Decades in Crisis: A Critical Analysis of the Underuse of Sections 81 and 84 of the *Corrections and Conditional Release Act* and its Role in the Systemic Neglect of Indigenous Rehabilitation and Reintegration

MADISON PARKER

I. Introduction & Statistics

When studying law and the criminal justice system as a whole, academics and practitioners alike are faced with applying the principles of fairness and equality while determining the best way to preserve these principles within their roles. Offenders should be treated with fairness and equality, a principle that seems elementary on its face, but administering fair and equal justice does not mean that all offenders should be treated the same; far from it in fact. Indigenous people have faced racial, religious, and cultural persecution since the time that Europeans began to colonize Canada. When settlers arrived, they were accompanied by their own legal system which was then forced onto the Indigenous people that had already been occupying this land for thousands of years, without surrender or consent.[1] The trauma experienced resides not only within the individual offender but also intergenerationally and at the societal, communal, and cultural levels.[2]

As a society, we should be consistently seeking change in the pursuit of true reconciliation and reparation with Indigenous Canadians, as well as

1 Jeffery G Hewitt, "Indigenous Restorative Justice: Approaches, Meaning & Possibility" (2016) 67 UNBLJ 313 at 324.

2 David Milward, "Sweating It Out: Facilitating Corrections and Parole in Canada through Aboriginal Spiritual Healing" (2011) 29:1 Windsor YB Access Just 27 at 32.

effective rehabilitation and reintegration of Indigenous offenders. The following paper will highlight the extent of the continued marginalization of Indigenous peoples within the sentencing process, as well as other custodial means of rehabilitation, while bringing into question why Correctional Services Canada (CSC) has failed to utilize ss. 81[3] and 84[4] of the *Corrections and Conditional Release Act* (*CCRA*) to the extent intended in order to combat the problem of Indigenous overrepresentation in custody. Currently, the application of the relevant sections of the *CCRA* become available only after sentencing as they fall within the jurisdiction of CSC. For effective change, the conversation regarding alternative custodial sentencing for Indigenous offenders should begin with the prior to and at the sentencing stage of proceedings. In addition, it is necessary that government funds are redirected from other sources in order to build and fund these alternative means of custodial rehabilitation.

To understand the scope of the overrepresentation of Indigenous people in the criminal justice system, it is necessary to define some of the terms that will be continuously referred to in this paper as well as ground the analysis in quantitative data. Recidivism rates are consistently referred to in academic literature, but despite the importance of understanding these figures, there has yet to be a consensus on the exact definition of recidivism.[5] CSC defines recidivism as "an individual's return to criminal behaviour after receiving a sanction or intervention for previous criminal behaviour."[6] CSC notes that when defining recidivism and measuring correctional outcomes, federal custody is the key outcome measured, but it is important to keep in mind that different definitions, measurements, and reporting practices are employed across Canada.[7]

In early 2020, a press release from the Office of the Correctional Investigator reported that Indigenous peoples account for upwards of 30% of the Canadian prison population – a population that has been steadily growing for the last several decades. That number may not seem shocking

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3 *Corrections and Conditional Release Act*, SC 1992, c 20, s 81 [*CCRA*].

4 *Ibid*, s 84.

5 Sarah Runyon, "Correctional Afterthought: Offences Against the Administration of Justice and Canada's Persistent Savage Anxieties" (2020) 43:5 Man LJ 1 at 1.

6 Correctional Service of Canada, *A Comprehensive Study of Recidivism Rates among Canadian Federal Offenders*, by Lynn A Stewart et al, No R-426 (Ottawa: Correctional Service of Canada, August 2019) at 1.

7 *Ibid* at 1–2.

on its own, but when juxtaposed with the fact that Indigenous peoples only make up roughly 5% of the Canadian population, the overrepresentation becomes blatantly clear.[8]

Further to that point, the population of non-Indigenous offenders has been steadily declining since 2010 at a rate of 13.7%, while the Indigenous population has risen by 43.4%.[9] The office of the Correctional Investigator notes that the "rising numbers of Indigenous people behind bars offset declines in other groups, giving the impression that the system is operating at a normal or steady state."[10] In theory, if the system were working correctly — with no implicit bias or discrimination — the imprisoned population would reflect the whole population of Canada. This may not be a viable goal given the intricacies of race politics, capitalism, and marginalization, but the goal of reducing the overrepresentation of Indigenous offenders needs more systemic attention.

Although these statistics need to be processed carefully (keeping in mind that there may be different definitions of recidivism and different measurements of success), it is without a doubt a dire problem. In *R v Gladue*, Justices Cory and Iacobucci writing for the majority court,[11] somewhat infamously, said that "[t]he figures are stark and reflect what may fairly be termed a crisis in the Canadian criminal justice system."[12] How is it possible that the Supreme Court of Canada labelled this as a "crisis" 21 years ago, and the numbers continue to increase annually? One scholar suggested that crisis is no longer an appropriate description of the phenomenon. Crisis implies that the issue of Indigenous mass imprisonment is a phenomenon that is "unstable" and "unique,"[13] and although this label may serve as an alert to the importance of the situation,

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8 Office of the Correctional Investigator, News Release, "Indigenous People in Federal Custody Surpasses 30% Correctional Investigator Issues Statement and Challenge" (21 January 2020), online: *Office of the Correctional Investigator* <www.oci-bec.gc.ca/cnt/comm/press/press20200121-eng.aspx> [perma.cc/J7MU-JFX2] [Office of the Correctional Investigator, "Indigenous People in Federal Custody Surpasses 30%"].

9 *Ibid*.

10 *Ibid*.

11 Justices Cory & Iacobucci writing for the majority.

12 *R v Gladue*, [1999] 1 SCR 688 at para 64, 171 DLR (4th) 385 [*Gladue*].

13 Efrat Arbel, "Rethinking the "Crisis" of Indigenous Mass Imprisonment" (2019) 43:3 CJLS 437 at 438–39.

it is a mischaracterization. The issue of Indigenous overrepresentation, like colonialism itself, is embedded in the fabric of the Canadian legal system.[14]

II. Factors Contributing to Overrepresentation

So, logically the question follows: what factors are behind this issue? Colonialism is a broad and far-reaching term that encompasses most of the systems put in place in Canada, so it is necessary to dive deeper and identify more specific factors that are resulting in the steady increase of Indigenous Canadians in both provincial and federal custody. There are several factors that will be touched upon to create a more comprehensive picture of this complex systemic problem.

