CLAIMING OUR RIGHTS

A Legal Guide for Indigenous Peoples Navigating Corrections in Newfoundland & Labrador

June 2026

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Understanding Our Rights: An Overview

This document is a companion Guide to First Light's March 2026 report, *Overrepresented and Undercounted: A Snapshot of Indigenous Adult Incarceration in Newfoundland and Labrador, 2025,* which presents a comprehensive demographic snapshot of Indigenous incarceration at all five adult correctional facilities in the province. First Light's study found that there was limited access to Indigenous cultural programming, low awareness and use of Gladue Reports, and a high rate of housing insecurity among inmates approaching release.

This Guide is primarily intended for Indigenous Peoples in Newfoundland and Labrador ("the **Province**"), including Indigenous Nations[1] and nonprofits, as well as individuals who are or have been incarcerated in any of the adult correctional facilities in the Province. We hope it will help empower Indigenous Peoples to better understand our rights as they relate to *Gladue* and to accessing cultural programming while incarcerated. It also describes options for recourse should those rights be violated. The first Section of this Guide speaks directly to the rights of Indigenous inmates. Sections of this Guide also address questions that leaders of Indigenous Nations may have relating to these issues, or questions that a concerned individual or nonprofit organization may have even if they have not personally been denied access to Indigenous cultural programming in the Province's correctional facilities.

From First Light's perspective, the issue of access to cultural programming for Indigenous inmates is not just a political or moral one, but a legal one. Readers should note, however, that the discussion of legal rights in this document reflects First Light's understanding of the law as it currently stands and how it may apply to the question of access to cultural programming. No court has yet addressed this question head on, so there is not at this point judicial confirmation of our right to such programming. This Guide helps explain how a court might consider the question, and where such a right may be rooted.

First Light encourages anyone interested in pursuing a legal claim to seek legal advice on the best way to pursue these potential arguments and legal avenues, and for advice on potential remedies based on individual circumstances.

1 The term "Nation" is used throughout this Guide to refer to any Indigenous rights-holding collective whether they identify as First Nations, Inuit, or Métis.

Gladue Factors and Reports

Gladue Factors

Indigenous individuals have a constitutionally-protected right, through the *Canadian Charter of Rights and Freedoms*, to have a judge take into consideration the way experiences of colonialism have shaped our lives and circumstances, and to have this incorporated into the judge's decision at various stages such as sentencing and bail. These circumstances are often referred to as "Gladue factors", named after a Supreme Court of Canada decision setting out the requirement for judges to consider them, with reference to s. 718.2(e) of the *Criminal Code.*

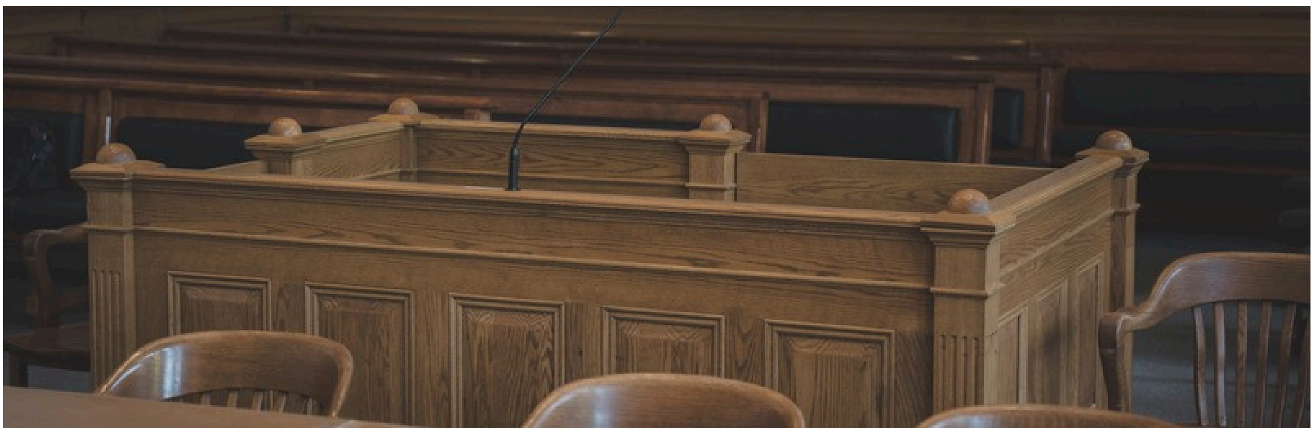
Gladue Reports

Gladue Reports are one way that Gladue factors can be presented to a judge. These reports are typically written by people trained to interview offenders, their family members, and/or community members to distill important information into a written report for the judge's consideration.

