The Constitutionality of Classification

Indigenous 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 crisis that has persisted for decades. The figures are stark: between 2007 and 2016, the Indigenous prisoner population increased by 39 percent while the total prisoner population increased by only 5 percent.[1] At the end of 2016, Indigenous men represented 25.2 percent of federal prisoners,[2] and Indigenous women represented 36.1 percent,[3] even though Indigenous peoples represent less than 5 percent of the Canadian population.[4] Historically, these figures are consistent. Indigenous

[1] The Correctional Investigator Canada, *Annual Report: Office of the Correctional Investigator, 2016-2017* (Ottawa: The Correctional Investigator Canada, 2017) at 48, online (pdf): <www.oci-bec.gc.ca/cnt/rpt/pdf/annrpt/annrpt20162017-eng.pdf> [perma.cc/TS64-FVH8] [OCI 2017].

[2] Public Safety Canada, *Corrections and Conditional Release Statistical Overview, Annual Report 2016*, (Ottawa: Public Works and Government Services Canada, 2017at 53, online (pdf) : <www.publicsafety.gc.ca/cnt/rsrcs/pblctns/ccrso-2016/ccrso-2016-en.pdf> [perma.cc/Q3J9-J396] [CCRSO 2016].

[3] At this time, Indigenous women are the fastest growing prison population. See The Correctional Investigator Canada, *Annual Report of the Office of the Correctional Investigator, 2 014-2015*, (Ottawa: The Correctional Investigator Canada, 2015) at 51, online (pdf): <www.oci-bec.gc.ca/cnt/rpt/pdf/annrpt/annrpt20142015-eng.pdf> [perma.cc/KR5M-EXK9] [OCI 2015].

[4] OCI 2017, *supra* note 1 at 48.

overrepresentation has increased over the past three decades.[5] The crises continues despite statutory and judicial remedial measures.[6]

In this paper, I address one remedial measure: In 1992, Parliament introduced section 81 of the *Corrections and Conditional Release Act* which aimed to decrease Indigenous overrepresentation in federal prisons by allowing Indigenous prisoners to serve their sentences in Indigenous communities or Healing Lodges. [7] Unfortunately, section 81 has not been effective. Indigenous overrepresentation is getting worse, and section 81 agreements remain underutilized, though they offer an important opportunity to enhance Indigenous community control of prisoner's sentences.[8] Of note, the element of community control has been effective in promoting successful community reintegration.[9]

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[5] See Royal Commission on Aboriginal Peoples, *Bridging the cultural divide: a report on Aboriginal people and criminal justice in Canada* (Ottawa: Canada Communication Group, 1995); Michael Jackson, "Locking Up Natives in Canada" (1989) 23:2 UBC L Rev 215; OCI 2017, *supra* note 1 at 48.

[6] See *R v Gladue*, [1999] 1 SCR 688, 171 DLR (4th) 385 [*Gladue*]; *R v Ipeelee* 2012 SCC 13, [2012] 1 SCR 433; *Corrections and Conditional Release Act*, SC 1992, c 20, ss 4(g), 80–84, 151(1),(3) [*CCRA*]; *Criminal Code*, RSC 1985, c C-46, s 718.2(e).

[7] *CCRA*, *supra* note 6, s 81.

[8] See Office of the Correctional Investigator, *Spirit Matters: Aboriginal People and the Corrections and Conditional Release Act* (Ottawa: Correctional Investigator Canada, 2012) at 17–22, online (pdf): <www.oci-bec.gc.ca/cnt/rpt/pdf/oth-aut/oth-aut20121022-eng.pdf> [perma.cc/CS6D-75RE] [Spirit Matters].

[9] For example, the Auditor General of Canada has reported that 78 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. See Office of the Auditor General of Canada, *Report 3: Preparing Indigenous Prisoners for Release* (Ottawa: Office of the Auditor General of Canada, 2016) at para 3.65, online:

There are several barriers to realizing the intent of section 81, including underfunding, institutional will, and community acceptance.[10] The most significant barrier, however, is Correctional Service Canada's requirement that applicants for section 81 transfers have minimum security classifications.[11] This barrier is significant because Indigenous people are not only overrepresented in prisons, but also overrepresented at higher security levels within prisons. In 2016, just 16.1 percent of the Indigenous prisoner population was classified at minimum security, compared to 23.7 percent for non-Indigenous prisoners.[12] Further, more Indigenous prisoners were classified at medium security, at 67.6 percent versus 61.9 percent for non-Indigenous prisoners. Finally, 16.3 percent of Indigenous prisoners are classified at maximum compared with

<www.oag-bvg.gc.ca/internet/English/parl_oag_201611_03_e_41832.html#p63> [perma.cc/TU7R-U3P9] [Preparing Indigenous Prisoners].

