions | 49 | 51 | 59 | 41 |
| Most serious outstanding charge | 78 | 22 | 80 | 20 |
| Severity of current charge | 31 | 69 | 39 | 61 |
| Sentence length | 79 | 21 | 76 | 24 |
| Street stability | 41 | 59 | 60 | 40 |
| Prior parole/ statutory release | 48 | 52 | 56 | 44 |
| Age at first federal admission | 40 | 60 | 52 | 48 |
| *Institutional Adjustment Subscale* | | | | |
| History of institutional incidents | 33 | 67 | 39 | 61 |
| Escape history | 75 | 25 | 85 | 15 |
| Street stability | 42 | 58 | 62 | 39 |
| Alcohol/drug use | 29 | 71 | 54 | 46 |
| Age at time of sentence | 49 | 51 | 62 | 38 |

*Assignable Scores for Scale Items (Table 5)*

| CRS Items | |
|---|---|
| *Security Risk Subscale* | |
| Number of prior convictions | 0, 3, 6, 9, 12, 15 |
| Most serious outstanding charge | 0, 12, 15, 25, 35 |
| Severity of current charge | 12, 36, 69 |
| Sentence length | 5, 20, 45, 65 |
| Street stability | 0, 5, 10, 20 |
| Prior parole/ statutory release | 0 – 21 |
| Age at first federal admission | 0 – 30 |
| *Institutional Adjustment Subscale* | |
| History of institutional incidents | 0 – 11 |
| Escape history | 0, 4, 12, 20, 20 |
| Street stability | 0, 16, 32 |
| Alcohol/drug use | 0, 3, 6 |
| Age at time of sentence | 0-24 |

The Institutional Adjustment subscale is more predictive than the Security Risk subscale. For Aboriginal inmates, between 2 and 4 of the 5 subscale items – depending on the outcome being

measured – were predictive: history of institutional incidents, street stability, and age at time of sentencing. However, alcohol and drug use and escape history did not predict: there was no statistically significant relationship between these two subscale items and the outcomes of interest.

The fact that the Security Risk Subscale is less predictive is significant because, as discussed above, where there is a difference in security classification recommendations between the two subscales, the scale which recommends the higher classification will determine the final security classification.[80]

This follows by necessary implication from the Security Classification policy's conjunctive definition of the security levels: minimum security is defined as between 0 to 85 on the institutional adjustment subscale AND between 0 to 63 on the Security Risk subscale; medium is defined as between 86 and 94 on the Institutional Adjustment subscale AND between 0 to 133 on the Security Risk subscale or between 0 and 85 on the Institutional Adjustment subscale AND between 64 and 133 on the Security risk subscale; and maximum is defined as 95 or greater on the Institutional Adjustment subscale or 134 or greater on the security risk subscale. Accordingly, a prisoner who receives a 78 on the Institutional Adjustment Subscale (minimum security), and a 64 on the Security Risk Subscale (medium security),[81] will be categorized by the CRS as medium security.[82]

This result is critical because the Security Risk subscale – i.e., the least predictive subscale – overwhelmingly recommends a *higher security classification*. Data from CSC's 2011 study

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[80] Subject to a discretionary override (*CD 705-2 supra* note 17). I note that this is data about male prisoners, so the conclusions I draw are not necessarily applicable to female Aboriginal prisoners. The CSC has undertaken a revalidation of the CRS for women offenders, but it is not publicly available, and I have not received it at the time of writing. See online: http://www.csc-scc.gc.ca/research/005008-0273-eng.shtml. However, see Webster and Doob, *supra* note 74 for an empirical critique of the CRS and women prisoners. They identify the same problems of predictive validity as are found above, but do not frame those findings within a *Charter* analysis.

[81] *CD 705-2 supra* note 17 at para 26.

[82] *Ibid.*

shows that the Institutional Adjustment subscale recommended a minimum-security classification in 78 percent of assignments, whereas Security Risk subscale recommended minimum security in only 19 percent of the cases, and medium security in 78 percent of cases.[83] That means that the overall CRS recommendation could only be minimum security in 19 percent of the cases, and ultimately, that the less predictive subscale overwhelmingly determines security classification.

The legal consequence is that the CRS is overbroad. It classifies some prisoners as medium security when they ought not to be classified as such – given the purpose of the classification scheme – because the more predictive subscale recommends minimum security.[84] That means that the effect of classifying them as such is arbitrary because the purpose of the CRS is to assign security classifications based on predicted risk. Put differently, if the objective of the CRS is to predict risk in order to assign a security classification that is proportionate to that risk, then the CRS should assign a minimum security classification where the predicted risk is minimal. If the predicted risk is minimal, it would be arbitrary to assign a medium security classification. Yet that is exactly what the CRS does when the Institutional Adjustment subscale recommends minimum security, but the Security Risk subscale recommends medium security. The liberty deprivations caused by assigning medium security classifications in those cases are therefore arbitrary because they are unnecessary for the objective of ensuring safety, *given that the more predictive subscale predicts safety is ensured at a minimum security classification*.[85]

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[83] *Gobeil supra* note 23 at p 15.

[84] I note that the more predictive subscale more frequently recommends maximum than the Security Risk Subscale. However, it is possible to construct a reasonable hypothetical under which an individual prisoner scores the maximum points for the most heavily weighted subscale items (sentence length and severity of current charge) under the Security Risk subscale, and will therefore automatically spend 2 years at a maximum security classification, despite the fact that these items are the least predictive. That is arbitrary for the purposes of section 7.

[85] The liberty deprivations may also be inconsistent with the objective of assigning a security classification based on predicted risk to ensure safety if it is the case that medium and maximum security prisons are less safe than minimum security prisons. This would engage security of the person interests.