Unfortunately, while Indigenous people have a right to have Gladue factors considered, this is not the same as having a right to a Gladue Report. That said, Gladue Reports may be the preferable way to have a judge consider Gladue factors and judges will sometimes order that a Gladue Report be prepared.

Indigenous individuals in custody who would like a Gladue Report:

- Should tell their lawyer or the court as soon as possible that they are Indigenous and would like such a report.
- May be able to access such a report through a Gladue Report program, such as the project run by the Newfoundland Aboriginal Women's Network (NAWN), or through their Nation or local Friendship Centre. Most Nations do not have or receive funding for Gladue Report writer programs, though some have made Gladue Reports available. For example, Miawpukek First Nation has a small number of Gladue writers.
- After having pled guilty or been found guilty at trial, lawyers representing Indigenous clients can request a Gladue Report. Those representing themselves can also request a report from a program, such as NAWN's, or through their Nation.



Access to Cultural Programming and Services

First Light believes Indigenous individuals likely have a legal right to access Indigenous cultural programming while in provincial custody. There are several potential sources of this legal right:

1. the provincial *Correctional Services Act;*[2]
2. common law regarding systemic negligence;
3. the Constitution of Canada, specifically the *Canadian Charter of Rights and Freedoms;*[3] and
4. the provincial *Human Rights Act;*[4]

The Province's *Correctional Services Act*

The *Correctional Services Act* requires the Act to be administered in a manner consistent with the principle that policies, programs, and practices be responsive to the unique needs of Indigenous inmates. Additionally, evidence-based programming and services specific to the needs and culture of Indigenous offenders must be coordinated and facilitated "wherever possible."

Systemic Negligence

The Province owes a duty of care to inmates in provincial custody. The Province is required to take reasonable care not to harm inmates. The Province would likely be in breach of this standard of care should it fail to ensure access to cultural programming, particularly as the *Correctional Services Act* recognizes that Indigenous offenders have unique needs and that policies, programs, and practices must be responsive to these needs and be evidence-based.

The *Canadian Charter of Rights and Freedoms*

The *Charter* guarantees certain fundamental rights and freedoms that must be respected, subject only to limitations that can be justified in a free and democratic society.

Section 15: We all have a right to equality and to freedom from discrimination. This right likely means that Indigenous people have a right to access cultural programming while incarcerated. Any absence of such programming creates a distinction on the basis of race, religion, and national or ethnic origin. The distinction is that non-Indigenous inmates have access to culturally appropriate and religious supports while in custody, while Indigenous inmates do not. Non-Indigenous inmates have access to programs and services that reduce recidivism rates and promote rehabilitation, while Indigenous inmates effectively do not unless cultural programming is made available.

Section 12: We all have a right not to be subjected to cruel and unusual treatment or punishment. Being deprived of access to culture, and being forced to rely on Christian religious services, may amount to cruel and unusual treatment, depending in part on an Indigenous individual's own personal history. It is possible that a court could find it is cruel and unusual for the government to continuously deny Indigenous Peoples access to our culture and spirituality, given individual and intergenerational trauma caused by such state-imposed denial. It repeats and exacerbates these traumatic patterns. It forces Indigenous inmates seeking religious / spiritual services to turn to Christian services,

2 *Correctional Services Act,* SNL 2011, c C-37.00001, ss 4, 45 [*Correctional Services Act*].

3 *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, ss 2(a), 12, 15(1) [*Charter*].

4 *Human Rights Act, 2010,* SNL 2010, c H-13.1 [*Human Rights Act*],

when many of us have personal, family, or community experiences of abuse at the hands of Christian authority figures.

Section 2(a): We all have a right to freedom of religion. It is possible this right could include a right to state-facilitated access to Indigenous spiritual services/practices during incarceration. Without access to cultural services while incarcerated, Indigenous inmates' freedom to practice our religion and spirituality is interfered with in a very significant way: Indigenous inmates are effectively denied the ability to exercise their sincerely held Indigenous beliefs and practices.

United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP): The *Charter* must be interpreted in a manner that is consistent with UNDRIP, which includes guarantees of access to culture and protections against discrimination and forced assimilation.

The Province's *Human Rights Act, 2010*

Section 11(1)(b) of the *Human Rights Act, 2010* ("*Human Rights Act*") protects us from discrimination in receiving services, amongst other things. This right to freedom from discrimination may give rise to a right to provincially-facilitated access to cultural programming while an Indigenous individual is incarcerated. The reasoning here is similar to the section 15 *Charter* reasoning. The Province has recognized the importance of ensuring access to services that respond to the unique needs of Indigenous inmates, yet the funding and structure of its services for inmates is known to have prevented such access for some Indigenous inmates.