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

[11] Correctional Service Canada policy states that "the offender must be able to be classified as minimum security or, on a case by case basis, be classified as medium security." Correctional Service Canada, *CCRA Section 81: Transfers*, Guideline No 710-2-1 online: <www.csc-scc.gc.ca/politiques-et-lois/710-2-1-gl-eng.shtml> [perma.cc/GYP6-3VZU] [GL 710-2-1]. Though the guideline provides for an individualized assessment of medium security prisoners on "a case by case basis," in practice this can only be true of female prisoners because all section 81 Healing Lodges for males are minimum security institutions. So, despite what the policy says on its face, it is reasonable to interpret the "case by case" language as referring only to female prisoners since there is one Healing Lodge for women which accepts medium security prisoners. On the other hand, there is nothing in the *CCRA* that requires s. 81 transferees to serve their sentences in Healing Lodges. In principle, it is possible for sentences to be administered in Indigenous communities in some other way. In that case, the case-by-case language may provide for the individual assessment of medium-male prisoners but not maximum-security prisoners.

[12] CCRSO 2016, *supra* note 2 at p 55.

14.5 percent of non-Indigenous prisoners.[13] Like Indigenous overrepresentation generally, this disproportionate classification in 2016 is consistent throughout Canadian history.[14] These figures show that the relief offered by section 81 is limited by the underrepresentation of Indigenous prisoners in minimum-security. In this paper, I analyze the security classification scheme used by Correctional Services Canada, and I conclude that it violates the *Canadian Charter of Rights and Freedoms.*[15] By that fact the limitation of section 81 transfers to minimum security prisoners is illegitimate.

The analyses is organized as follows. In Part I, I argue that the Correctional Services 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 No 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

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[13] *Ibid.*

[14] See collection of annual reports "Corrections and Conditional Release Statistical Overview", online: <www.publicsafety.gc.ca/cnt/rsrcs/pblctns/index-en.aspx> [perma.cc/SPC9-2GPL]; Canada Human Rights Commission, "Protecting Their Rights: A Systematic Review of Human Rights in Correctional Services for Federally Sentenced Women" (December 2003) at 28, online (pdf): <www.chrc-ccdp.gc.ca/sites/default/files/fswen.pdf> [perma.cc/923A-WUKD] [CHRC]; Carol LaPrairie, "Examining Aboriginal Corrections in Canada" (1996) at 73, online (pdf): < www.publicsafety.gc.ca/cnt/rsrcs/pblctns/xmnng-brgnl-crrctns/xmnng-brgnl-crrctns-eng.pdf> [perma.cc/QBQ7-H9YY]..

[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] Correctional Service Canada, *Security Classification and Penitentiary Placement*, Commissioner's Directive No 705-7, (online: <www.csc-scc.gc.ca/acts-and-regulations/705-7-cd-eng.shtml> [perma.cc/T7XA-53VL] [CD 705-7].

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 Indigenous prisoners into higher security classifications, diminishing their residual liberty and their likelihood of being paroled, thereby prolonging their incarceration. I conclude that these effects are arbitrary and overbroad under s. 7 and cannot be justified under s. 1 of the *Charter*.

Another policy, Guideline No 710-2-1 ("Community Release policy") implements section 81 of *CCRA*, which, as stated, provides that Indigenous prisoners can enter into agreements with the Minister of Public Safety and Emergency Preparedness for release into the care and custody of Indigenous communities to serve 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 security classifications issued by the *Charter* non-compliant Custody Rating Scale (discussed in Part I) to deny release to a Healing Lodge or Indigenous community.[20] I argue that this limitation is a deprivation of liberty for medium and maximum-security prisoners under s. 7 of the *Charter* based on an analysis of recent

[18] *Supra*, note 6, s 30(1).

[19] GL 710-2-1, *supra* note 11; *CCRA*, *supra* note 6, s 81.

[20] GL 710-2-1, *supra* note 11, at para 9(a).

habeas corpus case law.[21] I conclude that those effects are arbitrary and overbroad. Finally, I argue that arbitrarily assigned CRS classifications are challengeable by way of *habeas corpus*.

I. The Security Classification Policy

The Security Classification policy requires the use of a 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 measure the likelihood that a prisoner will be involved in institutional incidents, and therefore also the 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

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[21] Section 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] CD 705-7, *supra* note 17, at paras 10–15.

[23] *Ibid*, Annex B, Parts I–II. Although final security classification decisions are made in light of other assessments and information, such as psychological evaluation and professional judgment, the CRS recommendation is followed 77 percent of the time, and in the 12 percent of the cases where it is not followed, the security rating is increased for Indigenous men. See Correctional Service of Canada, *The Custody Rating Scale as Applied to Male Offenders*, by Renée Gobeil (Ottawa: Public Safety Canada, 2011) at 16, online (pdf): <www.publicsafety.gc.ca/lbrr/archives/cn21484-eng.pdf> [perma.cc/T5AY-VCS9]..

[24] See CD 705-7, *supra* note 17, Annex B, Part I.

[25] *Ibid*, .

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 subscale 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 prisoners are 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 argue 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 classification. So, because the CRS assigns the higher recommended classification, and the least predictive subscale makes that recommendation, the classification prisoners are ultimately

[26] *Ibid*. "Street stability" refers to factors like education level, employment history, family/marriage, interpersonal relationships and living arrangements.

