



SUPREME COURT OF CANADA

CITATION: Ewert v. Canada, 2018 SCC 30

APPEAL HEARD: October 12, 2017

JUDGMENT RENDERED: June 13, 2018

DOCKET: 37233

BETWEEN:

Jeffrey G. Ewert
Appellant

and

**Her Majesty The Queen in Right of Canada (the Commissioner of the
Correctional Service of Canada, the Warden of Kent Institution and the Warden
of Mission Institution)**

Respondent

- and -

**Native Women's Association of Canada, Canadian Association of Elizabeth Fry
Societies, Mental Health Legal Committee, West Coast Prison Justice Society,
Prisoners' Legal Services, Canadian Human Rights Commission, Aboriginal
Legal Services, Criminal Lawyers' Association (Ontario), British Columbia Civil
Liberties Association and Union of British Columbia Indian Chiefs**
Interveners

CORAM: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté,
Brown and Rowe JJ.

REASONS FOR JUDGMENT: Wagner J. (McLachlin C.J. and Abella, Moldaver,
(paras. 1 to 90) Karakatsanis, Gascon and Brown JJ. concurring)

REASONS DISSENTING IN PART: Rowe J. (Côté J. concurring)
(paras. 91 to 129)

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EWERT v. CANADA

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Indexed as: Ewert v. Canada

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File No.: 37233.

2017: October 12; 2018: June 13.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Prisons — Inmates — Indigenous offenders — Accuracy of information about offenders — Federal correctional authorities relying on psychological and actuarial assessment tools to make decisions regarding inmates in their custody — Métis inmate challenging reliance on these tools on ground that their validity when applied to Indigenous offenders has not been established through empirical research — Whether correctional authorities breached their statutory obligation to ensure that information about offenders is accurate by using these tools in respect of Indigenous offenders — If so, whether it is appropriate to issue declaration that obligation was breached — Corrections and Conditional Release Act, S.C. 1992, c. 20, s. 24(1).

Constitutional law — Charter of Rights — Principles of fundamental justice — Right to equality — Whether use of psychological and actuarial assessment tools to make decisions about Indigenous offender breached his rights to liberty, security of the person and equality — Canadian Charter of Rights and Freedoms, ss. 7, 15.

E, who identifies as Métis, is currently serving two concurrent life sentences. He has spent over 30 years in federal custody, in medium and maximum security settings. E challenged the use of five psychological and actuarial risk

assessment tools used by the Correctional Service of Canada (“CSC”) to assess an offender’s psychopathy and risk of recidivism, on the basis that they were developed and tested on predominantly non-Indigenous populations and that no research confirmed that they were valid when applied to Indigenous persons. He claimed, therefore, that reliance on these tools in respect of Indigenous offenders breached s. 24(1) of the *Corrections and Conditional Release Act* (“CCRA”), which requires the CSC to “take all reasonable steps to ensure that any information about an offender that it uses is as accurate, up to date and complete as possible”, as well as ss. 7 and 15 of the *Charter*. The trial judge agreed that, by relying on these tools despite long-standing concerns about their application to Indigenous offenders, the CSC breached its obligation under s. 24(1) of the *CCRA* and infringed E’s rights under s. 7 of the *Charter*. The Federal Court of Appeal overturned both of these findings.

Held (Côté and Rowe JJ. dissenting in part): The appeal should be allowed in part. The CSC breached its obligation set out in s. 24(1) of the *CCRA*.

Per McLachlin C.J. and Abella, Moldaver, Karakatsanis, **Wagner**, Gascon and Brown JJ.: In continuing to rely on the impugned tools without ensuring that they are valid when applied to Indigenous offenders, the CSC breached its obligation under s. 24(1) of the *CCRA* to take all reasonable steps to ensure that any information about an offender that it uses is as accurate as possible. However, the CSC’s reliance on the results generated by the impugned tools does not constitute an infringement of E’s rights under s. 7 or s. 15 of the *Charter*.

The inquiry into whether the CSC met its obligation under s. 24(1) of the *CCRA* gives rise to two main questions. The first is whether results generated by the impugned tools are a type of information to which s. 24(1) applies. Reading the words of s. 24(1) in their entire context and in their grammatical and ordinary sense harmoniously with the scheme and objects of the *CCRA*, the obligation in s. 24(1) applies to results generated by the impugned tools. In the ordinary sense of the words in s. 24(1), the knowledge derived from the impugned tools by the CSC is information about an offender.

This interpretation is supported by the relevant statutory context. Sections 23 through 27 of the *CCRA* deal with different aspects of the CSC's collection, use and dissemination of different types of information. When they are read together, it is clear that where Parliament intended a particular provision to apply to only certain types of information, it enumerated them or otherwise qualified the scope of the information. This reinforces the conclusion that the obligation in s. 24(1), which applies to any information, was intended to have broad application. The context of these other provisions also confirms that the broad scope of s. 24(1) is not limited by the narrower scope of s. 24(2). Furthermore, the legislative scheme within which the CSC operates and the CSC's practice based on the scheme contemplate that the CSC will use the results generated by the tools in making important decisions about offenders, and CSC policy requires its use in certain circumstances. This favours applying the obligation in s. 24(1) to this information.

In addition, the statutory purpose of the correctional system supports this interpretation. Accurate information about an offender's psychological needs and the risk he or she poses is crucial to achieving the system's purpose of contributing to the maintenance of a just, peaceful and safe society by carrying out sentences through safe and humane custody of inmates and assisting in their rehabilitation and reintegration into the community. Interpreting s. 24(1) as applying to a broad range of information is also consistent with the paramount consideration for the CSC: the protection of society may be undermined if inaccurate tests are applied and risk is underestimated. The nature of the information derived from the impugned tools provides further support for this interpretation: these tools are considered useful because the information from them can be scientifically validated; therefore, it should be accurate. As a result, the CSC's statutory obligation at s. 24(1) applies to results generated by the impugned assessment tools.

The second question to be addressed is whether the CSC breached its obligation, and more specifically, whether it failed to take all reasonable steps to ensure that the impugned tools produce accurate information when applied to Indigenous persons. Section 24(1) requires that the CSC take all reasonable steps to ensure the accuracy of information about an offender that it uses, not all possible steps. What constitutes all reasonable steps will vary with the context. In this case, the trial judge's conclusion that the CSC failed to take the reasonable steps required is amply supported by the record. The CSC had long been aware of concerns regarding the possibility of these tools exhibiting cultural bias yet took no action to confirm

their validity and continued to use them in respect of Indigenous offenders, despite the fact that research would have been feasible. In doing so, the CSC did not meet the legislated standard set out in s. 24(1). This conclusion is supported by the interpretation and application of the guiding principle set out in s. 4(g) of the *CCRA*. This principle requires that correctional policies, programs and practices must respect gender, ethnic, cultural and linguistic differences and must be responsive to the special needs of equity-seeking groups, and in particular Indigenous persons. Section 4(g) represents an acknowledgement of the systemic discrimination faced by Indigenous persons in the Canadian correctional system. It is evident from the grammatical and ordinary sense of the words of s. 4(g) and the legislative history of the *CCRA* that s. 4(g) should be understood as a direction from Parliament to the CSC to advance substantive equality in correctional outcomes for Indigenous offenders. It is critical that the CSC give this direction meaningful effect. In the context of the present case, this means, at a minimum, addressing the long-standing, and credible, concern that continuing to use the impugned tools in evaluating Indigenous inmates perpetuates discrimination and disparity in correctional outcomes between Indigenous and non-Indigenous offenders. The CSC must ensure that its policies and programs are appropriate for Indigenous offenders and responsive to their needs and circumstances. For the correctional system to operate fairly and effectively, the assumption that all offenders can be treated fairly by being treated the same way must be abandoned. The CSC's inaction with respect to the concerns raised about the impugned tools fell short of what s. 24(1) required it to do.

In the circumstances of this case, it is appropriate to issue a declaration that the CSC has failed to meet its obligation under s. 24(1) of the *CCRA*. A court may, in its discretion, grant a declaration where it has jurisdiction to hear the issue, where the dispute is real and not theoretical, where the party raising the issue has a genuine interest in its resolution, and where the respondent has an interest in opposing the declaration sought. These criteria are met. Although a declaration is an exceptional and discretionary remedy which should normally be declined where there exists an adequate alternative statutory mechanism to resolve the dispute or to protect the rights in question, the statutory grievance mechanism that may be available to E has not been effective and he should not be required to begin the grievance process anew.

E has not established an infringement of his rights under s. 7 of the *Charter*. To establish that the CSC's reliance on the impugned tools violated the principle of fundamental justice against arbitrariness or that against overbreadth, E had to show on a balance of probabilities that the CSC's practice of using the impugned tools with respect to Indigenous offenders had no rational connection to the government objective. He has not done so: there was no evidence before the trial judge that how the impugned tools operate in the case of Indigenous offenders is likely to be so different from how they operate in the case of non-Indigenous offenders that their use in respect of the former is completely unrelated to the government objective. E also failed to meet his onus of establishing that a new principle of fundamental justice — that the state must obey the law — should be

found to exist. Similarly, E has not established the infringement of his rights under s. 15 of the *Charter* that he alleged. The trial judge could not have found, on the evidence before him, that the impugned tools overestimate the risk posed by Indigenous inmates or lead to harsher conditions of incarceration or to the denial of rehabilitative opportunities because of such an overestimation. His conclusion should not be disturbed.

Per Côté and Rowe JJ. (dissenting in part): There is agreement with the majority with respect to E's ss. 7 and 15 *Charter* claims. However, there is disagreement that s. 24(1) of the *CCRA* imposes an obligation on the CSC to conduct research as to the validity of the impugned tools. Although it is important to address Indigenous overrepresentation in prison, and there is concern with the CSC's inaction with respect to the issue raised by E, it was not Parliament's intent to hold the CSC to account on this issue pursuant to s. 24(1). The scope of the obligation in s. 24(1), as applied to the impugned tools, simply requires that the CSC maintain accurate records of the inmates' test scores. Interpreted in their entire context and in their grammatical and ordinary sense harmoniously with the scheme and the object of the *CCRA* and the intention of Parliament, the words of s. 24(1) refer to biographical or factual information about an offender, such as age, criminal record, behaviour in prison, or courses taken with a view to rehabilitation, that should be accurate, up to date, and complete. The scheme that is set out in ss. 23 and 24 is straightforward: s. 23 lists information that is to be recorded, s. 24(1) requires the CSC to record this information accurately and to keep it up to date, and s. 24(2) provides a means for an inmate to

correct errors or deficiencies. The *CCRA*'s goals of managing the custody of offenders, assisting in their rehabilitation and reintegration, and protecting society require good decision-making based on accurate information. Section 24 relates to the accuracy of information, thus it serves an important function. However, that function does not include verifying the validity of the impugned tools. Rather, the scheme reflects Parliament's intent to provide offenders with a specific remedy to make sure that the CSC's duty to maintain accurate records is met. The word "information" in ss. 24(1) and 24(2), consecutive subsections of the same provision, should be given the same meaning. These provisions are about accurate record-keeping, not about challenging the means that the CSC uses to make its decisions. When an offender's complaint is about the way that a particular decision is made, the *CCRA* provides a means for offenders to file a grievance and if necessary, pursue judicial review.

There is also disagreement with the majority as to the remedy. A declaration should not be granted, even in the exceptional circumstances of this case. The proper remedy for breach of statutory duty by a public authority is judicial review for invalidity. Allowing inmates to apply for a declaration would effectively bypass the ordinary process of judicial review and thus fail to accord the deference typically shown to administrative decision makers. This could open the door to undue interference with the discharge of administrative functions in respect of matters delegated to administrative bodies. It is unwise to depart from settled legal principles, even on the facts of this case. The appeal should be dismissed.

Cases Cited

By Wagner J.

Referred to: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41; *Ewert v. Canada (Attorney General)*, 2008 FCA 285, 382 N.R. 370; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *R. v. Gladue*, [1999] 1 S.C.R. 688; *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101; *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3; *R. v. Malmö-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571; *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623; *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 S.C.R. 99; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44; *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *Ewert v. Canada (Attorney General)*, 2007 FC 13, 306 F.T.R. 234.