Additionally, an Indigenous Nation may be able to rely on the constitutional doctrine of the honour of the Crown to insist that the Province diligently implement the promise of cultural services set out in the *Correctional Services Act.* This principle is also informed by UNDRIP. This would be a novel argument, and its success would likely depend in part on exchanges between the Nation and the Province regarding such services.

Legal Recourse

If someone were considering bringing a legal challenge, they would have to consider who should bring the challenge, how, and where:

Indigenous Individuals

An Indigenous individual directly affected by a lack of access to Indigenous cultural programming could:

- Bring an **individual claim** at the Supreme Court of Newfoundland and Labrador;
- Bring a proposed **class action** claim at the Supreme Court of Newfoundland and Labrador;
- Avail of the procedure for **human rights complaints** with the Human Rights Commission of Newfoundland and Labrador.

Indigenous Third-Parties

A Nation, individual, or organization *not* directly affected could try to bring a claim on behalf of individuals who are directly affected by asserting public interest standing in a claim before the Supreme Court of Newfoundland and Labrador.

Indigenous Nations

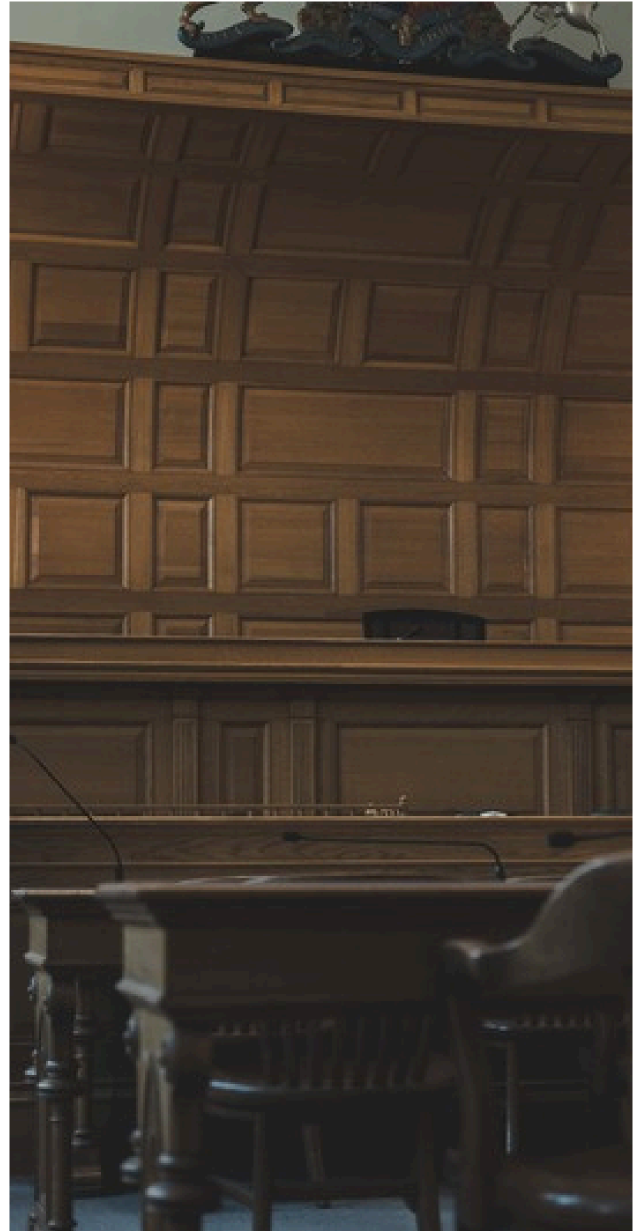
A Nation could potentially bring a novel claim at the Supreme Court of Newfoundland and Labrador relating to duties flowing from the honour of the Crown.

For Legal Representatives of Current and Former Indigenous Inmates

Gladue Factors and Reports

What are Gladue factors?

In the Canadian criminal justice system, judges are required to consider the unique circumstances of Indigenous Peoples, including when sentencing an Indigenous person for a crime. "Gladue factors" refers to these circumstances that a judge must consider. They are named after a Supreme Court of Canada case setting out the requirement for judges to consider them.[5] This case was about interpretation and application of section 718.2(e) of the *Criminal Code* which states that "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders." [6]



Gladue factors relate to the challenges faced by Indigenous individuals, their family, and their community due to experiences of colonization. This can include personal or family history at residential or day schools, placement in foster care, experiences of racism, and the ongoing effects of colonialism. Judges also have to consider alternatives to jail that are available to Indigenous individuals, such as community-supported restorative justice programs. Restorative justice programs have at times operated in the communities of Sheshatsiu and Miawpukek. [7]

5 See *R v Gladue*, 1999 CanLII 679 (SCC).

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

7 First Light, *Overrepresented and Undercounted: A Snapshot of Indigenous Adult Incarceration in Newfoundland and Labrador, 2025* (St. John's: First Light, 2026) at 12, online: https://firstlightnl.ca/site/uploads/2026/04/Overrepresented-and-Undercounted-2026.pdf.