[27] *Ibid*, Annex B, Part II.

[28] *Ibid*.

[29] *Ibid* at para 26.

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 particularly important for Indigenous prisoners. Indigenous prisoners disproportionately present the characteristics that correspond to non-predictive individual subscale items, as well as high score ranges for those items. 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. I argue 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.

1. The Security Classification Policy Violates Section 7

Section 7 guarantees that "[e]veryone has 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 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 results in liberty deprivations, is

[30] *Charter*, *supra* note 15, s 7.

[31] *Bedford v Canada*, 2013 SCC 72 at paras 58, 78, 93, [2013] 3 SCR 1101 [*Bedford*].

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.

a. The Deprivation

Security classification results in two kinds of liberty deprivations. 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.[32]

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.[33] The vast majority of parolees are minimum security

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[32] Correctional Service Canada, *Classification of Institutions*, Commissioners Directive 706 online: <www.csc-scc.gc.ca/lois-et-reglements/706-cd-eng.shtml#E_Security_Requirements> [perma.cc/WC96-YFKZ]; Correctional Service Canada, *Security Levels and What They Mean* online: < www.csc-scc.gc.ca/text/pblct/lt-en/2006/31-2/4-eng.shtml> [perma.cc/S4EJ-H7D9]*;* OCI 2015, *supra* note 3 at at 45,47.]; CHRC, *supra* note 14.

[33] See Office of the Auditor General of Canada, *Report 6: Preparing Male Prisoners for Release – Correctional Service Canada* (Ottawa: Office of the Auditor General of Canada, 2015) at paras 6.12–6.74, online: <www.oag-bvg.gc.ca/internet/English/parl_oag_201504_06_e_40352.html> [perma.cc/TC5C-KNK7] [Preparing Male Prisoners]; Preparing Indigenous Prisoners, *supra* note 3. See also Parole Board of Canada, *Performance Monitoring Reports* online: <www.canada.ca/en/parole-board/corporate/transparency/reporting-to-canadians/performance-monitoring-report.html> [perma.cc/N46P-9XPS].

prisoners. The following data can be used to identify these trends. [34] Maximum security prisoners returning to community are almost without exception released at statutory release (two-thirds of sentence). About two thirds of medium security prisoners returning to community are released at their statutory release date, while only ten to twenty percent of minimum security prisoners tend to be released at their statutory release dates.

	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

b. The Source of the Deprivation

To attract *Charter* protection, a deprivation of liberty must be caused by the state.[35] State action, legislation, or legislative policy is subject to *Charter* review.[36] Corrections Canada is certainly a government entity for the purposes of s. 32 of the *Charter*, and the *Charter* applies to its activities, including the making of rules and policies. I assume without argument as well that the Security Classification Policy causes the liberty deprivations described above. This standard is a low one, met by a reasonable inference on the balance of probabilities, and it does not require the law to

[34] Thanks to Marie Kingsley, Executive Director of the Office of the Correctional Investigator, for sharing this table with me.

[35] *Charter*, *supra* note 15, s 32(1)(a); *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573 at paras 33–35, 33 DLR (4th) 174 [*Dolphin Delivery*].

[36] *Great Vancouver Transport Authority v Canadian Federation of Students – British Columbia Component*, 2009 SCC 31 at para 53, [2009] 2 SCR 295 [*GVTA*].

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.[37]

c. 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 Supreme Court has articulated both substantive and procedural protections of life, liberty, and security of the person as principles of fundamental justice.[38] The former are related to the content or character of laws and the latter to the demands of fairness in legal procedure.[39] My argument relies on the former: the principles that any law that violates s. 7 rights must not be arbitrary or overbroad.[40]

Arbitrariness and overbreadth are purpose-based, relational norms that concern the relationship between the objective of the law and its effects.[41] 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.[42]

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[37] *Bedford supra* note 31 at paras 75 – 76.

[38] 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. 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).

[39] *Ibid*, chapter 13.

[40] *R v Moriarity*, 2015 SCC 55 at para 24, [2015] 3 SCR 485 [*Moriarity*]; *Bedford, supra* note 31 at paras 93–119.

[41] *Bedford*, *supra* note 31 at para 111.

[42] *Ibid.*

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.[43] Overbroad laws are arbitrary in part, in that some of the law's effects are not rationally connected to the law's objective.[44]

The effectiveness of the law or whether it is on balance a good one 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."[45]

To test for arbitrariness and overbreadth, the law's objective and effects must be compared. The analysis begins by identifying the objective.[46] Precision is required because arbitrariness and overbreadth are objective-dependent, 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:[47]

> [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 generally be both a precise and succinct…articulations of the law's objective.[48]

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[43] *Ibid* at paras 118–119.

[44] *Ibid* at paras 111, 113.

[45] *Ibid* at para 123.

[46] *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 73, [2015] 1 SCR 331 [*Carter*]; *Bedford*, *supra* note 31 at para 123. Note: I interchangeably use "objective", "purpose", and "goal" in this paper.

