EXAMINING THE JUDICIAL IMPOSITION OF INDETERMINATE SENTENCES FOR DANGEROUS OFFENDERS IN CANADA

by

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ABSTRACT

Part XXIV of the *Criminal Code* contains a legislative mechanism to detain indefinitely people who have repeatedly committed violent offences and who are deemed too dangerous to be released into society because of their history of violent offending. Sentencing under Part XXIV involves judicial consideration of statutorily mandated risk assessment reports. These reports are conducted by psychological experts who present their testimony surrounding their report in a DO hearing. Judges rely heavily on the information contained within these reports when deciding whether to impose an indeterminate sentence on an individual who has been designated dangerous. Despite being challenged over time, the DO regime has been upheld as constitutional. Notwithstanding, there is a growing body of research questioning the socio-cultural validity of Part XXIV's sentencing mechanism, specifically its great emphasis on predictions of future risk. The purpose of this thesis is to examine how and why judges decide to impose and indeterminate sentences on certain individuals designated dangerous, while others not.

I first question whether indeterminate sentences, as a practice, can be theoretically justified. Through examining caselaw I look at how judges determine the appropriate disposition for designated dangerous offenders, and the factors which judges appear to give the most weight in deciding whether to impose an indeterminate sentence. Specifically, I examine the impact that offender/victim relationships had on disposition outcome, and how judges consider the Indigeneity of the offender in assessing whether the indeterminate sentence is appropriate.

Ultimately, I flag the need for further research into cultural bias in the context of risk assessment under Part XXIV and how judges activate their remedial role by adopting a '*Gladue* forward approach' and refusing to impose indeterminate sentences on Indigenous people.

LAY SUMMARY

Part XXIV of the *Criminal Code* allows for the indefinite detention of people labelled dangerous and has been upheld as constitutional. In this thesis I sought to understand how judges decide which dangerous offenders should receive an indeterminate sentence. Specifically, I examined how offender/victim relationships and Indigeneity have an impact on disposition outcomes under Part XXIV in light of risk. Through examining caselaw I found that victim-offender relationships and *Gladue* reports mattered in DO hearings to the extent that they could inform expert psychological opinion surrounding risk reports. Part XXIV remains focused on public protection, at the cost of Indigenous people who are disproportionately affected by the regime, warranting further research.

PREFACE

This thesis is original, independent work by the author, Alison Mary Yule. Parts of this thesis were published in:

> Vincent Larochelle, Alison Yule and Gary Botting. *Dangerous Offender Law* (Toronto: LexisNexis Canada, 2021).

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LIST OF ABBREVIATIONS

ADHD - Attention Deficit Hyperactivity Disorder

APD - Antisocial Personality Disorder

CSC – Correctional Services Canada

DO - Dangerous Offender

DSM-5 - Diagnostic and Statistical Manual of Mental Disorders 5th Edition

HCR20-V3 - The Historical Clinical Risk Management 20 - Version 3

IPV – Intimate Partner Violence

LTO - Long-Term Offender

LTSO - Long-Term Supervision Order

PCL-R - Hare Psychopathy Checklist-Revised

PTSD – Post-Traumatic Stress Disorder

SCC – Supreme Court of Canada

SPIO – Serious Personal Injury Offence

SUD – Substance Use Disorder

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DEDICATION

This thesis is dedicated to my family.

Chapter 1: Introduction

1.1 Project Overview

Part XXIV of the *Criminal Code*[1] contains a legislative mechanism to detain indefinitely people who have repeatedly committed violent offences and who are deemed too dangerous to be released into society because of their history of violent offending. The Dangerous Offender (hereinafter "DO") provisions found in Part XXIV of the *Code*[2] apply to those offenders who have been convicted of serious personal injury offences and who have backgrounds of serious, persistent aggressive, sexual and/or violent behaviour.[3] Thus the purpose of Part XXIV is to protect society from Canada's most dangerous violent and/or sexual predators.

Briefly, the current regime under Part XXIV provides that individuals convicted of repeat violent and/or sexual offences can be designated as a DO[4] if a sentencing judge, on Crown application, is satisfied beyond a reasonable doubt that the offender constitutes a threat to the life, safety or physical or mental well-being of the public. Before the DO hearing can take place, the offender must be subjected to an assessment by a court appointed expert who generates a report for consideration in the hearing.[5] Where an offender is designated as a DO by the court, the offender may be sentenced to an indeterminate sentence of imprisonment.[6]

The DO scheme operates as a "two-stage"[7] process consisting of a designation stage and a disposition stage. First the judge must decide if certain criteria has been met for a designation of dangerousness. This is followed by the disposition stage: once an offender is designated by a

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[1] *Criminal Code* RSC 1985, c C-46, Part XXIV *Dangerous Offenders and Long-Term Offenders*.
[2] *Ibid.*
[3] *Code*, *supra* note 1, s 753(1).
[4] *Ibid.*
[5] *Code*, *supra* note 1, s 752.1(2).
[6] Public Safety Canada, *Dangerous Offender Designation*, online: Public Safety Canada. <https://www.publicsafety.gc.ca/cnt/cntrng-crm/crrctns/protctn-gnst-hgh-rsk-ffndrs/dngrs-ffndr-dsgntn-en.aspx>.
[7] *R v Boutilier*, 2017 SCC 64, [2017] 2 SCR 936 at para 13.

judge as a DO, the offender may be sentenced indeterminately, in which case the individual will be subject to periodic review by the Parole Board after 7 years, and every 2 years thereafter.[8] Where a DO is granted parole, the offender is subject to lifelong supervision by the Parole Board.[9] The sentencing judge also has the option to sentence a designated DO to a determinate sentence of a long term community supervision order[10] or to just a determinate sentence for the offences committed.[11]

This dissertation focuses on the second stage and examines how judges determine, at the disposition stage, whether the individual should receive an indeterminate sentence.[12] I examine judicial decisions in an effort to understand why certain designated DOs receive an indeterminate sentence and some of the factors that impact which disposition the judge chooses.

How and why judges impose an indeterminate sentence is a pressing legal research problem in Canada. Offenders sentenced to terms of life imprisonment[13] or indeterminate sentences, such as DOs, (both groups are referred to as "lifers"[14] by Correctional Services of Canada), serve longer than any other group of offenders.[15] These sentences are among the most serious sentences imposed in Canada and yet this process has not been subjected to careful scrutiny.

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[8] *Code*, *supra* note 1, s 761(1).
[9] Public Safety Canada, *supra* note 6.
[10] *Code*, *supra* note 1, s 753(4)(b).
[11] *Code*, *supra* note 1, s 753(4)(c).
[12] *Code*, *supra* note 1, s 753 (4)(a).
[13] *Code*, *supra* note 1, s.745(a).
[14] Matthew Young, Ian Broom, and Rick Ruddell, *Offenders Serving Life and Indeterminate Sentences: Snapshot (2009) and Changing Profile (1998 to 2008)*, online: Correctional Services Canada < http://www.csc-scc.gc.ca/005/008/092/005008-0231-eng.pdf>.
[15] *Ibid*.

Data from 2020 suggests that 1014 offenders have been designated as DOs in Canada since 1978.[16] A large majority of DOs serving indeterminate sentences in Canada were sentenced in Ontario, Quebec and British Columbia, which are also Canada's three most populous provinces.[17] The majority of designated DOs in Canada are given indeterminate sentences. Recent statistics[18] show that the number of DO designations has nearly doubled over the past decade, which suggests a significant "net-widening"[19]. As of 2020, 860 DOs remain under the responsibility of Correctional Service Canada with 77% having indeterminate sentences. As of 2020, of these 860 DOs, 736 were in custody (representing 5.4% of the total federal in-custody population) and 124 were in the community under supervision.[20] DOs are predominantly sex offenders; 67.1% of designated DOs have been convicted of a sexual offence.[21] Although the vast majority of DOs are men, nine women have been given DO designations, a number which shows that the rate at which women are being labelled dangerous offenders has more than doubled since 2016.[22] Although a statutory review mechanism exists for DOs, the Supreme Court of Canada in *Boutilier*[23] cited statistics showing that only 4-5% of DOs are ever released on parole. As of 2020, 93.8% of DOs with indeterminate sentences were in custody and 6.2% were in the community under supervision.[24]

[16] Public Safety Canada, *2020 Corrections and Conditional Release Statistical Overview*, online: Public Safety Canada < https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/ccrso-2020/index-en.aspx#sc14>.
[17] *Ibid.*
[18] *Ibid.*
[19] Net widening is a term in criminology suggesting the process of administrative or practical changes that result in a greater number of individuals being controlled by the criminal justice system.
[20] 2020 Statistical Overview, *Supra* Note 16.
[21] *Ibid.*
[22] *Ibid.*
[23] *Boutilier*, *Supra* note 7 at 114 citing *R v Walsh*, 2017 BCCA 195 at para 22.
[24] 2020 Statistical Overview, *Supra* Note 16.

Indigenous people continue to be disproportionately represented at all levels of the Canadian criminal justice system, including the DO offender population.[25] By the end of 2020, Indigenous offenders accounted for 36.3% of DOs,[26] and 26.1% of the total offender population even though they represent only 4.9% of the national population.[27]

Despite criticisms of the DO regime, its constitutionality was upheld by the Supreme Court of Canada in *R v Lyons*,[28][29] as not contravening the rights guaranteed by sections 7, 9, 11 or 12 of the *Canadian Charter of Rights and Freedoms*.[30] The key challenge in *R. v. Lyons* was based on s. 7 and considered whether sentencing someone based on predictions of future harm rather than based on past harm was contrary to the principles of fundamental justice. The Supreme Court in *Lyons* held that it was not.

A DO designation has serious lifelong consequences for the designated individual: it is a label that follows an offender for life[31] and those DOs who do eventually achieve parole will be subject to a lengthy set of conditions prescribed by the *Corrections and Conditional Release Regulations*[32] and/or by the Parole Board[33] and can be re-incarcerated if any of those conditions are violated.[34] Thus, indeterminate sentences are a costly approach to managing dangerousness. As of 2020, each indeterminate sentence is going to cost the Canadian government, on average,

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[25] From 2002-2012, the population of incarcerated Indigenous men under federal jurisdiction increased by 34%, while the number of incarcerated Indigenous women rose by 97%; Correctional Services Canada, *CSC- Research Results: Aboriginal Offenders*, online: <http://www.csc-scc.gc.ca/publications/005007-3027-eng.shtml>.
[26] 2020 Statistical Overview, *Supra* Note 16.
[27] Canadian Census, "Aboriginal Population Profile- Canadian Census 2016" online: https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/abpopprof/index.cfm?Lang=E.
[28] *R v Lyons*, [1987] 2 SCR 309.
[29] The then DO provisions of the *Code*: Part XXI, ss 687-695.
[30] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[31] Public Safety Canada, *Supra* Note 6.
[32] *Correction and Conditional Release Act* SC 1992, c 20 Part II Conditional Release, "Detention and Long-Term Supervision," s 134.1(1); *Corrections and Conditional Release Regulations*, SOR/92-620, s 161(1).
[33] *Code supra* note 1, s 753.2 (1); *Conditional Release Act, supra* note 32, s 134.1(2).
[34] *Code supra* note 1, s 753.01(4)-(5).

2.9 million dollars. I reached this conclusion based on the following calculation: the average age of DOs in the present study (at the time of their sentencing) was 35 years old. Furthermore, the average age of death of a federal inmate in Canada is 60 years old.[35] We also know that testimony in a recent SCC case indicated that only 4-5 percent of DOs are ever released on parole.[36] This means that DOs, who are sentenced indeterminately will spend, on average, 25 years in prison, and will likely die in prison. The current annual average cost of keeping an inmate in Canada incarcerated is presently $126,253.[37] If we multiply that annual cost by an average of 25 years, the result is that each indeterminately sentenced dangerous offender will cost the Canadian government, on average, $3.1 million dollars to institutionalize, over the course of their lifetime in prison.

Given the high social and financial cost of indeterminate sentences, this thesis aims to better understand how judges decide who receives one. To do this I decided to examined various factors impacting on disposition stage using case coding and analysis guided by a set of variables.

1.2 Research Questions

This thesis seeks to address existing research gaps in the area of DO sentencing through conducting a theoretically informed and empirically grounded analysis of reported DO caselaw over a three-year period. To address issues surrounding the disposition stage of a DO hearing, this thesis seeks to answer the following research questions:

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[35] Prison Free Press, *Prison Facts in Canada* Online: https://www.prisonfreepress.org/Facts.htm#:~:text='%20The%20prison%20population%20is%20not,men%20and%2083%20for%20women.

[36] *Boutlier*, *supra* note 7 at 114 citing *R v Walsh*, 2017 BCCA 195 at 22.

[37] Statista, *Average annual inmate expenditures for federal correctional services in Canada from FY 2010 to FY 2020*. Online: https://www.statista.com/statistics/563028/average-annual-inmate-federal-correctional-services-canada/#:~:text=This%20statistic%20shows%20the%20average,inmates%20averaged%20126%2C253%20Canadian%20dollars.

1. How are judges determining the appropriate disposition under s.753(4) for designated DOs - What factors do judges appear to give the most weight in deciding whether to sentence someone to an indeterminate sentence?

2. What is the impact of that nature of the offender/victim relationship on the decision whether to sentence someone to an indeterminate sentence?

3. How do judges consider the Indigeneity of the offender in assessing whether and indeterminate sentence is appropriate?

1.3 Scholarly Contribution to Field & Roadmap

Existing literature on indeterminate sentencing in Canada has addressed issues spanning violence risk assessment and criminogenic needs of DOs, the socio-political history of indeterminate sentencing in Canada, and the constitutionality of Part XXIV. However, there is a dearth of literature which critically analyzes the DO caselaw and the factors that judges consider when sentencing under Part XXIV. This thesis attempts to begin filling this gap by analyzing reported cases of dangerous offender cases stemming from four Canadian provinces over a three-year time period. The findings from this study form an original contribution to knowledge in the field of Canadian criminal law.

Perhaps more than in any other sentencing context, the prediction and risk of future harm is central to the determinations facing a judge in this context. Critics of the regime challenge the extent to which these determinations are predicated on risk assessments. Thus, understanding the nature of these critiques in the context of predicting future criminality provides a useful lens through which to analyze dangerous offender case law. This thesis further highlights the importance of the risk assessment for determining whether an indeterminate sentence will be imposed.

The chapters that follow start with an outline of the current legislative regime established in Part XXIV, followed by a description of the history of the DO provisions in Canada, including the constitutionality of the regime. This thesis then describes the methodological approach to answering the research questions, including the case coding which was used to find themes and patterns in the sentencing for further analysis. This is followed by a chapter exploring debates in the punishment theory literature surrounding the use of indeterminate sentences. A demographics chapter then sets out data extracted from case coding and introduces the two topics which are explored in greater depth through case studies, namely the nature of any relationships between victims and offenders and the Indigeneity of some offenders. The observations from these case studies are then discussed in light of relevant debates in the literature.

Chapter 2: The Canadian Dangerous Offender Regime in Context

2. Overview of the DO Regime

There are two stages to designating dangerous offenders (DOs) in Canada: the "designation stage", where the judge must determine if the offender meets the DO criteria, followed by the "disposition stage", where the judge must decide the appropriate disposition for the designated DO. In the following section, I outline the process and key concepts involved in sentencing DOs in Canada as set out under Part XXIV of the *Code*. This section is divided into four topic headings including designation stage, the role of risk assessments, disposition stage and a discussion about Long-Term Offenders. Finally, this section also briefly discusses the lifelong implications of a DO designation, post-sentence, through community supervision and breach, including the role of the Parole Board and the Correctional Service of Canada.

2.1.1 Designation Stage: Who is eligible to be designated a DO?

Once an offender has been convicted of a "serious personal injury offence"[38] (hereinafter "SPIO"), either through a trial or a guilty plea, the Crown then has the option to bring a DO application[39] under s 753(1) of the *Code*.[40] The Crown has to decide whether to proceed with a DO or Long-Term Offender (LTO) application by reviewing the offender's criminal history and any evidence arising from the triggering offences. The LTO designation is a lesser designation for those offenders deemed to be manageable through supervision in the community on a Long-Term Supervision Order (LTSO).

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[38] *Code*, *supra* note 1, s 752 "Definitions": "Serious personal injury offence means" (a) an indictable offence, other than high treason, treason, first degree murder or second degree murder, involving (i) the use or attempted use of violence against another person, or (ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage on another person, and for which the offender may be sentenced to imprisonment for ten years or more, or (b) an offence or attempt to commit an offence mentioned in section 271 (sexual assault), 272 (sexual assault with a weapon, threats to a third party or causing bodily harm) or 273 (aggravated sexual assault).

[39] *Code*, *supra* note 1, s 753 (1).

[40] *Ibid.*

The judge's consideration of whether the offender meets the DO criteria threshold constitutes the "designation" phase of the court's two-part analysis[41] in a DO hearing. Since 2008, the Court is required to[42] designate the offender as a DO if it is satisfied beyond a reasonable doubt that the offender meets the DO criteria set out in s.753 paragraphs 1(a) or (b) (discussed above in the 'threshold' section). If the offender is found to *not* meet the DO criteria, there is a crossover provision whereby the Crown may treat the DO application as if it were a LTO application.[43]

The criteria for designating an offender as a DO are found in s 753(1). The offender must have been convicted of a SPIO and their behaviour must constitute a threat to the life, safety or physical or mental well-being of others on the basis of evidence establishing conduct that falls under one of the following two streams: either s. 753(1)(a) which deals with nonsexual violent behavior or s.753(1)(b) which deals with sexual violence. Under the nonsexual violence stream, the offender must constitute a threat to the life, safety or physical or mental well-being of others based on evidence establishing one of the following: a pattern of repetitive behaviour[44] which can cause death, injury or severe psychological damage to others; a pattern of persistent aggressive behaviour demonstrating indifference to reasonably foreseeable consequences to others,[45] or any behaviour, associated with the predicate offence, that is of such a brutal nature that it indicates the offender is unlikely to be inhibited by normal standards of behavioural restraint.[46] Alternatively, under the sexual violence stream dealing with sex offenders who have been convicted of a SPIO, the offender must have shown a failure to control sexual impulses and

[41] *Boutilier*, *supra* note 7.
[42] *Code*, *supra* note 1, s 753(1).
[43] *Code*, *supra* note 1, s 753(5)(a).
[44] *Code*, *supra* note 1, s 753(1)(a)(i).
[45] *Code*, *supra* note 1, s 753(1)(a)(ii).
[46] *Code*, *supra* note 1, s 753(1)(a)(iii).

a likelihood of causing injury, pain or other evil to other persons through a failure in the future to control sexual impulses.[47]

Legislative amendments[48] to Part XXIV in 2008 introduced a mechanism whereby threshold criteria[49] will be deemed satisfied for certain repeat offenders.[50] Here, the Crown has a duty[51] to consider a DO designation and advise the court whether it intends to make a DO application where the presumption is met. Despite this mechanism being criticized as constituting a "three strikes" mechanism, the SCC in *R v Boutilier*[52] upheld the constitutionality of s753(1.1) finding that it does not violate the *Charter*.[53]

2.1.2 Disposition Stage

Once an offender has been designated a DO, the court must sentence the offender to indeterminate detention[54] unless the evidence presented during the DO hearing leads the judge to conclude that there is a "... reasonable expectation that a lesser measure will adequately protect the public against the commission by the offender of murder or a SPIO."[55]

There are three options[56] available to the sentencing judge at disposition in a DO hearing. The first is an indeterminate sentence,[57] the second is a LTSO that does not exceed ten years plus

[47] *Code*, *supra* note 1, s 753(1)(b).
[48] *Bill C-2 An Act to Amend the Criminal Code and to make consequential amendments to other Acts*, short title *Tackling Violent Crime Act*, 2008 RS, c C - 46.
[49] *Code*, *supra* note 1, s 753(1)(a)-(b).
[50] The DO criteria set out in in s.753 paragraphs (1)(a) or (b) are deemed met (unless the contrary is proven on the balance of probabilities) where the offender has been convicted of a primary designated offence for which it would be appropriate to impose a sentence of imprisonment of two years or more and the offender was convicted previously at least twice of a primary designated offence and was sentenced to at least two years of imprisonment for each of those offences. For a list of "primary designated offences" see Part XXIV, the *Code* "Definitions."
[51] *Code*, *supra* note 1,s 752.01.
[52] *Boutilier*, *supra* note 7.
[53] *Charter*, *supra* note 30.
[54] *Code*, *supra* note 1, s 753(4.1).
[55] *Ibid.*
[56] *Code*, *supra* note 1, s 753(4)(a)-(c).
[57] *Code*, *supra* note 1, s 753(4)(a).

a determinate sentence of at least two years,[58] and the third is a determinate sentence for the offence(s) with which the offender was convicted.[59]

Once a judge is satisfied that the s753(1) criteria is met and the individual is designated as dangerous, s753(4.1) sets a public safety threshold whereby a judge must impose an indeterminate sentence, unless satisfied that there is a reasonable expectation that a lesser measure will adequately protect the public against the commission by the DO of murder or a serious personal injury offence.[60] The "lesser measure" in s. 753(4)(b) and (c) is either a determinate sentence for the offence plus a long-term supervision order for a maximum of ten years, or a sentence for the offence for which the offender has been convicted.

Before the 2008 amendments to Part XXIV, courts had the discretion whether to designate an individual as a DO, even where the requirements in s. 753(1) were met. Since 2008 753(1) requires the court to designate an individual as a DO if its requirements are met. At disposition, ss. 753(4) and (4.1) now state that an indeterminate sentence is to be imposed unless the court is persuaded there is a "reasonable expectation" that a lesser measure will adequately protect the public. The standard of a reasonable expectation is higher than the "reasonable possibility" standard for designated LTOs. An "expectation" is a belief that something will happen, as opposed to the mere "possibility" that it will happen.[61]

Côté J held for the majority in *R v Boutilier* that this is not a rebuttable presumption but rather provides guidance on how a sentencing judge can properly exercise his or her discretion.[62]

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[58] *Code*, *supra* note 1, s 753(4)(b).
[59] *Code*, *supra* note 1, s 753(4)(c).
[60] *Code*, *supra* note 1, s753 (4.1).
[61] *R v Walsh* 2011 BCSC 1911, at paras 285 and 291.
[62] *Boutilier*, *supra* note 7 at 69; It is permissible for Parliament to guide the courts to emphasize certain sentencing principles in certain circumstances without curtailing their discretion. Once the sentencing judge has exhausted the least coercive sentencing options to address the question of risk based on the evidence, indeterminate detention in a penitentiary is the last option... ...an offender's moral culpability, the seriousness of the offence, mitigating factors, and principles developed for Indigenous offenders are each part of the sentencing process under the dangerous

She reaffirmed[63] the reasoning in *R v Lyons* that the "dominant purpose" at sentencing is the protection of the public[64] from "a very small group of offenders whose personal characteristics and particular circumstances militate strenuously in favour of preventive detention."[65]

2.1.3 Principles of Sentencing that Apply to DO Hearings

In *R v Johnson*, the Court confirmed that DO proceedings, as part of the sentencing process, "must be guided by the fundamental purpose and principles of sentencing contained in ss. 718 to 718.2" of the Criminal Code.[66] This was later affirmed by the SCC in *R v Steele*[67] and in *R v Boutilier*.[68]

Under s. 718.1 of the Code[69] the fundamental principle of sentencing is that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Under s. 718, the objectives of sentencing are:

a) the denunciation of unlawful conduct;

b) specific and general deterrence;

c) separating offenders from society, where necessary;

d) rehabilitation;

e) providing reparations for harm done to victims or to the community; and

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offender scheme. Each of these considerations is relevant to deciding whether or not a lesser sentence would sufficiently protect the public.

[63] *Boutilier*, *supra* note 7 at para 65.

[64] *Lyons*, *supra* note 28 at 338; *R v Currie*, [1997] 2 SCR 260 at para 31; *R v Steele* [2014] 3 SCR 138 at para. 35; *Boutilier*, *supra* note 7 at 106.

[65] *Lyons*, *supra* note 28.; *R v Johnson*, 2003 SCC 46 at para 19. An indeterminate sentence severely limits an individual's rights and freedoms and has been challenged as being too forward-looking a sentencing regime and thus draconian and disproportionate. The Supreme Court of Canada, however, has held that the principle of proportionality is pre-built into Part XXIV by way of the "gatekeeper" role of the SPIO prerequisite, which ensures that the disposition is not disproportionate to the predicate offence(s). Therefore, judicial reasoning at disposition shifts to focus on the DO's "propensity for committing violent crimes in the future, not the proportionality of the sentence to the relative severity of violent crimes committed in the past." Caldwell JA in *R v Toutsaint*, 2015 SKCA 117 at para 22, para 24.

[66] *Johnson*, *supra* note 65, at para 23.

[67] *Steele*, *supra* note 64 at para 40.

[68] *Boutilier*, *supra* note 7 at para 53 citing *Johnson* at para. 23.

[69] *Code*, *supra* note 1, s. 718.

f) promoting a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

Section 718.2 requires courts to take into consideration a number of relevant principles and purposes at sentencing, such as parity and the preference for sanctions other than imprisonment, with particular attention to the circumstances of Indigenous people.[70] Unlike the conventional sentencing process under Part XXIII of the Code, the primary objective of Part XXIV is the protection of the public, although other purposes of sentencing are relevant.[71]

A sentencing judge must also consider "the possibility that a less restrictive sanction would attain the same sentencing objectives that a more restrictive sanction seeks to attain".[72] With respect to the principle of proportionality in DO sentencing, "a proportionate sentence is one that not only balances the nature of the offence and the circumstances of the offender, but also gives considerable weight to the protection of the public".[73] As judges consider an indeterminate sentence "the relative importance of the objectives of rehabilitation, deterrence and retribution are greatly attenuated in the circumstances of the individual case, and that of prevention, correspondingly increased".[74]

Over time, judges in DO hearings, in crafting the appropriate disposition, have dissected the "reasonable expectation" test into various sub-tests. The DO's court-ordered risk assessment

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[70] *Code*, *supra* note 1, s. 718.2 (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing, (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances; (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh; (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders. (iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation.
[71] *Johnson*, *supra* note 65 at para 19; *Lyons*, *supra* note 28.
[72] *Johnson*, *supra* note 65 at para 28.
[73] *R v Armstrong*, 2014 BCCA 174 at para 72.
[74] *Johnson*, *supra* note 65 citing *Lyons* at 329.

report, including psychiatric diagnosis(es) and treatment prospects are key considerations at this stage of the judicial analysis.

The "Reasonable Expectation" Standard at Disposition Stage (s.753(4.1))

The term "reasonable expectation" is not defined in the Criminal Code. The standard of a "reasonable possibility", which is the current threshold for a LTO application was held by the Ontario Court of Justice to be "too low of a bar to set to protect the public" as more certainty was needed to persuade sentencing judges that the public would be adequately protected without an indeterminate sentence.[75]

In *R v Wormell*,[76] Ryan JA discussed the meaning of "satisfied". On a DO application the Crown must prove beyond a reasonable doubt the past conduct of the accused, however for the judge to be "satisfied," there is a reasonable expectation of eventual control of the risk in the community, proof beyond a reasonable doubt is not required.[77]

In *R v Walsh*,[78] Arnold-Baily J in the BC Supreme Court found in interpreting s753(4.1) that an "expectation" speaks to a belief that something will happen, as opposed to the mere possibility that something will happen. It is "a confident belief, for good and sufficient reasons" to be derived from the quality and cogency of the evidence heard on the application."[79]An "expectation" has further been interpreted in to "speak to the belief that that something will happen, as opposed to the mere possibility that something will happen."[80] The Saskatchewan Provincial Court in *R v Merasty*[81] considered the shift in wording from "reasonable possibility"

[75] *R v Moonias*, 2013 ONCJ 126, [2013] OJ No 1160 (QL).
[76] 2005 BCCA 328 (CanLII), at paras 32 – 34.
[77] *Ibid* at para 61.
[78] *Walsh*, *supra* note 61 at paras 285 and 291.
[79] *Ibid* at paras 291, 285 and 291; Arnold-Baily J found the comments of both Southin JA and Ryan JA instructive with respect to the post-2008 dangerous offender amendments in interpreting s. 753(4.1).
[80] *R v DJS*, 2015 BCCA 111, at para 30 as cited in *Walsh*, *supra* note 61.
[81] *R v Merasty* 2011 SKPC 109.

to the expression "reasonable expectation" and that the difference in wording, while subtle, is significant. The distinction between a "reasonable expectation" and a "reasonable possibility" is more than semantics. It goes to substance of the legal standard or measure.

The following distinction which was approved by a number of appellate Courts in Canada[82] was articulated in *R v JM*.[83] In that case, Justice Labach of the Provincial Court of Saskatchewan held that both of these terms really invoke an assessment of the offender's risk to the public. They ask a judge to consider if the offender's risk in the community can be lowered to an acceptable level by a lesser punishment. The only difference is under the old regime the question was one of "reasonable possibility" whereas under the new amendments the test is one of "reasonable expectation". On this point, Labach J held that "a 'reasonable possibility' connotes a belief that something may happen while a 'reasonable expectation' speaks to a belief that something will happen. The onus for finding a reasonable expectation then is somewhat higher but the factors to consider under both tests would essentially be the same."[84]

A "Reasonable Expectation" Must Be More Than "Mere Hope"

Benjamin Berger in his paper "Sentencing and the Salience of Pain and Hope" emphasized the importance of hope as a "relevant and salient" underlying factor in Canadian sentencing.[85] The "reasonable expectation" standard however "cannot be based on so many contingencies as to be little more than an expression of hope."[86] A hope or a possibility that the public could be protected without an indeterminate sentence is insufficient.[87] There must be evidence that the

[82] *R v Eamer*, 2017 ONSC 2549 at para 269; *R v Osborne* [2014] MJ no 216; *R v Toutsaint* [2015] SJ no 609; *R v DJS* [2015] BCCA 111; *R v Ominayak*, 2012 ABCA 337.
[83] *R v JM*, [2011] SKPC 109, at para 114.
[84] *Ibid.*
[85] Benjamin Berger, "Sentencing and the Salience of Pain and Hope" (2015) 70 Sup Ct L Rev 337.
[86] *DJS supra* note 80; *R v Bunn*, 2014 SKCA 112, 446 Sask R 184, *R v Toutsaint*, 2015 SKCA 117, *R v Bird*, 2015 SKCA 134, *R v JM*, 2011 SKPC 109, 379 Sask R 211, *R v Daniels*, 2013 SKQB 324, 271 CCC (3d) 339.
[87] *R v Dumas*, 2018 MBQB 49 at para 51.

risk posed could be controlled once a long-term supervision order expires and that imposing measures less than an indeterminate sentence will adequately protect the public.[88]

In order for the DO to establish evidence of treatability that is "more than an expression of hope" there must be an air of reality to the possibility of reducing or controlling the risk through the relevant treatment plan.[89] In *R. v. McCallum*[90] the Ontario Court of Appeal identified the nature of the evidence that was required in order to achieve the goal of the protection of the public in relation to Part XXIV.

In *R v Bragg*[91] the judge referred to the three elements in *R v McCallum*,[92] that must be present to achieve the goal of protecting the public regarding the reduction of risk to an acceptable level:

(1) there must be evidence of treatability that is more than an expression of hope;

(2) the evidence must indicate that the individual DO can be treated within a definite period of time; and

(3) the evidence of treatability must be specific to the individual DO.

Meaning of Reducing Risk to an "Acceptable Level"

In *R v Johnson* the SCC explained that the "essential question" to be determined at disposition stage in the DO hearing, "is whether the sentencing sanctions available pursuant to the long-term offender provisions are sufficient to reduce this threat to an acceptable level, despite the fact that the statutory criteria in s. 753(1) have been met."[93]

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[88] *R v Tom*, 2017 BCSC 452 at para 15; *R v Haley*, 2016 BCSC 1144.
[89] See *R v Casemore*, 2009 SKQB 306, [2009] SJ No. 440 (QL), at para. 19; *R v DWAP*, 2006 BCSC 1288, [2006] BCJ No 1961 (QL).
[90] [2005] OJ No 1178, at para. 47.
[91] *R v Bragg*, 2015 BCCA 498 at para 55.
[92] 2005 CanLII 8674 (ON CA), [2005] OJ No. 1178 at para. 47 (adopted in *R v Taylor*, 2012 ONSC 1025 at para. 356).
[93] *Johnson*, *supra* note 65, at para 29.

The sentencing sanctions available under the long-term offender provisions must be capable of reducing the threat to the life, safety or physical or mental well-being of other persons to an acceptable level.[94] Under s. 753.1(3), long-term offenders are sentenced to a definite term of imprisonment followed by a long-term community supervision order of a maximum of ten years in accordance with the *Corrections and Conditional Release Act*. Supervision conditions under s. 134.1(2) of the Act may include those that are "reasonable and necessary in order to protect society". The purpose of a LTSO is to protect society from the threat that the offender currently poses without resort to "the blunt instrument of indeterminate detention" as long as the public threat can be reduced through either a determinate period of detention or a determinate period of detention followed by a long-term supervision order.[95]

In *R v Boutilier*, the SCC notes that the s. 753(4.1) is a codification of this abovementioned exercise of discretion required in *R v Johnson* in light of Part XXIV's general purpose of public protection and a DOs likelihood of harmful recidivism.[96] Under s. 753(4.1), the sentencing judge is under the obligation to conduct a "thorough inquiry" into the possibility of control in the community.[97]. The judge considers all the evidence presented during the hearing in order to determine the fittest sentence. The SCC citing Justice Tuck-Jackson of the Ontario Court of Justice[98] then set out the framework for s.753(4.1),

First, if the court is satisfied that a conventional sentence, which may include a period of probation, if available in law, will adequately protect the public against the commission of murder or a serious personal injury offence, then that sentence must be imposed. If the court is

[94] *Johnson*, *supra* note 65, at para 32.
[95] *Ibid.*
[96] *Boutilier*, *supra* note 7 at para 65.
[97] *Boutilier*, *supra* note 7 at para 68 citing *Johnson*, at para 50.
[98] *R v Crowe*, Ont Ct J, No. 10-10013990, March 22, 2017.

not satisfied that this is the case, then it must proceed to a second assessment and determine whether it is satisfied that a conventional sentence of a minimum of 2 years of imprisonment, followed by a LTSO for a period that does not exceed 10 years, will adequately protect the public against the commission by the offender of murder or a serious personal injury offence. If the answer is "yes", then that sentence must be imposed. If the answer is "no", then the court must proceed to the third step and impose a detention in a penitentiary for an indeterminate period of time. Section 753(4.1) reflects the fact that, just as nothing less than a sentence reducing the risk to an acceptable level is required for a dangerous offender, so too is nothing more required.

Treatability

Treatability is among the factors to be considered in determining whether there is a reasonable expectation that a lesser measure will adequately protect the public. The judge in considering the "forward-looking" expert forensic psychiatric evidence, must review the proposed treatment plan and determine if it leads the Court to the conclusion that the terms set out therein will provide the level of probable control required by section 753 (4.1). A finding of treatability does not require a showing that an offender will be "cured" through treatment, or that his or her rehabilitation may be assured. What it does require is proof that the nature and severity of the offender's identified risk can be sufficiently contained in the community.[99]

There should be a full exploration of all treatment options available to the offender. An appropriate period of imprisonment can have deterrent and rehabilitative effects on the individual. An appropriate period of community supervision can also have a restraining effect.[100]

[99] *R v Slippery* 2016 SKPC 131; *R v Little*, 2007 ONCA 548 at paras 39,42; *R v MAG*, 2007 SKCA 144 at para 57.
[100] *Ibid* at 144-145; *R v L (GL)*, 2004 SKCA 125 at para 63.

In the BC Provincial Court, Justice Rideout in *R v Davidson*[101] cited the risk assessment report as identifying a non-exhaustive list of internal and situational factors that may be considered relevant in assessing an offender's risk to reoffend. Internal factors may include motivation, lack of remorse,[102] lack of confidence,[103] age "burn-out",[104] underlying deviant sexual interests[105] and, generally, the individual DO's attitude that predisposes them to offending. Predispositions discussed in the case law include the following:

a. Recklessness or impulsivity: an indicator of future risk.[106]

b. Using sex to cope with negative emotions.[107]

c. Negative attitudes towards women.[108]

7. Intimacy deficits.[109]

8. Past offenses while on community supervision.[110]

9. Poor attitude towards intervention.[111]

10. Problems with supervision.[112]

11. Willingness to participate in psychological and/or pharmacological treatment.[113]

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[101] *R v Davidson*, 2015 BCPC 335 at para 50.
[102] *Boutilier*, *supra* note 7 at para 185.
[103] *Boutilier*, *supra* note 7 at para. 170.
[104] The burn-out factor has been accepted as a factor relevant to the offender's possibility of future re-offences as increasing age correlates to physical deterioration and a reduction in sex drive. However, in *Boutilier*, at para. 171, Justice Voith noted that the burn-out factor has little relevance where evidence suggests that it does not apply to the particular offence or medical illness at issue, e.g. pedophilia and psychopathy. Burn-out also has diminished relevance when the offender shows a pattern of increasing severity of offences or continued severe offences at an older age; *R v Jesse*, 2013 BCCA 456; *R v Bruneau*, 2009 BCSC 1089, at para. 195.
[105] *DJS supra* note 80 at para 11.
[106] *Boutilier*, *supra* note 7 at para. 161.
[107] *DJS supra* note 80 at para 9.
[108] *Ibid.*
[109] *Ibid.*
[110] *R v Natomagan*, 2012 SKCA 46 at para 41.
[111] *DJS supra* note 80.
[112] *Boutilier*, *supra* note 7 at para 173.
[113] *R v Sawyer*, 2015 ONCA 602, at para 41.

Situational factors may include being in a position of authority or power over a vulnerable person (child, youth, or intoxicated individual)[114]; being alone with a person[115]; substance abuse[116] ; anti-social peers or pro-social support.[117]

Considering "Real-World" Rehabilitation Resources at Disposition.

Evidence concerning the availability of treatment and supervision programs is relevant to assessing the treatability of a DO. [118] For a judge to be satisfied that a DOs risk can be adequately managed in the community, there must be evidence that the proposed treatment and supervision options are "reasonable and presently available". [119] In relation[120] to the supervision component, there must also be evidence that there are supervision resources available to complement the treatment component. To be effective, the availability of those resources cannot be uncertain.[121]

Finally, s. 759 provides for appeals against dangerous offender and long-term offender decisions. An offender who is found to be a DO or LTO may appeal a decision on any ground of law or fact, or mixed law and fact.[122] The Attorney General can appeal only on a question of law.[123]

2.1.4 The Role of Psychological Risk Tools

Having set out the relevant legal tests at the disposition stage in a DO hearing, it is important to consider the vital role that expert opinion evidence plays in assisting judges to decide whether or not there is a "reasonable expectation" that either of the two lesser measures

[114] *DJS supra* note 80 at para 36.
[115] *DJS supra* note 80.
[116] *Ibid.*
[117] *Boutilier*, *supra* note 7 at para 175.
[118] *R v Heaton,* 2018 BCPC 136.
[119] *Heaton*, *supra* note 118 at 44 citing *R v GL,* 2007 ONCA 548, at paras 58-63.
[120] *Ibid.*
[121] *Heaton*, *supra* note 118 at 45 citing R v Trevor, 2010 BCCA 331, at para 35.
[122] *Code*, *supra* note 1, s 759 (1).
[123] *Code*, *supra* note 1, s 759 (2).

will adequately protect the public.[124] Despite the importance of the risk assessor's opinions at this stage, it remains the responsibility of the sentencing judge to make factual findings and draw conclusions.[125] As stated by Justice Murray in the Alberta Court of Appeal in *R v Neve*, "the experts do not become the judges and the expert opinion is not the judgment."[126]

Risk reports are statutorily mandated in Part XXIV proceedings. If the court, on receiving a Crown application, is of the opinion that there are reasonable grounds to believe that the offender might be found to be a DO[127] or an LTO, it can remand the offender for an assessment for a period not longer than 60 days. The assessment report is then used as evidence in the DO application.[128]

There are no explicit rules as to what content should be in an assessment report nor which psychiatric assessment tools should be used. However, commonly used tools include the Hare Psychopathy Checklist-Revised (PCL-R), Violence Risk Appraisal Guide (VRAG), Sexual Offender Risk Appraisal Guide (SORAG), Static-99, and HCR-20 (V3).[129] All of these actuarial risk assessment instruments are used by the risk assessors to estimate the probability that the individual subject to the DO proceedings will engage in future violence.

The expert risk assessors who use these tools to generate risk reports are usually court appointed mental health experts. Many assessments are done at provincial forensic mental health services that have secure detention facilities. In a large city, the risk assessments are usually conducted by multi-disciplinary teams that include psychiatrists, psychologists, and sometimes nurses, correctional officers, social workers and/or others who have opportunities to observe the

[124] *Code*, *supra* note 1, s.753(4)(b)-(c).
[125] *R v Avadluk*, 2017 NWTSC 51.
[126] *R v Neve*, 1999 ABCA 206 at para 199.
[127] *Code*, *supra* note 1, s 752.01.
[128] *Code*, *supra* note 1, s 753(1).
[129] See Appendix for a detailed list of psychiatric risk tools used to generate risk reports for DO proceedings.

offender during the remand period.[130] The assessments are done for the court, not for the prosecution or the defence, although both parties can call upon other expert risk assessors to conduct additional risk assessments.[131]

The court-appointed expert reviews the offender's mental health, social and psychological functioning, criminal history, past treatment programming, future treatment prospects and other factors to determine what risk the offender poses and whether there is a reasonable expectation that that risk can be managed to an acceptable level in the community. Here, the risk assessor offers expert opinion as to whether the offender meets the statutory criteria for finding someone a DO. They use a variety of methods including clinical interviews, psychometric testing, file reviews, direct observation and, in some cases, interviews with family members and other close sources. [132] They may do cognitive and memory testing to check for signs of brain injury and if the offender is a sex offender and/or pedophile, phallometric and other tests are used.[133]

The risk assessment report generated will be used as evidence at the DO hearing and if no DO application is brought, the assessment is admissible at a regular sentencing hearing.[134] Additionally, the offender cannot be compelled to participate in the risk assessment, which may force an increased reliance on information provided by the prosecution and other third parties. [135]

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[130] Public Safety Canada, *The Investigation, Prosecution and Correctional Management of High-Risk Offenders: A National Guide*, online: Public Safety Canada <https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/2009-pcmg/index-en.aspxat> at 21.
[131] Prior to Bill C-55 the risk assessment had to be conducted by *two* psychiatrists, one for the defence and one for the prosecution. In 1997, Part XXIV was amended to require a single court appointed risk assessor conduct the report.
[132] National Guide, *supra* note 130.
[133] *Ibid.*
[134] *R v N(RA),* 2001 ABCA 312.
[135] National Guide, *supra* note 130 at 24.

Finally, the Crown must obtain the consent of the Attorney General[136] before a DO application can be heard before the court.[137]

There are currently more than 400 structured risk assessment instruments used on six continents.[138] This begs the question: which risk assessment instrument is the most accurate?[139] Yang, Wong, and Coid in 2010 conducted a meta-analysis selecting nine of the most popular actuarial risk tools in order to examine which risk tool yielded consistently the greatest accuracy at predicting violence. Their study concluded that "there is no appreciable or clinically significant difference in the violence-predictive efficacy" and that "the nine tools are essentially interchangeable".[140]

Another problem associated with risk technologies is the high incident of both false positives and false negatives. A "false positive" occurs when a person is assessed as being dangerous or high risk but, actually is not. Conversely, a "false negative" is where the individual being assessed is classified as low-risk, but then goes on to reoffend at a serious level. One UK study,[141] which followed released inmates who had been convicted of sex offences over a few years found that, although there were many true positives, there were also many false positives (87 per cent over a 4-year period). This study found that the parole board had been

[136] *Code*, *supra* note 1, s 754(1).
[137] British Colombia Prosecution Services, *Crown Counsel Policy Manual*, online: <https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/dan-1.pdf> at 7.
[138] See Desmarais Singh, et al., "International Perspectives on the Practical Application of Violence Risk Assessment: A Global Survey of 44 Countries" (2014) 13 (3) Int J Forens Ment Health 193-206.
[139] Nicholas Scurich, "An Introduction to the Assessment of Violence Risk" in Jay P. Singh, Stål Bjørkly, and Seena Fazel, International Perspectives on Violence Risk Assessment, Online: Oxford Scholarship Online, August 2016. Online:<http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199386291.001.0001/acprof-9780199386291> at 10.
[140] Min Yang, Stephen C Wong, and Jeremy Coid "The efficacy of violence prediction: a meta-analytic comparison of nine risk assessment tools" (2010) 136 (5) Psychol Bull at 759.
[141] Roger Hood *et al*. "Sex Offenders Emerging from Long-Term Imprisonment. A Study of Their Long-term Reconviction Rates and of Parole Board Members' Judgements of Their Risk" (2002) 42 (2) Brit J Criminol 371-394.

overestimating the seriousness of an individual's risk and had a low false negative rate; after six years only one person was classified as low-risk who then went on to reoffend.[142]

Another problem associated with the use of risk tools in the legal decision-making process which is identified in the literature is the fact that one outcome of risk assessment is the application of (often enduring or permanent) labels to an individual. Labels adversely affect how individuals are perceived and treated in the criminal justice system and can also affect their self-perception. A "high risk" label is difficult to escape and, as a consequence, can be self-fulfilling.[143] Applying 'high risk' labels based on past offending behaviour "makes the questionable assumption that the individual before the court is indistinguishable from their future (and perhaps not so risky) self. The issue here is that static or backward-looking assessments cannot adequately take into account the inherently fluid quality of risk.[144] Ultimately, the purpose of risk assessment is to lead to "better-informed legal decision making."[145] Risk must be clearly communicated by the risk assessor, and one must take into account the possibility of human error when legal decision makers interpret risk scores.[146]

There are two central concerns regarding the legitimacy of risk assessment tools: the problem of applying group-based data to high-risk individuals and the problem of impact that risk tools may have on disadvantaged groups, including considerations of sex, race and/or

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[142] Karen Harrison, *Dangerousness, Risk and the Governance of Serious Sexual and Violent Offenders* (Abingdon, Oxford: Routledge, 2011) at 1.