What are Gladue Reports?

A Gladue Report is a written report that can be provided to the judge to inform them about the Gladue factors relevant to a specific Indigenous offender. The Gladue Report writer will typically interview the individual, their family members, and community members. The final report will tell the story of the offender's life, family, and/or community, including the factors that led them to court and the available options other than jail time.

What are our rights relating to Gladue?

All Indigenous offenders have a right for the judge to consider Gladue factors when sentencing them. This right applies even for those who don't have status, don't live on reserve, don't live in an Indigenous community, were adopted into a non-Indigenous community, or grew up in foster care. If the sentencing judge does not consider these factors during sentencing, the sentence can be overturned on appeal. [8]

While a judge *must* consider Gladue factors, this does not necessarily mean an Indigenous offender must have a Gladue Report. Gladue factors can be presented to the judge in other forms, including orally or in a more traditional pre-sentencing report (PSR). Courts in other jurisdictions have emphasized that the requirement is not about the *form* that the information takes; instead, the legal requirement is that the judge must have all relevant information before them.[9]

Judges and other decision-makers should consider Gladue factors at all stages of the criminal process, not just sentencing. This includes bail hearings, parole decisions, and solitary confinement decisions.[10]

Court Ordered Gladue Reports

Practices relating to Gladue Reports differ across provinces.[11] For example, for a long time Gladue Reports were not available in Quebec, a fact met with contempt by at least one judge in Ontario.[12] In some situations, a court may determine that it cannot effectively obtain information on Gladue factors by means other than a report, and that ordering preparation of a Gladue Report is therefore required. In Saskatchewan, the Court of Appeal has stated that court-ordered Gladue Reports prepared at public expense are ordered "only exceptionally" and only "where a sentencing judge concludes that the information necessary to give effect to s. 718.2(e) cannot be reasonably or practicably obtained by way of a PSR or [...] by way of the testimony of the offender, the submissions of counsel, or some other way or combination of ways."[13] The practice of court-ordered Gladue Reports appears more common in Ontario.[14]

8 *R v Legere*, 2016 PECA 7 at para 24; *R v Wolfleg*, 2018 ABCA 222 at para 81.

9 See e.g. *R v Lawson*, 2012 BCCA 508 at para 27; *R v Gamble*, 2021 SKCA 71 at paras 47, 49; *R v Wedzin*, 2024 NWTTC 1 at para 17.

10 See e.g. *R v Robinson*, 2009 ONCA 205; *R v Rich*, 2016 NLTD(G) 87; *Twins v Canada (Attorney General)*, 2016 FC 537; *Hamm v Attorney General of Canada (Edmonton Institution)*, 2016 ABQB 440, appeal adjourned 2019 ABCA 391.

11 et al, *Applying R v Gladue: The use of Gladue reports and principles* (Department of Justice, 2023), at pp. 11-15. Available on-line: https://www.justice.gc.ca/eng/rp-pr/jr/gladue2/docs/rsd_gladue-caselaw-review_en.pdf.

12 *R. v. Knockwood,* 2012 ONSC 2238, esp at paras 8, 70-71 [*Knockwood*].

13 *R v Gamble,* 2021 SKCA 72, at para 50.

14 E.g. *Knockwood,* esp at paras 6, 9-10, 14.

In Newfoundland and Labrador, Gladue factors have at times been included in PSRs referred to as "Pre-Sentence Reports (Gladue Perspective)"[15] or "pre-sentence reports with a Gladue perspective."[16] A 2017 decision from Justice John L. Roy of the Newfoundland and Labrador Provincial Court expresses outrage at the fact that the evidence before him, provided by the senior Labrador probation officer, indicated that none of the probation officers in the province were trained to prepare fulsome Gladue Reports, and instead could prepare only "Pre-Sentence Reports (Gladue Perspective)" that tended to be about half the length of Gladue Reports filed in jurisdictions such as Ontario.[17]

Justice Roy concluded his reasons for judgment by suggesting that an Indigenous offender in Newfoundland and Labrador, or their counsel, can ask the court to order preparation of Gladue Reports pursuant to s. 720 of the *Criminal Code*, with the expectation that, if the court makes such an order, a report will be prepared by a properly trained writer. It is not clear what capacity actually exists in the province to undertake this important work. Justice Roy's decision has not subsequently been cited by any court in the province in relation to preparation of Gladue Reports.