[47] *Carter*, *supra* note 46 at para 77.

[48] *Moriarity*, *supra* note 40 at paras 28–29.

The analysis assumes that the objective is both "lawful and appropriate,"[49] and that it must be identified in its full context. To that end, the text, the context, and scheme of the Act are all relevant.[50]

The objective of the Security Classification policy must therefore be determined in light of the overall objectives of the *CCRA* and the particular purpose of the policy itself. The *CCRA* states that the fundamental objective of all correctional policy is to carry out sentences in a safe and humane fashion, and to assist with the rehabilitation and community reintegration of prisoners through the provision of programs in penitentiaries and in the community.[51] The *CCRA* further states that the protection of society is the paramount consideration in the provision of correctional services.[52] Section 4 identifies the principles that must guide the CSC in administering the *CCRA*.[53] 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 respond to the unique needs of Indigenous prisoners.[54]

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 this context. It is reasonable to assume that the CSC introduced the scale – an objective, statistical

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[49] *Ibid* at para 30.

[50] *Ibid* at para 31.

[51] *Supra* note 6, s 3.

[52] *Ibid*, s 3.1.

[53] *Ibid*, s 4.

[54] *Ibid*, ss 4(a),(c),(g).

instrument – to eliminate subjectivity from the classification process, to ensure that the appropriate restrictions are imposed on prisoners while ensuring safety to the public, and to 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 for the further purpose of assigning the correct security classification. In other words, the purpose of the Security Classification policy is to ensure safety by assigning a security classification that is proportionate to predicted risk.[55] That is why risk is measured in the first place. This is the objective against which the effects are to be compared.

The effects of the Security Classification policy on Indigenous prisoners are well documented.[56] As previously outlined, Indigenous prisoners are disproportionately represented at higher security levels. Put simply, the effect of the CRS is to cause Indigenous 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.

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 measure with what it actually does by asking whether and to what extent the effects of the chosen measure advance its purpose, or whether the rights-infringing effects are unnecessary or inconsistent with that purpose.[57] I compare the objective of the Security Classification policy and

[55] CDO 705 – 7, *supra* note 17, Annex A.

[56] CCRSO 2016, *supra* note 2.

[57] *Moriarity*, *surpa* note 40 at paras 24, 27.

the CRS with the identified effects. In each case, I conclude that the effects are either arbitrary or overbroad.

Whether there is a disconnect between the objective of the CRS and the effect of overclassification is equivalent to the following question: are Indigenous prisoners *accurately* classified at higher security levels. In other words, are Indigenous prisoners overrepresented 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 of measuring risk and correlating it with security levels? That is, is it a valid tool? Does it measure what it is supposed to measure (risk as a function of the individual subscale items)? Data from a recent CSC study shows that the answer to these questions is no.

It is important to note that the s. 7 analysis does not ultimately assess the wisdom or effectiveness of the law.[58] 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 Indigenous 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 flawed tool, that alone does not make it unconstitutional. The point is that in applying it, some Indigenous prisoners who pose a low risk to safety are deprived of their liberty by being classified as medium when they ought to be classified as minimum, or as maximum when they ought to be classified as minimum or medium,

[58] *Ibid* at para 30; *Carter*, *supra* note 46 at para 79; *Bedford*, *supra* note 31 at para 123.

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.[59] A 2011 study concluded that it is valid for security classification purposes.[60] The notion of validity the tool is taken to satisfy is that of discrimination validity. 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.[61] 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 Indigenous prisoners.[62] This fact is legally significant. To be *Charter* compliant, I argue 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.

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[59] See e.g. 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*"* (2004) 46:4 Can J Criminology & Crim Justice 395; ; Cheryl Marie Webster; Anthony N Doob, "'Taking Down the Straw Man' or Building a House of Straw? Validity, Equity, and the Custody Rating Scale" (2004) 46:5 Can J Criminology & Crim Justice 631; Gobeil, *supra*, note 23.

[60] Gobeil, *supra* note 23.

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

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

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 increased from minimum to medium security or above on arbitrary grounds because of the contribution in points from non-predictive subscale items. So notwithstanding whatever predictive validity the scale as a whole may have, the inclusion of non-predictive subscale items might nevertheless mean the difference between minimum, medium or maximum security for a given individual prisoner. That is the problem.

Table 1, 2, and 3 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 Indigenous prisoners for each of the outcomes of interest because fewer of its subscale items are statistically significant. Of note, two of the most heavily weighted items are not statistically significant. As of 2011, 5 of the 7 scale items did not predict: 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 Indigenous prisoners disproportionately present those very characteristics that then qualify them as higher risk on what are in fact non-predictive criteria.[63] The characteristics that Indigenous prisoners are more likely to present are itemized

[63] CCRSO 2016, *supra* note 2 at 62. Compare the following differences between Indigenous and non-Indigenous prisoners:

under the most heavily weighted criteria (see Table 4 and 5) such as severity of current charge, which are negatively correlated with some of the outcomes of interest.