[143] Andrew Ashworth & Lucia Zedner, Risk Assessment and the Preventive Role of the Criminal Court in Andrew Ashworth and Lucia Zedner, *Preventative Justice* (Oxford: Oxford University Press, 2014) at 123 citing D Downes and P Rock, *Understanding Deviance* 5th ed (Oxford: Oxford University Press, 2007). https://academic.oup.com/book/2737/chapter-abstract/143209510?redirectedFrom=fulltext

[144] *Ibid* at 123.

[145] Kirk Heilbrun, "Prediction versus management models relevant to risk assessment: The importance of legal decision-making context" (1997) 21 (4) Law Hum Behav at 347.

[146] Nicholas Scurich, "An Introduction to the Assessment of Violence Risk" in Jay P Singh, Stål Bjørkly, and Seena Fazel, International Perspectives on Violence Risk Assessment, Online: Oxford Scholarship Online, August 2016. Online:<http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199386291.001.0001/acprof-9780199386291> at 10.

cultural bias. Andrew Ashworth and Lucia Zedner raise the continual importance of "individualization" as a hallmark of present-day legal institutions:

> Individualization dictates that legal institutions show respect for the individual offender, which in turn requires that offenders are treated as morally autonomous beings whose independence and dignity calls for a distinct and appropriate response, and that they should not be treated as objects of an aggregate policy or collective decision-making.[147]

Here, Ashworth and Zedner raise the sentencing principle of "individualised justice", which holds that "in order for justice to be done, information pertaining to an offender must be specific to that offender and not simply identify the offender, or his or her characteristics, with other known individuals or classes of individuals."[148] Ashworth and Zedner see this principle as coming into conflict with risk assessment in the juridical process, as a diametrically opposed sentencing principle.[149]

Feeley and Simon's described societal shift from individual to group determinations of risk as a 'new penology'[150] which has led to a governance of risky populations, rather than individuals. In relation to such group-based predictive claims, methodological issues arise (some of which were discussed above) concerning the size of the group sample, the selection of the population, and the margin of error.[151] Critics of actuarial tools point out, "if all one knows about an individual is their membership of a risk group, what can 'individual risk' mean?"[152]

Overall, actuarial risk assessment is based on group aggregated data, which is based on the case files of a subpopulation of incarcerated offenders, rather than general population data. As explained above, Hannah-Moffat notes this as an issue for concern about biased prediction of

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[147] Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Oxford: Oxford University Press, 2014) at 142.
[148] Ashworth & Zedner, *supra* note 143.
[149] *Ibid.*
[150] Malcolm Feeley and Jonathan Simon, "Chapter 14: Actuarial Justice: The Emerging New Criminal Law" in David Nelken, *The Futures of Criminology* (London: Sage, 1994) at 178.
[151] Ashworth & Zedner, *supra* note 143 at 134.
[152] *Ibid* citing D Mossman and T Sellke, "Avoiding Errors About Margins of Error" (2007) 191 Brit J Psychiatry at 561.

risk. Prison populations are not random but are themselves the result of sentencing policy and disproportionately affect Black and Indigenous people, as well as other socially marginalized groups.[153] She further notes that this overrepresentation is relevant to the 'ethics of decision-making' because base rate estimates for recidivism may actually be lower among the general offender population than the rates predicted by risk assessment tools:

> This may result in the possibility that a more severe penalty is administered on the basis of a risk assessment tool that inflates the actual risk posed by certain groups of offenders. Logically, the converse may also apply. Thus, a significant disjuncture appears between the academic science of risk prediction and emerging practices .[154]

Actuarial tools and their applicable methodologies require practitioners to ask individuals a series of personal questions related to their criminal history, education level, past sentences, family and relationships, mental health, housing, substance use and/or abuse, children, economic situation, and employment history, among other factors, depending on the tool being applied. The risk assessment process involves a high degree of discretion based on an assessment of some of the abovementioned factors that can lead to subjective discrimination, which works against resolving problems of systemic discrimination and inequality in the criminal justice system.

Hannah Moffat has shown that race and gender are complex social constructs and cannot simply be reduced to binary variables and then tested for significance (predictive validity and reliability) in risk instruments.[155] Empirical research on risk assessment tools reveals that risk scales do not sufficiently consider gender, racial, or ethnic differences, between individuals or the socio-economic or political contexts in which these tools are used. Additionally, the science supporting the use of risk tools is contested and insufficiently advanced to prove that they do not

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[153] Kelly Hannah-Moffat (2013) "Actuarial Sentencing: An "Unsettled" Proposition" (2013) 30 (2) Just Quart 270 at 277.
[154] Hannah-Moffat, *supra* note 153 at 279.
[155] Kelly Hannah-Moffat, "The Uncertainties of Risk Assessment: Partiality, Transparency, and Just Decisions" (2015) 27 (4) Federal Sentencing Reporter at 244 citing Hannah-Moffat, *supra* note 153.

replicate or reproduce forms of systemic discrimination. Many of the factors interpreted in risk assessments are identified by critical scholars as being correlated with race and social inequality, and as being capable of being interpreted differently in different contexts. According to Hannah-Moffat, "individuals who are racialized, live in poverty, are unemployed, and/or struggle with mental illness are potentially disadvantaged by these criteria, and the suitability of these tools for women and racialized populations is still hotly debated."[156]

The relationship between race, gender, social inequality, and risk is an important but highly complex theoretical and methodological problem which cannot be reduced to actuarial scores. There is an emerging body of literature on the conceptual and methodological problems associated with the use of generic risk assessments indicating that these instruments fail to adequately control for gender or racial disparity and the potential for discriminatory outcomes.[157] Fundamentally, actuarial tools do not mitigate or account for systemic issues such as income disparity, racial/ethnic discrimination, gender imbalance, social welfare distribution, unemployment, and limited health and mental health care provisions that all may contribute to an individual's criminal involvement and/or limit their opportunity to advance in life[158] rendering actuarial justice "an unsettled proposition."[159]

When assessing the degree of risk that an individual presents to society for the purpose of labelling them as "dangerous", it is important to critically consider the "structural forces that lead to certain populations being disproportionately represented in the prison system."[160] This is particularly important as certain populations face bias in the risk assessment process, which is

[156] Hannah-Moffat, *supra* note 155.
[157] Hannah-Moffat, *supra* note 153.
[158] Hannah-Moffat, *supra* note 153 at 280
[159] *Ibid.*
[160] Anna Olofssona, Jens O. Zinnb, Gabriele Griffinc, Katarina Giritli Nygrend, Andreas Cebullae and Kelly Hannah-Moffat, "The mutual constitution of risk and inequalities: intersectional risk theory" (2014) 16 (5) Health, Risk & Soc at 425.

shaped by gender and racial inequalities.[161] When risk information is used systematically to distinguish high or low risk individuals, it tends to burden gendered and racialized groups.[162]

Structured risk tools are widely used in the criminal justice and forensic mental health system. Although there is a generally agreed upon benefit to these tools, there are outstanding questions concerning their generalizability to different ethnic groups (e.g., Black, Hispanic, Asian, Indigenous).[163] For example, the issue of cultural bias in psychological testing, such as in the case of psychological tests applied against African Americans, has a long history in Western society, stirring debate surrounding potential bias for different racialized groups.[164]

2.1.5 Long-Term Offenders (LTOs)

It is important to briefly outline the LTO provisions found under Part XXIV because they are sometimes an included disposition on a DO hearing. There is a LTO "crossover provision" whereby if an offender, at the "designation" phase of a DO hearing is found *not* to be a DO, the Crown may treat the DO application "as if it were a LTO application," and the court may designate the offender as a LTO. Also, where someone is designated a dangerous offender, one of the disposition options includes the imposition of a long-term supervision order.

Section 753.1 (1) deals with the criteria for designating someone an LTO. Here, the court may, after the Crown has filed an assessment report, find an offender to be a LTO if the offender meets all three LTO criteria: (a) that it would be appropriate to impose a sentence of imprisonment of two years or more for the offence for which the offender has been convicted;[165]

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[161] *Ibid.*
[162] Mark Miller and Norval Morris "Predictions of Dangerousness: An Argument for Limited Use" (1988) 3 Violence and Victims at 276-277.
[163] Seung C Lee and Karl Hanson, "Similar Predictive accuracy of the Static-99r risk tool for White, Black, and Hispanic Sex offenders in California" (2017) 44 (9) Crim Just & Behav 1125 at 1125.
[164] James R Andretta, Frank C Worrell, Katara M Watkins, Ryan M Sutton, Adrian D. Thompson, and Malcolm H Woodland, "Race and Stereotypes Matter When You Ask About Conduct Problems: Implications for Violence Risk Assessment in Juvenile Justice Settings" (2019) Journal of Black Psychology 1.
[165] *Code*, *supra* note 1, s 753.1 (1)(a).

(b) that there is a substantial risk that the offender will reoffend;[166] and (c) that there is a reasonable possibility of controlling the risk that that offender presents, in the community.[167] The court must find that the offender meets the second s.753.1(1)(b) criteria that there is a "substantial risk that the offender will reoffend" if the offender has been convicted of one of the sexual offences enumerated[168] under the provision has shown either (i) a pattern of repetitive violent behaviour demonstrating a likelihood of causing future death or injury to others,[169] or (ii) sexual conduct that shows the offender is likely to commit a similar sex offence in the future.[170] If the offender is found to be a LTO[171] it must sentence that offender to a minimum two years imprisonment combined with a LTSO up to ten years.

2.2 The Canadian Dangerous Offender Regime in its Historical Context

Preventive detention laws aimed at protecting the public from high-risk offenders have been enacted globally,[172] since the beginning of the 20th century. These laws exist because some offenders are considered to be so dangerous that a determinate (fixed) sentence is deemed inadequate to prevent them from committing future harmful acts. In North America, repeat nonsexual violent and/or sex offenders and the risk that they present to public safety have been managed under different forms of criminal legislation.

[166] *Code*, *supra* note 1, s 753.1(1)(b).
[167] *Code*, *supra* note 1, s 753.1(1)(c).
[168] *Code*, *supra* note 1, s 753.1 (2)(a).
[169] *Code*, *supra* note 1, s 753.1 (2)(b)(i).
[170] *Code*, *supra* note 1, s 753.1(2)(b)(ii).
[171] *Code*, *supra* note 1, s 753.1 (3)(a) and (b).
[172] Australia: A dangerous prisoner application is made pursuant to *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) and then an "indefinite sentence" may be ordered pursuant to Part 10 of the *Penalties and Sentences Act 1992* (Qld). UK: *Criminal Justice and Courts Act 2015* c. 2 PART 1 *Dangerous offenders.* The *Legal Aid, Sentencing and Punishment of Offenders Act 2012* abolished what was called Imprisonment for Public Protection (IPP) and has not since been replaced. Netherlands: A compulsory TBS "terbeschikkingstelling" order where the offender will be detained in a psychiatric institution and this can be prolonged indefinitely.

Tensions between balancing offender's rights with the protection of the community have been at play throughout the evolution of DO laws in Canada. The incarceration and reintegration of repeat violent and/or sex offenders is a challenging and pressing topic of "central importance"[173] as these offenders pose "a substantial risk of committing further serious offences"[174] and some will eventually be released back into the community.[175] In response, indeterminate sentencing laws have evolved in Canada since the 1940's and have been the subject of considerable legal and political debate. Differing models and theories of crime control[176] reflect the complexity of the debate surrounding appropriate responses to dangerousness and risk. Over the past three decades, and with the emergence of new DO legislation, Canada has adopted an increasingly punitive response to DOs, with a two-fold increase in the number of indeterminate sentences over the past decade.

In the following section, I outline the historical evolution of DO laws in Canada. I examine how understandings of dangerousness and risk[177] have shaped key changes in DO legislation, over time. Here, five time periods reflect the evolution of DO laws in Canadian criminal law history: *The Early DO (Sex Offender) Laws* (1947-1976), *Bill C-51: The Inclusion of Nonsexual Violent DOs* (1977), *The Rise of a Public Protection Agenda in Canada* (Early 1980's-1997), *Bill C-55: The Introduction of the LTO* (1997), and, finally, *Tackling Violent Crime Act*: *Relevant Amendments* (Post-2008).

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[173] National Guide, *supra* note 130; Report of the Canadian Committee on Corrections: *Toward Unity: Criminal justice and corrections* (Ouimet Report) (Ottawa: Information Canada, 1969).
[174] See generally: Webster, Chris D et al, *Violence Risk-assessment and Management: Advances Through Structured Professional Judgment and Sequential Redirections* (Hoboken: John Wiley & Sons, 2013).
[175] MacAlister, David "Use of risk assessments by Canadian judges in the determination of dangerous and long-term offender status, 1997-2002" in *Law and Risk* (Vancouver: UBC Press, 2005) 20.
[176] See generally: Packer, Herbert L, "Two Models of the Criminal Process" (1964) 1 U Penn L Rev 113; Garland, David, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press, 2001) at 172; See also: Garland, David, *Punishment and Modern Society: A Study in Social Theory* (Chicago: University of Chicago Press, 1990).
[177] Key concepts defining dangerousness and risk are unpacked in Chapter 2 "Theoretical Framework".

2.2.1 The Early DO (Sex Offender) Laws (1947-1976)

The management of dangerousness in Canada through the enactment of preventive detention legislation can be traced back to its origins in both the U.K.'s *Prevention of Crime Act* 1908[178] and U.S. legislation.[179] Rooted in 19th century psychology, notions of an offender as a "born criminal' influenced societal concepts of dangerousness[180] whereby such an offender was believed to suffer from mental disorder, which was the root cause of their criminal deviance.[181] Such individuals were believed to possess an inherent propensity for criminal behavior that was difficult to treat, making them "habitually criminal."[182] These early preventive detention laws evolved in response to societal fear of violent and unpredictable conduct by offenders who were targeting vulnerable populations, particularly through sex crimes against children.[183]

Dangerous offender laws were originally enacted in Canada in 1947 to target a small class of highly dangerous sex offenders and were expanded in 1977 to include other violent offenders.[184] In 1947, following recommendations of the 1938 Archambault Commission, Canada enacted the *Habitual Offender Act* (HOA) and *Criminal Sexual Psychopath Act*

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[178] *Prevention of Crime Act* 1908, c 59; Ouimet Report, *supra* note 173.
[179] Pratt, John, "Governing the Dangerous: A Historical Overview of Dangerous Offender Legislation" (1996) 5 Soc & Leg Studies 21; In the United States, the concept of sexually deviant, mentally disordered offenders was recognized through the development of the "Sexual Psychopath" and "Sexually Dangerous Persons" laws beginning in the 1930s. U.S. Sexual Psychopath laws originally targeted sex offenders and homosexual individuals; Sullivan, Edward H, "The Sexual Psychopath Laws" (1950) 40 (5) JCLC 543; Sullivan notes early sexual psychopath statutes were drafted in various US states ie. California (Welfare and Inst. Code §§5500-5516, 1939), Illinois (Rev. Stats. Ch. 38, §§820-825, 1938), Massachusetts (Laws ann., ch. 123A, §§1-6, 1947); Michigan (Stats. ann., ch. 25, §28.967, 1939), and Minnesota (Stats., §§52609-52611, 1945).
[180] Foucault, Michel et al, "About the Concept of a Dangerous Individual in 19th Century Legal Psychiatry" (1978) 1 (1) Int J Law Psychiatry 1.
[181] Petrunik, Michael, *Models of Dangerousness: A Cross-Jurisdictional Review of Dangerousness Legislation and Practice*, Ottawa, Ministry of the Solicitor General, Corrections Branch 1994; Pratt, John, "Governing the Dangerous: A Historical Overview of Dangerous Offender Legislation" (1996) 5 Soc & Leg Studies 21.
[182] *Ibid*.
[183] Michael Petrunik, *Models of Dangerousness: A Cross-Jurisdictional Review of Dangerousness Legislation and Practice*, Ottawa, Ministry of the Solicitor General, Corrections Branch 1994 at 11-12.
[184] Bonta, James et al, "The Dangerous Offender Provisions: Are they Targeting the Right Offenders?" (1998) 40 (4) Can J Criminol 377; Petrunik, Michael, *Models of Dangerousness: A Cross-Jurisdictional Review of Dangerousness Legislation and Practice*, Ottawa, Ministry of the Solicitor General, Corrections Branch 1994.

provisions in the *Code* in 1947 and 1948 respectively[185] to target "habitual offenders" and "sexual psychopaths". The HOA[186]was based on the UK's preventive detention regime at that time,[187] and provided for the indeterminate detention of an offender, designated as a habitual criminal.[188] The HOA was enacted to deal with offenders charged with an indictable offence on three separate occasions and who were thus considered to demonstrate persistent criminal behavior,[189] with the *Code* allowing for both an indeterminate and a determinate sentence to be imposed on the "habitual offender". This was the emergence of a two-part sentencing process in Canada, whereby a high-risk offender receives a determinate sentence for the specific offence committed, combined with an indeterminate sentence aimed at protecting the community. Under the HOA legislation an indeterminate sentence was framed as "preventive detention", which was a term used in the legislation until 1977. [190]

Post-World War II, sex crimes against children were regarded as one of the greatest social concerns in Canada. Fuelled by media coverage of a number of sexual assaults against children in various Canadian provinces, there was public demand for the government to respond in a fast and effective manner.[191] In response, the 1947 House of Commons debate concerning a proposal to adopt criminal sexual psychopath legislation, MP Howard C. Green introduced a

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[185] Valiquet, Dominque, *The Dangerous Offender and Long-Term Offender Regime*, online: Parliamentary Information and Research Service, Legal and Legislative Affairs Division < http://epe.lac-bac.gc.ca/100/200/301/library_parliament/infoseries-e/2008/dangerous_offender/prb0613-1e.pdf>.
[186] *An Act to amend the Criminal Code* (*Habitual Offender Act)* SC 1947 C55. This Act was inspired by an Act in the UK, the *Prevention of Crime Act*, 1908.
[187] *Prevention of Crime Act* (UK), 1908, 8 EDW, 7, CH 59.
[188] Ouimet Report, *supra* note 173.
[189] Section 660.2(a) of the (then) *Criminal Code* defined a habitual criminal as a person who: "has, on at least *three* separate and independent occasions been convicted of an indictable offence for which he was liable to imprisonment for five years or more and is leading persistently a criminal life, or (b) he has been previously sentenced to preventive detention."
[190] John Howard Society of Alberta, *Dangerous Offender Legislation Around the World: Directions for Canada* (Edmonton: The Society, 1995). John Howard Society of Alberta, *Dangerous Offender Legislation around the World*, online: < http://www.johnhoward.ab.ca/docs/dangrous/page10.htm>.
[191] Chenier, Elise "The Criminal Sexual Psychopath in Canada: Sex, Psychiatry and the Law at Mid-Century" (2003) 20 (1) CBMH 75.

resolution from the British Columbia Provincial Convention of Parent-Teacher Associations which viewed sex offenders as mentally disturbed people in need of psychiatric treatment.

Also, in 1947, the Canadian Penal Association (CPA) brought together a cross-section of Canadian experts in medicine, law and education to form the "Committee on the Sex Offender" (CSO). Their report addressed the sexual psychopath construct and described how they should be treated, whether they could be contained, and how they might be prevented.[192] The report's conclusions were that prison was not reformative, that sex offenders would re-offend and commit increasingly serious crimes, and that psychiatric treatment was the only possible method to rehabilitate (or perhaps more precisely reeducate) the deviated offender to the norms of society-upon which the criminal sexual psychopath as a clinical-legal construct rested.[193] Thus, the indeterminate sentence could also now be conceived of as a means to ensure the long-term protection of society from a criminal deemed psychopathic and incurable.

Although recidivism rates were low, society still needed protection from those who committed compulsive and repetitive acts of sexual violence; a definition of a sexual psychopath and/or whether or they could benefit from treatment could not be agreed upon and in 1950 the CSO ended due to a lack of funds with no final report published.[194] On June 14,1948 Canada's Members of Parliament unanimously approved the passage of Section 1054A of the new Part XXI of the Criminal Code referring to criminal sexual psychopaths.[195]

In 1948, the *Criminal Sexual Psychopath Act*[196] (the CSPA) was enacted.[197] The central principle behind criminal sexual psychopath legislation was that perpetrators of sex crimes were

[192] *Ibid.*
[193] Chenier, *supra* note 191 at 86-88.
[194] Chenier, *supra* note 191 at 90.
[195] *Ibid.*
[196] *Act to Amend the Criminal Code (Criminal Sexual Psychopath Act)* SC 1948, c 39, s 43.
[197] Petrunik, *supra* note 183 (Models of Dangerousness).

unable to control their sexual impulses. It allowed the Crown to apply for designation of an accused as a "criminal sexual psychopath" if he or she was convicted of one of the sexual offences enumerated in the Act: these offences were attempted or actual assault, rape, or carnal knowledge and, after amendments[198] in 1953, buggery or bestiality, and gross indecency. Criminal sexual psychopaths were determined to present a great risk to the public due to their "lack of power" to control their sexual impulses, thus prediction of that risk through expert testimony began to be important to the courts, planting the early seeds of an actuarial justice model or "medical model"[199] for managing dangerousness.

The CSPA required mental health experts to identify dangerous sexual offenders.[200] The Crown could apply for an accused to be designated as a "criminal sexual psychopath" if convicted of one of the sexual offences enumerated in the CSPA. An assessment was made by two psychiatrists and they deemed the offender sexually dangerous, he or she would be subject to the special sentencing provisions, which included a minimum two years of determinate incarceration followed by indeterminate detention, subject to review every three years.

From 1954 to 1958 Justice McRuer led a Royal Commission on the Criminal Law Relating to Criminal Sexual Psychopaths which held hearings in every province in which medical experts, including psychiatrists, gave testimony on issues concerning human sexual behavior.[201] Chapter II of the report criticized the substantive 1948 DO laws as being ineffective as only 23 offenders between 1948-1955 had been sentenced as criminal sexual psychopaths.[202]

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[198] *Criminal Code*, SC 1953-54, c 51, ss 660-667.
[199] Grant, Isabel, "Dangerous Offenders" (1985) 9 (2) Dal Law J 347.
[200] *Ibid*.
[201] Chenier, *supra* note 191 at 92.
[202] McRuer, The Honorable JC *et al*, *Report of the Royal Commission on The Criminal Law Relating to Criminal Sexual Psychopaths*, Ottawa, 1958 at 15.

The report focused on the term "criminal sexual psychopath" as being objectionable based on expert opinion that "psychopath" is a term of no precise clinical meaning to the psychiatrist, but that members of the legal profession and laymen are inclined to regard the term as one capable of clinical definition and was therefore the use of the term created confusion.[203] Criticisms of the CSPA stemming from McRuer's report[204] resulted in the *Criminal Sexual Psychopath Act* provisions in the Code being replaced[205] and a specification of the criteria in 1960, when the *Dangerous Sexual Offender Act* (DSOA)[206] provisions replaced the CSPA.

In 1960 the *Dangerous Sexual Offender Act* (DSOA) was enacted in Canada. Under the DSOA, dangerousness was based on the offender's criminal record and the circumstances of the current offence.[207] The DSOA was intended to widen the net of who could be caught under a dangerous sexual offender application, by allowing DSO hearings to be held for individuals who had only one conviction but who appeared highly dangerous based on their personal history and the circumstances of their offence.[208] Under the new threshold for a DSO, a dangerous sexual offender's "lack of power" to control their sexual impulses was changed to their "failure" to do so. Only one conviction was required, and offenders already released into the community could be the subject of a hearing if an application was made within three months of their release. These offenders could be subject to an indeterminate sentence subject to review by the Parole Board after three years, and thereafter yearly review. DSO legislation was viewed as problematic[209] and caselaw[210] highlighted how DSO provisions did not restrict designations of dangerousness to

[203] *Ibid.*
[204] *Ibid.*
[205] Chenier, *supra* note 191.
[206] *Act to Amend the Criminal Code (Dangerous Sexual Offender Act)* SC 1960-1961 c43.
[207] *Prevention of Crime Act* (UK) 1908, 8 EDW, 7, CH 59.
[208] Petrunik, *supra* note 183 (Models of Dangerousness).
[209] In 1969, the Ouimet corrections committee tabled their report making several major recommendations with respect to the *Habitual Offender Act* and *Dangerous Sexual Offender Act*.
[210] *Klippert v The Queen* [1967] SCR 822.

truly dangerous individuals.[211] For example, in *Klippert v The Queen*[212], a gay man was convicted of the then-offence of committing anal intercourse with another consenting adult. He was declared a DSO and sentenced indeterminately.

In 1964 a Special Committee on Corrections (known as the "Ouimet Committee" for its chair, Quebec Superior Court Justice Roger Ouimet) was appointed by the Canadian Minister of Justice to critically assess the field of corrections in Canada and recommend what changes needed to be made. The committee's final report[213] was published in 1969 and recommended a rehabilitative rather than punitive approach to corrections. Most notably it recommended the abolition of the death penalty and an overhaul of the regime for dealing with high-risk offenders.

The Ouimet Report after a comprehensive review[214] and made major recommendations with respect to the HOA and DSOA. The HOA was seen as ineffective and was found to be inconsistently applied across Canadian jurisdictions. Further criticisms included that a) determinations of dangerousness were based on short psychiatric interviews, b) it tended to capture non- dangerous individuals, c) its failure to include dangerous non-sexual offenders and that it was often applied against non-violent and non-dangerous offenders. In terms of the DSOA provisions, the Ouimet Committee found its provisions to have a lack of clarity in the definition of the "dangerous sexual offender", which created uncertainty and made it difficult to meet the legal standard of proof.[215] The DSOA was also criticized for being applied erratically, and on

[211] *Ibid*. In 2017 the Canadian government issued a posthumous pardon of his conviction (he had been released from prison in 1971.
[212] *Ibid.*
[213] Ouimet Report, *supra* note 173.
[214] *Ibid.*
[215] *Ibid.*

occasion for sexual offenders who were not violent. It also failed to address those whose offences were not sexual in nature but who were still nonetheless dangerous.[216]

2.2.2 Bill C-51: The Inclusion of Nonsexual Violent DOs (1977)

By the beginning of the 1970s the use of psychiatric risk assessment was proliferating, and there was a paradigm shift in the criminal justice system away from the clinical treatment of offenders towards a more punitive approach which values individual rights and retribution.[217] This was in response to a lack of public confidence in any clinical ability to diagnose and treat habitually dangerous, violent sexual and/or psychopathic offenders.[218]

In 1977, Bill C-51 (*Criminal Law Amendment Act*)[219] repealed the preventive detention sections of the Criminal Code (then Part XXI) and enacted what is now Part XXIV of the Code, providing for indeterminate or determinate sentences for offenders found to be dangerous under revised criteria. The new 1977 law was designed to apply to both sex offenders and to those offenders who had committed violent acts of a non-sexual nature. There was a shift away from a focus on mental illness toward a focus on violence. Therefore the 1977 legislative changes ensured that other types of violent offenders, not just sex offenders, could be caught under the new regime.[220]

The new DO provisions provided for a dangerous offender designation for offenders convicted of a "serious personal injury offence",[221] which included both sexual and non-sexual offences. The DO threshold required that an offender present an ongoing threat to other persons, due to a pattern of repetitive and persistent aggressive behavior, where the prevention of future

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[216] Shereen Hassan, *The long-term offender provisions of the Criminal Code: an evaluation* (PhD Thesis, Simon Fraser University School of Criminology, 2010) [unpublished].
[217] Michael Petrunik, "The Politics of Dangerousness" (1982) 5 (3) Int J Law & Psychiatry 225.
[218] *Ibid.*
[219] *Criminal Law Amendment Act*, 1977, SC 1976-77, c53, s 14.
[220] Jackson, Michael, *Sentences that Never End* (Vancouver: University of British Columbia, Faculty of Law, 1982).
[221] *Supra* note 1, Definitions: "Serious Personal Injury Offence."

violent behavior was unlikely. A designated DO was sentenced to either an indeterminate or determinate period of incarceration. These DO provisions remained relatively unchanged until 1997.

2.2.3 The Rise of a Public Protection Agenda in Canada (Early 1980's-1997)

In the mid 1980s in Canada, victims' rights campaigns and the emergence of crime prevention agendas led to increased efforts to enact provisions to protect the public from dangerous individuals.[222] Key strategies in an increasing public protection agenda included ramping up the use of monitoring, sex offender notification/flagging systems, and post-sentence management in the form of indeterminate sentencing, peace bonds, and community surveillance.[223] This shift in focus was further bolstered by a sharp decline in the rehabilitative ideal, based on emerging literature[224] in the 1970s, that offender treatment did not "work" to reduce rates of recidivism. Victims' rights lobbyists claimed that previously applied models of crime control failed to protect the community from the enduring risk posed particularly by sex offenders[225] and demanded that a focus be placed on public protection over the rights of offenders and their available treatment programming.[226] These groups pressured the government for harsher sentencing measures for dangerous offenders, including demands for increased use of indeterminate sentencing under Part XXIV.[227]

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[222] Isabel Grant, "Legislating Public Safety: The Business of Risk" (1998) 3 Can Crim LR 177 (Business of Risk).
[223] Michael Petrunik, "The Hare and the Tortoise: Dangerousness and Sex Offender Policy in the United States and Canada" (2003) 45 (1) Can J Criminol Crim Justice 43 (Hare and Tortoise).
[224] Robert Martinson, "What works? Questions and answers about prison reform (1974) The Public Interest 22.
[225] Petrunik, *supra* note 223.
[226] *Ibid.*
[227] Grant, *supra* note 199.

By the mid-1980s, the "perceived enduring dangerousness of sex offenders" and society's increasing "fear of the violent stranger"[228] had emerged in response to several high-profile cases in Canada involving the sexual assault and murder of children, which shaped public attitudes towards violent offenders.[229] Most notably, the murder of 11-year-old Christopher Stephenson, who was raped and killed by Joseph Fredericks, has been cited[230] as a key precursor to this growing community outrage. Fredericks had been released from prison just two months, when he raped and killed Frederiks after serving two-thirds of a five-year sentence for sexually assaulting a 10-year-old Ottawa boy. What outraged the public particularly was the lack of monitoring in the community; his parole officer had lost track of him and had been unaware that he had been convicted previously of eight sexual assaults against children. In January 1993 the Ontario Coroner's Inquest into the death of Christopher Stephenson issued its report.[231] The inquest into Christopher's death produced seventy-one recommendations to "improve the present system's ability to better deal with dangerous sexual predators,"[232] including recommendations[233] surrounding the indeterminate detention of high-risk (sexual) offenders past the expiration of their prison sentence.[234]

In February of 1993 the *Federal/Provincial/Territorial Task Force on High-Risk Violent Offenders* was established with a focus on Part XXIV of the Code. The working group rejected the idea of sexual violent predator laws and instead, recommended amendments to the existing

[228] Grant, *supra* note 222 (Business of Risk) at 181. Grant, in her 1998 article, noted this misperceived fear of a violent '*stranger*'- when in fact, in the majority of violent sexual crimes, the offender is actually *known* to their victim. Here, violence "by the stranger" whereby "the threat of violence so construed is random, anonymous, and ever-present."
[229] Petrunik, *supra* note 183 (Models of Dangerousness); 181.
[230] Grant, *supra* note 222 (Business of Risk); Petrunik (Models of Dangerousness), *supra* note 181.
[231] Inquest into the death of Christopher Stephenson: verdict of the jury. Ministry of the Solicitor General, Office of the Chief Coroner. Brampton, Ont. Ministry of the Solicitor General, Office of the Chief Coroner, 1993.
[232] Grant, *supra* note 222 (Business of Risk) at 219.
[233] Christopher Stephenson Inquest, *supra* note 231.
[234] This case also prompted Canada's first sex offender registry, known as "Christopher's Law" in Ontario in 2001.

DO legislation. The Task-Force concluded that high-risk offenders are not a homogenous group and therefore a "one-size-fits-all" solution, would not be effective. While some offenders present such a high risk that they must be detained indeterminately, other offenders present a risk that can be adequately managed through intensive supervision in the community after a period of incarceration and treatment.[235]

The Task-Force included two key recommendations[236] that had a significant impact on DO legislation in Canada. First, they recommended the introduction of a new form of intensive community supervision after an offender has completed his sentence, which became the LTO provisions in the *Code*.[237] Second, the task force suggested the creation of a National Flagging System[238] to track high-risk, violent offenders. The system, introduced in March 1995, was developed mainly for use by Crown prosecutors to ensure they are aware of potential information held cross-provincially regarding a potential DO or LTO.[239] There was public pressure on legislators to enact harsher measures for dealing with violent repeat offenders and to "appease interest groups" as a "public opinion poll in 1994 revealed that 82% of respondents thought that sentences were too lenient". [240]

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[235] Bonta, James & Annie K Yessine, *The National Flagging System: Identifying and responding to high-risk, violent offenders 2005-04*, online: Public Safety and Emergency Preparedness Canada <https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/ntnl-flggng-systm/index-en.aspx> (National Flagging System).
[236] Report of the Federal/Provincial/Territorial Task Force on High-Risk Violent Offenders: *Federal/Provincial/Territorial Task Force on High-Risk Violent Offender* (Ottawa: Federal/Provincial/Territorial Ministers Strategies for Managing High-Risk Offenders, 1995).
[237] Petrunik, *supra* note 223 (Hare and Tortoise).
[238] Bonta & Yessine,(National Flagging System). *supra* note 235.
[239] *Ibid.*
[240] Grant, *supra* note *222* (Business of Risk).

2.2.4 Bill C-55: The Introduction of the LTO (1997)

On August 1, 1997, Parliament sought to amend the *Code* through the introduction of Bill C-55[241] which introduced various new provisions including the introduction of a new category of LTOs,[242] rules for expert testimony,[243] and new peace bond[244] provisions.[245] The most significant addition to the DO provisions in 1997 was the introduction of the LTO category. The LTO provisions[246] were aimed at offenders who presented a substantial risk of reoffending after their release but could be managed through intensive community supervision (up to a maximum of ten years).[247] This new mechanism thus gave judges an option, other than indeterminate detention, for managing the risk presented by these offenders in the community.[248] A court could impose a long-term supervision order if it was satisfied that there was a substantial risk that the offender would reoffend, but also where there was a reasonable possibility that such risk could be managed in the community with appropriate supervision and intervention.[249]

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[241] Bill C-55, *An Act to amend the Criminal Code (high-risk offenders)*, SC 1997, c 17 (came into force 1 August 1997).
[242] The following are the LTO provisions of the Code introduced in 1997: s.753.1(1)-(6), which includes application, the threshold for substantial risk, sentence for a LTO, exceptions and procedure if offender is found not to be a LTO; s.753(5)(a)-(b) If the court does not find an offender to be a dangerous offender, (a) the court may treat the application as an application to find the offender to be a long-term offender, section 753.1 applies to the application and the court may either find that the offender is a long-term offender or hold another hearing for that purpose; or (b) the court may impose sentence for the offence for which the offender has been convicted.
[243] *An Act to amend the Criminal Code (high-risk offenders)*, SC 1997, c 17 (came into force 1 August 1997).
[244] A s810 order "provides for the supervision of those who present a risk of committing a serious personal injury offence- can be used against someone who has never been charged with a crime but thought to be dangerous or thought to be dangerous at the expiry of their sentence"; Petrunik, Michael, "The Hare and the Tortoise: Dangerousness and Sex Offender Policy in the United States and Canada" (2003) 45 (1) Can J Criminol Crim Justice 43.
[245]Petrunik, *supra* note 223 (Hare and Tortoise); Dominque Valiquet, *The Dangerous Offender and Long-Term Offender Regime*, online: Parliamentary Information and Research Service, Legal and Legislative Affairs Division < http://epe.lac-bac.gc.ca/100/200/301/library_parliament/infoseries-e/2008/dangerous_offender/prb0613-1e.pdf>.
[246] s 753.1(1)(a)-(c).
[247] MacAulay, The Hon Lawrence, Solicitor General Canada, *High Risk Offenders: A Handbook for Criminal Justice Professionals* (Ottawa: Criminal Justice Handbook, Solicitor General Canada, 2001).
[248] *Code*, *supra* note 1, s 753.1(1)(a)-(c).
[249] Hassan, *supra* note 216.

The introduction of Bill C-55[250] also meant changes to the rules for expert testimony in the risk assessment process. A court was no longer required to receive a risk assessment report conducted by two psychiatrists or psychologists (one for defence and one for Crown) but rather through the use of a single court appointed assessor.[251] It also changed the parole review eligibility for DOs under indeterminate supervision. The eligibility timeframe for the DOs initial parole review was changed from three years to seven years, and every two years thereafter.[252]

2.2.5 Tackling Violent Crime Act: Relevant Amendments (Post-2008)

After many amendments to the legislative regime over the years, the current Dangerous Offender (DO) and Long-Term Offender (LTO) regime under Part XXIV was most recently amended in 2008. In the *Tackling Violent Crime Act*,[253] Bill C-2 aimed to better protect the public by enabling the courts to designate more offenders as 'dangerous,'[254] while at the same time widening judicial discretion at disposition to include three sentencing options for a judge to hand a designated DO.[255]

The 2008 legislative amendments made changes to judicial discretion at both the designation and disposition stages in a DO hearing. First, if the court has reasonable grounds to believe that the offender might be found to be a DO[256] or a LTO[257] the Court must remand the offender for assessment. Second, the amendments removed judicial discretion at the designation stage of a DO hearing: once the offender is found to meet the DO criteria under s.753(1)(a) or (b), the court *must* find that offender to be a DO. However, judicial discretion was added at the

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[250] *An Act to amend the Criminal Code (high-risk offenders)*, SC 1997, c 17 (came into force 1 August 1997). Now s 752.1(1)-(3).
[251] David MacAlister *supra* note 175, at 20.
[252] *Code*, *supra* note 1, s 761(1).
[253] *Tackling Violent Crime Act, Supra* Note 48.
[254] Shereen Hassan, *supra* note 216.
[255] *Bill C-2*, *supra* note 48.
[256] *Code*, *supra* note 1, s 753.1(2)(a).
[257] *Code*, *supra* note 1, s 753.1.

stage of disposition. Prior to 2008, a court retained discretion at designation, however lost discretion at the disposition stage. The 2008 amendments essentially reversed this discretion allowing for judicial discretion when imposing sentence on a DO.

The legislation has remained unchanged since the 2008 amendments such that now when a court designates the offender as a DO the Court "may" impose one of the three options at disposition – an indeterminate sentence, a determinate sentence with an LTO, or just a determinate sentence. This gain in judicial discretion is qualified by a new provision,[258] introduced in 2008, which states that the court must impose an indeterminate sentence at disposition, unless it is satisfied on the evidence, that there is a "reasonable expectation" that a lesser measure[259] will adequately protect the public against the future commission by the offender of murder or SPIO.

2.3 The Constitutionality of Part XXIV

In 1982, the entrenchment of the *Charter*[260] changed the legal landscape of Canadian criminal law by empowering judges to invalidate legislative provisions[261] to the extent that they are inconsistent with *Charter*-protected rights.[262] Once the *Charter* was introduced, it did not take long for a *Charter* challenge of the DO regime to make its way to the Supreme Court of Canada.[263]

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[258] *Code*, *supra* note 1, s 753 (4.1).
[259] *Code*, *supra* note 1, s 753(4)(b) or (c).
[260] *Charter*, *supra* note 30.
[261] *Code*, *supra* Note 1.
[262]Since 1982, DO laws in Canada have been challenged under the following legal rights guaranteed by the Charter: Sections 7 (right to life, liberty and security of the person), section 9 (the right not to be arbitrarily detained or imprisoned), section 11(d) (the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal), section 11(f) (except in the case of an offence under military law tried before a military tribunal, the right to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment), section 12 (the right not to be subjected to any cruel and unusual treatment or punishment) and section 15 (equality rights).
[263] *Lyons*, *supra* note 28.

Charter challenges to DO laws have played a role in shaping the evolution of DO policy and legislation and help explain what is problematic with the regime.[264] The fundamental question at issue in all of these cases is whether the DO regime, which is premised on making assessments about future risk, is consistent with the individual rights guaranteed by Canada's constitution.

There are some fundamental criticisms of Part XXIV and constitutional challenges to the DO regime have been made based on these arguments. Although a number of *Charter* provisions are potentially implicated by the DO regime, the majority of *Charter* challenges to the DO regime have focused on section 7 of the *Charter*, which provides the right not to be deprived of life, liberty and security of the person except in accordance with the principles of fundamental justice. Section 9 prohibits arbitrary detention, section 12 protects the right not to be subjected to cruel and unusual treatment or punishment.

2.3.1 *R v Lyons*[265]

In 1987 the Supreme Court of Canada upheld the constitutionality of the DO regime in *R v Lyons*.[266] *Lyons* remains the leading constitutional case on indeterminate sentencing and is the only Supreme Court of Canada decision to have examined the entire DO regime and assessed the constitutionality of imposing indeterminate detention on the basis of assessments of future dangerousness.[267] The regime was upheld on the basis that few DO applications are brought each year, the provisions deal with a small population of dangerous people who have shown themselves to be highly violent, and the legislation specifically prescribes the conditions under which an offender may be designated as dangerous.

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[264] *Code*, *supra* Note 1, Part XXIV. The history of DO legislation is outlined in Chapter 1.
[265] *Lyons*, *supra* note 28.
[266] *Ibid.*
[267] *Ibid.*

In *Lyons*, the appellant, Thomas Patrick Lyons, pled guilty to four charges laid against him, including breaking and entering, sexual assault with a weapon, firearms possession, and theft.[268] At the commencement of the sentence hearing, the Crown made a DO application for Lyons under (then) Part XXI of the *Criminal Code*.[269] At trial the judge found that the DO criteria had been satisfied beyond a reasonable doubt. The trial judge also considered and rejected Lyons' arguments that Part XXI of the *Criminal Code* violated sections 7, 9 and 12 of the *Charter* and sentenced Lyons to an indeterminate period of detention.[270] Lyons was 16 years old when he was declared a DO.[271]

The Supreme Court of Canada[272] examined whether the DO provisions under (then) Part XXI violated rights guaranteed by sections 7, 9, 11 and/or 12 of the *Charter*, and whether they could be saved by section 1.[273] The majority ruled that Part XXI did not violate the *Charter* primarily because it was designed to apply to a narrow group of habitually dangerous people.[274] The following outlines the Supreme Court of Canada's reasoning.

