

# The Duty to Scrutinize

Assessing the Effectiveness of Sentences for Indigenous Persons



# PART I:

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What is the duty to scrutinize?

# The obligation to assess the effectiveness of sentences for Indigenous individuals:

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- *Gladue*: prison often fails to achieve sentencing objectives, particularly for Indigenous persons; sentences for Indigenous persons must be carefully crafted to **effectively** achieve these objectives (paras 54-57, 68-69, 80)
- *Ipeelee*: if current sentencing practices for Indigenous persons are not **effectively** furthering sentencing objectives, they must change. (para 66)
- *Ipeelee*: Judges 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” to **effectively** achieve the objectives of sentencing (para 74)

# The obligation to assess the effectiveness of sentences for Indigenous individuals

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- *R v Hills*, 2023 SCC 2: SCC has repeatedly referred to longstanding doubts about whether incarceration writ large is an effective tool of deterrence (para 137)
- *Hills* and *R v Hilbach*, 2023 SCC 3: Proportionality remains at the heart of the imposition of an effective sentence. Harsher sentences are not more effective at deterring: a proportionate sentence will be more effective (*Hills* para 137, *Hilbach*, para 142)
- *Hills*: Courts should consider the effect of a sentence on the particular offender. The principle of proportionality implies that where the impact of imprisonment is greater on a particular offender, a reduction in sentence may be appropriate. (para 135)

# What is Effectiveness

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Effective: “producing a decided, decisive, or desired effect” – Merriam-Webster

Effectiveness: “the degree to which something works well and produces the result that was intended” -Macmillan

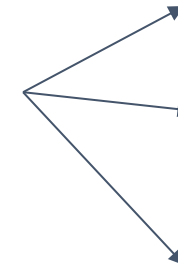
# Assessing effectiveness: Separate purposes from practices

## PURPOSES

### Purposes

**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.



## PRACTICES

- Prison
- Fine
- Suspended sentence with probation
- Conditional prison sentence
- Restitution
- Absolute and conditional discharges
- ...

# Two key ideas to the duty to scrutinize the effectiveness of the sentence

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1. Scrutinize the logistics and details of different sentences
  - Knowing about the before, the during and the after of the particular sentence under consideration
1. Scrutinize individualized impacts of the sentencing process and sanction on the offender in relation to sentencing objectives

→ **The continuum!**

# The duty to scrutinize - lower court guidance

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- **Macintyre-Syrette**, 2018 ONCA 259: Sentencing judges need details of community-based proposals to be confident in their effectiveness
- **Kritik**, 2020 QCCQ 8353: Sentencing judges must scrutinize what happens in jail and post-release to effectively reduce recidivism risk (paras 67-71)
- **Beardy**, 2017 MBPC 32: Sentencing judges must scrutinize jail's impact on the particular offender to avoid counterproductive impacts (paras 15-16)
- **Iserhoff**, 2019 QCCQ 2339: Prison may be harsher for Indigenous persons due to cultural differences, remoteness from communities, and systemic discrimination in prison; this speaks to proportionality (paras 172-173)
- **Charlie**, 2018 YKTC 44: In-custody programs “available on paper” may not always be available, accessible, or beneficial in practice (paras 56-58)



# Indigenous laws and effectiveness

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“[T]here has been a history of successful or adequate social ordering for Indigenous peoples within Canada for thousands of years.

We heard this again and again . . . people were not saying . . . “we want something more culturally appropriate,” they said, “We want something more effective.”

Everybody wants something more effective.

And it makes sense that we could be drawing on Indigenous legal traditions that are more effective to the people who develop them within the spaces where they made sense. . . . there are effective legal resources out there that we have not yet accessed in a serious way in Canada, despite 50 years of reports.”

