Inhibiting Reintegration: Identifying Racial Discrimination in Parole Board of Canada Release Conditions

> "Between 2007 and 2016, while the overall federal prison population increased by less than 5%, the Indigenous prison population increased by 39%. For the last three decades, there has been an increase every single year in the federal incarceration rate for Indigenous people. Today, while Indigenous people make up less than 5% of the Canadian population, as a group they comprise 26.4% of the total federal inmate population. 37.6% of the federal women inmate population is Indigenous. I cannot help but think that the over-incarceration of First Nations, Métis and Inuit people in corrections is among the most pressing social justice and human rights issues in Canada today."
>
> - Ivan Zinger, J.D., Ph.D. Correctional Investigator, 2016-17 Report

In June 2018, the Supreme Court of Canada decision *Ewert v. Canada* found that the Correctional Service of Canada had a legal obligation to "ensure that its policies and programs are appropriate for Indigenous offenders and responsive to their needs and circumstances."[i] Justice Richard Wagner wrote that, vis-à-vis their non-Indigenous peers, incarcerated First Nations, Métis, and Inuit individuals "are more likely to receive higher security classifications, to spend more time in segregation, to serve more of their sentence behind bars before first release, to be under-represented in community supervision populations, and to return to prison on revocation of parole."[ii] The *Ewert* decision pertained primarily to the first of the issues, security classifications, but the verdict inspired this study into other ways the Canadian correctional system impedes the successful reintegration of First Nations, Métis, and Inuit individuals after incarceration.

Using publicly available data, it is possible to test whether the Parole Board of Canada (PBC) has met the standards for treatment of First Nations, Métis, and Inuit individuals laid out by the Supreme Court of Canada.[1] The 1999 Supreme Court decision *R. v. Gladue* acknowledged that as a result of "unique systemic and background factors", First Nations, Métis, and Inuit individuals are more adversely affected by incarceration than non-Indigenous people.[iii] In 2012, the Supreme Court's decision *R. v. Ipeelee* reaffirmed the *Gladue* verdict and encouraged "different or alternative sanctions" while noting that the "current levels of [Indigenous] criminality are intimately tied to the legacy of colonialism."[iv] What follows is an analysis of PBC Release Conditions datasets from 2010-2011 to 2016-2017, published by Statistics Canada, covering 254,842 cases where restrictions were imposed. What is clear is that conditions are not imposed evenly across racial groups—and alternative parole sanctions are going disproportionately to non-Indigenous individuals.

Results

There are discrepancies in the release conditions imposed upon racial groups by the PBC. Fig. 1 and Fig. 2 are proportional and absolute breakdowns of a number of release conditions by race group. The dotted white line in Fig. 1 indicates the proportion of the overall prison population that is white, the dotted black line shows the expected Aboriginal proportion (when the purple section of the graph is

[1] While the specific laws that the Parole Board of Canada must adhere to may vary from those sighted in *Gladue, Ipeelee,* and *Ewert*, the case of *Joey-Lynn Twins v. Attorney General of Canada* (2016) stated that the *Gladue* "principles must apply" to Parole Board Decisions (paras 58).

above the white line, White people are over-represented; wherever the red section of the graph is below the black line, Aboriginal people are over-represented):