Reported case law suggests that the first time a full Gladue Report was presented to a court in Newfoundland and Labrador was 2022. It appears this was done at the initiative of defence counsel, and it is unclear how the report was funded.[19]

> **"[...W]hen a court orders a "Gladue Pre-Sentence Report," [i.e. a Gladue Report,] that is what the court expects to receive within the time the court sets for its production. If probation services only supply a "Pre-Sentence Report (Gladue Perspective)," that report is not in compliance with the order.**
>
> **Provincial and territorial governments have an obligation to provide probation officers, or other trained officials, with the appropriate training to enable them to provide "Gladue Pre-Sentence Reports," [i.e. Gladue Reports,] and to employ enough of them, so that they supply these reports within the time set by the court, and not with the ever-expanding time limits announced by probation services from time to time. The Supreme Court of Canada directed all courts in Canada to meet this standard, and it is not open to any province or territory to exempt itself from that requirement.**
>
> **Non-compliance amounts to state misconduct, and the court has a wide range of remedies, including significant reduction of sentence, and contempt of court proceedings."[18]**
>
> **—Justice John L. Roy, *R v Noble* (2017)**

15 E.g. *R. v Noble*, 2017 CanLII 32931 (NL PC) [*Noble*].

16 E.g. *R. v. Onalik*, 2022 NLSC 137, at para 73 [*Onalik*].

17 *Noble*, at paras 38-40, 51-57.

18 *Noble*, at paras 106-108.

19 *Onalik*, at para 73.

How can offenders obtain a Gladue Report?

Indigenous offenders should tell their lawyer or the court as soon as possible that they are Indigenous and want a Gladue Report. For those representing themselves, the Crown attorney may be able to help obtain access to a Gladue Report.

Since 2024, the Newfoundland Aboriginal Women's Network (NAWN) has had a Gladue Writer Project, though long-term funding to continue the program remains uncertain.

After an Indigenous offender has pled guilty or been found guilty at trial, their lawyer can request a Gladue Report from NAWN. Those representing themselves can also request a report from NAWN.[20]

Indigenous offenders can also contact their Nation or other Indigenous organizations to ask if they can help provide a Gladue Report. Miawpukek First Nation has a small number of Gladue writers,[21] as do some Friendship Centres.

Can Gladue factors be considered without a Gladue Report?

Even if an Indigenous offender does not have access to a Gladue Report, they still have a right for the sentencing judge to be presented with and consider their Gladue factors. Indigenous offenders should tell their lawyer or the judge as soon as possible that they are Indigenous and want their Gladue factors to be considered.

Defence lawyers and the Crown attorney should make sure that this information is provided to the judge. Lawyers representing Indigenous clients can tell the judge about the Gladue factors during the sentencing hearing, or this information may be included in a PSR. Ideally, however, it will be provided in the form of a fulsome Gladue Report.

What can Indigenous Nations and organizations do?

Unfortunately, unless an Indigenous Nation or other organizations like Friendship Centres receive funding from the federal or provincial government to support Gladue writers and/or restorative justice programs, access to these services will remain limited. If a community does not have these programs available, Indigenous people and our allies can – and must – advocate for federal and provincial funding to establish Gladue writing programs and restorative justice programs in Indigenous communities, including those in urban areas.

20 Newfoundland Aboriginal Women's Network, *"Newfoundland Aboriginal Women's Network Gladue Pilot Project Information for Defense Counsel"* (last visited 19 May 2026), online: https://static1.squarespace.com/static/65fdd10698456571fa8fb78b/t/68af32fc4553f83cb9612852/1756312316262/NAWN+Gladue+Report+Info+sheet+for+counsel.pdf.

21 First Light at 13.

What do provincial laws say about our rights relating to cultural programming?

There are two pieces of provincial legislation that are particularly relevant: the Correctional Services Act ("the **Act**") and the *Human Rights Act, 2010* (*Human Rights Act*).

Correctional Services Act

In early February 2025 the Correctional Services Act ("the **Act**") came into effect. The Act consolidated the Prisons Act, 1969 and the Adult Corrections Act, 1975. It also introduced new statutory requirements relating to services for Indigenous offenders.

Responding to Specific Needs of Indigenous Offenders

Section 4(h) of the Act states that the Act and regulations made under it must be "interpreted and administered in a manner consistent" with the principle that "policies, programs and practices will be responsive to the particular needs of Indigenous peoples." [22] This is an important recognition that Indigenous individuals have unique needs, and that policies, programs, and practices should be responsive to them.