Lyons' main section 7 *Charter* challenge was that Part XXI resulted in a deprivation of liberty that was not in accordance with the principles of fundamental justice by allowing individuals to be detained based on the future assessment of risk or for crimes for which a person

[268] Contrary to s306(1)(b) of the *Criminal Code*, RSC 1985, c C-46; contrary to s 246.2(a) of the *Criminal Code*; Contrary to s 83(1)(a) of the *Criminal Code*; unlawfully stealing property of a total value exceeding $200, contrary to s 294(a) of the *Criminal Code*. These offences were committed approximately one month after the appellant's sixteenth birthday.
[269] *Lyons, supra* note 28 at para 4. On November 8, 1983, consent to the application was obtained from the Deputy Attorney General of Nova Scotia, as required by (then) s 689(1)(a) of (then) Part XXI of the *Criminal Code* and expert psychiatric testimony, was tendered on behalf of both the Crown and the appellant.
[270] *Lyons, supra* note 28 at paras 6-7.
[271] *Lyons, supra* note 28 at para 8; Lyons appealed his trial decision first to the Nova Scotia Supreme Court, Appeal Division.
[272] *Lyons, supra* note 28.
[273] As being "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society"; *supra Note 28 (Lyons)* at para 9 and 22; The appellant also argued that there were procedural violations of the Charter in this case which fall outside the focus of this chapter.
[274] *Lyons, supra* note 28 at para 16.

had already been punished.[275] LaForest J, writing for the majority, first held that Part XXI's provisions did not violate section 7, as Part XXI did not allow for punishment for crimes for which an accused is not being tried or might do in the future. Instead, the majority emphasized that Lyons had been sentenced for the serious personal injury offences which he had been found guilty of committing.[276]

Secondly, the majority held that the DO regime is consistent with the purpose of sentencing in criminal law, namely the protection of society. Here, the Court held that sentencing need not be entirely reactive or based on a "just deserts" rationale. With Part XXI, the relative importance of the objectives of rehabilitation, deterrence and retribution are greatly attenuated in the circumstances of the individual case, and that of crime prevention, correspondingly increased. The legislative intent of DO laws is to protect society. Indeterminate detention serves a both punitive and preventive role, both of which are legitimate sentencing goals.[277] The Court held that the DO regime does not violate section 7 as the DO regime appropriately enables the court to tailor its sentence to individuals "not inhibited by normal standards of behavioral restraint" and of whom future violent acts can confidently be expected.[278]

The majority then continued to assess the constitutionality of the "effects" of the legislative regime which required investigating the `treatment meted out' or what is actually done to the individual being punished, how that punishment is accomplished and whether this "treatment" violates sections 12 as cruel and unusual treatment or punishment and/or 9 as

[275] Under section 7 of the *Charter*, the phrase "principles of fundamental justice" sets out the parameters of the right not to be deprived of life, liberty and security of the person *Re BC Motor Vehicle Act*, [1985] 2 SCR 486. These principles were stated to inhere in the basic tenets and principles not only of the judicial system but also of the other components of our legal system *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at 512, *per* Lamer J; *supra note 28 (Lyons)* at para 23.
[276] The punishment flows from the actual commission of a specific crime, the requisite elements of which have been proved to exist beyond a reasonable doubt; *supra* note 28 *(Lyons)* at para 25.
[277] *Lyons, supra* note 28 at para 26-27.
[278] *Lyons, supra* note 28 at para 27.

arbitrary imprisonment of the *Charter*.[279] In *Lyons*, Part XXI was also found not to violate section 12. The test for section 12 was set out in *R v Smith,*[280] of whether the punishment prescribed is "so excessive as to outrage the standards of decency".[281] The test is thus one of "gross disproportionality", because it is aimed at punishments that are more than merely excessive.[282] Only if the punishment is grossly disproportionate to what would have been appropriate, does it infringe section 12.[283]

Lyons argued that it was not the detention itself but its indeterminate quality that harbours the potential for cruel and unusual punishment.[284] The Court conceded that the effects of an indeterminate sentence on a DO are "profoundly devastating" and "saps the will of an offender, removing any incentive to rehabilitate himself or herself."[285] however, the majority held that the parole provisions/process saved the DO legislation even if it was rare for a DO to ever achieve parole.[286] The sentences imposed under these provisions were found not to be indeterminate, *simpliciter*, as the DO scheme ensured that a sentence was "meted out" to a DO's individual circumstances, review for parole was a possibility and incarceration would be

[279] *Lyons, supra* note 28 at para 36.
[280] *R v Smith* (Edward Dewey), [1987] 1 SCR 1045.
[281] *Ibid* at 1072-74.
[282] *Lyons, supra* note 28 at para 40 per LaForest J citing Lamer J in *R v Smith* (Edward Dewey), [1987] 1 SCR 1045 at 1072-74.
[283] In assessing whether a sentence is grossly disproportionate, the Court must first consider the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case in order to determine what range of sentences would have been appropriate to punish, rehabilitate or deter this particular offender or to protect the public from this particular individual. The other purposes which may be pursued by the imposition of punishment, in particular the deterrence of other potential offenders, are thus not relevant at this stage of the inquiry. This does not mean that the judge or the legislator can no longer consider general deterrence or other penological purposes that go beyond the particular offender in determining a sentence, but only that the resulting sentence must not be grossly disproportionate to what the offender deserves.
[284] *Lyons, supra* note 28 at para 46.
[285] *Ibid.*
[286] s 695.1 of (then) Part XXI of the *Criminal Code* RSC 1985, c C-46 and s 10(1)(a) of the *Parole Act*, RSC 1970, c.P 2, s10(1)(a); *Supra Note 28 (Lyons),* at para 48-49; evidence before the Court indicated that between 1980-86, only six DOs were ever granted day parole, two of whom had served 10-15 years, three, 15-20 years, and one, more than 20 years.

imposed for only as long as required.[287] It is noteworthy that at the time of *Lyons*, parole review was every three years, compared to after two years and then every seven years as it is now. The Supreme Court of Canada ultimately found that Part XXI did not violate section 12 of the *Charter* as the legislative objective of public safety was sufficiently important to warrant limiting the rights and freedoms of DOs, even if that meant imposing an indeterminate sentence, as DOs "evince the very characteristics that render such detention necessary."[288] Lyons further argued that Part XXI resulted in arbitrary detention, contrary to section 9 of the *Charter,* because the test of "likelihood" under Part XXI was unconstitutionally vague, the labelling of persons as DOs was arbitrary since it was based on inherently unreliable psychiatric evidence, and the prosecutor had unfettered discretion in deciding when to commence a DO application.[289]

At the time of *Lyons,* the Court had not yet determined the appropriate test for the scope of s.9 and the meaning of the words "arbitrarily detained or imprisoned." Without doing so in this case, the majority held that in no sense of the word could imprisonment resulting from Part XXI's provisions be considered "arbitrary".[290] The main issue the Court considered under section 9 was whether the lack of uniformity in the treatment of DOs that arises by virtue of the prosecutorial discretion to make an application under Part XXI, constituted arbitrariness. La Forest J found this prosecutorial discretion not only rationally connected to the legislative purpose, but also necessary to justify the process through which individuals are selected for the DO hearing process, based on relevant evidence. The majority also noted that very few DO applications had been brought each year suggesting that the provisions were not being abused.

[287] *Lyons, supra* note 28 at para 36; by using the term "treatment meted out" LaForest J explains this means what is actually done to the offender and how that is accomplished.
[288] *Lyons, supra* note 28 at para 45.
[289] *Lyons, supra* note 28 at para 59.
[290] *Lyons, supra* note 28 at para 60.

Also, despite the fact that there was great variation in the number of DO designations brought each year cross-provincially, no research had attempted to explain the significance of that data.[291]

Overall, Part XXI was found not to authorize arbitrary imprisonment contrary to section 9 of the *Charter* as the DO scheme was found to apply to a narrowly defined class of dangerous individuals, specifically prescribing the conditions under which an offender may be designated as dangerous.[292] Thus the DO criteria served to protect public safety.[293]

Since *Lyons*, there have been a few *Charter* challenges to Part XXIV's provisions and a couple of these judicial decisions have found some of Part XXIV's provisions to be unconstitutional, although none has been successful in the Supreme Court of Canada.[294] The most recent challenge to make its way to that Court was *R v Boutilier*[295].

In *R v Boutilier*, Côté J writing for the majority, upheld the constitutionality of the regime on the basis of three points: 1) that future treatment prospects of an offender are and *must* be considered at the designation stage; 2) that since the criteria for dangerousness were not amended in 2008, *R v Lyons* remains authority[296] that "intractability" of the offender is still required to be

[291]The affidavit evidence in *R v Lyons* suggested that (at that time) DO applications were being made more frequently in British Columbia (25% of all such applications) and almost never in Quebec, Newfoundland, Manitoba or Prince Edward Island; *supra* note 28 *(Lyons)*, at para 66.
[292] *Lyons*, *supra* note 28 at para 62.
[293] With regards to Section 11(f) of the *Charter*, which protects the right to a trial by jury, where the maximum punishment is five years imprisonment or a more severe punishment, the majority held that the DO sentence hearing was a separate issue from *charging* the offender and thus does not fall within the scope of 11(f). La Forest J explained that a DO application and hearing form part of the *sentencing* stage, where an offender has already been convicted of the offence for which he or she was charged. Therefore, Part XXI was found not to violate section 11(f) of the *Charter*.
[294] See Bryant J in *R v Hill*, 2012 ONSC 5050 and Voith J in *R v Boutilier* 2015 BCSC 901; In *R v Hill* the defendant died before an appeal could be made and Voith J's decision was overturned by the SCC in *R v Boutilier*, 2017 SCC 64.
[295] *Boutilier*, *supra* note 7.
[296] Boutilier had relied on *R v Szostak*, 2014 ONCA 15 to argue that intractability is no longer a requirement under the current DO regime.

considered at this designation stage;[297] and 3) that all evidence related to an offender's treatment prospects is considered at *both* designation and disposition.[298]

2.4 DO Risk Assessment and the Potential for Cross- Cultural Bias

Internationally, scholars have raised important concerns about how an increasing use of risk tools in the judicial process affects, targets and indirectly discriminates against racial minorities.[299] The use of actuarial risk tools is considered to reproduce and embed forms of systemic discrimination;[300] legal understandings of risk are gendered and racialized[301] and that the integration of conventional risk/need assessments into penal practices produces gendered and racial effects.[302] Statistical predictions of dangerousness that result in discrimination against minorities is increasingly being understood as a result of the *methodologies* by which risk predictions are conducted whereby biases can enter into the risk assessment process. [303]

There are distinct risk and protective factors for different ethnic groups that have not been fully addressed by risk scales developed and validated on multiethnic samples. [304] Risk scales that would be developed and validated on multiethnic samples should consider both "calibration" (or the relationship between expected and observed recidivism rates), as well as "discrimination" (or the difference between recidivists and non-recidivists). Here, the risk tool should check for

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[297] *Boutilier, supra* note 7, at para 28.
[298] *Boutilier, supra* note 7, at 42-45.
[299] See for example Bernard Harcourt, *Against Prediction: Profiling, Policing and Punishing in the Actuarial Age* (Chicago: University of Chicago Press, 2007).
[300] Paula Maurutto & Kelly Hannah-Moffat. "Understanding risk in the context of the Youth Criminal Justice Act" (2007) Can J Criminol 49(4), 465–91.
[301] Kelly Hannah-Moffat & Pat O'Malley (eds) *Gendered Risks* (London: Routledge, 2007); Bernard Harcourt, *Against Prediction: Profiling, Policing and Punishing in the Actuarial Age* (Chicago: University of Chicago Press, 2007).
[302] Kelly Hannah-Moffat & Paula Maurutto, "Re-Contextualizing Pre-Sentence Reports Risk and Race" (2010) 12(3) Punishment & Soc 262 at 264.
[303] Mark Miller & Norval Morris "Predictions of Dangerousness: An Argument for Limited Use" (1988) 3 Violence and Victims at 277.
[304] Seung C Lee & Karl Hanson, "Similar Predictive accuracy of the Static-99r risk tool for White, Black, and Hispanic Sex offenders in California" (2017) 44 (9) Crim Just & Behav at 1126.

potential cultural/racial bias in respect of both calibration and discrimination. Prediction scales are only unbiased when it can be proven that there are no systematic differences across ethnic subgroups in the expected recidivism rates for individuals with the same score or category.[305]

In Canada, the courts, drawing on expert testimony from risk assessors, rely heavily on risk assessment tools like the Static-99[306] and the Hare Psychopathy Checklist (PCL-R)[307] that stress static factors in the form of past criminal misconduct, for determinations of dangerousness.[308] These use of such risk tools on Indigenous populations in Canada is increasingly being criticized on the basis that their design and development has largely been based on the testing of white males.[309]

There are different theoretical explanations as to why risk assessment tools that have been developed on white offenders would perform differently among different racial high-risk groups. Firstly, the imbalanced social structure of White-dominated society and postcolonial attitudes towards ethnic minority populations might lead to substantially different patterns of risk-relevant factors from those of White populations. Ethnic minorities may have their own culture-specific risk factors. [310] Researchers have thus recommended exploring potentially unique risk factors for different ethnic or racial groups.[311]

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[305] *Ibid.*
[306] See "Static-99" Coding Form, Online: <http://www.static99.org/>; The Static-99 relies primarily on factors that assess previous sex offences, and is commonly used by risk assessors for DO hearings as a large percentage of DOs are sexual offenders.
[307] See Robert D. Hare, *The Psychopathy Checklist: Revised*, 2nd ed (Toronto: Mutli-Health Systems, 2003); The PCL-R was primarily developed to clinically assess psychopathy, and measure behavioural, interpersonal and overall personality disorder.
[308] Jordan Thompson, "Reconsidering the Burden of Proof in Dangerous Offender Law: Canadian Jurisprudence, Risk Assessment and Aboriginal Offenders" (2016) 79 Sask Law Rev at 64.
[309] Leticia Gutierrez *et al*, "The Prediction of Recidivism with Aboriginal Offenders: A Theoretically Informed Meta-Analysis" (2013) 55 (1) Can J Criminol Crim Just 55-99.
[310] Lee & Hanson, *supra* note 304 at 1127.
[311] Lee & Hanson, *supra* note 304 at 1138.

While employing different methodologies, risk instruments all compare an accused's score to a statistical baseline.[312] Because these baselines have been determined on the premise of ethnic and racial neutrality, researchers have questioned their applicability to minority populations including Indigenous populations in Canada.[313] Risk assessments tools need to be empirically tested and validated in order to defend their use with a diverse offender population.[314]

Professor Milward, a member of the Beardy's & Okemasis First Nation in Saskatchewan,[315] stresses the need for greater judicial awareness and sensitivity towards alternatives to incarceration for Indigenous people, as well as the development of an Indigenous-specific risk assessment instrument that stresses dynamic instead of static risk factors. Professor Milward argues that the methodology of standard static risk tools focuses on past convictions, giving insufficient consideration to dynamic factors (associated with transformative progress and present behaviour) which could be more predictive of and relevant to Indigenous risk. His idea was that an Indigenous-specific risk assessment instrument will take into account the background and systemic factors that bring Indigenous people into contact with the justice system at disposition.[316]

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[312] Actuarial tools measure an accused's historical level of education, employment, mental illness, and criminal history. Clinical assessments measure ''dynamic factors" such as: ongoing substance abuse, active psychosis, instability, attitude and insight, response to treatment, stress, and levels of anger and hostility. These dynamic risk factors can also be seen as ''need" factors or areas in an accused's life that, if treated properly, can reduce the likelihood of recidivism. Both sets of factors are generally studied together, screened through what is known as a ''structured risk assessment instrument."

[313] Deborah Dawson, ''Risk of Violence Assessment: Aboriginal offenders and the assumption of homogeneity" (1999) online:< http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.540.6340&rep=rep1&type=pdf>.

[314] Kelly Hannah-Moffat & Paula Maurutto, *supra* note 302 at 265.

[315] David Milward, "Locking up those Dangerous Indians for Good: An Examination of Canadian Dangerous Offender Legislation as Applied to Aboriginal Persons" (2014) 51 (3) Alberta L Rev 619.

[316] *Ibid*.

The main issue regarding the suitability of risk scales for Indigenous populations concerns whether the predictive accuracy of the scale (and the difference between what Gutierrez *et al* call "discrimination and calibration") differs between Indigenous and non-Indigenous people.[317] Studies have demonstrated that commonly-used risk assessment scales are less accurate at predicting recidivism for Indigenous peoples compared to non-Indigenous.[318] Gutierrez *et al*[319] find some empirical support for the predictive accuracy of risk scales with Indigenous peoples, however they query why there is a fairly consistent pattern of lower accuracy compared to non-Indigenous, stating that the reason for this pattern, scientifically, is not clear.

It is therefore imperative that additional caution is exercised in applying risk tools and using risk knowledge across population groups that are not white men, particularly for life-changing sentencing decisions that may permanently restrict an offender's liberty like a designation of dangerousness and/or an indeterminate sentence. If we acknowledge that risk technologies still predict recidivism with moderate accuracy,[320] abandoning their use completely is, perhaps, not entirely defensible.

Proponents of risk technologies[321] support the use of empirically validated structured risk assessments with Indigenous offenders, until there is more research done to better understand differences in predictive accuracy.

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[317] Leticia Gutierrez, Maaike Helmus, and Karl Hanson, "What We Know and Don't Know About Risk Assessment with Offenders of Indigenous Heritage" Research Report, Public Safety Canada: 2017–R009 at 7.
[318] *Ibid* at 1.
[319] *Ibid.*
[320] For Canadian Indigenous offenders, there is currently sufficient evidence to support the applied use of the Level of Service instruments for general recidivism, and Static- 99R for sexual recidivism; Leticia Gutierrez L. Maaike Helmus R. Karl Hanson, "What We Know and Don't Know About Risk Assessment with Offenders of Indigenous Heritage" Research Report, Public Safety Canada: 2017–R009 at 10.
[321] Gutierrez et al, *supra* note 317 at 1.

2.4.1 *Ewert v Canada*

Ewert v Canada[322] highlighted the possible role that risk assessment plays in perpetuating a cross-cultural bias, through biases built into risk assessment instruments. This means that Indigenous people could be detained in federal penitentiaries for longer than necessary or for longer than their non-Indigenous counterparts.[323]

This limitation of actuarial tools creates the potential for a 'selection effect' in the population of individuals studied whereby the offenders upon whom the actuarial tools were designed and tested are different qualitatively than the offender newly being subjected to the risk assessment process.[324] For example, if the tools were developed based on the behavior of white offenders, the scoring criteria may not be as transferable to an Indigenous woman who is charged with the same offence, but represents a completely different set of criminogenic risks and needs.[325] It has been suggested that we call these problematics "issues of fit."[326]

Ewert, a Métis man, was convicted of murder and attempted murder for strangling and sexually assaulting two women in 1984, for which he was serving two concurrent life sentences.[327] He challenged the use of five risk assessment tools used by the Correctional Service of Canada,[328] (hereinafter "CSC") on the basis that they were developed and tested on

[322] *Ewert v Canada*, 2018 SCC 30.
[323] Correctional Services Canada is responsible for the management of all inmates in federal prisons, who have been sentenced for a criminal offence for two years or more imprisonment, as was the case with Ewert.
[324] Nicholas Scurich, "An Introduction to the Assessment of Violence Risk" in Jay P. Singh, Stål Bjørkly, and Seena Fazel, International Perspectives on Violence Risk Assessment, Online: Oxford Scholarship Online, August 2016. Online:<http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199386291.001.0001/acprof-9780199386291> at 6.
[325] This is a reference to the Risk Needs Responsivity (RNR) model, which is often used by Canadian corrections to identify an individual offender's risks, needs and potential responsivity to treatment.
[326] Scurich, *supra* note 324 at 10-11.
[327] Ewert has spent over 30 years in federal prison. He has been eligible for day parole since 1996 and full parole since 1999, however he has waived his right to each parole hearing; *Ewert v Canada*, 2018 SCC 30 at paras 9-10.
[328] Corrections relies on risk assessment reports to determine an individual's suitability for parole based on a number of factors; Inmates are released on parole, if granted from Corrections, with a number of conditions.

predominantly non-Indigenous populations and that there was no research confirming their validity with Indigenous persons.[329]

Ewert argued that the CSC's reliance on these tools in respect of Indigenous offenders constituted a breach of section 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 sections 7 and 15 of the *Charter*.[330] The trial judge accepted expert 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.[331] It was held that the CSC breached section 24(1) of the *CCRA* and section 7 of the *Charter* by relying on risk assessment tools despite long standing concerns about their application to Indigenous offenders.[332] The Federal Court of Appeal overturned both of these findings.

In the Supreme Court of Canada, Ewert's history of complaints regarding risk assessment tools was examined.[333] It became evident that the CSC had been aware of long-standing concerns as to whether the impugned tools were valid when applied to Indigenous offenders.[334] CSC had said that they would ask for an opinion from an independent outside body but failed to do so.

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[329] Hare Psychopathy Checklist-Revised ("PCL-R") is 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"); he also challenged CSC's use of the Static-99, an actuarial tool designed to predict sexual and violent recidivism and the Violence Risk Scale – Sex Offender ("VRS-SO"), which assesses the risk of sexual recidivism and used with sex offender treatment; *Ewert v Canada*, 2018 SCC 30 at para 11.
[330] *Ewert*, *supra* note 322 at para 3.
[331] *Ewert*, *supra* note 322 at para 72.
[332] Ewert initially complained about the CSC's use of risk assessment tools back in April 2000; *Ewert*, *supra* note 322 at para 12.
[333] *Ewert*, *supra* note 322 at para 17.
[334] *Ewert*, *supra* note 322 at para 72.

This research was referred to by the Federal Court in 2007 and was identified as requiring further investigation which was never completed before the decision in the Federal Court of Appeal in 2008. Despite this inattention, the CSC continued to rely on these risk tools in making decisions about Indigenous offenders. The majority held that CSC breached its obligation set out under section 24(1) of the *CCRA* by continuing to rely on the impugned tools without ensuring that they are valid when applied to Indigenous offenders.[335] The majority, however, did not agree that this reliance constituted a violation of Ewert's section 7 *Charter* rights.[336] The Court qualified this decision stating that it is essential that risk scales be empirically validated in order to defend their use and that further research is needed.[337]

[335]The Correctional Service of Canada breached its obligation set out under s24(1) *Corrections Conditional Release Act* to take all reasonable steps to ensure that any information about an offender that it uses is as accurate as possible; *Ewert v Canada*, 2018 SCC 30 at paras 80 and 89 with Côté and Rowe JJ dissenting, in part.
[336] To establish that a law or a government action violates s7 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 at para 55.
[337] Gutierrez et al., *supra* note 317 at 4.

Chapter 3: Reconciling the DO Regime with Theories of Punishment

3.1 Introduction

Sentencing represents one of the most violent expressions of state power over the lives of its citizens.[338]

In many states, judges can preventively detain those deemed dangerous, that is, those thought to pose a risk of serious harm to the public.[339] Such preventive regimes create a framework for the designation of certain offenders as "dangerous offenders" and establish conditions under which such persons can be sentenced to a penitentiary for an indeterminate period in the name of public protection. The use of indeterminate sentences as a form of preventive detention represents one of the most contested exercises of state power. As a form of punishment, it requires justification because it entails stripping an individual of their liberties for an indeterminate period of time.[340]

Indeterminate sentences do not fit within a purely retributivist punishment justification although there are retributive elements. They are a forward-looking utilitarian type of sentencing based on a future assessment of risk. Some claim that the most promising rationale for indeterminate sentences[341] stems from a mixed theory of punishment whereby retributivist concerns account for deserved time in prison and forward-looking utilitarian public protection goals are what ultimately decide the offender's actual date of release. [342] Predicting that future risk is based in part on past behaviour. The dangerous person is detained indefinitely based on a risk which has both backward and forward-looking components.

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[338] Lucia Zedner, *Criminal Justice* (Oxford, England: Oxford University Press, 2004) at 174.
[339] Ashworth & Zedner, *supra* note 147 at 144.
[340] Ashworth & Zedner, *supra* note 147 at 146-147.
[341] Indeterminate sentencing, as discussed in this article, is a sentencing practice wherein offenders are sentenced to a range of potential imprisonment terms with the actual release date determined later by a parole board.
[342] Michael O'Hear, "Beyond Rehabilitation: A New Theory of Indeterminate Sentencing" (2011) 48(3) Am Crim Law Rev 1247 at 1250.

In this chapter I begin by discussing dangerousness at a conceptual level as a precondition of indeterminate sentences. I set out the two main theories of punishment, retributive and utilitarian[343], before discussing indeterminate sentences as a small subset of utilitarian-based sentencing. I then explore whether there are any workable punishment theories that can justify indeterminate sentences on either retributive or utilitarian goals or some mix of both (mixed theory). In doing this I ask the following questions: how does sentencing someone who has offended violently, based on the likelihood of further violence, fit within our understanding of the principles of punishment? What do we lose, in principle, when we shift away from proportionality – based on retributivist theories of justice towards a purely utilitarian justification? Examining these justifications offers a theoretical framework to later explore judicial decision-making in dangerous offender caselaw.

3.2 The Concept of Dangerousness as a Precondition for Indeterminate Sentences

Several justifications have been advanced to support indeterminately detaining DOs and it is worth exploring theories offered over time by various commentators. For example, Norval Morris in his lecture "on dangerousness" discussed the "definitional, moral, and evidentiary problems" in the application of the concept of "dangerousness" in criminal law. [344] Specifically, he noted how preventively detaining criminals before they have a chance to strike is an "alluring idea".[345]

Ultimately, the notion of dangerousness implies an ability to predict future conduct[346] and indeterminate sentences are founded on what Morris and Miller term "anamnestic prediction" or

[343] Jeremy Bentham, *An introduction to the Principles of Morals and Legislation* (Oxford: Clarendon Press, 1907).
[344] Norval Morris, "On Dangerousness in the Judicial Process" (1984) 39:2 Rec Ass'n B City NY 102 at 102.
[345] *Ibid.*
[346] Herschel Prins, "Dangerous Offenders: Some Problems with Management" (1998) 12 (2) Int Rev Law Comput Technol 299 at 300.

the assumption that the future behavior of the dangerous offender is likely to be similar to the way they have behaved in the past.[347] Morris, in his lecture, focused on whether and with what precision one can predict future violent behavior, and how and to what extent judges should apply that knowledge.[348] This involves a central inquiry into whether indeterminate sentences are sufficiently legitimate that we can afford what we lose (ethically/principally in law) because of what is gained.[349]

As indeterminate sentences involve a prospective assessment of dangerousness, we first must briefly define dangerousness as a precondition of an indeterminate sentence. Here, it is useful to distinguish the notion of dangerousness from risk. The latter simply refers to the likelihood of a person's committing any future harmful act, while the former combines the perceived likelihood of a future harmful act being committed with a perception of how serious that harm is considered to be.[350] At a conceptual level, dangerousness is, of course, a social and cultural construct, the meaning of which varies over time and by jurisdiction.[351] Harmful behavior, unacceptable risks and assessments of dangerousness are, as Floud and Young[352] argued, "socially constructed".[353] Petrunik noted that a key feature of society's response to persons deemed dangerous is "a primal fear of a threat which is irrational and unpredictable and conduct which is physically and morally repulsive or bizarre."[354]

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[347] Norval Morris and Marc Miller, "Predictions of Dangerousness" (1985) 6 Crime & Justice 1 at 13-14.
[348] Morris, *supra* note 344 at 107.
[349] It is important to note here that the accuracy of risk prediction, as a science, falls outside the scope of this chapter. The reliability of risk prediction instruments and their socio-legal implications is discussed instead in the chapter of this thesis discussing risk tools and diagnosis in the context of the statutorily mandated risk assessments under Part XXIV.
[350] Petrunik, *supra* note 223, at 45.
[351] Mark Brown and John Pratt, eds, *Dangerous Offenders: Punishment and Social Order* (London: Routledge, 2000); *Supra note 140 (Preventive Justice),* at 144.
[352] Jean Floud & Warren Young, *Dangerousness and criminal justice* (London, England: Heinemann, 1981) at 40.
[353] Jessica Black, "Is the Preventive Detention of Dangerous Offenders Justifiable?" (2011) 6 Journal of Applied Security Research 317 at 325.
[354] Petrunik, *supra* note 223 at 45.

The type of sentence required to protect society from a designated dangerous offender may depend on differing perceptions of what constitutes a threat, which can be impacted by the socio-political climate in which the assessment of risk is made.[355] For example, Garland stressed the importance of understanding that "penal measures and institutions have social determinants that have little to do with the need for law and order, social effects that go beyond the business of crime control" and that therefore we cannot think about them in "purely instrumental terms."[356] Instead, punishment should be viewed as a "social institution".[357] As part of these social institutions, inevitably the "dangerous offender" label has been described as being part of a "politically charged emotional landscape."[358]

Violence is almost universally regarded as the hallmark of dangerousness. Dangerous offenders are presumed to be violent and violent offenders are presumed to be dangerous".[359] Nonetheless, different theorists have offered various theories as to how we can justify indeterminate sentences for those labelled as a dangerous offender. Bottoms and Brownsword's model[360] stated that a "vivid danger threshold" must be met to label someone as a dangerous.[361] Additionally, a certain gravity and likelihood of the feared harm taking place must exist.[362] Ashworth and von Hirsch stated that the standard of dangerousness has to be a "sufficiently exacting standard of seriousness" and that "there must be a risk of potentially lethal or very

[355] Andrew Ashworth and Lucia Zedner, "Some Dilemmas of Indeterminate Sentences: Risk and Uncertainty, Dignity and Hope" in Jan W de Keijser, Julian V Roberts and Jesper Ryberg eds, *Predictive Sentencing: Normative and Empirical Perspectives* (Oxford: Hart Publishing, 2019) 127 at 127; Paula Maurutto and Kelly Hannah-Moffat, "Assembling Risk and the Restructuring of Penal Control" (2006) 46 Brit J Criminol 438.
[356] David Garland, "Sociological Perspectives on Punishment" (1991) 14 Crime and Justice 115 at 116.
[357] *Ibid* at 118.
[358] Linda Mussell and Michael Orsini, "Governing Through Remorse: The Discursive Framing of Dangerous Offenders in Canada" (2021) 36 (3) Can Law Soc Rev 505 at 507.
[359] Floud & Young, *supra* note 352 at 7.
[360] Albert Bottoms and Roger Brownsword, "The Dangerousness Debate After the Floud Report" (1982) 22(3) Brit J Criminol 229.
[361] *Ibid* at 240.
[362] *Ibid*.

serious violence and a high degree of certainty that amounts to a substantial risk of the harm materializing;"[363] therefore preventive imprisonment should be limited to offenders who have previously committed serious offences (a very serious conviction offence, which is narrowly defined) because the less serious the conviction offence is, the more blatantly disproportionate a preventive sentence would be.[364]

Slobogin has argued that a "core trait" that normatively distinguishes the dangerous person who may be detained for preventive purposes from the dangerous person who may not be, is "undeterrability".[365] According to Slobogin a dangerous person is undeterrable when the commands of the criminal justice system do not work or cannot work. The idea here is that undeterrable people lack autonomy or will choose the bad course of action regardless of the consequences.[366] Similarly, Pratt identifies this quality of repetition of violent offences that triggers the judgment of dangerousness as "ungovernability."[367] The idea here is that an individual labelled as dangerous lacks any future treatment prospects or ability to rehabilitate in the future so as to reduce the risk of harm that they present to any acceptable level. Therefore, their undeterrability, ungovernability or "intractability"[368] forms a basis for justifying an indeterminate sentence. Having discussed the dangerousness criteriaon, at a conceptual level, I now explore whether retributivist, utilitarian or mixed theories can justify the indeterminate sentence itself.

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[363] Andrew von Hirsh and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford: Oxford University Press, 2005) at 50-61.
[364] *Ibid* at 55-57.
[365] Christopher Slobogin, "A jurisprudence of dangerousness" (2003–2004) 98 (1) Northwestern University Law Review 1 at 42.
[366] *Ibid* at 47.
[367] John Pratt, *Governing the Dangerous: Dangerousness, Law and Social Change* (Sydney: Federation Press, 1997).
[368] The Supreme Court of Canada has used this term to describe behavior that a dangerous offender is unable to surmount in a prospective assessment of dangerousness; *Boutilier*, *supra* note 7 at 27.

3.3 Retributive vs Utilitarian Theories of Punishment

The retributivist approach to punishment is based on the concept of desert: punishing people for breaking the law is morally permissible because such people deserve to be punished. This solution is backward-looking; it claims that committing an offence in the past is sufficient to justify punishment now, whether or not this will produce any beneficial consequences in the future.[369] By contrast, a utilitarian solution to the problem of punishment is forward-looking; it attempts to justify punishing offenders in the present by appealing to the beneficial effects that this will bring about in the future. According to utilitarian goals, punishing people for breaking the law is morally permissible because of its presumed good consequences such as deterrence, incapacitation or even rehabilitation.[370]

3.3.1 Retributivism

Retributivism justifies punishment as an inherently good response to criminal behavior on the basis that it annuls the crime or gives offenders what they deserve because of their immoral/illegal actions. Retributivists believe that 'the punishment should fit the crime;' they see the offender as having gained an unfair advantage in the commission of the offence, which must now be compensated for by handing them their 'just deserts' in order to repair the harm.[371]

Retributivism dates back to the biblical injunction of "an eye for an eye, a tooth for a tooth"[372] and ancient Roman law *Lex talionis* which is Latin for the "law of retaliation". Kant endorsed this notion of punishment stating, "whatever undeserved evil you inflict upon another within the people, that you inflict upon yourself."[373] Thus retributive sentencing focuses on the

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[369] David Boonin, *The Problem of Punishment* (Cambridge: Cambridge University Press, 2008) at 85.
[370] *Ibid*, at 37.
[371] David Dolinko, "Punishment" in John Deigh and David Dolinko, *The Oxford Handbook of Philosophy of Criminal Law* (Oxford: Oxford University Press, 2011) at 409.
[372] *Exodus* 21: 23–25; *Leviticus* 24:17–20.
[373] Emmanuel Kant, *The Metaphysics of Morals*, Mary Gregor (trans), (New York: Cambridge University Press, 1991[1797]) at 141.

relationship between the seriousness of the offence and the offender's culpability; punishment must be proportionate to the gravity of the offence and the moral culpability of the offender. Detention beyond this term is disproportionate.[374] Just desert theory increased in popularity in the 1970s with the publication of several works on sentencing policy that influenced sentencing and penal policy in the US and Europe.[375]

Retributivism claims that wrongdoers morally deserve punishment for their wrongful acts. It has both a positive claim complemented by a negative deontic claim: those who have done no wrong may not be punished. Negative retributivism[376] is the view that wrongdoers forfeit their right not to suffer proportional punishment. This prohibits both punishing those not guilty of wrongdoing (who deserve no punishment) and punishing the guilty more than they deserve (i.e., inflicting disproportionate punishment).[377]

Many theorists argue that a purely just deserts–based approach leads to an outright rejection of preventive detention, ignoring consequentialist rationales.[378] However, Jesper Ryberg recently addressed whether it is possible to reconcile dangerousness with desert in the context of risk-based sentencing if one subscribes to full-blown retributivist theories.[379] Ryberg addresses what he and other theorists call an 'unresolved dilemma' in penal theory, namely, "on the one hand, the existence of proportionality constraints on how offenders should be punished and, on the other, the fact that there seem to be strong reasons for the criminal justice system to

[374]Ashworth & Zedner, *supra* note 147 at 151.
[375] See for example Andrew Von Hirsh, *Doing Justice: The Choice of Punishments: Report of the Committee for the Study of Incarceration* (New York: Hill and Wang, 1976).
[376] Herbert Lionel Adolphus Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* 2nd ed, (Oxford: Oxford University Press, 2008 [1968]).
[377] Alec Walen *Retributive Justice* Online: https://plato.stanford.edu/entries/justice-retributive/.
[378] Ashworth & Zedner, *supra* note 147 at 148.
[379] Jesper Ryberg, "Risk and Retribution: On the Possibility of Reconciling Considerations of Dangerousness and Desert" in Jan W de Keijser, Julian V Roberts and Jesper Ryberg eds, *Predictive Sentencing: Normative and Empirical Perspectives* (Oxford: Hart Publishing, 2019).

undertake procedures that will prevent future crimes being committed by dangerous offenders."[380] Ryberg considers whether there are ways in which dangerousness can somehow be incorporated into a retributivist framework that reaches beyond risk assessments. According to Ryberg, dangerousness can in itself, under certain conditions, be something that warrants deserved punitive reactions. [381]

Ryberg asks how a risk of future harms can be incorporated into a currently existing base of desert?[382] He refers to what he terms the 'possession' and 'omission' models.[383] If an offender at the end of a prison term is considered dangerous, then possessing certain traits provides a rationale for further incarceration. Here, such offenders would be punishable for the "crime of risk". [384] By contrast, on the omission model, a person deserves punishment for not taking steps to lower this risk. Thus, while the base of desert on the first approach consists in the mere possession of risk characteristics, the second bases punitive desert on the failure to react to such characteristics.[385]

Ryberg builds on a question originally posited by Husak[386] which raises the temporal issue of risk: do dangerous offenders deserve punishment by virtue of presently possessing the characteristics that predict future dangerousness?[387] Here, it could seem absurd to punish someone for being dangerous if this person no longer constitutes a risk. However, Ryberg states

[380] Ryberg *supra* note 379 at 66.
[381] Ryberg *supra* note 379 at 54
[382] Ryberg *supra* note 379 at 55.
[383] *Ibid* citing Douglas Husak, "Lifting the Cloak: Preventive Detention as Punishment" (2011) 48 San Diego Law Rev 1173 at 1199.
[384] Ryberg, *supra* note 379 at 54.
[385] *Ibid*; Ryberg in looking at the role that assessments should play in sentencing describes these characteristics as "the existence of risk factors" and notes that Husak Husak does not commit himself to any particular view on the contents of these characteristics (he simply refers to such traits as x, y and z) – they are theoretical set of dangerousness characteristics/criteria that risk assessors ascribe to in order to predict future recidivism.
[386] Husak, *supra* note 383 at 1197.
[387] Ryberg, *supra* note 379 at 64.

that this misconceives or conflates the significance of the different temporal directions in forward-looking and backward-looking justifications of punishment. Whether the person at a later stage ceases to be dangerous is totally irrelevant. The 'crime', so to speak, has already been committed.[388] Ryberg presents a hypothetical scenario that demonstrates how this could be seen as problematic:

> We can image a person who is a member of a notorious criminal gang and who, on all risk parameters, must be regarded as dangerous; in contrast to him or her, let us imagine a person who was a member of the same gang and who used to be equally dangerous, but who has now successfully been through an exit programme and is spending time helping others escape such an environment. On the retributivist models we are considering here, risk considerations provide equally good reasons for punishing both, which is an implication somewhat hard to accept.[389]

According to Ryberg "there is room for taking the risks of future crimes into consideration, regardless of the theory of punishment to which one subscribes – that is, even if one holds that a retributivist theory provides sufficient justification for punishment and for the determination of how severely different crimes should be punished. Despite this, Ryberg notes that "the role which consequences play within penal theory gradually diminishes as we move from pure consequentialist theories, through mixed theories, to full-blown retributivist theories of punishment...there is still a tension between observing retributivist proportionality constraints and the possibility of initiating more comprehensive measures to prevent criminal activity by dangerous persons."[390] Ultimately, Ryberg did not find anything close to a conclusive argument, stating that "although there is some appeal in pursuing justice and in preventing future crimes, you cannot completely achieve both."[391]

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[388] *Ibid.*
[389] *Ibid.*
[390] Ryberg, *supra* note 379 at 66.
[391] Ryberg, *supra* note 379 at 67.

3.3.2 Utilitarianism

In contrast to a retributive model, utilitarian (sometimes called consequentialist) theories are *forward- looking* justifications of punishment which look towards future benefits, such as the prevention of future crimes. In this social cost-benefit analysis, the punishment inflicted on the offender is weighed against the total sum happiness of society gained from the punishment.

One notable utilitarian theorists was John Stuart Mill.[392] Both Mill and his predecessor Jeremy Bentham[393] believed, on the premise of social contract theory (the idea that government rested in some sense on an original agreement or compact between rulers and subjects), that an action which produces the most 'overall happiness' and/or wellbeing ('utility') and produces the least amount of suffering, is the most ethically valid. Foucault, citing Bentham's "Panopticon",[394] in his work "Discipline and Punish", uses quarantine in a plague as an example of this principle.[395]

Utilitarian sentencing regimes, such as indeterminate sentences, test the moral limits of acceptable punishment in a fair justice system. As a sub-set of utilitarian sentencing regimes, they are based not only on past behavior but also on the likelihood that the individual will reoffend in the future. Thus, indeterminate sentences struggle to find legitimacy on retributive grounds but are often justified on a utilitarian basis; the dangerous offender's prior convictions increase the risk of future offending and thus preventive sentences will protect the public from future harm at the cost to the individual liberties of a small subset of offenders.[396] However, such

[392] John Stuart Mill, *On Liberty* (Harmondsworth, Middlesex: Penguin, 1979 [1859]).
[393] (1748-1832).
[394] Jeremy Bentham, *The Panopticon Writings* (London: Verso, 1995).
[395] Michel Foucault, *Discipline and Punish: The Birth of the Prison* (London: Allen Lane, 1977).
[396] von Hirsh & Ashworth, *supra* note 363 at 53.

regimes leave unresolved questions about how far beyond normal proportionality constraints it is justifiable to go.[397]

Indeterminate Sentences as Incapacitation

Indeterminate sentencing regimes can have different utilitarian aims including deterrence, rehabilitation, and incapacitation.[398] One subset of utilitarianism is incapacitation; indeterminate sentences are often justified on the basis of their crime prevention benefits. If the goal is to prevent future crime, then the simplest means to achieve this is to incapacitate those who have trespassed previously. Incapacitation aims to make it impossible for a person who has offended before to offend again, at least outside of prison. Its focus is on restraining a person who has proved themself dangerous, generally by committing a past crime, to prevent the commission of further crimes.[399]

Incapacitation is the dominant utilitarian justification of what has been argued as the "high social cost of indeterminate sentencing."[400] A forward-looking punishment is justified as a defensible and reasonable act if its overall consequences are beneficial to the greatest number of people in society. For example, preventive detention sentencing regimes provide for the indeterminate detention of a small select number of designated dangerous offenders, with the ultimate aim of enhancing public protection.

By contrast, some use rehabilitation as a justification to preventive ends in defence of the indeterminate sentence. The principle of rehabilitation states that individual freedoms should not be taken in excess of that which needs to be in order to reform a person.[401] Thus many see the

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[397] Ashworth & Zedner, *supra* note 147 at 151.
[398] Christopher Slobogin, "Preventive justice: A paradigm in need of testing" (2018) 36 Behav Sci Law 391at 392.
[399] Kevin Carlsmith, John Darley and Paul Robinson, "Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment" (2002) 83 (2) J Pers Soc Psychol 284 at 285.
[400] Nicola Lacey, *State Punishment* (London: Routledge, 1988) at 41.
[401] Norval Morris, *Punishment, Desert and Rehabilitation, in Equal Justice Under the Law* 136 (US Dept of Justice Bicentennial Lecture Series 1976) at 152.

practice of indeterminate sentencing as inconsistent with the principle of rehabilitation. The use of indeterminate sentences on the basis of public protection has been described as a "slippery slope" with some associated problems: dangerousness may be over-used, there is the risk of false positives and there is the risk that the judge will leave the principle of rehabilitation by the wayside.[402] Furthermore, rehabilitation has "suffered the scrutiny of empirical research."[403] According to Von Hirsch, only 'incapacitation' for public protection has endured, appealing to those who advocate for strong punitive measures to reduce crime."[404]

Indeterminate Sentences and Utilitarianism: Some Challenges/Criticisms

There are several criticisms of adopting a purely utilitarian model for justifying a given sentencing practice. One critique of utilitarianism is that technically one could justify punishing an innocent person if it would lead to the greater good of humanity. Equally, a wrongful conviction, or in the case of dangerous offenders, an inappropriate designation of dangerousness, could be justified if the greater overall safety and total sum happiness of society outweighs the suffering of the individual sentenced under this justification whose rights and freedoms have been stripped away. For example, a pedophile may be indeterminately detained on the basis of a risk assessment that he is likely to harm children again in the future. However, a basic theory of justice is that humans are not to be treated as 'ends into themselves.' [405] One has a right to exist within society even if one possesses certain risk characteristics. Thus, utilitarian theories of punishment fall short of upholding the rights of the individual.

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[402] Frank Zimrig & Gordon Hawkins, Dangerousness and Criminal Justice (1986) 85 (3) Michigan L Rev 481 at 483.
[403] See for example Martinson's "Nothing Works" essay from the Public Interest, which is known for being the death knell of the rehabilitative era.
[404] Andrew Von Hirsch, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* (New Brunswick: Rutgers University Press, 1985).
[405] John Rawls, *A Theory of Justice* (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 1971).

From a utilitarian stance it is believed that the social utility to be derived from indeterminate sentences used for protective purposes in terms of crime prevention outweighs the humanitarian cost to a small minority of people sentenced under this justification.[406] However, adopting a purely utilitarian approach would seem to permit most forms of preventive detention, provided it could be shown, first, that the increase in general welfare outweighed the detriment to the individual and, second, that preventive detention outperformed all other alternatives.[407]

Sentencing regimes not bound by the strictures of proportionality may permit extended sentencing on utilitarian grounds. The danger here in adopting a purely utilitarian approach is that it makes individual people instruments of public utility, while not knowing if they will eventually go on to reoffend (increase in utility).[408] We know their behavior is moderated (mainly from harming those outside) while in prison, however even those subject to an indeterminate sentence may eventually be released. Thus, in the context of indeterminate sentences this is particularly problematic when there is not sufficient existing evidence that longer preventive sentences actually result in any significant reduction in crime.[409] Arguments in favour of utilitarian justifications for indeterminate sentences are undermined by the challenges in accurately predicting future behavior. Nobody can really know whether reoffending will occur.

For some theorists, indeterminate sentences mean that too much of the retributivist justification, particularly proportionality, is lost – the indeterminate sentence is focused too much

[406] Michael Tonry, "Selective incapacitation: The debate over its ethics" in von Hirsh & Ashworth, *supra* note 363 at 165.
[407] Christopher Slobogin, "Prevention as the Primary Goal of Sentencing: The Modern Case for Indeterminate Dispositions in Criminal Cases" (2011) 48 San Diego Law Rev 1127; Andrew Ashworth and Lucia Zedner, "Preventive Detention of the Dangerous" in Ashworth & Zedner, *supra* note 147 at 151.
[408] Ashworth & Zedner, *supra* note 147 at 152; Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge: Cambridge University Press, 2010) at 207.
[409] Ashworth, *supra* note 408.

on prevention based on the assessment of a future risk. This presents a challenge for states seeking to justify indeterminate sentences as a legitimate form of punishment; if we lean too far towards utilitarian goals, we run the risk of obscuring proportionality constraints underpinning a legitimate legal system in modern democratic societies.

The above arguments underly the contention that neither a purely utilitarian nor strict retributive approach to criminal justice can adequately justify indeterminate detention. Both fall short as justifications on their own. As indeterminate sentences have both backward- and forward-looking components, it is inadequate to justify the proportionality constraints inherent in indeterminate sentences on purely utilitarian theories. A purely utilitarian justification must be dismissed as an unacceptable one in a society that respects citizens' human rights—especially the right to liberty. Additionally, the empirical problems inherent in prediction methods prevent this from being a successful justification. Furthermore, it is hard to justify indeterminate sentencing on retributivist grounds as it aims to prevent future crimes rather than punish past behavior.[410]

Instead, theorists have argued that a sentencing goal is needed which is not based only on retribution for past acts but also prevention of future ones. As Ashworth and Zedner stated "the larger task is to articulate justifications of preventive detention that serve preventive ends while observing retributive standards of respect for individual autonomy."[411] The following section looks at how mixed theories have evolved as an attempt to reconcile the two abovementioned approaches and whether any mixed theory can sufficiently justify the degree of proportionality lost with indeterminate sentences.

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[410] Christopher Slobogin, *Proving the unprovable—The role of law, science, and speculation in adjudicating culpability and dangerousness* (Oxford: Oxford University Press, 2007) at 3.
[411] Ashworth & Zedner, *supra* note 147 at 152.