By Rowe J. (dissenting in part)

R. v. Gladue, [1999] 1 S.C.R. 688; *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433; *Ewert v. Canada (Attorney General)*, 2007 FC 13, 306 F.T.R. 234, aff'd 2008 FCA 285, 382 N.R. 370; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *R. v. Zeolkowski*, [1989] 1 S.C.R. 1378; *Kim v. Canada*, 2017 FC 848; *Tehrankari v. Canada (Correctional Service)* (2000), 38 C.R. (5th) 43; *Charalambous v. Canada*

(Attorney General), 2015 FC 1045, aff'd 2016 FCA 177, 483 N.R. 398; *Tehrankari v. Canada (Attorney General)*, 2012 FC 332; *Greater Vancouver (Regional District) v. British Columbia*, 2011 BCCA 345, 339 D.L.R. (4th) 251; *Holland v. Saskatchewan*, 2008 SCC 42, [2008] 2 S.C.R. 551; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 7, 15.

Corrections and Conditional Release Act, S.C. 1992, c. 20, ss. 3, 3.1, 4, 15.1, 23 to 27, 23, 24, 25(1), 26, 27, 28, 28 to 31, 30, 80 to 84, 90.

Corrections and Conditional Release Regulations, SOR/92-620, ss. 13, 17, 18, 74 to 82.

Criminal Code, R.S.C. 1985, c. C-46, s. 718.2(e).

Federal Courts Rules, SOR/98-106, r. 64.

Federal Courts Act, R.S.C. 1985, c. F-7, s. 17.

Interpretation Act, R.S.C. 1985, c. I-21, s. 12.

Authors Cited

Brown, Donald J. M., and John M. Evans, with the assistance of David Fairlie. *Judicial Review of Administrative Action in Canada*. Toronto: Thomson Reuters, 2013 (loose-leaf updated April 2018, release 1).

Canada. *Commission of Inquiry into Certain Events at the Prison for Women in Kingston*. Ottawa: Public Works and Government Services Canada, 1996.

Canada. Department of Justice and Solicitor General. *A Framework for Sentencing, Corrections and Conditional Release — Directions for Reform in Sentencing*,

Corrections and Conditional Release. Ottawa: Supply and Services Canada, 1990.

Canada. House of Commons. *House of Commons Debates*, vol. IV, 3rd Sess., 34th Parl., November 4, 1991, pp. 4430-31.

Canada. Office of the Auditor General. *Fall 2016, Reports of the Auditor General of Canada: Report 3, Preparing Indigenous Offenders for Release — Correctional Service Canada*. Ottawa, 2016.

Canada. Office of the Correctional Investigator. *Annual Report 2015-2016*. Ottawa, 2016.

Canada. Office of the Correctional Investigator. *Spirit Matters: Aboriginal People and the Corrections and Conditional Release Act — Final Report*. Ottawa, 2012.

Canada. Royal Commission on Aboriginal Peoples. *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada*. Ottawa, 1996.

Canada. Solicitor General. *Towards a Just, Peaceful and Safe Society: The Corrections and Conditional Release Act Five Years Later — Consolidated Report*. Ottawa: Public Works and Government Services of Canada, 1998.

Hogg, Peter W., Patrick J. Monahan and Wade K. Wright. *Liability of the Crown*, 4th ed. Toronto: Carswell, 2011.

Manitoba. Public Inquiry into the Administration of Justice and Aboriginal People. *Report of the Aboriginal Justice Inquiry of Manitoba*, vol. 1, *The Justice System and Aboriginal People*. Winnipeg, 1991.

Sarna, Lazar. *The Law of Declaratory Judgments*, 4th ed. Toronto: Thomson Reuters, 2016.

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 6th ed. Markham, Ont.: LexisNexis, 2014.

APPEAL from a judgment of the Federal Court of Appeal (Nadon, Dawson and Webb JJ.A.), 2016 FCA 203, 487 N.R. 107, 363 C.R.R. (2d) 120, [2016] F.C.J. No. 853 (QL), 2016 CarswellNat 3417 (WL Can.), setting aside a decision of Phelan J., 2015 FC 1093, 343 C.R.R. (2d) 15, [2016] 1 C.N.L.R. 50, [2015] F.C.J.

No. 1123 (QL), 2015 CarswellNat 4551 (WL Can.). Appeal allowed in part, Côté and Rowe JJ. dissenting in part.

Jason B. Gratl and *Eric Purtzki*, for the appellant.

Anne Turley and *Banafsheh Sokhansanj*, for the respondent.

Pam MacEachern and *Virginia Lomax*, for the interveners the Native Women's Association of Canada and the Canadian Association of Elizabeth Fry Societies.

Mercedes Perez and *Karen A. Steward*, for the intervener the Mental Health Legal Committee.

Avnish Nanda, for the interveners the West Coast Prison Justice Society and the Prisoners' Legal Services.

Fiona Keith and *Sasha Hart*, for the intervener the Canadian Human Rights Commission.

Emily Hill and *Jessica Wolfe*, for the intervener the Aboriginal Legal Services.

Anita Szigeti, Jill R. Presser, Andrew Menchynski and Breana Vandebek, for the intervener the Criminal Lawyers' Association (Ontario).

Paul Champ and Christine Johnson, for the interveners the British Columbia Civil Liberties Association and the Union of British Columbia Indian Chiefs.

The judgment of McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon and Brown JJ. was delivered by

WAGNER J. —

I. Overview

[1] A person who is convicted of a criminal offence and sentenced to imprisonment for two years or longer becomes an inmate of Canada's federal correctional system. Parliament has directed in s. 3 of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 ("CCRA"), that the purpose of the correctional system is to contribute to the maintenance of a just, peaceful and safe society. This purpose is to be achieved by two means: first, by carrying out sentences through the safe and humane custody of offenders and, second, by assisting in their

rehabilitation and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and the community. The Correctional Service of Canada (“CSC”) is the entity charged with ensuring that the purpose of the correctional system is achieved.

[2] In order to fulfill its mandate, the CSC must make numerous decisions about each inmate in its custody. For example, it is required to assign a security classification of maximum, medium or minimum to each inmate, taking into account the risk to public safety posed by the inmate, the inmate’s likelihood of escape, and the inmate’s institutional supervision needs: see *CCRA*, s. 30; *Corrections and Conditional Release Regulations*, SOR/92-620, s. 18. The CSC must decide in which penitentiary to house each inmate, taking into account factors such as the safety of the inmate, other inmates and the public, and the availability of rehabilitative programs and services: see *CCRA*, s. 28. It develops a correctional plan for each inmate in order to ensure that inmates receive the most effective programs to rehabilitate them and prepare them for reintegration into the community on their release: see *CCRA*, s. 15.1. The CSC also decides whether to recommend to the Parole Board of Canada that an inmate be released on parole.

[3] If the CSC is to effectively assist in the rehabilitation of inmates while ensuring the safety of other inmates and staff members and the protection of society as a whole, it must base its decisions about inmates in its custody on sound information. This is explicitly recognized in s. 24(1) of the *CCRA*, which requires the

CSC to “take all reasonable steps to ensure that any information about an offender that it uses is as accurate, up to date and complete as possible”.

[4] This appeal concerns a challenge by the appellant, Jeffrey G. Ewert, to the CSC’s use of one particular type of information. Mr. Ewert, who is Métis, challenges the CSC’s reliance on certain psychological and actuarial risk assessment tools on the ground that the validity of the tools when applied to Indigenous offenders has not been established through empirical research.

[5] A judge of the Federal Court concluded that, by relying on these tools despite long-standing concerns about their application to Indigenous offenders, the CSC had breached its obligation under s. 24(1) of the *CCRA* and had unjustifiably infringed Mr. Ewert’s rights under s. 7 of the *Canadian Charter of Rights and Freedoms*. The Federal Court of Appeal overturned both of these findings.

[6] I agree with the Federal Court of Appeal that Mr. Ewert has not established a violation of his *Charter* rights. However, I conclude that the trial judge was correct to find that the CSC had, in continuing to rely on the impugned tools without ensuring that they are valid when applied to Indigenous offenders, breached its obligation under s. 24(1) of the *CCRA*. As I will explain, my conclusion in this respect is informed in part by the guiding principle in s. 4(g) of the *CCRA*, which provides that correctional policies, programs and practices must respect cultural differences and be responsive to the special needs of Indigenous peoples.

[7] For the reasons that follow, I would allow Mr. Ewert's appeal in part, and declare that the CSC did in fact breach the obligation in s. 24(1) of the *CCRA*. Although a declaration is an exceptional remedy, it is one that is available in the circumstances of this case and one that this Court should exercise its discretion to grant.

II. Background

[8] Mr. Ewert is 56 years old. He identifies as Métis.

[9] Mr. Ewert was convicted of murder and attempted murder for strangling and sexually assaulting two women in two separate incidents in 1984. Mr. Ewert is currently serving two concurrent life sentences for these offences. He has spent over 30 years in federal custody and has been held in medium and maximum security settings during that time.

[10] Mr. Ewert has been eligible to apply for day parole since 1996 and for full parole since 1999. He has waived his right to each parole hearing for which he has been eligible.

[11] At trial, Mr. Ewert challenged the CSC's use of five psychological and actuarial risk assessment tools. One of these is the Hare Psychopathy Checklist-Revised ("PCL-R"), a tool that was designed to assess the presence of psychopathy but is also used to assess the risk of recidivism. Mr. Ewert also challenged the use of

the Violence Risk Appraisal Guide (“VRAG”) and the Sex Offender Risk Appraisal Guide (“SORAG”), two actuarial tools designed to assess the risk of violent recidivism; the Static-99, an actuarial tool designed to estimate the probability of sexual and violent recidivism; and the Violence Risk Scale – Sex Offender (“VRS-SO”), a rating scale designed to assess the risk of sexual recidivism that is used in connection with the delivery of sex offender treatment.

[12] Mr. Ewert claimed that while he has been incarcerated, the CSC has relied on these tools in conducting needs and risk assessments on him. He further claimed that these tools had been developed and tested on predominantly non-Indigenous populations and that there was no research confirming that they were valid when applied to Indigenous persons. Mr. Ewert submitted that, therefore, the CSC’s reliance on the impugned tools in respect of Indigenous offenders represented a failure by the CSC to take all reasonable steps to ensure the accuracy of information about offenders that it uses, as required by s. 24(1) of the *CCRA*. He also argued that the CSC’s reliance on the tools was contrary to the guiding principle now set out in s. 4(g) of the *CCRA* that correctional policies and practices must respect ethnic and cultural differences and be responsive to the special needs of Indigenous persons. Further, Mr. Ewert argued that the CSC’s reliance on tools that had not been shown to be valid when applied to Indigenous offenders infringed his rights under ss. 7 and 15 of the *Charter*. He sought declaratory relief and an injunction preventing the CSC from using the impugned tools in respect of him or disseminating any results generated by the tools in his case.

III. Judgments Below

A. *Federal Court (Phelan J.), 2015 FC 1093, 343 C.R.R. (2d) 15*

[13] At trial, Mr. Ewert relied in support of his claims on the expert evidence of Dr. Stephen Hart, a professor of psychology at Simon Fraser University. Dr. Hart was qualified to give opinion evidence in the area of the development, application and validity of actuarial and psychological instruments used by the CSC. The trial judge generally accepted Dr. Hart's evidence. In particular, he accepted and relied on Dr. Hart's evidence that tests like the impugned tools are susceptible to "cross-cultural bias" or "variance". Dr. Hart testified that cross-cultural variance occurs when the reliability or validity of an assessment tool varies depending on the cultural background of the individual to whom the tool is applied. He further testified that membership in a cultural group is assessed through self-identification and that acculturation is a matter of degree. Generally speaking, however, because of the significant cultural differences between Indigenous and non-Indigenous Canadians, the impugned tools — which were developed for and validated by studies on predominantly non-Indigenous populations — are more likely than not to be cross-culturally variant to some degree when applied to Indigenous individuals. Dr. Hart testified that notwithstanding his opinion that the tools were likely to be affected by cultural bias, he could not express an opinion on the impact of that bias: it could be subtle and tolerable or it could be profound and intolerable.

[14] The trial judge also accepted Dr. Hart's evidence that although there are a number of types of analyses that can be employed to establish that an actuarial test is free of cross-cultural variance, none of them have been completed for the impugned tools. One academic study published in 2013 suggests that the PCL-R does validly predict the recidivism risk posed by Indigenous offenders, but Dr. Hart discounted it because, for one thing, it is based on a small sample size. Dr. Hart's evidence led the trial judge to find that the scores generated by the impugned tools when applied to Indigenous individuals ought not to be relied upon "in and of themselves": para. 56.