To sum up: Aboriginal prisoners are being arbitrarily classified because they are scoring "points" on the Security Risk Subscale for subscale items that have no predictive value.[86] Moreover, Aboriginal prisoners are more likely to present the characteristics that correspond to those subscale items, and several of those items are the most heavily weighted under the scheme. The more predictive subscale – the Institutional Adjustment Subscale – is actually not used to assign security classifications in many cases. Thus, in those cases, the liberty deprivations caused by the security classifications are arbitrary given the purpose of classifying prisoners in terms of the risk they pose as measured in terms of the likelihood that they will engage in institutional misconduct or be returned to custody. Because of the conjunctive definition of the security classification under the Security Classification policy, the least predictive subscale determines classification. Aboriginal prisoners are in some cases going to be classified as medium where they do not pose a medium security level of risk. These effects are also inconsistent with the statutory objectives of using the lease restrictive measures and relying only on relevant information.[87]

**Section 1**

The limitations clause of the *Charter* grants the state the opportunity to prove that the *Charter* breach is justified. The question under s. 1 is: are the limitations on the s. 7 rights reasonable and can they be demonstratively justified in a free and democratic society?[88]

[86] Of course, if the Institutional Adjustment subscale were to recommend medium and the Security Risk subscale were to recommend minimum for a given prisoner, the liberty restriction would be less arbitrary. However, the result could still be arbitrary because the Institutional Adjustment Subscale is non-predictive for alcohol and drug use – that means that for a given prisoner, their security classification could be elevated from minimum to medium on the more predictive subscale because of a non-predictive item. That is arbitrary and the effect is arbitrary as well for the purposes of the *Charter*.

[87] The "medium security" designation will not be relevant for the purposes of penitentiary placement in those cases where it is assigned because of the contribution in points from non-predictive subscale items.

[88] *Charter supra* note 15, s 1.

In order to be saved under section 1, the impugned policy must be prescribed by law, and it must be justified under the *Oakes* framework: the policy must be motivated by a pressing and substantial objective, it must be rationally connected to its effects, it must be minimally impairing, and its deleterious effects must be proportionate to its salutary ones.[89] I conclude that The Security Classification policy is prescribed by law, it is motivated by a pressing and substantial objective, but it is not rationally connected to its rights-infringing effects and it is not minimally impairing.

***Limits Prescribed By Law***

The Security Classification Policy is prescribed by law if it is both law and prescribed. The law requirement is satisfied if the policy was properly enacted under the authority of a government entity empowered by statute to make policy, and if the policy is one of binding application. The prescribed requirement is satisfied if the policy is "sufficiently accessible and precise":[90]

> So long as the enabling legislation allows the entity to adopt binding rules, and so long as the rules establish rights and obligations of general rather than specific application…they will quality as "law" which prescribes a limit on a *Charter* right.[91]

The policy is law for the purposes of s. 1. The analysis is the same as it was for the purposes of s. 7. Parliament has delegated to the Commissioner rule-making authority under the *CCRA* and *CCRR* and the policy made under that authority is binding on those to whom it applies: staff must use the CRS to assign a security classification to all incoming prisoners.[92] The policy establishes prisoner's rights and obligations by creating different liberty restrictions corresponding to the different security classifications. Finally, the policy is prescribed by law because it is accessible to staff, prisoners, and the public, and it is sufficiently precise because it is fully comprehendible by

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[89] *R v Oakes*, [1986] 1 SCR 103 at paras 73-74 [*Oakes*].
[90] *GVTA supra* note 37 at para 64.
[91] *Ibid.*
[92] *CD 705-7 supra* note 17 at para 24 – 28.

those to whom it applies.[93] Moreover, the CRS itself is precise because it is an actuarial tool. It was introduced for the very purpose of reducing discretionary decision making and increasing predictability and certainty by removing human subjectivity from the decision-making process.[94]

***Justification of Limits***

*Pressing and Substantial Objective*

This s. 1 requirement is satisfied where the objective of the law is of sufficiently great societal importance to "warrant overriding a constitutional right or freedom."[95] The objective that must be identified is that of the measures which cause the limitation on the *Charter* right.[96] It is the objective of the impugned measure that matters, that is, the objective of the CRS and Security Classification policy.

Having already outlined the objective of the Security Classification policy and the CRS above, I repeat only the most relevant guiding principles: section 4(a) states that the sentence is to be carried out having regard to all relevant information; 4(c) states that the CSC "uses measures that are consistent with the protection of society, staff members and prisoners and that are limited to only what is necessary and proportionate to attain the purposes of the Act"; and section 4(g) states that "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 group (my emphasis).[97] The specific objective of the CRS to "to determine the inmates security classification and penitentiary placement"[98] is

[93] *Montréal (Ville de) c. Arcade Amusement Inc.* [1985] 1 SCR 368 at para 84 [*Montreal Arcade*].
[94] See Grant, Brian A. and Fred Luciani, "Security Classification Using the Custody Rating Scale", Research Branch, Correctional Service of Canada, Ottawa, (1998).
[95] *R v Big M Drug Mart ltd* [1985] 1 SCR 295 at para 165.
[96] *Oakes supra* note 90 at para 73.
[97] *CCRA supra* note 6.
[98] *CDO 705-7 supra* note 17 – Purpose Statement.

interpreted in this context. I conclude that accurately classifying prisoners for the purposes of the *CCRA* is a pressing and substantial societal objective.

*Rational Connection*

The objective of the CRS is not rationally connected to its effects because its effects are arbitrary. The CRS is supposed to determine two things: (1) the degree of supervision and control a prisoner requires within the penitentiary and (2) the probability of escape and the risk to public safety in the event of an escape.[99] A determination of (1) is equivalent to a prediction of involvement in institutional incidents and conviction of serious institutional charges. A determination of (2) is equivalent to a prediction of the likelihood that a prisoner will be returned to custody. The CRS, however, is not predictive of either outcome for Aboriginal prisoners because there is no significant relationship between the scale items and the outcomes the Security Risk subscale measures, yet the Security Risk subscale frequently determines security classification because of how the Security Classification policy defines minimum, medium and maximum security.