Fig. 1

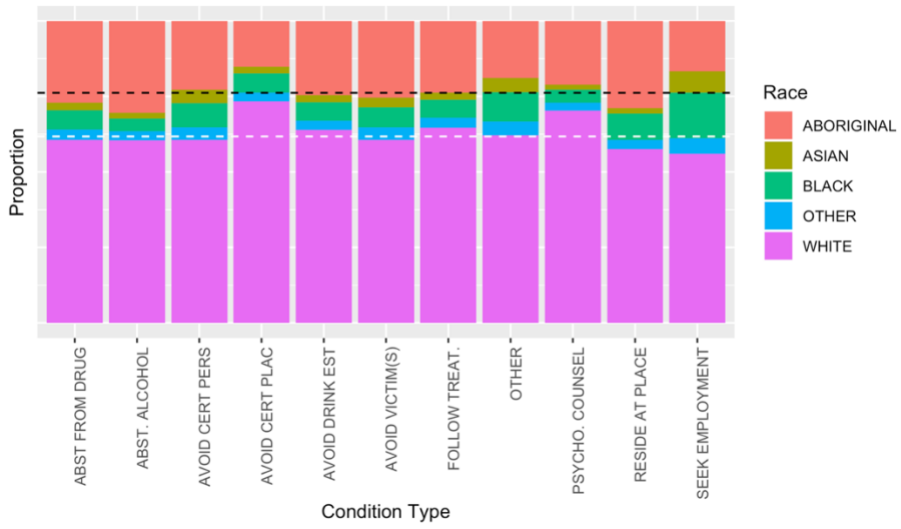
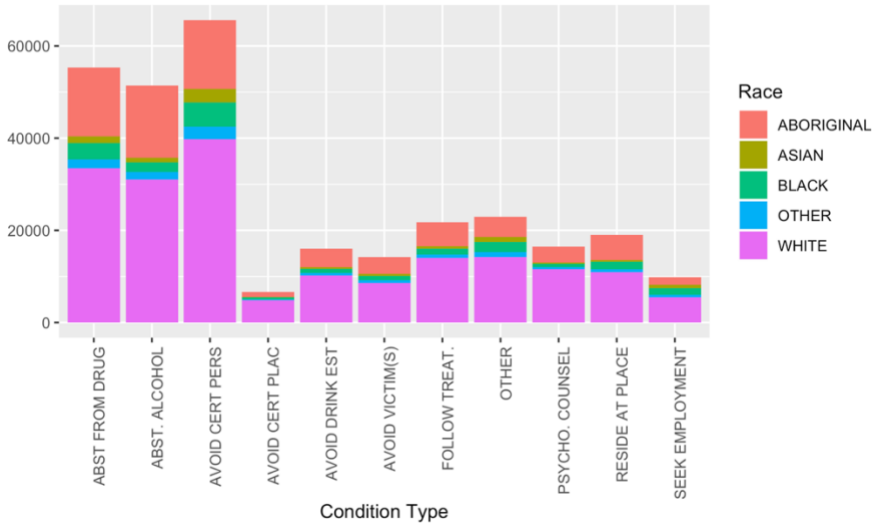
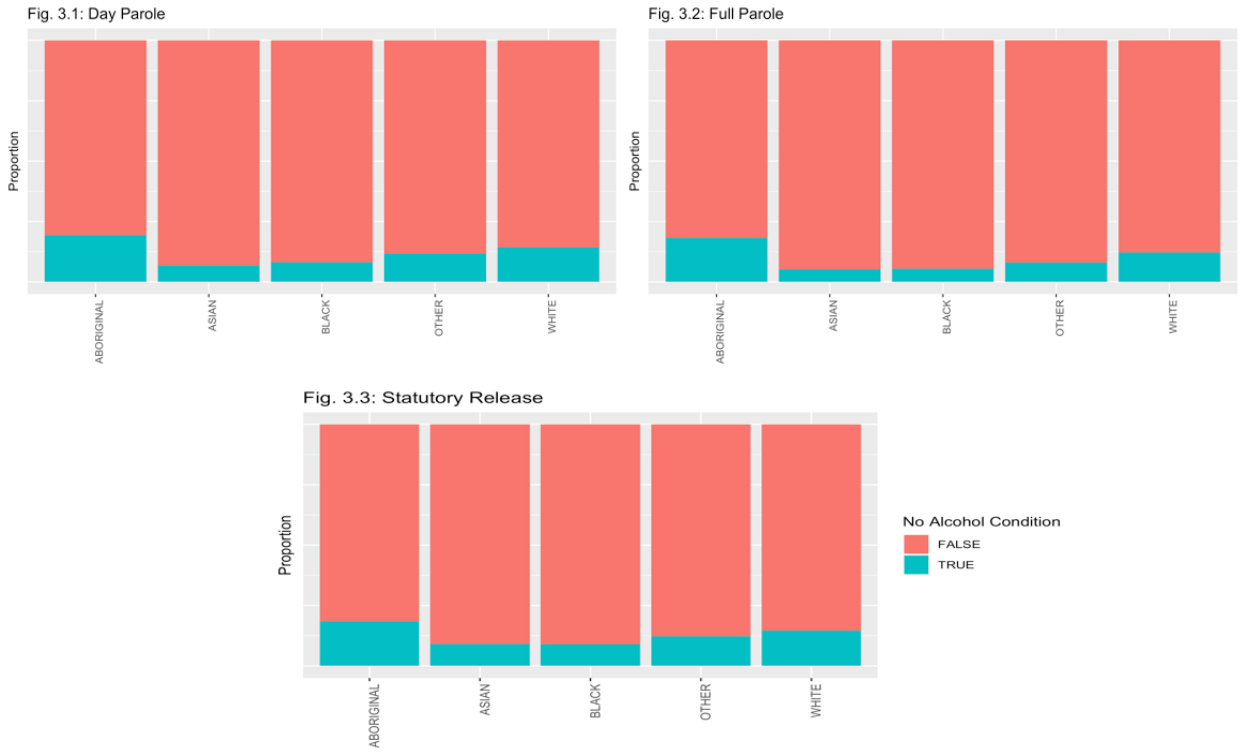