[15] The respondent, to whom I will refer as the "Crown" in these reasons, presented the conflicting expert evidence of Dr. Marnie Rice, a clinical psychologist, researcher and professor of psychology and psychiatry. Dr. Rice testified that the impugned tools are valid and are not affected by cultural bias with respect to Indigenous offenders. The trial judge found Dr. Rice's evidence to be of little assistance and concluded that it could not be relied upon, except where it was consistent with that of Dr. Hart.

[16] The trial judge accepted that the CSC had relied on results generated by certain of the impugned tools in making decisions that affected key aspects of Mr. Ewert's incarceration. Specifically, he found that results generated by these tools were one factor CSC decision-makers had considered in deciding whether to recommend that Mr. Ewert be granted parole, in determining his security classification, and in denying requests for escorted temporary absences. The trial

judge also found that it was common practice in the CSC to use the impugned tools to assess an inmate's psychopathy or risk of violence, and that the scores derived from these assessments were required to be taken into account in determining an inmate's overall security rating.

[17] Citing the evidence of the Crown's fact witness, a former head of research at the CSC, the trial judge found that the CSC had been aware of concerns about the validity of the application of the impugned tools to Indigenous offenders since 2000, but that it had conducted no research to verify the validity of their application in that context.

[18] These findings led the trial judge to conclude that, by continuing to rely on the impugned tools without confirming — even though it had long had concerns in this respect — that they are valid when applied to Indigenous persons, the CSC had failed to “take all reasonable steps to ensure that any information about an offender that it uses is as accurate . . . as possible” as is required by s. 24(1) of the *CCRA*.

[19] The trial judge also concluded that the CSC had, by relying on the impugned tools, infringed Mr. Ewert's rights under s. 7 of the *Charter*. The trial judge was satisfied that Mr. Ewert's s. 7 liberty interest had been adversely affected by decisions related to his security classification, his suitability for parole and his requests for temporary absences, and that his security of the person interest under that section was engaged by the impact on him of being labelled a psychopath. The trial judge concluded that these deprivations of liberty and security of the person were

contrary to the principles of fundamental justice. The CSC's application of the impugned tools to Indigenous inmates was arbitrary and overbroad given the purpose and objective being pursued by the CSC in making decisions, which the trial judge characterized as being to predict an offender's risk of reoffending as accurately as possible in the interests of public safety. These infringements could not be justified under s. 1 of the *Charter*.

[20] Mr. Ewert argued, in the alternative, that the CSC's use of the impugned tools was contrary to a proposed new principle of fundamental justice, namely that the state must obey the law. The trial judge concluded that it was unnecessary to address this argument. The trial judge also held that the factual record was not sufficiently developed to support Mr. Ewert's argument that his rights under s. 15 of the *Charter* had been infringed.

[21] Having concluded that the CSC had breached a statutory duty owed to Mr. Ewert and had violated his rights under s. 7 of the *Charter*, the trial judge ordered an interim injunction that prohibited the CSC from using results generated by the impugned tools with respect to Mr. Ewert. The trial judge also indicated his intention to issue a final order enjoining the use of these tools in respect of Mr. Ewert and other Indigenous inmates until, at a minimum, the CSC had conducted a study that confirmed the reliability of the tools for use in respect of Indigenous offenders. The details of the final order were to be addressed at a remedies hearing.

B. *Federal Court of Appeal (Dawson J.A., Nadon and Webb J.J.A. Concurring), 2016 FCA 203, 487 N.R. 107*

[22] The Federal Court of Appeal allowed the Crown's appeal from the trial judge's interim order.

[23] The Federal Court of Appeal concluded that the trial judge had applied an incorrect legal test in deciding whether Mr. Ewert had established a breach of s. 24(1) of the *CCRA*. The Court of Appeal stated that, to find that s. 24(1) had been breached, the trial judge had to be satisfied on a balance of probabilities that the assessment tools produce or are likely to produce false results and conclusions when applied to Indigenous persons. Because there was no evidence showing that to be the case, Mr. Ewert had not established that the CSC had failed to take all reasonable steps to ensure that the information it used about Indigenous inmates was as accurate as possible.

[24] The Court of Appeal also held that to establish a violation of s. 7 of the *Charter*, Mr. Ewert had to establish on a balance of probabilities that the impugned tools produce inaccurate results when applied to Indigenous inmates. The trial judge had erred in failing to require Mr. Ewert to meet this standard, as he had instead relied on the absence of evidence proving the accuracy and reliability of the assessment tools when applied to Indigenous offenders to find that Mr. Ewert had established a s. 7 violation.

[25] Finally, the Court of Appeal rejected Mr. Ewert's argument that it should find that his rights under s. 15 of the *Charter* had been infringed.

IV. Issues

[26] Mr. Ewert's appeal to this Court raises the following issues:

A. Did the CSC breach its obligation under s. 24(1) of the *CCRA* by failing to take all reasonable steps to ensure the accuracy of the results generated by the impugned tools when applied to Indigenous offenders?

B. Did the CSC's reliance on results generated by the impugned tools constitute an unjustified infringement of Mr. Ewert's rights under s. 7 of the *Charter*?

C. Did the CSC's reliance on results generated by the impugned tools constitute an unjustified infringement of Mr. Ewert's rights under s. 15 of the *Charter*?

V. Analysis

[27] In this Court, Mr. Ewert's argument that the CSC breached its obligation under the *CCRA* has been made primarily in support of the further argument that this constituted an infringement of his rights under the *Charter*. Mr. Ewert argues that this

Court should recognize a new principle of fundamental justice, namely that the state must obey the law, and he further argues that he was deprived of liberty and security of the person contrary to that principle, because the CSC was in breach of its obligation under s. 24(1) of the *CCRA*. Mr. Ewert has failed to establish his *Charter* claims. I nonetheless agree with the trial judge that Mr. Ewert has established that the CSC breached its obligation under s. 24(1) of the *CCRA*. In the exceptional circumstances of this case, it is appropriate for this Court to exercise its discretion to grant a declaration to this effect. I will set out my reasons for reaching this conclusion after explaining the basis for my finding that the CSC was in breach of the obligation in s. 24(1) of the *CCRA* and for my conclusion that Mr. Ewert's *Charter* claims should be dismissed.

A. *Did the CSC Breach Its Obligation Under Section 24(1) of the CCRA?*

[28] In order to determine whether the CSC breached its obligation under s. 24(1) of the *CCRA*, the scope of that obligation must first be defined. Then, the CSC's conduct must be examined in order to determine whether the CSC met the legislated standard.

[29] To interpret the scope of the obligation provided for in s. 24(1), I will apply the modern approach to statutory interpretation: "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, quoting E. Driedger,

Construction of Statutes (2nd ed. 1983), at p. 87). Because the *CCRA* is federal legislation, the interpretation exercise must also be guided by s. 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which reads as follows:

12 Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[30] In the instant case, the inquiry into whether the CSC has met the obligation set out in s. 24(1) gives rise to two main questions. The first is whether results generated by the impugned tools are a type of information to which s. 24(1) applies. If the answer is yes, the second question is whether the CSC took sufficient steps to ensure the accuracy of that information. I will discuss each of these questions in turn.

- (1) Does the Obligation Provided for in Section 24(1) of the *CCRA* Apply to Results Generated by the Impugned Tools?

[31] The first issue to address is whether the obligation provided for in s. 24(1) of the *CCRA* applies to results generated by the impugned tools. Mr. Ewert argues that it does, while the Crown argues that it does not. The Crown submits that s. 24(1) requires only that information be properly gathered and recorded, and that the obligation imposed by that provision is inapplicable to the results generated by the impugned tools. For the reasons set out below, I would reject the Crown's argument. Reading the words of s. 24(1) in their entire context and in their grammatical and ordinary sense harmoniously with the scheme and objects of the *CCRA*, I conclude

that the obligation provided for in s. 24(1) applies to results generated by the impugned tools.

[32] Section 24(1) of the *CCRA* reads as follows:

Accuracy, etc., of information

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

[33] On its face, the obligation imposed by s. 24(1) of the *CCRA* appears to apply to information derived from the impugned tools. Section 24(1) provides that the obligation applies to “any information about an offender that [the CSC] uses”. In the ordinary sense of these words, the knowledge the CSC might derive from the impugned tools — for example, that an offender has a personality disorder or that there is a high risk that an offender will violently reoffend — is “information” about that offender. The trial judge found that the CSC uses results generated by the impugned tools in making various decisions about offenders. Thus, those results are “information about an offender that [the CSC] uses” in the ordinary meaning of those words. The fact that s. 24(1) applies to “any” such information confirms that, if its words are read in their grammatical and ordinary sense, it applies to the information at issue in this case.

[34] This interpretation of s. 24(1) is supported by the relevant statutory context. Sections 23 through 27 of the *CCRA* all fall under the heading “Information”

and must be read together. However, although these sections all relate generally to information, they deal with different aspects of the CSC's collection, use and dissemination of information and apply to different types of information. For example, s. 23(1) enumerates specific types of information the CSC must obtain when a person is sentenced, committed or transferred to penitentiary. Section 25(1) requires the CSC to disclose to bodies authorized to supervise offenders "all information under its control that is relevant to release decision-making". Section 26 governs the disclosure of information about an offender to a victim of an offence, enumerating, for example, specific information that *must* be disclosed to the victim (s. 26(1)(a)) and other information that *may* be disclosed to the victim in specific circumstances (s. 26(1)(b)). Section 27 governs the disclosure to an offender of information considered in taking a decision about him or her, requiring that in certain circumstances the offender be given "all the information" to be considered or that was considered in the taking of the decision, or a summary of that information.

[35] When ss. 23 through 27 are read together, it is clear that where Parliament intended a particular provision to apply to only certain types of information, it enumerated them or otherwise qualified the scope of the information to which a particular provision was to apply. This further reinforces the conclusion that the obligation in s. 24(1) — which applies to "any information about an offender that [the CSC] uses" — was intended to have broad application.

[36] Furthermore, reading s. 24(1) in the context of the other provisions in ss. 23 through 27 confirms that the broad scope of the obligation in s. 24(1) should not be limited by the evidently narrower scope of s. 24(2). Section 24(2) provides that it applies to information the CSC has obtained pursuant to s. 23(1) and then disclosed to an offender pursuant to s. 23(2). However, the fact that subs. 24(2) is in the same section as subs. 24(1) does not mean that these two provisions were intended to have identical scopes. As I mentioned above, certain provisions in s. 26 expressly apply to different types of information, but s. 26 as a whole deals generally with the disclosure of information to victims. And whereas the subsections of s. 27 all deal generally with giving information to offenders, ss. 27(1) and 27(2) address the giving of information in different circumstances. Likewise, ss. 24(1) and 24(2) both deal generally with the accuracy of information. It does not follow that they apply to identical types of information. Had Parliament intended s. 24(1) to apply only to information the CSC has collected pursuant to s. 23(1), it could have said so explicitly. Moreover, it could have placed the two subsections of s. 24 in s. 23 instead of placing them together in a separate section. In any case, the fact that subss. 24(1) and 24(2) are in the same section is not sufficient to overcome the clear language of the words “any information”, which indicate that the obligation provided for in s. 24(1) has a broad scope.

[37] The legislative scheme within which the CSC operates also favours a reading of the words “any information about an offender that [the CSC] uses” in s. 24(1) that includes results generated by the impugned tools. Both that legislative

scheme and the CSC's practice based on the scheme contemplate CSC decision-makers using information such as results generated by the impugned tools in making important decisions about offenders. For example, s. 17 of the *Corrections and Conditional Release Regulations* requires the CSC to consider "any physical or mental illness or disorder suffered by the inmate" and "the inmate's potential for violent behaviour" in determining the security classification to be assigned to an inmate. Moreover, according to evidence presented at trial, it is CSC policy to require that psychological risk assessments be conducted with respect to offenders in some circumstances, including where an inmate serving a life sentence is being considered for conditional release. The fact that the legislative scheme contemplates that the CSC will use information such as results generated by the impugned tools indicates that the scheme also contemplates that the information will be subject to the obligation provided for in s. 24(1). And the fact that CSC policy requires the use of this information in certain circumstances favours applying the obligation to it.

[38] In addition, the statutory purpose of the correctional system supports an interpretation according to which the CSC's obligation under s. 24(1) extends to the accuracy of psychological or actuarial test results that it uses. As I mentioned above, the system's purpose is to contribute to the maintenance of a just, peaceful and safe society by carrying out sentences through the safe and humane custody of inmates and by assisting in their rehabilitation and their reintegration into the community as law-abiding citizens: *CCRA*, s. 3. Having accurate information about an offender's psychological needs and the risk the offender poses is doubtless crucial for the CSC

to effectively achieve this purpose. Thus, the system's purpose is best furthered by interpreting s. 24(1) of the *CCRA* broadly.