One of the most prominent issues resulting in overrepresentation is something that academics have termed the Revolving Door Syndrome, which is the constant re-institutionalizing of the same offenders, or an individual's inability to stay out of the criminal justice system. One of the main factors contributing to this "syndrome" of the system is so-called "offences against the administration of justice" or "breach offences."[15]

The Canadian Department of Justice has recognized that these types of offences make up a substantial proportion of the caseload of police, prosecutors, and custodial facilities, with a large amount of these offences being "committed" (for lack of a better word) by Indigenous peoples.[16] Offences against the administration of justice are categorized loosely as offences not involving behaviour that is considered "criminal" and were committed only after another offence has been committed.[17] More plainly, when offenders are released on parole, placed on probation, or released on an order of their own recognizance and subsequently offend some part of the agreement of that order, they are charged with a breach. These breaches create a revolving door effect due to many of the factors that make Indigenous peoples more likely to be arrested in the first place; this intersection makes it extremely difficult for them to adhere to conditional release orders. One academic concisely articulates the issue as follows:

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14 *Ibid.*

15 Runyon, *supra* note 5 at 2.

16 *Ibid.*

17 *Ibid.*

> The goal of reducing Indigenous over-incarceration by employing non-custodial measures is thwarted as these segments of the population become further marginalized, both socially and economically, through the criminal prosecution of their administrative offences. I argue that efforts to reduce over-incarceration will fall short if the justice system and its participants continue to ignore the devastating impact that administrative court orders have on the accused.[18]

As stated earlier, many of the same factors affect the inability to adhere to conditional releases and the inability to adhere to the laws in the first place. Offenders that are released into poverty, who may suffer from substance abuse issues, cognitive issues, and/or may be transient, can find it nearly impossible to adhere to these release orders or report to a parole officer, thus perpetuating the vicious cycle of the custodial revolving door. These factors of marginalization often make it extremely difficult for an individual to live within prescribed geographic restrictions, or comply with demanding reporting requirements.[19] Traditionally, probation has been seen as a rehabilitative tool much preferred to a custodial sentence, but is it preferred if the conditions of the probation are unrealistic in the state that the offender is being released? This is just one of the confounding questions seemingly neglected by those who should be working tirelessly on a sustainable solution to the problem. The lack of attention given to resolving the issue of offences against the administration of justice directly opposes the Canadian government's effort over the last several decades to reduce the rates of Indigenous incarceration.[20]

The prevalence of these offences fit into the statistical picture explored in a *Maclean's* article that noted that Canada's crime rates were lower in 2016 than they had been in 45 years, yet the number of incarcerated Canadian's is at an all-time high.[21] These 'breach offences' account for the discrepancy between incarceration numbers and crime rates. The same research showed that in Manitoba courtrooms, 85% of offenders are Indigenous, with even higher rates in the Headingley Women's prison, where nine out of ten women held are Indigenous. At Stony Mountain, 65% of the population is Indigenous, with many incarcerated for failing to

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18 *Ibid* at 3.

19 *Ibid*.

20 *Ibid*.

21 Nancy Macdonald, "Canada's prisons are the 'new residential schools'", *Maclean's* (18 February 2016), online <www.macleans.ca/news/canada/canadas-prisons-are-the-new-residential-schools> [perma.cc/ZF9Y-CUQ6].

comply with various forms of release.[22] More specifically, Statistics Canada reported that in 2018/2019, there were 226,048 admissions to custody in Canada, and of those admissions, 68,814 were Indigenous Canadians.[23] Focusing on Manitoba, it was reported in 2018/2019 that of the 28,141 admissions into custody, 21,046 of those were Indigenous – meaning that 74% of individuals incarcerated in Manitoba are Indigenous, a number grossly disproportionate to the total provincial population.[24]

Multiple factors have resulted in the marginalization of Indigenous peoples in Canada. Some of them are ingrained in the justice system, such as over-policing of Indigenous peoples (and areas highly-populated by Indigenous individuals), inadequate access to legal representation and basic legal education for those yet to be convicted, followed by lack of access to rehabilitative programs for Indigenous peoples once in the system.[25] Other factors are broader, stemming from the effect of colonialism and discrimination over generations that result in socio-economic factors like poverty, substance abuse, and Fetal Alcohol Spectrum Disorder.[26] The devastating effect of the residential school system has created penetrating and unending grief that is held in the hearts of Indigenous Canadians; the extent and details of this horror is now coming to light with the catastrophic discovery in May 2021 of 215 children in a mass grave on the grounds of the Kamloops Indian Residential School.[27] Two months later that number has risen to more than 1300[28] as Indigenous Canadians and allies call for each former residential school site to be searched. This unthinkable genocide has resulted in enduring mourning and loss of culture, often

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22 *Ibid.*

23 Statistics Canada, "Adult custody admissions to correctional services by aboriginal identity: Provinces and territories" (last modified 6 June 2021), online: <www150.statcan.gc.ca> [perma.cc/4BQL-7DEC].

24 Statistics Canada, "Adult custody admissions to correctional services by aboriginal identity: Manitoba" (last modified 6 June 2021), online: <www150.statcan.gc.ca> [perma.cc/2Z8K-R9DE].

25 Celeste McKay & David Milward, "Onashowewin and the Promise of Aboriginal Diversionary Programs" (2018) 41:3 Man LJ 127 at 128.

26 *Ibid.*

27 Brooke Taylor, "'We do not want this to be hidden': Remains of 215 children discovered on site of former residential school", *CTV News* (28 May 2021), online: <www.ctvnews.ca/> [perma.cc/STP7-Q5NC].

28 Adam Kovac, "Children's remains found at residential school has some Catholics thinking of leaving the church", *CTV News* (4 July 2021), online: <montreal.ctvnews.ca> [perma.cc/7WHN-H3SL]

resulting in a lack of positive self-esteem and substance abuse as a means of coping with firsthand and intergenerational trauma.

Another factor hampering Indigenous offenders' ability to experience rehabilitative sentences or be granted alternative sentences is the consistent issue of security classification. Scholarly studies consistently report that Indigenous offenders are disproportionately placed in stricter security classifications compared to non-Indigenous offenders. This issue is even more prevalent in the classification of female offenders, who were even more likely to receive a higher security classification than their non-Indigenous counterparts.[29] Security classification impacts whether or not an offender can access education and rehabilitative programming while incarcerated, which can impact the conditions of their release. The higher the security classification, the more likely an offender is to return to custody on a breach offence.

The CSC has implemented a tool for the classification of female offenders, taking into account the unique range of factors that impact women in the prison system.[30] Some of the factors considered are positive contact with family members and current progress in the correctional programs. This may seem to be an effective classification tool, but the 2017 *Auditor General*'s Report found that when classifying incarcerated women, CSC staff frequently overrode or ignored the results that the tool indicated and classified women as higher risk.[31]

III. EFFORTS TO COMBAT INDIGENOUS OVER-INCARCERATION

The systemic obstacle of Indigenous over-incarceration has not been completely neglected – although the numbers do not reflect that effort. There have been efforts to reduce the length and severity of Indigenous sentences, as well as efforts to sentence those offenders to more healing and

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29 Milward, *supra* note 2 at 40–41.