Fig. 2



Aboriginal people are perhaps most alarmingly over-represented in the “Abstain from Alcohol” category (referred to hereafter as the “No Alcohol” condition). As Figures 3.1, 3.2, and 3.3 show, this holds across all stages of parole. 19.3 percent of Aboriginals released on Day Parole receive an alcohol prohibition, compared to 14.3 percent among White people, and under 10 percent of Black or Asian people, and the numbers are nearly identical for the Full Parole and Statutory Release stages.



As Fig. 1 showed, there are three types of Release Conditions that are substantially more common than the others. However, the data clearly show that non-Indigenous individuals are being given alternative conditions at a much higher rate. Fig. 4.1 and Fig. 2 highlight some interesting trends: in Fig. 4.1, we see that non-Indigenous individuals are given the most obvious alternative to an outright alcohol ban, "Avoid Drinking Establishment", at higher rates than First Nations, Métis, and Inuit individuals. As the Supreme Court noted in R. v. Ipeelee, the "Avoid Drinking Establishment" condition is more sensible, given it does not penalize alcohol consumption in-and-of-itself, but rather removes individuals from places where they might pose a risk to the community due to their struggles with alcohol.[2]

[2] "It is therefore necessary to consider what sentence is warranted in the circumstances. Mr. Ipeelee breached the alcohol abstention condition of his LTSO. His history indicates a strong correlation between alcohol use and violent offending. As a result, abstaining from alcohol is critical to managing his risk in the community. That being said, the conduct constituting the breach was becoming intoxicated, not becoming intoxicated and engaging in violence. The Court must focus on the actual incident giving rise to the breach. A fit sentence should seek to manage the risk of reoffence he continues to pose to the community in a manner that addresses his alcohol abuse, rather than punish him for what might have been. To engage in the latter would certainly run afoul of the principles of fundamental justice." R. *v.* Ipeelee at paras 91.