The Correctional Investigator has reported that compared to non-Indigenous prisoners, Indigenous 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.[64]

- "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.
- 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."

[64] OCI 2015, *supra* note 3 at 37.

Association of CRS Items and Conviction of Institutional Charges (Table 1)[65]

	Extent of Association (r_Φ)[66]			
	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)

Association of CRS Items and Involvement in Institutional Incidents (Table 2)[67]

	Extent of Association (r_Φ)			
	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				

[65] Gobeil *supra* note 23 at p 50.

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

[67] *Gobeil supra* note 23 at p 49.

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)[68]

	Extent of Association (r_Φ)			
	Aboriginal		Non-Aboriginal	
CRS Items	Any Return	Return with Offence	Any Return	Return with Offence
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)[69]

	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

[68] *Ibid* at p 52.
[69] *Ibid* at p 14.

Alcohol/drug use	29	71	54	46
Age at time of sentence	49	51	62	38

Assignable Scores for Scale Items (Table 5)[70]

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 because a greater ratio of its subscale items are statistically significant. For Indigenous 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 did not predict involvement in institutional incidents or conviction for institutional charges (Table 1 and 2), and there was no statistically significant relationship between escape history and conviction for institutional charges either (Table 1). The fact that the Security Risk subscale is less predictive is significant because, as discussed above, where there is

[70] CD 705-7 *supra* note 17.

a difference in security classification recommendations between the two subscales, the scale which recommends the higher classification will determine the final security classification.[71]

In Gobeil 2011, the author states: "[a]s mentioned, the two subscales produce independent security classification recommendations, and the actual CRS security classification recommendation corresponds to the higher of these" and cites CSC's security classification policy, Commissioner's Directive 705 - 7.[72] The claim quoted above is not explicitly made in that directive, but I suppose it follows by 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 both a 78 on the Institutional Adjustment Subscale receives a minimum security recommendation on that subscale, and a 64 on the Security Risk Subscale receives a

[71] Subject to a discretionary override (CD 705-7, *supra* note 17). I note that this is data about male prisoners, so the conclusions I draw are not necessarily applicable to female Indigenous 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: <www.csc-scc.gc.ca/research/005008-0273-eng.shtml> [perma.cc/SSD8-F9MJ]. See Webster and Doob, *supra* note 74 for an empirical critique of the CRS and women prisoners. The authors identify the same problems of predictive validity as are found above, but they do not frame those findings within a *Charter* analysis.

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

medium security on that subscale, and will therefore be categorized by the CRS as medium security.[73]

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 shows that the Institutional Adjustment subscale recommended a minimum-security classification in 78 percent of assignments, whereas the Security Risk subscale recommended minimum security in only 19 percent of the cases, and medium security in 78 percent of cases.[74] That means the overall CRS recommendation could only be minimum security in 19 percent of the cases, and therefore the less predictive subscale overwhelmingly determined 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. The same is true, *mutatis mutandis*, for maximum security classifications.[75] That means that the effect of these classifications is arbitrary because the purpose of the CRS is to assign security classifications based on predicted risk. In other words, if the objective of the CRS is to predict risk in order to assign a

[73] CD 705-7, *supra* note 17 at para 26.

[74] Gobeil, *supra* note 23 at 15.

[75] I note that the more predictive subscale more frequently recommends maximum than the Security Risk subscale. See *Ibid*. 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 (recall security classifications are re-assessed at two year intervals) at a maximum security classification, despite the fact that these items are the least predictive of risk. That is arbitrary for the purposes of section 7.

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*.[76]

To sum up: Indigenous prisoners are being arbitrarily classified because they are scoring points on the Security Risk Subscale for subscale items that have no predictive value.[77] And because Indigenous 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 inclusion of those items in the Security Risk subscale disproportionately impacts Indigenous prisoners. The more predictive subscale – the Institutional Adjustment Subscale – is not used to assign security classifications in many cases.[78] Thus, in those cases, the liberty deprivations caused

[76] The same point holds, *mutatis mutandis*, for maximum-security prisoners.

[77] 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 also arbitrary for the purposes of the *Charter*.

[78] Note: a key difference between the facts and analysis I have laid out above and those from the recent SCC decision in *Ewert v Canada*, 2018 SCC 30. In *Ewert*, the Court was not prepared to find that CSC's use of psychological

by the security classifications are arbitrary given the purpose of classifying prisoners in terms of the risk they pose as measured by 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. Indigenous prisoners are in some cases going to be classified as medium where they do not pose a medium security level of risk, or maximum where the risk they pose is not maximal. These effects are also inconsistent with the statutory objectives of using measures that are limited to what is necessary and proportionate to attaint the purposes of the Act, having regard to all relevant information.[79]

2. The Policy Is Not Justified Under 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 "demonstrably justified in a free and democratic society"?[80]

In order to be saved under section 1, the impugned policy must be prescribed by law, and 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

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assessment tools that are not known to be reliable for Indigenous prisoners violated the *Charter,* even where those assessments were considered by Corrections officials for the purposes of reclassification and the granting of parole, etc. The CRS is different. I am not arguing that it is not known to be reliable, but that it is known to be unreliable. So the argument is much stronger.