3.4 Mixed Theories

Many scholars argue that "any workable theory of sentencing must address both retributive and utilitarian concerns, rather than just one of them." [412] For example, consider the following scenario raised by Anthony Duff:

> It is tempting to say of such an offender that when he is convicted of his latest serious crime of violence, he should be subjected to an extended period of secure imprisonment to incapacitate him from committing further such crimes: not just because, on consequentialist grounds, this will be a cost-effective method of preventing serious crimes, but because this would be a justified, deserved, response (retributive) to his crimes.[413]

Before exploring the mixed theories or justifications best suited for indeterminate detention, we must first understand the basic tenet of a mixed theory of punishment. In the mid-twentieth century, the problem of reconciling utilitarianism and retribution was tackled by a number of thinkers, most famously HLA Hart and John Rawls, who each developed an approach that purported to finally reconcile these two.[414]

Rawls, in his seminal book *A Theory of Justice*[415] qualified Mill and Bentham's 'total sum happiness' theory of utilitarianism with the concept of "justice as fairness."[416] For Rawls, a principled reconciliation of liberty and equality is the basic structure of a well-ordered society. According to Rawls' principles of "justice as fairness" people must have at least some fundamental or inalienable rights that cannot be overridden by consequentialist justifications.

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[412] Richard Frase, *Just Sentencing: Principles and Procedures for a Workable System* (Oxford: Oxford University Press, 2012) at 82; Norval Morris, "Penal Sanctions and Human Rights" in Norval Morris and Colin Howard, eds. *Studies in Criminal Law* (Oxford: Clarendon Press 1964) at 175.
[413] Antony Duff, *Punishment Communication and Community* (Oxford: Oxford University Press, 2001).
[414] Whitley RP Kaufman, "The Mixed Theory of Punishment" in Whitley RP Kaufman, *Honor and Revenge: A Theory of Punishment* (New York: Springer, 2012) at 73.
[415] *Supra* note 405 (Rawls).
[416] *Ibid.*

In place of a state of nature, Rawls imagines that people are asked to choose a basic structure from within what he calls an "original position." Since you are not supposed to know what your particular role in the society is going to be you would have to choose from behind "a veil of ignorance", which forces you to choose a basic structure using strictly impartial criteria. Since you would not know if you were going to be a woman, or a man, or a person of colour, etc. Rawls' argument is that, placed in an original position behind the veil of ignorance, you would not choose utilitarian principles; you would choose the principles of "justice as fairness" instead. Here, justice is more important than economic efficiency as every person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. According to this theory, justice denies that the loss of freedom for some is made right by a greater good shared by others.[417]

According to another famous mixed theorist, Hart, punishment is just only if two conditions are met: 1) it has desirable consequences (such as the deterrence of crime); and 2) it is inflicted only on those who are guilty of violating the law. Within this mixed theory of punishment Hart distinguished between the "general justifying aim" of punishment and its "distribution." Essentially there is the punishment's *general justifying aim* which asks why and in what circumstances it is a good institution to maintain[418] or what "general aim or value its maintenance fosters?"[419] Then the question of *distribution* asks who may be punished and to what degree. It is from this distinction that a *mixed theory* arises whereby the institution of punishment is justified by its consequences (utilitarianism) and is also distributed according to

[417] *Ibid.*
[418] Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, 2nd ed (Oxford: Oxford University Press, 2008 [1968]) at 178.
[419] *Ibid* at 179-180.

offender desert (retributivism).[420] In the following I explore debates amongst some modern mixed theorists and how they attempt to reconcile unresolved tension between utilitarian and retributive justifications for indeterminate sentences.

3.4.1 Can Mixed Theories Reconcile Tensions between Retributive and Utilitarian Punishment Goals in the Context of Indeterminate Sentences?

Despite many theorists contending that mixed theories had left us with an "unsolved problem about punishment,"[421] these theories continue to be relied upon to defend indeterminate sentences as morally permissible. Modern mixed theorists contend that indeterminate sentences have a mix of retributive and utilitarian elements and offer nuanced understandings and perspective on indeterminate sentences which attempt to explain why they should be allowed.

In response to the dangerousness debate following the Floud report, written by Britain's Howard League for Penal Reform,[422] a model was proposed by Bottoms and Brownsword in 1982 in which the authors agreed that being punished for no more than one deserves is a requirement of fairness, and deviations from this require strong justifications.[423] They relied on theories advanced by Dworkin in his book *Taking Rights Seriously*[424] in which Dworkin stated that rights should be respected even if disregarding them would provide greater net social benefits. On this basis, indeterminate sentences are not justifiable because they strip and individual of their liberties for the purpose of protecting society. Dworkin provided two grounds for derogation: 1) when a competing right is involved and 2) when the loss of social utility involved in maintaining the fairness constraint would be of "extraordinary dimensions". Bottoms

[420] *Ibid* at 181.
[421] George Sher, "An Unsolved Problem About Punishment" (1977) 4 (2) Social Theory and Practice 149.
[422] Jean Floud & Warren Young. *Dangerousness and Criminal Justice* (London: Heinemann, 1981); The theoretical framework of Floud's ethical approach was structured around two key principles: the principle of "just redistribution of risk" between a known dangerous offender and a potential victim of a predicted offence, and the principle that the citizens of a free society have the right to be presumed free of harmful intentions.
[423] *Supra* note 314 *(Dangerousness Debate*), at 239.
[424] Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977).

and Brownsword relied on Dworkin's first argument to justify indeterminate sentences when particularly dangerous offenders threaten the rights of victims.[425]

Bottoms and Brownsword agree with an exception to proportionality on the basis that what they term "protective sentences" should only be invoked when there is a "vivid danger" or a substantial and immediate likelihood of one or more injurious acts occurring.[426] As such, only individuals who present a "vivid danger" to others should be given a period of confinement in excess of what they deserve due to the gravity of their offences.[427]

The problem with this model is that the justifying aim of the punishment relies upon accurately defining those who are dangerous - who meet the dangerousness criteria.[428] Theorists Andreas von Hirsch and Andrew Ashworth asserted that the Bottoms-Brownsword's justification model is thus only acceptable if predictions of violence are "tolerably reliable."[429] Other critiques of the Bottoms-Brownsword model include the vagueness of the vividness criterion for dangerousness and, of course, the problem of identifying offenders who pose a substantial and immediate likelihood of serious injury to the public. Any offenders who are mistakenly identified as likely to reoffend would be wrongfully detained.[430] As an alternative to the forfeiture thesis based on Dworkin's first ground, von Hirsh and Ashworth have proposed that a higher threshold should be used when the proportionality of desert is overridden. This approach follows Dworkin's second ground of justification, namely where "harmful consequences of an extraordinary character" would otherwise occur.[431]

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[425] von Hirsh & Ashworth, *supra* note 363 at 50.
[426] Bottoms & Brownsword, *supra* note 360 at 239.
[427] von Hirsh & Ashworth, *supra* note 363 at 50.
[428] Black, *supra* note 353 at 324.
[429] von Hirsh & Ashworth, *supra* note 363 at 58.
[430] Black, *supra* note 353 at 320-322.
[431] von Hirsh & Ashworth, *supra* note 363 at 52.

Can any mixed theories of punishment work to justify indeterminate sentences? While there is extensive literature on the rise and fall of mixed punishment theories generally, there is limited literature on their ability to explain indeterminate sentencing. Von Hirsch is skeptical about the ability of any criminal justice system to determine with precision which offenders should be legitimately subject to preventive measures that exceed proportionality constraints.[432]

When it comes to hard punishment, Von Hirsch does not think even a mixed theory of punishment can justify dangerous people being restrained on an ongoing basis like tigers in a cage, but should instead be treated as moral agents. For von Hirsch this means giving priority to retributive or desert considerations as he concludes that "a patched-together compromise such as this between ideas of prevention and those of equity would be likely to satisfy neither those preoccupied with crime prevention, nor those concerned seriously with questions of justice."[433]

In general, there is a need for proportionality between a sentence and the gravity/likelihood of the anticipated harm and also the culpability or responsibility for a potential future offence. Nicola Lacey sees that utilitarian concerns may be justified in overriding proportionality in the context of preventatively detaining dangerous individuals, where harmful consequences would be of "extraordinary character." The concern for Lacey is that in the face of an assessed risk, the proportionality argument will fall subordinate to the harm of the initial conviction, which then is used to legitimize an additional infringement of the offender's liberty. According to Lacey, if public protection is a justifiable sentencing principle, "the logic of indeterminate confinement constrained only by considerations of magnitude and gravity of risk

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[432] Andreas von Hirsch, *Censure and Sanctions* (Oxford: Oxford University Press, 1993). Online: https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780198262411.001.0001/acprof-9780198262411-chapter-002; Andrew von Hirsch, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* (Chapters 13-15) (New York: Rutgers, 1985); Andrew von Hirsch "Proportionality in the Philosophy of Punishment," (1992) 16 Crime Justice 55.

[433] Andreas von Hirsch "Recent Trends in American Criminal Justice Sentencing" [1983] (42) 1 Maryland L Rev 6 at 16.

of social harm is hard to resist." Thus, Lacey concludes that "the problem of the conflict between the principles of protection and proportionality has yet to be resolved satisfactorily."[434]

A central problem with mixed theories thus far is that they rely on that accurate prediction of future conduct. Mixed theorist Christopher Slobogin argues that the risk assessment element incorporated into an indeterminate sentence necessitates a more nuanced understanding of retributivism.[435] Building on this idea, Slobogin proposed a utilitarian model of preventive justice that permits preventive sentences, "cabined only very loosely by desert."[436]

Slobogin[437] suggests that the law's response to the dilemma of reconciling proportionality with the utilitarian public protection goals of indeterminate sentences has been to take a "contextual approach".[438] This means that for any form of preventive detention to be fair, the sentence must be both proportionate to the probability and magnitude of the risk and it must use the least restrictive means of achieving the goal of public protection which Slobogin calls the "least drastic risk-reducing intervention.[439]

Slobogin sees crime prevention as a legitimate goal of government as a form of "preventive justice" which includes the use of indeterminate sentences.[440] Slobogin's notion of limiting retributivism calls for a "preventive justice sentencing regime", which adopts sentence ranges consistent with the offender's desert and then relies on expert parole boards to determine

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[434] Nicola Lacey "Dangerousness and Criminal Justice: The Justification of Preventive Detention" (1983) 36 (1) Curr Legal Probs 31 at 44.
[435] Douglas Husak, "Why Legal Philosophers (Including Retributivists) Should Be Less Resistant to Risk-Based Sentencing" in Jan W de Keijser, Julian V Roberts and Jesper Ryberg, eds, *Predictive Sentencing: Normative and Empirical Perspectives* (Oxford: Hart Publishing, 2019) at 33–50.
[436] Slobogin, *supra* note 407 at 1130.
[437] Christopher Slobogin, "Preventive Justice: How Algorithms, Parole Boards, and Limiting Retributivism Could End Mass Incarceration" (2021) 56(1) Wake Forest L Rev 97.
[438] Christopher Slobogin, "Legal Limitations on the Scope of Preventive Detention" in Bernadette McSherry & Patrick Keyzer, eds, *Dangerous People: Policy, Prediction and Practice* (London: Routledge, 2011) at 39.
[439] *Ibid* at 40.
[440] Christopher Slobogin & Lauren Brinkley-Rubinstein, "Putting Desert in Its Place" (2012) 65 (1) Stanford L Rev 77.

the nature and duration of sentence within this range, based on consideration of individual prevention goals (i.e., incapacitation, specific deterrence, and rehabilitation) as measured through risk assessment instruments.[441]

According to Slobogin a *limiting retributivism* approach involves setting a range of punishment according to desert but allowing a risk assessment at the front end of the process to determine the period of imprisonment, whether indeterminate or a fixed sentence. Upon this basis properly constituted through careful drafting of legislation, Slobogin argues that indeterminate sentences could be justified as a morally defensible method of preventing crime.[442]

In a determinate sentencing regime, punishment is generally supposed to be proportionate to desert (culpability). Where an indeterminate sentence is possible under a particular sentencing regime, the decision to mete out such a sentence should be proportionate to risk. Risk can be measured along a number of dimensions, but the two most important are the probability that harm will occur and its magnitude. Under the risk-proportionality principle, the government is required to prove a high degree of risk in order to justify confinement.[443]

A central counter argument[444] to a preventive justice model of justifying indeterminate sentences through limiting retributivism surrounds the inability to assess risk and problems with predictions of dangerousness.[445] Slobogin concedes that such objections to those critiques and concerns about predictive accuracy should not be ignored.[446] Here, he concedes that the inaccuracy of risk sciences is the main argument against relying on preventive sentencing practices such as indeterminate sentences. In numerous articles he has developed sets of

[441] Slobogin, *supra* note 437.
[442] Slobogin, *supra* note 407 at 1129.
[443] *Ibid* at 1135.
[444] Slobogin, *supra* note 398 at 403.
[445] *Barefoot v Estelle*, 463 U.S. 880, 920 (1983).
[446] Slobogin, *supra* note 398 at 403.

principles for how states can enhance public protection through prevention mechanisms of incapacitation, specific deterrence, and rehabilitation without unduly undermining deontological, retributive precepts.[447]

Slobogin raises three responses to the inaccuracy objection: risk assessment is improving; risk assessment is no more inaccurate than culpability assessment; and mistakes in risk assessment are less costly than mistakes about culpability. The first and third points related to risk assessments improving and their accuracy is highly technical and contested subject outside the scope of this chapter.

In Slobogin's second argument, he argues that those against relying on risk assessment to justify indeterminate sentences point out unavoidable risk assessment flaws but seldom compare them to the inaccuracy associated with the culpability assessment mandated by sentencing in determinate and limited retributivism regimes.[448] His claim is that sentences based on retribution are also rife with "inaccuracy" and gives the example of the scenario whereby two rapists sentenced according to desert can receive wildly different sentences within different US state jurisdictions. Slobogin's argument is that "if we are willing to countenance a criminal system based on this degree of uncertainty, we may be hard-pressed to criticize a preventive detention regime on unreliability grounds."[449]

Slobogin later qualifies all three of his arguments with the key issue of discrimination that remains unsatisfactorily resolved – that a preventive justice regime would be insidiously discriminatory. He concedes that discrimination is the most troublesome as a "constellation of objections centering on the concern that risk assessment and risk management are likely to affect

[447] Slobogin *supra* note 398 at 403.
[448] Slobogin, *supra* note 407.
[449] Slobogin, *supra* note 410 at 110.

people in unfair ways."[450] Here, the objection is that sentences based on risk, as opposed to those based on desert, result in disparity. The concern about discrimination in preventive regimes is that the modern risk assessment techniques upon which they rely are often based on factors that might be proxies for race and class. Slobogin believes this proxy effect is very possibly more likely in culpability evaluations than in risk evaluations. So far there have been contrasting studies with conflicting results on this question.[451]

Punishment theorists have argued that no mixed theories successfully resolve tensions between retributive and utilitarian accounts.[452] Along this line, it appears that there is not yet a concrete theory that adequately justifies indeterminate sentences. Although mixed theories provide the closest rationale, they often give too little weight to retributive considerations, and place the greatest weight on utilitarian considerations of public protection. This can lead to disproportionate and inconsistent sentencing outcomes for people who are labelled dangerous and the consequences of getting that wrong are drastic.[453] Although using indeterminate sentences for dangerous offenders achieves public protection goals, they should be used sparingly because of these issues with justification.

3.5 Conclusion

Relying on indeterminate sentences is a policy choice that many jurisdictions make globally with the general aim of better protecting the public. However, it is important for states to provide an adequate justification for indeterminate sentences because of their devastating impact on an individual's liberties. According to Kantian philosophy a person should not be used

[450] Slobogin *supra* note 398 at 403.
[451] David Baldus, Race discrimination and the legitimacy of capital punishment: Reflections on the interaction of fact and perception, 53 DePaul Law Review 1411, 1494 (2004); Jennifer Skeem & Christopher T Lowenkamp, "Risk, race, & recidivism: Predictive bias and disparate impact" (2016) 54 (4) Criminology (Beverly Hills) 680.
[452] Richard Lippke, "Mixed Theories of Punishment and Mixed Offenders: Some Unresolved Tensions" (2006) 44 South J Philos 273 at 273.
[453] Black, *supra* note 353 at 319.

as a means to a social end.[454] Proportionate punishment is exceeded if offenders are not treated as equal moral agents in a manner consistent with the fundamental respect for the dignity of human beings.[455] Proportionality inherent in a retributive based regime is lost when the focus shifts to prevention and future predictions rooted in part on the basis of past conduct.

Theorists debate whether indeterminate sentences punish offenders for past crimes or restrain them from committing further ones. Mixed theories appear more promising than pure utilitarian justifications but ultimately all are unsatisfactory justifications in and of themselves; retributivists will object to the idea that the purpose of punishment is utilitarian; utilitarians will object to the arbitrary inclusion of constraints on the maximization of utility.

Accepting an indeterminate sentencing regime as a legitimate form of punishment requires placing greater emphasis on utilitarian goals, which not even a mixed theory of punishment can adequately account for. Perhaps the tensions are not irresolvable, but they do not appear to have been resolved in the existing debates. A further problem with an indeterminate sentencing regime is reliably identifying who is going to continue to be dangerous and explaining why their ongoing detention should not be limited by proportionality constraints.

With indeterminate sentences, tensions will continue to exist between public protection and retributive aims of legal punishment. Where some offenders will continue to require to be restrained, retributivism will struggle to explain how this is justified. Mixed theories appear to be the most promising attempt to reconcile the two different aims of punishment however they appear not to fully justify indeterminate sentences

[454] Immanuel Kant, *Groundwork of The Metaphysics of Morals* Herbert James Paton, trans (New York, NY: Harper & Row, 1964).
[455] Dirk Van Zyl Smit & Andrew Ashworth, "Disproportionate Sentences as Human Rights Violations" (2004) 67 (4) Modern L Rev 541 at 542.

Chapter 4: Methodology

A methodology is a set of principles and ideas that inform the design of a research study. Methods, on the other hand, are practical procedures used to generate and analyze data. [456] In the following section, I outline both my research methodology and research methods for this thesis. This thesis employs a mixed - methods[457] or "multi-methodology"[458] approach. It is empirically based (on a case analysis) and theoretically informed (see Chapter 2 "Theoretical Framework"), with a qualitative case analysis of DO cases that have arisen between January 1, 2016 to December 31, 2018, spanning nine Canadian provinces and territories.[459]

4.1 Interviews with Key Informants in Initial Stage of Research

Key informant interviews form a part of this study as they helped me formulate my research questions and understand the context of the judicial regime. Key informant interviews are in-depth interviews of a select group of experts who are most knowledgeable of the issues discussed in this thesis and are used to supplement the case analysis findings, particularly for the interpretation of case analysis results. [460] These key informants were chosen because of their expertise about the subject matter of this thesis. The key informant interviews were conducted face-to-face or via Skype and often recorded (where permission granted) and transcribed for inclusion as supplementary material to the central case analysis.

Between April and June 2018, I interviewed nine expert participants from four key informant categories: 1) Legal academics who have researched and written extensively on

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[456] Melanie Birks and Jane Mills, *Grounded Theory: A Practical Guide* (London: Sage Publications, 2011).
[457] Robert Burke Johnson, Anthony J Onwuegbuzie & Lisa A Turner "Towards a definition of mixed method research" (2007) 1 J Mix Methods Res 112.
[458] John Brewer & Albert Hunter, *Foundations of Multi-method Research: Synthesizing Styles* (Thousand Oaks, California: Sage Publications, 2006).
[459] Most dangerous and long-term offender cases have arisen out of BC, Ontario, Saskatchewan and Quebec, which is why these regions were chosen for this case analysis.
[460] Jennifer A Parsons "Key Informant" in Paul Lavrakas, Eds, *Encyclopedia of Survey Research Methods* (Thousand Oakes CA: SAGE Publications Inc, 2008).

dangerous offenders and/or Part XXIV's risk assessment process; 2) forensic psychologists and psychiatrists, who have either developed the risk assessment tools used by the court appointed risk assessors for the purpose of DO hearings, or who are court appointed risk assessors who have prepared s.752.1(1) reports for the purpose of a DO hearing; 3) lawyers who have made submissions in DO hearings (two Crown and two defence counsel); and 4) policy analysts who have been involved in the drafting of Part XXIV and governmental reports related to DO sentencing in Canada.

UBC BREB required that the semi-structured in-depth interviews be based on a script, and thus all nine participants were asked the same set of questions. After conducting nine interviews, the information provided by participants had reached a sufficient degree of saturation,[461] to ensure that adequate and quality data had been collected to support the case study for this thesis. Each interview was recorded, with the consent of each participant. The objective is to use these interviews to supplement a critical discussion in the focused case studies.

For the purpose of conducting key informant interviews for this thesis, I obtained UBC BREB Approval Certificate number H17-03094. The interview study for this thesis was approved by UBC's BREB as meeting the "minimal risk criteria" as a study that presented minimal foreseeable research risk[462] to interview participants, partly due to their high level of education and expertise.

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[461] See generally: Barney Glaser & Anselm Strauss, *The discovery of grounded theory: Strategies for qualitative research* (Chicago: Aldine Publishing Co, 1967); Anselm Strauss & Juliet Corbin, *Basics of qualitative research: Techniques and procedures for developing grounded theory* (Thousand Oaks, CA: Sage Publications, 2007); Anselm Strauss & Juliet Corbin, "Grounded theory methodology" in NK Denzin & YS Lincoln (Eds), *Handbook of qualitative research* (Thousand Oaks, CA: Sage Publications, 1994) pp. 273–285.

[462] Research risk includes psychological and/or physical harm, social risk and/or conflicts of interest. See UBC BREB's definition of research risk: <https://ethics.research.ubc.ca/behavioural-research-ethics/breb-guidance-notes/guidance-notes-behavioural-application#minimalriskreview>.

4.2 Research Questions

This thesis examines the disposition stage[463] of sentencing someone who has been declared a dangerous offender (DO) under Part XXIV,[464] by asking the following three research questions:

1. What factors do judges appear to give the most weight in deciding whether to sentence someone to an indeterminate sentence?

2. What is the impact of that nature of the offender/victim relationship on the decision whether to sentence someone to an indeterminate sentence?

3. How do judges consider the Indigeneity of the offender in assessing whether and indeterminate sentence is appropriate?

Specifically, the thesis examines the impact of various factors on the disposition decision such as the relationship between the victim and the perpetrator, the nature of the diagnosis and how the Indigeneity of the perpetrator plays into these determinations.

4.3 The Case Sample

To answer the above-mentioned research questions, I analyzed 102 trial decisions, reported online between January 1, 2016 to Dec 31, 2018[465] in French and English, in which the Crown successfully brought an application for a DO designation.

To generate the case sample, I searched three online legal databases: LexisAdvance Quicklaw,[466] WestlawNext Canada,[467] and CanLii[468] in the selected timeframe, using the

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[463] *Boutilier*, *supra* note 7 at para 15.
[464] *Code*, *supra* note 1.
[465] Katerina Linos & Melissa Carlson, "Qualitative Methods for Law Review Writing" (2017) 84 U Chi L Rev 213; To generate the case sample for this thesis, the technique of "systematic sampling" was used to produce credible generalizations. This involved choosing a starting point and selecting cases based on a selected timeframe. Creating this sample allows me to identify common factors impacting disposition outcome and make observations about how judges approached DO sentencing.
[466] https://advance.lexis.com/canadaresearchhome?crid=74f55313-53c7-4922-a80a-0272ba0c7b98
[467] https://nextcanada.westlaw.com/Search/Home.html?transitionType=Default&contextData=(sc.Default)
[468] https://www.canlii.org/en/.

following search terms: “dangerous offender” or “délinquant dangereux”, “indeterminate sentence” or “une peine d'une durée indéterminée”, “s.753(1)”, “s.753(4)(a)”, “s.753(4)(b)” and “s.753(4)(c).”

An online search of all DO cases in the selected timeframe produced a final case sample of 102 trial decisions from nine Canadian provinces and territories.[469] No designated DO cases were found from Nunavut, PEI, New Brunswick or Nova Scotia, which is why these jurisdictions are not included in the case sample.

4.3.1 Exclusion Criteria

Excluded from the case law analysis are cases where the Crown brought a LTO application[470] or cases where the court declined to designate the offender as a dangerous offender. The primary focus of this study is understanding how and why judges decide the appropriate disposition for a designated DO.

4.4 Qualitative Case Law Analysis

Taking the above-mentioned research limitations into consideration, I adopted the following three-phase methodology for critically analyzing the case sample.

4.4.1 Phase I: First Reading of Case Sample and Exploratory Study

The focus of this thesis’ inquiry is on how judges distinguish between cases where an indeterminate sentence is necessary and those where risk can be managed in the community. In order to answer the research questions, Phase I of the legal analysis was an exploratory study, which involved reading all cases in the case sample and noting observations. The objective of Phase I was to develop a list of coding variables to help organize the caselaw data and assist in

[469] British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, Newfoundland and Labrador, Yukon; and Northwest Territories.
[470] *Code*, *supra* note 1, s 753.1(1).

answering the research questions. Although this thesis focuses primarily on the in-depth case studies, some demographic observations were gleaned from coding the case sample, which are discussed in Chapter 5 “Demographics."

The coding variables identified during the Phase I reading of the case sample are:

- Jurisdiction (province or territory)
- Offence(s)
- Joint submission
- Drugs/intoxication involved
- Number of victims
- Relationship between accused and victim
- Age of accused
- Gender of accused
- Accused Indigenous or otherwise racialized
- History of past abuse/sexual abuse
- Psychiatric diagnosis
- Judicial analysis of *Gladue* factors
- Judicial application of burnout theory
- Disposition outcome
- Length of LTSO (if applicable)

4.4.2 Phase II: Second Reading of Case Sample and Case Coding

Phase II involved a systematic analytical coding of each case in the sample using a coding sheet developed on Excel, which contains variables identified in Phase I. Here, the coding results were collected and organized into Chapter 5 “Demographics”.

Emerging Topics for Exploratory Study.

After conducting a Phase I reading and Phase II coding, two case study topics emerged warranting further exploratory study. These two areas of inquiry relevant to disposition although not directly predictive of disposition, were 1) the relationship between the DO and their victim(s); and 2) the relevance of Indigeneity to disposition decisions. My interest in exploring the latter was due to the high number of Indigenous people in the sample and the ways that s. 718.2(e) of the *Criminal Code* and sentencing principles for Indigenous people has been discussed in these DO dispositions.

4.4.3 Phase III: Exploratory Case Studies

The final two chapters of this thesis involve two exploratory case studies on the abovementioned topics related to DO sentencing. This involves a critical examination of a few important DO cases in the case sample on each topic. Selecting a smaller pool of cases from the larger case sample allows for a deeper analysis of judicial approaches and how these core issues are playing out at disposition in relation to each of these three issues.

4.5 Doctrinal Analysis of Primary and Secondary Materials

Additionally, this thesis is supplemented by a traditional literature review of existing primary and secondary materials related to DO sentencing in Canada, including sources on related legal theory, legislation, and a review of the leading case law since the introduction of the DO regime.

4.6 Limitations of Study

One limitation of this case analysis is that the study is limited to reported sentencing decisions from DO hearings, published online as written reasons. Having said that, one would expect that given the gravity of a dangerous offender finding, a large number of decisions would

result in reported reasons. It has been observed that judges can be inconsistent with their approach to the penalty stage of Part XXIV's legal framework, which is reflected in the regional disparity in judge's sentencing of DOs, across Canada. Finally, it is not possible to identify the particular weight given to individual factors in a DO disposition or in sentencing generally. Judges tend to do a more holistic analysis of all the evidence in choosing a disposition and thus inferences need to be drawn from their written reasons. To this extent some conclusions must remain speculative. Finally, it is important to note that the sample was small and that the sentencing of DOs is a complex process involving judicial consideration of various aggravating and mitigating factors. While sentencing outcomes can be studied, it is particularly challenging to determine any precise impact that victim offender relationships have had on disposition outcome in DO hearings due to the myriad factors at play in any sentencing decision.[471]

[471] Isabel Grant, "Sentencing for intimate partner violence in Canada: Has s. 718.2(a)(ii) made a difference?" (2017) Victims of Crime Research Digest No. 10, Department of Justice, Ottawa. Online: https://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rd10-rr10/p2.html.

Chapter 5: Demographics

5.1 Introduction: Case Sample Coding Results

After a preliminary reading of all the cases in the sample, I coded the cases using an Excel spreadsheet, based on a list of variables in an attempt to uncover more about the demographic make-up of the sample, what factors are impacting dispositions in these cases and to help reveal issues for further critical exploratory study.

There are five sets of variables. The first set relate to the legal proceedings itself, such as the jurisdiction in which the case was decided, whether there was a joint submission, the qualifying offence and the sentencing outcome. The second set of variables consists of demographic factors related to the accused such as age, Indigeneity, race, gender, affiliation with a criminal organization or gang, education level, and past abuse (physical and/or sexual). The third set examines the relationship between DOs and victims, including whether they knew one another or were strangers, and for those who did know each other, the nature of their relationship. The fourth set of variables explores the relationship between psychiatric diagnosis and disposition. This fourth set includes factors such as whether the DO is a sex offender, any DSM-5 (Diagnostic and Statistical Manual of Mental Disorders) [472] diagnoses, and whether drugs or intoxication were involved in the offences. The final set of variables looks at the impact of *Gladue*[473] factors on DO sentencing outcomes.

The following section presents the results of the case coding, including discussions surrounding which issues in DO sentencing warrant further exploratory study, and why.

[472] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 5th Ed (DSM-5) (Arlington: American Psychiatric Association, 2013).
[473] *R v Gladue*, [1999] 1 SCR 688.

5.2 Legal Proceedings

5.2.1 Designation

This thesis examines a sample of cases in which the individual was designated a DO in a DO hearing. An online search of all reported DO cases in the selected three-year timeframe (January 1, 2016-December 31, 2018) produced a final case sample of 101 trial decisions and 21 appeals from decisions in the case sample, from nine Canadian provinces and territories.[474] No designated DO cases were found from Nunavut, PEI, New Brunswick or Nova Scotia. The majority of DO cases came from Ontario (36), British Columbia (17), Quebec (16) and Saskatchewan (15). The remaining DO cases came from Manitoba (6), Alberta (5), Yukon Territory (4) Newfoundland & Labrador (2), and the Northwest Territories (1).

5.2.2 Disposition

There are three possible sentencing outcomes for persons designated DOs at the disposition stage under section 753(4): an indeterminate sentence,[475] a determinate sentence for the offence committed of at least two years combined with a LTSO of up to ten years,[476] or a determinate sentence for the offence(s) for which the offender was convicted.[477]

From the total case sample, 65% of DOs received an indeterminate sentence, whereas 35% received a determinate sentence with an LTSO.[478] No DOs in the case sample received a determinate sentence without an LTSO. The average length of a LTSO was 9 years with the shortest being 6 years.[479] Most LTSO's [32/35 or 91%] were for the maximum 10 years.

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[474] British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, Newfoundland and Labrador, Yukon, and Northwest Territories.
[475] *Code*, *supra* note 1 s 753(4)(a).
[476] *Code*, *supra* note 1 s 753(4)(b).
[477] *Code*, *supra* note 1 s 753(4)(c).
[478] 66 out of 101 DOs were sentenced indeterminately; 35 out of 101 DOs received a LTSO, one of which became an LTSO on appeal within the selected timeframe (*R v Malakpour*, 2018 BCCA 254).
[479] *R v Obey* 2016 SKPC 031.

Table 1: DO Disposition Outcomes by Province/Territory

Disposition	BC	AB	SK	MB	ON	QC	NL	NT	YT	**TOTAL Cases**
Indeterminate s.753(4)(a)	12 (71%)	4 (80%)	7 (47%)	5 (83%)	26 (72%)	10 (69%)	1 (50%)	1 (100%)	0 (0%)	**66 (65%)**
DO Determinate (min 2 years) + LTSO s.753(4)(b)	5 (29%)	1 (20%)	8 (53%)	1 (17%)	10 (28%)	5 (31%)	1 (50%)	0 (0%)	4 (100%)	**35 (35%)**
TOTAL DOs in each Province/ Territory	**17**	**5**	**15**	**6**	**36**	**15**	**2**	**1**	**4**	**101**

Looking at disposition outcomes, some provinces seem to have higher numbers of indeterminate sentences than others. This is the case in British Columbia, Alberta, Manitoba, Ontario and Quebec. The number of DO's in the Northwest Territories and Newfoundland and Labrador are too small to draw any conclusions. In Saskatchewan and the Yukon there were more determinate sentences with an LTSO than indeterminate sentences.[480] It is noteworthy that a majority of DOs from Saskatchewan and the Yukon were Indigenous (50% and 88% respectively) compared to the rate in other provinces and territories, with the exception of

[480] DOs in the case sample, broken down by province and territory: The majority of DOs in BC (71%), Alberta (80%), Manitoba (83%), Ontario (72%), Quebec (69%)[480] and Northwest Territories (100%, with only one case) were given an indeterminate sentence. In contrast, 47% of DOs received an indeterminate sentence in Saskatchewan, 50% in Newfoundland & Labrador and none of the DOs in the Yukon received an indeterminate sentence.

Manitoba, where five of six DOs were Indigenous and Northwest Territories where the only DO was Indigenous.[481]

5.2.3 Appeals

Appeal outcomes were coded in the case sample as the final sentencing outcome. This prevented any given case being coded twice. There were sixteen appeals of cases from the case sample that are included in the study: five from BC, one from Alberta, two from Saskatchewan, two from Ontario, four from Quebec and two from the Yukon Territory.

5.2.4 Joint Submissions

In several cases in the sample, the disposition for a DO was decided through a joint submission. A joint submission is part of a resolution discussion between parties whereby Crown and defence counsel "agree to recommend a particular sentence to the judge, in exchange for the accused entering a plea of guilty".[482] There would be no incentive for a DO to accept a joint submission for an indeterminate sentence given the severity of that outcome. While the Crown might have some incentive to accept a determinate sentence in exchange for a guilty plea, the Crown is more likely to agree to a joint submission in exchange for a determinate sentence with an LTSO.

Seven of the 101 cases proceeded by joint submission. The majority were in BC (3) and the Yukon (2).[483] As would be expected, all of the joint submissions were for a determinate sentence combined with an LTSO, in which both parties had previously agreed about both the duration of fixed sentence and the length of the LTSO. Judges accepted the joint submission in

[481] 2/4 DO LTSOs in the Yukon were Indigenous and 7/8 DO LTSOs in Saskatchewan were Indigenous; 6/17 DOs in BC were Indigenous; 5/6 DOs in Manitoba were Indigenous; 1/5 DOs in Alberta were Indigenous; 9/36 DOs in Ontario were Indigenous; 2/16 DOs in Quebec were Indigenous; the only one DO from Northwest Territories was Indigenous; Out of only 2 DOs from Newfoundland & Labrador, one was Indigenous.
[482] *R v Anthony-Cook*, 2016 SCC 43 at para 2.
[483] As for the remaining two joint submission cases: one was from Quebec and the other was from Ontario.

all 7 cases, sometimes varying either the length of proposed sentence or the length of the proposed LTSO.

Trial judges may depart from joint submissions; however, the Supreme Court of Canada held in *R v Anthony-Cook*[484] that they should only do so in very limited circumstances, where the proposed sentence would bring the administration of justice into disrepute or would otherwise be contrary to the public interest.[485] In that case, the Court held that the public interest test for departing from a joint submission is an "undeniably high threshold"[486] that will only be met where the sentence proposed "would be viewed by reasonable and informed persons, as a breakdown in the proper functioning of the justice system.[487]

5.3 DO Demographics

5.3.1 Gender

All 101 of DOs in the case sample were reported as being either a man or a woman. The vast majority or 98/101 of those DOs were men, with only 3/101 being women. This disparity is consistent with federally reported numbers at the end of 2020, revealing that 1% of all individuals designated as DOs at that time in Canada were women.[488]

5.3.2 Age

Out of the 92 cases in the case sample in which the accused's age was reported, the average age of DO at disposition was between 40-45 years old, with a median age of 44 years old.[489]

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[484] *Anthony-Cook*, *supra* note 482.
[485] *Anthony-Cook*, *supra* note 482 at para 32.
[486] *Anthony-Cook*, *supra* note 482 at para 34.
[487] *Anthony-Cook*, *supra* note 482 at para 42.
[488] Statistical Overview, *supra* note 16.
[489] 15-20 years old = 0 DOs; 21-25 years old = 2 DOs; 26-30 years old = 4 DOs; 30-35 years old = 21 DOs; 36-40 years old = 21 DOs; 41-45 years old = 12 DOs; 46-50 years old = 18 DOs; 51-55 years old = 8 DOs; 56-60 years old = 4 DOs; 61-65 years old = 0 DOs; 66-70 years old = 0 DOs; 70-75 years old = 2 DOs; Age unknown = 10 DOs.

5.3.3 Indigeneity and Race

Coding the case sample for Indigeneity and race (to the extent it was discussed in the cases) revealed that 40/101 of DOs in the sample were Indigenous. In the case sample 10/101 of DOs were identified as otherwise racialized.

5.3.4 Education Level

It is challenging to make an accurate assessment of the education level attained by DOs in the case sample as education level was not reported in more than half the cases.[490] After examining those 44 cases where the DO's education level was reported, 25% of DOs in the sample had less than a grade 8 education, 43% had some years of high school education, 25% had achieved their high school equivalency (GED) at some point, and 7% went further than high school.[491]

5.3.5 Gang Affiliation

Approximately 22/101 of DOs in the case sample were associated with a gang or organized crime, which usually constituted affiliation with one of the following: the Hell's Angels, the Bloods, the Crips, the Native Syndicate, the Indian Posse, or some form of organized drug dealing. Of the 22 gang affiliated DOs, 18/22 received an indeterminate sentence, and only 5/22 received a determinate sentence combined with a LTSO. This can be compared with the

[490] 58/101 DOs in the case sample.

[491] Less than grade 8- 11/44 or 25% of DOs whose education level was reported had completed less than a grade 8 education; Grade 8- 2/44 or 5% of DOs whose education level was reported had completed grade 8 as their highest level of education; Grade 9- 9/44 or 20% of DOs whose education level was reported had completed grade 9 as their highest level of education; Grade 10- 4/44 or 9% of DOs whose education level was reported had completed grade 10 as their highest level of education; Grade 11- 2/44 or 5% of DOs whose education level was reported had completed grade 11 as their highest level of education; Grade 12 - 2/44 or 5% of DOs whose education level was reported had completed grade 12 as their highest level of education; GED- 11/44 or 25% of DOs whose education level was reported had achieved their GED; Advanced Ed- 2/44 or 5% of DOs whose education level was reported had completed some form of advanced education after high school (ie diploma or technical trade) as their highest level of education; Graduate- 1/44 or 2% of DOs in the case sample had completed graduate school.

46/79 non-gang members who received an indeterminate sentence. Thus, DOs associated with a gang or criminal organization appeared more likely to receive an indeterminate sentence.

5.4 DO and Victim Relationships

It is challenging to provide clarity on the nature of the relationship between DOs and victims because many DOs have lengthy criminal histories, some with multiple victims over many years. Therefore, the data was coded based on the relationship involved in the predicate offence leading to the DO designation. The relationship between DOs and victims was divided into five relationship categories for coding: family member, intimate partner, stranger, acquaintance and other.

Almost half or 45/101 of DOs were a stranger to their victim at the time of the predicate offence. Here the DO is a stranger to the victim from the perspective of the victim. For example, in some cases the DO had planned the attack and/or followed the victim yet are still categorized as strangers.

The victim and DO already knew one another at the time of the predicate offence in 56/101 of cases. These relationships included intimate partners 19/101,[492] family members 8/101 and acquaintances/other 29/101. For the purpose of this study, I am defining "intimate partner" as meaning someone's (current or former) spouse, common-law partner, or dating partner.

[492] There is no specific offence of intimate partner violence in the criminal code, however the House of Commons passed Bill C-75 on March 29, 2018 (receiving royal assent in June, 2019) expanding the definition of "intimate partner" to include "dating" partners and both current and former partners; *Bill C-75, An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts* SC 2019, c25; Section 2 of *the Act* was amended to define intimate partner with respect to a person, "includes their current or former spouse, common-law partner and dating partner."

In those cases which fell under the "other" relationship category, the DO and victim(s) knew one another to varying degrees. Half of these "other" relationship category offences were committed in an institutional setting.[493]

5.4.1 Relationship Between DO, Victim and Sentencing Outcome

This section examines the victim-offender relationship and the sentencing outcome. The results of coding the case sample indicate that offenders who knew their victim intimately are less likely to receive an indeterminate sentence.

Looking at the case sample as a whole, 29/56 of DOs who previously knew their victim to some varying degree received an indeterminate sentence, whereas 37/45 of those who did not know their victim received an indeterminate sentence.

Table 2: Relationship between DO and Victim and Disposition: Stranger vs Non-Stranger

Disposition	DO and Victim are Strangers	DO and Victim Previously Knew One Another	Total DOs
DO Indeterminate	37 (80%)	29 (52%)	66
DO Fixed + LTSO	9 (20%)	27 (48%)	35
Total	46	55	101

If one looks further at the closest relationships, assuming that intimate partners and family members comprise close relationships, the rate of indeterminate sentences was somewhat lower where the predicate offence was committed against someone with whom the offender was

[493] Other= 11/101 or approximately 11% of which 6/101 or approximately 6% were predicate offences committed in an institutional setting; Breakdown of 12 "other" relationship types: 1 – Residents in care home; 1 – Probation officer ; 1 – Unknown; 1- Male Inmates; 3 – Pimp and female sex trade workers; 1- Drug deal transaction; 2-; Workers at a treatment or correctional centre; and 1- Resident at a halfway house who assaulted two workers at his halfway house.

in a close relationship. Those DOs who were strangers to their victims were more likely to receive an indeterminate sentence. Thus, this observation warranted further exploratory study.

Table 3: Relationship Between DO, Victim and Disposition: Family & Intimate Partners

	Indeterminate sentence	Determinate + LTSO	Total
Intimate/Familial	15 (56%)	12 (44%)	27
Acquaintance/Other	15 (52%)	14 (48%)	29
Stranger	36 (80%)	9 (20%)	45
Total	66 (66%)	35 (34%)	101 Total DO Cases

5.5 Diagnosis

A DO's psychiatric diagnoses are reported in the risk assessment report and are weighed by the judge in the DO hearing as a key factor for determining future risk and treatability. The risk assessment reports include past diagnoses (from previous experts) combined with an updated diagnosis from the court-appointed risk assessor. DOs in the case sample had on average three diagnoses from the Diagnostic and Statistical Manual of Mental Disorders ("DSM-5").[494]

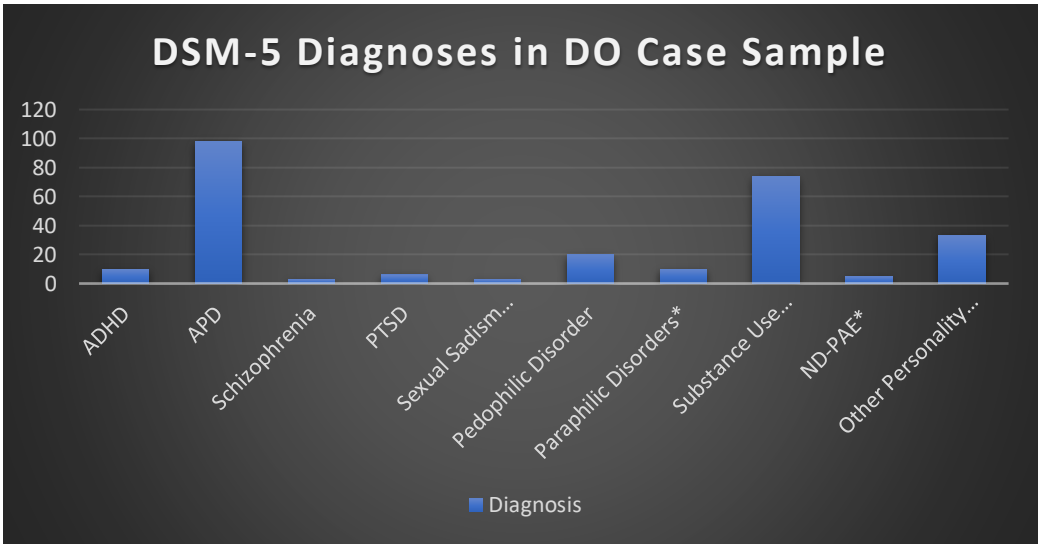
There is a broad spectrum of DSM-5 diagnoses that are raised in the case sample however, most can be categorized into three groups for greater exploration as to the relationship between these diagnoses and DO disposition. The three main diagnostic areas are: 1) substance abuse disorders; 2) paraphilic disorders (including pedophilic disorder); and 3) personality disorders, including antisocial personality disorder. Less common diagnoses in the sample including attention deficit hyperactivity disorder (ADHD), post-traumatic stress disorder

[494] DSM-5 *supra* note 472.

(PTSD), schizophrenia and neurobehavioral disorder associated with prenatal alcohol exposure (ND-PAE).