Fig. 4.1: No Bars vs. No Alcohol

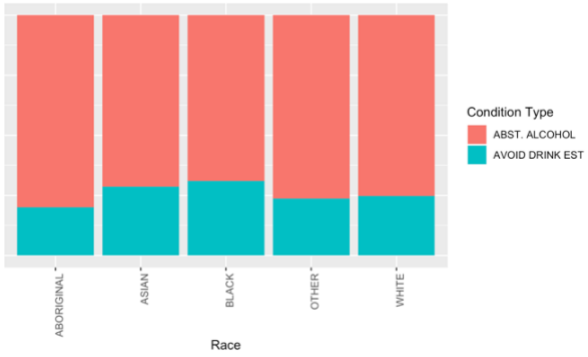


Fig. 4.2: Seek Employment vs No Alcohol

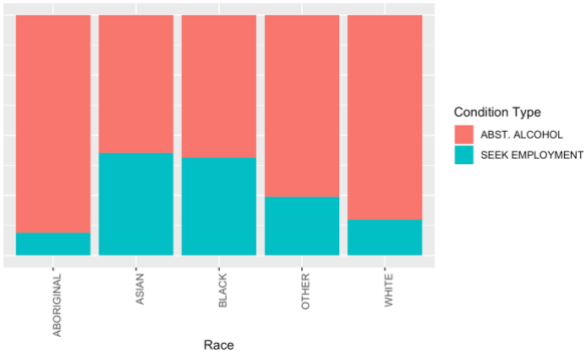


Fig. 4.2 provides evidence against perhaps the strongest justification for the discrepancy in the distribution of conditions, namely that the "No Alcohol" condition incentivizes recovery or is accompanied by more support for an individual's struggles. Far fewer First Nations, Métis, and Inuit individuals are given a "Seek Employment" condition at any stage of parole than non-Indigenous individuals. While the alcohol issues facing First Nations, Métis, and Inuit communities are well documented, so are economic issues; so why would there be such underrepresentation in the "Seek Employment" category? If the interest is protecting the community, the "Avoid Drinking Establishment" condition is a more sensible condition; if the interest is aiding the parolee in successful reintegration, the "Seek Employment" condition is just as important as the "No Alcohol" condition. The overrepresentation of non-Indigenous individuals in both of these alternative categories is something that should be examined by the PBC.

There are major limitations to the publicly available parole data, mostly as a result of efforts to protect the identities of individuals caught up in the criminal justice system. While the racial discrepancies in parole conditions above hold across all stages of parole and for offenders accused of all kinds of crimes, the public data does not have the age of individuals or specific details about the crime—such as whether alcohol was involved. This study is by no means conclusive proof of discrimination, but it is a sign that the PBC should look carefully at their decisions data to insure it adhere to *Gladue* principles. The recent Supreme Court decision *Ewert v. Canada* made it clear that the onus is on institutions to demonstrate that their procedures are not discriminatory. Thus, the PBC needs to provide an explanation for these discrepancies if changes are not made to the system as it currently exists.

Implications

As Wagner noted in *Ewert*, "substantive equality requires more than simply equal treatment" given the considerable obstacles First Nations, Métis, and Inuit individuals face upon exiting prison.[v] The 2015-2016 Auditor General's *Report on Preparing Indigenous Offenders for Release* showed that over three quarters of First Nations, Métis, and Inuit individuals exited prison directly from maximum-security or medium-security facilities "limiting their ability to benefit from a gradual release supporting successful reintegration."[vi] Furthermore, the 2015-2016 Correctional Investigator's Annual Report showed that two-thirds of the parents of incarcerated First Nations, Métis, or Inuit individuals had a substance abuse issue and 48 percent had been removed from their family home.[vii] This is to say First Nations, Métis, and Inuit individuals face more challenging path to successful reintegration. The data however show that even this insufficient standard of equal treatment is not being met.

The "No Alcohol" condition in particular is clearly being imposed disproportionately on First Nations, Métis, and Inuit individuals.[3] This discrepancy is an issue not only because it criminalizes relapses for those struggling with alcohol abuse, but also because it shapes how our society views an individual re-entering society and how that individual views themselves. In his book *Making Good: How Ex-Convicts Reform and Rebuild Their Lives,* Shadd Maruna explores the essential elements for successful societal reintegration after incarceration. Maruna argues that "to desist from crime, ex-offenders need to develop a coherent, prosocial identity for themselves."[viii] The key is to construct a powerful "self-narrative" wherein ex-offenders are recognized and even exonerated by a variety of authorities.[ix] It is not hard to see how Canada's legacy of cultural genocide, which attempted to erase First Nations, Métis, and Inuit identity, presents serious issues for the development of the sense of self and belonging that Maruna shows is vital to successful reintegration. Instead of actively working to counteract this, it appears as if the PBC is labeling First Nations, Métis, and Inuit individuals in ways that perpetuate destructive stereotypes.

Moving Forward

There are major obstacles to advocating for changes in the imposition of Release Conditions upon inmates. It is unlikely an attorney would challenge a "No Alcohol" condition imposed by the PBC. This would amount to an admission that one's client could not be trusted to abstain from alcohol and imply they were a danger to the community. Despite the "No Alcohol" condition effectively criminalizing a relapse, lawyers run the risk of keeping their clients behind bars longer if they argue against the condition's imposition.

Given the dilemma parolees and their lawyers face, it should not come as a surprise that the problems identified above are far from new. In 1991, the Report of the Aboriginal Justice Inquiry of Manitoba argued that "the present parole system is not working for Aboriginal peoples and systemically discriminates against them."[x] That same report recommended that "the practice of placing special parole conditions on Aboriginal inmates, such as abstention from the consumption of drugs or alcohol as a matter of course, cease." The data only serves to confirm what Aboriginal advocates have known for decades.

