

Risk Assessments and their Contribution to the Overincarceration of Indigenous Offenders

Jessica Shabtai

INTRODUCTION

It is easy to understand the appeal of standardized tools in assessing risk. Humans are fallible and subject to biases. If we could reduce that bias, maybe there would be justice for Colten Boushie, Cindy Gladue, and all of Canada's Missing and Murdered Indigenous Women and Girls.

Wouldn't it be great if we could take the bias out? To take out the risk of unskilled assessment? At face value, the answer is yes. Unfortunately, it requires taking the human element out of a human problem. People are more than a series of yes and no questions. There is a lot of gray area, and even the best tools cannot account for all the nuances of human behaviour, including participation in criminal activity.

While tools may help us in predicting human behaviour, overreliance on mechanical measures can have devastating consequences, particularly for the most vulnerable members of our communities.

INDIGENOUS PEOPLES AND CRIMINAL LAW

Before discussing the application of risk measurement to Indigenous people, a brief orientation to the population is necessary. Indigenous communities in Canada fall into three distinct subgroups: First Nations, Inuit and Métis. Even within these groups, there are substantial differences. The term First Nations, in particular, is used to refer to at least 617 distinct subgroups. One common factor is a shared history of colonization and marginalization by settlers in the land we know as Canada.

Nunavut Inuit experienced colonization through:

- Forced relocations
- Residential schools
- The slaughter of sled dogs by RCMP
- The imposition of foreign legal and social structures

Clinicians are typically trained in a western colonial system, and tools are developed in that context. In applying a colonial framework to Indigenous peoples, professionals are ignorant to potential cultural differences in various facets of daily life that contribute to both resilience and risk, perpetuating Canada's colonial legacy. Using these tools both reflects and perpetuates a system that is based on colonial values and excludes Indigenous voices from the narrative. It assumes that constructs of risk are the same cross-culturally despite evidence to the contrary contributing further to systemic discrimination. Systemic discrimination exacerbates the problem of over-incarceration of marginalized groups which further marginalizes individual members, making them more likely to engage in criminal activity, creating an endless cycle.

None of this should be taken to suggest that all Indigenous people engage in criminal behaviour, or that every Indigenous person has experienced trauma. It should also not be taken to suggest that Indigenous people are purely victims. Along with trauma, there are many strengths and a great deal of resilience.

HISTORY AND USAGE OF RISK ASSESSMENT

Psychologists routinely make assessments of strengths and needs, but there is a reluctance to predict a specific individual's propensity to engage in a behaviour, and often for very good reason. If nothing else, human behaviour is predictably unpredictable.

The consequences of being wrong about a person's level of risk of recidivism (re-offending) can be devastating. If the clinician overestimates risk, people who would not commit further harm may face harsher penalties. If the clinician underestimates risk and restrictions are lifted, an innocent party may be harmed. It is only natural then that social scientists would want to increase their accuracy through the creation of objective measures.

Risk assessment measures were developed to identify safety needs of individuals and society, and more specifically, to assess the likelihood of recidivism. They vary in their methodology but typically involve checklists and structured clinical interviews that are scored to determine the level of 'risk' to society.

The legal system typically uses these measures to identify safety concerns for the community. The result for the individual is generally greater restrictions on freedom and personal autonomy. Currently, in Canada, risk assessments are used at various stages in the criminal law system, including:

- Courtroom decisions such as sentencing
- Correctional settings including security designations and associated restrictions on freedom
- Forensic psychiatry
- Decisions to grant probation and parole
- Ongoing assessment of parolees
- Eligibility and access for treatment
- Supervision conditions and intensity

Risk assessments typically measure some combination of the following eight factors:

1. Criminal history
2. Pro-criminal attitudes
3. Pro-criminal associates
4. Antisocial personality patterns
5. Employment & education
6. Family/marital factors
7. Substance abuse
8. Leisure/recreation

Risk assessments set out to ease the process of identifying risks to public safety and treatment needs of offenders. While both are pressing needs, it is not clear that risk assessments are as useful in achieving those objectives as advocates purport them to be. In the first place, their predictive utility is limited. Richard Rogers has indicated that for the high-risk category, the most well-supported tools are only accurate in predicting risk 90% of the time with a false-positive rate of as high as 68%. While 90% may seem like a sufficiently high value at face value, a 68% false-positive rate suggests that the 'high risk' label is applied to a large number of people who do not pose a threat to public safety. The overly broad net created by risk assessment measures is inconsistent with the presumption of innocence which is purported to be the 'golden thread' that holds together the criminal law system.

EWERT, GLADUE THE CHARTER

R v Ewert

Jeffrey Ewert is a Métis man who was convicted of attempted murder in 1984. He was eligible to apply for day parole in 1996 and full parole in 1999.

In 2000, Mr. Ewert filed a grievance with Correctional Services Canada over the use of five risk assessment measures that were routinely employed to assess risk while in custody. He alleged that the tools created a barrier to his release and that they lacked evidence of predictive utility for Indigenous offenders. Correctional Services Canada dismissed his grievances, and he continued to appeal the decision until the matter reached the Supreme Court of Canada in 2018.