[39] Accurate information about an offender's psychological needs is also necessary for the CSC to comply with the guiding principle set out in s. 4(c) of the *CCRA*, namely that the CSC is to use necessary and proportionate measures to attain the purpose referred to in s. 3. And interpreting s. 24(1) such that the obligation to ensure the accuracy of information applies to the results of psychological tests is consistent with the guiding principle in s. 4(g) that the CSC's practices must be responsive to the needs of equity-seeking groups, including persons requiring mental health care. This is because psychological tests, including some of the tests at issue in this case, are used to assess the psychological and treatment needs of such persons.

[40] Interpreting s. 24(1) as applying to a broad range of information, including psychological test results and recidivism risk assessments, is also consistent with the paramount consideration for the CSC set out in s. 3.1 of the *CCRA*: the protection of society. Mr. Ewert's concern in this case is that, as a result of cultural bias, the impugned psychological tests and risk assessments incorrectly identify him as having psychopathic personality disorder or overestimate the risk that he will reoffend. But when the CSC uses tests whose accuracy is in question, there is also a risk of the converse: that psychological or actuarial tests that are inaccurate when applied to a particular cultural group may underestimate risk, thereby undermining the protection of society.

[41] Finally, the nature of the information derived from the impugned tools provides further support for its inclusion in the scope of the words “any information” in s. 24(1). In oral argument, the Crown took the position that actuarial tests are an important tool because the information derived from them is objective and thus mitigates against bias in subjective clinical assessments. In other words, the impugned tools are considered useful *because* the information derived from them can be scientifically validated. In my view, this is all the more reason to conclude that s. 24(1) imposes an obligation on the CSC to take reasonable steps to ensure that the information is accurate.

[42] I accordingly reject the Crown’s argument that the obligation in s. 24(1) relates only to information-gathering and record-keeping — that is, that the CSC’s obligation extends only to ensuring that information about an offender is accurately recorded. Had Parliament so intended, it would have been simple enough to provide that the obligation was “to take all reasonable steps to ensure that any information the CSC uses is accurately recorded”. Moreover, an obligation to ensure accurate record-keeping would be relatively easy for the CSC to meet. The obligation s. 24(1) *actually* creates with respect to ensuring accuracy is qualified: what is required is that “all reasonable steps” be taken to ensure that information is “as accurate . . . as possible”. The fact that Parliament considered these qualifications necessary suggests that s. 24(1) requires more than simply good record-keeping.

[43] The Crown also argues that the obligation to ensure accuracy provided for in s. 24(1) should not apply to results generated by the impugned tools, because it is inappropriate to speak of “accuracy” in the context of actuarial science. The Crown submits that actuarial scores cannot be described as being “accurate” or “inaccurate”; rather, they may have “different levels of predictive validity, in the sense that they predict poorly, moderately well or strongly”: R.F., at para. 106. However, the obligation provided for in s. 24(1) is a general one that is necessarily described using general rather than technical language. Even if we accept that actuarial science draws a distinction between the concepts of accuracy and “predictive validity”, it is not inappropriate to apply the obligation provided for in s. 24(1) to actuarial test scores: in this context, the obligation to take all reasonable steps to ensure that information is “as accurate . . . as possible” may be understood to mean that the CSC must take steps to ensure that it relies on test scores that predict risks strongly rather than those that do so poorly.

[44] In any case, at trial, both parties’ experts proceeded from the premise that the accuracy of a psychological or actuarial assessment tool can be evaluated and that such an evaluation is relevant to a decision whether to use that tool. For example, Dr. Hart testified that “validity” is a term of art in psychology that refers to “the accuracy or meaningfulness of test scores” and that “with respect to a violence risk assessment tool, the accuracy would be the ability of the test scores to forecast future violence”: A.R., vol. XX, at pp. 6635-36. Similarly, Dr. Rice testified that, in the context of risk assessment instruments, “validity” refers to “the accuracy of measurement” or “the

degree to which an assessment measures what it's supposed to measure": "accurate predictions are said to be valid": A.R., vol. XXI, at pp. 6770-71. That the experts understood that accuracy is a concept relevant to the impugned tools makes sense. The PCL-R produces a numerical score that is meant to indicate whether the subject has a psychopathic personality disorder; if PCL-R scores actually reflect the subject's state in this regard, they can, in ordinary language, be said to be accurate. Similarly, if the results generated by assessment tools meant to assess the risk of recidivism actually correspond to the risk that the subject will reoffend, they can be said to be accurate.

[45] In light of the words, the context and the purpose of s. 24(1) of the *CCRA*, I conclude that results generated by the impugned tools are "information" within the meaning of that provision. As a result, the CSC's statutory obligation to take "all reasonable steps" to ensure that information is accurate applies to them.

(2) Did the CSC Take "All Reasonable Steps" to Ensure That the Information It Used Was Accurate?

[46] Having determined that the obligation provided for in s. 24(1) applies to information derived from the impugned tools, the next question is whether the CSC breached that obligation. More specifically, it must be asked whether the CSC took all reasonable steps to ensure that the impugned tools produce accurate information when applied to Indigenous persons such as Mr. Ewert.

[47] Mr. Ewert bore the onus of establishing on a balance of probabilities that the CSC had breached its obligation under s. 24(1) of the *CCRA*. As the trial judge correctly found, this did not require Mr. Ewert to prove that the impugned tools produce inaccurate results. The question is not whether the CSC relied on inaccurate information, but whether it took all reasonable steps to ensure that it did not. Showing that the CSC failed to take all reasonable steps in this respect may, as a practical matter, require showing that there was some reason for the CSC to doubt the accuracy of information in its possession about an offender. If the trial judge's reasons for judgment are read as a whole, it is clear that this is what he meant when he wrote that it was sufficient for Mr. Ewert to raise a "reasonable challenge" to the "reliability" of the assessment tools: paras. 82. The trial judge stated clearly that the question to be addressed was whether the CSC's actions were sufficient to fulfill the legislated standard of all reasonable steps to ensure accuracy, currency and completeness. He made no error in setting out the applicable legal test, and there is no indication that he applied an incorrect standard of proof: see *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at para. 54.

[48] Section 24(1) requires that the CSC take all reasonable steps to ensure the accuracy of information about an offender that it uses, not all possible steps. What constitutes "all reasonable steps" for the purposes of s. 24(1) of the *CCRA* will vary with the context. The trial judge's conclusion that the CSC failed to take the reasonable steps required in the particular circumstances of this case is amply supported by the record.

[49] The trial judge noted that the CSC had long been aware of concerns regarding the possibility of psychological and actuarial tools exhibiting cultural bias. Such concerns had in fact led the CSC to conduct research into the validity of certain actuarial tools other than the impugned tools when applied to Indigenous offenders and to cease using those other tools in respect of Indigenous inmates. Similar confirmatory research had also been contemplated by the Federal Court of Appeal in *Ewert v. Canada (Attorney General)*, 2008 FCA 285, 382 N.R. 370. As well, research into the validity of at least some of the impugned tools when applied to members of cultural minority groups had been conducted in other jurisdictions.

[50] By contrast, the trial judge found that the CSC had not taken any action to confirm the validity of the impugned tools and that it had continued to use them in respect of Indigenous offenders without qualification. This was true despite the fact that research by the CSC into the impugned tools, though challenging, would have been feasible. In these circumstances, the trial judge concluded that the CSC's failure to take *any* steps to ensure the validity of the impugned tools when applied to Indigenous offenders did not meet the legislated standard set out in s. 24(1) of the *CCRA*.

[51] Further support for the conclusion that the CSC's inaction in this respect constituted a failure to take the requisite reasonable steps can be found in the guiding principle set out in s. 4(g) of the *CCRA*, which the trial judge highlighted as being of particular relevance to his inquiry. That provision reads as follows:

Principles that guide Service

4 The principles that guide the Service in achieving the purpose referred to in section 3 are as follows:

...

(g) correctional policies, programs and practices respect gender, ethnic, cultural and linguistic differences and are responsive to the special needs of women, aboriginal peoples, persons requiring mental health care and other groups;

...

[52] This is the first opportunity this Court has had to consider the interpretation and application of s. 4(g) of the *CCRA*. The inquiry into its meaning must be guided by the modern approach to statutory interpretation I discussed above in relation to s. 24(1) of the *CCRA*.

[53] In my view, the application of that approach leads to the conclusion that the principle set out in s. 4(g) of the *CCRA* can only be understood as a direction from Parliament to the CSC to advance substantive equality in correctional outcomes for, among others, Indigenous offenders. Section 4(g) represents an acknowledgement of the systemic discrimination faced by Indigenous persons in the Canadian correctional system. This is a long-standing concern, and one that has become more, not less, pressing since s. 4(g) was enacted. In these circumstances, it is critical that the CSC give meaningful effect to s. 4(g) in performing all of its functions. In the context of the present case, giving meaningful effect to s. 4(g) means, at a minimum, addressing the long-standing, and credible, concern that continuing to use the impugned risk

assessments in evaluating Indigenous inmates perpetuates discrimination and contributes to the disparity in correctional outcomes between Indigenous and non-Indigenous offenders.

[54] It is evident from the grammatical and ordinary sense of the words of s. 4(g) that this provision requires the CSC to ensure that its practices, however neutral they may appear to be, do not discriminate against Indigenous persons. The requirement that the CSC respect differences and be responsive to the special needs of various groups reflects the long-standing principle of Canadian law that substantive equality requires more than simply equal treatment and that, indeed, “identical treatment may frequently produce serious inequality”: *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at pp. 164-65. Although s. 4(g) is not limited to Indigenous persons, the fact that the provision specifically adverts to the needs of Indigenous persons, as well as of women and persons requiring mental health care, indicates that, in Parliament’s view, those groups are among the most vulnerable to discrimination in the correctional system.

[55] The legislative history of the *CCRA* supports the view that s. 4(g) mandates the CSC to pursue substantive equality in correctional outcomes by respecting the unique needs of equity-seeking groups, and in particular those of Indigenous persons. A guiding principle similar to the one now found in s. 4(g) was among the proposals originally set out in a federal government green paper entitled *Directions for Reform in Sentencing, Corrections and Conditional Release* (1990):

see Canada, Solicitor General, *Towards a Just, Peaceful and Safe Society: The Corrections and Conditional Release Act Five Years Later — Consolidated Report* (1998), at pp. ii and 7; *House of Commons Debates*, vol. IV, 3rd Sess., 34th Parl., November 4, 1991, at pp. 4430-31 (Hon. Doug Lewis). One of the concerns identified in *Directions for Reform* was that although the correctional system had shortcomings even in “managing a homogenous population of offenders” (p. 10), the function to which it was geared, its shortcomings were even more acute for women, Indigenous persons, racialized persons, persons with mental health issues and other distinct groups. The authors acknowledged that the profound effects of this disparity called into question the very effectiveness, fairness and even-handedness of the corrections system, and they called for reforms to promote equity and predictability in the system and in decisions made about individual offenders: pp. 10 and 15, see also pp. 6-7.

[56] In *Directions for Reform*, the over-representation of Indigenous persons in the criminal justice system was emphasized as a priority for the federal government. The paper expressed a commitment to ensuring the equitable treatment of Indigenous offenders by all components of that system, including the correctional system. Significantly, the authors explicitly recognized that equitable treatment of Indigenous offenders involves “more than the replication of programs designed for non-Aboriginal offenders”: p. 25. Inequitable treatment of Indigenous offenders in the correctional system and the conditional release process was specifically linked to the issue of Indigenous over-representation in prison populations: p. 11.

[57] The mischief s. 4(g) was intended to remedy informs its interpretation. This mischief is, at least in part, the troubled relationship between Canada's criminal justice system and its Indigenous peoples. The alienation of Indigenous persons from the Canadian criminal justice system has been well documented. Although this Court has in the past had occasion to discuss this issue most extensively in the context of sentencing and of the interpretation and application of s. 718.2(e) of the *Criminal Code*, R.S.C. 1985, c. C-46, it is clear that the problems that contribute to this reality are not limited to the sentencing process. Numerous government commissions and reports, as well as decisions of this Court, have recognized that discrimination experienced by Indigenous persons, whether as a result of overtly racist attitudes or culturally inappropriate practices, extends to all parts of the criminal justice system, including the prison system: see *R. v. Gladue*, [1999] 1 S.C.R. 688, at paras. 61-65 and 68; *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433; Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba*, vol. 1, *The Justice System and Aboriginal People* (1991), pp. 431-73; Canada, Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (1996); Canada, *Commission of Inquiry into Certain Events at the Prison for Women in Kingston* (1996), at pp. 219-23.