[79] For example, a "medium security" designation will not be relevant for the purposes of penitentiary placement in any cases where it is assigned as a result of the contribution in points from non-predictive subscale items.

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

deleterious effects must be proportionate to its salutary ones.[81] I conclude that the Security Classification policy is prescribed by law and is motivated by a pressing and substantial objective, but it is not rationally connected to its rights-infringing effects and is not minimally impairing.

a. 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":[82]

> 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.[83]

The policy is law for the purposes of s. 1.[84] 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.[85] Staff must use the CRS to assign a security classification to all incoming prisoners.[86] The policy establishes prisoner's rights and obligations by creating different liberty restrictions corresponding to the different security classifications. Accessibility is

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[81] *R v Oakes*, [1986] 1 SCR 103 at paras 69–71, 26 DLR (4th) 200 [*Oakes*].

[82] *GVTA*, *supra* note 36 at para 64.

[83] *Ibid.*

[84] I am adopting this argument from Adelina Iftene, "Employing Older Prisoner Empirical Data to Test a Novel s 7 Charter Claim" (2017) 40:2 Dal LJ 1, where the author argues that certain Commissioner's Directives are prescribed by law for the purposes of section 1, as here, but also for the purposes of section 7.

[85] *CCRA supra* note 6 s 97, 98.

[86]CD 705-7, *supra* note 17 at paras 24–28.

required by the *CCRA*, and the policy is in fact accessible to staff, prisoners, and the public.[87] 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.[88]

b. 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."[89] The objective that must be identified is that of the measures which cause the limitation on the *Charter* right.[90] The impugned measure is 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

[87] *CCRA supra* note 6 s.98(2) requires Commissioner's Directives to be accessible to prisoners, staff members, and the public.

[88] See Correctional Service of Canada (Research Branch), *Security Classification Using the Custody Rating Scale*, by Brian A Grant & Fred Luciani" (1998), , online (pdf): <www.csc-scc.gc.ca/research/092/r67_e.pdf> [perma.cc/5AGX-KR5J]. [

[89] *R v Big M Drug Mart Ltd* [1985] 1 SCR 295 at para 139, 18 DLR (4th) 321.

[90] *Oakes*, *supra* note 81 at para 73.

linguistic differences and are responsive to the special needs of women, aboriginal peoples, persons requiring mental health care and other group."[91] The specific objective of the CRS "to determine the inmates security classification and penitentiary placement"[92] must be 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.[93] CSC has decided that 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 Indigenous prisoners because there is no significant relationship between most of 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 Indigenous 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,

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[91] *CCRA*, *supra* note 6, ss 4(a),(c),(g) [emphasis added]

[92] See the statement of purpose of CD 705-7, *supra* note 17.

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

it is irrational to rely on inaccurate information for that purpose and to classify prisoners who pose a minimum security risk as medium security.[94]

Furthermore, an effect of a policy which directly contradicts the statutory objectives of the Act that the policy implements cannot be rationally connected to its effects.[95] The *CCRA* requires that sentences be administered using measures that are limited to only what necessary and proportionate to the purposes of the Act, having regard to all relevant information.[96] The information on which the CRS relies in classifying Indigenous 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.[97]

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

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[94] 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.

[95] *Vriend v Alberta*, [1998] 1 SCR 493 at paras 118−119, 156 DLR (4th) 385.

[96] *Supra*, note 6, ss 4(a)–(c).

[97] See also *R v Chambers*, 2014 YKCA 13 at para 74, 316 CCC (3d) 44; *Hitzig v R*, 177 OAC 321 at para 115, 231 DLR (4th) 104. These two appellate cases held that the proposition that the state must obey the law is a principle of fundamental justice. 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.

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 therefore cannot be justified under s. 1.[98] A prisoner will therefore be able to challenge a security classification determined in this manner by way of *habeas corpus*, as discussed below.

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 Indigenous community to serve their sentence. The policy restricts eligibility to minimum-security prisoners, or, on a case by case basis, medium- security female prisoners.[99] If a maximum-security prisoner were to apply, they would automatically be denied, whereas medium-security prisoners may benefit from individual assessment. By employing the unconstitutionally assigned security classifications discussed in Part I, the Community Release policy violates s. 7. Where a prisoner is denied an application based on their security status, and their security status has been determined by the CRS in the *Charter* non-

[98] I note that the policy cannot be saved by the fact that it allows for a discretionary override of the presumptive classification determined by the CRS. It may not be contended that where the initial CRS-determined security classification is inappropriate (as a result of the contribution in points from non-predictive subscale items), a *Charter* infringement can be avoided because that determination can be overridden at the discretion of a corrections official. Unconstitutional laws are null and void under s. 52 of the *Constitution Act* and cannot be made constitutional on a case-by-case basis depending on how administrators apply it, and bad policy, "fixed up" on a case-by-case basis by corrections officials is not preferred by public policy. For a discussion of these points in a different context, see *R v Nur*, 2015 SCC 15, at paras 85–91, [2015] 1 SCR 773.