30 Correctional Service of Canada, *The Security Reclassification Scale (SRSW) for Shorter Review Periods among Federal Women Offenders* (Research at a glance), by Lysiane Paquin-Marseille, No R286 (Ottawa: CSC, March 2013), online (pdf): <www.csc-scc.gc.ca/005/008/092/005008-0286-eng.pdf> [perma.cc/4RT9-A5C3].

31 Leah Combs, "Healing Ourselves: Interrogating the Underutilization of Sections 81 & 84 of the *Corrections and Conditional Release Act*" (2018) 41:3 Man LJ 163 at 177, citing Office of the Auditor General of Canada, *Report 5 – Preparing Women Offenders for Release - Correctional Service of Canada* (Ottawa: Office of the Auditor General, 21 November 2017) at 5.25.

rehabilitative programming. Some of these efforts are written into legislation, while some of them come from Supreme Court of Canada case law.

A. Section 718.2 of the Criminal Code

In September 1996, new provisions of the *Criminal Code* came into force that codified the principles and fundamental purposes of sentencing. Provision 718.2[32] codified the principles that should be taken into consideration in terms of aggravating and mitigating factors in sentencing. One of those factors is "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal[33] offenders."[34] This was the first time that Indigenous background and lived experience was codified as a factor in the sentencing process but not the first time it had been federally recognized.

B. *R v Gladue*

The case of *R v Gladue* went to the Supreme Court in 1999, three years after the codification of s. 718.2. Gladue was convicted at the trial level, and an application to the British Columbia Court of Appeal was dismissed.

Gladue was the child of a Cree mother and a Métis father. She lost her mother at a young age and became a mother herself at the age of 19.[35] She had substance abuse problems and, at the time of her crime, had only completed a grade nine education. In 1995, while five months pregnant with their second child, Gladue got into an altercation about infidelity with her partner and the father of her children, and she subsequently stabbed him to death. A neighbour, Mr. Gretchin, saw the incident and had observed Gladue stabbing her partner, Reuben Beaver.[36]

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32 *Criminal Code*, RSC 1985, c C-46, s 718.2.

33 Legislation often still employs the use of the word "Aboriginal" due to the fact that our current Constitution uses that language. The current accepted language referring to the first people of Canada is "Indigenous," but "Aboriginal" may be used when discussing legislative language, intent, and interpretation.

34 *Criminal Code*, *supra* note 31, s 718.2(e).

35 *Gladue*, *supra* note 12 at para 2.

36 *Ibid* at paras 5–6.

On June 3, 1996, Gladue was charged with second degree murder and entered a plea of manslaughter. Seventeen months passed between the charges being laid and the sentencing trial. During that time, Gladue lived peacefully with her father, attended counselling for substance abuse, completed grade ten, and began grade 11. She was also diagnosed and subsequently prescribed medication for an overactive thyroid.[37] At the sentencing hearing, Gladue showed remorse and apologized to the court and to the victim's family. The problem arose when, at the sentencing trial, Gladue's counsel did not ask that Gladue's indigeneity be taken into consideration during sentencing. This may have stemmed from what we now acknowledge as one of the many "*Gladue* Myths," that:

> [T]he seriousness or violent nature of the offence, and/or the presence of significant aggravating factors, especially a prior record for the same kind of offence for which the accused is being sentenced, will denude *Gladue* of any meaningful practical value during a sentencing hearing.[38]

Her counsel did not draw on the proper legislation but did request a suspended or conditional sentence. Ultimately, Gladue was sentenced to three years imprisonment as well as a ten-year weapons prohibition.[39] She appealed the sentence to the British Columbia Court of Appeal (BCCA), and it was dismissed. Justice Rowles, writing the dissent of the BCCA, stated that:

> [S]. 718.2(*e*) invites recognition and amelioration of the impact which systemic discrimination in the criminal justice system has upon aboriginal people. She referred to the importance of acknowledging and implementing the different conceptions of criminal justice and of appropriate criminal sanctions held by many aboriginal peoples, including, in particular, the conception of criminal justice as involving a strong restorative element.[40]

Following the dismissal from the BCCA, the case ended up before the Supreme Court, at which time the now renowned "*Gladue* Principles" became binding case law. The Supreme Court laid out a framework for sentencing that shed light on what is meant by "circumstances of Aboriginal offenders" in the legislation, what should be taken into account in terms of

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37 *Ibid* at para 10. Suffering from a hyperthyroid condition had a side effect of exaggerated emotional reactions – presumably a factor in her violence on the night of the attack.

38 David Milward & Debra Parkes, "*Gladue*: Beyond Myth and Towards Implementation in Manitoba" (2011) 35:1 Man LJ 84 at 92.

39 *Gladue*, *supra* note 12 at para 13.

40 *Ibid* at para 21.

background and systemic factors, as well as clarified the definition of who is Aboriginal for the purposes of the legislation.[41] It was decided that those that come into the purview of s. 718(2)(e) of the *Criminal Code* would be the same individuals that fall under the jurisdiction of s. 35 of the *Constitution Act*.[42]

These clarified principles for assisting in applying s. 718.2 of the *Criminal Code* when sentencing were meant not to be a form of "reverse discrimination,"[43] but to help correct the staggering injustices currently experienced by Indigenous peoples within the criminal justice system and address the fact that Indigenous peoples are often alienated from the system in a way that does not reflect their specific needs or understanding of an appropriate sentence.[44]

The addition of *Gladue* factors — now commonplace in Canadian sentencing courts — was meant to combat the rising numbers of incarcerated Indigenous peoples. Since 1999 when *Gladue* came out of the Supreme Court, the Indigenous prison population has steadily risen from the 17% it was in 1999[45] to over 30% today.[46]

C. *Corrections and Conditional Release Act*, Sections 81 and 84

Beginning in the late 1980s and into the early 1990s, the systematic failures resulting in the over-incarceration of Indigenous peoples were under the microscope. Consultations were conducted as a part of the 1998

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41 *Gladue*, *supra* note 12. This determination broadened the scope of the classification from that of the trial judge who had restricted the application to merely those crimes that took place in rural/reserve Indigenous communities.

42 *Ibid* at para 90; *Constitution Act, 1982*, s 35, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 (Rights of the Aboriginal Peoples of Canada).

43 *Gladue*, *supra* note 12 at para 86. This term is used explicitly in the wording of the Supreme Court decision in *Gladue*. I would like to note that I do not believe that there can be reverse discrimination, especially while in pursuit of reconciliation and reparation.

44 *Ibid* at para 88.