[58] Parliament has recognized an evolving societal consensus that these problems must be remedied by accounting for the unique systemic and background factors affecting Indigenous peoples, as well as their fundamentally different cultural

values and world views. In the sentencing context, this recognition is embodied in s. 718.2(e) of the *Criminal Code*, which directs sentencing judges “to undertake the process of sentencing aboriginal offenders differently, in order to endeavour to achieve a truly fit and proper sentence”: *Gladue*, at para. 33. Given this social context, the clear direction in s. 4(g) of the *CCRA* to respect cultural and linguistic differences, together with the provisions dealing specifically with Indigenous inmates in ss. 80 through 84, should be understood to be the means by which Parliament chose to address this broader problem in the correctional context.

[59] Indeed, the purpose of the correctional system set out in the *CCRA* cannot be fully achieved without giving effect to the guiding principle set out in s. 4(g). The CSC must provide for the humane custody of offenders, using measures that are limited to what is necessary and proportionate: *CCRA*, ss. 3(a) and 4(c). It must also assist in their rehabilitation and their reintegration into the community in order to contribute to the maintenance of a just, peaceful and safe society: *CCRA*, ss. 3 and 3.1. To achieve these objectives relative to Indigenous offenders, the CSC must ensure that its policies and programs are appropriate for Indigenous offenders and responsive to their needs and circumstances, including needs and circumstances that differ from those of non-Indigenous offender populations. For the correctional system, like the criminal justice system as a whole, to operate fairly and effectively, those administering it must abandon the assumption that all offenders can be treated fairly by being treated the same way.

[60] Two and a half decades have passed since this principle in s. 4(g) was incorporated into the *CCRA*. Nonetheless, there is nothing to suggest that the situation has improved in the realm of corrections. Recent reports indicate that the gap between Indigenous and non-Indigenous offenders has continued to widen on nearly every indicator of correctional performance. For example, relative to non-Indigenous offenders, Indigenous offenders are more likely to receive higher security classifications, to spend more time in segregation, to serve more of their sentence behind bars before first release, to be under-represented in community supervision populations, and to return to prison on revocation of parole: Canada, Office of the Correctional Investigator, *Spirit Matters: Aboriginal People and the Corrections and Conditional Release Act* (2012); Canada, Office of the Correctional Investigator, *Annual Report 2015-2016* (2016), at pp. 43-44; Canada, Office of the Auditor General, *Fall 2016, Reports of the Auditor General of Canada Report 3, Preparing Indigenous Offenders for Release — Correctional Service Canada* (2016).

[61] It is thus clear that the concerns that motivated the incorporation of the principle set out in s. 4(g) into the *CCRA* are no less relevant today than they were when the *CCRA* was enacted. In the face of ongoing disparities in correctional outcomes for Indigenous offenders, it is crucial, to ensure that the correctional system functions fairly and effectively, that the direction set out in s. 4(g) be given meaningful effect. Although many factors contributing to the broader issue of Indigenous over-incarceration and alienation from the criminal justice system are beyond the CSC's control, there are many matters *within* its control that could

mitigate these pressing societal problems: see *Spirit Matters*, at pp. 6 and 13. Taking reasonable steps to ensure that the CSC uses assessment tools that are free of cultural bias would be one.

[62] Against this backdrop of the purposes of s. 4(g) of the *CCRA*, I will now turn to how this provision can inform the inquiry into what was required of the CSC in the context of this case. In my view, both the clear direction expressed in s. 4(g) and the underlying rationale for that direction strongly support the conclusion that the CSC's inaction with respect to the concerns raised about the risk assessment instruments at issue in this appeal fell short of what s. 24(1) of the *CCRA* required it to do.

[63] The trial judge found that the impugned tools were susceptible to cultural bias. He also found that, although the CSC was aware of this concern, it had not conducted any research to confirm the validity of the tools when used in respect of Indigenous inmates. The CSC failed to address a concern that the psychological and risk information generated by these tools — information that influences the CSC's decisions — may be less accurate in the case of Indigenous inmates. This failure is contrary to the direction set out in s. 4(g) that correctional practices must respect cultural and linguistic differences.

[64] The failure to inquire into the validity of the impugned tools also risked undermining the purposes of s. 4(g) and of the *CCRA* as a whole. The trial judge found that scores derived from the impugned tools were considered in CSC decisions

on key aspects of Mr. Ewert's incarceration, including those related to his security classification, to escorted temporary absences and to parole. The trial judge's findings therefore show that these tools are used for a variety of purposes, including in areas in which Indigenous inmates reportedly lag behind non-Indigenous inmates.

[65] Thus, the clear danger posed by the CSC's continued use of assessment tools that may overestimate the risk posed by Indigenous inmates is that it could unjustifiably contribute to disparities in correctional outcomes in areas in which Indigenous offenders are already disadvantaged. For example, if the impugned tools overestimate the risk posed by Indigenous inmates, such inmates may experience unnecessarily harsh conditions while serving their sentences, including custody in higher security settings and unnecessary denial of parole. Overestimation of the risk may also contribute to reduced access to rehabilitative opportunities, such as a loss of the opportunity to benefit from a gradual and structured release into the community on parole before the expiry of a fixed-term sentence. Another effect of an overestimation of the risk is that it could bar an inmate from participation in Indigenous-specific programming that is contingent on an offender having a low security classification or being eligible for an escorted temporary absence: see generally *Spirit Matters*, at pp. 3-4 and 29; *Annual Report, 2015-2016*, at p. 44. Thus, any overestimation of the risk posed by Indigenous offenders would undermine the purpose of s. 4(g) of the *CCRA* of promoting substantive equality in correctional outcomes for Indigenous inmates and would also frustrate the correctional system's

legislated purpose of providing humane custody and assisting in the rehabilitation of offenders and their reintegration into the community.

[66] Given this context, it is crucial that the CSC heed the directive set out in s. 4(g) of the *CCRA*, the effect of which is that the CSC's practices must not perpetuate systemic discrimination against Indigenous persons. In the context of the case at bar, this required, at the very least, that the CSC take seriously the credible concerns that have been repeatedly raised according to which information derived from the impugned tools is of questionable validity with respect to Indigenous inmates because the tools fail to account for cultural differences. By disregarding the possibility that these tools are systematically disadvantaging Indigenous offenders and by failing to take any action to ensure that they generate accurate information, the CSC fell short of what it is required to do under s. 24(1) of the *CCRA*.

[67] Although this Court is not now in a position to define with precision what the CSC must do to meet the standard set out in s. 24(1) in these circumstances, what is required, at a minimum, is that if the CSC wishes to continue to use the impugned tools, it must conduct research into whether and to what extent they are subject to cross-cultural variance when applied to Indigenous offenders. Any further action the standard requires will depend on the outcome of that research. Depending on the extent of any cross-cultural variance that is discovered, the CSC may have to cease using the impugned tools in respect of Indigenous inmates, as it has in fact done with other actuarial tools in the past. Alternatively, the CSC may need to qualify or modify

the use of the tools in some way to ensure that Indigenous inmates are not prejudiced by their use.

B. *Did the CSC's Reliance on Results Generated by the Impugned Tools Constitute an Unjustified Infringement of Mr. Ewert's Rights Under Section 7 of the Charter?*

[68] To establish that a law or a government action violates s. 7 of the *Charter*, a claimant must show that the law or action interferes with, or deprives him or her of, life, liberty or security of the person and that the deprivation is not in accordance with the principles of fundamental justice: *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at para. 55.

[69] In this Court, Mr. Ewert argues that the trial judge was correct to find that the CSC's use of the impugned tools deprived him of liberty and security of the person in a way that was contrary to the principles of fundamental justice prohibiting arbitrariness and overbreadth. In the alternative, he submits that this Court should recognize a new principle of fundamental justice — that the state must obey the law — and should find that the CSC's use of the impugned tools was contrary to that principle because it constituted a breach of s. 24(1) of the *CCRA*.

[70] Assuming, although I will not so decide, that the CSC's reliance on the impugned tools in making decisions about Mr. Ewert engaged a liberty interest or security of the person interest protected by s. 7 of the *Charter*, I conclude that Mr. Ewert has not established that the CSC's reliance on the tools violated the principle of

fundamental justice against arbitrariness or that against overbreadth. I also conclude that Mr. Ewert has not established that this Court should recognize a new principle of fundamental justice in this case. Therefore, Mr. Ewert has not established an infringement of his rights under s. 7 of the *Charter*.

(1) Mr. Ewert Has Not Established That the CSC's Reliance on the Impugned Tools Violated the Prohibition Against Arbitrariness or That Against Overbreadth

[71] This Court discussed the prohibitions against arbitrariness and overbreadth as principles of fundamental justice in *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at paras. 107 and 111-13 (citations omitted):

Although there is significant overlap between these three principles, and one law may properly be characterized by more than one of them, arbitrariness, overbreadth, and gross disproportionality remain three distinct principles that stem from what Hamish Stewart calls “failures of instrumental rationality” — the situation where the law is “inadequately connected to its objective or in some sense goes too far in seeking to attain it” As Peter Hogg has explained:

The doctrines of overbreadth, disproportionality and arbitrariness are all at bottom intended to address what Hamish Stewart calls “failures of instrumental rationality”, by which he means that the Court accepts the legislative objective, but scrutinizes the policy instrument enacted as the means to achieve the objective. If the policy instrument is not a rational means to achieve the objective, then the law is dysfunctional in terms of its own objective.

. . .

Arbitrariness asks whether there is a direct connection between the purpose of the law and the impugned effect on the individual, in the sense that the effect on the individual bears some relation to the law's purpose.

There must be a rational connection between the object of the measure that causes the s. 7 deprivation, and the limits it imposes on life, liberty, or security of the person A law that imposes limits on these interests in a way that bears *no connection* to its objective arbitrarily impinges on those interests. . . .

Overbreadth deals with a law that is so broad in scope that it includes *some* conduct that bears no relation to its purpose. In this sense, the law is arbitrary *in part*. At its core, overbreadth addresses the situation where there is no rational connection between the purposes of the law and *some*, but not all, of its impacts. . . .

Overbreadth allows courts to recognize that the law is rational in some cases, but that it overreaches in its effect in others. Despite this recognition of the scope of the law as a whole, the focus remains on the individual and whether the effect on the individual is rationally connected to the law's purpose. For example, where a law is drawn broadly and targets some conduct that bears no relation to its purpose in order to make enforcement more practical, there is still no connection between the purpose of the law and its effect on the *specific individual*. Enforcement practicality may be a justification for an overbroad law, to be analyzed under s. 1 of the *Charter*.
[Emphasis in original.]

[72] In the instant case, the trial judge concluded that the CSC had infringed Mr. Ewert's rights under s. 7 of the *Charter*, because its reliance on the impugned tools in making decisions about Indigenous persons was contrary to the principles against arbitrariness and overbreadth. His conclusions on arbitrariness and overbreadth can be considered together, because they were based on the same underlying findings. The trial judge found that the objective of the CSC's decision-making was to "reliably predict an offender's risk of reoffending as accurately as possible in the interests of public safety": para 96. In this Court, Mr. Ewert does not take issue with this characterization of the relevant objective. The trial judge accepted Dr. Hart's evidence that the impugned tools were susceptible to cultural bias and that there was no evidence that scores generated by those tools predict the risk of

recidivism as accurately for Indigenous inmates as for non-Indigenous inmates. In the trial judge's view, two conclusions flowed from these findings. First, given the absence of evidence of accuracy, the CSC's continued use of the impugned tools in respect of Indigenous offenders was inconsistent with the objective of predicting the risk posed by offenders and was therefore arbitrary. Second, because the CSC's reliance on the impugned tools with respect to Indigenous offenders was arbitrary but its reliance on them with respect to non-Indigenous offenders was unobjectionable, its practice of using those tools for the entire inmate population without distinguishing between Indigenous and non-Indigenous inmates was overbroad.