The following chart shows a breakdown of the DSM-5 diagnoses that were reported in the case sample. The most prevalent diagnoses were antisocial personality disorder (APD), which was found in 64% of all DOs, and substance abuse disorder (SUD), which was found in 73% of all DOs. [495]

Table 4: DSM-5 Diagnoses in DO Case Sample

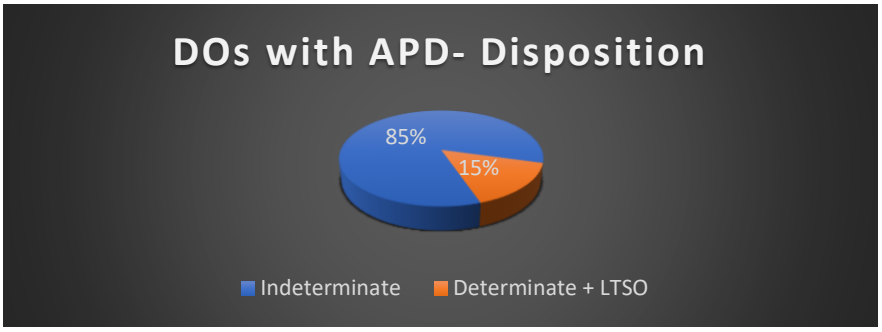


5.5.1 Personality Disorders and Disposition

[495] *Ibid*; Attention-Deficit/Hyperactivity Disorder (ADHD) = 10/101 or 10% of DOs were diagnosed with ADHD; Schizotypal (Personality) Disorder = 4/101 or 4% of DOs had suspected schizophrenia; Schizophrenia = 3/101 or 3% of DOs had a diagnosis of schizophrenia; Posttraumatic Stress Disorder (PTSD) = 6/101 or 6% of DOs had PTSD; Antisocial Personality Disorder = 65/101 or 64% of DOs were diagnosed with APD; Borderline Personality Disorder = 12/101 or 12% of DOs were diagnosed with BPD; Narcissistic Personality Disorder = 10/101 or 10% of DOs were diagnosed with NPD; Sexual Sadism Disorder = 3/101 or 3% of DOs were diagnosed with SSD; Pedophilic Disorder = 20/101 or 20% of DOs in the case sample are pedophiles; Other Specified Paraphilic Disorder = 6/101 or 6% of DOs have OSPD; Unspecified Paraphilic Disorder = 4/101 or 4% of DOs have UPD; Mixed "other personality disorder" = 7/101 or 7% of DOs have a mixed personality disorder; Neurobehavioral disorder associated with prenatal alcohol exposure (ND-PAE) = 5/101 or 5%); Substance Use Disorder = 74/101 or 73% of DOs had substance use disorder, of which: Alcohol Use Disorder = 31/74 or 42% have AUD; 31/101 or 30% of DOs in the total case sample suffer from AUD; Opioid Use Disorder = 6/74 or 8% have OUD; Stimulant Use Disorder = 9/74 or 12% have SUD.

Examining the case sample showed that a diagnosis of antisocial personality disorder (APD) carried a high degree of likelihood that a judge would sentence the individual to an indeterminate sentence. Sixty-five out of 101 of DOs in the sample were diagnosed as having APD. Coding those 65 DOs with APD in the case sample further revealed that 55/65 of people diagnosed with APD were given an indeterminate sentence.

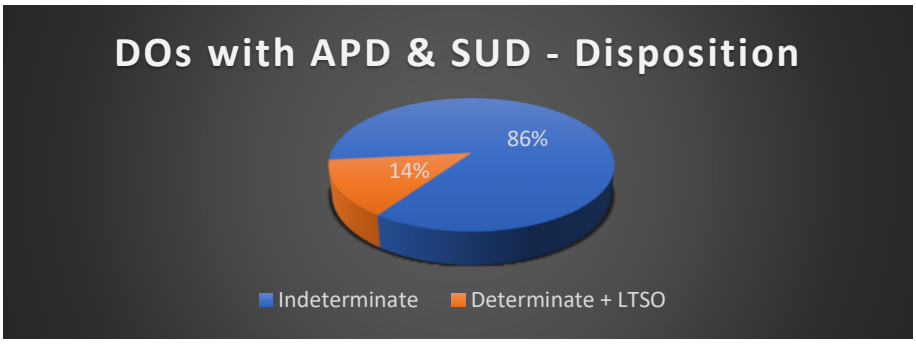
Table 5: DOs with APD - Disposition



5.5.2 APD Combined with Substance Use Disorder (SUD): Disposition

If an individual DO was diagnosed with both APD and at least one substance use disorder (SUD), this led to a very high likelihood of being sentenced indeterminately. APD was found to be highly co-morbid with substance use disorder (SUD). Of those DOs with APD, 51/65 had also been diagnosed with at least one SUD. Looking specifically at those DOs diagnosed with both APD combined with SUD, 41/51 were sentenced indeterminately, in contrast with 7/51 receiving a determinate sentence combined with an LTSO.

Table 6: DOs with APD and SUD – Disposition Outcomes



As we can see the case sample shows that APD is typically co-morbid with at least one type of substance abuse disorder. While substance use disorder is viewed as treatable, there is debate as to whether APD is treatable. APD, as "personality" disorder, is viewed as an internal trait, and believed by some experts to be heritable.[496] Judges in the case sample, citing the risk assessors, discuss APD as being difficult if not impossible to treat.[497] In some cases, DOs with APD are true psychopaths needing constant supervision; however, there is significant debate in the literature as to whether some who have been diagnosed with APD are in fact treatable.[498]

Reliance on an APD diagnosis can be problematic as the accuracy of both the diagnosis itself and its treatability is debated by experts.[499] The observation that there is consistently a high correlation between a diagnosis of APD and indeterminate sentencing thus warrants further exploratory study in the case sample.

5.5.3 Substance Use Disorders

Seventy-three percent of DOs in the case sample had been diagnosed with at least one type of substance use disorder.[500] Further, in just over half of the DO cases in the case sample, the DO consumed drugs or alcohol at the time of the predicate offence.[501] Alcohol was a common substance used by this group of DOs, as well as stimulants, and opioids. In 38% of cases in which the DO was diagnosed with SUD the substance itself was unspecified.

5.5.4 Sex Offending and Pedophilic Disorder

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[496] Karen J Derefinko & Thomas A Widiger, "Antisocial Personality Disorder" in S Hossein Fatemi & Paula J Claytons, eds, *The Medical Basis of Psychiatry*, 3rd Ed. (Totowa NJ: Humana Press, 2008) at 219.
[497] *Ibid.*
[498] See for example: Rasmus Rosenberg Larsen, "Psychopathy Treatment and the Stigma of Yesterday's Research" (2019) 29 (3) Kennedy Inst Ethics J 243.
[499] *Ibid.*
[500] 74/101 DOs in the case sample had been diagnosed with substance use disorder.
[501] In 52/101 DO cases in the case sample, some form of substance use was involved in the commission of the predicate offence.

Looking at the case sample 52/101 of DOs had been convicted of at least one sex offence. Of those DOs, 63% received an indeterminate sentence[502] and 37 percent received a determinate sentence combined with an LTSO.[503] Furthermore 19/52 received a diagnosis of pedophilic disorder.[504] Of those DO pedophiles, 53% were given an indeterminate sentence and 47% received a determinate sentence combined with the LTSO.[505]

5.6 Indigenous DOs and *Gladue*

Much has been written about the overrepresentation of Indigenous men and women in Canadian penitentiaries as well as the high rate of Indigenous persons labelled as dangerous offenders. Looking at the case sample as a whole, 40% of DOs are Indigenous. Just over half of those Indigenous DOs (54%) received an indeterminate sentence while 46% received a determinate sentence with an LTSO. This was lower than the case sample average (66%). This can be compared with the 73% of non-Indigenous DOs who received an indeterminate sentence and the 27% of non-Indigenous DOs who received a determinate sentence plus an LTSO.[506] A *Gladue*[507] report was produced in 67% of Indigenous DO cases.[508] Judges discussed a reduction in the Indigenous DOs "moral blameworthiness" and the relevance of *Gladue* factors in less than half of these cases (39%).[509] Issues spanning the judicial application of *Gladue*, the use of

[502] 33/52 or 63% of all DO sex offenders received the indeterminate sentence.
[503] 19/52 or 37% of all DO sex offenders received the determinate sentence combined with a LTSO.
[504] 19/52 or approximately 37% of DO sex offenders in the case sample are pedophiles.
[505] 10/19 or 53% of DO pedophiles received an indeterminate sentence; 9/19 or 47% of DO pedophiles received a determinate sentence combined with an LTSO.
[506] 39/101 or 38% of DOs in the case sample are Indigenous. Of those 39 Indigenous DOs, 21/39 or 54% were sentenced indeterminately; 18/39 or 46% of Indigenous DOs received a determinate sentence plus an LTSO. Of those 63 non-Indigenous DOs, 46/63 or 73% were sentenced indeterminately, whereas 17/63 or 27% non-Indigenous DOs received a determinate sentence plus an LTSO.
[507] *Gladue*, *supra* note 473.
[508] In 26/39 cases.
[509] In 15/39 cases.

Gladue reports, issues surrounding Indigeneity and future predictions of risk, and moral blameworthiness and sentencing in DO proceedings are further explored in chapter seven.

Chapter 6: DO-Victim Relationships and the DO Regime

6.1 Introduction

Historically, Part XXIV evolved in response to societal fears of predatory rapists and pedophiles[510] and society's "fear of the violent stranger".[511] In general, it is said that the fear of crime is largely a fear of strangers.[512] However, research has shown that an alarming number of perpetrators of violent crime are family members[513] and the majority of sexual offences against children are committed by a family member.[514] Conversely, only about one in ten sexual offences against children are committed by a stranger.[515]

While reading the case sample I observed that in some cases judges did not impose an indeterminate sentence on DOs who had a close relationship to their victim, particularly where the victim was the child of the DO. At first glance, this appeared consistent with the idea that

[510] Grant, *supra* note 222; Grant, *supra* note 199.
[511] Grant, *supra* note 199.
[512] Anita D Timrots, Michael R Rand and Steven R Schlesinger, "Violent Crime by Strangers and Non-Strangers" US Dept of Justice, Bureau of Justice Statistics, Special Report, 1988.
[513] A report from the US found that as high as 80 per cent of murder and aggravated assault victims belonging to primary group relationships; President's Commission on Law Enforcement and the Administration of Justice, 2020 at 130.
[514] Kathy AuCoin "Children and Youth as Victims of Violent Crime" (2005) Juristat 25:1, Catalogue No 85-002-XIE (Ottawa: Statistics Canada) Online: https://www150.statcan.gc.ca/n1/en/pub/85-002-x/85-002-x2005001-eng.pdf?st=mTcFyY_e; Isabel Grant and Janine Benedet, "The "Statutory Rape" Myth: A Case Law Study of Sexual Assaults against Adolescent Girls" (2019) 31:2 CJWL 266.
[515] *Ibid.* Canadian data shows that, for youth between the ages of twelve and fifteen, only approximately 13 percent of reported sexual assaults are committed by strangers. Young children (under 6 years) most often physically assaulted by family members; According to police-reported data, the majority of physical assaults against children under 6 years of age were perpetrated by someone the victim knew. In six out of ten police- reported physical assaults of children under 6, the perpetrator was a family member (64% female victims, 62% male victims) and in 18% of cases the perpetrator was a close friend or acquaintance; Statistics vary according to the source, however a government study in 2015 found that one-quarter of all victims of police-reported violent crimes in Canada were victimized by a family member; Family violence in Canada: A statistical profile, 2015 https://www150.statcan.gc.ca/n1/pub/85-002-x/2017001/article/14698-eng.htm. The 2015 edition of the report features an in-depth analysis of self-reported childhood maltreatment in Canada. In 2015, there were over 322,600 victims of police-reported violent crime in Canada and, of these, just over one-quarter (26%) were victimized by a family member. Overall, about two-thirds (67%) of victims were female. Furthermore, the SCC in 2020 highlighted that "more than 74% of police-reported sexual offences against children and youth took place in a private residence in 2012 and 88% of such offences were committed by an individual known to the victim; *R v Friesen*, 2020 SCC 9 at para 66.

stranger offenders tend to receive harsher sentences than non-stranger offenders, warranting further investigation.[516]

In the following, I explore the effects of relationships on DO sentencing through a careful reading of select cases to see how judges consider victim offender relationships at the disposition stage in DO hearings. To do this I utilized demographic data extracted from case coding to identify relationship categories for exploratory case analysis.[517] After outlining demographic findings on each victim-offender relationship group I explore five cases to better understand some of the ways that the nature of the victim-offender relationship might be relevant to a judge choosing the appropriate disposition.[518]

When reading the cases I looked at whether the nature of the relationship (stranger versus intimate partner/familial) had any impact on the decision to order indeterminate detention.[519] In doing this I asked the following questions. Did legal treatment of the victim offender relationship in DO hearings appear to play a role in deciding who would receive an indeterminate sentence? Did stereotypes surrounding violent crime committed by strangers vs non-strangers appear in the reasoning in these cases? In the non-stranger context, how did judges grapple with intimate partner violence (IPV) cases and those cases where the DO was a relative of the victim(s)? The

[516] Leonore MJ Simon, "Effect of the Victim-Offender Relationship on the Sentence Length of Violent Offenders" (1996) 19 (1) J Crim Justice 129.
[517] As many DOs have lengthy criminal histories, some involving several different victims over many years, coding the case sample was based on information reported in the DO hearing about the predicate offence.
[518] In most cases in the sample the nature of the victim-offender relationship and the nature of the pattern of violence (ie a history of targeting strangers) was discussed in the context of the "Pattern analysis" at designation stage when determining if the offender met the test for a DO designation (*Criminal Code*, RSC 1985, c C-46, s753(1)(a)(i) a pattern of repetitive behaviour or s753(1)(a)(ii) a pattern of persistent aggressive behaviour); See for example *R v Blanchard*, 2018 ABQB 205 at para 137. For an extensive "pattern analysis" in a DO hearing see for example: *R v MacDonald*, 2016 ABPC 300 at paras 329-413.
[519] The exploratory analysis for this chapter involved examining a total of 72 out of 101 cases from the total case sample.

ultimate aim of this chapter was to determine whether judicial treatment of relationships could shed any light on whether a DO was sentenced to an indeterminate sentence.

6.1.1 DO-Victim Relationships: Applicable Sentencing Principles

Côté J, writing for the majority in *R v Boutilier*[520] reaffirmed that the dominant sentencing principle under Part XXIV is the protection of the public from "a very small group of offenders whose personal characteristics and particular circumstances militate strenuously in favour of preventive detention."[521] Although incapacitation is the primary objective, other sentencing principles are also relevant.

The Supreme Court of Canada held in *R v Johnson*,[522] that Part XXIV proceedings, as part of the sentencing process, must be guided by the principles of sentencing contained in ss. 718[523] to 718.2 of the Code. Included in these sections are the purpose and objectives of sentencing[524] and the fundamental principle of proportionality.[525] Also included is 718.2(e) which requires sentencing judges to consider sanctions other than imprisonment for all offenders, and to pay attention to the unique circumstances of Indigenous offenders (discussed in the following chapter).[526]

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[520] *Boutilier*, *supra* note 7.
[521] *Boutilier*, *supra* note 7 at para 28 citing *Lyons* at para 339.
[522] *Johnson*, *supra* note 59 at para 23. This was later affirmed in *R v Steele* at 40 and subsequently in *R v Boutilier*, at 53.
[523] *Code*, *supra* note 1, s718.1; The fundamental principle of sentencing is that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Under s. 718, the objectives of sentencing are: a) the denunciation of unlawful conduct; b) specific and general deterrence; c) separating offenders from society, where necessary; d) rehabilitation; e) providing reparations for harm done to victims or to the community; and f) promoting a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.
[524] *Code*, *supra* note 1, s.718.
[525] *Ibid*, s.718.1.
[526] In *R v Warawa* the Court of Appeal of Alberta made clear that 718.2(e) applies in DO hearings requiring courts to consider the circumstances of the Indigenous DO were considered in assessing whether a lesser measure would adequately protect the public; *R v Warawa* 2011 ABCA 294 at para 40.

Some sentencing principles are particularly relevant to victim-offender relationships. For example, in terms of the intimate partner or family context, the *Code*[527] was amended in 1996 to oblige the courts to consider the abuse of a spouse or a child as an aggravating factor in sentencing.[528] In 2000 common law partners were added[529] as part of a package of reforms "designed to end discrimination against same-sex partners"[530] and in 2019 the definition of intimate partner in the Code was extended to include former and current intimate partners.[531]

6.2 DO and Victim Relationships: Some Case Findings

Researchers have quantitatively examined victim-offender relationships to better understand the demographics of violent crime.[532] Studies about the role of relationships in crime and sentencing often divide cases into those involving strangers and those involving victims known to the offender.[533] In the present study, coding the case sample helped identify the types of relationships involved in these cases, and whether there were sentencing patterns related to disposition outcomes worth exploring.

The majority of relationships between DOs and victims in these cases fell into three main categories for analysis.[534] The first group involved strangers, meaning the DO and victim had no pre-existing relationship. In about half (45/101 or approximately 46%) of these cases the victim was a stranger to the perpetrator.[535] For the purpose of this research the definition of a stranger

[527] *Code*, *supra* note 1, s.718.
[528] An amendment of this provision enacted in 2005, removed the word "child" and added subsection s. 718.2(a)(ii.1) to separately address the abuse of a person under the age of 18 years; *An Act to amend the criminal code (protection of children and other vulnerable persons) and the Canada Evidence Act*, SC 2005, c 32.
[529] Bill C-23, *Modernization of Benefits and Obligations Act*, 36th Parl, 2nd Sess, 2000, c 12, s 94(c).
[530] Grant, *supra* note 471.
[531] *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, SC 2019, c 25, <https://canlii.ca/t/53rgg>.
[532] Anita D Timrots, Michael R Rand and Steven R Schlesinger, "Violent Crime by Strangers and Non-Strangers" US Dept of Justice, Bureau of Justice Statistics, Special Report, 1988.
[533] Scott Decker, "Exploring Victim-Offender Relationships in Homicide: The Role of Individual and Event Characteristics" (1993) 10 (4) Justice Q 585.
[534] 73/101 or approximately 72% of the total cases from the sample.
[535] 46/101 or approximately 46% of cases.

means "the accused is not known to the victim in any way."[536] The second group involved intimate/familial victim-offender relationships which included current or former intimate or dating partners, parent-child relationships, and any other type of familial relationship (27 cases).[537] The third category was "acquaintance/other" relationship category which covered the remaining variety of victim-offender relationships observed in the case sample (29 cases). These included where the DO and victim(s) of the predicate offence were acquaintances,[538] sex trade workers,[539] friends,[540] neighbours,[541] family friends,[542] work colleagues,[543] partners in a drug deal,[544] prison inmates,[545] and cohabitants in a residential facility.[546] This third category also included formal relationships where the victim(s) were correctional prison staff,[547] probation officers,[548] halfway house staff,[549] treatment centre workers,[550] police officers[551] or the DO's family lawyer.[552]

[536] Derek E. Janhevich, "Violence Committed By Strangers" (1998) 18 (9) Juristat 1 at 2. https://www150.statcan.gc.ca/n1/en/pub/85-002-x/85-002-x1998009-eng.pdf?st=vFLlGtQU
[537] Crimes committed by a DO who was a stranger refer to those committed by total strangers in which the DO was totally unknown to the victim. For non-stranger crimes, which included friends, acquaintances, intimate partners and relatives, I chose to focus on the DO cases where the victim(s) of the predicate offence were intimate partners and relatives.
[538] *R v Lonechild,* 2017 SKQB 338; *R v Kodwat,* 2017 YKTC 26; *R v Skookum,* 2016 YKTC 62.
[539] *R c Chemama,* 2016 QCCS 4472; *R v Ellis,* 2016 YKTC 44; *R v Bowman,* 2018 MBQB 167.
[540] *R v Hamer,* 2018 BCSC 783; *R v Okemow,* 2017 MBQB 118.
[541] *R v Jones,* 2017 BCSC 2349.
[542] *Supra* note 433 *(Obey).*
[543] *R v Ryan,* 2017 WCB 140.
[544] *R v Wong,* 2016 ONSC 6362.
[545] *R v Gronlund,* 2016 SKQB 156; *R v Slippery,* 2016 SKPC 131.
[546] *R v Sutherland,* 2016 BCPC 0072.
[547] *R c Surprenant,* 2017 QCCQ 20947.
[548] *R v Thurley,* 2018 BCPC 225.
[549] *R c Desrochers,* 2018 QCCQ 2592.
[550] *R v Hamel,* 2017 ONCJ 44.
[551] *Ibid.*
[552] *R v Smith,* [2018] OJ No 5123.

Table 7. Victim Offender Relationships in Case Sample

Relationship	Stranger	Intimate/Familial	Acquaintance/Other	Total
	45	27	29	101

The victim and DO already knew one another at the time of the predicate offence in a total of 55/101 or 54% of cases.[553] In this chapter I focus on the first two categories where the DO was a stranger to the victim or cases where he was an intimate partner or family member.

At least in this small case sample, judges appeared somewhat less likely to impose an indeterminate sentence on intimate/familial DOs. Coding revealed that 80% of the stranger DOs (37/45 cases) were sentenced to an indeterminate sentence. Conversely, 56% of the intimate/familial DOs (15/27 cases) received an indeterminate sentence. [554]

Table 8. Stranger DO Cases & Sentencing Outcomes

Indeterminate (% of Stranger DOs)	**Fixed + LTSO (% of Stranger DOs)**	**Total**
80% (36 cases)	20% (9 cases)	100% (45 Cases)

In all but one of the cases where the DO and victim(s) were related, the victims were children.[555] In 12 of 18 or 67% of cases in the sample involving intimate partner violence (IPV)

[553] 55/101 DOs in the case sample already knew their victim at the time of the predicate offence.
[554] In 75% (6/8) cases where the victims were children and strangers, the DO received an indeterminate sentence. By contrast, only 1 out of 7 (14%) cases where the DO was a relative of the child victim cases (14%) received an indeterminate sentence.
[555] The criminal code defines a child as a person who is or appears to be under the age of eighteen years old; *Supra* Note 254, s172(3). Under the DSM-5 pedophilic disorder is a diagnosis assigned to adults (defined as age 16 and up) who have sexual desire for prepubescent children; *Supra* note 472 (DSM-5). In the present study all victims identified as children were under the age of 18.

cases, the DOs received indeterminate sentences.[556] In cases where the DO was related to the child victim(s), [557] they were the victim's father, uncle or step-grandfather.[558] Fathers and uncles appeared the least likely to be sentenced to an indeterminate sentence.[559] Where the DO was a family member of the victim(s), the courts were more likely to find that the risk presented by the DO could be managed in the community and they were given determinate sentences followed by long-term supervision orders.[560]

Table 9. Relationships between DO and the Victim at the Time of the Predicate Offence

	IPV Cases (% of 102 Case Sample Cases)	Sentenced to an Indeterminate Sentence
Married but Separated	1 (<1%)	0
Common-Law	9 (9%)	5
Dating	8 (8%)	7
Total	18 (18%)	12

In the case sample, the impact of relationships appears to be connected to judicial assessments of risk. In other words, those who offend against strangers are portrayed as being at

[556] When the predicate offence involved IPV between the DO and victim who were common law partners, sentencing outcomes were approximately 50/50 as to whether the DO received the indeterminate sentence. I observed that when the DO and victim were dating; the DO received the indeterminate sentence in 88% of those "dating" cases. These numbers were so small in this category it is hard to derive meaning from these stats.
[557] The Criminal Code defines a child as a person who is or appears to be under the age of eighteen years old; *Code supra* note 1, s172(3); Pedophilic Disorder is a DSM-5 (Diagnostic and Statistical Manual of Mental Disorders, fifth edition), diagnosis assigned to adults (defined as age 16 and up) who have sexual desire for prepubescent children. All victims identified as children in this chapter were under the age of 18.
[558] For the purpose of this exploratory study, I use the term "father" to include individuals who are the biological, adoptive, step or foster father of the victim of the predicate offence. As many DOs have lengthy criminal histories, some with several different victims over many years, the coding for the case sample was based on information reported in the DO hearing about the predicate offence.
[559] In 2/8 or 25% of cases involving a child relative victim of the DO, the DO was sentenced indeterminately.
[560] *Code*, *supra* note 1, s753(4)(b).

a greater risk of reoffending, and less likely to be managed in a community setting. In the following I aim to contribute to a body of knowledge on DO sentencing by exploring cases which highlight how relationships play out in DO hearings and how relationships impact on judicial perceptions of dangerousness.

6.3 DO and Victim Relationships: An Exploratory Case Study

Part XXIV is a preventive detention regime and a form of punishment premised on future predictions of risk and judges place a significant amount of weight on the statutorily mandated risk reports which are prepared for the DO hearing.[561] In *R v Boutilier*[562] the Court held that a prospective assessment of risk is "integral to all stages" (both designation and disposition) of a DO hearing.[563] At the disposition stage, the judge must decide whether the DO poses a future "threat" of violent offending;[564] The SCC has referred to this test as the "public safety threshold".[565] Judges do not treat lightly the decision to sentence a DO indeterminately due the lifelong impact that this type of sentence has on an individual's liberty. The following study aims to shed new light on how two factors, relationships and risk, are interwoven in judicial decisions.

[561] *Code*, *supra* note 1, s752.1(2).
[562] *Boutilier*, *supra* note 7 at 6.
[563] *Code*, *supra* note 1, s753 (1)(b); As discussed in previous chapters, at disposition stage there are three available sentencing options for the designated DO; s753 (4)(a)-(c) a judge *must* impose an indeterminate sentence unless satisfied that there is a "reasonable expectation" that one of the two lesser sentencing measures will adequately protect the public; *Code*, *supra* note 1, s753 (4.1).
[564] *Boutilier*, *supra* note 7.
[565] *Boutilier*, *supra* note 7 at 113; *Code*, *supra* note 1, s753 (4.1); ss 753(4)(b) and (c); Once a judge is satisfied that DO s753(1) criteria is met and the individual is designated as dangerous, at the penalty stage, s753(4.1) sets a "public safety threshold" whereby a judge must impose an indeterminate sentence, unless satisfied that there is a "reasonable expectation" that a "lesser measure" will adequately protect the public against the commission by the DO of murder or a serious personal injury offence. The "lesser measure" is either a determinate sentence for the offence plus a long-term supervision order for a maximum of ten years, or a fixed sentence; The standard of a reasonable expectation js higher than the "reasonable possibility" standard for designated LTOs; An "expectation" is a belief that something will happen, as opposed to the mere "possibility" that it will happen.

Stranger Danger Cases

6.3.1 Judicial Perceptions of the "Unpredictable Nature" of Stranger Violence

The decision in, *R v Heaton*[566] illustrates how the notion that strangers present a heightened risk plays out in a DO hearing. The Court, in sentencing Heaton to an indeterminate sentence gave "significant weight" to the stranger danger element of the predicate offence, and the expert's opinion that the "unpredictable nature of the predicate offence" made the DO's treatment difficult, which increased his level of risk.[567]

Heaton broke into the victim's home, violently attacking and sexually assaulting her before a neighbour intervened.[568] Judge Rideout had to decide whether Heaton posed a sufficient future threat to public safety to warrant an indeterminate sentence[569] emphasizing that evidence of future treatment prospects was relevant at both stages of the DO hearing.[570]

Rideout J deliberated on which of the three sentencing options would achieve the aim of public protection and whether the issue of eventual release should be left to corrections and parole officials.[571] He held that there had to be an "expectation" that Heaton's rehabilitation would happen, as opposed to a mere possibility.[572] Rideout J noted that overall, the court had to be satisfied that: (1) the evidence of Heaton's treatability was more than an expression of hope; (2) the evidence indicated that Heaton could be treated within a definite period of time; and (3) the evidence of treatability was specific to Heaton's risk and needs.[573] Furthermore, the proposed

[566] *Heaton*, *supra* note 118 at para 211.
[567] *Heaton*, *supra* note 118 at para 158 citing Dr. Reimer's report at pp 67-68.
[568] The predicate offences included aggravated sexual assault per *Supra Note 254*, s 273(2)(b); unlawful confinement per s279(2); break and enter to commit the offence of robbery per s 348(1)(b); *Heaton, supra* note 118 at para 1.
[569] *Heaton*, *supra* note 118 at para 10 citing *Boutilier* at 34.
[570] *Heaton*, *supra* note 118 at para 13.
[571] *Heaton*, *supra* note 118 at para 34 citing *R v Davidson*, 2015 BCPC 0335, at paras 34 – 35.
[572] *R v DJS*, 2015 BCCA 111 at para 30.
[573] *Heaton*, *supra* note 118 at para 43 citing *R v Bragg*, 2015 BCCA 498, at para 55.

treatment options and supervision options had to be reasonable and available.[574] In relation to the supervision component, there also had to be evidence that there were supervision resources available which could address the unpredictable nature of Heaton's offending behaviour.[575] Crimes targeting strangers often involve an element of unpredictability that increases concern about risk. Risk may be seen as more difficult to control if it is more random.

Evidence related to Heaton's risk level was characterized by risk assessor Dr. Reimer as either "internal factors" (those that are innate to, and can be controlled by, the DO) versus "situational factors" (those that are external to, and cannot be controlled by, the DO).[576] Dr. Reimer, in utilizing four actuarial assessment instruments,[577] opined that Heaton appeared to have a complete lack of empathy for the victim of the predicate offence. Dr. Reimer described the assault as "demonstrating a degree of callousness, suggesting that Heaton was highly emotionally disconnected. He seemed indifferent to the impact of his actions.[578]

Dr. Reimer testified that it was concerning that Heaton went into the victim's residence planning to commit a property offence and that the "sudden violent sexual assault" of the victim "did not fit a typical sexual assault profile." Dr. Reimer's biggest concern was that Heaton's actions were "unpredictable." He had come out of nowhere – was unknown to the victim:

> It's very unpredictable because if you have a typical -- you know, if the typical pattern is followed, you kind of know -- you kind of can predict what might happen if they're in that kind of situation. But this seems to be something that occurred in the moment so it makes it very unpredictable in terms of what motive there is, what the intent is, So that unpredictability, by itself -- raises some concerns in a sense that a person is able to do this without provocation or hasn't planned it. It's almost -- it's very difficult then to supervise, or to treat that, or to change that because it's -- how can he then describe how he went

[574] *R v GL*, 2007 ONCA 548, at paras 58-63.
[575] *R v Trevor*, 2010 BCCA 331, at para 35.
[576] *Heaton*, *supra* note 118 at para 46; *Supra* note 118 *(Heaton)*, at para 47 citing *R v Davidson*, 2015 BCPC 0335 at paras 50 and 51; The BCPC in Davidson identified internal and situational factors that may be considered relevant in assessing an offender's risk to reoffend.
[577] *Heaton*, *supra* note 118 at 118; The Psychopathy Checklist (PCL-R 2nd Edition), Violence Risk Assessment Guide (VRA-G), Historical Clinical Risk (HCR-20), and the Static 99-R.
[578] *Ibid* at para 145 citing Dr. Reimer's report at page 23.

> through that process of figuring out where he was going to go? And if it's not connected to a sexual deviation or a sexual preference for this, then how did he come to that point at that moment to actually engage in that -- in that behaviour.[579]

The stranger danger element of the crime went to the central question of treatment and risk: Dr. Reimer noted that the unpredictable nature of the predicate offence made treatment difficult, which increased Heaton's risk.[580] Heaton was found to pose a high risk to reoffend both violently and sexually based on that unexplained and unpredictable aspect of the nature of the predicate offences "in which sex and violence intersected."[581]

Rideout J noted giving "significant weight" to Dr. Reimer's opinions in relation to his assessment and evaluation of Heaton's risk for recidivism, including treatability, treatment recommendations and strategies.[582] Rideout J stressed Dr. Reimer's emphasis on the sudden and unprovoked sexual assault, the "sheer unpredictability" of the sexual assault, and the level of brutality which made it "a unique case".[583] Rideout J was not satisfied that there was a reasonable expectation that a conventional penitentiary sentence followed by a 10 - year LTSO would reduce the threat posed by Heaton.[584]

6.3.2 How Stranger Offending Informed a DO's "Un-Treatability" at Disposition[585]

The unpredictable nature of stranger violence against women was central to the DO's risk assessment and sentencing outcoming in another case in its *R v Foulds*.[586] In this case the accused was convicted of sexually assaulting a minor, while on a two-year s. 810.2 recognizance. On the day of the offence, he sexually assaulted a 17-year-old girl, whom he targeted while she

[579] *Ibid* at para 152 citing Dr Reimer's response to a question from the Crown about Heaton's future risk when looking retrospectively at the predicate offences.
[580] *Ibid* at para 158 citing Dr. Reimer's report at pp 67-68.
[581] *Ibid* at para 206.
[582] *Ibid* at para 211.
[583] *Ibid* at para 119 citing Dr. Reimer's report at pages 72-76.
[584] *Ibid* at para 235.
[585] *R v Foulds* 2018 BCSC 1809.
[586] *Foulds supra* note 585, at para 50.

was waiting to take the bus to school. Foulds' history of targeting women who were strangers contributed to him scoring at a high risk for future sexual and violent recidivism; the stranger danger was integral to the DO's psychiatric diagnosis – that he became sexually aroused by power and control over female victims. Brown J discussed the stranger danger pattern of Foulds' offending in the context of the report prepared by defence risk assessor Dr. Cooper. The fact that Foulds had a pattern of targeting women who were strangers was factored into his future risk assessment, which then impacted his sentencing outcome. Fould's diagnosis was key in him receiving an indeterminate sentence:

> Dr. Cooper was of the view that Mr. Foulds' risk for future sexual recidivism is high, as is his risk for future violent recidivism. The most likely [future] victim would be a female stranger whom he has targeted, if only briefly and opportunistically, by virtue of real or perceived vulnerabilities. He may use a weapon or threats of violence to intimidate and gain compliance in the context of a robbery. He may also sexually assault his victim by force and the threat of violence. He is likely to be sexually aroused by the power and control he has over his victim. If a victim resists, violence may be used as a means of compliance.

Brown J highlighted some expert evidence which pointed to the un-treatability of the DO. Dr. Cooper opined that Foulds' treatment prognosis pointed to a negative outcome and that Foulds stated desire to participate in sex offender treatment programming was nothing more than a "statement of hope."[587]

The stranger danger element of Foulds' offending (pattern of offending against women who were strangers) was one of two key factors informing that un-treatability at disposition. The other was that he had historically performed poorly when released into the community.[588]

[587] *Foulds supra* note 585, at para 53.
[588] *R v Walsh*, 2011 BCSC 1911 at para 291.

Based on this opinion Brown J found that Foulds presented a high likelihood of harmful recidivism and that his conduct was "intractable."[589] She had to decide whether, after a determinate sentence, the nature and severity of Fould's identified risk could be sufficiently contained in a non-custodial setting, and managed on an LTSO.[590]

Given Foulds' lack of treatability and his historically poor performance while released into the community, Brown J did not have a belief based on the evidence that a lesser measure than an indeterminate sentence would adequately protect the public.[591] Ultimately, she sentenced Foulds to an indeterminate sentence due to insufficient evidence that his condition could be sufficiently treated to ensure the protection of the public.[592]

6.3.3 DO Found "High Risk but Manageable" Despite Escalating Stranger Violence [593]

Relationships do not in and of themselves appear to determine whether an indeterminate sentence is necessary. For example, in *Belfoy*[594] the victim was walking home on a bicycle path that she regularly took on the way home from school every day when the accused savagely attacked her, throwing her to the ground and punching and kicking her in the head. The DO was found to be high-risk but manageable, even in light of his escalating pattern of violence against strangers. The judge raised the fact that Belfoy had attacked a victim who was a stranger in the context of the risk assessment report. In this case the Court highlighted that Belfoy's substance use disorder was the main driver of his criminality.[595] The central risk factor was external (substance use disorder) and the stranger danger secondary to that. Notably, Belfoy was found to be "high-risk but manageable." Here, Langevin JCQ emphasized that at the disposition stage, the

[589] *Foulds*, *supra* note 585 at para 65.
[590] *Foulds*, *supra* note 585 at para 79.
[591] *Foulds*, *supra* note 585 at para 80.
[592] *Ibid.*
[593] *R c Belfoy*, 2018 QCCQ 3025.
[594] *Ibid.*
[595] *Belfoy*, *supra* note 593 at paras 78-79.

DO's treatment outlook helps the court determine the appropriate sentence to manage the danger they pose.[596] Langevin JCQ in considering both risk assessor's opinions outlined four main reasons why Belfoy did not need the indeterminate sentence.[597] Overall, Langevin JCQ was satisfied on the basis of the evidence as a whole contained in the risk reports,[598] that Dr. Dumais' control strategy for Belfoy would sufficiently protect the public without the need for an indeterminate sentence.

In this case a control strategy was deemed possible even in light of the DO's escalating pattern of offending against strangers. Thus, this case demonstrates how judges focus on risk assessment and that the nature of the relationship between victim-offender (stranger or not) is relevant to the extent that it shapes that risk assessment. When treatment options are available, the role of the relationship appears to diminish in significance.

This case indicated how victim-offender relationship alone (in this case, stranger status) does not have a direct impact in DO sentencing– it becomes relevant within the context of the DO's psychiatric diagnosis, and what that implies in terms of future risk. If the pattern of offending is motivated by internal factors or is deemed as a product of an intractable condition, such as APD, then the relationship dynamic can contribute to the DO being seen as less manageable, higher risk and less likely to pass the public safety threshold.

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[596] *Ibid* at para 66.

[597] *Ibid* at paras 76-80. Langevin JCQ highlights the expert testimony that: 1) Belfoy was not a psychopath "nor was he in the grey zone of psychopathy;" 2) that the risk assessors both viewed Belfoy's criminality as resulting from a substance use disorder; 3) that it was Belfoy's first long prison sentence; and 4) that there were treatment and therapies which had not yet been tried, which would be available to Belfoy in prison.

[598] Dr Alexandre Dumais was the court appointed psychiatrist who conducted the mandatory risk assessment of Belfoy at the Philippe Pinel Institute (PPI) in Montreal before his DO hearing Defence risk assessor Dr. Touma also provided a risk report for the DO hearing; *Ibid* at paras 4-5.

Intimate/ Familial Cases

Stranger DO cases can be compared with cases from the sample involving non-stranger relationships where the DO and victim(s) of the predicate offence were either intimate partners (including former partners or spouses) or relatives. Previous research has indicated that offenders who are related to victims often receive less harsh sentences than those who are non-family.[599] Based on this small sample my initial observation was that judges in these cases were more hesitant to impose an indeterminate sentence where the victim was an intimate partner of the offender.

Despite the fact that family violence is aggravated by the significant breach of trust involved, the familial relationship had a particular impact on risk assessment and sentencing outcomes that was illustrated in these dangerous offender cases. Generally, while this abuse of trust was recognized in the cases, the family dynamic fell second to the central question of risk. In cases in the sample involving children[600] the decision to impose an indeterminate sentence appeared to be mainly based on evidence cited from the risk assessment reports at disposition. The following familial case from the sample highlights how the focus is on the DO's clinical diagnosis within the context of victim-offender relationship status.

6.3.4 Victim-Offender Relationships Relevant to DO's Risk Plan Strategy

In *R v SPC*[601] the victim-offender relationship was not a key consideration at disposition although it helped inform the DOs risk plan strategy. Based on the predicate offences SPC was found to present a risk of intra-familial sexual offending. He also had a history of extra familial offences prior to those predicate offences. The primary risk identified was where children could

[599] Kathleen Daly, "Neither Conflict nor Labeling nor Paternalism Will Suffice: Intersections of Race, Ethnicity, Gender, and Family in Criminal Court Decisions." (1989) (35) 1 Crim & Delinquency 136.
[600] *R v Jaramillo,* 2018 QCCQ 4647; *R v KC,* 2017 ONSC 5803; *R v SPC,* 2017 SKQB 24.
[601] 2017 SKQB 24.

come within his control.[602] The Court, relying on expert testimony, found "no indications that SPC would be at high risk to offend against total strangers" but that "all female children whom SPC could bring within his ambit of power and control (those who he can potentially 'groom') would be at risk."[603] As Allbright J was satisfied that a release plan strategy could control the proximity of SPC's relationship to potential future victims, the judge found that his risk could be managed in the community.

SPC was convicted of sexually assaulting[604] and sexually interfering[605] with two of his four biological daughters with whom he was living at the time of the commission of those predicate offences. He was convicted of having sexual intercourse with one of those two daughters repeatedly over a span of a couple of years.[606] SPC was further convicted of possessing and making child pornography in which he used his daughters as the subjects[607] across more than ten incidents. SPC also failed to comply with the terms of his sex offender registration order in the months before his DO hearing.[608] The Court highlighted that SPC had completed core sex offender programming while in prison[609] and that SPC's success was going to be highly dependent upon the type of monitoring he was going to have in the community.[610]

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[602] *SPC supra* note 601 at para 58.
[603] *Ibid.*
[604] Contrary to *Code*, *supra* note 1, s271.
[605] Contrary to *Code*, *supra* note 1, s151.
[606] Contrary to *Code*, *supra* note 1, s155(2).
[607] Contrary to *Code*, *supra* note 1, s163.1(2).
[608] Prior to the predicate offences, SPC had been previously sentenced to one year of probation for two sexual assaults (he was aged 15 and 22 at the time of those sentencing hearings) and in 2002 for sexual assaulting and sexually interfering with a victim who was 10-14 at the time. SPC was sentenced to 5 years jail for the 2002 offence; While under an obligation under *Supra Note 254*, s490.091, notice of which was served on him on November 29, 2005, at Prince Albert, Saskatchewan, SPC failed without reasonable excuse to comply with that obligation: SPC failed to report to a registration centre between 11 months and 1 year of the date of the last registration as required by the Sex Offender Registration Act, contrary to *supra* note 254, s490.031.
[609] *SPC*, *supra* note 601, at paras 14-15; SPC had completed core programs for sex offending while in prison while at Prince Albert Penitentiary and then was in CSC's Sex Offender Maintenance Program.
[610] *SPC*, *supra* note 601, at paras 14 and 23.

SPC pled guilty to all charges after which two psychiatric reports were prepared by Crown and defence risk assessors. Allbright J noted various sections of the report related to victim-offender relationships including that SPC had unhealthy past intimate relationships, that his relationships in the future would need monitoring, and that SPC could "never, ever be alone with children again".[611] The expert report indicated that SPC did not suffer from any major mental disorder of psychotic proportions nor did he have a mood disorder or an anxiety disorder.[612] SPC was described as a heterosexual, non-exclusive pedophile, given his extensive sexual contact with adult women, and his pubescent victims:

> His victims have all been family members (his step-daughter would be included in this categorization) and hence [SPC] formally [is to] be diagnosed as a man with a pedophilic disorder, sexually attracted to females, and limited to incest.[613]

The assessment of risk was framed around a discussion of the DO's relationship to his potential future victims including the risk for further contact sexual offences with children limited to family (incest) and then the risk for progression to offences with children outside of family. Within this context Dr. Lohrasbe opined that SPC's personality dysfunctions are "relatively confined to the realms of intimate relationships" and sexuality related to those relationships.[614]

Allbright J highlighted Dr. Lohrasbe's prognosis for SPC's treatability based on three considerations. The first was that SPC was likely to age-out of his offending as "likelihood as well as the frequency of offending declines with age."[615] The second was based loosely on the notion that the DO hearing process would have a deterrent effect – that the DO "process would

[611] *SPC*, *supra* note 601 at para 52 citing Dr. Dr. Lohrasbe's report at page 27.
[612] *SPC*, *supra* note 601 at para 53.
[613] *SPC*, *supra* note 601 at para 54 citing Dr. Lohrasbe's report at page 28.
[614] *SPC*, *supra* note 601 at para 55 citing Dr. Lohrasbe's report at page 30.
[615] *SPC*, *supra* note 601 at para 59 citing Dr. Lobrasbe's report at pages 36-39.

impress upon SPC the seriousness with which the justice system takes his offending." The third was a risk-management strategy that could be "readily put in place at the time of SPC's reintegration into the community."[616]

Although the risk assessors had deemed SPC to be a high-risk offender in the foreseeable future, that did not mean his risk would be unmanageable in the community. The Court outlined the conditions of a risk management plan for victim safety planning. [617] Firstly, SPC could never be alone with children. Secondly, any potential intimate partner had to be brought into a circle of support and care, with full disclosure of his past. The "public" at risk was defined as "young girls":

> There can be no doubt from the evidence, and particularly the evidence of Dr. Lohrasbe, that S.P.C. presents a high risk to reoffend to a particular segment of the community, that segment being young girls. If a structure can reasonably be put in place which prevents S.P.C. from being in a position to ever victimize this particularly vulnerable segment of society, he is not likely to offend in any other fashion... with appropriate supports being put into place, that S.P.C. may satisfactorily live in and be a part of the community... An example of this is the condition that S.P.C. not be in any relationship where he has an association of virtually any kind with young girls. Proponents of an indeterminate sentence for someone such as S.P.C. may well suggest that it is practically not feasible to put in place such a structure and to more importantly monitor the compliance of an offender within such a structure. I simply do not share this view...while S.P.C. presents a high risk to reoffend under an unstructured release into the community, that is not what I would at all anticipate would be the format of his release into the community under a long-term supervision order.[618]

It is interesting to note that these types of monitoring conditions, while ideal in theory, were described by a judge in one IPV case in the sample as "being virtually impossible

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[616] *Ibid.*

[617] *Ibid.* This included recommendations for his monitoring *(*to be watched through multiple, cooperative 'eyes' including therapists, parole officer, work supervisor, roommates, intimate partner), checked on frequently, with frequent appointments as well as home and work visits by a parole officer, supervision including restrictions on residence, travel, and not being at locations and events that are considered inappropriate. Dr. Lobrasbe noted that supervising his access to child pornography was "going to be a challenge" and that any contact with his victims should be forbidden unless and until they, as adults, seek it. Treatment recommendations included group and individual therapy, 12-step programs, medications. It was recommended that SPC should be offered support and treatment.