This means that some Aboriginal prisoners are being placed into higher security levels for arbitrary reasons. If the purpose is to make accurate predictions about prisoner involvement in institutional and social misconduct to assign an appropriate security classification, it is irrational to rely on inaccurate information for that purpose, and it is not rational to classify prisoners who pose a minimum security risk as medium security.[100]

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[99] *Corrections and Conditional Release Regulations*, SOR/ 96-602 s 18 [*CCRR*].

[100] I have focussed the discussion on arbitrary medium assignments for simplicity of exposition. But similar reasonable hypotheticals can be made involving maximum security prisoners. For example, a prisoner who scores few to no points on the most predictive items, but, due to the severity of their charge and the length of their sentence (the least predictive subscales), they will automatically be classified as maximum security.

Furthermore, an effect of a policy which is in direct contradiction to the statutory objectives of the Act that the policy implements cannot be rationally connected to its effects.[101] The *CCRA* requires that sentences be administered in the least restrictive manner necessary having regard to all relevant information.[102] The information on which the CRS relies in classifying Aboriginal prisoners – the points associated with scale items and the non-predictive scale items themselves – are in many cases going to be irrelevant for the purposes of classification because that information has no predictive value. This results in the imposition of restrictions that are not necessary and disproportionate. I conclude that the Security Classification policy is therefore not rationally connected to its effects.[103]

*Minimal Impairment*

The CRS is not minimally impairing. Less impairing measures can be easily envisioned. For example, if the final security designation were determined by the most predictive subscale instead of the subscale that recommends the higher security classification, the policy would be less impairing than it currently is. Alternatively, the scales could be combined, or the non-predictive subscale items could be removed. The policy cannot be saved under s. 1.

**Section 15**

Section 15 of the *Charter* guarantees that every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination

[101] *Vriend v Alberta* [1988] 1 SCR 493 at paras 118-119.
[102] *CCRA supra* note 6 at ss 4(a) – 4(c).
[103] Moreover, there are two appellate cases which have held that the proposition that the state must obey the law is a principle of fundamental justice. So where a policy directly contravenes the law proclaimed by Parliament and in that process violates liberty, that violation cannot have been in accordance with the principles of fundamental justice. See *R v Chambers*, 2014 YKCA 13 at para 74 and *Hitzig v R*, 2003 117 OAC 231 at para 115.

and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[104]

A law will violate s. 15 if it distinguishes a group based on a protected ground and imposes on them burdens not imposed on others, or takes away benefits that are otherwise generally available.[105] The first step in the analysis is to identify a distinction in purpose or effect.[106] The second is to determine whether it is based on an enumerated or analogous ground and to identify the impact: does the distinction impose arbitrary disadvantage by virtue of membership within a protected group.[107] In other words, is the distinction discriminatory: "[i]f the state conduct widens the gap between the historically disadvantaged group rather than narrowing it, then it is discriminatory"[108] Evidence that the law is perpetuating disadvantage through stereotyping and prejudice is relevant at this stage, as well as evidence of the historical disadvantage of the group.[109]

***Distinction***

Aboriginal prisoners are likely to score more points in respect of four of the non-predictive CRS subscale items: alcohol and drug use, severity of current charge,[110] sentence length, and prior parole/statutory release. The Office of the Correctional Investigator has reported that:

> Aboriginal Prisoners tend to be younger, less educated, and more likely to present a history of substance abuse, addictions, and mental health concerns. A recent file review of the social histories of Indigenous women prisoners indicates that over half of the women reported having attended or having had a family member attend a residential school. With respect to childhood events, two-thirds of their parents had a substance use issue and 48% of the file sample had been removed from the family home. Almost all of the women's files indicated

[104] *Charter supra* note 15, s 15.
[105] *Quebec (Attorney General) v A* 2013 SCC 5 at para 323 [*A*].
[106] *R v Kapp* [2008] 2 SCR 483 at para 17 [*Kapp*].
[107] *Ibid.*
[108] *A supra* note 108 at paras 348-349, 332.
[109] *Whithler v Canada* [2011] 1 SCR 396 at para 38 [*Withler*].
[110] *CCRASO 2016 supra* note 2 at p 61.

> the existence of previous traumatic experiences, including sexual/physical abuse, as well as substance mis-use.[111]

The CRS thus creates a distinction in effect between Aboriginal prisoners and non-Aboriginal prisoners in effect due to the particularities of the Aboriginal prisoner profile.

***Grounds***

Aboriginality is a protected ground,[112] reflecting one of "the most common and probably most socially destructive and historically practiced bases of discrimination."[113] Those historical practices are well documented,[114] have been judicially noticed,[115] and animate the s.15 inquiry because the analysis "must take place…within the context of the enumerated grounds."[116]

Though distinctions at law are inevitable, "such distinctions should not bring about or reinforce the disadvantage of certain groups and individuals by denying them the rights freely accorded to others",[117] or by imposing burdens upon them not imposed on others. Therefore, at the final step of the analysis, a distinction will be classified as discriminatory where it "has the effect of perpetuating arbitrary disadvantage on the claimant because of his or her membership in an enumerated or analogous group."[118]

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[111] Annual Report of the Office of the Correctional Investigator *(2015-2016)* p 43, online: http://www.oci-bec.gc.ca/cnt/rpt/pdf/annrpt/annrpt20152016-eng.pdf, referring to CSC, Social Histories of Aboriginal Women Offenders, Emerging Research Results – ERR 14-7 (May 2014).
[112] *Charter supra* note 15 s 15.
[113] *Andrews v Law Society of British Columbia* [1989] 1 SCR 143 at para 20 [*Andrews*].
[114] See Truth and Reconciliation Commission of Canada. *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*. Winnipeg: Truth and Reconciliation Commission of Canada, 2015 [*TRC*].
[115] *Gladue supra* note 6 at paras 58 – 60.
[116] *Andrews supra* note 116 at para 25.
[117] *Andrews supra* note 116 at para 52.
[118] *A supra* note 108 at para 331.