[73] The trial judge reasonably concluded that, given the concerns relating to cultural bias, it was problematic for the CSC to continue to use the impugned tools without qualification or caution. Be that as it may, to establish arbitrariness or overbreadth, Mr. Ewert had to show on a balance of probabilities that the CSC's practice of using the impugned tools with respect to Indigenous offenders had no rational connection to the relevant government objective. The fact that a government practice is in some way unsound or that it fails to further the government objective as effectively as a different course of action would is not sufficient to establish that the government practice is arbitrary. The finding that there is uncertainty about the extent to which the tests are accurate when applied to Indigenous offenders is not sufficient to establish that there is no rational connection between reliance on the tests and the relevant government objective. Indeed, taken at its highest, Dr. Hart's expert evidence does not support a finding that there is no such rational connection. Dr. Hart testified

that the tools were susceptible to cultural bias. But when asked directly about the likely magnitude of any cultural bias, he was unable to say: he suggested the bias might be relatively limited and tolerable, but could also be profound and intolerable. In other words, there was no evidence before the trial judge that how the impugned tools operate in the case of Indigenous offenders is likely to be so different from how they operate in the case of non-Indigenous offenders that their use in respect of Indigenous offenders is completely unrelated to the government objective.

[74] This is not to say that the trial judge's findings with respect to the CSC's unqualified reliance on the impugned tests are not troubling. Nevertheless, the onus was on Mr. Ewert to prove that the CSC's impugned practice was arbitrary or overbroad; he has not done so in this case.

(2) Mr. Ewert Has Not Established That This Court Should Recognize a New Principle of Fundamental Justice

[75] Mr. Ewert's primary argument with respect to the breach of his s. 7 rights is based on the alleged arbitrariness and overbreadth of the CSC's practice of relying on the impugned tools, as discussed above. However, he also argues, in the alternative, that the alleged deprivation of his liberty and security of the person interests was contrary to a proposed new principle of fundamental justice: that the state must obey the law. The trial judge found it unnecessary to address the issue of this proposed new principle of fundamental justice.

[76] Mr. Ewert bears the onus of establishing that this principle should be found to exist as a principle of fundamental justice. But he presented no detailed argument on this point and did not directly address how the proposed new principle would meet the test developed by this Court for determining that a principle is one of fundamental justice within the meaning of s. 7 of the *Charter*: see *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3, at para. 46; *R. v. Malmö-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571, at para. 112. He has not established that this Court should recognize this proposed new principle of fundamental justice in the case at bar.

C. *Did the CSC's Reliance on Results Generated by the Impugned Tools Constitute an Unjustified Infringement of Mr. Ewert's Rights Under Section 15 of the Charter?*

[77] At trial, Mr. Ewert argued that the CSC's reliance on the impugned tools infringed his rights under s. 15 of the *Charter*. He submitted in his statement of claim that by using the impugned tools, the CSC was using "reliable or true information" to make decisions about non-Indigenous inmates and "unreliable or false information" to make decisions about Indigenous inmates. This practice, he claimed, led the CSC to mete out harsher treatment and prolonged incarceration to Indigenous inmates.

[78] The trial judge rejected Mr. Ewert's s. 15 claim on the basis that the evidentiary record was not sufficiently developed. The Federal Court of Appeal upheld that conclusion. In this Court, Mr. Ewert argues that the factual findings set out in the trial judge's reasons are sufficient to support this claim.

[79] In my view, Mr. Ewert has not established the infringement of his s. 15 rights that he alleged. As I explained above, the evidence before the trial judge established a risk that the impugned tools are less accurate when applied to Indigenous inmates than when they are applied to non-Indigenous inmates. However, the trial judge did not find, and indeed could not have done so on the evidence before him, that the impugned tools do in fact overestimate the risk posed by Indigenous inmates or lead to harsher conditions of incarceration or to the denial of rehabilitative opportunities because of such an overestimation. I would therefore not disturb the trial judge's conclusion on this issue.

VI. Conclusion and Disposition

[80] The CSC was aware of long-standing concerns as to whether the impugned tools were valid when applied to Indigenous offenders. Yet it continued to rely on the results they produced in making decisions about offenders without inquiring into their validity with respect to Indigenous offenders. This was a breach of the CSC's obligation under s. 24(1) of the *CCRA* to take all reasonable steps to ensure that any information about an offender that it uses is as accurate as possible. In these circumstances, it is appropriate for this Court to exercise its discretion to issue a declaration that the CSC has failed to meet its obligation under s. 24(1) of the *CCRA*.

[81] A declaration is a narrow remedy but one that is available without a cause of action and whether or not any consequential relief is available: *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at

para. 143; P. W. Hogg, P. J. Monahan and W. K. Wright, *Liability of the Crown* (4th ed. 2011), at p. 37; L. Sarna, *The Law of Declaratory Judgments* (4th ed. 2016), at p. 88; see also *Federal Courts Rules*, SOR/98-106, r. 64. A court may, in its discretion, grant a declaration where it has jurisdiction to hear the issue, where the dispute before the court is real and not theoretical, where the party raising the issue has a genuine interest in its resolution, and where the respondent has an interest in opposing the declaration sought: see *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 S.C.R. 99, at para. 11; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at para. 46; *Solosky v. The Queen*, [1980] 1 S.C.R. 821, at pp. 830-33.

[82] These criteria are met here. The Federal Court had jurisdiction over the substance of Mr. Ewert's claim: *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 17. The question whether the CSC is required to validate the impugned assessment tools for use with Indigenous inmates is a real, not a theoretical, one that has been the subject of proceedings spanning almost two decades. Mr. Ewert, as an Indigenous individual and an inmate subject to the CSC's decision-making — including decision-making that affects critical aspects of his incarceration such as his security classification and the granting of parole — has a genuine interest in the resolution of this question. Finally, the federal Crown, and its representative, the Commissioner of the CSC, are proper parties to oppose the declaration.

[83] A declaration is a discretionary remedy. Like other discretionary remedies, declaratory relief should normally be declined where there exists an adequate alternative statutory mechanism to resolve the dispute or to protect the rights in question: see D. J. M. Brown and J. M. Evans with the assistance of D. Fairlie, *Judicial Review of Administrative Action in Canada* (loose-leaf), at topic 1:7330. Here, the grievance procedure created by s. 90 of the *CCRA* arguably provides an alternative means by which Mr. Ewert could challenge the CSC's compliance with the obligation in s. 24(1) of the *CCRA*. It may be that in most cases, the existence of this statutory grievance mechanism would be a reason to decline to grant a declaration. However, in the exceptional circumstances of this case, a declaration is warranted.

[84] These exceptional circumstances include the fact that Mr. Ewert has already used the statutory grievance mechanism to raise his concerns about the CSC's use of actuarial assessment tools on Indigenous inmates. It cannot be said, based on the events that followed, that the grievance mechanism was effective in resolving the issues raised by Mr. Ewert.

[85] Beginning in April 2000, Mr. Ewert filed a series of grievances complaining about the use of the PCL-R, the VRAG and other assessment tools in respect of Indigenous inmates: *Ewert v. Canada (Attorney General)*, 2007 FC 13, 306 F.T.R. 234, at paras. 7-14. In the course of responding to these grievances, the CSC acknowledged that there remained questions about the validity of these tools when

applied to Indigenous offenders and stated that it was not aware of any research validating the tools for use with such offenders. However, despite indicating that it would obtain an opinion on the issue from an independent outside body, the CSC failed to do so. It also failed to otherwise confirm the validity of the tests. In closing Mr. Ewert's grievance in June 2005 — more than five years after he filed his first complaint — the CSC informed him that it was reviewing its intake assessment tools used for Indigenous offenders and that it would take no further action in connection with his grievance until its review was complete.

[86] The fact that a review of the CSC's assessment tools was under way in 2005 was an important factor in the Federal Court's decision to dismiss Mr. Ewert's application for judicial review with respect to the resolution of his grievance: *Ewert* (2007), at paras. 66-67. It was also an important consideration in the Federal Court of Appeal's decision to uphold the dismissal of that application, including on the basis that it was premature: *Ewert* (2008), at paras. 7-8 and 10. In its 2007 decision, the Federal Court urged the CSC to explain to Mr. Ewert the results, if any, of its review. Such an explanation had not yet been provided when Mr. Ewert appealed to the Federal Court of Appeal in 2008 — eight years after he commenced the grievance procedure. Indeed, the trial judge in the present proceeding observed that there was no evidence that the CSC had ever completed the research referred to by the Federal Court in 2007 and anticipated by the Federal Court of Appeal in 2008: para. 72.

[87] Almost two decades have now passed since Mr. Ewert first complained about the use of certain of the impugned assessment tools with respect to Indigenous inmates. In these exceptional circumstances, Mr. Ewert should not be required to begin the grievance process anew in order to determine whether the CSC's continued failure to address the validity of the impugned assessment tools is a breach of its duty under s. 24(1) of the *CCRA*. That it may technically have been open to him to do so should not preclude this Court from exercising its discretion to grant a declaration to this effect.

[88] To be clear, a declaration that the CSC breached its obligation under s. 24(1) of the *CCRA* does not invalidate any particular decision made by the CSC, including any decision made in reliance on the impugned assessment tools. Should Mr. Ewert wish to challenge the validity of any such decision, he must do so through an application for judicial review of the relevant decision.

[89] I would also emphasize that in allowing Mr. Ewert's appeal in part and issuing a declaration that the CSC breached its obligation under s. 24(1) of the *CCRA*, this Court is not restoring the Federal Court's order. The trial judge was of the view that the interim order he issued, as well as the final order he indicated would follow, could be based either on his finding that the CSC violated Mr. Ewert's rights under s. 7 of the *Charter* or on his finding that the CSC breached its obligation under s. 24(1) of the *CCRA*. I have concluded that the trial judge erred in accepting Mr. Ewert's argument under s. 7 of the *Charter*. This Court did not hear argument on the

availability of consequential relief based on the CSC's breach of its obligation under s. 24(1) of the *CCRA* and I make no comment on the availability of such relief in new proceedings. However, I would not remit this matter for a remedies hearing. If Mr. Ewert is of the view that any further remedy is available or appropriate in the circumstances, he may apply, in new proceedings, for a determination of that issue.

[90] Accordingly, I would allow Mr. Ewert's appeal in part. Mr. Ewert is entitled to the following declaration: That the Correctional Service of Canada breached its obligation set out in s. 24(1) of the *Corrections and Conditional Release Act*.

The reasons of Côté and Rowe JJ. were delivered by

ROWE J. —

I. Overview

[91] I have read Justice Wagner's reasons. I agree with Justice Wagner's analysis with respect to Mr. Jeffrey G. Ewert's claims under ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms*. However, I would dismiss the appeal. I respectfully part ways with the majority on several issues. First, I do not interpret s. 24(1) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 ("*CCRA*"), as requiring the Correctional Service of Canada ("*CSC*") to conduct studies on the tests

that psychologists use to assess offenders. Second, I would decline to grant declaratory relief; the appropriate course of action for Mr. Ewert would be to seek judicial review.

[92] I share with the majority a view that it is important to address Indigenous overrepresentation in prisons. This Court has emphasized that decision makers in the penal system, such as judges, should take into account the specific needs and circumstances of Indigenous peoples: *R. v. Gladue*, [1999] 1 S.C.R. 688; *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433. Thus, I am in accord with Justice Wagner in his expressions of concern as to the CSC's inaction with respect to the issue that Mr. Ewert has raised. Notwithstanding the foregoing, I am not persuaded that it was Parliament's intent to hold the CSC to account on this issue pursuant to s. 24(1) of the *CCRA*.

II. Background

[93] My colleague has described accurately the nature of Mr. Ewert's claim and the decisions of the courts below. I would, however, emphasize certain key facts. The procedural history is significant; it is important to understand the CSC's response — including its failings — to Mr. Ewert's concerns about these psychological tools. As well, it helps frame Mr. Ewert's claim with respect to the remedy sought. That is critical to the proper disposition of this appeal.

[94] Mr. Ewert first complained about the use of the impugned tools a very long time ago, in April 2000. In the years after, he filed inmate complaints about the use of these tools. All these grievances were dismissed. In June 2005, the CSC dismissed a third-level grievance, but sent Mr. Ewert a letter indicating that it was in the process of having the tools reviewed.

[95] About this time, Mr. Ewert commenced an action in Federal Court on these matters. The action was severed. Part of it proceeded as a judicial review; the rest of the action was stayed pending the outcome of the judicial review. The Federal Court and Federal Court of Appeal dismissed the judicial review on the basis that the application was premature, as the CSC's review of the impugned tools was ongoing: *Ewert v. Canada (Attorney General)*, 2007 FC 13, 306 F.T.R. 234, aff'd 2008 FCA 285, 382 N.R. 370.