Professors Val Napoleon and Hadley Friedland, testimony for a hearing of the Public Inquiry Commission on Relations between Indigenous Peoples and Certain Public Services in Québec, December 6, 2017,

# Indigenous laws and effectiveness: Similar purposes and objectives, different ways of meeting these

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**Fundamentally different worldviews do not preclude similarity of purposes when responding to criminal/harmful behaviour:**

- protect society [people, relationships, community]
  - contribute to respect for the law [legal relationships, processes, authorities]
  - contribute to the maintenance of a just, [healthy], peaceful and safe society
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- Hadley Friedland, “Engaging with Indigenous Laws in a Gladue Context” (Powerpoint presentation prepared for a webinar provided to Legal Aid BC Gladue writer roster, online, October 29, 2020) at 8.

Indigenous laws and effectiveness: Similar purposes and objectives, different ways of meeting these

Atikamekw purposes and objectives (Legitimus project)	Criminal Code of Canada Sentencing objectives (s 718)
Reparation	Denunciation
Promoting responsibility	Deterrence
Balance	Separation
Healing	Rehabilitation
Exclusion or banishment	Reparation
Neutralise by separation	Promoting responsibility

# Assessing effectiveness: thinking about the journey

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“I'm not a big fan of recidivism studies. Healing is a process. I don't think someone who offends and then reoffends is a failure. There may be reasons, as long as they continue to work on their healing.”

- Jonathan Rudin, testimony at the *Public Inquiry Commission on relations between Indigenous Peoples and certain public services in Québec: listening, reconciliation and progress*, February 14, 2018



# PART II

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Scrutinize the effects of the sentencing process

# Assessing effectiveness: Thinking about the process itself and its effects

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“Process is product” - Judge Barry Stuart in *R v Elias*, 2001 YKTC 501 at paras 91-94

Process has outcomes relevant to sentencing objectives:

- Circle, ADR and mediation process
- Gladue interview process
- Elders and justice committee guidance process
- PSR process
- Standard court process

E.g. “The objective of dissuasion is more likely to be achieved through a process such as the Circle, where the individual has to face the people affected by his actions, be accountable, be active in finding ways to repair the damage he has done and ways to prevent such event to reoccur.” - *R c Kawapit*, 2013 QCCQ 5935, para 72.



# PART III

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Scrutinize the logistics and the effectiveness of community-based sentences

# What do we know about the effectiveness of community-based sentences?

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Do we know...?

1. What they are exactly, what they offer, and how they will work (i.e. their details and logistics)

E.g. *Macintyre-Syrette* (2018 ONCA 259)

2. Their objective(s)

3. Their meaningfulness to the individuals involved and the community

4. Their benefits and disadvantages

5. Their expected short-term and long-term impacts

6. Do they have potential for addressing underlying causes of crime?



# Getting information about the effectiveness of community-based sentences

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- Academic and grey literature that evaluates same or similar approaches or programming
- Indigenous perspectives based on input from Indigenous community members, Elders, knowledge keepers, etc.
- Indigenous laws may help explain or contextualize proposals from Indigenous communities in terms of effectiveness
- Case law, judicial experience, and other sources of good practices could speak to what works and what doesn't

# Literature on the effectiveness of community interventions

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- Crime prevention literature provides strong empirical support for community intervention and community-based treatment
- In general, community-based treatment programs appear to be more effective than in-custody programs, especially for youth
- Programs engaging informal sources of *social* control within the community tend to be more effective than using *formal* control
- Mobilizing communities with shared sense of purpose for crime prevention through collective action can be effective
- For summary of empirical findings, see e.g. Charlotte Gill, “Community Interventions” in D. Weisburd et al, *What Works in Crime Prevention and Rehabilitation: Lessons from Systematic Reviews* (NY: Springer, 2016) 86

# Literature on the effectiveness of community interventions

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- Crime prevention literature also provides empirical support for restorative justice programs and youth mentoring
- Connecting at-risk youth and offenders to prosocial influences in community with one-on-one interactions has strong support
- Temporary home leave (similar to CSO) and work release opportunities show promise as strategies for crime reduction
- But intensive supervised probation has been found ineffective with “backfire effect” of increasing technical violations
- For summary of empirical findings, see e.g. Charlotte Gill, “Community Interventions” in D. Weisburd et al, *What Works in Crime Prevention and Rehabilitation: Lessons from Systematic Reviews* (NY: Springer, 2016) 86