A majority of the Supreme Court ruled that they did not believe Mr. Ewert had demonstrated that there was a breach of his Charter rights on the balance of probabilities. However, they found that "continuing to rely on the impugned tools without ensuring that they are valid when applied to Indigenous offenders" violated the *Corrections and Conditional Release Act*.

Charter of Rights and Freedoms

The Supreme Court considered whether the tools violated the principles of arbitrariness or overbreadth. With all due respect to our highest court, I must disagree with their conclusion that they did not. Once the court accepted that the tools are not known to be valid, it categorically follows that the results of the measures will be overbroad and arbitrary.

The limited data available identifies that even if tools are valid, they have lower predictive utility for Indigenous offenders. It is indisputable that public safety is a legitimate objective. But, without any indication that risk assessment measures provide any better accuracy than a coin flip's 50%, it is unreasonable to conclude that there is no violation of the principle of arbitrariness.

Correctional Services Canada uses all of the impugned measures to determine security ratings. These ratings have a direct impact on restrictions of freedom. A poorly designed and arbitrary tool will capture offenders who are unlikely to re-offend within the high-risk designation, contributing to the gross overrepresentation of Indigenous Peoples. Gross disproportionality is also evident in the high burden placed on the offender who may have limited resources in challenging a powerful state.

A Brief Note about R v Gladue

The Supreme Court in *R v Gladue* emphasized that s. 718.2(e) of the Criminal Code of Canada requires consideration of an offender's particular circumstances, especially in the case of Indigenous offenders. These circumstances are intended to both inform decisions of moral blameworthiness and to identify any appropriate alternatives to incarceration.

Unfortunately, specific risk factors that serve to mitigate moral blameworthiness are frequently cited as criteria that increase levels of risk. These factors are often rooted in intergenerational trauma. For Indigenous offenders, this serves to perpetuate the legacy of colonialism and systemic discrimination.

RECOMMENDATIONS

1. More research is needed to address risk factors and mitigating factors that are specific to Indigenous populations.
2. Following such research, and in conjunction with the principles established in *Gladue*, risk assessments have the potential to identify **needs**. Case managers could use the identified strengths and needs to build a case plan to support offenders as they transition through the criminal law system and return to their home communities.
3. Case management of offenders as they progress through the system requires an interdisciplinary approach. Supports and discharge planning should begin at conviction and should include input from the client. A dedicated case manager should follow them and assist in structuring a plan that is sensitive to the individual offender's needs as they progress through the system.

REFERENCES

- Statute**
Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [Charter]. At s.7, s.15 [Charter]
- Criminal Code**, RSC 1985, c C-46 at s.718
- Case Law**
Ewert v Canada 2018 SCC 30
R v Gladue [1999] 1 SCR 688
- Secondary Sources**
Bloom Hy, Christopher Webster, *Essential Writings in Violence Risk Assessment and Management*, (Toronto: Centre for Addiction and Mental Health, 2007)
Canada, Public Safety Canada, *The prediction of recidivism with Aboriginal offenders: A theoretically informed meta-analysis*, by Leticia Gutierrez, Holly A Wilson, Tanya Ruggie & James Bonta (Canada, 2013)
Canada, Public Safety Canada, *what we know and don't know about risk assessment with offenders of Indigenous heritage*, by Leticia Gutierrez, L Maaike Helms & R. Karl Hanson (Canada, 2017)
Canille Emma, "Charter rights, state expertise: Testing state claims to expert knowledge" (2019) [Forthcoming in Supreme Court Law Review (2nd series), 2019]
Haag Andrew et al, "An introduction to the issues of cross-cultural assessment inspired by *Ewert v Canada*" (2016) 3:2 Journal of Threat Assessment and Management 65
Hart Stephen, "Culture and Violence Risk: The Case of *Ewert v Canada*" (2016) 3:2 Journal of Threat Assessment and Management
Kroner Daryl, "The *Ewert v Canada* judgment: Moving forward" (2016) 3:2 Journal of Threat Assessment and Management
Luther Glen and Dr. Mansfield Mela, "The top ten issues in law and psychiatry" (2006) 69 Saskatchewan Law Review 401
Hy Bloom & Christopher Webster, *Essential Writings in Violence Risk Assessment and Management*, (Toronto: Centre for Addiction and Mental Health, 2007)
Shepherd Stephane & Anthony Thalia, "Popping the cultural bubble of violence risk assessment tools" (2018) 29:2 The Journal of Forensic Psychiatry and Psychology
Shepherd Stephane & Lewis-Fernandez Roberto, "Forensic risk assessment and cultural diversity: Contemporary challenges and future directions" (2016) 22:4
Singh Jay, Sill Bjorkly & Seena Fazel, *International perspectives on violence and risk*, (Oxford Scholarship Online, 2016).

ACKNOWLEDGEMENTS AND CONTACT

Thank you to Glen Luther for encouraging me to pursue this research topic in our Indigenous Criminal Justice course and for providing support throughout the process. Thank you also to Serena Ableson for her help with the research process, and to the University of Saskatchewan College of Law for arranging printing of this poster. Thank you also to my colleague, Jasmine Redfern for encouraging me to enter this competition.

Please feel free to contact me with any questions or critiques at jessica.shabtai@usask.ca