Additionally, section 45(b) of the Act states that the Director of Corrections and Community Services must, wherever possible, coordinate and encourage the following both in correctional facilities and in the community: (i) programming that is evidence based where possible; and (ii) specific programming and services to reflect the needs and culture of Indigenous offenders. [23]

Arguably, these amendments provide backing directly within the *Correctional Services Act for legal obligations that already exist at law by virtue of the Constitution, the common law, and human rights legislation.*

Focus on Rehabilitation

Additionally, the *Correctional Services Act* has a focus on rehabilitation that is relevant to obligations regarding cultural programming for Indigenous offenders. In addition to the requirement articulated above to "coordinate and encourage" culturally responsive services for Indigenous inmates, another principle outlined in section 4 of the Act is one relating to the importance of "maximizing individual opportunities for rehabilitation and reintegration that recognize the needs and circumstances of inmates in correctional facilities and offenders in the community." [24]

This focus on rehabilitation and reintegration is found throughout the Act:

- Each superintendent is responsible, under the supervision of the chief superintendent, for administration of the Act and for providing programs to assist with rehabilitation and reintegration of inmates within the superintendent's respective correctional facility. [25]
- Additionally, the chief adult probation officer is responsible, under the supervision of the director, for developing programs to assist with rehabilitation and reintegration. [26]

22 *Correctional Services Act*, s 4(h).
23 *Correctional Services Act*, s 45(b).
24 *Correctional Services Act*, s 4(b).
25 *Correctional Services Act*, ss 7(3)(c), (e).
26 *Correctional Services Act*, s 8(1)(c).

- After an inmate has entered a correctional facility, they must undergo a security and risk assessment, and a plan must be prepared that in part is intended to support their rehabilitation and reintegration.[27]
- Finally, a superintendent may permit an inmate to be absent from the correctional facility for purposes of assisting with their rehabilitation or reintegration.[28]

Given evidence that suggests cultural programming can help facilitate rehabilitation and help reduce recidivism for Indigenous offenders,[29] this focus on rehabilitation in the Act underscores the need to ensure Indigenous inmates are provided with access to cultural services. In other words, cultural programming is required to support rehabilitation and reintegration of Indigenous offenders.

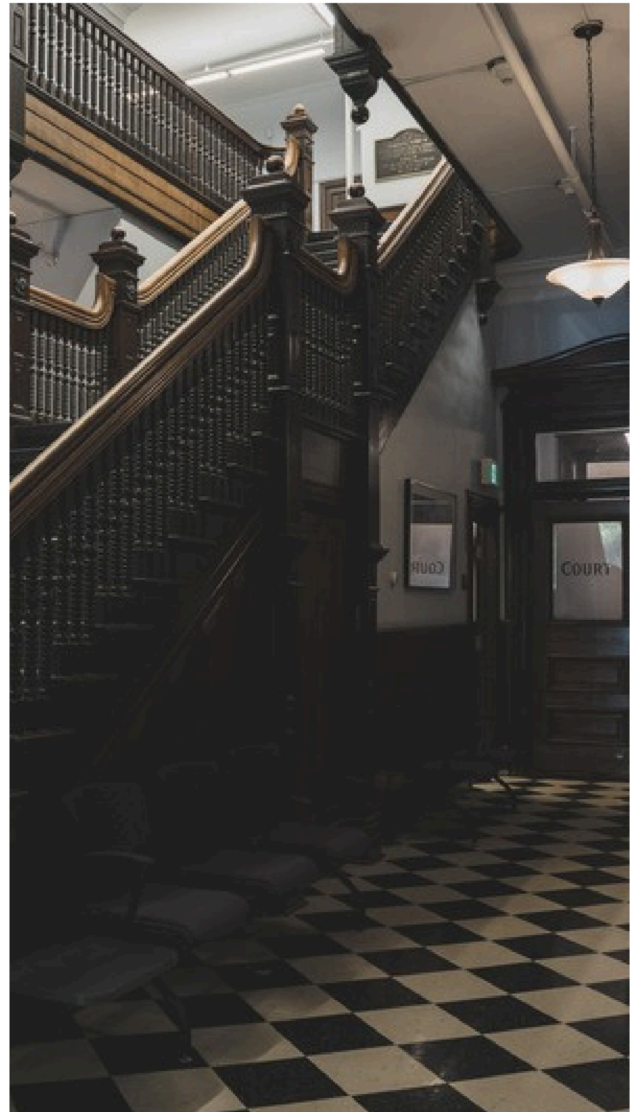
Human Rights Act

The provincial *Human Rights Act* prohibits discrimination.

Specifically, section 11(1)(b) of the *Human Rights Act* prohibits anyone from discriminating against a person or class of persons with respect to goods, services, accommodation or facilities that are offered to the public.[30]

This prohibition against discrimination means it is illegal for us to be treated differently in accessing or receiving services – including correctional services – because of characteristics such as race, colour, nationality, ethnic origin, social origin, or religious beliefs. In other words, if a person in custody is being treated differently because they are Indigenous, this could be illegal.

At the same time, if identical treatment means the unique needs of an Indigenous individual are not being met, this could also be illegal. Sometimes avoiding discrimination requires differential treatment aimed at responding to unique needs.