45 Statistics Canada, *Adult Correctional Services in Canada, 1999-00*, by Charlene Lonmo, Catalogue No 85-002-XIE, vol 21, no 5 (Ottawa: Statistics Canada, June 2001) at 8, online (pdf): *Statistics Canada* <www150.statcan.gc.ca/n1/en/pub/85-002-x/85-002-x2001005-eng.pdf?st=UvriKtGd> [perma.cc/MDK9-P434].

46 Office of the Correctional Investigator, "Indigenous People in Federal Custody Surpasses 30%", *supra* note 8.

Task Force on Aboriginal Peoples in Federal Corrections, and discovered that offenders were often being released into their communities without giving the communities notice, information on the offender and their time in custody, or the ability to prepare conditions to ensure that community members felt safe.[47]

Further, in 1991, the Aboriginal Justice Inquiry of Manitoba concluded that the principles and procedures of the Canadian justice system were both inadequate and incompatible with Indigenous custom and traditional law. The Inquiry recommended that there be legislation to empower Indigenous communities to establish their own Indigenous-controlled justice system. Due to the unique circumstances and life experience that accompany Indigenous identity in Canada, the Law Reform Commission of Canada stated that "the justice system should not be a uniform system, but one which Aboriginal people themselves have shaped and moulded to their particular needs and that there should be community-based and controlled correctional facilities."[48]

The *CCRA* was enacted in 1992 in response to these Federal recommendations. In keeping with the direction of this analysis, the focus will remain on two provisions of the *Act*: ss. 81 and 84, enacted with the purpose of decreasing the number of incarcerated Indigenous offenders.

S. 81 reads as follows:

> **Agreements**
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> **81(1)** The Minister, or a person authorized by the Minister, may enter into an agreement with an Indigenous governing body or any Indigenous organization for the provision of correctional services to Indigenous offenders and for payment by the Minister, or by a person authorized by the Minister, in respect of the provision of those services.
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> **Scope of Agreement**
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> **(2)** Notwithstanding subsection (1), an agreement entered into under that subsection may provide for the provision of correctional services to a non-Indigenous offender.
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> **Placement of offender**

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47 Canada, Office of the Correctional Investigator, *Spirit Matters: Aboriginal People and the Corrections and Conditional Release Act: Final Report* (Ottawa: Correctional Investigator Canada, 22 October 2012) at para 14, online (pdf): *Office of the Correctional Investigator* <publications.gc.ca/collections/collection_2013/bec-oci/PS104-6-2013-eng.pdf> [perma.cc/HX8V-PG6W] [Office of the Correctional Investigator, *Spirit Matters*].

48 *Ibid* at para 23.

> **(3)** In accordance with any agreement entered into under subsection (1), the Commissioner may transfer an offender to the care and custody of an appropriate Indigenous authority, with the consent of the offender and of the appropriate Indigenous authority.[49]

This section is meant to address the care and custody of Indigenous offenders through the delivery of a wide variety of Canadian custodial and community services. Applying statutory interpretation, ambiguity regarding the form of these agreements has been found to include, among other options, the placement of Indigenous offenders in healing lodges instead of provincial and federal prisons and, more generally, release into the care and custody of Aboriginal communities.[50] When reading this statute, s. 81 is given the broadest interpretation when subsections (1) and (3) are read together. Read this way, the statute allows Indigenous communities the power to negotiate whether they want to enter an agreement, the number and security classification[51] of offenders that they wish to accept, and the risks that they are willing to assume when accepting offenders into the community.[52]

It is important to note that s. 81 is not intended to, and does not, transfer jurisdictional responsibility for corrections onto the communities. That responsibility remains with the Federal government. It is meant for the allowance of services and programming, including care and custody, to be agreed upon and delivered by Indigenous peoples and communities "for payment by the Crown."[53]

S. 84 provides for:

> **Release into Indigenous Community**
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> **84** If an inmate expresses an interest in being released into an Indigenous community, the Service shall, with the inmate's consent, give the community's Indigenous governing body
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> > **(a)** adequate notice of the inmate's parole review or their statutory release date, as the case may be; and

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49 CCRA, *supra* note 3, ss 81(1)–(3).

50 Combs, *supra* note 30 at 174.

51 Office of the Correctional Investigator, *Spirit Matters*, *supra* note 46 at para 11. Initially, the CSC intended that s. 81 arrangements would be available to any security classification but acknowledged that building up trust between the CSC and the communities would take time.

52 *Ibid* at para 10.

53 *Ibid* at para 13.

> **(b)** an opportunity to propose a plan for the inmate's release and integration into that community.[54]

The purpose of s. 84 is to collaborate with Indigenous communities in the correctional planning of Indigenous offenders and is built on the notion that adequate notice will allow the community in question to create a plan for that individual and provide a support network for offenders upon their release. The thinking is that if offenders are released into their communities with their cultural and familial support systems, they will be less likely to re-offend or breach a release order, thereby increasing the overall rehabilitative and restorative purpose of our justice system and working to address the issue of overrepresentation.[55] This regime was introduced with the optimistic view that over time, their alternative custodial and community sentences would, by reducing offences against the administration of justice, allow more Indigenous Canadians to remain in the community and out of the criminal justice system through renewed connection with their land and people.[56]

These provisions are a natural and progressive extension of s. 35 of the *Constitution Act*, respecting existing treaty rights of Indigenous peoples in Canada and their traditions, customs, and cultures.[57] These provisions have been derived from extensive work of federal task forces and commissions to involve Indigenous peoples in developing and delivering this type of programming to Indigenous offenders.

IV. CURRENT SECTION 81 FACILITIES

Since the enactment of the *CCRA* in 1992, there have been several funding agreements entered into with Indigenous Communities regarding the organization, establishment, and maintenance of the healing lodges. Healing lodges, in this context, are custodial facilities where the specific needs of the offender are addressed through purposeful contact with Elders, traditional teachings and ceremonies, as well as meaningful interaction with

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54 *CCRA*, *supra* note 3, ss 84(a)–(b).

55 Combs, *supra* note 30 at 175.

56 *Ibid* at 164.