[99] GL 710-2-1, *supra* note 17.

compliant way illustrated above, I argue that they could challenge that classification under *habeas corpus* under section 10(c) of the *Charter*.[100] More generally however, a prisoner should be able to challenge by way of habeas corpus any security classification that results from the contribution in points from non-predictive subscale items.

1. The Community Release Policy Violates Section 7 and Habeas Corpus Should Lie to Challenge Unconstitutional Security Classifications

In *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."[101] Though Lamer CJ confined his analysis to *habeas corpus* applications, the principles should be applicable under s. 7.[102]

The liberty deprivation resulting from the Community Release policy falls under 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*.[103] While s. 81 of the *CCRA* grants Indigenous prisoners a

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[100] *Charter*, *supra* note 15, s 10(c): Everyone has the right to have the legality of their detention determined by way of *habeas corpus*. Of course, any arbitrary classification by the CRS could also be challenged.

[101] *Dumas v Leclerc Institute*, [1986] 2 SCR 459 at para 12, 34 DLR (4th) 427 [*Dumas*] [emphasis added].

[102] 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.

[103] *Supra*, note 6 s 81: 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.

conditional opportunity to serve their sentence in the care and custody of an Indigenous 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 Indigenous prisoner is eligible to request a transfer. However, by imposing a minimum-security classification requirement, the Community Release policy *makes 84 percent of Indigenous prisoners ineligible for a transfer*.[104] This is a consequence of the fact that CSC has structured section 81 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.[105] Eighty-four percent of Indigenous 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 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 are cases where a prisoner

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[104] Eighty-four percent of Indigenous prisoners are classified as medium-security or above.

[105] See Correctional Service Canada, *Correctional Service Canada Healing Lodges*, online: <www.csc-scc.gc.ca/aboriginal/002003-2000-eng.shtml> [perma.cc/AZ3B-4XZZ].

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 analyzed whether there is a deprivation of liberty in either of these scenarios. The leading case among those which hold that there is not is *LVR*.[106] In that case, a prisoner ("LVR") 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 reclassified as a medium security prisoner and transferred to Mountain Institution, a medium security penitentiary. LVR applied to be reclassified as minimum security and sought to be transferred to a minimum-security institution. The application was denied.[107] LVR 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.[108]

The chambers judge found that *habeas corpus* could not lie to challenge the reclassification decision.[109] The chambers judge relied on *Mapara*, 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.[110] Likewise, because LVR's classification status remained at medium

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[106] *LVR v Mountain Institution (Warden)*, 2016 BCCA 467, 346 CCC (3d) 254 [*LVR*].

[107] *Ibid* at para 3.
[108] *Ibid* at paras 1, 11.
[109] *Ibid* at paras 7–8.

[110] *Mapara v Ferndale Institution*, 2012 BCCA 127 at paras 15–16 [*Mapara*].

security and the conditions of his confinement had not changed, the chambers judge reasoned that there was no diminution of LVR's residual liberty.[111]

This reasoning was upheld on appeal. Stromberg-Stein JA, for the British Columbia Court of Appeal applied the leading *habeas corpus* case, *Khela*:[112]

> *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*.[113]

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."[114] Each of these are examples of the second type of liberty deprivation identified in *Dumas* (a substantial change in the conditions of detention).

However, the quotation from Stromberg-Stein JA contains a *nonsequitur.* It is not valid to reason 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 reason that because there *are* deprivations of liberty of the second type identified in *Dumas,* there *are not* deprivations of the third type.

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[111] *LVR*, *supra* note 106 at para 8.
[112] *Khela v Mission Institution*, 2014 SCC 24, [2014] 1 SCR 502 [*Khela*].

[113] *LVR*, *supra* note 106 at para 42 [emphasis added].

[114] *Khela*, *supra* note 112 at para 34.

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.[115] 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.[116] Since *Khela,* a detention could be unlawful for being unreasonable.[117]

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, which would have resulted in Dumas' being paroled, was fulfilled. This factual finding was crucial to the Court's ultimate dismissal of Dumas' challenge. 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."[118] But Dumas' detention was never unlawful because Dumas had never actually acquired the status of a parolee. Because Dumas' parole was conditional and the condition was

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[115] *May v Ferndale Institution,* 2005 SCC 82 at para 74, [2005] 3 SCR 809 .

[116] *Khela*, *supra* note 112 at para 72.

[117] *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."

[118] *Dumas*, supra note 101 at para 12.

never fulfilled, 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. This contradicts Stromberg-Stein JA's dictum above.

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.[119]

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 only to illustrate 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 conditions thereof. The conditions were not material to Dumas' claim – it was the legality that mattered.[120]

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[119] *LVR*, *supra* note 106 at para 25.