***Impact***

The Security Classification Policy disproportionately impacts Aboriginal prisoners and thereby perpetuates their pre-existing disadvantage. Many of the specific characteristics of the Aboriginal prisoner profile that are targeted by the CRS are a product of the discriminatory practices that have shaped Aboriginal social history. Effectively, this means that the scale takes a pre-existing disadvantage, securitizes it, and converts it into a liberty restriction. The policy does not merely "freeze' the status quo" of historical discriminatory practices but converts the outcomes of a history of discrimination into current liberty restrictions.[119] Significantly, as discussed above, higher security classifications have consequences beyond just the imposition of increasingly restrictive conditions. Classification also affects the likelihood and timeframe within which prisoners can cascade down into lower security levels, which affects the likelihood of being granted day or full parole, and ultimately rates of recidivism and length of incarceration.[120]

Section 15 protects the norm of substantive equality.[121] A law violates the norm of substantive equality where it:

> draws *discriminatory* distinctions – that is, distinctions that have the effect of perpetuating arbitrary disadvantage based on an individual's membership in an enumerated or analogous group. The s.15(1) inquiry is accordingly concerned with the social and economic context in which a claim of inequality arises, and with the effects of the challenged law or action on the claimant group.[122]

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[119] *Ibid* at para 332.

[120] The Auditor General has reported that "[o]ffenders first released at their statutory release date from maximum- and medium-security levels do not receive the full benefit of a planned, gradual release into the community. Parole Board data indicates that prisoners released on parole generally have lower levels of violent reoffending before their sentence expires than those released at their statutory date. CSC assesses which prisoners may be recommended for early release on parole based on the progress each offender has made on his correctional plan, his overall behaviour, and his potential to be safely supervised in the community. However, CSC policy does not require that prisoners at higher levels of security be assessed for a transfer to a lower level before their statutory release date, as a way to support their safe reintegration into the community" (2015 Spring Reports of the Auditory General – Preparing Male Prisoners for Release at para. 6.32)

[121] *A supra* note 108 at para 325.

[122] *Kahkewistahaw First Nation v Taypotat,* 2015 SCC 30 at para 19 [*Taypotat*].

Social and economic context are relevant because they influence the outcome of the laws' application to the protected group, thereby enabling a precise identification of the law's disadvantageous impact on the that group.

The disadvantageous impact of the CRS is to perpetuate historical discrimination against Aboriginal peoples, as demonstrated by the following consideration of individual CRS scale items:

*Prior Parole/Statutory Release*

The Final Report of the Truth and Reconciliation Committee ("TRC") states that

> [i]n addition to the emotional and psychological damage they inflicted, one of the most far-reaching and devastating legacies of residential schools has been their impact on the educational and economic success of Aboriginal people. The lack of role models and mentors, insufficient funds for the schools, inadequate teachers, and unsuitable curricula generally taught in a foreign language have all contributed to dismal success rates for Aboriginal education.[123]

This passage identifies the prevalence of social determinants of crime within the Aboriginal community and connects their existence to the legacy of Residential Schools. The CRS essentially securitizes the outcomes of those social determinants of crime or that particular legacy of Residential schools, resulting in a diminution of liberty for some prisoners.

*Severity of Current Charge*

Aboriginal prisoners are more likely than non-Aboriginal prisoners to be serving a sentence for a serious violent offence, particularly in respect of Aboriginal women: "[a]t the end of the fiscal year 2015-16…71.9% of Indigenous women prisoners were serving a sentence for a violent offence compared to 46.3% of non-Indigenous women offenders."[124] As above, this directly raises

[123] *TRC* at p 143.
[124] *CCRASO supra* note 2 at p 61.

the "risk" an Aboriginal prisoner presents, and correspondingly, their security classification. The discriminatory nature of this relationship has been identified by the TRC:

> Violence and criminal offending are not inherent in Aboriginal people. They result from very specific experiences that Aboriginal people have endured, including the intergenerational legacy of residential schools. It should not be surprising that those who experienced and witnessed very serious criminal violence against Aboriginal children in the schools frequently became accustomed to violence in later life.[125]

The CRS is functioning here, as above, in a manner that converts the outcomes of a history of state sanctioned discrimination into new disadvantages. That is another example of the legacy of the Residential School system identified by the TRC.

The discriminatory impact of securitizing prisoners based on the severity of their current charge is different in the case of Aboriginal women prisoners. That Aboriginal women are serving sentences for violent crimes reflects the failure of the state to provide for the maintenance of a just, safe and peaceful society:

> The serious violent crimes for which women are charged and convicted must be appropriately contextualized. Overwhelmingly, the actions of women in these contexts are defensive or otherwise reactive to violence directed at themselves, their children or another third party.[126]

This passage suggests that the state responsibility to maintain the public peace and protect citizens is being deputized by the state to individual women. This factor is discriminatory on the intersectional ground of Aboriginality and sex. Moreover, the severity of the charge for which Aboriginal prisoners are committed into custody explains in part why Aboriginal prisoners generally serve longer sentences than non – Aboriginals, which again has a substantial impact on security classification given how these items are scored.

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[125] *TRC supra* at note 125 p138.