57 Office of the Correctional Investigator, *Spirit Matters*, *supra* note 46 at para 8.

nature.[58] Facilities under s. 81 have a combined total of 189 beds, 131 for men and 58 for women.[59]

The first, *Prince Albert Grand Council Spiritual Healing Lodge*, located on the Wahpeton First Nation in Saskatchewan, opened in 1995.[60] The capacity of this lodge has fluctuated, opening with 25 beds in 1995, then reopening in 2014 after a two-year closure with 12 beds. The closure followed a failure of the government to renew its portion of the s. 81 agreement, forcing the lodge to close its doors. The agreement was eventually renewed, and the doors reopened.[61] This healing centre is a minimum-security facility for male offenders and, as the name suggests, is managed by the Prince Albert Grand Council.[62]

In 1999, a s. 81 agreement was signed with the O-Chi-Chak-Ko-Sipi First Nation to open a healing lodge in Crane River, Manitoba. After two years of operations, financial difficulties were experienced, and residents of the healing lodge were transferred out. The lodge had a grand reopening in May 2004 following the implementation of financial control procedures.[63] *O-Chi-Chak-Ko-Sipi Healing Lodge* is managed wholly by the First Nation and is a minimum-security facility for men, currently with 24 beds.[64]

The 73-bed *Stan Daniels Healing Centre* in Edmonton, Alberta opened in 1999 as both a minimum-security facility for men and a residential facility for offenders on community conditional release.

Located an hour from Montreal near the Laurentian mountains, the *Waseskun Healing Centre* opened in 1999 in Quebec with 22 beds. Similar to the *Stan Daniels Healing Centre*, it is both a minimum-security facility for men and a facility for men on conditional release. [65]

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58 "Indigenous healing lodges" (last modified 22 March 2021), online: *Correctional Services Canada* <www.csc-scc.gc.ca> [perma.cc/7B6C-VXVE].

59 Office of the Correctional Investigator, *Spirit Matters*, *supra* note 46 at para 30.

60 *Ibid.*

61 "Spiritual Healing Lodge" (2014), online: *Prince Albert Grand Council* <www.pagc.sk.ca/spiritual-healing-lodge> [perma.cc/68U9-PAZB].

62 "About the different lodges", *supra* note 58.

63 Correctional Service Canada, *Evaluations Report: Section 81 Agreement between the O-Chi-Chak-Ko-Sipi First Nation and the Correctional Service of Canada - The O-Chi-Chak-Ko-Sipi Healing Lodge*, No 394-2-70 (November 2007) at 3, online (pdf): *Correctional Service Canada* <www.csc-scc.gc.ca/text/pa/ev-ohl/ev-ohl-eng.pdf> [perma.cc/Z7PF-LZCQ].

64 "About the different lodges", *supra* note 58.

65 *Ibid.*

In addition to the four healing lodges for men, there are two for women. The first, *Buffalo Sage Wellness House*, opened in 2011 under the management of the Native Counselling Services of Alberta. The facility has 28 beds and houses minimum and medium security women, as well as some on conditional release.[66]

Lastly, and most recent, is the *Eagle Women's Lodge* in Winnipeg, Manitoba, which opened in September 2019. This facility has 30 beds for multi-security level women and is managed by Indigenous Women's Healing Centre Inc.[67] It is the first of its kind for Indigenous Manitoban women, giving them the opportunity to experience this kind of rehabilitative sentencing while staying close to family and friends.

Other agreements were entered into under s. 81 but did not involve the establishment of a healing lodge. Rather with community custody agreements providing that First Nations would assume the responsibility of transferring offenders onto the First Nation land. In this kind of agreement, an offender can be accommodated by a community and confined to the boundaries of the reserve unless granted permission to leave temporarily.[68]

S. 81 agreements are required to provide a schedule detailing where the offender will be in the community and when, allowing affected individuals to be aware of the offender's location. The First Nation is also required to calculate a budget *per diem* for keeping the offender in the community and submit it to the CSC.[69]

V. PROGRAMMING & STRUCTURE OF SECTION 81 FACILITIES

The structure and focus of programming can vary within each facility, but all the facilities share the goal of moving away from the Eurocentric hierarchical approach of our prisons. The goal of these practices is to increase restoration and rehabilitation within the program and focus on restorative justice. Restorative justice, in this instance, is "a location of decolonization in that Indigenous models of justice assist in revitalizing Indigenous laws through practice."[70] These facilities are based on the recognition that Indigenous offenders should be dealt with in a culturally

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66 *Ibid.*

67 *Ibid.*

68 Office of the Correctional Investigator, *Spirit Matters*, *supra* note 46 at para 32.

69 *Ibid* at para 33.

70 Hewitt, *supra* note 1 at 317.

meaningful way, while trying to draw together all the parties affected by the harm of the crime in order to restore harmony within the community. Indigenous peoples have their own laws that were not accepted by the colonial settlers when they were establishing the justice system in Canada. Healing lodges are a step towards formal recognition of Indigenous law in the correctional planning of Indigenous offenders.

The *Stan Daniels Healing Centre*, for example, seeks to provide a safe, structured environment for both the offenders and their families. The program focuses on holistic healing and re-centering Indigenous identity in an effort to restore self-esteem. The programming focuses on "relationships, loss and recovery, family, relapse prevention, healing, and substance abuse."[71] Another way by which the lodges seek to heal the connection between the offenders and their culture is by encouraging participation in traditional ceremonies such as the Sundance Ceremony, smudging, and sweat lodges.

At the *O-Chi-Chak-Ko-Sipi Healing Lodge*, the objective is the same, with a focus on mental, physical, and spiritual healing, as well as tradition. An Indigenous architect designed the "Earthen Spiritual Centre" in the facility, which has a tipi-inspired central lodge, four residences, and a place for visitors. The program also encourages healthier lifestyle choices, including "nutrition, exercise, stress relief, anger management, parenting, and sexual/health issues."[72]

The *Buffalo Sage Wellness House*, a women's facility, has programs that were developed with the Task Force on Federally Sentenced Women in order to provide programs focused on the specific and diverse needs of women. The lodge is founded on a caring attitude towards self, family, and community; programs also highlight the transitory aspects of Indigenous life. An important feature of the structure of these lodges is that the programs are delivered in a non-hierarchical fashion – a structure that has proven to be more effective in the rehabilitation of Indigenous offenders. This structure focuses more on the exchange of learning rather than on individuals in power.[73] Residents are guided by the in-house Elders through the lens of an "interconnected, Indigenous worldview."[74] This organization

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71 "About the different lodges", *supra* note 58.

72 *Ibid.*

73 Combs, *supra* note 30 at 174.

74 *Ibid* at 175.

helps to reconnect with cultural roots lost through the colonial foundation of our current prison system. Statistics show that being involved with these programs[75] can help with recidivism by fostering the offenders' relationships, not only with their traditions and culture, but by reinforcing their sense of self, which is often buried by the trauma — both firsthand and vicarious — many of Indigenous Canadians have suffered since childhood.

VI. UNDERUTILIZATION OF SECTIONS 81 & 84 OF THE *CCRA*

Recall that this legislation was introduced in 1992, so you may be wondering – why are the numbers consistently rising? The research shows that it is not due to the legislation being ineffectual, but simply to the legislation not being utilized to the extent that it was intended by the legislators and the various federal task forces.