[618] *SPC*, *supra* note 601 at paras 122-127.

logistically to enforce" because they "would require 24/7 monitoring and little if anything that can be done to enforce such conditions or terms."[619]

Ultimately the victim-offender relationship in this case was held relevant to the risk plan strategy. Allbright J found SPC to meet the public safety threshold test on the basis of a perceived ability to control the proximity of SPC's relationship to potential future victims, the primary risk being identified in relationships of incest. Assuming that such a risk management strategy could be put in place within the community where SPC was to reside upon release, a lengthy follow-up was deemed essential that would be tailored to this risk. SPC's release was to be contingent on the ability to monitor his future relationships with potential victims through a) restricting any access to his interaction to young girls and b) ensuring that he disclose his sex offending history to potential future partners. Thus, the indeterminate sentence was not deemed necessary.[620]

6.3.5 Where Victim-DO Relationship Deemed Relevant to the DO's Risk Level[621]

Section s.718.2(a)(ii), which requires that intimate partner relationships between an offender and victim be considered an aggravating factor in sentencing, was rarely discussed in depth by judges in the DO hearings. This may be because the relationship between aggravating factors and risk assessment in the context of DO hearings is unclear. Under Part XXIII of the Code aggravating factors ordinarily go to proportionality and the offender's moral blameworthiness not any future risk they are assessed to present. Part XXIV, however, operates as a preventive regime, yet the same sentencing principles are required to apply, although constricted by Part XXIV's primary sentencing goal of public protection. In cases where it was

[619] *R v Clayton*, 2018 BCSC 1671 at para 115.
[620] *SPC*, *supra* note 601.
[621] *R v Malakpour*, 2018 BCCA 254.

raised it was sometimes merely listed as an additional aggravating factor at disposition stage. Intimate relationships between DOs and victims were usually raised by the judge in the context of assessing the DOs risk of committing a further SPIO. Judges needed evidence that risk could be adequately managed outside of prison. Therefore, the intimate relationship was discussed insofar as it could answer the likelihood of further violence being committed against future potential partners, or women generally, and the likelihood of managing the risk the DO presented if released into the community.

As part of the familial group of cases explored in this chapter, below I examine an IPV case to see how judges handled the intimate relationship as a factor in the DO hearing. The primary purpose was to identify the role that the victim-offender relationship had on the sentencing outcome. In the following cases, there are two identified ways in which IPV mattered at disposition: 1) in terms of a potential future risk to the specific victim of the predicate offence; and 2) in relation to potential future risk to victims "at large."

In *R v Malakpour*[622] the offences had been perpetrated against the DO's former wife. While the sentencing judge initially imposed an indeterminate sentence, that was overturned on appeal. Malakpour did not accept that his Canadian divorce was legitimate and believed that the victim of the predicate offence (his former wife) continued to be married to him under Sharia law. Malakpour believed that his wife was required to obey him and justified his criminal behavior to her as a legitimate extension of his religious beliefs, which he believed trumped any laws of Canada.[623]

At trial the risk assessor had found Malakpour's risk to reoffend tied to his lack of "intrinsic motivation and psychological capacity to benefit from therapeutic intervention,

[622] *Ibid.*
[623] *Malakpour, supra* note 621 at para 56.

exacerbated by his rejection of the legitimacy of the Canadian justice system."[624] The trial judge made it clear that Malakpour was not being sentenced for his religious views but rather "for criminal offending behaviour that he justifies on the basis of his espoused religious views". She concluded that that there was nothing more than an "expression of hope" that Malakpour would stop offending violently against his ex-wife.[625]

In the Court of Appeal, Malakpour submitted that the indeterminate sentence imposed on him was grossly disproportionate to the circumstances of the predicate offences. He argued that he was not one of the narrow group of habitual criminals who presented a high risk to the public.[626] The Court of Appeal focused on Malakpour being "a rather unusual dangerous offender because he did not have the typical criminal history associated with dangerous offenders":[627]

> As the various risk assessments have indicated, he has not led a criminal lifestyle, he does not use drugs or alcohol, he does not have a major mental illness and is not psychopathic. He does not fit neatly into many of the assessment tools used by the experts. The combination of his religious beliefs and cultural attitudes and his personality disorder have manifested in extremely rigid, inflexible thinking... the evidence does not indicate that Mr. Malakpour is a habitual criminal who poses a tremendous risk to public safety. Until the predicate offences, all of his threatening conduct was verbal, some aspects of which were described by Dr. Ghafari as a feature of his culture "where being melodramatic is the norm of functioning and not necessarily an expression of genuine intent to act out what is being said", and Ms. Safaei-Chalaksara appeared to understand that. With the predicate offences, Mr. Malakpour's behaviour clearly escalated to violence against Ms. Safaei-Chalaksara but even then, she was able to calm him down as evidenced by the fact that during the incident she was able to get him to give her the wire cutters.

The Court of Appeal ultimately found that Malakpour posed a risk, but a risk that could be managed by a lengthy sentence and a long-term supervision order. Additionally, the expert

[624] *Malakpour, supra* note 621 at para 104.
[625] *Malakpour, supra* note 621 at para 107.
[626] *Malakpour, supra* note 621 at para 108.
[627] *Malakpour, supra* note 621 at para 116.

opinion that only imprisonment could prevent his reoffending failed to consider gaps of time after being released from prison when Malakpour had not contacted his ex-wife. The Court of Appeal felt that such contact could be constrained by no contact orders.[628]

The BC Court of Appeal acknowledged that there was no question that Mr. Malakpour faced serious challenges in controlling his behaviour towards his ex-wife and posed a risk of violent reoffending however, found sufficient evidence to establish a reasonable expectation that a substantial determinate sentence, followed by long-term supervision, would provide adequate protection.[629] The DO's relationship to his ex-wife and the nature of his offending within the context of their relationship was relevant as it could inform a future assessment of risk. As Malakpour was deemed to present a risk specifically to his ex-wife, but was assessed as low risk for offending against victims "at large", his indeterminate sentence was overturned on appeal.[630]

6.4 Conclusion

Exploring the caselaw revealed a common thread that a consideration of victim-offender relationship status, alone, was not given much weight at disposition stage, with judges focusing mainly on the risk reports.[631] To better understand the relevance of relationships to the public safety threshold at the disposition stage, I saw the importance of the victim-offender relationship being mediated by risk. Certain victim-offender relationships were treated as aggravating, while in other cases they were downplayed or ignored entirely.[632] Overall relationship status appeared to matter in the DO hearing to the extent that it could inform the judge's calculation of the DO's future risk per the s.753(4.1) public safety threshold under Part XXIV.[633]

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[628] *Malakpour, supra* note 621 at para 120.
[629] *Malakpour, supra* note 621 at para 123.
[630] *Ibid.*
[631] *Code*, *Supra* Note 1 s752.1(2).
[632] *Code*, *Supra* Note 1 s753(1)(b).
[633] *Code*, *Supra* Note 1 s753(4.1); The court shall impose a sentence of detention in a penitentiary for an indeterminate period unless it is satisfied by the evidence adduced during the hearing of the application that there is a reasonable

Chapter 7: Judicial Considerations of *Gladue*[634] Principles in DO Hearings

7.1 Introduction

The overrepresentation of Indigenous[635] people in the federal prison population is an ongoing crisis in the Canadian criminal justice system.[636] In early 2020, the number of federally incarcerated Indigenous people reached a historic high, after steadily increasing for decades.[637] Although Indigenous people account for 5% of the general Canadian population, they now comprise 26.1% of the offender population under federal sentence. Between 2010-2020, the Indigenous inmate population increased by 43.4%, whereas the non-Indigenous incarcerated population declined by 13.7%.[638] The statistics are even more troubling for Indigenous women, who now account for almost half of the women in federal prisons.[639] Such alarming numbers call for "bold and urgent actions" to address the Indigenous over-representation crisis.[640]

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expectation that a lesser measure under paragraph (4)(b) or (c) will adequately protect the public against the commission by the offender of murder or a serious personal injury offence.

[634] *Gladue, supra* note 473.

[635] I will be using the term "Indigenous" throughout this PhD thesis to reflect the wording adopted by the United Nations' Declaration on the Rights of Indigenous Peoples, as a collective name for the original peoples of North America and their descendants. Marie-Céline Charron a member of the Naskapi Nation of Kawawachikamach explains: "Although the terminology used by the Government can be a good guideline for understanding the differences between Métis, Inuit and First Nations (which all fall under the terms "Aboriginal" or "Indigenous"), the best guideline comes directly from Indigenous people. The term "Indigenous" is increasingly replacing the term "Aboriginal", as the former is recognized internationally, for instance with the United Nations' Declaration on the Rights of Indigenous Peoples. However, the term Aboriginal is still used and accepted:" https://www.national.ca/en/perspectives/detail/no-perfect-answer-first-nations-aboriginal-indigenous/. I am also mindful to avoid possessive phrases such as "Canada's Indigenous Peoples (or First Nations/Inuit/Métis)" which implies ownership of Indigenous Peoples. Bob Joseph, a member of the Gwawaenuk Nation and former professor at Royal Roads University, explains: https://www.cbc.ca/news/indigenous/indigenous-aboriginal-which-is-correct-1.3771433.

[636] Kent Roach and Jonathan Rudin, "Gladue: The judicial and political reception of a promising decisions" 2000 (42) 3 Can J Criminol 355 at 356.

[637] Office of the Correctional Investigator, "Indigenous People in Federal Custody Surpasses 30% Correctional Investigator Issues Statement and Challenge" January 21, 2020, Government of Canada, Ottawa. Online: https://www.oci-bec.gc.ca/cnt/comm/press/press20200121-eng.aspx.

[638] *Ibid.*

[639] Major, Darren, "Indigenous women make up almost half the female prison population, ombudsman says" CBC News, Online: https://www.cbc.ca/news/politics/indigenous-women-half-inmate-population-canada-1.6289674#:~:text=Indigenous%20people%20make%20up%20about,the%20population%20in%20women's%20prisons.

[640] Correctional Investigator, *supra* note 637.

As an initial step towards remedying over-representation, Canadian sentencing laws were amended in 1996, after public inquiries determined that racism had translated into systemic discrimination in the criminal justice system.[641] There was "alarming evidence that Indigenous peoples were incarcerated disproportionately compared to non-Indigenous people in Canada."[642] Section 718.2(e) of the Code was added[643] to the traditional sentencing principles, providing that "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders."[644]

Despite this sentencing reform, and the SCC's subsequent interpretation of s.718.2(e) in *Gladue*[645] and *Ipeelee,*[646] Indigenous peoples convicted of crime are increasingly being incarcerated. Not only are they disproportionately represented at all levels of the Canadian criminal justice system, but they are also disproportionately represented in the dangerous offender (DO) population. By the end of 2020, Indigenous people accounted for 36.3% of the DO population.[647] Also, a concerning number of Indigenous women are being labelled by courts as DOs and subjected to indeterminate sentencing.[648] These concerning statistics raise important questions as to whether and how judicial considerations of whether and how s. 7189.2(e) and the

[641] Roach & Rudin, *supra* note 636 at 356.
[642] David Milward & Debra Parkes, "Gladue: Beyond Myth and towards Implementation in Manitoba" (2011) 35:1 Man LJ 84.
[643] June 1995, Parliament passed Bill C-41, a bill amending the Criminal Code with respect to sentencing. The new law came into force in 1996 and contained Criminal Code Section 718.2(e), which was intended to ameliorate the high rates of incarceration of Indigenous people; Department of Justice, "Overrepresentation of Indigenous People in the Canadian Criminal Justice System: Causes and Responses" Government of Canada, Research and Statistics Division, Ottawa, Retrived online 2020-04-09: https://www.justice.gc.ca/eng/rp-pr/jr/oip-cjs/p5.html.
[644] *Code*, *supra* note 1 s.718.2(e).
[645] *Gladue*, *supra* note 473.
[646] *R v Ipeelee,* [2012] 1 SCR 433.
[647] Statistical Overview, *supra* note 16.
[648] The statistics are even more troubling for Indigenous women who now account for 42% of the general women inmate population: Public Safety Canada, Corrections and Conditional Release Statistical Overview (2019 Annual Report) Online: https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/ccrso-2019/index-en.aspx at page 19.

evidence relevant to its application substantively influence the sentencing process, particularly in the context of serious offences and DO hearings. Such uncertainties call into question the ameliorative potential of s. 718.2(e) and the *Gladue* framework in sentencing under Part XXIV.[649]

7.1.1 Chapter Roadmap

I begin by outlining the *Gladue*[650] sentencing framework, and the role of *Gladue* reports at sentencing, generally. I then discuss how *Gladue* principles apply in the context of DO hearings. With little direction on this from the Supreme Court of Canada, I look to appellate and lower court authorities for an understanding of the current approach. This introduction sets the backdrop for understanding the exploratory case studies that follow.

In the second part of this chapter, I introduce my demographic findings related to Indigenous DO cases in the sample and identify two issues that emerged when reading the cases. The first issue is related to *Gladue* reports, specifically whether judges were willing to reduce an Indigenous DO's moral blameworthiness (and sentence) in light of both their *Gladue* factors and their assessed risk factors. The second issue relates to how judges consider restorative justice options within the public safety threshold test at disposition.[651] I explore these two issues through the lens of a handful of cases that highlight different ways in which judges handled *Gladue* information at the disposition stage. The case studies are then followed by a discussion of relevant debates and criticisms in the literature.

[649] Nate Jackson, "The Substantive Application of *Gladue* in Dangerous Offender Proceedings: Reassessing Risk and Rehabilitation for Aboriginal Offenders" (2015) 20:1 Can Crim L Rev 77.
[650] *Gladue*, *supra* note 473.
[651] *Code*, *supra* note 1, s.753(4.1).

7.1.2 *Gladue*[652] Sentencing Framework

Sentencing is a discretionary process guided by principles set out in section 718 of the Code.[653] Before unpacking the Supreme Court's *Gladue* sentencing framework and how it applies to DO hearings, it is important to first situate it within the broader sentencing principles under section 718.[654]

Section 718 sets out a codified list of sentencing objectives, the first three of which are denunciation, deterrence and separation. The later three are focused on more restorative sentencing aims, including rehabilitation and reparation to victims.[655] Judicial discretion at sentencing must also be guided by two key principles to determine a 'fit' sentence– the principle of proportionality, set out in section 718.1, which is that "[a] sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender" and the principle of parity - that similar crimes should be tried in a similar manner.[656]

Three years after the introduction of 718.2(e), the SCC ruled on its application and interpretation in *R v Gladue.*[657] Jamie Gladue, a 19-year-old woman of Cree descent who was living in British Columbia, pled guilty to manslaughter for stabbing her common-law partner Reuben Beaver. The Supreme Court of Canada held in *Gladue* that 718.2(e) is a "remedial provision" enacted specifically "to oblige the judiciary to do what is within their power to reduce

[652] *Gladue*, *supra* note 473.
[653] *R v Lacasse*, [2015] 3 SCR 1089.
[654] *Code*, *supra* note 1, s.718.
[655] 718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives: a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;(b) to deter the offender and other persons from committing offences; (c) to separate offenders from society, where necessary; (d) to assist in rehabilitating offenders; (e) to provide reparations for harm done to victims or to the community; and (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.
[656] *Code*, *supra* note 1, s.718.
[657] *Gladue*, *supra* note 473.

the over-incarceration of Indigenous people and to seek reasonable alternatives for Indigenous people who come before them."[658]

According to section 718.2(e), judges must, when sentencing any persons who self-identify as Indigenous, consider all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community, with particular attention to the circumstances of Indigenous offenders.[659] This section applies to all Indigenous people: status or non-status, First Nations, Métis, or Inuit. It does not matter if they live on-reserve or off -reserve, or if they live in an Indigenous or a non-Indigenous community — s. 718.2(e) still applies.[660] The Court interpreted s. 718.2(e) as requiring sentencing judges to consider the following two inquiries:[661]

> a) the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and
>
> b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.[662]

On the first line of inquiry, "*Gladue* factors" may include "such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Indigenous

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[658] Milward & Parkes, *supra* note 642 at para 64.
[659] *Code*, *supra* note 1, s.718.2(e).
[660] *Gladue*, *supra* note 473 at para 91.
[661] *Gladue*, *supra* note 473; Pursuant to s.718.2(e) of the Code, judges when sentencing an Indigenous person must consider: (a) The systemic and background factors which played a part in bringing the Indigenous person to court; and (b) The types of sentencing procedures and sanctions that may be appropriate for the offender in light of his or her Indigenous heritage.
[662] *Gladue*, *supra* note 473 at para 66.

peoples."[663] Sentencing judges must do more than merely mention the fact that an individual before the Court is Indigenous to meet the criteria of s. 718.2(e).[664] Section 718.2(e) directs judges to craft sentences in a manner that is meaningful by engaging in an individualized assessment of all of the relevant factors and circumstances, "including the status and life experiences, of the person standing before them."[665]

Gladue factors provide the necessary context to enable a judge to determine the individual's moral blameworthiness and the appropriate sentence for an Indigenous person convicted of crime.[666] This is because many Indigenous individuals convicted of crime are in "situations of social and economic deprivation" and suffer "lack of opportunities and limited options for positive development" and thus their "constrained circumstances may diminish their moral culpability."[667]

On the second line of inquiry, judges must consider the "different types of sentencing procedures and sanctions which may be appropriate in the circumstances",[668] including the applicability of restorative justice practices in crafting a fit sentence. The Court held that "where these sanctions are reasonable in the circumstances, they should be implemented."[669] Even where community-based sanctions may not be reasonable or possible due to mandatory minimum sentences of imprisonment or sentencing ranges that start with incarceration, the Court stated that it is appropriate for sentencing judges to "attempt to craft the sentencing process and the

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[663] *Ipeelee, supra* note 646 at 60.
[664] *R v Kakekagamick,* (MR) (2006), 2006 CanLII. 28549 (ON CA), 214 OAC 127.
[665] The Court made clear in *Ipeelee* that systemic and background factors need to be "tied in some way to the particular offender and offence". LeBel J noted that "unless the unique circumstances of the particular offender bear on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized, they will not influence the ultimate sentence." *Ipeelee, supra* note 646 at para 83.
[666] *R v Wolfleg*, 2018 ABCA 222 at 56 citing *R v Laboucane*, 2016 ABCA 176; *R v Okimaw*, 2016 ABCA 246; *R v Swampy*, 2017 ABCA 134.
[667] *Ipeelee, supra* note 646 at 73.
[668] *Gladue, supra* note 473 *at* para 66.
[669] *Gladue, supra* note 473 at para 74.

sanctions imposed in accordance with the Aboriginal perspective".[670] This may lead to shorter sentences for Indigenous people as compared to non-Indigenous people in some cases.[671]

However, the Court also acknowledged that there will be cases where the objectives of deterrence, denunciation, and separation are still "fundamentally relevant".[672] The SCC in *Gladue* raised the applicability of *Gladue* to the "gravest of offences", stating that the more violent and serious the offence, the more likely the terms of imprisonment for Indigenous and non-Indigenous people will be "close to each other or the same, even taking into account their different concepts of sentencing".[673] Thus 718.2(e) does not mean "an automatic reduction of a sentence."[674] Instead, it requires judges to consider the unique background circumstances of Indigenous individuals and weigh various relevant factors in crafting a fit sentence.[675] Thus in some cases "deterrence and denunciation" will still be paramount sentencing factors to be considered.[676]

In 2012 the SCC in *R v Ipeelee*[677] addressed how s.718.2(e) applies to breaches of long-term supervision orders and further clarified the *Gladue* framework.[678] The SCC recognized that Indigenous over-incarceration was persisting in part due to the fundamental misunderstanding and misapplication of 718.2(e) and the *Gladue* analysis by sentencing judges.

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[670] *Ibid.*
[671] *Gladue, supra* note 473 at para 79.
[672] Gladue, supra note 473 at para 78.
[673] *Gladue, supra* note 473 at para 79.
[674] Gladue, supra note 473 at para 88.
[675] *Ibid.*
[676] *R v Wells,* 2000 SCC 10.
[677] *Ipeelee, supra* note 646.
[678] In *Ipeelee* the SCC restated the need for sentencing judges to "take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples". The SCC described this case-specific information about an Indigenous person as "indispensable" to judges in fulfilling their duties under section 718.2(e).

The Court made two important clarifications in *Ipeelee*. First, Indigenous people need not establish a "causal link" between their systemic and background factors and the offence in question before these factors would be considered.[679] Second, the SCC affirmed that *Gladue* principles apply to all offences, including the most serious offences.[680] The Court clarified the applicability of *Gladue* in the context of serious and/or violent offences, addressing what it described as this ''fundamental misunderstanding and misapplication" of both s. 718.2(e) and in its own dicta in *Gladue*.

The SCC emphasized that sentencing judges have a statutory duty to consider the *Gladue* principles in all cases involving Indigenous people, and a failure to do so is inconsistent with the principle of proportionality.[681] The proportionality principle requires judges to craft a sentence for each individual case that balances aggravating factors with mitigating factors because "failing to take these circumstances into account would violate the fundamental principle of sentencing — that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender."[682]

Here, the SCC clarified that s. 718.2(e) and *Gladue* must be considered in all cases (impliedly also including DO hearings), which requires a contextual analysis:

> ...these matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders. Rather, they provide the necessary context for understanding and evaluating the case-specific information presented by counsel. Counsel have a duty to bring that individualized information before the court in every case.

[679] *Ipeelee, supra* note 646, at paras 81-83.
[680] *Ipeelee, supra* note 646, at paras 84-87.
[681] *Ibid.*
[682] *Ipeelee, supra* note 646 at 73.

The Court held that systemic and background factors do not operate as an excuse or justification for an offence,[683] but rather *Gladue* requires a "different method of analysis"[684] which "does not necessarily mandate a different result."[685] This has led to criticisms surrounding the effectiveness of *Gladue* as a remedial provision, particularly whether *Gladue* can be reconciled with other principles of sentencing, such as deterrence and/or denunciation, in the context of serious (violent and/or sexual) offences.

7.1.3 *Gladue* Reports

Gladue reports, addressed in section 718.2 (e) are different from pre-sentencing reports governed by section 721. *Gladue* reports are prepared with the help of someone who understands experiences of colonization and has connections to Indigenous communities. The purpose of a *Gladue* report is to give the court a holistic picture of the Indigenous offender and their background, their Indigenous community, and how they have been impacted by colonization and systemic racism.[686] *Gladue* reports thus play a key role in the process of sentencing Indigenous people.

The SCC has not provided specific direction about the preferred content, structure, and/or approach of *Gladue* reports. The production and delivery of *Gladue* reports is complex and differs according to jurisdiction. There is no national approach, guideline, or policy for production and delivery of *Gladue* reports. Instead, there are three ways in which courts receive

[683] *Ipeelee, supra* note 646 at para 83.
[684] *Ipeelee, supra* note 646 at para 59.
[685] *Kakekagamick, supra* note 664.
[686] Some examples of the types of information a judge will seek in a Gladue report include: Where the person is from; Where they live (city, a rural area or on a reserve); Whether they have been in foster care; Whether other family members have been in foster care; Whether a family member is a survivor of Indian residential school; History of substance abuse or growing up with family members who struggled with substance abuse; Growing up in a home where there was domestic violence or abuse; Availability of community programming (counselling program, alcohol or drug rehabilitation programming); Past participation in community activities such as family gatherings, fishing, longhouse ceremonies, or sweat lodge ceremonies; Legal Services Society of BC, "Gladue Primer" Online: https://pubsdb.lss.bc.ca/pdfs/pubs/Gladue-Primer-eng.pdf.

Gladue information at the time of sentencing: 1) *Gladue* reports; 2) pre-sentence reports (PSRs) with *Gladue* components; or 3) via oral submissions.[687] As a result, the scope and content of *Gladue* reports provided for DO hearings varies greatly.[688]

There is disparity in access to *Gladue* reports for an Indigenous person labelled DO across Canada. In Québec, PEI and Nova Scotia, the seriousness of the offence is not part of any eligibility criteria to qualify for a *Gladue* report.[689]

Gladue reports are intended to reflect the conditions that impact Indigenous people in Canada such as "unemployment, disrupted family environments, substandard educational facilities and general conditions of poverty".[690] They are written after multiple meetings with an "empathic peer",[691] and are intended to be restorative, through providing the Indigenous person convicted of crime with the opportunity to "critically contemplate his or her personal history and

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[687] Patricia Barkaskas, Vivienne Chin, Yvon Dandurand and Dallas Tooshkenig, "Production and Delivery of *Gladue* Pre-sentence Reports: A Review of Selected Canadian Programs" International Centre for Criminal Law Reform and Criminal Justice Policy (ICCLR), 2019. Online: https://icclr.org/wp-content/uploads/2020/02/Production-and-Delivery-of-Gladue-Reports-FINAL.pdf?x64956.

[688] Even where the service is available, the accessibility of *Gladue* reports is subject to the availability of resources. For example, in British Columbia, *Gladue* reports can only be prepared by people who have been trained by the Legal Services Society. Cuts to legal aid from 2001 onwards placed significant constraints on the ability of the Legal Services Society to authorize *Gladue* Reports for Indigenous offenders, which are now only funded by legal aid in limited circumstances. This becomes problematic as the provision of pre-sentence information can be a key determinant of the effectiveness of *Gladue* and some consider it a reason that s. 718.2(e) has not reduced overrepresentation; Cunliffe C Barnett and William Sundhu, "Fifteen years after Gladue, what progress?" 2014 CBA/ABC National. http://nationalmagazine.ca/Articles/April-2014-web/The-Supreme-Court-of-Canada-and-Gladue.aspx; Department of Justice, *Spotlight on Gladue: Challenges, Experiences, and Possibilities in Canada's Criminal Justice System,* Research and Statistics Division, Ottawa September 2017. Online: <https://www.justice.gc.ca/eng/rp-pr/jr/gladue/gladue.pdf> citing Jonathan Rudin, "Aboriginal Over-representation and *R v Gladue*: Where We Were, Where We Are and Where We Might Be Going" The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference 40. (2008). Online: http://digitalcommons.osgoode.yorku.ca/sclr/vol40/iss1/22.

[689] There are, however, some lower court decisions in which judges have provided specific direction as to the content of *Gladue* reports, the different ways in which *Gladue* information can be brought before a court, and the differences the differences between PSRs with Gladue components and *Gladue* reports; *R v Lawson*, 2012 BCCA 508 at paras 26-28; *R v Blanchard*, 2011 YKTC 86 at para 25; *R v Legere*, 2016 PECA 7 at para 20; Patricia Barkaskas, Vivienne Chin, Yvon Dandurand and Dallas Tooshkenig, "Production and Delivery of *Gladue*; Pre-sentence Reports: A Review of Selected Canadian Programs" The International Centre for Criminal Law Reform and Criminal Justice Policy (ICCLR), 2019. Online: https://icclr.org/wp-content/uploads/2020/02/Production-and-Delivery-of-Gladue-Reports-FINAL.pdf?x64956 at pg 63.

[690] Spotlight on Gladue, *supra* note 688.

[691] *Ibid*.

situate it in the constellation of family, land and ancestry that informs identity and worth."[692] *Gladue* reports may also provide culturally appropriate sentencing options that a standard pre-sentence report would not contemplate.[693]

They assist in putting the Indigenous offender's special circumstances into an Indigenous context so that the judge can come up with a sentence that's unique to them and their culture, which has an emphasis on rehabilitation (healing). These special circumstances include the Indigenous community's views on an individual's potential for reintegration, any rehabilitative measures undertaken or planned for them in conjunction with the community, and their suitability for any particular disposition or programs.[694]

7.1.4 *Gladue* Reports and Part XXIV: Some Criticisms in the Literature

Since the SCC's decisions in *Gladue* and *Ipeelee*, Canadian courts have been criticized for applying *Gladue* principles and considering *Gladue* reports at sentencing in an ineffective and inconsistent manner.[695] Judicial opinion is divided on how much weight to give *Gladue* evidence, specifically whether *Gladue* reports are of "limited relevance" in the context of sentencing serious offences.[696]

For example, David Milward and Debra Parkes pointed to a 2010 decision, in which Justice McKelvey noted that no report was available to provide insight into the role of systemic factors behind a manslaughter case involving an Aboriginal accused.[697] Despite this, she opined that *Gladue* would not likely affect the sentence for a serious offence like manslaughter, which

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[692] Milward & Parkes, *supra* note 642 at 88; The preparation of *Gladue* reports involves interviewing a greater number of collateral contacts like family members, community members, and Elders, and requires in-person interviews and a meaningful rapport with members of the Indigenous community due to the nature of the information collected.
[693] Milward & Parkes, *supra* note 642 at 89.
[694]Law Reform Commission, *supra* note 690 at 77.
[695] Kent Roach, "One step forward, two steps back: *Gladue* at ten and in the courts of appeal" (2009) 54 Crim L Q 470.
[696] *R v Radcliffe*, 2017 ONCA 176 at 63.
[697] Milward & Parkes, *supra* note 642 at 86.

would involve similar sentences for both Aboriginal and non-Aboriginal people alike. Milward and Parkes describe this as furthering identifiable "myths" that have contributed to the limited implementation of *Gladue*. In their view, the idea that *Gladue* does not apply or will generally not make a difference in sentencing for serious offences is one of the myths that has contributed to the limited implementation of *Gladue*.

Another criticism is that *Gladue* reports can be obscured by judicial emphasis on risk reports in the context of serious offences. Under Part XXIV, psychiatric risk reports are mandated for all individuals against whom the Crown is bringing a DO application.[698] In cases involving an Indigenous accused a *Gladue* report is also usually submitted for the DO hearing. Previous commentators have noted that judges often base their decision-making primarily on information contained in court-ordered risk assessment reports. Milward has found this approach to be problematic when sentencing an Indigenous person labelled as a DO as "DO determinations hinge almost exclusively on risk instruments that rely on static factors tied with past criminal conduct. These instruments, while on the surface neutral and objective, may not provide sufficient consideration to dynamic factors that are relevant to the criminogenic needs of Aboriginal accused."[699]

Psychiatric risk assessment reports place the greatest emphasis on psychiatric diagnosis, adhere to the risk/need model and focus on actuarial testing, which in and of itself is controversial when applied in an Indigenous context.[700] By contrast, *Gladue* reports have been developed to give meaningful effect to s. 718.2(e) and "provide the court with culturally situated

[698] *Code*, *supra* note 1, 752.1 (1).
[699] Milward, *supra* note 315 at 658.
[700] Maike Helmus, "Predictive accuracy of static risk factors for Canadian Indigenous offenders compared to non-Indigenous offenders: Implications for risk assessment scales" (2018) 25 (3) Psych Crim and Law 1; Ivan Zinger, "Actuarial Risk Assessment and Human Rights: A Commentary" (2004) 46 Canadian Journal of Criminology and Criminal Justice 607 at 610.

information which places the offender in a broader social-historical group context...and reframe the offender's risk/need by holistically positioning the individual a part of a community and as a product of many experiences."[701] Thus *Gladue* reports contain the "critical ingredients" of information and insight relevant to Indigenous experience. This allows judges to meaningfully weigh risk and rehabilitation with an understanding of the accused's Aboriginal heritage.

There is also criticism about the potentially discriminatory impact that *Gladue* reports have in the face of risk assessments. For example, Janine Benedet and Isabel Grant have noted that "it is important to recognize that sometimes the information that is provided as background to explain the impact of colonialism and residential schools in a *Gladue* report can be a double-edged sword in sentencing for violent offences, and judges need to be attuned to this reality."[702] Benedet and Grant raise the example of where an accused asserts that he was a victim of sexual abuse as a child, which could be mitigating in sentencing; however, it may also be characterized as a risk factor for future offending and then used to justify a harsher sentence.[703]

Undoubtedly there is a need to better understand the impact that intergenerational trauma has had on Indigenous persons labelled as "dangerous" and the role that *Gladue* factors play in shaping psychiatric diagnoses and perceptions of risk. Furthermore, should *Gladue* factors be relied upon as risk factors favouring lengthier incarceration?[704]

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[701] Debra Parkes, "Ipeelee and the Pursuit of Proportionality in a World of Mandatory Minimum Sentences" (2012) 33:3 For the Defence 22 at 24 citing Kelly Hannah-Moffat and Paula Marutto, "Re-contextualizing Pre-sentence reports: risk and race," (2010) 12 Pun & Soc 262.
[702] Janine Benedet and Isabel Grant, "Breaking the Silence on Father-Daughter Sexual Abuse of Adolescent Girls: A Case Law Study" (2020) 32 (2) CJWL 239 at 283.
[703] Benedet & Grant, *supra* note 702 at 283.
[704] Bronwen Perley-Robertson, L. Maaike Helmus & Adelle Forth, "Predictive accuracy of static risk factors for Canadian Indigenous offenders compared to non-Indigenous offenders: Implications for risk assessment scales" (2018) 25 (3) Psych Crim and Law 1; *R v Jennings*, 2016 BCCA 127; Hannah-Moffat & Maurutto *supra* note 314.

The potential for *Gladue* factors to inflate risk scores was initially raised three decades ago by the Law Reform Commission of Canada.[705] Such factors can be interpreted as predictive risk factors for criminality, even if when they are rooted in the ongoing harms caused by colonization (the legacy of residential schools, history of discrimination, higher levels of poverty and substance abuse)".[706] *Gladue* factors can be associated with higher criminality and therefore can be used to classify an Indigenous person as posing a higher risks for criminal offending.[707]

As Kelly Hannah-Moffat has noted, "marginalized groups, including Aboriginal people in Canada, unavoidably score higher on risk instruments because of their increased exposure to risk, racial discrimination, and social inequality—not necessarily because of their criminal propensities or the crimes perpetrated." [708] Thus risk scores can be a reflection of systemic factors for marginalized individuals.[709]

It is problematic for *Gladue* factors to be raised mainly within the context of psychiatric diagnosis and not contextualized in the collective experience of Indigenous communities. Otherwise *Gladue* factors can work *against* the Indigenous person by elevating their risk score.[710] Hannah-Moffat and Maurutto argue that pre-sentence reports may "identify and

[705] Spotlight on Gladue, *supra* note 688; Bronwen Perley-Robertson, L. Maaike Helmus & Adelle Forth, "Predictive accuracy of static risk factors for Canadian Indigenous offenders compared to non-Indigenous offenders: Implications for risk assessment scales" (2018) 25 (3) Psych Crim and Law 1.
[706] Spotlight on Gladue, *supra* note 688 at 6.
[707] For an in-depth discussion on the SCC's decision in *Ewert v Canada* 2018 SCC 30 and the predictive accuracy of risk tools when applied against Indigenous peoples, please see Chapter 5 "Risk." In short, *Ewert v Canada* held that the validity of actuarial risk tools when applied to an Indigenous person, had to be established through empirical research. As of November 2020, research mandated by the SCC has yet to be produced and the literature that is available on this issue is divided; Bronwen Perley-Robertson, L. Maaike Helmus & Adelle Forth, "Predictive accuracy of static risk factors for Canadian Indigenous offenders compared to non-Indigenous offenders: Implications for risk assessment scales" (2018) 25 (3) Psych Crim and Law 1 at 23.
[708] Unsettled Proposition, *supra* note 146 at 281.
[709]Hannah-Moffat & Maurutto *supra* note 314; Hannah-Moffat, "Aboriginal Knowledges in Specialized Courts: Emerging Practices in *Gladue* Courts" (2015) 31:3 Can J Law & Soc 451 at 456.
[710] Hannah-Moffat & Maurutto *supra* note 314 at 456; Maike Helmus, "Predictive accuracy of static risk factors for Canadian Indigenous offenders compared to non-Indigenous offenders: Implications for risk assessment scales" (2018) 25 (3) Psych Crim and Law 1.

document typical *Gladue* factors such as lack of education, poverty, unemployment, and fragmented families, but they typically locate the cause of these factors within the individual, thereby elevating the perceived risk of offenders and the severity of the sanctions imposed." [711]

Maurutto and Hannah-Moffat have emphasized the importance of a contextualized understanding of risk;[712]*Gladue* reports respond to this need by situating Gladue factors within histories of race relations drawing explicit linkages between those histories and the current treatment of Aboriginal peoples. Importantly, these narratives show the role that the state has played in the production of criminal histories (and criminal records) and thus "*Gladue* reports offer a different structure in which the voices and histories of Aboriginal peoples can be advanced within legal proceedings."[713]

7.1.5 How do *Gladue* Principles Apply to a DO Hearing?

In *R v Johnson*,[714] the SCC reaffirmed that the primary purpose of the DO regime and Part XXIV is the protection of the public, citing *R v Lyons*[715] which stated that the regime was designed to "carefully define a very small group of offenders whose personal characteristics and particular circumstances militate strenuously in favour of preventative incarceration". The SCC further reiterated in *R v Steele*[716] its finding from *Lyons* that indeterminate detention and long-term supervision under Part XXIV[717] are "exceptional sentences" in our criminal justice system, reserved for individuals who "pose an ongoing threat to the public and accordingly merit enhanced sentences on preventative grounds."[718] Given the severity of indeterminate detention,

[711] Hannah-Moffat & Marutto, *supra* note 709 at 463-464.
[712] *Ibid*.
[713] Legal Services Society of BC, "Gladue Primer" Online: https://pubsdb.lss.bc.ca/pdfs/pubs/Gladue-Primer-eng.pdf.
[714] *Johnson, supra* note 65 at para 19.
[715] *Lyons, supra* note 28.
[716] *Steele, supra* note 64.
[717] *Code, supra* note 1, Part XXIV.
[718] *Steele, supra* note 64 at para 1.

an indeterminate sentence will only be proportionate when the offender is very blameworthy and the offence is quite grave.[719]

It is now settled that *Gladue* principles[720] apply in serious cases, including under Part XXIV. Beyond this, there has been little direction from the SCC, which has led to an inconsistent application of *Gladue* principles by judges in DO hearings, as discussed below.

The Supreme Court of Canada: *R v Boutilier*[721]

In *R v Boutilier*[722] Justice Côté reiterated judges' 718.2(e) duty to pay attention "to the circumstances of Aboriginal offenders in sentencing proceedings"[723] and that "principles developed for indigenous offenders" form one of many factors relevant at disposition, along with "an offender's moral culpability, the seriousness of the offence, and any mitigating factors."[724] According to Côté J, "each of these considerations is relevant to deciding whether or not a lesser sentence would sufficiently protect the public."[725] Beyond this, Côté J did not discuss *how* exactly judges should apply *Gladue* in the context of a DO hearing or the weight that should be given to *Gladue* factors at disposition.

Appellate and Lower Court Authorities

A substantial number of lower court decisions have addressed the application of *Gladue* factors in DO proceedings.[726] A detailed review of appellate and lower court decisions involving

[719] Karakatsanis J in *Boutilier*, *supra* note 7 at para 114.
[720] *Code*, *supra* note 1 s.718.2(e); *Gladue*, *supra* note 473.
[721] *Boutilier*, *supra* note 7.
[722] *Ibid.*
[723] *Boutilier*, *supra* note 7 at para 54; *Gladue*, *supra* note 473 at 37.
[724] *Boutilier*, *supra* note 7 at para 63.
[725] *Ibid.*
[726] *R v Standingwater*, 2013 SKCA 78; *R v Montgrand*, 2014 SKCA 31; *R v Peekeekot*, 2014 SKCA 97 *R v Fontaine*, 2014 BCCA 1; *R v Standingwater*, 2013 SKCA 78; *R v Peekeekot*, 2014 SKCA 97 *R v John* 2018 SKPC 023 at para 92. *R v Standingwater*, 2013 SKCA78; *R v Montgrand*, 2014 SKCA 31; *R v Peekeekot*, 2014 SKCA 97.

an Indigenous person who was designated dangerous revealed some key points. The following is a brief summary of those authorities.

It is now considered "well established" that *Gladue* principles apply to DO hearings involving an Indigenous offender.[727] Appellate courts have further held that for a *Gladue* analysis to be correct it must be based on sufficient *Gladue* evidence.[728] In DO hearings, Crown prosecutors and defence counsel alike share a positive duty to provide information and submissions on *Gladue* factors where appropriate. The judge, even when faced with an inadequate report or inadequate assistance from counsel, is still obliged to try and obtain the information necessary for a meaningful consideration of *Gladue*.[729]

Furthermore, sentencing judges must do more than merely mention or "pay lip service"[730] to *Gladue* considerations in a DO hearing. Judges in DO hearings must craft meaningful sentences that reflect "an individualized assessment of all of the relevant factors and circumstances, including the status and life experiences, of the person standing before them."[731] Thus, judges must do more than merely mention a DO's Indigeneity when sentencing to discharge their s.718(2)(e) duty. This was reaffirmed recently in *R v Wolfleg*,[732] when the Alberta Court of Appeal stated that "failing to take these circumstances into account would violate the fundamental principle of sentencing – that the sentence must be proportionate to the gravity of the offence and the *degree of responsibility* of the offender."[733]

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[727] *Radcliffe*, *supra* note 696.
[728] *Wolfleg*, *supra* note 666.
[729] Milward, *supra* note 315.
[730] *R v Starblanket* 2017 SKPC 005 at para 38 citing *R v Moise*, 2015 SKCA 39 at para 24; R v Montgrand, 2014 SKCA 31.
[731] *Ipeelee*, *supra* note 646.
[732] *Wolfleg*, *supra* note 666.
[733] *Wolfleg*, *supra* note 666; *Ipeelee*, *supra* note 646 at para 73.

For example, in *Kritik c R*, the Quebec Court of Appeal[734] found the trial judge had erred in law because he "made no mention of fundamental considerations such as the appellant's highly problematic upbringing, nor of his suicidal tendencies, and generally ignored the *Gladue* report, dismissing its author as not being an expert and saying that her report contained nothing specific to address a sexual offender".[735] On appeal, Hesler CJQ cited Wagner J (as he then was) in *Steele*[736] that indeterminate detention and long-term supervision and the designation of a DO "are exceptional sentences in our criminal justice system" and as such "it is crucial that judges decide these matters on the basis of a complete record and take into account all relevant factors." Hesler CJQ overturned Kritik's DO designation and indeterminate sentence as the trial judge had "generally ignored the *Gladue* report."[737]

Even once sufficient *Gladue* evidence is produced and considered, this will not necessarily lead to a different disposition outcome in a DO hearing.[738] Although systemic and background factors provide the necessary context to enable a judge to determine an appropriate sentence, rather than to excuse or justify the underlying conduct, it is only where the unique

[734] *Kritik c R* 2019 QCCA 1336.
[735] *Ibid* at para 15; Kritik, an Inuit man from Nunavik, appealed both his designation as a DO and indeterminate sentence following a conviction for sexual assault (at para 1). By the time he was found guilty of the predicate offence, he had a lengthy history of sexual offences, primarily against Inuit women, despite his young age (at para 10). In 2017, the Court of Appeal granted Kritik's request for the preparation of a second Gladue report.
[736] *Steele*, *supra* note 64.
[737] *Kritik*, *supra* note 734; The Gladue evidence (at para 13) revealed the intergenerational impact of the state's assimilation policies on Kritik, and his resulting "deplorably dysfunctional" family history, which included daily alcohol and drug abuse, as well as physical and sexual abuse perpetrated on him from a very young age. His family had lost their ability to pursue traditional hunting and survival methods after the slaughter of their local pack of dogs by the Canadian government. Kritik started drinking at the age of twelve, first attempted suicide at thirteen (there were ten such attempts), and sustained a serious head injury at nineteen, which caused him cognitive problems. A nurse in the report noted problematic interaction between his prescribed medication and his alcohol and drug consumption and a possible onset of schizophrenia.
[738] *Radcliffe*, *supra* note 696 at para 60 citing *R v Angelillo*, 2006 SCC 55 at para 15; *R v Peekeekoot*, 2014 SKCA 97 at para 46.

circumstances of an offender bear on culpability, or indicate which sentencing objective can and should be actualized, that they will influence the ultimate disposition.[739]

In *R v Wolfleg*,[740] from the Alberta Court of Appeal the defence appealed a DO designation and indeterminate sentence. The appellant was Indigenous, but no *Gladue* report was ordered for the DO hearing. The appellant argued that the *Gladue* report, tendered as fresh evidence for the appeal, set out relevant systemic and background factors relevant to him as an Indigenous person and which demonstrated Indigenous-specific treatment and programming that are available in the community. He argued that had this crucial *Gladue* information been available to the sentencing judge, the outcome would have been different and more favourable to him.[741]

Despite being allowed to submit a fresh *Gladue* report, the Court of Appeal found there was nothing in it that would make Wolfleg's behaviour less blameworthy or that would suggest that discretion should be exercised against indeterminate incarceration. According to the Court, the opinions of the risk assessors weighed in favor of indeterminate detention and the *Gladue* report did not sufficiently address Wolfleg's risk of re-offending or control in the community.[742]

In determining how much weight *Gladue* should be afforded at DO disposition and at which stage, the current approach adopted by Canadian courts stems from Schutz JA's statement in *R v Wolfleg*[743], which implied that *Gladue* principles apply at *both* stages of a DO hearing[744]

[739] *Ipeelee*, *supra* note 646 at para 83.
[740] *Wolfleg*, *supra* note 666.
[741] *Wolfleg*, *supra* note 666 at paras 78, 36.
[742] *Wolfleg*, *supra* note 666 at 165; Here the Alberta Court of Appeal actually made an error applying the lower standard of "reasonable possibility" which only applies to those declared a Long-Term Offender.
[743] *Wolfleg*, *supra* note 666.
[744] *Wolfleg*, *supra* note 666 at para 126.

though their application "may be more limited in light of public protection."[745] This was clearly stated by Hamilton JA. of the Manitoba Court of Appeal in *R v OEC*[746] where she wrote:

> The Crown appropriately acknowledges that *Gladue* applies to dangerous offender applications. However, the Crown rightly asserts that the impact of *Gladue* must be considered in the context of the fact that the protection of the public is the paramount consideration in these proceedings.

The cases in my study revealed an inconsistent application of *Gladue* at disposition which raises debate as to whether *Gladue* is of "limited relevance" in the context of sentencing DOs.[747]

7.2 Case Study Methods and Findings

Out of 101 cases in this study, 40 involved a designated DO who self-identified as Indigenous; judges conducted a *Gladue* analysis (albeit to varying degrees) in all 40 of those cases. Previous research states that as many as 76% of offenders sentenced to a repeat offence received a shorter sentence when a *Gladue* report was prepared, compared to offenders without *Gladue* reports.[748] The present study found that Indigenous DOs were sentenced to an indeterminate sentence approximately half (21/40 or 53%) of the time. This can be compared with the 46/63 or 73% of non-Indigenous DOs who received an indeterminate sentence. It is difficult to draw conclusions from these relatively small numbers, given the fact-specific nature of sentencing and the many variables in play. Nevertheless, the numbers warrant further research to see if *Gladue* could in fact be reducing reliance on indeterminate sentences.