[126] Canadian Human Rights Commission, *Protecting Their Rights: A Systematic Review of Human Rights in Correctional Services for Federally Sentence Women* (Ottawa: Minister of Public Works and Government Services Canada, 2003) at 32.

*Alcohol and Drug Use*

The Aboriginal population generally, and the Aboriginal prisoner population in particular, tend to have higher rates of alcohol and drug use than the non Aboriginal population. By securitizing a history of drug and alcohol use, rather than placing prisoners within a therapeutic environment where addictions issues and mental health issues can be properly addressed, the state discriminates on the intersectional ground of race and disability. This factor speaks to a lack of correspondence between Aboriginal prisoners' actual needs and the Security Classification policy.

I conclude that Aboriginal prisoners are not being treated equally by the Security Classification policy, and that that unequal treatment is discriminatory in nature.[127]

## PART II: THE COMMUNITY RELEASE POLICY

The Community Release Policy establishes the eligibility criteria for a s. 81 transfer of a prisoner into the care and custody of an Aboriginal community to serve their sentence. The policy restricts eligibility to only minimum-security prisoners, or, on a case by case basis, medium security prisoners. If a maximum-security prisoner were to apply, they would automatically be denied, whereas a medium security prisoner is subject to a more onerous eligibility standard, or has less priority than a minimum-security prisoner. In employing the unconstitutionally assigned security classifications discussed in Part I, the Community Release policy violates s. 7. Moreover,

[127] I do not think the section 15 violation can be saved under section 1. The effects of the Security Classification policy are not rationally connected to its objective. The s. 1 analysis from above is applicable here, because the liberty restrictions under the s. 7 claim are the equality infringements. They are both at once. And an absence of a rational connection between the effects and objective was demonstrated under the s. 1 analysis above.

should a prisoner be denied an application on the basis of their security status, I argue that they could challenge that decision by way of *habeas corpus* under section 10(c) of the *Charter*.[128]

**Section 7, 10(c): The Deprivation of Liberty**

In *R v Dumas*, Lamer CJ identified three types of liberty deprivations: "[i]n the context of correctional law, there are three different deprivations of liberty: the initial deprivation of liberty, a substantial change in conditions amounting to a further deprivation of liberty, and a continuation of the initial deprivation of liberty" (my emphasis).[129] Though Lamer CJ confined his analysis to *habeas corpus* applications, the principles are applicable under s. 7.[130]

The liberty deprivation resulting from the Community Release Policy is of the third type. The policy causes a continuation of the initial deprivation of a prisoner's liberty by restricting the application of s. 81 of the *CCRA*.[131] While s. 81 of the *CCRA* grants Aboriginal prisoners a conditional opportunity to serve their sentence in the care and custody of an Aboriginal community, The Community Release policy infringes liberty by taking that opportunity away.

Section 81 does not contain any restrictive language – on a plain reading, any Aboriginal prisoner is eligible to request a transfer. By imposing a minimum-security classification requirement however, The Community Release policy *makes 84 percent of Aboriginal prisoners ineligible for a transfer*.[132] This is a consequence of the fact that CSC has structured section 81

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[128] *Charter supra* not 15 s 10(c): Everyone has the right to have the legality of their detention determined by way of *habeas corpus.*
[129] *Dumas v Leclerk Institute of Laval*, [1986] 2 SCR 459 at para 12 [*Dumas*].
[130] I cannot see any reason in principle why a liberty deprivation for the purpose of one would not amount to the same for the other.
[131] *CCRA supra* note 6 s 81: s.81(1) CCRA: The Minister, or a person authorized by the Minister, may enter into an agreement with an aboriginal community for the provision of correctional services to aboriginal prisoners and for payment by the Minister, or by a person authorized by the Minister, in respect of the provision of those services.
[132] Eighty-four percent of Aboriginal inmates are classified as medium-security or above.

agreements such that in almost every case where a transfer is made, the prisoner is transferred to a Healing Lodge, which are minimum security institutions.[133] Eighty-four percent of Aboriginal prisoners are therefore faced with a continuation of their initial liberty deprivation. This engages ss. 7 and 10(c) of the *Charter*.

Within the *habeas corpus* jurisprudence, however, there is a line of cases that hold that a continuation of an initial deprivation of liberty is not a deprivation of liberty challengeable by way of *habeas corpus*. Because I am arguing for the applicability of the types of liberty deprivations identified in *Dumas – a habeas corpus* case – to the s. 7 context, this line of cases must be addressed.

These cases are generally of two types, the first being involuntary transfers of prisoners from and to penitentiaries of the same security classification. These are referred to as lateral transfers because the conditions in each institution are equally restrictive. The second type is that where a prisoner applies to be reclassified at a lower security status – from maximum to medium or from medium to minimum – and the application is denied.

The Courts have analysed whether there is a deprivation of liberty in either of these scenarios. The leading case among those which hold that there is not is *RVL*.[134] In this case, a prisoner ("RVL") was initially classified at a maximum-security level and imprisoned at the Regional Reception Assessment Center, a maximum-security penitentiary in Matsqui Institution, British Columbia. He was subsequently re-classified as a medium security prisoner and transferred to Mountain Institution, a medium security penitentiary. RVL applied to be reclassified as

[133] See Correctional Service Canada Healing Lodges, online: http://www.csc-scc.gc.ca/aboriginal/002003-2000-eng.shtml
[134] *R(LV) v Mountain Institution*, 2016 BCCA 467 [*RVL*].

minimum security and sought to be transferred to a minimum-security institution. The application was denied. RVL challenged that decision by way of *habeas corpus*, which he combined with claims under s. 7 of the *Charter*, alleging an absence of procedural fairness and unreasonableness.