The literature on Indigenous over-incarceration is clear on several facets highlighted in the previous pages, specifically that it is a devastating issue — even a "crisis" — and that the numbers are consistently rising, notwithstanding the efforts of the justice system to decrease the blatant problem. So, with this in mind, what logical reason could there be for the near neglect of these provisions in practice? Disappointingly, in the case of s. 84, lack of sufficient knowledge has been cited as one of the major reasons for its underutilization.[76] Individuals at all levels of involvement in the justice system have stated that there is a lack of awareness and understanding about the kind of agreements that these sections refer to, and, in turn, application of the sections is avoided. This inadequate knowledge of the legislation results in confusion surrounding who is responsible for implementing these releases.[77]

This preliminary explanation seems to follow a pattern of diffusing responsibility with regard to the efforts of the system to repair the damage done to Indigenous communities primarily through over-incarceration of their people.

A major hurdle in the application and utilization of s. 84 is the isolation of many communities and the absence of proper transportation, creating a geographical barrier between the offenders and the officers and programs required for those individuals to complete programs put in place by s. 84.

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75 Milward, *supra* note 2 at 37.

76 *Ibid* at 181.

77 *Ibid.*

Isolated communities are deeply affected by intergenerational trauma and often the resulting violence, making it difficult to build the programs and infrastructure for the facilitation of the agreements.[78]

These factors are intensified by the fact that many Indigenous communities are already deficient in many resources, particularly financial resources, leaving them without the capacity to provide the services necessary for conditionally released offenders to reintegrate into their communities successfully.[79] Although that may seem like a valid argument on its face, it becomes less persuasive due to the fact that in 2000, an agreement was entered into in which $11.9 million dollars was to be given to the CSC over five years under Public Safety Canada's *Effective Corrections and Citizen Engagement Initiative.* These funds were meant to aid with the construction of alternative rehabilitation facilities (healing lodges), for the specific application of s. 81, as well as aid in helping with community programming outside of the incarceratory environment.[80]

In the 20 years since, only one stand-alone Healing Lodge has been constructed – the *Waseskun Healing Centre* in Edmonton. Recall that two other healing lodges were opened for women in 2011 and 2019, but these facilities were converted for the purposes of complying with s. 81 and were not constructed using the initiative funds. It is also necessary to note that when an individual is in the care of the First Nation within one of these facilities, the government gives them a *per diem* allowance based on how many offenders are in the facility each day.[81]

During the process of delving into the issue of where these funds were being directed, as the $11.9 million had clearly not been used to aid in s. 81 agreements and facility construction, documents from 2002 were found detailing that the *Effective Corrections* money had been diverted to cover other institutional costs.[82] Some of the funds were used for Pathways Healing Units – Indigenous healing units in medium-security prisons. Other funds were used to hire and train more Indigenous community development officers and support a National Aboriginal Working Group and an Aboriginal Gangs initiative at Stony Mountain Institution in

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78 *Ibid* at 181–82.
79 *Ibid* at 181.
80 *Ibid* at 176.
81 Office of the Correctional Investigator, *Spirit Matters*, *supra* note 46 at para 33.
82 *Ibid* at paras 36–37.

Manitoba.[83] Although these initiatives and programs appear helpful, necessary, and backed by noble intentions within the prisons, the problem still stands – the funds were redirected to better accommodate the large population of Indigenous offenders in prison when their purpose was to reduce the number of Indigenous inmates by increasing alternative custodial centres and enhancing reintegration programming. The money had been diverted away from solving, or at least decreasing the issue, to mere accommodation of the issue – an unacceptable substitute for change.

When the CSC was asked to explain the policy changes that resulted in the change towards institutional priorities for the funds, they said that the programs they were funding would inevitably prepare the offenders for the move into the healing lodge environment.[84] Although it seems plausible that this could be the truth for some offenders in need of a more structured correctional approach before a transition, it fails to address the fact that the funds were directed away from their intended purpose and the numbers of incarcerated Indigenous offenders continues to rise.

VII. OVER-CLASSIFICATION OF INDIGENOUS OFFENDERS

A major issue contributing to the underutilization of these sections of the *CCRA* is the over-classification of Indigenous offenders. Not only does classifying Indigenous offenders as higher risk than necessary exclude them from being eligible to participate in some incarceratory programming, but it also often excludes them from being eligible to be transferred to s. 81 facilities. As previously noted, all of the male healing lodges are for minimum security offenders; the women's lodges allow medium and high-security classifications on a case-by-case basis. This arguably excludes many offenders from even having the opportunity to be released to one of these facilities at sentencing or transferred there at a later date. The over-classification of these offenders makes the pool of eligible offenders even smaller.[85]

This issue was explored in the 2018 case of *Ewert v Canada*, a case dealing with assessment tools used by the CSC to help determine security classification. The facts of Ewert's case are not applicable to the discussion surrounding s. 81 facilities as Mr. Ewert was charged and convicted with the

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83 *Ibid*.

84 Combs, *supra* note 30 at 176.

85 *Ibid* at 177.

sexual assault and murder of two women on two separate occasions.[86] There is likely no scenario in which he would have been considered for a healing lodge under s. 81 given the violence, cruelty, and nature of his crimes. That said, the case he brought to the Supreme Court dealing with the use of particular risk assessment tools will undoubtedly have an impact on many Indigenous peoples in the system moving forward.

Ewert challenged the CSC's reliance on certain "psychological and actuarial risk assessment tools"[87] because there is no solid empirical research regarding their effectiveness when applied to Indigenous offenders, the validity of the tools is in question. He argued that the tools had been developed and tested on predominantly non-Indigenous people, and their effectiveness had not been confirmed in the case of an Indigenous inmate. He sought a declaratory remedy that the CSC had, by using these tools, failed to uphold its legal obligation under s. 24(1) of the *CCRA*, which states: "[t]he 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."[88]

Ewert also made an argument that the reliance on the tools offended s. 4(g) of the *CCRA*[89] and that correctional policies and practices have to respect cultural differences and be "responsive to the special needs of women, Indigenous persons, visible minorities, persons requiring mental health care and other groups."[90]

During the trial, an expert witness testified to the phenomenon of cross-culture or variance bias in the application of assessment tools, claiming that the reliability of an assessment tool can vary greatly, depending on the cultural background of the test subject. He further noted that due to the significant cultural differences between non-Indigenous and Indigenous Canadians, the impugned tools were more likely to experience a cross-cultural variance in results.[91] The doctor did not provide evidence on the magnitude of the variance, only stating that the variance could be on a spectrum from subtle to profound.[92]

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86 *Ewert v Canada*, 2018 SCC 30 at para 9 [*Ewert*].
87 *Ibid* at para 4.
88 *CCRA*, *supra* note 3, s 24(1).
89 Combs, *supra* note 30 at 178–79.
90 *CCRA*, *supra* note 3, s 4(g).
91 *Ewert*, *supra* note 84 at para 13.
92 *Ibid*.