[120] Frankel J.A. makes the same mistake in *Mapara*, *supra* note 110, where he states at para 17 that the Court in *Dumas* rejected the challenge to the Boards decision because "the Board had not affected his residual liberty

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 impact of *Khela* on *Dumas.*[121]

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 LVR'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

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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 did not matter.

[121] See *Gogan v R (Attorney General)*, 2017 NSCA 4, where the Nova Scotia Court of Appeal is careful to confine the precedential value of *LVR* to its specific facts. The Court in *Gogan* carefully distinguishes between the second and third type of deprivation at paras 53–54.

> hearing a petition for *habeas corpus*…cannot consider the lawfulness of the administrative body's decision unless there is a deprivation of residual liberty.[122]

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).[123] 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*.[124]

a. 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 Indigenous community for the provision of

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[122] *Supra* note 106 at para 40.

[123] Without knowing the basis of LVR'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 LVR 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 LVR'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?*

[124] 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*. See e.g. *Canada (Attorney General) v Hollinger*, [2007] OJ No 3326, 2007 CanLII 36816 (ONSC). 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 *Khela* and *Dumas* and therefore more persuasive.

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."[125] 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.[126]

Additionally, where Parliament has enacted laws specific to Indigenous 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:

> [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.[127]

Similarly, it is reasonable to assume that Parliament intended to redress Indigenous overincarceration 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

[125] *Supra* note 6, s 81.
[126] Spirit Matters, *supra* note 8 at para 12.

[127] *Supra* note 6 at para 64.

> accessing the broad Aboriginal social and community services networks that support the reintegration of an offender.[128]

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 limiting eligibility criteria to minimum security, or on a case by case basis, medium security prisoners.[129]

The practical reality is that Indigenous 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 for men 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 Indigenous prisoners would not be able to apply for relief under it: 83.9 percent of Indigenous 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 Indigenous prisoners in practice are Healing Lodges, and Healing lodges are inaccessible to medium-security prisoners who are men. There is thus no individualized assessment possible in those cases. I think it is reasonable to conclude that the purpose of section 81 is to reduce Indigenous overrepresentation, and to deliver culturally specific programming to aid in the rehabilitation of prisoners in a manner that is consistent with public safety.

b. The Effects of the Community Release Policy

The effects of the eligibility criterion of the Community Release policy are several. First, maximum security prisoners are ineligible for a s. 81 release. Second, medium security prisoners

[128] GL 710-2-1, *supra* note 17.

[129] GL 710-2-1, *supra* note 17 at para 9(a).

are in practice ineligible for a s. 81 transfer to a community-run Healing Lodge. These effects are liberty deprivations under the third type from *Dumas*.

c. 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 Indigenous overincarceration, providing culturally specific programming within Indigenous 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.[130] Granted, few maximum-security prisoners are released on parole, but some are.[131] Why then, in the context of parole, is individualized assessment appropriate and consistent with the goals of rehabilitation and the maintenance of a just, safe, and peaceful society, but not in the context of section 81 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, in addition to those who are assigned a maximum-security classification purely on the basis of non-predictive subscale items. It is important to keep in mind that all prisoners serving life sentences will be classified as maximum security given the distribution of points for

[130] *CCRA*, *supra* note 6, ss 102(a)–(b).

[131] See chart on p 8 (this page number is likely to change on final version) .

Medium security prisoners are in practice ineligible to transfer to existing section 81 Healing Lodges although the policy seems to provide for individualized assessment on a "case-by-case" basis. It may be said that medium security prisoners therefore have a diminished hope of eligibility. 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 where some have been arbitrarily categorized as such. The use of non-predictive scale items, for any given prisoner, could mean the difference between minimum, medium, or maximum security. There is no rational connection between the effect of a diminished hope of eligibility and the objectives of reducing Indigenous overrepresentation, assisting in rehabilitation by providing culturally specific programming, and ensuring public safety. I conclude that a prisoner whose security classification results from the contribution in points from non-predictive scale items in the CRS may challenge that decision by way of *habeas corpus*. Decisions to deny section 81 transfers based on those same security classifications will therefore be unreasonable.

Conclusion

Indigenous overrepresentation in prisons remains a significant issue in Canada. One factor that contributes to this issue is the underutilized remedial provision in the *CCRA* – s.81. I argue that the policy implementation of section 81 frustrates its remedial potential by imposing a minimum-security eligibility requirement, thereby excluding over 80 percent of Indigenous prisoners from possibly attaining a s. 81 release. I advanced the claim that the security classification scheme used by CSC is unconstitutional, and that the eligibility requirement is therefore unconstitutional by association. I conclude that prisoners can challenge arbitrary classifications resulting from the contribution in points from non-predictive subscale items by way

of *habeas corpus*. In these cases, a decision to deny a section 81 transfer based on the impugned security classification will also be unreasonable. I suggest that the defectiveness of the Custody Rating Scale demands its disuse. Further, I offer modifications that would make it *Charter* compliant, such as removing the non-predictive subscale items. These measures would begin to respond to the Truth and Reconciliation Commission's Call to Action 35.