The chambers judge found that *habeas corpus* could not lie to challenge the reclassification decision.[135] The chambers judge relied on *Mapara,*[136] which held that a Warden's decision not to grant an application for an Escorted Temporary Absence did not constitute a deprivation of liberty for the purposes of *habeas corpus* because that decision did not result in a change in the applicant's conditions of confinement. Likewise, because RVL's classification status remained at medium security and the conditions of his confinement had not changed, the chambers judge reasoned that there was no diminution of RVL's residual liberty.

This reasoning was upheld on appeal. Stromberg-Stein JA, for the British Columbia Court of Appeal applied the leading *habeas corpus* case:[137]

> *Khela* does not seek to exhaustively list the types of decisions that could constitute a deprivation of residual liberty, but the examples listed in *Khela* at para. 34 all reflect decisions that would increase the restrictions of an inmate's residual liberty. Thus, an initial classification decision following a valid committal or a decision denying a transfer to a lower security facility would not be decisions that constitute a deprivation of residual liberty for the purposes of *habeas corpus*.[138] (my emphasis)

The part of paragraph 34 of *Khela* that Stromberg-Stein JA is referring to reads: "[d]ecisions which might affect an offender's residual liberty include, but are not limited to, administrative segregation, confinement in a special handling unit and, as in the case at bar, a transfer to a higher security institution".[139] Each of these are examples of the second type of liberty deprivation identified in *Dumas* (a substantial change in the conditions of detention).

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[135] *RVL supra* note 137 at para 7.
[136] *Mapara v Ferndale Institution*, 2012 BCCA 127.
[137] *Khela v Mission Institution*, 2014 SCC 24 [*Khela*].
[138] *RVL supra* note 137 at para 42.
[139] *Khela supra* note 140 at para 34.

The quotation from Stromberg-Stein JA contains a *non-sequitur*. It is not valid to conclude that decisions that result in the continuation of the initial deprivation of liberty *do not* constitute deprivations for the purpose of *habeas corpus* because decisions that increase restrictions on inmates' residual liberty *do* constitute deprivations of liberty for the purpose of *habeas corpus.* That would be to argue that because there *are* deprivations of liberty of the second type identified in *Dumas,* there *are not* deprivations of the third type.

I suggest that the error in Stromberg-Stein JA's reasons lies in failing to take account of the implications of *Khela* for *Dumas.*

*Khela* expanded the availability of *habeas corpus.* Prior to *Khela,* the test for *habeas corpus* consisted in showing 1) a deprivation of liberty, the onus for which lay with the applicant, and 2) that the deprivation is lawful, the onus for which lay with the state.[140] A deprivation might be unlawful for an absence of jurisdiction or procedural fairness. *Khela* added a third ground of unlawfulness by permitting prisoners to challenge the *reasonableness* of decisions that diminish their residual liberty.[141] Since *Khela,* a detention could be unlawful for being unreasonable.[142]

This is relevant to the proper interpretation of the third type of liberty deprivation from *Dumas.* The *habeas corpus* challenge at issue in *Dumas* was to a decision of the Parole Board of Canada reversing their earlier decision to grant Dumas parole. The initial decision provided that the granting of Dumas' parole was conditional. The reversal occurred before the condition was fulfilled. This factual finding was crucial to the Courts' ultimate dismissal of Dumas' challenge.

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[140] *May v Ferndale Institution,* [2005] 3 SCR 809 at para 74 [*May*].
[141] *Khela supra* note 140 at para 72.
[142] *Ibid* at para 74: "a decision will be unreasonable, and therefore unlawful, if an inmate's liberty interests are sacrificed absent any evidence or on the basis of unreliable or irrelevant evidence, or evidence that cannot support the conclusion."

Lamer CJ held that "[t]he continuation of an initially valid deprivation of liberty can be challenged by way of *habeas corpus* only if it becomes unlawful".[143] The Court held that Dumas' detention was never unlawful because Dumas had never actually acquired the status of a parolee. Dumas' parole was conditional and the condition was never fulfilled, therefore he was never legally entitled to parole and his continued detention was not at any point unlawful and was consequently unchallengeable.

The crucial point to take away from this analysis is that Dumas' detention *could* have been unlawful, *despite* the fact that there were no changes to the conditions of Dumas detention; namely, if his continued detention was incompatible with the entitlements implied by his status as a parolee. There is no requirement in the Supreme Court jurisprudence that a deprivation of liberty can only arise where there is a change in the conditions of detention.

Despite this, Stromberg-Stein JA explicitly claims that there must be a change in the conditions of detention:

> [a] decision denying an inmate access to less restrictive conditions does not constitute…a deprivation. *Dumas* held that *habeas corpus* was not available to challenge a decision to revoke parole before parole was actually granted because there was no substantial change in the conditions of detention; hence, there was no change in the inmate's residual liberty.[144]

There are two problems with this passage. First, it misinterprets *Dumas*. *Dumas* held that *habeas corpus* was not available to challenge a decision to revoke parole before parole was actually granted *because parole was never actually granted*. The Court pointed out that there were no substantial changes in the conditions of Dumas' detention to illustrate only that there were no other grounds to claim that there had been a liberty deprivation of the second type. And Lamer CJ was clear that Dumas was challenging the continuation of the deprivation of his liberty and not the

[143] *Dumas* supra note 132 at para 13.
[144] *RVL supra* note 137 at para 25.

conditions thereof. The conditions were not material to Dumas' claim – it was the legality that mattered.[145]

The second problem with this passage is that by holding that a change in the conditions of detention is a necessary pre-condition for finding a deprivation of liberty, the third type of liberty deprivation identified in *Dumas* ceases to exist. In considering whether a continuation of an initial deprivation of liberty constitutes a deprivation challengeable by way of *habeas corpus*, it is inappropriate to focus the analysis on the restrictiveness of the conditions of detention. Doing so misses the point of distinguishing between the second and third type of liberty deprivations and obscures the significant impact of *Khela* on *Dumas.*[146]

The impact is crucial. *Dumas* says that a continuation of an initial liberty deprivation is challengeable only if it becomes unlawful. *Khela* says that detentions can be unlawful for being unreasonable. Combining the two, it becomes possible to answer the question "is a given continuation of an initial liberty deprivation challengeable?" by asking: "is that continuation reasonable?"