When first reading the DO cases that had a *Gladue* report I observed two key issues raised at disposition that aligned with the judge's analysis of the two limbs in *Gladue* analysis.

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[745] *R v Haley*, 2016 BCSC 1144; *R. v. Ominayak*, 2012 ABCA 337 at para 41; and *R v Standingwater*, 2013 SKCA 78 at para 49.
[746] *R v OEC*, 2013 MBCA 60 at para 35.
[747] *Radcliffe*, *supra* note 696 at para 63.
[748] Spotlight on Gladue, *supra* note 688.

The first was the way *Gladue* information was considered in relation to risk reports. Here, I examined how *Gladue* factors impacted a DO's moral blameworthiness in light of their risk factors and psychiatric diagnosis.[749] The second was how resource limitations impacted the availability of the lesser sentence for an Indigenous DO. On the first limb I found that judges were less inclined to incorporate both *Gladue* and the psychiatric risk assessment in an equal and complementary partnership into their analysis at disposition with the majority placing greater emphasis on the risk reports. On the second limb of the *Gladue* analysis, judges are required to consider restorative justice options, however I observed tensions emerge in the case sample between this objective and the primary objective of Part XXIV, which is public protection.[750]

The SCC has held that judges "must not overshoot the public protection purpose of the DO regime"[751] and consider whether less restrictive sanctions may be appropriate in the circumstances. Indigenous persons are greatly overrepresented in prisons and especially in the dangerous offender population, thus on the second limb of s.718.2(e) in a DO hearing a judge must consider "the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection."[752] Additionally, the sentencing judge must be guided by the principle of restraint[753] in sentencing a DO and a judge ought to impose an indeterminate sentence only in those instances in which there does not exist less restrictive means by which to protect the public adequately from the threat of harm."[754]

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[749] It is important to note on this first issue that I observed no uniform way in which Gladue information was presented to the court. In some cases, there was a formal *Gladue* report and in other cases there was a risk assessment report with a *Gladue* component.

[750] *Lyons*, *supra* note 28; *Boutilier*, *supra note* 7 at para 56.

[751] *Johnson*, supra note 65 at para 20; *Boutilier*, *supra note* 7 at para 57.

[752] *Boutilier*, *supra note* 7 at para 108; *Gladue*, *supra* note 473 at para 66.

[753] *Code*, *supra* note 1, s. 718.2(d) & (e).

[754] *Boutilier supra note* 7 at para 109 citing *Johnson*, supra note 65 at para 29.

The following explores the different ways in which judges handle Gladue information in the context of DO hearings, through the lens of six Indigenous DO cases. In all six of these cases the judge conducted a full *Gladue* analysis, which wasn't the case in all of the Indigenous DO cases in the sample. In some cases, the judge would acknowledge their duty to consider s.718.2(e) but did not go into any depth on the two branches of *Gladue* analysis. Additionally, these six cases were selected as a mix of both types of disposition outcomes (cases where the Indigenous DO was sentenced to an indeterminate sentence vs fixed sentenced with a LTSO). I wanted to examine both types to see if there were any observable differences in the judges reasoning.

7.3 Issue 1: *Gladue* Reports, DO Moral Blameworthiness & Risk Narratives

In the case sample judges would cite a psychiatric risk assessment report which had a *Gladue* component, a formal *Gladue* report, or both in fulfilling their s.718.2(e) duty. In some exceptional DO cases, the approach of using a *Gladue* component in a risk assessment report in place of a full *Gladue* report had been held to be sufficient. For example, in *R v Jennings*,[755] a forensic psychologist provided the information surrounding Jennings' Indigeneity to the court in lieu of a formal *Gladue* report.[756]

[755] *R v Jennings*, 2016 BCCA 127.

[756] In this case the accused had a violent criminal history involving repeated sexual offences against children over a span of 30 years. In 2013 Jennings was convicted of the predicate offence of sexually assaulting an eight-year old boy, triggering a Part XXIV application by the Crown. At trial, the sentencing judge considered the circumstances of Jennings' Indigenous heritage, as required by s. 718.2 (e). A On appeal, Jennings raised several objections to his DO designation and indeterminate sentence. He argued that the judge failed to use a formal *Gladue* report and thus did not have sufficient evidence of *Gladue* factors relevant to his case. Specifically, he argued that the trial judge failed to consider alternative Indigenous-based programming when determining whether there was a reasonable expectation that he could be controlled in the community. The BCCA rejected his arguments, deeming the risk assessor's incorporation of his history as sufficient to meet the s. 718.2 (e) requirement. Additionally, after reviewing available sex offender programs, the BCCA deemed there was no evidence of any kind of supervision and/or intervention that could treat the serious nature of Jennings' offending patterns. Due to past failures in treatment programs and repeated breaches of community supervision, the BCCA believed he would likely fail in an Indigenous sex offender program and thus the indeterminate sentence was the most suitable in the circumstances. The overwhelming risk posed by Jennings to children far outweighed his *Gladue* factors.

Although information contained in *Gladue* reports and risk reports should be viewed as both distinct and intrinsically connected, the case sample showed that the latter unfortunately often obscured the former. This is problematic given there have been serious concerns raised as to whether risk reports meaningfully incorporate and contextualize *Gladue* factors and whether an overemphasis on psychiatric diagnosis could obscure meaningful *Gladue* analyses.[757] For example, in one case the judge deferred to the risk assessor's diagnosis, even after acknowledging that the assessor failed to sufficiently account for *Gladue* factors in their evidence.[758]

Judges in DO hearings must consider psychiatric evidence about an Indigenous person labelled a DO, and also contextualize their understanding of that evidence within a *Gladue* framework. Thus, a factor that influenced whether the Indigenous DO received an indeterminate sentence was the degree to which judges saw the *Gladue* report as successfully addressing concerns raised in the risk reports. The following section examines how judges navigated that *Gladue* information at disposition.

7.3.1 *R v Roper*[759]

In *R v Roper*[760] the Indigenous accused pled guilty to the predicate offences of unlawful confinement,[761] reckless discharge of a prohibited firearm,[762] possession of a loaded prohibited firearm,[763] and aggravated assault.[764] In this case Silverman J considered "numerous sources of information and opinions" including Roper's criminal history, parole records, a *Gladue* report,

[757] Spotlight on *Gladue*, *supra* note 688.
[758] *R v Roper,* 2016 BCSC 977.
[759] *Ibid.*
[760] *Ibid.*
[761] *Code*, *supra* note 1 at s.279(2).
[762] *Code*, *supra* note 1 at s.244.2(3).
[763] *Code*, *supra* note 1 at s.95(1).
[764] *Code*, *supra* note 1at s.268.

the risk assessment report, and defence witnesses before deciding to sentence him indeterminately.[765]

Roper, who had struggled with significant substance abuse issues, had been drug-free for five years prior to the DO hearing.[766] Oral testimony was provided regarding his *Gladue* factors from an Indigenous elder who was working in the prison system. In this testimony she suggested several out-of-custody facilities that might be available to Roper at some point in the future with the "most attractive" option not available for federal prisoners.[767]

A formal *Gladue* report was also provided which Silverman J described as "extremely helpful" as it provided information about a "number of potentially useful facilities for aboriginal men facing long prison terms."[768] In the report, there were a number of categories of different types of recommended facilities. The defence argued that because there were a number of resources available for Roper, articulated in the *Gladue* report, this did not require him to serve an indeterminate sentence.[769]

The risk assessor in this case concluded that Roper possessed antisocial/psychopathic personality traits, however he acknowledged the testing was not conclusive and that Roper was not a psychopath. The risk assessor did state that Roper exhibited "one of the worst and most entrenched substance abuse problems (he had) ever seen"[770] and that his trajectory through life had been deteriorating due to a number of factors including drug abuse, lack of stable employment, lack of healthy relationships, and "this sort of deteriorating trajectory carries a

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[765] *Roper*, *supra* note 758 at para 106.
[766] *Roper*, *supra* note 758 at para 112.
[767] *Roper*, *supra* note 758 at para 114.
[768] *Roper*, *supra* note 758, at para 115.
[769] 1. Métis Nation 2. Correctional Service of Canada; 3. aboriginal programming; 4. Kwìkwèxwelhp Healing Village in Harrison Mills; a post-release residential treatment community; 5. several post-release residential treatment centres and the programs they provide; 6. post-treatment options including housing; and 7. post-treatment options including trauma counselling.
[770] *Roper*, *supra* note 758 at para 127.

substantial risk of increased severity of violent offending, both against intimate partner and stranger victims." [771]

The risk assessor opined that Roper's *Gladue* factors which he called "aboriginal issues" or "childhood factors" played a role in his psychological development but were now so entrenched that they reasonably could not be expected to be undone by way of any type of therapy.[772] In this sense the risk assessor contextualized factors associated with Roper's Aboriginal upbringing as risk factors.[773]

Dr. Semrau was asked by the Court to provide a supplementary report to address the *Gladue* report because it had not been available prior to his original risk assessment report, but concluded that it "did not affect his opinion".[774] He said in his new risk report, referring to the *Gladue* report:

> On page 9, last full paragraph, it is noted that Mr. Roper. . . is lacking the life skills of planning for the future." In my opinion this statement (and for that matter the entire *Gladue* report) does not take into account what in my opinion is the key factor in Mr. Roper's highly deviant lifestyle, which is his very serious personality disorder.[775]

In the risk assessor's opinion, the summary of Roper's diagnoses and their possible solutions in the *Gladue* report did "not take into account Mr. Roper's key criminogenic factors" which he believed created "a danger that reliance upon the statement as a basis for treatment planning and optimism for future change could distract from the necessary focus on the other key problems and/or result in unwarranted optimism regarding future change."[776] He then qualified this statement saying that he did not argue against trauma-related or Aboriginal-related

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[771] *Roper*, *supra* note 758 at para 128.
[772] *Roper*, *supra* note 758 at para 129.
[773] For a discussion of how *Gladue* factors impact on actuarial risk assessments see: Hannah-Moffat & Maurutto *supra* note 314 at 268 – 275.
[774] *Roper*, *supra* note 758 at para 132.
[775] *Roper*, *supra* note 758 at para 134.
[776] *Roper*, *supra* note 758 at para 135.

counseling, as they both potentially offer general mental health and well-being benefits, but cautioned against optimism that those kind of measures would play any significant role in reducing reoffence risk for Roper at this stage in his life.

The *Gladue* report, in contrast, pointed to Roper's successes with the various programs and certificates, Corrections reports that he has a strong work ethic, and a positive progress report from a different psychologist whom he was seeing while on parole indicating "commitment and progress." Roper had reconnected two years previously with his Métis heritage, and had reconciled with his mother after 20 years. He had been in jail for five years at the time of the DO hearing, but prior to the hearing he had gone AWOL from his parole officer to nurse his dying father in the last months of his life, which was described by the judge as a "bad decision." The report discussed how Roper desired post-sentence release to return to a small town in BC to live with his brother and mother, a location that was an hour's drive from the closest police force, parole officer or probation officer. Silverman J saw that plan as problematic as supervision was unlikely to be available in that small town.

Defence counsel argued that the risk assessor Dr. Semrau had not been very helpful in interpreting the *Gladue* report. Dr. Semrau had said he went "online" to find out "if any of these Aboriginal programs and treatment facilities ever had any positive effect", and his evidence was that "he did not find much." Silverman J conceded that "was a limiting factor in terms of what Dr. Semrau was able to provide."[777] Silverman J further noted that the treatment and supervisory options set out in the *Gladue* report were available only if Roper made it into the community, which would be unlikely if he received an indeterminate sentence. Defence counsel urged that a long-term supervision order would mean Roper access that kind of help.

[777] *Roper*, *supra* note 758 at para 150.

Silverman J held that Roper had a reduced moral blameworthiness in part arising out of the *Gladue* factors and the trauma he suffered as an infant and acknowledged the "shortcomings" and "concerns" in Dr. Semrau's evidence including his limited familiarity with *Gladue* reports and his reference to Roper as "purple" which was allegedly a "proofreading error".[778] Silverman J then lamented that the *Gladue* report was "useful" but "written by a probation officer who is not an expert witness."[779] He weighed that against the report from the risk assessor, whom he described as an "expert", stating that none of the complaints about the risk report in light of *Gladue* "go to the significance of the doctor's opinion."[780] Sentencing analysis then shifted from the *Gladue* report to treatability. Here, Silverman J quotes Dr. Semrau's opinion that there are not any currently available therapies likely to bring about positive change for Roper, and that currently available ones are "grossly inadequate"[781] and that "only incarceration" could curtail Roper's violent offending. He ordered an indeterminate sentence for Roper stating, "That is a regrettable statement for the state of our ability to assist people in your situation and it is also regrettable for the effect that it has on you, sir."[782]

Silverman J followed the risk assessor's opinion instead of treatment recommendations listed in the *Gladue* report. This is problematic because even though the risk assessor is unable to include the *Gladue* report, the judge still sides with the risk assessor's opinion despite the known "shortcomings" of the risk report, including its inattention to Roper's *Gladue* factors. The judge in this case placed great weight on the court-appointed psychiatrist, and on the psychiatric evidence, with less emphasis on systemic factors related to the Indigenous DO's past. The

[778] *Roper*, *supra* note 758 at para 162.
[779] *Ibid.*
[780] *Ibid.*
[781] *Roper*, *supra* note 758 at para 172.
[782] *Roper*, *supra* note 758 at para 173.

judge's overemphasis on psychiatric opinion appeared to severely limit any remedial potential of the information contained in the *Gladue* report to reduce sentence.

7.3.2 *R v Dunlop*[783]

In *R v Dunlop*[784] MacKinnon J found Dunlop guilty of the predicate offences of entering a house with intent to commit an indictable offence, robbery and aggravated assault.[785] Dunlop also had a lengthy history of violent offending.[786] Before trial, court appointed risk assessor Dr. Mark Pearce diagnosed Dunlop with severe poly-substance abuse disorder (PSUD) as well as a very serious anti-social personality disorder (APD).[787]

In Dunlop's DO hearing McCarthy J acknowledged that a failure to apply the *Gladue* factors would be "contrary to this statutory obligation."[788] Dunlop's *Gladue* factors included alcohol abuse in his family, physical abuse, sexual abuse while in foster care, and peer ridicule. He spent most of his adolescent life in foster homes, group homes, youth detention, and correctional facilities. He has also had substance abuse problems throughout his life.[789]

The *Gladue* report noted that Dunlop, following a suicide attempt in 2011 and while incarcerated at the CNCC, participated in a First Nation's program called "Eastern Door", received his spiritual name and "generally awakened to and embraced his Indigenous heritage."[790] The *Gladue* report writer concluded that the programs that appeared the most

[783] *R v Dunlop* 2018 ONSC 1076.
[784] *Ibid.*
[785] *Dunlop* supra note 783 at para 1.
[786] *Dunlop* supra note 783 at para 2; Dunlop's criminal antecedents include: four convictions for assault of police; four convictions for dangerous driving; seven convictions for assault; two convictions for assault causing bodily harm; one conviction for assault with a weapon; one conviction for aggravated assault; four convictions for uttering threats; one count of robbery; three convictions for forcible confinement; one conviction for intimidation and one conviction for forcible entry.
[787] *Dunlop* supra note 783 at para 27.
[788] *Dunlop* supra note 783 at para 58.
[789] *Dunlop* supra note 783 at para 59.
[790] *Dunlop* supra note 783 at para 60.

effective for Dunlop were those that employ Indigenous culture and spiritual teachings. She then made community recommendations for the court's consideration, which were not reported in the judgment.[791]

McCarthy J, however, pointed to what he considered were "shortcomings" of the *Gladue* report including "the failure of the *Gladue* report writer to address the DO's diagnosis."[792] According to him there was nothing in the report that could rebut or challenge the risk assessor's opinion that Dunlop's conditions are "practically untreatable and irreversible."[793] In the risk assessor's opinion there was "no verifiable data or studies offered about the success rates experienced by those aboriginal offenders who avail themselves of the services, programs and resources identified by Ms. Pettigrew [the *Gladue* report writer]".[794] McCarthy J was unwilling to place any weight on the suggestions or recommendations in the *Gladue* report as he found Ms. Pettigrew "failed to address, in any meaningful way, the concerns raised by Dr. Pearce's twin diagnoses of PSAD and ASPD."[795] This was McCarthy J's reason for not being willing to place any weight on her suggestions or recommendations.

After discussing the principles of sentencing including denunciation, deterrence, and specific deterrence, McCarthy J raised the principle of rehabilitation, stating there was no conventional treatment to successfully combat Dunlop's antisocial personality disorder."[796] He accepted the risk assessor's opinion that Dunlop's PSUD (polysubstance use disorder) and APD (antisocial personality disorder) may have "derived partly from his aboriginal heritage" and that

[791] *Dunlop* supra note 783 at para 61.
[792] *Roper*, *supra* note 759.
[793] *Dunlop*, *supra* note 783, at para 63.
[794] *Ibid*.
[795] *Dunlop*, *supra* note 783 at para 71.
[796] *Dunlop*, *supra* note 783 at para 87.

the "systemic factors which afflict the aboriginal community likely played their part in bringing Dunlop before the criminal courts."[797]

This highlights a problematic approach to viewing *Gladue* information in that it is equating Dunlop's Aboriginal heritage as being synonymous with his mental disorders. Legal researchers have discussed the ways in which the principles articulated in *Gladue*, later reaffirmed in *Ipeelee* are being interpreted by criminal courts in a manner that exacerbates the problem; The focus of *Gladue* is supposed to be on the impact of colonialism and systemic racism, not on pathology and deficits in Indigenous people and Indigenous communities.[798] McCarthy J's approach is contrasted later in this chapter with Cole J's approach to interpreting *Gladue* information in *R v Gardner*.[799]

Ultimately McCarthy J believed "the tension between the obligation to both acknowledge and apply the *Gladue* factors, and to consider all available sanctions other than imprisonment on the one hand, and the need to protect society from repeat, violent offenders on the other hand" could only be resolved with an indeterminate sentence.[800] For McCarthy J, the "shortcomings of the proposed aboriginal treatment and programming" would still leave potential victims at risk under any supervision order.[801]

These two abovementioned cases can be contrasted with the following two cases in which the judges interpret the need for an individualized assessment as necessitating a *Gladue* forward approach to sentencing an Indigenous DO under Part XXIV. In these cases the judge prioritized their remedial role under s.718(2)(e) and refuses to sentence indeterminately on the

[797] *Dunlop*, *supra* note 783 at para 72.
[798] Jillian Rogin, "Gladue and Bail: The Pre-Trial Sentencing of Aboriginal People in Canada" (2017) 95 (2) Can Bar Rev 325 at 325.
[799] *R v Gardner,* 2016 ONCJ 45.
[800] *Dunlop*, *supra* note 783, at para 107.
[801] *Dunlop*, *supra* note 783 at para 108.

basis that high *Gladue* factors are present, and the undeniable role that those *Gladue* factors have played in bringing the Indigenous person, now labelled as dangerous, before the Court.

7.3.3 *R v Pelly*[802]

In *R v Pelly*[803] Pritchard J emphasized her "remedial role" as a judge, noting that although protection of the public is the primary purpose of Part XXIV, "nevertheless, parliament has allowed for sanctions other than indeterminate detention for DOs provided such sanctions adequately protect the public."[804] Pelly had argued that "adequate protection" is to be interpreted as "acceptable protection" and that the only sentence that is an acceptable one to society is a sentence that includes "a fair and just application of s. 718.2(e) which is intended to remedy the over-representation of Aboriginal people in custody by recognizing applicable *Gladue* factors and their role in the offending behaviour."[805]

The *Gladue* report told that, for generations, Pelly's family has suffered from extreme poverty and alcohol and domestic abuse. Adverse childhood experiences had a significant impact on Pelly's mental health as outlined in both the risk and *Gladue* reports.[806] Pritchard J acknowledged this was the result of "systemic bias of the criminal justice system against Aboriginal people who have been raised in pathogenic circumstances."[807]

Pritchard J noted that there would be "real challenges to reintegration" for Pelly but that that did not necessarily require that he should be indefinitely imprisoned, which Pritchard J described as "the harshest sentence that this Court can impose on any offender." In her view, this

[802] *R v Pelly*, 2018 SKQB 160.
[803] *Ibid.*
[804] *Pelly supra* note 802 at para 53.
[805] *Ibid.*
[806] Pelly *supra* note 802 at para 54.
[807] *Ibid.*

was a case where the degree of protection that society would consider adequate "must be informed by a collective desire to stem the systemic over incarceration of Aboriginal peoples."[808]

7.3.4 *R v Gardner*[809]

In *R v Gardner,*[810] Cole J contextualized the DO's individual risk factors and psychiatric diagnosis from a *Gladue* forward perspective and declines the Crown's recommendation for an indeterminate sentence on the importance and urgency of the mandates from *Ipeelee*, while also taking into consideration the seriousness of case and the accused's APD and SUD diagnoses.

The Indigenous accused pled guilty to two counts of aggravated assault, triggering a DO application by the Crown.[811] This case is an example of the judge affording greater weight to information contained in the *Gladue* report because of its "successfully ability" to "address concerns raised in the risk assessment report."[812]

Prior to the predicate offence, Gardner and the first victim had been in a volatile domestic relationship for more than three years, characterized by frequent violence triggered by alcohol and drug use.[813] For the predicate offences, Gardner had been granted probation for a previous assault conviction on the same day the victim was released on bail for a separate charge. That night they drank heavily together, and while arguing Gardner stabbed her in the chest. When a man came to help the victim, Gardner also stabbed that man in the chest. In addition to these predicate offences Gardner had a record of 13 previous adult convictions for violent offences.[814]

The *Gladue* report was prepared by an experienced adult probation officer who had supervised Gardner. He opined that Gardner required intensive counseling "to assist him in

[808] Pelly *supra* note 802 at para 58.
[809] *R v Gardner,* 2016 ONCJ 45.
[810] *Ibid.*
[811] *Gardner, supra* note 809 at para 1.
[812] *Ibid.*
[813] *Gardner, supra* note 809 at para 5.
[814] *Gardner, supra* note 809 at para 18.

processing family of origin issues"[815] and that Gardner's desire to address alcohol use disorder was "genuine" but that they "lack the resources in probation to get him inpatient treatment...as no appointment was available for three months." [816] Additionally, Crown and defence risk assessors Drs. Klassen and Gojer submitted their own risk assessment reports for the purpose of Gardner's DO hearing.

The *Gladue* Report was described by Cole J as a "very comprehensive and helpful" document which "makes for hard reading" because it reflects "the kind of searing fact patterns so eloquently and painfully described in the recent Truth and Reconciliation Commission Report (2015) regarding the sequelae for subsequent generations of parental placement in residential school settings."[817] The *Gladue* report revealed that many of Gardner's relatives had been residential school survivors and his mother grew up in a remote First Nation Territory which has been reported as having the highest suicide rate in the world.[818] Gardner's emotional development was significantly affected by alcohol abuse in his family,[819] and his subjection to emotion, physical and sexual abuse during his childhood.[820] Cole J explained the challenges of piecing together *Gladue* information in preparing a report[821] however was satisfied that the picture presented regarding Gardner's family background was "reasonably accurate," as were the two psychiatrists who interviewed Gardner.[822]

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[815] *Gardner, supra* note 809 at para 49.
[816] *Ibid.*
[817] *Ibid.*
[818] *Gardner, supra* note 809 at para 51.
[819] *Gardner, supra* note 809 at para 55.
[820] *Gardner, supra* note 809 at para 63.
[821] The *Gladue* report writer herself explained these challenges/limitations to formulating a complete story: The "records" relied upon to document intergenerational trauma are often incomplete and partially uncorroborated and there can be deficiencies in the records themselves. For example, a key family member may refuse to participate in the formation of the report and/or decline to be interviewed, efforts to contact certain family members can be unsuccessful, or those who do cooperate with its preparation may be uncertain of some of the accused's background.
[822] *Gardner, supra* note 809 at footnote 12.

Of most relevance was how the *Gladue* report and judge related *Gladue* analysis to Gardner's diagnosis. In this case the *Gladue* report contained mental health evidence, including how Gardner had been diagnosed with Conduct Disorder.[823] Cole J noted that risk assessor Dr. Kalia described this type of early diagnosis as being "pivotal" to the DO application. All risk assessors agreed that Gardner met the criteria for APD, SUD and borderline personality disorder.[824] Where the risk assessors disagreed was whether Gardner's risk could be managed in the community.

Defence risk assessor Dr. Kalia proposed Gardner be managed and treated in custody and in the community.[825] Similarly Dr. Gojer, opined the LTSO gave a highly controlled mechanism that would allow Gardner to deal with his past, create a stable foundation and become a productive and prosocial individual.[826] By contrast, court appointed risk assessor Dr. Klassen opined that Gardner was "at significant risk of violent recidivism"[827] and that there was "little reason for optimism" that Gardner could be successfully managed on a Long-Term Supervision Order (LTSO), because his background made it "very difficult to provide psychiatric support for the notion of "reasonable possibility of eventual control of the risk in the community" and that he would likely face numerous charges for breaches of his LTSO".[828]

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[823] 312.8, Childhood onset. Severe" according to the (then) DSM-IV; *Gardner, supra* note 809 at 72.
[824] The risk assessors in the case used a number of different risk tools including the PAI, the PCL-R, the HCR-20 and the VRAG. Cole J citing Dr. Kalia's report in *Gardner, supra* note 809 at para 43-44.
[825] Dr. Kalia opined that Gardner was motivated to make changes to his lifestyle, his substance abuse, and address his childhood trauma, and his anger. Dr. Kalia linked the anger pathology and disorders to childhood trauma and abuse highlighting that these issues could be resolved by many available therapies both in the carceral system and the community. These included high intensity violence programs that address intimate partner violence significantly more than the standard PARs programs offered by probation services. Dr. Kalia also raised substance use programs and general anger management programs that have been "tailored to aboriginal needs"; *R v Gardner*, 2016 ONCJ 45 at para 84.
[826] *Gardner, supra* note 809 at para 87 citing Dr. Gojer's report at p. 69.
[827] *Ibid* citing Dr. Klassen's report at p. 45.
[828] *Ibid* citing Dr. Klassen's report at p. 49.

Cole J described how the evidence and testimony of various members of Gardner's family, friends and supporters in the *Gladue* report addressed those risk factors[829] and what Cole J described as "protective factors."[830] Cole J concluded that Gardner was "not one of that very small group of offenders whose personal characteristics and particular circumstances strongly militate in favour of indefinite preventive detention."[831]

Cole J applied *Gladue/Ipeelee*[832] principles at sentencing stating that "*Gladue*...is intended to remedy [the failure of Canadian courts]...to take into account the unique circumstances of Aboriginal offenders that bear on the sentencing process" and "is intended to remedy this failure by directing judges to craft sentences in a manner that is meaningful to Aboriginal peoples".[833] By the time Cole J reached his *Gladue* analysis he was already comfortable rejecting the Crown's submission for an indeterminate sentence because the *Gladue* report had "obviously made out" the clear linkage between Gardner and colonialism's lasting legacy.[834] He further reiterated that *Gladue/Ipeelee* factors are to be applied at *all* stages of the sentencing process, not just in the determination of whether to impose an indeterminate sentence.[835] Gardner, after being designated a DO, was sentenced to a total custodial term of 810 days, followed by a Long-Term Supervision Order for 10 years.[836]

Here, Cole J was able to consider available alternatives to indeterminate sentencing, by weighing a fulsome *Gladue* report with other presentence reports. It is the acknowledgement of the *Gladue* report as intrinsically connected to the psychiatric report that gives Gardner a second

[829] *Gardner, supra* note 809 at para 93.
[830] *Gardner, supra* note 809 at para 94.
[831] *R v G (JLA),* [2004] SJ No. 590; *R v Lemaigre* [2004] SJ No. 589.
[832] *Gardner, supra* note 809 at para 111 citing *Ipeelee, supra* note 646 at paras 71-76.
[833]*), Gardner, supra* note 809 at para 111 citing *Ipeelee, supra* note 646 at para 75.
[834] *Gardner, supra* note 809 at para 108.
[835] *Gardner, supra* note 809 at para 111.
[836] *Gardner, supra* note 809 at para 135.

chance. The "extremely helpful *Gladue* report" pointed to some factors that influences the decision-making in this case: the *Gladue* report was highly detailed, it addressed the psychiatric reports, and both the judge and the *Gladue* report writer addressed the limitations of the *Gladue* report itself. Finally, Cole J acknowledged the undeniable link between the *Gladue* factors and colonialism as root causes for Gardner's diagnoses from a decolonized approach; there was formal acknowledgement that the system created the problem so resources had to be provided to help resolve it rather than using indefinite detention as the solution. The judge also highlights testimony that APD and SUD are treatable, reflecting recent psychological research.[837] Cole J ultimately discusses treatment recommendations stemming from both the *Gladue* report and the risk assessors, which helps formulate a roadmap to treatment at sentencing.

The abovementioned case reflects the importance of the judge's ability to incorporate both *Gladue* and the psychiatric risk assessment in an equal and complementary partnership into their analysis at disposition. Here, Cole J's focus was on the purpose of s. 718.2(e) and the availability of treatment in the community and state obligations to provide such treatment with an indeterminate sentence as an extraordinary, last resort.[838] Pritchard and Cole JJ's approach to *Gladue* under Part XXIV, however, is not representative of the predominant approach.

7.4 Issue 2: Considering Alternatives to Imprisonment for Indigenous Persons Labelled Dangerous

The second limb of Section 718.2(e) directs judges to consider all available sanctions other than imprisonment that are reasonable in the circumstances, with particular attention to the circumstances of Aboriginal offenders, where appropriate.[839] This requires them to prioritize

[837] See the discussion of APD in the Demographics chapter of this thesis for a discussion.
[838] Cole J is one of the leading judges on Canadian sentencing law; See for example: David Cole & Julian Roberts eds, *Sentencing in Canada: Essays in Law, Policy and Practice* (Toronto: Irwin, 2020).
[839] *Code*, *supra* note 1, s.718.2(e).

restorative justice principles and play a role in helping remedy the problem of Indigenous over-incarceration. Additionally, the public safety threshold test at disposition stage for a DO under s.753(4.1) mandates a DO to be incarcerated for an indeterminate period unless the judge is satisfied there is a "reasonable expectation" that one of the two lesser available sentencing measures will adequately protect the public.[840]

Under Part XXIV, the option to impose an indeterminate sentence is rooted in the notion that we must deter persons convicted of crime from re-offending by separating them indefinitely from society. Thus judges, in crafting a disposition for an Indigenous person labelled dangerous under Part XXIV, must consider both retributive and restorative approaches to justice, which some argue are "irreconcilable".[841] Part XXIV has been criticized as a sentencing regime which is fundamentally inconsistent with *Gladue* and s.718.2(e), in that it discourages judges from prioritizing restorative justice principles at disposition.[842]

With no authority on this issue from the SCC, two Court of Appeal decisions[843] contain statements that appear to diminish the applicability of *Gladue* in DO cases due to the lack of resources for Indigenous, community-based healing or other non-carceral approaches. In *R v Little*[844] Cronk JA stated that "the overriding purpose of the dangerous and long-term offender regimes is the protection of the public" and "thus, "real world" resourcing limitations cannot be ignored or minimized where to do so would endanger public safety."[845] If such means exist, and are suitable in the circumstances, then they help the possibility of eventual control of the risk that the Aboriginal offender will reoffend in the community. As such, the non-existence of such

[840] *Code*, *supra* note 1, s.753(4.1) (b)-(c).
[841] Spotlight on Gladue, *supra* note 688.
[842] Milward, *supra* note 315; Nate Jackson, "The Substantive Application of Gladue in Dangerous Offender Proceedings: Reassessing Risk and Rehabilitation for Aboriginal Offenders" (2015) 20:1 Can Crim L Rev 77.
[843] *Little*, *supra* note 99; *R v Jennings*, 2016 BCCA 127.
[844] *Little*, *supra* note 99.
[845] *Little*, *supra* note 99 at para 70.

means is relevant to sentencing under Part XXIV.[846] Similarly, in *R v Jennings*[847] the BC Court of Appeal stated that judges in DO hearings, when considering sanctions other than indeterminate incarceration, must bear in mind "the more limited application" of *Gladue* in the context of a DO hearing.[848] In that case there was no evidence of any availability of suitable alternative Aboriginal programs to sufficiently address Jennings' risk factors.

Some cases in the sample reflected the approach from *Little* and *Jennings*. For example, in *R v Toulejour*[849] the DO was sentenced indeterminately due to insufficient community supervision resources in a remote Indigenous community where the DO expressed intent to reintegrate.[850] In *R v Morrison*,[851] the judge accepted expert opinion that the DO would require 24/7 monitoring, a resource not realistically available on parole so a LTSO was not an option.[852] In *R v Gronlund*,[853] the Saskatchewan Court of Queen's Bench found that there was no restorative justice approach available to Gronlund that would adequately protect the public.[854]

The following section examines three cases that show how Indigenous resource constraints formed a pivotal factor at disposition and the different ways in which judges approached this issue when crafting their sentence.

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[846] *R v Lemaigre*, 2004 SKCA 125 at paras 39 and 40.
[847] In this case the DO had a violent criminal history involving repeated sexual offences against children over a span of 30 years. In 2013 Jennings was convicted of the predicate offence of sexually assaulting an eight-year-old boy, triggering a Part XXIV application by the Crown. On appeal, Jennings raised several objections to his DO designation and indeterminate sentence. Specifically, he argued that the trial judge failed to consider alternative Indigenous-based programming when determining whether there was a reasonable expectation that he could be controlled in the community; *Jennings, supra* note 756 at para 39.
[848] *Jennings, supra* note 756 at para 39; In this case the Crown argued there was insufficient evidence of the existence of Aboriginal-focused programs that would address the circumstances aggravating Jennings' risk of sexualized offending. Respecting Aboriginal facilities, the Crown further argued the evidence did not show how any Indigenous facilities could provide sufficient constraints on Jennings' behaviour in the community. As there was no evidence of any availability of suitable alternative Aboriginal programs to sufficiently address his risk factors, his indeterminate sentence was upheld.
[849] *R v Toulejour,* 2016 SKQB 84.
[850] *Ibid.*
[851] *R v Morrison*, 2017 SKQB 256.
[852] *Ibid.*
[853] *R v Gronlund,* 2016 SKQB 156 at para 92.
[854] *Ibid.*

7.4.1 *R v Bourdon*[855]

In *R v Bourdon*[856] the DO was an untreated sex offender who was recommended to receive Indigenous focused high-intensity sex offender treatment.[857] Tranmer J relied on three elements stemming from *R v McCallum*[858] and Hill J's "reasonable expectation" framework from *R v DB.*[859] In that case Hill J found that reducing an offender's risk to an acceptable level within a defined period of time depends on control through treatment and effective community supervision and that "evidence of treatability must be specific to the offender." Tranmer J summarized the elements which must be present to achieve the objective of public protection: 1. There must be evidence of treatability that is more than an expression of hope; [860] 2. The evidence must indicate that the offender can be treated within a definite period of time; and 3. The evidence of treatability must be specific to the offender.[861]

The risk assessors in this case opined that there was little evidence Bourdon suffered a DSM-V psychiatric disorder or cognitive deficits. Although had been sexually abused as a child and was in denial of his sex offending, the risk assessor opined that "childhood sexual abuse was not a factor in his offending." He further opined that non-Aboriginal sex offenders suffered from the same risk factors which meant that Indigenous community-based programming was not

[855] *R v Bourdon*, 2018 ONSC 3431.
[856] *Ibid.*
[857] *Bourdon*, *supra* note 855 at para 207.
[858] [2005] OJ No 1178 at paras 47 – 49.
[859] *R v DB*, 2015 ONSC 5900.
[860] *Bourdon*, *supra* note 855 at para 686.
[861] *McCallum*, *supra* note 90 at paras 47 – 49; *R v DB*, 2015 ONSC 5900 at para 199; Here, Tranmer J made reference to four of Justice Hill's factors, specifically:10.What improvements or gains in the risk reduction can be expected during a period of custody preceding community release; 11. Has past engagement with community supervision been compliant; 12. Apart from treatment considerations, are there sufficiently available and resourced external controls in the community to adequately protect the public; 13. As a factor independent of treatment, is there compelling, not speculative, expert evidence that the offender's proclivities will significantly decline in the future while falling within the period of determinate sentence and the term of a LTSO.

prioritized. As such, nothing short of an indeterminate sentence would adequately protect the public against Bourdon.[862]

Tranmer J further noted that there was "no evidence" as to whether and/or when Bourdon could gain admission to an Indigenous healing centre.[863] Furthermore, the judge cited a lack of evidence as to when Bourdon could be admitted or how long he would have to stay there for risk to be reduced to the standard of reasonable expectation of adequate protection.[864] Tranmer J felt the evidence weighed against risk reduction options in the community. The availability of maintenance programming for Bourdon once he would be released was a key concern as a Mohawk Elder testified that Bourdon would likely not be accepted back by his own Indigenous community.[865] Ultimately Tranmer J concludes that even if *Gladue* factors had carried greater weight, the nature of the offence "cried out for deterrence and denunciation".[866]

It appears paradoxical to the spirit of *Gladue/Ipeelee* when Tranmer J agrees with expert testimony that it is difficult to achieve successful sex offender treatment for an Indigenous sex offender in a non-Indigenous group setting[867] and that the traditional way of healing is to deal with the person as a whole person, holistically. Here reference was made to Mohawk elder Winston Brant's point that this approach involves a lot of people from the community and the

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[862] *Bourdon, supra* note 855 at 258; According to risk assessor Dr. Gray, Bourdon on the Static-99R, placed at the highest end of the third level of 5 ascending risk categories for sexual or violent re-offence at an "average" relative risk. On VRAG-R, he placed in the second highest of 9 risk categories with a very high risk of re-offence the probability of reoffending at a rate of 60% in five years and 82% in 15 years. His actuarial test results for these two assessments show a moderate to high risk of re-offence. On the PCL-R, his higher score, 27, is associated with a higher risk of re-offence and a poor response to treatment.

[863] The *Gladue* report contained evidence of available alternative healing options in the community including Wasekun Healing Centre, which is a residential service designed to holistically facilitate re-entry of an Indigenous person convicted of crime in a manner which reflects native spirituality, traditions and values. The program is run and supported by Elders and Tranmer J acknowledged that the centre accepts DOs subject to a LTSO; *Bourdon, supra* note 855 at para 792.

[864] *Ibid.*

[865] Mohawk Elder Winston Brant testified that in his personal experience he had never seen an Aboriginal community accept back into the community an Aboriginal offender for a serious offence on his release from jail; *Ibid* at para 428.

[866] *Bourdon, supra* note 855 at para 846.

[867] *Bourdon, supra* note 855 at para 776.

use of healing medicines.[868] Despite this testimony, Tranmer J then proposes that Bourdon participate in sex offender programming within prison.[869]

Tranmer J contends that the *Gladue* report "did not canvas relevant local programming initiatives, address what institutions exist within Bourdon's community and whether there are specific proposals from community leadership or organizations for alternative sentencing to promote Bourdon's reconciliation to his community and his treatment recommendations."[870] Ultimately, Tranmer J cited the lack of sex offender treatment for Indigenous people in Bourdon's community[871] combined with Bourdon's previous LTSO breach, as key justifications in sentencing him to an indeterminate sentence.[872] Tranmer J found that the only appropriate sentence was an indeterminate sentence given Bourdon's "high-risk and resistance to treatment."[873]

7.4.2 *R v Moore*[874]

In *R v Moore*[875] Menzies J held that *Gladue* and alternatives to imprisonment had to be considered in the context of public protection as the paramount consideration.[876] Menzies J referenced the Manitoba Court of Appeal's finding in *R v Osborne*,[877] that judges when sentencing under Part XXIV have a "limited discretion" and that "DO applications must be considered on the basis that the paramount purpose of the DO regime is the protection of the

[868] *Bourdon, supra* note 855 at para 781.
[869] *Bourdon, supra* note 855 at para 770; The Aboriginal Integrated Correctional Program Model – High Intensity Sex Offender Programming.
[870] *Ibid.*
[871] *Bourdon, supra* note 855 at paras 802-805.
[872] *Bourdon, supra* note 855 at para 815.
[873] *Jennings, supra* note 755 at para 43.
[874] *R v Moore,* 2016 MBQB 116.
[875] *Ibid.*
[876] Menzies J in *Moore, supra* note 874 at para 25 citing Hamilton JA in *R v OEC*, 2013 MBCA 60 at para 35.
[877] *R v Osborne* 2014 MBCA 73.

public."[878] Menzies J acknowledged that colonization and the breakdown of Indigenous society had a devastating effect on Moore.[879] However, noting that the "overriding purpose" of Part XXIV is public protection, the judge held that "real world resourcing limitations cannot be ignored or minimized where to do so would endanger public safety." [880]

In *Moore*,[881] the DO had been convicted of committing an assault causing bodily harm on his domestic partner. Additionally, he had a lengthy criminal record, which included eight convictions for assault, three convictions of assault causing bodily harm, one conviction for each of robbery, prison breach, assault a peace officer, utter threats, resist arrest and manslaughter, and two convictions for sexual assault. During one of these sexual assaults Moore forced intercourse on a young teenage girl and then violently beat her father when he came to her aid.[882]

Menzies J noted that a large number of Moore's convictions were for spontaneous unrestrained violent behaviour towards women.[883] Menzies J made reference to Dr. Kolton's[884] risk assessment report on Moore.[885] Dr. Kolton opined that Moore's "childhood history of exposure to domestic violence and abuse, both within his own family and community, left him with supportive attitudes towards domestic violence and negative attitudes toward women."[886]

In this case the *Gladue* factors were discussed as a component of the psychiatric report rather than a full Gladue report. The report detailed that Moore was from the Shoal River First Nation north of Swan River in Manitoba. After being rejected by his father as an infant due to

[878] *Moore, supra* note 874 at paras 24-25 citing *R v Osborne* 2014 MBCA 73 at para 90 and 96.
[879] *Moore, supra* note 874 at para 25.
[880] *Moore, supra* note 874 at para 25*; R v G*, 2007 ONCA 548 at para 70 citing Cronk JA.'s comment from *R v Little*.
[881] *Moore, supra* note 874.
[882] *Moore, supra* note 874 at para 11.
[883] *Moore, supra* note 874 at para 13.
[884] Dr. Kolton is a clinical psychologist with a specialization in clinical forensic psychology.
[885] Risk assessment report was prepared pursuant to s. 752.1 for the DO hearing.
[886] *Moore, supra* note 874 at para 19 citing Dr. Kolton's report at page 19.

being born with red hair and fair skin, he was raised by his grandparents. Moore's parents and grandparents attended residential schools. He was routinely beaten in his childhood and witnessed his own mother being physically abused, which then became normalized to him. [887] As Menzies J noted "he came to accept that physical abuse of women was normal."[888] Moore was sexually abused from the age of 13 by men who would drink in his home. His family extensively abused alcohol and Moore began sniffing solvents at age 8.

Defence counsel argued that Moore is the product of governmental policies affecting Indigenous peoples since the coming of Europeans to North America and that it would be the "height of hypocrisy for a society that created the conditions in which Moore was raised to now ask that he be incarcerated for an indeterminate period."[889] Menzies J responded that the irony of having to protect society from someone who is the product of historical governmental policies was "not lost on the court" but that the court must balance this "historical dilemma" with the need to protect the public.[890] He then emphasized that the vast majority of Moore's victims were Indigenous people themselves.[891]

Moore was evaluated to be at a high risk for future violent behaviour, specifically intimate partner violence. As such, Menzies J, in determining whether there was a reasonable expectation that the threat of harm could be reduced to an acceptable level, required "evidence that the nature of the risk posed by any particular offender can be sufficiently controlled in a non-custodial setting so at to offer some measure of protection to the public."[892] Menzies J, in

[887] *Moore*, *supra* note 874 at para 27.
[888] *Moore*, *supra* note 874 at para 31.
[889] *Moore*, *supra* note 874 at para 32.
[890] *Moore*, *supra* note 874 at para 33.
[891] *Ibid.*
[892] *Moore*, *supra* note 874 at para 38; *Little*, *supra* note 99.

contemplating the LTSO option, and whether there was a reasonable expectation that Moore could be "sufficiently controlled" outside of the prison context, stated:

> In assessing whether or not the risk to the public safety can be controlled, the court must consider the question with a view to real world realities. The need to invest resources to control an offender must be coupled with evidence of the availability of those resources. Releasing a dangerous offender into the community based on a treatment or supervision plan that will not exist upon their release is not an available option.

Moore's record revealed that he was violent in the community. However, Menzies J observed that he seemed to function "relatively well" as a custodial inmate.[893] He had also participated extensively in corrections programming over many years of custodial sentences.[894] As Menzies J could only rely on the risk report and not a formal *Gladue* report, Moore's risk, needs and projected responsivity to treatment were taken from the risk report and discussed in light of *Gladue*. In Dr. Kolton's opinion, Moore required between 5-10 years of intensive treatment to reduce the risk that he posed to public safety.[895]

The risk assessor in the DO hearing Dr. Kolton, portrayed the potential for a positive outcome for Moore. Menzies J acknowledged that Moore's "dangerous personality" was "likely a result of the effects of past government policies respecting aboriginal people" and that "with

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[893] *Moore, supra* note 874 at para 41.

[894] Moore has attended the following corrections programs: 1984: Chemical dependency
1989: Alcoholics Anonymous and Chemical Dependency; 1999: Cognitive Skills and Aboriginal Healing Circlen; 2000: Clearwater Sex Offender Program; 2001: Aboriginal Substance Abuse Program; 2002: Community Orientation Program Choices and Community Relapse Prevention; 2006: Moderate Intensity National Substance Abuse Program 2009-10: 8.5 hours of unknown programming; 2011: Thinking Awareness Program and Peaceful Choices Program 2014: Coming to Terms Program; *Supra Note 835 (Moore)* at para 42.