[96] The part of the action that had been stayed eventually continued; it is the basis for the present appeal. Throughout, Mr. Ewert claimed damages based on breaches of his *Charter* rights. However, the other civil claims that formed the basis of this action evolved considerably between 2005 and 2015 when, finally, the trial occurred. Mr. Ewert's first amended statement of claim, filed after the judicial review, claimed that the CSC acted negligently in its treatment of him. That claim was later replaced with claims of misfeasance of public office and breach of fiduciary duties. The third (and final) amended statement of claim removed the claim for misfeasance and substituted a claim that the CSC acted contrary to its statutory

obligations. The remedies sought included damages, a declaration that the CSC breached Mr. Ewert's *Charter* rights, and an injunction to prevent the CSC from using the impugned tools.

[97] The action in this third permutation proceeded through the Federal Court to the present appeal. The judge saw the case "firstly as a breach of [the] statutory duty" contained in s. 24(1) of the *CCRA* (2015 FC 1093, 343 C.R.R. (2d) 15, at para. 77); he also found that Mr. Ewert's s. 7 *Charter* rights had been infringed. The judge held that Mr. Ewert was not required to "establish definitively that the tests are biased": para. 82. With respect to remedy, the judge issued an interim order prohibiting the CSC from using the tools' results in respect of Mr. Ewert; the order went on to direct the parties to file written submissions about the parameters of a study of the impugned tools. The trial judge indicated that he intended to issue a final order enjoining the use of the impugned tools in respect of Mr. Ewert and other inmates until the CSC's study of the tools' reliability was completed. In effect, the Federal Court would approve the study to be undertaken by the CSC. While the judge did not address this, his approach would seem to lead to a continuing order, pursuant to which the Federal Court would evaluate the outcome of the CSC study.

[98] The Federal Court of Appeal allowed the appeal on both the statutory breach and the *Charter* breach, finding that the trial judge erred first, in applying the burden of proof, and second, that none of Mr. Ewert's claims were established on a balance of probabilities: 2016 FCA 203, 487 N.R. 107. In light of the foregoing, the

Court of Appeal did not see it as necessary to deal with either the statutory interpretation of s. 24(1) or the remedy.

III. Issues

[99] The issues in this appeal are the following:

- a) Does s. 24(1) of the *CCRA* impose an obligation on the CSC to test the tools used by psychologists to assess offenders?
- b) What is the appropriate remedy?

[100] I would answer these questions as follows. Section 24(1) does not impose an obligation on the CSC to conduct research as to the validity of the impugned tools. As well, I would not grant declaratory relief.

IV. Analysis

[101] As I would decide this case on a different basis, I begin with a brief note of clarification with respect to my position on the reasons offered by the Federal Court of Appeal. Mr. Ewert in his claim set out two factual propositions about the use of the impugned tests with respect to Indigenous inmates: first, the results generated by the impugned tools are of unknown reliability; and, second, the impugned tools generate false results. The Federal Court found that on the balance of probabilities

Mr. Ewert had demonstrated the first proposition. The Federal Court of Appeal held that the trial judge misapplied the balance of probabilities test. As I will not dispose of this case on the standard of proof, I do not need to decide the issue. I would say only that the trial judge's analysis was far from clear and that I agree with the Federal Court of Appeal that Mr. Ewert failed to prove the second proposition on the balance of probabilities.

A. *Whether Section 24(1) of the CCRA Imposes an Obligation on the CSC to Test the Tools Used by Psychologists to Assess Offenders?*

[102] The opening sections of the *CCRA* outline the purposes and principles of the statutory regime. Sections 3, 3.1 and 4 state:

3 The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by

(a) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and

(b) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community.

3.1 The protection of society is the paramount consideration for the Service in the corrections process.

4 The principles that guide the Service in achieving the purpose referred to in section 3 are as follows:

...

(g) correctional policies, programs and practices respect gender, ethnic, cultural and linguistic differences and are responsive to the special needs of women, aboriginal peoples, persons requiring mental health care and other groups;

...

[103] Sections 23 and 24 of the *CCRA* are the opening sections under the heading “Information”. They read as follows:

23 (1) When a person is sentenced, committed or transferred to penitentiary, the Service shall take all reasonable steps to obtain, as soon as is practicable,

(a) relevant information about the offence;

(b) relevant information about the person’s personal history, including the person’s social, economic, criminal and young-offender history;

(c) any reasons and recommendations relating to the sentencing or committal that are given or made by

(i) the court that convicts, sentences or commits the person, and

(ii) any court that hears an appeal from the conviction, sentence or committal;

(d) any reports relevant to the conviction, sentence or committal that are submitted to a court mentioned in subparagraph (c)(i) or (ii); and

(e) any other information relevant to administering the sentence or committal, including existing information from the victim, the victim impact statement and the transcript of any comments made by the sentencing judge regarding parole eligibility.

(2) Where access to the information obtained by the Service pursuant to subsection (1) is requested by the offender in writing, the offender shall be provided with access in the prescribed manner to such information as would be disclosed under the *Privacy Act* and the *Access to Information Act*.

(3) No provision in the *Privacy Act* or the *Access to Information Act* shall operate so as to limit or prevent the Service from obtaining any information referred to in paragraphs (1)(a) to (e).

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

(2) Where an offender who has been given access to information by the Service pursuant to subsection 23(2) believes that there is an error or omission therein,

(a) the offender may request the Service to correct that information; and

(b) where the request is refused, the Service shall attach to the information a notation indicating that the offender has requested a correction and setting out the correction requested.

[104] In interpreting s. 24(1) I will look to the “words of [the] Act . . . in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, citing E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87.

[105] There are two possible interpretations of s. 24(1). One interpretation is that insight or understanding derived from the assessment tools — for example, that an offender has a personality disorder or is at a high risk to reoffend — is “information” that the CSC uses in its decision-making. Thus, the requirement to take “reasonable steps” to ensure the information is “accurate” imposes an obligation on the CSC to verify that the tests are valid, i.e. that they meaningfully assess that which they are intended to assess. An alternative interpretation is that s. 24(1) refers to biographical or factual information about an offender. Thus, things like age, criminal

record, behaviour in prison, courses taken with a view to rehabilitation, and the like are “information” that should be “accurate, up to date and complete”.

[106] Mr. Ewert urges on us the first interpretation. He argues that s. 24(1) imposes a duty on the CSC to test the impugned tools, as the test results are “information” that the CSC “uses”, *inter alia*, to assess the risk to public safety: *CCRA*, ss. 28 to 31; *Corrections and Conditional Release Regulations*, SOR/92-620, ss. 13, 17 and 18. As well, s. 4(g) of the *CCRA* requires the CSC to respect the different needs of Indigenous inmates. Thus, the CSC’s statutory duty to take reasonable steps to ensure the accuracy of “information” includes an obligation to ensure the validity of assessments whose results are recorded in an inmate’s records.

[107] The CSC argues for a more limited view of s. 24(1), taking the position that the provision is limited to “primary facts” and not “inferences or assessments drawn by the Service”. Parliament has created a scheme governing the CSC’s use of information that allows offenders to challenge inaccuracies in that information pursuant to s. 24(2). Sections 24(1) and 24(2) should be read together and interpreted in this context. Thus, the requirement under s. 24(1) to take reasonable steps with respect to the accuracy of “information” does not include an obligation to conduct studies as to the validity of assessment tools. Section 4(g) of the *CCRA* expresses guiding principles to inform the CSC’s actions, but does not prescribe a particular outcome for any CSC decision, nor does it infuse s. 24(1) with the meaning that Mr. Ewert suggests.

[108] I find the second interpretation to be persuasive. Sections 24(1) and 24(2) of the *CCRA* are about accurate record-keeping. Section 24 is not about challenging the means that the CSC uses to make its decisions. When an offender's complaint is about the way that a particular decision is made, the *CCRA* provides a means for offenders to file a grievance and, if necessary, pursue judicial review: *CCRA*, s. 90; *Corrections and Conditional Release Regulations*, ss. 74 to 82. That is of fundamental importance. But, it is not what is dealt with in ss. 24(1) and 24(2).

[109] The *CCRA* is concerned with managing the custody of offenders, assisting in their rehabilitation and reintegration, and protecting society: *CCRA*, ss. 3 and 3.1. These goals require good decision-making based, *inter alia*, on accurate information. Section 24 relates to the accuracy of information. For instance, the CSC should correct a report that says that an offender was involved in a fight when the offender was not involved. Making decisions on the basis of inaccurate information will not assist the CSC in furthering its objectives to rehabilitate offenders and protect society. Thus, s. 24 serves an important function. That function does not include verifying the validity of assessment tools. Such matters are open to challenge. But, the proper avenue for such challenges is the grievance procedure and, where necessary, judicial review. These challenges must be brought in a way that respects Parliamentary intent, rather than forcing an unwarranted interpretation of s. 24.

[110] Parliament imposed a duty on the CSC in s. 24(1) to record information accurately. Section 24(2) provides a means for inmates to correct errors in the

information that is recorded. The scheme is simple. It reflects Parliament's intent to provide offenders with a specific remedy they could use to make sure that the CSC's duty to maintain accurate records is met.

[111] This interpretation is reinforced by the reference to s. 23 in s. 24(2). Section 23 sets out the types of information the CSC will obtain about an offender when they arrive at a penitentiary. All this information is factual or biographical. This is the type of information referred to in s. 24(1). An offender may be provided with this information upon request and, if there is an error, it can be corrected pursuant to the procedure set out in s. 24(2).

[112] Mr. Ewert argues that Parliament would have referred to the types of information subject to s. 24(1) if it wanted to do so, just as it did in s. 23. This is not persuasive. The scheme that is set out in ss. 23 and 24 is straightforward. Section 23 lists the information that is to be recorded. Section 24(1) requires the CSC to record this information accurately and to keep it up to date. Section 24(2) provides a means for an inmate to correct errors or deficiencies in the information.

[113] Mr. Ewert argues that the word "information" in ss. 24(1) and 24(2) should be given different meanings. Indeed, the logic of his position, and that adopted by the majority, requires that "information" be given different meanings in s. 24(1) and s. 24(2). This is so because "information", in s. 24(2) is expressly linked to what is described in s. 23, while Mr. Ewert and the majority say that "information" in s. 24(1) has a far wider meaning. But why would Parliament have chosen such an

oblique structure as to give two different meanings to the same word (“information”) in consecutive subsections of the same provision? It is not plausible. Moreover, when the same words are used throughout a statute, they are presumed to have the same meaning: *R. v. Zeolkowski*, [1989] 1 S.C.R. 1378, at p. 1387.

[114] We should also consider the other words in s. 24, including the requirement that the information be “as accurate, up to date and complete as possible”. My colleague rejects the Crown’s argument that it is inappropriate to speak of “accuracy” when dealing with actuarial science because “the obligation provided for in s. 24(1) is a general one that is necessarily described using general rather than technical language”: para. 43. In support of this, he writes that “both parties’ experts proceeded from the premise that the accuracy of a psychological or actuarial assessment tool can be evaluated and that such an evaluation is relevant to a decision whether to use the tool”: para. 44.

[115] With respect, the expert evidence in this case points to a different understanding of “accuracy”. Dr. Hart, the expert whom the trial judge found to be most credible, described the predictive capacity of the impugned tools in terms of *validity* and *reliability*, rather than accuracy. It is not appropriate to speak of a psychological test as being accurate or inaccurate, in the same way that an instrument such as a thermometer is or is not accurate. Rather, *validity* (the meaningfulness of the inferences drawn from assessment measurements) and *reliability* (the stability of measurements across evaluators or across time) exist on a spectrum: A.R., vol. XVIII,

at pp. 5703-5. Thus, a psychological test can be more or less *valid* or *reliable*, but it cannot properly be described as being “accurate” or “inaccurate”.

[116] Further, one needs to consider how the CSC would be required to act under my colleague’s interpretation. If further research provides insight into the degree of validity and reliability of the impugned tools as applied to Aboriginal offenders, how *valid* or *reliable* must the tools be in order to be deemed “accurate” (as opposed to “inaccurate”)? This is quite different from verifying factual information such as those items listed in s. 23(1) — date of birth, criminal history, or other primary information that will necessarily be accurate or inaccurate. As well, what does it mean to require the impugned tools to be “as accurate as possible”? The assessment of human personality, by whatever means, remains imprecise. It is not clear how the CSC and the courts are to account for this, if they are required to ensure that such assessments are “as accurate as possible”.