Based on the testimony of one of the Crown's witnesses, a former head of research at the CSC, the trial judge found that the CSC had been aware of concerns from researchers about the cross-cultural validity of the assessment tools at issue since 2000.[93]

Writing for the majority, Justice Wagner (as he then was) noted in his conclusion that the question of validating the impugned tools is more than a theoretical query, but a real question that has been subject to proceedings that began two decades ago. The CSC indicated that they would obtain an opinion on the validity of the tools from an objective outside source but failed to do so. The Court then concludes that the CSC breached its duty under s. 24(1) of the *CCRA*.[94]

It is important to note that the *Ewert* case did not decide whether or not risk assessment tools are valid assessment tools for Indigenous offenders. The reach of the case holds that the CSC has a legal obligation under s. 24(1) to take all the reasonable steps necessary to determine the accuracy of the results when dealing with Indigenous offenders – and it was determined that they had not fulfilled this obligation.

Following *Ewert*, the Correctional Investigator called for change and innovation and asked the CSC to respond publicly to the gaps identified in *Ewert* and reassure the public that more culturally applicable indicators would be used in future assessments. Another recommendation called for the CSC to acquire independent external expertise to conduct empirical research assessing the validity of all existing risk assessment tools used to inform the correctional path of Indigenous offenders.[95]

If the cross-cultural variance of the assessment tools used in institutions in Canada had the effect of classifying an inmate at a higher security level, this failure by the CSC has a direct impact on the overrepresentation of Indigenous inmates in Canadian correctional facilities. As stated, over-classification means that inmates may not be eligible for programming while in prisons, s. 81 facilities, or the earliest possible parole opportunities. In 2016–2017 it was reported that compared to non-Indigenous offenders,

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93 *Ibid* at para 17.

94 *Ibid* at paras 82–85, 90.

95 Canada, Office of the Correctional Investigator, *2018-2019 Annual Report*, by Ivan Zinger (Ottawa: Office of the Correctional Investigator, 25 June 2019) at 70 [Office of the Correctional Investigator, *Annual Report*].

Indigenous inmates served a higher portion of their sentence before being released on their first-day parole: 40.8% versus 49.0%, respectively.[96]

The House of Commons Standing Committees on Public Safety and National Security and Status of Women committees concluded studies on Indigenous peoples in the federal correctional system and Indigenous women's experience of federal corrections, respectively.[97] Their suggestions aligned with those of the Office of the Correctional Investigator, who called for the validation of existing risk assessment tools and/or the development of tools more applicable to the histories and realities of Indigenous peoples in custody.[98] In response to these recommendations, the CSC did identify several "potentially promising initiatives,"[99] including Aboriginal Intervention Centres and contracts with Indigenous communities for reintegration services. Unfortunately, the majority of these responses were vague and non-committal and seemed to express intention to maintain the current procedures.

Another issue briefly touched upon in the introductory pages is that even when assessment tools are used, the assessment is often ignored, and liberties are taken with regard to the placement of offenders – often female offenders. After initial placement in a facility, there is a Security Reclassification Scale for Women (SRSW), a tool used to determine where a female inmate should be more permanently placed. A study was conducted by the CSC regarding the operational value of the classification system in shorter review periods. Findings from the study found that the majority of the SRSW recommendations were to a medium-security level. Although few of the scales fell between discretionary ranges, more than half of those were placed in high security when they did. Furthermore, final decisions that overrode the SRSW results happened in 29% of cases, and the majority of those (76%) were also to higher security, claiming to be based on measures of current behaviour and attitude.[100]

The scope of over-classification is broad and has many implications for the type of rehabilitative programming available to offenders and their length of time in custody before conditional release. Misclassification is one

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96 *Ibid* at 65.

97 Office of the Correctional Investigator, *Annual Report*, *supra* note 93 at 64.

98 *Ibid* at 66.

99 *Ibid* at 67.

100 Paquin-Marseille, *supra* note 29.

of the major factors which results in the underutilization of s. 81 provisions, so many offenders do not qualify due to their security classification, which would be a fair principle, in theory, if the classifications were based on reliable assessment measures.

All factors considered, this legislation is not being applied readily enough and should be considered in court at the sentencing hearing of every Indigenous individual, alongside pre-sentence reports and formal *Gladue* reports. These provisions of the *CCRA* are meant to be remedial and cannot achieve their objective if they are not being used to aid in the judicial process. The *CCRA* is a piece of legislation that should be interpreted in a "fair, large and liberal manner" to ensure that it will achieve the intent, meaning, and spirit of its systematic goal.[101] Its underutilization is not only an injustice, but causes continued harm to the First Nations people in Canada by the government, in addition to the ongoing failure to achieve reconciliation. It is not just the freedom of Indigenous peoples that hangs in the balance, but their physical safety, and for some, it is a matter of life and death. Indigenous inmates in Canada account for a disproportionate number of self-inflicted injuries while in custody. In 2018–2019, while making up just 29% of the overall population of inmates, they accounted for 52% of self-injury incidents.[102] This statistic illustrates the pain, trauma, and hardship, both physical and mental, flowing from this failure to act. These avenues are in place to give Indigenous offenders the type of rehabilitation that our government themselves have said needs to be provided, and yet the provisions remain underutilized and underfunded.

Furthermore, where these s. 81 agreements have been entered into, the statistics from the Auditor General Reports show that they have been highly successful, resulting in lower recidivism rates while achieving more positive community reintegration.[103] The need for more s. 81 agreements is not unknown to the judicial actors in the criminal justice system. Following the Annual Report, which noted an increase of 1,423 Indigenous inmates, while only a 174 inmate increase overall,[104] the Office of the Correctional Investigator implored the increased use of ss. 81 and 84, also suggesting increased *Gladue* factor training, training on Aboriginal social history, and

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101 Combs, *supra* note 30 at 185.

102 Office of the Correctional Investigator, *Annual Report*, *supra* note 93 at 65.

103 Combs, *supra* note 30 at 182.

104 Office of the Correctional Investigator, *Annual Report*, *supra* note 93 at 65.

how that knowledge should be applied in the decision making and sentencing process.[105]

All these issues discussed thus far impact the underuse of s. 81 are overshadowed by the main problem, lack of beds as a result of underfunding. In 2017, roughly 40,000 people were incarcerated in Canada, and of those, an estimated 11,000 are Indigenous.[106] As stated, there are currently only 189 beds available in s. 81 facilities. Whether these agreements are being advocated for or sought after is one issue, but at the current capacity rates, most offenders — regardless of their security classification, assessment tools, culture, or individual needs — will not find themselves in a s. 81 facility.