# Literature on the effectiveness of Indigenous cultural continuity, connectedness, and engagement

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- Engagement in traditional cultural activities and spirituality has been shown to protect against alcohol and substance misuse
  - E.g. Rosalie A. Torres Stone et al, “Traditional Practices, Traditional Spirituality, and Alcohol Cessation Among American Indians” (2005)
- For Indigenous persons, fostering strong connections and access to their cultures, traditions, and spiritualities has been shown to meaningfully reduce the risk of recidivism
  - E.g. L. Gutierrez et al, “Culturally Relevant Programming Versus the Status Quo: A Meta-Analytic Review of the Effectiveness of Treatment of Indigenous Offenders” (2018); C.E. Burnette & C.R. Figley, “Risk and Protective Factors Related to the Wellness of American Indian and Alaska Native Youth: A Systematic Review” (2016)



# PART IV

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Scrutinize the logistics and effectiveness of prison sentences

# What do we know about the effectiveness of prison sentences?

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Do we know...?

1. What they are exactly, what they offer, and how they will work (i.e. logistics and details)  
E.g. *McKenzie* (SKPC), *Kritik* (QCCQ), *Charlie and Taylor* (YKTC)
2. Their objective(s)
3. Their meaningfulness for the individuals involved and the community
4. Their benefits and disadvantages
5. Their short-term and long-term impacts  
E.g. *Beardy* (MBPC) and *Iserhoff* (QCCQ)
6. Do they have the potential to address the underlying causes of crime?

# Getting information about the effectiveness of prison sentences

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- Academic and grey literature that evaluates programming that is anticipated to be available
- Indigenous perspectives based on input from Indigenous community members, Elders, knowledge keepers, etc.
- Indigenous laws may help explain or contextualize proposals from Indigenous communities in terms of effectiveness
- Case law, judicial experience, and other sources of good practices could speak to what works and what doesn't

# Literature on the effectiveness of prison sentences

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- Crime prevention literature provides little empirical support for prison as effective deterrent (i.e. “the deterrence hypothesis”)
- Many offences are committed in “the heat of the moment” or when intoxicated, limiting the reflective capacity to be deterred
- Members of the public typically hold inaccurate views of likely sentences for particular offences, limiting general deterrence
- Some studies find longer prison sentences can be criminogenic
- For summary of empirical findings, see e.g. Amanda E. Perry, “Sentencing and Deterrence” in D. Weisburd et al, *What Works in Crime Prevention and Rehabilitation: Lessons from Systematic Reviews* (NY: Springer, 2016) 169



# Literature on the effectiveness of in-custody programs

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- Crime prevention literature provides support for at least some in-custody programs (moving beyond “nothing works” debate)
- Cognitive-behavioural therapy has shown some success
- Some evidence of success for educational programs, vocational programs, and correctional work programs for employment
- Some evidence of success for long-term, intensive “therapeutic communities” for addiction recovery, isolated from gen. pop.
- For summary of empirical findings, see e.g. David B. Wilson, “Correctional Programs” in D. Weisburd et al, *What Works in Crime Prevention and Rehabilitation: Lessons from Systematic Reviews* (NY: Springer, 2016) 193

# Thinking about the community perspective and Indigenous law

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- When prison is seen as cruel, not meaningful, too harsh: offenders being sent to jail seen as victims. In conjugal violence, women who complained are sometimes seen as the “villain”: makes jail ineffective.

Lucy Grey, testimony at the *Public Inquiry Commission on relations between Indigenous Peoples and certain public services in Québec: listening, reconciliation and progress*, November 23, 2018

“Above all, it was felt that any penalty imposed must not worsen an already difficult situation.”

Pauktuutit Inuit Women of Canada, *The Inuit Way: A guide to Inuit culture*, 2006, p 9

→ Circles back to *Hills* and *Hilbach*: sentences that are too harsh sentences are not effective