[117] The scope of the obligation in s. 24(1), as applied to the impugned tools, simply requires that the CSC maintain accurate records of the inmates’ test scores. If Mr. Ewert scored in the 98th percentile on Factor 1 of the Hare Psychopathy Checklist Revised, but the CSC documents that figure as being in the 89th percentile and uses that incorrect score in the course of its decision-making, then the CSC would have breached its obligations under s. 24(1) (assuming that the CSC failed to take “reasonable steps” to ensure the score was recorded correctly). The remedy for Mr. Ewert in such a case would be to bring an application under s. 24(2).

[118] Where the offender brings a challenge under s. 24(2) to have errors corrected, this is not the same as bringing a challenge to a decision made on the basis of incorrect information: *Kim v. Canada*, 2017 FC 848, at para. 43 (CanLII). A proceeding to enforce s. 24(2) only considers whether there has been an error in the information recorded in the offender's file. If so, it will be corrected or a notation will be added. By contrast, in a judicial review of a grievance proceeding, the usual question is whether the CSC's decision based, *inter alia*, on information in the inmate's file (including test results) was reasonable. Judicial review allows the court to consider how the CSC makes its decisions, including the validity of the impugned tools.

[119] The Federal Court regularly conducts judicial reviews of the CSC's decision-making, including applications to correct information under s. 24(2). This jurisprudence supports a reading of s. 24(1) that is consistent with the analysis that I have set out above. The Federal Court has limited the CSC's obligation under s. 24(1) to ensure that *factual* information is accurate, up to date and complete. Section 24(1) was held not to apply to "the inferences or assessments drawn by the Service from file information": *Tehrankari v. Canada (Correctional Service)* (2000), 38 C.R. (5th) 43 (F.C.T.D.), at para. 41; see also *Charalambous v. Canada (Attorney General)*, 2015 FC 1045, at para. 15 (CanLII), *aff'd* 2016 FCA 177, 483 N.R. 398.

[120] The Federal Court has also interpreted the phrase "reasonable steps" in a way that is consistent with the idea that the CSC's obligations extend only to factual

information. The word “reasonable” is a limit on the CSC’s obligations that is meant to ensure that the CSC can rely on information it obtains from official records. The CSC is not required — as a reasonable step — to re-investigate all the factual information it obtains from such records: *Tehrankari v. Canada (Attorney General)*, 2012 FC 332, at paras. 35-36 (CanLII); *Charalambous (F.C.)*, at para. 16. For instance, when an offender is transferred, officials at the new institution must make decisions about the offender based on records created at another institution, by the police or by the courts. It would go beyond “reasonable steps” to require the CSC to fact-check everything in the official records.

[121] I would adopt the reasoning of the Federal Court in the foregoing decisions. The Federal Court and the Federal Court of Appeal in its jurisprudence has set out a clear and coherent interpretation of s. 24(1) and (2). I see no reason to depart from that jurisprudence.

[122] Justice Wagner relies in part on s. 4(g) of the *CCRA* to determine the CSC’s obligations. This provision helps to interpret the *CCRA*, but it does not transform the nature and purpose of s. 24(1). Indeed, while s. 4(g) is part of the *CCRA*’s statement of principles, such provisions do not “create legally binding rights or obligations, nor do they purport to do so”: R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at pp. 454 and 455, citing *Greater Vancouver (Regional District) v. British Columbia*, 2011 BCCA 345, 339 D.L.R. (4th) 251.

[123] As stated above, I am in full accord with the majority that the CSC needs to take into account the special circumstances of Indigenous offenders in its decision-making. Failing to do so may render a decision (e.g., denial of a transfer from a medium security facility to a minimum security facility) unreasonable. However, s. 4(g) does not assist this Court in choosing between the competing interpretations of the type of information that is within the scope of s. 24(1). Indeed, my colleague does not rely on s. 4(g) to do so, but rather relies on it to interpret the “reasonable steps” requirement *after* he has determined that the results of the impugned tools is information that has to be accurate under s. 24(1), i.e., that the tests must be valid.

[124] In addition, my colleague’s interpretation of the “reasonable steps” requirement in s. 24(1) leaves open some important questions about the scope of the CSC’s obligations. If the CSC must study the impugned tools to ensure their validity and reliability with respect to Indigenous offenders, what level of specificity is required? Must it distinguish between Métis and other Indigenous offenders? Must it distinguish between Indigenous persons who live on reserve and those who live off reserve? Must it distinguish between male and female Aboriginal offenders? Or with respect to other groups with unique “gender, ethnic, cultural and linguistic differences”? The majority reasons will invite further challenges on this issue. The courts will then be faced with difficult line-drawing exercises about the degree to which these tools must be validated with respect to specific communities. While it is desirable for the CSC to search for better decision-making methodologies, it is not the courts who are best equipped to engage in this exercise, as compared to the CSC itself

or actuarial experts. Section 24 was not intended to require the courts to look behind these decisions.

[125] One can readily understand Mr. Ewert's frustration with the CSC's failure, after his repeated requests, to study the validity of the assessment tools when used with Indigenous offenders. The CSC responded to Mr. Ewert's 2005 grievance by telling him that they were studying the tools. The reviewing judges of the Federal Courts took note of the CSC's delayed response and declined to order costs to the CSC: *Ewert* (2007), at para. 71, *Ewert* (2008), at para. 11. A further decade has passed. This further delay, without any valid explanation, might make the CSC's actions unreasonable. But, that is not the issue that is now before us.

B. *What Is the Appropriate Remedy in This Case?*

[126] I would dismiss the appeal on the basis that s. 24(1) does not impose an obligation on the CSC to study the impugned tools, but in addition I differ from the majority as to the remedy. My colleague grants a declaration, relying on the exceptional circumstances of this case. Notwithstanding these circumstances, I would decline to do so.

[127] This Court has stated that “[t]he proper remedy for breach of statutory duty by a public authority, traditionally viewed, is judicial review for invalidity”: *Holland v. Saskatchewan*, 2008 SCC 42, [2008] 2 S.C.R. 551, at para. 9. Allowing inmates to apply to the Federal Court for a declaration that the CSC has violated s. 24

or some other provision would effectively bypass the ordinary process of judicial review. The consequences of a declaratory “bypass” of judicial review are significant. Such a remedy would fail to accord the deference that is typically shown to administrative decision makers. This could open the door to “undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures”: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 27.

[128] While I am sympathetic to Mr. Ewert’s situation, it is unwise to depart from settled legal principles, even on the hard facts of this case.

V. Disposition

[129] I would dismiss the appeal.

Appendix: Relevant Statutory Provisions

Canadian Charter of Rights and Freedoms

7. Everyone 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.

15. (1) 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 and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Corrections and Conditional Release Act, S.C. 1992, c. 20

PART I

Institutional and Community Corrections

Purpose and Principles

Purpose of correctional system

3 The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by

(a) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and

(b) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community.

Paramount consideration

3.1 The protection of society is the paramount consideration for the Service in the corrections process.

Principles that guide Service

4 The principles that guide the Service in achieving the purpose referred to in section 3 are as follows:

...

(c) the Service uses measures that are consistent with the protection of society, staff members and offenders and that are limited to only what is necessary and proportionate to attain the purposes of this Act;

...

(g) correctional policies, programs and practices respect gender, ethnic, cultural and linguistic differences and are responsive to the special needs of women, aboriginal peoples, persons requiring mental health care and other groups;

...

Information

Service to obtain certain information about offender

23 (1) When a person is sentenced, committed or transferred to penitentiary, the Service shall take all reasonable steps to obtain, as soon as is practicable,

(a) relevant information about the offence;

(b) relevant information about the person's personal history, including the person's social, economic, criminal and young-offender history;

(c) any reasons and recommendations relating to the sentencing or committal that are given or made by

(i) the court that convicts, sentences or commits the person, and

(ii) any court that hears an appeal from the conviction, sentence or committal;

(d) any reports relevant to the conviction, sentence or committal that are submitted to a court mentioned in subparagraph (c)(i) or (ii); and

(e) any other information relevant to administering the sentence or committal, including existing information from the victim, the victim impact statement and the transcript of any comments made by the sentencing judge regarding parole eligibility.

Access by offender

(2) Where access to the information obtained by the Service pursuant to subsection (1) is requested by the offender in writing, the offender shall be provided with access in the prescribed manner to such information as would be disclosed under the *Privacy Act* and the *Access to Information Act*.

Disclosure to Service

(3) No provision in the *Privacy Act* or the *Access to Information Act* shall operate so as to limit or prevent the Service from obtaining any information referred to in paragraphs (1)(a) to (e).

Accuracy, etc., of information

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

Correction of information

(2) Where an offender who has been given access to information by the Service pursuant to subsection 23(2) believes that there is an error or omission therein,

(a) the offender may request the Service to correct that information; and

(b) where the request is refused, the Service shall attach to the information a notation indicating that the offender has requested a correction and setting out the correction requested.

Service to give information to parole boards, etc.

25 (1) The Service shall give, at the appropriate times, to the Parole Board of Canada, provincial governments, provincial parole boards, police, and any body authorized by the Service to supervise offenders, all information under its control that is relevant to release decision-making or to the supervision or surveillance of offenders.

...

Disclosure of information to victims

26 (1) At the request of a victim of an offence committed by an offender, the Commissioner

(a) shall disclose to the victim the following information about the offender:

(i) the offender's name,

(ii) the offence of which the offender was convicted and the court that convicted the offender,

(iii) the date of commencement and length of the sentence that the offender is serving, and

(iv) eligibility dates and review dates applicable to the offender under this Act in respect of temporary absences or parole;

(b) may disclose to the victim any of the following information about the offender, where in the Commissioner's opinion the interest of the victim in such disclosure clearly outweighs any invasion of the offender's privacy that could result from the disclosure:

(i) the offender's age,

(ii) the name and location of the penitentiary in which the sentence is being served,

(ii.1) if the offender is transferred, a summary of the reasons for the transfer and the name and location of the penitentiary in which the sentence is being served,

(ii.2) if the offender is to be transferred to a minimum security institution as designated by Commissioner's Directive and it is possible to notify the victim before the transfer, a summary of the reasons for the transfer and the name and location of the institution in which the sentence is to be served,

(ii.3) the programs that were designed to address the needs of the offender and contribute to their successful reintegration into the community in which the offender is participating or has participated,

(ii.4) the serious disciplinary offences that the offender has committed,

(iii) information pertaining to the offender's correctional plan, including information regarding the offender's progress towards meeting the objectives of the plan,

(iv) the date of any hearing for the purposes of a review under section 130,

(v) that the offender has been removed from Canada under the *Immigration and Refugee Protection Act* before the expiration of the sentence, and

(vi) [Repealed, 2015, c. 13, s. 46]

(vii) whether the offender is in custody and, if not, the reason why the offender is not in custody;

(c) shall disclose to the victim any of the following information about the offender, if, in the Commissioner's opinion, the disclosure would not have a negative impact on the safety of the public:

(i) the date, if any, on which the offender is to be released on temporary absence, work release, parole or statutory release,

(ii) the conditions attached to the offender's temporary absence, work release, parole or statutory release,

(iii) the destination of the offender on any temporary absence, work release, parole or statutory release, whether the offender will be in the vicinity of the victim while travelling to that destination and the reasons for any temporary absence; and

(d) shall provide the victim with access to a photograph of the offender taken on the occurrence of the earliest of any of the following — and any subsequent photograph of the offender taken by the Service — if, in the Commissioner's opinion, to do so would not have a negative impact on the safety of the public:

(i) the release of the offender on unescorted temporary absence,

(ii) the offender's work release,

(iii) the offender's release on parole, and

(iv) the offender's release by virtue of statutory release or the expiration of the sentence.

...

Information to be given to offenders

27 (1) Where an offender is entitled by this Part or the regulations to make representations in relation to a decision to be taken by the Service about the offender, the person or body that is to take the decision shall, subject to subsection (3), give the offender, a reasonable period before the decision is to be taken, all the information to be considered in the taking of the decision or a summary of that information.

Idem

(2) Where an offender is entitled by this Part or the regulations to be given reasons for a decision taken by the Service about the offender, the person or body that takes the decision shall, subject to subsection (3), give the offender, forthwith after the decision is taken, all the information that was considered in the taking of the decision or a summary of that information.

Appeal allowed in part, CÔTÉ and ROWE JJ. dissenting in part.

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