Beyond simply abolishing certain parole conditions, discretion is necessary in terms of policy solutions. In the words of Judge Robert Cawsey "everything that has worked when we're dealing with Natives has come from the Natives. I don't know of anything that has worked that has been foisted upon them from above. There is no one model of justice development."[xi] Culturally sensitive justice practices that promote healing and successful reintegration must reflect the idiosyncrasies of specific communities. Local leadership and knowledge should guide policy change. Yvonne Boyer showed that community-based justice initiatives save money and address core issues such as poverty, addiction, and homelessness.[xii] The government needs to find a way to stop impeding the reintegration and healing by limiting its use of coercive force. Phil Lane Jr. et al. discussed the need to rid ourselves of labels and

[3] While this study focuses primarily upon the "No Alcohol" condition, it is worth noting how damaging conditions that remove First Nations, Métis, and Inuit individuals from their communities can be as well. The data show that such conditions are imposed more in-line with the demographics of the prison system than the "No Alcohol" condition. Still, conditions which force an individual to avoid certain places or people being imposed more evenly does not mean that the isolating effects of those conditions are distributed evenly among all racial groups. The data does show overrepresentation in the "Reside at Place" condition requiring individuals to stay at halfway houses. That discussion is beyond the scope of this study however.

stereotypes that reinforce the belief that individuals "can't leave behind harmful habits, such as alcohol and drug abuse or family violence", urging instead that returning to healthy community structures requires systems built around positive incentives of "life-promoting, life-enhancing values, beliefs, and moral standards."[xiii]

Maruna brought up the possibility of "rebiographing as policy", noting the powerful role "redemption rituals" can play as a symbolic turning point for ex-offenders.[xiv] Maruna pushes for "positive acknowledgement or recognition of rehabilitation", something he notes is exceedingly rare because "by its nature, criminal justice is almost entirely negative."[xv] Parole is perhaps the most logical place for one of these moments of redemption to take place. There is considerable evidence that, in a First Nations context, providing a "profound sense of meaning and belonging" is the best way to ensure successful reintegration.[xvi] The current Canadian parole system appears to be actively working against First Nations, Métis, and Inuit individuals who want to replace "a personal identity of dysfunction…[with] a much richer, deeper identity anchored in culture and community."[xvii]

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[i] *Ewert v. Canada*, 2018 SCC 30, at paras 59.
[ii] Ewert v. Canada, at paras 60.
[iii] R. *v.* Gladue, [1999] 1 S.C.R. 688, at paras 68.
[iv] R. *v.* Ipeelee, 2012 SCC 13, [2012] 1 S.C.R. 433, at paras 68 + 77.
[v] *Ewert v. Canada*, at paras 54.
[vi] Auditor General of Canada, Preparing Indigenous Offenders for Release—Correctional Service Canada, (Office of the Auditor General: Ottawa, 2016), 3.11.
[vii] Annual Report of the Office of the Correctional Investigator 2015-2016, Section 4: Indigenous Corrections
[viii] Shadd Maruna, *Making Good: How Ex-Convicts Reform and Rebuild Their Lives,* (American Psychological Association: Washington DC, 2001), 7.
[ix] Ibid, 13.
[x] Aboriginal Justice Implementation Commission, 1991, *Report of the Aboriginal Justice Inquiry of Manitoba*, Chapter 12—Parole.
[xi] Quoted from: Yvonne Boyer, "Community-Based Justice Initiatives of the Saskatoon Tribal Council", in *Justice as Healing*: *Indigenous Ways, Writings on Community Peacemaking and Restorative Justice from the Native Law Centre,* Wanda D. McCaslin, Editor, (Living Justice Press: St. Paul, 2005), 205.
[xii] Ibid, 201.
[xiii] Phil Lane Jr., Michael Bopp, Judie Bopp, Julian Norris of Four Worlds International, "Mapping the Healing Journey: First Nations Research Project on Healing in Canadian Aboriginal Communities", in *Justice as Healing,* 370-371.
[xiv] Maruna, 163-164.
[xv] Ibid, 162.
[xvi] Lane et al., 376.
[xvii]Ibid, 396.