Reading *Dumas* and *Khela* together this way exposes the error in Stromberg-Stein JA's reasoning. Stromberg-Stein JA declined to address RVL's contestation of the reasonableness of the denial to lower his security classification:

> [w]ithout commenting on the merits of the appellant's objections relating to the alleged assessment errors, the *Charter* and procedural fairness, I am of the view that they reflect his misunderstanding of the scope, purpose and remedial ambit of the writ of *habeas corpus.* A court hearing a petition for *habeas corpus*…cannot consider the lawfulnesss of the administrative body's decision unless there is a deprivation of residual liberty.[147]

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[145] Frankel J.A makes the same mistake in *Mapara,* where he states at para 16 that the Court in *Dumas* rejected the challenge to the Boards decision because "the Board had not affected his residual liberty interests because its decision to revoke did not result in Mr. Dumas being subjected to a more restrictive form of confinement". Again, Dumas was not challenging the conditions of his confinement, so whether they had changed or not does not matter.
[146] *Gogan v R (Attorney General)* 2017 NSCA 4 is careful to confine the precedential value of BVL to its specific facts; that is, the court carefully distinguishes between the second and third type of deprivation at para 53.
[147] *RVL supra* note 137 at para 40.

But this cannot be right. Rather, a court must consider the lawfulness (including the reasonableness) of the decision at issue in order to determine if there is a challengeable deprivation of liberty. Stromberg-Stein JA's ignores the third category of deprivation identified in *Dumas* and its relationship to unlawfulness (i.e. reasonableness).[148] The court must first ask if the decision is lawful in order to determine if the continuation of the initial deprivation is itself lawful, and therefore challengeable by way of *habeas corpus*.[149]

**Fundamental Justice: The Objective of the Community Release Policy**

Section 81(1) of the *CCRA* states that "[t]he Minister, or a person authorized by the Minister, may enter into an agreement with an aboriginal community for the provision of correctional services to aboriginal prisoners and for payment by the Minister, or by a person authorized by the Minister, in respect of the provision of those services.

Section 81 is worded broadly – no eligibility criteria are specified. The Correctional Investigator has stated that section 81 was introduced to:

> provide options for care and custody to the broadest number of Aboriginal inmates (First Nations, Metis, and Inuit) in federal institutions in order to eventually reduce over-representation; provide appropriate programs and services to Aboriginal prisoners based on tradition and cultural values; and reinforce relationships with Aboriginal communities.[150]

Additionally, where Parliament has enacted laws specific to Aboriginal peoples, the Supreme Court has discerned Parliament's intent by noting the social and historical context within which the law was introduced. The reasoning from Gladue is pertinent:

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[148] Sidenote: without knowing the basis of RVL's s 7 claim, it is easy to wonder why it is not relevant to the deprivation question under a *habeas corpus* petition. If the liberty deprivation alleged was not framed in terms of a reasonably hypothetical person, but was related to RVL himself, it seems that if that deprivation was made out, then that would support finding the deprivation claimed in respect of the *habeas* petition. If RVL's continued detention is the result of an arbitrary, overbroad, or grossly disproportionate law or legislative policy, then should we not conclude that his continued detention is *unlawful* for the purposes of *habeas corpus?*

[149] Without addressing the analysis above, a line of Ontario cases has adopted the view that where it is unreasonable to maintain a prisoner's security classification instead of lowering it, then that prisoner is entitled to a lower classification. Maintenance of the prisoner's classification is therefore a continuation of their initial deprivation of liberty and challengeable by *habeas corpus* (*Canada (Attorney General) v Hollinger*, [2007] OJ No 3326) Although Stromberg-Stein JA and several lower court decisions have not followed these decisions, in light of the above it is at least arguable that they are more consistent with the *Khela* and *Dumas* and therefore more persuasive.

[150] *Spirit Matters supra* note 8 at para 12.

> [t]he drastic overrepresentation of aboriginal peoples within both the Canadian prison population and the criminal justice system reveals a sad and pressing social problem. It is reasonable to assume that Parliament, in singling out Aboriginal prisoners for distinct sentencing treatment in s.718.2(e), intended to attempt to redress this social problem to some degree.[151]

Similarly, it is reasonable to assume that Parliament intended to redress Aboriginal over-incarceration using section 81 agreements.

Unfortunately, in implementing section 81 of the *CCRA*, the Community Release policy frustrates Parliament's intent by neutralizing the remedial purpose of the law. This is not obvious on a plain reading Community Release Policy's stated purpose, which is:

> to facilitate the care and custody of an offender in an Aboriginal community where services address the rehabilitation of prisoners through culturally, spiritually and traditionally relevant interventions and programming; to facilitate access to an Aboriginal community with the capacity to provide services and benefits within a positive environment for Aboriginal prisoners that will assist them to become law-abiding citizens; and to facilitate the development of skills though accessing the broad Aboriginal social and community services networks that support the reintegration of an offender.[152]

The stated purpose of the policy is compatible with the purpose of the section of the Act it implements. However, the directive frustrates its own purpose, and the purpose of section 81 by specifying severely limiting eligibility criteria.