[895] *Moore, supra* note 874 at para 44 citing Dr. Kolton's opinion at page 26 of his report: "Individuals with significant characterological disorders, substance abuse problems, and violence and domestic violence histories respond best to long-term, multi-modal psychological interventions. Mr. Moore has not been exposed to these types of interventions since his participation in the Clearwater Program 15 years ago and reports from his participation then were positive. It is likely, given his age and increased level of insight, that he would be even more open to this type of intervention at this point in his life than he would have been then. In terms of institutional programming, Mr. Moore would benefit from high-intensity, long-term programming that combines individual and group treatment modalities. He also requires maintenance follow up support, both following the completion of a program on the institution, and upon his release to the community."

intensive treatment and positive participation from Moore over an extended period of time, his risk to the public safety can be reduced and managed in the community."[896]

However, Menzies J felt that Moore's risk "could not be reduced or controlled without extensive long-term treatment in a controlled environment"[897] and that his positive prognosis was "based on the availability of extensive therapeutic and supervisory resources over an extended period of time" the availability of which were "unknown".[898] As such, Moore was sentenced indeterminately.

This case highlights the impact that judicial perceptions of resource limitations have on considerations of alternatives to incarceration. Menzies J appeared to go against the risk assessor's opinion and deemed Moore to present an unmanageable risk in the community due to his "dangerous personality." Defence pointed to the unfairness of this on a governmental policy level, given the courts acknowledgment that Moore's personality disorder is the product of colonizer's actions. The risk assessor stated that Moore's risk could be managed in the community. However, there was no formal *Gladue* report providing any recommendations for alternatives to imprisonment. Thus, a key issue in Moore's case was the *Gladue* information gap relating to whether any of the resources recommended to him by the risk assessor were available.

7.4.3 *R v Mooswa*[899]

R v Mooswa[900] points to the fact that Crown counsel, defence counsel and sentencing judges must make a "meaningful evaluation of any alternatives to incarceration including culturally sensitive programming, supports and safeguards available within and outside the

[896] *Moore, supra* note 874 at para 48.
[897] *Moore, supra* note 874 at para 49.
[898] *Moore, supra* note 874 at para 47.
[899] *R v Mooswa,* 2016 SKQB 122.
[900] *Ibid.*

Aboriginal community which may assist in rehabilitating the offender, reducing his or her risk to reoffend violently and managing his or her behaviour within the community.[901]

In this case the DO was found guilty of ten criminal offences arising out of one indictment, including assault causing bodily harm, robbery with a firearm, and theft of a motor vehicle, triggering the Crown's application for his designation as a DO and an indeterminate sentence.[902] He had 68 prior convictions which were categorized in the pre-sentence report as 31 (46 %) property offences, 15 (22 %) compliance- related (administration of justice) offences, 7 (10 %) violent offences and 15 (22 %) other (miscellaneous) offences.[903]

The defence risk assessor in the case, Dr. Wormith, opined that Mooswa was "a candidate for rehabilitation" and "should be considered for a LTSO despite being a very high risk to reoffend and a high risk to reoffend violently. [904] Dr. Wormith suggested that programs such as healing lodges, which offer an Indigenous perspective, would be particularly beneficial.[905] He did not find any suggestion of Mooswa being psychopathic in nature and felt

[901] *Mooswa supra* note 899 at para 105 citing *R v Moise*, 2015 SKCA 39 at paras 24-26; *Ipeelee, supra* note 646 at paras 59-60.
[902] Jeremy Jerry Mooswa was found guilty of 1) committing assault causing bodily harm contrary to s. 267(b) of the Criminal Code; 2) using a firearm in robbing Clifton Wolfe contrary to Section 344(1) of the Criminal Code; 3) confining Clifton Wolfe contrary to Section 279(2) of the Criminal Code; 4) committed theft of a motor vehicle, the property of Clifton Wolfe contrary to Section 333.1(1) of the Criminal Code; 5) (pled guilty) possessing a prohibited weapon while he was prohibited from doing so by reason of an order made pursuant to Section 109 of the Criminal Code contrary to Section 117.01(1) of the Criminal Code; 6) (pled guilty) possessing a prohibited firearm together with readily accessible ammunition, capable of being discharged from the said firearm, not being the holder of an authorization or licence under which he may possess the said firearm, contrary to Section 95(1)(a) of the Criminal Code; 7) (pled guilty) occupying a motor vehicle in which he knew that there was at that time a firearm, and that no occupant of the motor vehicle was the holder of a license or authorization to transport it, contrary to Section 94(1)(b) of the Criminal Code; 8) without lawful excuse, pointing a firearm at Clifton Wolfe, contrary to Section 87 of the Criminal Code; 9) possessing a weapon for a purpose dangerous to the public peace contrary to Section 88 of the Criminal Code; 10) (pled guilty) possessing a firearm, knowing that he was not the holder of a licence under which he may possess it, contrary to Section 92(1) of the Criminal Code.
[903] *Mooswa, supra* note 899 at para 33.
[904] Dr. Wormith opined this was because of Mooswa's motivation to rehabilitate, his relative lack of problematic behavior during his current remand, and his potential to benefit from treatment and rehabilitation programs made him a very good candidate for intensive intervention by correctional authorities; *Mooswa, supra* note 899 at para 63.
[905] Dr. Wormith's conclusion at pages 42 and 43 of his risk assessment report.

that he possessed the full ability to participate in programming.[906] By contrast, Crown risk assessor, Dr. Lohrasbe, diagnosed Mooswa with APD.[907] In considering the design of appropriate treatment for Mooswa, Dr.Lohrasbe opined "that ideally there should be short incarceration, then long supervision". Dr. Lohrasbe agreed with defence counsel that a correctional setting provides little available Indigenous programming.[908]

Allbright J cited the Saskatchewan Court of Appeal's statement in *R v Moise* on how "Section 718.2(e) requires a sentencing judge to consider both, the unique circumstances of Aboriginal offenders which may diminish their moral blameworthiness in committing the offences for which they are charged, and any available alternatives to incarceration which exist as a result of culturally sensitive programming and supports both within and outside the Aboriginal community." [909]

Allbright J addressed the "constant theme" in the SCC and courts of appeal in considering DO applications that protection of the public is the "paramount consideration." For example, *R v Standingwater*, observed that although *Gladue* factors must be considered, it remains a fact that under Part XXIV proceedings, "there is often little alternative to imprisonment." [910] Nonetheless, in this case when considering all the evidence along and Mooswa's background, there was a notable nexus between the disadvantages which he had experienced and his involvement in the criminal justice system.[911] Thus, Allbright J was of the

[906] *Mooswa, supra* note 899, at para 63.
[907] *Mooswa supra* note 899 para 57.
[908] He was particularly of the view that "In Search of Your Warrior Program" should be made available to Mooswa. He opined that substance abuse would have to be replaced by total abstinence, and ASPD [antisocial personality disorder] countered by a deep understanding of how his thoughts, feelings, intentions, attitudes, behaviors, and relationships interrelate with one another and lead to harm to himself and to others. If Mr. Mooswa can achieve the twin goals of abstinence and insight, there is the possibility of self-control, and reduced risk; Dr. Lohrasbe's report, section "Treatability and risk management" at page 34; *Mooswa, supra* note 900 at para 49-53.
[909] *R v Moise* 2015 SKCA 39 at paras 24-26.
[910] *R v Standingwater*, 2013 SKCA 78.
[911] *Mooswa, supra* note 899, at para 113.

view that *Gladue* factors did become relevant in fashioning appropriate sentence. In this case Allbright J sentenced Mooswa to a global sentence of eleven years followed by a ten-year LTSO.[912] According to Allbright J the *Gladue* factors had to serve to ameliorate a sentence that would otherwise be imposed.[913]

This case suggests that it is an error of law for a judge to throw their hands in the air and state that the availability of restorative justice/rehabilitation resources aimed at remedying *Gladue* related risks/needs identified in a pre-sentence report for an Indigenous DO is simply "unknown"; a fulsome consideration must be given to restorative justice resources related to disposition and if those resources are unknown, the judge must investigate.[914]

This onus to discover such evidence is not only on defence counsel or the *Gladue* writer and it certainly should not rest on the risk assessors. As Allbright J stated in the following case, "where counsel fail to present such evidence, the sentencing judge must act to ensure that information is put before the court."[915] This does not necessarily mean that an LTSO order will follow; however, *Gladue* mandates that in considering the LTSO option under 753(4), judges must decide, based on sufficient evidence, how a restorative justice approach to community-based sentencing could work.

7.5 Conclusion

The SCC in *Gladue*[916] held that Indigenous peoples hold "different conceptions of appropriate sentencing procedures and sanctions" and that principles of sentencing such as deterrence, separation, and denunciation are often "far removed from the understanding of

[912] *Mooswa, supra* note 899 at para 120.
[913] *Mooswa, supra* note 899 at para 134.
[914] *Wolfleg, supra* note 666 at para 52; *Mooswa, supra* note 899 at para 105 citing *R v Moise*, 2015 SKCA 39 at paras 24-26; *Ipeelee, supra* note 646 at paras 59-60.
[915] *Mooswa, supra* note 899 at para 105 citing *R v Moise*, 2015 SKCA 39 at paras 24-26 citing *Ipeelee, supra* note 646 at paras 59-60.
[916] *Gladue, supra* note 473.

sentencing held by these offenders and their communities".[917] The Court further offered a general definition of restorative justice as:

> ...an approach to remedying crime in which it is understood that all things are interrelated and that crime disrupts the harmony which existed prior to its occurrence, or at least which it is felt should exist. The appropriateness of a particular sanction is largely determined by the needs of the victims, and the community, as well as the offender. The focus is on the human beings closely affected by the crime.

The SCC in *Gladue,* however, indicated that judges are not forced to use a restorative sanction in every case involving an Indigenous person, to the detriment of deterrence, denunciation, and separation. Instead judges must consider alternatives to incarceration when sentencing an Indigenous person when appropriate in the circumstances.[918] Post-*Gladue* and *Ipeelee*, evaluating the degree of responsibility of an Indigenous person requires a "different method of analysis"[919] which does not necessarily mandate a different result.[920] This presents judges with the task of reconciling a meaningful consideration of *Gladue* with the legislature's intent that public protection to be paramount under Part XXIV in deciding whether or not to sentence the DO indeterminately.

Previous research has cautioned that, "the lack of resources – both in the preparation of pre-sentence information, and in the availability of alternatives to incarceration – is a crucial impediment to remedying over incarceration."[921] In 2014 David Milward raised the fact that implementing *Gladue* principles requires "additional resources at every step of the sentencing process" and that "judges need additional information about the Indigenous accused's background, as well as available and appropriate alternatives to incarceration or to the traditional

[917] *Gladue*, *supra* note 473 at para 70.
[918] *Gladue*, *supra* note 473 at paras 57 and 72.
[919] *Ipeelee*, *supra* note 646 at para 59.
[920] *Kakekagamick*, *supra* note 664.
[921] *Spotlight on Gladue*, *supra* note 688.

sentencing process."[922] These Indigenous initiatives and programs also need to exist and be adequately resourced in the community.[923]

There are many factors that militate against indeterminate sentencing as a criminal justice policy which, as Milward points out, "take on a special relevance when it comes to Aboriginal DOs". One is that there is "no doubt" that "incarceration is an immensely expensive sanction to administer." [924] As of 2019, it costs an average of $125,466 per year to keep an inmate incarcerated for one year.[925] The cost associated with maintaining an individual convicted of crime in the community is 74% less than what it costs to maintain them in custody ($32,327 per year versus $125,466 per year).[926] Milward explains that this reality has led to the coining of the term "justice reinvestment" or the idea that it will be more cost effective in the long term to "invest in social programming that steers prospective offenders away from lives of crime before they even come into contact with the justice system, and to invest in more robust correctional and supervisory services for those persons who do get charged."[927]

For example, in *R v Wells*,[928] Wells was sentenced to imprisonment instead of a conditional sentence in part because of the lack of anti-sexual assault programming in his immediate community.[929] This is an area of challenge that is consistently seen in the case sample. The issue is further exacerbated when the DO lives in an urban area and is disconnected

[922] Milward, *supra* note 315.
[923] Andrew Welsh and James R.P. Ogloff, "Progressive Reforms or Maintaining the Status Quo?: An Empirical Evaluation of the Judicial Consideration of Aboriginal Status in Sentencing Decisions" (2008) 50 (4) Can J Crimin & Criminal Just 491; Debra Parkes, "Ipeelee and the Pursuit of Proportionality in a World of Mandatory Minimum Sentences" (2012) 33:3 For the Defence 22.
[924] Milward, *supra* note 315 at 630.
[925] 2019 Corrections and Conditional Release Statistical Overview: https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/ccrso-2019/index-en.aspx#b3.
[926] *Ibid.*
[927] Milward, *supra* note 315.
[928] *Wells*, *supra* note 676.
[929] Roach & Rudin, *supra* note 636 at 356.

from a remote Indigenous community where they plan to reintegrate.[930] The Truth and Reconciliation Commission of Canada in 2015 forewarned that without adequate resourcing of alternatives to imprisonment, *Gladue* reports across Canada would likely have little effect in reducing overrepresentation.[931]

My review of reported DO cases reveals some insights into judicial navigation of *Gladue* evidence at disposition. Indigenous people labelled as DO in the sample were just as likely to receive an indeterminate sentence as their non-Indigenous counterparts. Indigenous DOs were sentenced to an indeterminate sentence approximately half (21/40 or 53%) of the time. Thus, in the context of serious offences, more research is needed into whether *Gladue* is substantially impacting on whether an Indigenous DO receives an indeterminate sentence. Additionally, cases in the sample showed that the scope and content of *Gladue* information provided for DO hearings varied greatly; the way in which *Gladue* information was presented before to the courts was not uniform.[932]

Furthermore, cases in the sample highlight that the weight afforded to *Gladue* evidence in a DO hearing depends on whether judges perceive the *Gladue* report as sufficiently addressing information contained in the risk assessment reports, such as psychiatric diagnoses. Conversely, judges seemed to place little emphasis on whether the risk assessors had adequately addressed *Gladue* information. This points to a separate and relevant issue of whether the risk tools that

[930] Spotlight on Gladue, *supra* note 688.
[931] The Truth and Reconciliation Commission of Canada "Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada" Ottawa, 2015. Online: http://www.trc.ca/assets/pdf/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf.
[932] Even where the service is available, the accessibility of *Gladue* reports is subject to the availability of resources. For example, in British Columbia, *Gladue* reports can only be prepared by people who have been trained by the Legal Services Society. Cuts to legal aid from 2001 onwards placed significant constraints on the ability of the Legal Services Society to authorize *Gladue* Reports for Indigenous offenders, which are now only funded by legal aid in limited circumstances. This becomes problematic as the provision of pre-sentence information can be a key determinant of the effectiveness of *Gladue* and some consider it a reason that s. 718.2(e) has not reduced overrepresentation; Barnett & Sundhu, *supra* note 688; Spotlight on Gladue *supra* note 688.

risk assessors rely upon in conducting their reports for DO hearings are appropriate when used on Indigenous peoples. The SCC in *Ewert v Canada*[933] mandated further empirical research into this matter, which as of today still has not been produced.

This is problematic for a few reasons. First, Indigenous people are often assessed using risk assessment instruments which need further empirical research for their use on BIPOC persons, as mandated by the SCC in *Ewert v Canada*.[934] Second, *Gladue* factors can actually inflate the risk scores of an Indigenous person labelled as a DO and subsequently worsen their disposition outcome. Third, there is an expectation being placed on *Gladue* writers to adequately address psychiatric diagnoses in *Gladue* reports prepared for DO hearings, but not an expectation being placed on risk assessors to understand *Gladue.* Fourth and finally, risk is not an exact science – even the risk assessors themselves will disagree on the diagnosis and/or the appropriate course of treatment for the DO.

It is interesting to note that recently in *Kritik c R*,[935] the Quebec Court of Appeal overturned an indeterminate sentence that was based on an incomplete consideration of both types of reports. Hesler CJQ found that the trial judge's analysis, in failing to consider both the risk assessment and the *Gladue* report together, did not follow the framework that the Supreme Court prescribes in *R v Boutilier*.[936] In *Kritik* Côté J stated that "future risk assessment has always required consideration of future treatment prospects". Based on the content of the *Gladue* report, a psychiatric assessment was necessary to fully inform the Court about Kritik's future treatment prospects.[937]

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[933] *Ewert*, *supra* note 322.
[934] *Ibid.*
[935] *Kritik*, *supra* note 734.
[936] *Boutilier*, *supra* note 7 at paras 23–42.
[937] *Kritik*, *supra* note 734 at para 21.

A retributive model of sentencing that is rooted in proportionality gives effect to reduced moral blameworthiness relating to systemic discrimination in the past. Part XXIV, however, is predicated on future predictions of risk, which means great emphasis is placed on psychiatric evidence. This creates a tension between the two contrasting sentencing objectives. The principles in *Gladue* which promote a restorative justice approach and the consideration of alternatives to incarceration when sentencing an Indigenous person are arguably at odds with the public safety threshold under Part XXIV, which prioritizes deterrence and the separation of DOs from society. Ultimately, the cases explored in the sample highlight that an equal consideration of both types of reports does not necessarily always lead to a lesser sentencing option; however, a meaningful *Gladue* analysis is one that does not allow the information contained in one type of report to overshadow the other.

The case sample further showed that in determining whether an Indigenous person labelled as a DO meets this public safety threshold, judges will often limit the already narrow application of *Gladue* principles at disposition where there is evidence of resource constraints in the Indigenous community where the DO plans to rehabilitate. The cases involving judicial consideration of *Gladue* evidence showed that judicial considerations of "real-world"[938] resource limitations to Indigenous community-based rehabilitation programming was a key factor as to whether the Indigenous DO would receive the lesser sentence. Judges, in determining whether an Indigenous person labelled as a DO meets the public safety threshold test, will often limit the already narrow application of *Gladue* principles at disposition where there is evidence of resource constraints in the Indigenous community where the DO plans to rehabilitate.

[938] *Little*, *supra* note 99.

The public safety threshold requires that there be a reasonable expectation that the treatment recommendations in the *Gladue* reports (or in the risk reports) can be carried out. This expectation has to amount to more than mere hope. The case sample revealed the importance of *Gladue* reports outlining the availability of community supervision resources in the Indigenous community where the DO wishes to rehabilitate. When that information is not immediately available, judges, defence counsel and prosecutor all have a duty under s.718.2(e) to discover it for the purpose of the DO hearing.

Where there is clear evidence that the recommended community supervision and/or programming is not available, the judge's hands are often tied, and the result is devastating for the Indigenous person who has been labelled dangerous. This raises a longstanding need for there not only to be a greater description of what resources are available in *Gladue* reports, but for those resources to exist and be funded, specifically in remote Indigenous communities. Some judges in the sample further pointed to the role of Indigenous communities in accepting whether an Indigenous person may be granted re-entry into their community. Although this goes beyond the scope of this thesis as a sentencing analysis, it does point to a dire need for justice reinvestment, otherwise the Indigenous overincarceration crisis in the DO population will continue or worsen.

Despite this, some lower court judges have interpreted the "individualized assessment" mandated by *Gladue* as necessitating a "*Gladue* forward approach" to sentencing an Indigenous person labelled dangerous. For example, this approach was adopted by Pritchard J of the Saskatchewan Court of Queen's Bench in *R v Pelly*[939] who prioritizes the court's remedial role under s.718(2)(e) and refused to impose an indeterminate sentence on the basis that *Gladue*

[939] *Pelly*, *supra* note 802.

factors were present, and the undeniable role that those *Gladue* factors had played in bringing the Indigenous person, now labelled as dangerous, before the Court.[940] However, was not the predominant approach.

[940] *Ibid.*

Chapter 8: Conclusion

In this thesis I sought to better understand how and why judges determine which DOs should receive an indeterminate sentence. The SCC has pointed out that "…only offenders who pose a tremendous future risk are designated as dangerous and face the possibility of being sentenced to an indeterminate detention."[941] However, determining which DOs pose such "tremendous future risk" presents significant challenges for judges given one cannot predict the future with absolute certainty.

The Constitutionality of Part XXIV has been challenged over time, with the SCC most recently upholding the regime in 2017[942] as not contravening the rights guaranteed by sections 7, 9, 11 or 12 of the *Canadian Charter of Rights and Freedoms*.[943] As such, *R v Lyons*[944][945] remains good law. *Boutilier* clarified that all evidence related to an offender's treatment prospects is considered at *both* designation and disposition stage.[946] This is why expert testimony surrounding psychological risk assessments and treatability continues to play a central role at both stages in DO hearings.

Despite Part XXIV being constitutional, a crisis of Indigenous overrepresentation persists in the DO offender population.[947] In 2020, more than 36.3% of DOs were Indigenous[948] while representing 4.9% of the national population.[949] The SCC in *Ewert*[950] called for further research

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[941] *Boutilier*, *supra* note 7 at para 46.
[942] *Ibid.*
[943] *Charter*, *supra* note 30.
[944] *Lyons*, *supra* note 28.
[945] *Code*, *supra* note 1, ss 687-695.
[946] *Boutilier*, *supra* note 7 at 42-45.
[947] From 2002-2012, the population of incarcerated Indigenous men under federal jurisdiction increased by 34%, while the number of incarcerated Indigenous women rose by 97%; Correctional Services Canada, *CSC- Research Results: Aboriginal Offenders*, online: <http://www.csc-scc.gc.ca/publications/005007-3027-eng.shtml>.
[948]2020 Statistical Overview, *Supra* Note 16.
[949] Canadian Census, "Aboriginal Population Profile- Canadian Census 2016" online: https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/abpopprof/index.cfm?Lang=E.
[950] *Ewert*, *supra* note 322 at para 72.

into the cross-cultural validity of these psychological tools. This thesis examined the potential for cultural bias in a sentencing process and how risk scores arguably conflate systemic and background factors of Indigenous groups (marginalization, racism, residential schools, intergenerational trauma) [951] with dangerousness. Ultimately, this thesis supports a growing body of research demanding further research on the use of risk tools in the DO sentencing process, specifically how it affects, targets and indirectly discriminates against racial minorities.[952]

On a theoretical level this thesis questioned whether the use of indeterminate sentences, based on the likelihood of further violence, fits within our understanding of punishment principles. Part of this involved looking at dangerousness as a social construct, and how preventive sentencing regimes are vulnerable to key issues of discrimination that remain unsatisfactorily resolved.[953] Locking someone up indeterminately is predicated on an assumption that we can accurately define who is worthy of this extreme punishment. Here, dangerousness implies a prediction of future conduct.[954] This thesis did not find a theory of punishment that could adequately justify the use of indeterminate sentences; accepting an indeterminate sentencing regime as a legitimate form of punishment requires placing greater emphasis on utilitarian goals. While mixed theories appear to be the most promising attempt to reconcile retributive and utilitarian punishment aims, potential discrimination surrounding future predictions remains unsatisfactorily resolved and cannot be overlooked. This is particularly

[951] Hannah-Moffat, *supra* note 146, at 280-281.
[952] Hindpal Singh Bhui, "Racism and Risk Assessment: Linking theory to practice with Black mentally disordered offenders" (1999) Probat J 46 (3) 171; William Alex Pridemore "Review of the literature on risk and protective factors of offending among Native Americans" (2004) 2 (4) J Ethn Crim Justice 45; Barbara Hudson and Gaynor Bramhall, "Assessing the other: Constructions of Asianness in risk assessment by probation officers" (2005) 45(5) Brit J Criminol 721; Bernard Harcourt, *Against Prediction: Profiling, Policing and Punishing in the Actuarial Age* (Chicago: University of Chicago Press, 2007).
[953] Slobogin, *supra* note 368; Slobogin, *supra* note 364 at 110.
[954] Prins, *supra* note 346 at 300.

heavy, and warrants further philosophical inquiry given the high social and financial cost of indeterminate sentences.

The substantive chapters of this thesis utilized exploratory case analysis to unpack two themes relevant to DO disposition: 1) the relationship between the DO and their victim; and 2) the Indigeneity of the DO. The cases highlighted different ways in which indeterminate sentences are primarily contingent on judicial interpretations of risk reports. Although "fear of the violent stranger"[955] has been a central driver of DO policy and legislation in Canada, many DOs were in fact family members or intimate partners of the victims.

This thesis looked at the way in which courts in these cases responded to victim offender relationships in the face of violent and/or sexual offending and societal attitudes towards women and children.[956] It is not entirely clear in the case law how the concept of aggravating factors play into a regime that focuses entirely on public safety not proportionality. Victim-offender relationship dynamics become more relevant as they assist in answering the public safety threshold test under s.753(4.1). Overall, the nature of the relationship (stranger versus intimate partner/familial) did not appear to have any significant impact on the decision to order indeterminate detention.[957] Instead, it appeared to matter to the extent that it could inform expert risk assessment reports. Hence it appeared that the random and unpredictable nature of stranger crime may influence risk assessments through the degree to which risk could be managed in the community. Thus, Part XXIV remains a sentencing regime focused on preserving "public safety" through the management of risk.[958] Regardless of the relationship between victims and DOs the

[955] Grant, *supra* note 222.
[956] *Friesen*, *supra* note 515, at paras 50, 208, and 309.
[957] The exploratory analysis for this chapter involved examining a total of 72 out of 101 cases from the total case sample.
[958] *Code*, *supra* note 1, s752.1(2).

most important factor considered at disposition appeared to be the DO's psychiatric diagnosis and its implications for the DOs future treatment prospects.

It is possible that the risk tools themselves are geared towards finding heightened risk amongst stranger offending. Given judicial reliance on risk reports in DO hearings, it was difficult to tell whether any potential biases stem from the risk reports themselves or from the ways in which judges are interpreting risk scores. Whether men who offend violently against strangers are in fact more likely to reoffend, and less likely to be managed in the community, is beyond the scope of this thesis. As the sample of those familial cases was so small, I am flagging this as an issue for further research.

The second substantive chapter of this thesis examined how Canadian courts are applying *Gladue* principles under Part XXIV.[959] Despite the SCC's decisions in *Gladue* and *Ipeelee*, Indigenous people continue to be increasingly over-represented in the prison population, including the dangerous offender population. The SCC has recognized that racism, colonialism, and intergenerational trauma inform these disturbing statistics.[960] The caselaw showed that Indigenous DOs were just as likely to receive an indeterminate sentence as their non-Indigenous counterparts. This raises questions as to whether *Gladue* is having any real impact at disposition in DO hearings. It is a "well established" practice to apply *Gladue* principles to DO hearings involving an Indigenous offender.[961] However beyond a couple of paragraphs in *Boutilier*, there has been little direction from the SCC as how to apply *Gladue* to Part XXIV proceedings, which has led to an inconsistent approach.

[959] *Code*, supra note 1, at s.718.2(e); *Gladue*, *supra* note 473.
[960] *R v Williams*, [1998] 1 SCR 1128, at para 58; *Gladue*, *supra* note 473 at para 65; *Ipeelee*, *supra* note 646 at para 61.
[961] *Radcliffe*, *supra* note 696.

One of the most problematic findings with regard to Indigenous peoples caught in the Canadian correctional system, including the DO population, is that they tend to score significantly higher than their non-Indigenous counterparts on most risk factors.[962] Critics assert that psychological risk assessments often place the Indigenous individual in an unfavorable light, as they tend to score higher on most risk instruments. Studies have also found that in regards to the prediction of violent recidivism, there were no differences between Indigenous and non-Indigenous offenders. It is difficult to separate the problematic issue of risk assessments from judicial decision-making at disposition stage in DO hearings as *Gladue* reports and risk assessment reports are linked to the decision of whether or not the DOs receives an indeterminate sentence. Here, the case sample showed some ways in which *Gladue* reports and risk reports appear somewhat at odds with one another. Part XXIV prioritizes public protection and prevention of future crime. However, reducing sentence based on moral blameworthiness is rooted in a retributive model of sentencing – that a sentence must be proportionate to the offender's past conduct and degree of moral blameworthiness for that conduct. Thus, the first branch of the *Gladue* framework sits uneasily within a preventive regime like Part XXIV in which disposition is based mainly on future predictions of risk.

Some DOs in the sample did receive a lesser sentence where the judge was satisfied that the *Gladue* report successfully addressed the issues raised in the psychiatric risk report.[963] This appeared to force *Gladue* information into risk narratives rather than vice versa, which appeared

[962] *Ewert*, *supra* note 322; In 2018, the SCC in *Ewert* raised such problematics regarding the appropriate use of actuarial risk assessment instruments in the criminal justice system. The case, which involved a Parole Board of Canada hearing, highlighted questions about the accuracy of the use of risk assessment tools for Indigenous individuals within the broader Canadian criminal justice system and a concern that cross-cultural bias may be implicitly built into the risk tools, resulting in inaccurate scores for Indigenous individuals. Ultimately, the SCC called for further research into the use of standardize risk assessments on Indigenous groups to ensure those scores are valid.

[963] See for example Justice Cole's reasoning in *R v Gardner*, 2016 ONCJ 45.

to obscure the systemic causes of risk amongst Indigenous DOs. For example, one factor that seemed to influence whether the Indigenous DO received an indeterminate sentence was the degree to which judges saw the *Gladue* report or *Gladue* information contained in the risk report as successfully addressing concerns raised in the risk reports or if the Gladue report was seen as failing to take into account the DOs "key criminogenic factors."[964] The judges were willing to reduce moral blameworthiness in part arising out of the *Gladue* factors and trauma suffered by the DO in their childhood but noted that none of the complaints about the risk report in light of *Gladue* went "to the significance of the doctor's opinion."[965] In that case the judge pointed out the failure of the *Gladue* report writer to address the DO's diagnosis."[966]

In another case where the *Gladue* report also contained mental health evidence[967] the judge described how the evidence and testimony in the *Gladue* report successfully "addressed his risk factors."[968] There are undeniable links between the *Gladue* factors and colonialism as root causes for the DO's diagnosis. This appears to be something *Gladue* writers should be addressing in the future.

I noted in the case sample that some judges refused to sentence the Indigenous DO indeterminately and chose to give greater weight to the systemic role that their *Gladue* factors played in bringing them before the court. In that case they applied a "*Gladue* forward approach" and raised the importance of judges "playing a remedial role" to help remedy the problem of Indigenous overincarceration.[969] This highlights the importance judicial adoption of an approach

[964] *Roper*, *supra* note 758 at para 134.
[965] *Roper*, *supra* note 758 at para 162.
[966] *Roper*, *supra* note 758.
[967] *Gardner, supra* note 809 at para 72.
[968] *Gardner, supra* note 809 at para 93.
[969] *Pelly*, *supra* note 802.

that prioritizes *Gladue* principles when crafting a proportionate sentence.[970] An "individualized assessment" necessitates a "*Gladue* forward approach" to sentencing an Indigenous DO under Part XXIV, whereby a judge prioritizes their remedial role under s.718(2)(e) and refuses to impose an indeterminate sentence on the basis that high *Gladue* factors are present, given the undeniable role that *Gladue* factors have played in bringing the Indigenous person, now labelled as dangerous, before the Court. This approach was adopted by Pritchard J of the Saskatchewan Court of Queen's Bench in *R v Pelly*.[971]

This thesis also found that despite SCC mandates, logistical challenges in monitoring an Indigenous DO post-sentence in the community were used to justify indeterminate sentences. In one case the required programming was deemed unavailable.[972] In a second case the judge found the only suitable sex offender programming for the Indigenous DO was in prison.[973]

Overall, this thesis points to a need for a contextualized approach to understanding risk within Canada's DO population. Such an approach involves recognizing the undeniable role that *Gladue* factors have played in bringing the Indigenous person into a DO hearing and socio-legal implications (based on race and gender) of heavy reliance on risk tools. It also necessitates judges to identify pre-existing norms and underlying assumptions associated with risk that further systemic racism when crafting a fair and appropriate sentence.

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[970] *Gladue*, *supra* note 473 at para 66; Through s. 718.2(e) sentencing judges are required to pay particular attention to the circumstances of Indigenous offenders and recognize that the systemic disadvantages and marginalization faced by Indigenous peoples must inform their moral blameworthiness and the proportionality of sentences for Indigenous offenders. In *Gladue*, the SCC interpreted s. 718.2(e) as requiring sentencing judges to consider the following two branches of principles in sentencing decisions for Indigenous offenders:
a) The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and b) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.
[971] *Pelly*, *supra* note 802.
[972] *Moore*, *supra* note 874.
[973] *Bourdon*, *supra* note 855.

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Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld).
Legal Aid, Sentencing and Punishment of Offenders Act 2012 (UK).
Penalties and Sentences Act 1992 (Qld).
Prevention of Crime Act 1908 (UK).

Appendix

Table 9: Summary of Substantive Amendments to DO/LTO Provisions in Part XXIV
The following table is a summary of all the *Tackling Violent Crime Act* amendments to Part XXIV. As of 2018, Part XXIV has remained essentially the same since these legislative amendments in 2008:

Section	Type of Amendment	Amendment
s.752	New	New definitions of "designated offence," "long-term supervision" and of "primary designated offence."
752.01	New	The prosecutor's duty to inform the court about whether a dangerous offender (s.753) or long-term offender (753.1) application will be made when offender convicted of a SPIO (designated offence) and also convicted previously at least twice of a designated offence and was sentenced to at least two years of imprisonment for each of those convictions.
752.1 (1)	Amended	On application by the prosecutor, if the court has reasonable grounds to believe that the offender might be found to be a DO under 753.1(2)(a) or a LTO under 753.1, the court no longer has discretion to remand an offender for assessment.
752.1 (2)	Amended	The risk assessor, who must conduct his or her assessment of the offender within 60 days of an application being brought by the Crown per 752.1(1), now has 30 days (previously 15 days) to file that report after it is completed and make copies available for the Crown and defense.
752.1 (3)	New	On application by the prosecutor, the court may now, if they find reasonable grounds, extend the deadline for filing the assessment report by 30 days.
753 (1)	Amended	The court no longer has discretion at designation; once the offender is found to meet the DO criteria under s.753(1)(a) or (b), the court must (previous wording of "may" changed to "shall") find that offender to be a DO.
753 (1.1)	New	An offender who has been convicted of a listed "primary designated offence" (punishable by minimum 2 years imprisonment) and has previously been convicted and sentenced to two such primary

		offences, is presumed to meet the DO criteria unless the offender can prove otherwise on the balance of probabilities.
753 (4)	Amended	The court now has gained discretion at the sentencing phase: If the court finds the offender to be a DO (which previously carried a mandatory indeterminate sentence), the court "may" impose an indeterminate sentence per s.753(4)(a), impose a LTSO up to 10 years community supervision combined with a minimum 2 years imprisonment per s.753(4)(b) or a fixed sentence per s.753(4)(c).
753 (4.1)	New	The court "shall" impose an indeterminate sentence on a DO unless it is satisfied by the evidence adduced during the DO hearing that there is a "reasonable expectation" that a lesser measure under paragraph (4)(b) or (c) will adequately protect the public against the future commission by the offender of murder or SPIO. This is a codification of principles of proportionate sentencing under Part XXIV from *R. v. Johnson*.
753.01	New	If a DO is later convicted of a SPIO, or breaches a LTSO, the court "shall" remand the offender for assessment, after which the Crown does not have to establish the DO criteria and may apply for an indeterminate sentence, or a new LTSO.

Table 10: Some Widely Used Risk Assessment Tools[974]

- Violence Risk Appraisal Guide [VRAG] – assesses the risk of recidivism for men who have committed serious, violent or sexual offenses;[975]
- Sex Offender Risk Appraisal Guide [SORAG] –assess the risk of violentrecidivism for adult male offenders;[976]
- Rapid Risk Assessment of Sex Offender Recidivism [RRASOR] – assesses risk of sex offence recidivism;[977]
- Level of Supervision Inventory - Revised [LSI-R] – assesses the needs of the offender and risk of general criminal recidivism;[978]
- Statistical Information on Recidivism - Revised 1 [SIR-R1] – assesses offender re-integration potential;[979]
- Static-99 - assesses risk of sex offence recidivism;[980]
- Static- 2002 - assesses the risk of sexual and violent recidivism among adult male sexual offenders;[981]
- Sex Offender Need Assessment Rating [SONAR] – assesses change in risk among sexual offenders;[982]
- Hare Psychopathy Checklist-Revised [PCL-R] – assesses criminal psychopathy;[983]
- HCR-20 Version 3 – Following Versions 1 and 2 of the HCR-20, V3 embodies and exemplifies the Structured Professional Judgment (SPJ) model of violence risk assessment. This structured professional judgment tool generates a score of risk from a consideration of 20 key (static) violence risk factors and their relevance to the evaluee at hand (dynamic).[984]

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Table 11. Stranger DO Cases & Sentencing Outcomes (Total 45 Cases)
Total cases in the sample where the victim(s) of predicate offence and DO are strangers.

Stranger DO Case	**Adult or Child Victim**	**DO Disposition**
R v Teneycke 2018 BCPC 60	Two adult store clerks	Indeterminate (*Gladue*)
R v Foulds 2018 BCSC 1809	17-year-old girl	Indeterminate
R v Heaton 2018 BCPC 136	Woman in 30s	Indeterminate
R v Awasis 2016 BCPC 0219	Two adult women	Indeterminate (*Gladue*)
R v Haley 2016 BCSC 1144	Male adult victim	Indeterminate (*Gladue*)
R v Patel 2018 BCSC 412	Transgender adult victim	Indeterminate
R v Dadmand 2018 BCSC 729	Multiple adult women	Indeterminate
R v Blanchard 2018 ABQB 205	Adult woman	Indeterminate
R v MacDonald 2016 ABPC 300	Adult male	Indeterminate
R v John 2018 SKPC 023	Two adult men	Indeterminate (*Gladue*)
R v Morrison SKQB 256	Elderly woman in 70s	Indeterminate (*Gladue*)
R v Potter 2018 SKPC 60	9-year-old boy	Indeterminate
R v Starblanket 2017 SKPC 5	Adult male	Indeterminate (*Gladue*)
R v St Cyr 2018 SKQB 295	Adult male	Indeterminate
R v Mooswa 2016 SKQB 122	Adult male	Fixed + LTSO (Gladue)
R v Pelly 2018 SKQB 160	Adult male	Fixed + LTSO (*Gladue*)
R v Pechawis 2017 SKPC 009	Two adult males	Fixed + LTSO (*Gladue*)
R v Kirton 2018 MBQB 20	Two adult males	Indeterminate (Gladue)
R v Steele 2016 MBQB 147	Three adults	Indeterminate (*Gladue)*
R v Ahmed 2017 ONSC 3491	Adult woman	Indeterminate
R v Blake 2016 ONSC 2204	Adult couple	Indeterminate
R v Brown 2017 ONSC 561	Two adult men	Indeterminate
R v Dunlop 2018 ONSC 1076	Adult man	Indeterminate (*Gladue*)
R v FC 2018 ONSC 561	11-year-old girl	Indeterminate
R v JW 2016 ONSC 408	18-year-old girl	Indeterminate (*Gladue*)
R v Kozovksi 2018 ONCJ 5	Elderly man in 70s	Indeterminate
R v Lund 2016 ONCJ 858	Children and animals	Indeterminate
R v Robertson 2018 ONSC 2226	21-year-old woman	Indeterminate
R v Simpson-Fry 2016 ONCJ 532	Adult woman	Indeterminate
R v Williams 2018 ONSC 2030	Adult woman	Indeterminate
R v MacArthur 2017 ONSC 58	Adult woman and daughter	Indeterminate
R v McManus 2018 ONSC 1714	Two adult bankers	Indeterminate

R v Wabasse 2017 ONSC 1269	Adult male	Fixed + LTSO (*Gladue*)
R v TR 2017 ONSC 7182	12-year-old boy	Fixed + LTSO (*Gladue*)
R c Auguste 2018 QCCQ 1994	Adult couple	Indeterminate
R c Allard 2018 QCCQ 7114	Three children	Indeterminate
R c Boies 2017 QCCQ 956	Two girls under 18	Indeterminate
R c Bolduc 2018 QCCQ 7460	Adult men and women	Indeterminate
R c Duperron 2017 QCCQ 19763	Young girl	Indeterminate
R c Paillé 2017 QCCQ 11021	Two adult men	Indeterminate
R c Bérubé 2016 QCCQ 10326	Adults	Fixed + LTSO
R c Belfoy 2018 QCCQ 3025	Young girl	Fixed + LTSO
R c Mallette 2017 QCCQ 11966	Adults	Fixed + LTSO
R c Mequish 2016 QCCQ 2200	Adult woman	Fixed + LTSO (*Gladue*)
R v Boalag 2017 NLPC 0113A00338	Two adult women and one 15-year-old girl	Indeterminate

Table 12. IPV DO Cases and Sentencing Outcomes (Total 19 Cases)
Total Cases in Sample where Predicate Offence involved IPV (Intimate Partner Violence)

Case Name	**Relationships DO & Victim at Time of Predicate Offence**	**Disposition Outcome**
R v Clayton 2018 BCSC 1671	Dating	Indeterminate
R v Roper 2016 BCSC 977	Dating	Indeterminate
R v Tom 2017 BCSC 452	Dating	Indeterminate
R v Miller 2016 ABPC 59	Dating	Indeterminate
R v Moore 2016 MBQB 116	Common-law	Indeterminate
R v Bourdon 2018 ONSC 3431	Dating	Indeterminate
R v Eamer 2017 ONSC 2549	Dating	Indeterminate
R v Korecki 2016 ONSC 3654	Common-law	Indeterminate
R v Ridgeway 2016, ONSC 4222	Common-law	Indeterminate
R v Simpson 2016 ONSC 7767	Common-law	Indeterminate
R v TW 2017 ONSC 3669	Common-law	Indeterminate
R v JDP 2017 ONSC 2953	Dating	Indeterminate
R v Malakpour 2018 BCCA 254	Married but separated	Fixed + LTSO (on appeal)
R v Burnouf 2016 SKPC 122	Common-law	Fixed + LTSO
R v Gardner 2016 ONCJ 45	Common-law	Fixed + LTSO
R v Cook 2017 ONSC 1434	Dating	Fixed + LTSO
R v Jararuse 2018 NLSC 118	Common-law	Fixed + LTSO
R v Toulejour 2016 SKQB 84 new	Common-law	Indeterminate
R v Cleave 2016 YKTC 2 new	Former Common-Law	Fixed + LTSO

Table 13. Familial DO Cases and Sentencing Outcomes (Total 8 Cases)
Total Cases where Predicate Offence Included a Family Member(s)

Case	Victim(s)	DO's Relationship to Victim(s)	Disposition
R v TLP 2017 BCSC 1868	4 x children 4-10	Uncle	Fixed + LTSO
R v Hunter 2018 ABPC 287	34-year-old woman	Third Cousin	Fixed + LTSO
R v SPC 2017 SKQB 24	2 x girls 10-14	Father	Fixed + LTSO
R v KC 2017 ONSC 5803	4 x girls under 8	Father and Uncle	Indeterminate
R v AAG 2017 ONSC 3681*	1 boy 1 girl	Step-Father	Indeterminate
R v MM 2018 Carswell Ont 2276*	Multiple girls under 16	Father	Fixed + LTSO
R v CB 2016 ONCJ 209	5 children <16	Uncle	Fixed + LTSO
R c Jaramillo 2018 QCCQ 4647	2 girls 8 & 10	Father	Fixed + LTSO

Table 14. Acquaintances/Other Relationships Category Cases (Total 29 Cases)

Case	DO's Relationship to Victim	Disposition
R v Hamer 2018 BCSC 783	Friends	Indeterminate
R v Jones 2017 BCSC 2349	Child Neighbour	Fixed + LTSO
R v Cosman 2016 ABQB 170	Acquaintances	Indeterminate
R v Lonechild 2017 SKQB 338	Acquaintances POD	Fixed + LTSO
R v Obey 2016 SKPC 031	Brother of Partner	Fixed + LTSO
R v Slippery 2016 SKPC 131	Acquaintances	Fixed + LTSO
R v Dumas 2018 MBQB 49	Acquaintances	Indeterminate
R v Okemow 2017 MBQB 118	Acquaintances	Indeterminate
R v Inacio 2018 ONSC 6617	Acquaintances	Indeterminate
R v Kebokee 2018 ONCJ 173	Acquaintances	Indeterminate
R v Ryan 2017 WCB 140	Work Colleagues	Fixed + LTSO
R v Smith [2018] OJ No 5123	Lawyer	Indeterminate
R v Morgan-Baylis 2018 ONSC 5815	Acquaintance	Fixed + LTSO
R v Avadluk 2017 NWTSC 51	Acquaintance	Indeterminate
R v Kodwat 2017 YKTC 26	Acquaintance POD	Fixed + LTSO
R v Skookum 2016 YKTC 62	Acquaintance POD	Fixed + LTSO
R v Bisson 2017 ONCJ 419	Acquaintance	Fixed + LTSO
R v Sutherland 2016 BCPC 0072	Cohabitants in Facility	Indeterminate
R v Thurley 2018 BCPC 225	Probation Officer	Fixed + LTSO
R v Anderson 2018 BCSC 2528	??	
R v Gronlund 2016 SKQB 156	Fellow Inmate	Indeterminate
R v Bowman 2018 MBQB 167	Sex trade workers	Fixed + LTSO

R v Wong 2016 ONSC 6362	Drug dealer partners	Indeterminate
R c Desrochers 2018 QCCQ 2592	Halfway House Worker	Indeterminate
R c Mataev 2016 QCCS 650	Procuring Prostitution	Indeterminate
R c Surprenant 2017 QCCQ 20947	Correctional Staff Prison	Indeterminate
R c Chemama 2016 QCCS 4472	Sex Trade Workers	Indeterminate
R v Ellis 2016 YKTC 44	Sex for Money	Fixed + LTSO
R v Hamel 2017 ONCJ 44	Treatment Centre Worker	Fixed +LTSO