VIII. RECOMMENDATIONS

The viable solution to applying these provisions of the *CCRA* in the way they were intended, in order to lower the overrepresentation of Indigenous inmates in Canadian custody, is through the redirection of government funds to the construction of numerous additional s. 81 facilities and programs on Indigenous land and in Indigenous communities. The government may not have excess money at their disposal, but funds can be redirected from departments and from issues that pose less of a risk to Indigenous peoples and, in turn, create opportunities for reconciliation between the Canadian Government and Indigenous Canadians. In the same way that the funds from the *Effective Corrections and Citizen Engagement Initiative* were redirected to incarceratory programs, those funds should be directed back to the purpose for which they were intended.

Many social justice activist groups in 2020 have been calling for the redirection of funds from police departments across the country. Just as one of the issues relating to the over-incarceration of Indigenous peoples is the over-policing of primarily Indigenous neighbourhoods, so too is the funnelling of government money into the enhancement of the police departments, rather than the rehabilitation of the individuals and communities affected by societal marginalization. In May and June of 2020,

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105 Office of the Correctional Investigator, *Spirit Matters*, *supra* note 46 at para 81.

106 The John Howard Society of Canada, "Data on Canada's prison system" (25 January 2020), online (blog): *The John Howard Society of Canada* <johnhoward.ca/blog/data-on-canadas-prison-system> [perma.cc/LW2N-9VHC].

activist groups, allies, and citizens across the country — and throughout North America — gathered to march in solidarity with the Black Lives Matter movement and to call for defunding police departments around the continent. The Winnipeg Police budget has almost doubled in the last 12 years, from about $170 million in 2008 to over $305 million in 2020.[107] The comparison of these numbers to the $11.9 million given to aid in the construction of s. 81 facilities highlights the discrepancy in governmental priorities; the funding allocated to the s. 81 initiative over two decades is equivalent to approximately 4% of the funding given to the Winnipeg Police Force in a single fiscal year.

Furthermore, for the 2019/2020 Fiscal Year ending on March 31, 2020, the Manitoba Government cited that their expenditure on Indigenous and Northern Relations was $35 million compared to the $114 million funnelled into Sport, Culture and Heritage.[108] This money covers Le Centre Culturel Franco-Manitobain, Manitoba Arts Council, Manitoba Combative Sports Commission, Manitoba Film and Sound Recording Development Corporation, and Sport Manitoba Inc.[109] The Indigenous and Northern Relations money is meant to provide "funding for projects and initiatives led by Indigenous and non-Indigenous organizations and communities to engage in new and innovative approaches to advance reconciliation in the province."[110] That there is such a disparity between the funding for sport and art-related programming compared to the provincial funding of programs related to reconciliation is a stark illustration of the priority imbalance within the Manitoba Provincial Government. To add to this bleak picture, the budget for 2020/2021 cites a two million dollar increase in the funding for Sport, Culture and Heritage and a two million dollar decrease in funding for Indigenous and Northern Relations, allowing for $116 million and $33 million, respectively.[111]

All of this is to illustrate that the funding is there and accessible, but it is being allocated to departments deemed more important by the same

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107 Michael D'Alimonte, "Advocates ask why Winnipeg Police Service is getting more when community groups are getting less", *CTV News* (28 September 2020), online: <winnipeg.ctvnews.ca> [perma.cc/ZPB4-KFM5].

108 Government of Manitoba, *Manitoba Budget 2020*, (19 March 2020) at 3, online (pdf): *Government of Manitoba* <www.gov.mb.ca/asset_library/en/budget2020/budget.pdf> [perma.cc/6ZET-4AF2].

109 *Ibid* at 9.

110 *Ibid* at 79.

111 *Ibid* at 6.

government decision-makers who constantly pledge their allegiance to Indigenous peoples, communities, and land, while upholding the systems that continue to marginalize them.

The departments mentioned above are just two examples of overfunded government departments that could be even marginally defunded in order to provide more support to reconciliation initiatives by the government. Even decreasing funding to some other departments by one to two percent each fiscal year could make a difference in the resources available for the implementation of ss. 81 and 84 agreements. There is no reason that s. 81 facilities (one of many extra-incarceratory programs that lack funding) should be struggling when the "crisis" of Indigenous overrepresentation has persisted for over 40 years.

Lastly, within the scope of sentencing, these programs are somewhat on the periphery. It is not currently within the power of the judiciary to sentence an Indigenous inmate directly to a s. 81 facility at a sentencing disposition in the way they might with other correctional or conditional release orders. That said, if the budget were expanded to facilitate a drastic increase in the number of beds in these facilities, then it would be plausible to advocate for a change in the current procedure, putting the power of s. 81 sentences in the hands of the judiciary, instead of solely in the jurisdiction of the CSC. This type of change would make it plausible for s. 81 facilities and agreements to be a factor included in future sentencing submissions. At the very least, it could be taken under advisement; judges should have the discretion to render the sentence most conducive to a relatively seamless transition into one of these programs, soon after the sentence has been passed.

Finally, it bears acknowledging the apparent contradiction between the goal of reducing Indigenous Canadians in custody and the means suggested herein – alternative forms of custody. Although it may seem irreconcilable, the answer lies in the effect that healing lodges and alternative, culturally-centred forms of incarceration and rehabilitation have on recidivism. The statistical success of this type of programming is staggering – Indigenous offenders who participated in cultural and traditional activities as a central focus of their correctional plan saw a 28.9% drop in recidivism. Further, the recidivism rate for Indigenous offenders who participated in spiritual ceremonies and spent time with Elders during their time in custody saw

recidivism rates dropping by roughly 40%.[112] Theoretically, over time, by increasing s. 81 and s. 84 *CCRA* agreements, there will be a reduction in the overall number of Indigenous Canadians behind bars; this will be achieved through successful rehabilitation of these individuals achieved by way of meaningful connection with their heritage and community.

IX. CONCLUSION

There is no magic solution to the systemic tragedy of Indigenous over-incarceration, but there is something better – extensive empirical, anthropological, academic, and cultural-historical research that paints a clear picture of what can and will make a difference if properly implemented. The *Ewert* case and countless others have illustrated that, among other things, the system cannot treat Indigenous offenders and non-Indigenous offenders the same way and expect a uniform outcome. As legal professionals, we must demand that the system recommits to directing funds into reconciliation, meaningful programming, and the overall well-being of our Indigenous Canadians. Indigenous peoples have a rich history and culture, with their own laws and theories of rehabilitation and growth. It is the job of the government to find a way to fund these programs because a crisis that has persisted for decades is no longer a crisis: it is a flaw embedded in the foundation of our system. We must not allow another decade to pass without a collective demand for change.

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112 Milward, *supra* note 2 at 36–37.