Section 81 is a remedial provision in a remedial Act, and as such should receive "such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit."[153] However, read as an 'interpretation' of section 81, the following criterion could not have resulted from a purposeful application of the above principle of interpretation:

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[151] *Gladue supra* note 6 at para 64.
[152] *CD 710-2-1 supra* note 19.
[153] *Interpretation Act SC 1985, c 11, s 11*.

> 8(a): The offender must be able to be classified as minimum security or, on a case by case basis as medium security.[154]

The practical reality is that Aboriginal prisoners released under section 81 are almost always released to a Healing Lodge, and access to Healing Lodges is limited to minimum security prisoners. Each Healing Lodge is a minimum security facility. So even if the provision could be interpreted in a non-restrictive way, consistent with the plain language and intention of the *CCRA*, most Aboriginal prisoners would not be able to apply for relief under it: 83.9 percent of Aboriginal prisoners are classified at medium security or above. So although a medium security prisoner can in principle enter into a section 81 agreement, the only communities that accept Aboriginal prisoners in practice are Healing Lodges, and Healing lodges are inaccessible to medium security prisoners.

I think it is reasonable to conclude that the purpose of section 81 is to reduce Aboriginal overrepresentation, and to deliver culturally specific programming to aid in the rehabilitation of prisoners in a manner that is consistent with public safety.

**The Effects of the Community Release Policy**

The effects of the Community Release policy are several. First, maximum security prisoners are disentitled to a s. 81 release. Second, medium security prisoners are in practice disentitled to a s. 81 transfer to a community-run Healing Lodge. Third, not all medium security prisoners are eligible for a s. 81 transfer. Rather, they are confronted with a further obstacle for a

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[154] *CD 710-1-2 supra* note 19 *at s 8(a)*; As it is written, the criterion seems to suggest that to apply to become a section 81 transferee, a prisoner must be either classified as minimum security, or deemed suitable for transfer as a medium security prisoner, within the undefined and criteria-less discretion of a CSC administrator, on a case-by-case basis, which potentially raises the issue of unconstitutional vagueness and whether the criterion meets the 'prescribed by law' standard.

section 81 transfer, namely, a "case-by-case" assessment on unspecified criteria, the result of which is to create the possibility for arbitrary decision making.

These effects are liberty deprivations. Healing Lodges are minimum security institutions so the conditions of confinement are less restrictive than at medium or maximum security designations. Moreover, even if it cannot be shown that the difference in conditions of confinement as between a medium security institution and whatever arrangement may obtain under a negotiated section 81 agreement, the prisoner who is denied eligibility due to their status could challenge the continuation of their initial liberty deprivation by way of *habeas corpus.*[155] Because the denial would be based on irrelevant information, it would be unreasonable and therefore unlawful.

**Disconnect between Objective and Effect**

The disconnect between the effect of absolutely prohibiting maximum security prisoners from transferring under a section 81 agreement and the purposes of reducing Aboriginal overincarceration, providing culturally specific programming within Aboriginal communities to aid in the rehabilitation of prisoners, and ensuring public safety is straightforward. The disconnect is most clearly illustrated by a comparison with parole.

Maximum security prisoners are not absolutely prohibited from applying for parole. Rather, their eligibility to apply is determined by statute, and the decision to grant or deny parole is informed by an individual assessment.[156] Granted, few maximum-security prisoners are released on parole. However, some are.[157] Why then, in the context of parole, is individualized assessment appropriate and consistent with the twin goals of rehabilitation and the maintenance of a just, safe,

[155] The remedy would not be release, but a reconsideration of the decision on relevant information. Likewise, if a prisoner made a challenge to their security classification, the remedy would be reclassification. (See *R v Gamble*, [1998] 2 SCR 596).
[156] *CCRA supra* note 8 ss102(a), 102(b).
[157] See graph p 8.

and peaceful society, but not in the context of section transfers? If it is safe to parole some maximum security prisoners, then it must be possible to do the same within a section 81 agreement. The effect of the absolute prohibition therefore appears to be overbroad for those individuals who could potentially be granted parole but not a section 81 transfer.

Medium security prisoners are in practice ineligible to transfer to a Healing lodge, and in principle subject to a more onerous eligibility standard; that is, on the vague "case-by-case" basis. Medium security prisoners have a diminished hope of eligibility because, at the very least, it appears minimum security prisoners have priority. This effect is arbitrary given the above finding of arbitrariness and overbreadth in respect of the CRS. It is not rational to impose a more stringent eligibility requirement on all medium security prisoners when they have been arbitrarily categorized as such. The use of non-predictive scale items, for any given prisoner, could mean the difference between minimum and maximum. In other words, there is no rational connection between the effect of a diminished hope of eligibility and the objectives of reducing Aboriginal overrepresentation, assisting in rehabilitation by providing culturally specific programming, and ensuring public safety. I conclude that a prisoner can challenge both their security classification in the cases where it has been assigned based on the contribution from non-predictive criteria, and a denial of a section 81 release by *habeas corpus.*

## CONCLUSION

I have approached the problem of Aboriginal overrepresentation by focussing on an underutilized remedial provision in the *CCRA* – s.81. I argued that policy implementation of section 81 frustrates its remedial potential by imposing a minimum security eligibility requirement, thereby excluding over 80 percent of Aboriginal prisoners from possibly attaining a s. 81 release. I argued that the security classification scheme used by CSC is unconstitutional, and that the

eligibility requirement is therefore unconstitutional by association. I concluded that prisoners can challenge a denial under s.81 by way of *habeas corpus.*

My argument relied on characterizing CSC policy as law for the purposes of *Charter* review. It is important that the policies in question lend themselves to this characterization, because it expands the scope of *Charter* review to encompass administrative matters within prison walls.

I have suggested that the defectiveness of the Custody Rating scale justifies its disuse, and I suggested modifications that would make it *Charter* compliant, such as removing the non-predictive subscale items. I think this step ought to be taken.

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