27 *Correctional Services Act*, s 18(2)(b).

28 *Correctional Services Act*, s 34(1)(b).

29 First Light at 11, citing Leticia Gutierrez et al, *Culturally-Relevant Programming versus the Status Quo: A Meta-Analytic Review of the Effectiveness of Treatment for Indigenous Offenders*, Research report nos. 2017-R016 (Public Safety Canada, Research Division, 2018).

30 *Human Rights Act*, s 11(b).

Is there a constitutional right to cultural programming?

An important part of the *Constitution Act*, 1982 is the *Canadian Charter of Rights and Freedoms* ("the **Charter**"). The Charter sets out certain rights and freedoms guaranteed to everyone in Canada. Some of these are relevant to the issue of access to cultural programming for Indigenous inmates.

In understanding our rights under the *Charter,* it is important to be aware of limits that can be placed on them. Specifically, section 1 of the *Charter* allows for reasonable limits to rights and freedoms. These limits must be set out in law and be justifiable in a free and democratic society. [31]

This means that if the government breaches our *Charter* rights, the government can try to legally justify it. The government can do this by convincing a court that the breach of *Charter* rights occurred as the result of the government pursuing an important objective (an objective that was "pressing and substantial") and that the objective was pursued in a way that caused the least infringement of *Charter* rights as possible.[32]

Right to equality (Section 15)

Under s. 15(1) of the *Charter*, we have a right to equality and to freedom from discrimination:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, **without discrimination based on race, national or ethnic origin, colour, religion**, sex, age or mental or physical disability. [33]

What this means is that we are protected from laws or state conduct that:

- on their face or in their impact, create a distinction based on grounds such as race, ethnic origin, religion, etc; and
- impose burdens or deny benefits in a way that results in reinforcing, perpetuating, or exacerbating disadvantage.[34]

Section 15 is concerned with **substantive equality**, not formal equality.[35] In other words, it recognizes that state action treating everyone exactly the same can amount to discrimination where it has the effect of further disadvantaging a protected group.[36] As the Supreme Court of Canada ("**SCC**") recently explained, "substantive equality is distinct from formal equality, which would treat everyone identically, regardless of their differences. When applied to people in unequal circumstances, formal equality can result in injustice." [37]

This means that s. 15(1) of the *Charter* protects us as Indigenous persons from being treated exactly the same as a non-Indigenous persons if such identical treatment results in different outcomes that are harmful. For example, the SCC has explained that denying all healthcare patients access to sign language interpreters is discriminatory, even though it treats everyone in exactly the same way. It is discriminatory because it places individuals with hearing loss who require interpreters to communicate with healthcare providers at a disadvantage compared to individuals who can communicate without such interpretation.[38]

31 *Charter*, s. 1.

32 See *R v Oakes*, 1986 CanLII 46 (SCC) [*Oakes*].

33 *Charter, s 15(1) [emphasis added].*

34 *Fraser v Canada (Attorney General),* 2020 SCC 28 at para 27 [*Fraser*].

35 *Quebec (Attorney General) v Kanyinda,* 2026 SCC 7 at para 7 [*Kanyinda*].

36 *Fraser* at paras 52–54.

37 *Kanyinda* at para 37.

38 *Eldridge v British Columbia (Attorney General),* 1997 CanLII 327 at paras 60–80 (SCC).

At the same time, s. 15(1) also protects us from being treated differently if that treatment results in different outcomes that are harmful. The real focus of s. 15(1) is on equality of outcomes.

Right not to be subjected to cruel and unusual treatment (Section 12)

Under section 12 of the *Charter,* we have the right not to be subjected to any cruel and unusual treatment or punishment.

The purpose of section 12 is "to prevent the state from inflicting physical or mental pain and suffering through degrading and dehumanizing treatment or punishment. It is meant to protect human dignity and respect the inherent worth of individuals."[39]

There is a two-stage test to determine whether an individual's section 12 rights have been infringed.

1. Is the section 12 right engaged?
There must be a "treatment or punishment" by an actor to whom the *Charter* applies, which includes federal and provincial state actors.[40] Courts would likely consider the absence of cultural services and programming for inmates to be "treatment" by the Province, not "punishment". The punishment is incarceration; access to programing and services (or lack thereof) is an issue that arises *after* the courts issue the punishment.[41]

2. Was the section 12 right violated?
The treatment or punishment must be "cruel and unusual" to make out this part of the test.[42] Conduct can be cruel and unusual based on either the severity and quantity of the particular treatment or punishment, or due to the method or inherent nature of the punishment or treatment:

- Severity or quantity: Section 12 prohibits treatments or punishments "whose effect is grossly disproportionate to what would have been appropriate" in an individual's particular circumstances, even if that same measure could be appropriate in someone else's situation.[43] This is a very high threshold. A measure must be more than "merely excessive" or disproportionate: it must "outrage our society's sense of decency" such that Canadians would find it "abhorrent or intolerable."[44]
- Method or inherent nature: Section 12 prohibits a "narrow class" of treatments or punishments that are "inherently" cruel and unusual because they are "degrading or dehumanizing" and "intrinsically incompatible with human dignity".[45]

39 *Quebec (Attorney General) v 9147-0732 Québec inc*, 2020 SCC 32 at para 51.
40 *Charter*, s 32(1)(b).
41 *R v Boudreault*, 2018 SCC 58 at paras 38–39, citing *R v KRJ*, 2016 SCC 31 at para 41; *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at paras 95–98; *Canadian Civil Liberties Association v Canada*, 2019 ONCA 243 at paras 83–86; *Ogiamien v Ontario (Community Safety and Correctional Services)*, 2017 ONCA 667 at para 7; *R v Biever*, 2023 ABCA 138 at para 8.
42 *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4 at para 47.
43 *R v Bissonnette*, 2022 SCC 23 at paras 6, 61–63 [*Bissonnette*].
44 *R v Morrisey, 2000 SCC 39 at para 26.*
45 *Bissonnette* at paras 6, 60, 64, 68.

Right to freedom of religion (Section 2(a))

Section 2(a) protects our freedom of conscience and religion.[46]

The purpose of section 2(a) of the *Charter* is to prevent interference with profoundly held personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being.[47]

Under section 2(a) of the *Charter*, we are protected from government action when:

- sincerely holding a belief or engaging in a practice that has a connection with religion; and
- a government action interferes with our ability to act in accordance with our religious beliefs or spirituality in more than a small way (in a way that is "more than trivial or insubstantial").[48]

Is the *United Nations Declaration on the Rights of Indigenous Peoples* Relevant?

The status of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) in Canadian law is a rapidly evolving area of law, particularly since the introduction of federal and some provincial and territorial legislation purporting to implement UNDRIP.[49]

While Newfoundland and Labrador does not have UNDRIP legislation, it is arguable that the federal UNDRIP legislation does affect the interpretation of *Charter* rights at the provincial level (and also in respect of prisoners serving federal sentences and/or regarding provincial prisons that receive federal funding or otherwise have federal service agreements).

The SCC has confirmed that UNDRIP now forms part of Canada's positive domestic law.[50] Canadian laws – including the common law and section 35 – must be interpreted in a manner consistent with UNDRIP.[51] It should follow that the *Charter*, too, must be interpreted in a manner consistent with UNDRIP.[52] This would mean that if there is more than one possible interpretation of a *Charter* right, an interpretation that would respect a right outlined in UNDRIP should be chosen over an interpretation that would not.

46 *Charter*, s 2(a).

47 *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para *32* [*Hutterian*].

48 *Hutterian* at para 32.

49 *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14; *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44; *United Nations Declaration on the Rights of Indigenous Peoples Implementation Act*, SNWT 2023, c 36.

50 *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 at para 15.

51 *Gitxaala v British Columbia (Chief Gold Commissioner)*, 2025 BCCA 430; *Kebaowek First Nation v Canadian Nuclear Laboratories*, 2025 FC 319.

52 See also *R v Hape*, 2007 SCC 26, at paras 53 ff, for discussion of the presumption of conformity of Canadian laws, including the *Charter*, with international law.

UNDRIP articles of particular relevance include:

- **Article 2:** right to be free from discrimination of any kind;[53]
- **Article 8(1):** the right not to be subjected to forced assimilation; (2) a state's obligation to provide effective mechanisms for the prevention of any action that deprives Indigenous Peoples of their integrity as distinct people or of their cultural values, and any form of forced assimilation or integration;[54]
- **Article 11(1):** the right to practise and revitalize cultural traditions and customs;[55] and
- **Article 12(1):** the right to manifest, practise, develop and teach spiritual and religious traditions, customs and ceremonies.[56]

What are the legal implications of denying access to cultural services and programming?

Is the denial negligent?

Negligence arises when someone who owes a duty of care fails to meet the standard a reasonable person would meet in the circumstances, and that failure causes harm that is compensable at law.

In this respect, a failure on the part of the Province to provide or fund cultural services to Indigenous inmates may amount to **systemic negligence.**

To succeed in making a claim based in negligence, the following would have to be established in relation to an Indigenous inmate:

1. that the other party owes a "duty of care" to the Indigenous inmate (i.e., that party is in a sufficiently close and direct relationship that they must take reasonable care to avoid causing harm);
2. that the other party's conduct did not live up to the standard of care required;
3. that the Indigenous inmate sustained damage as a result of the other party's conduct; and
4. that the damage was caused by the other party's failure to live up to the standard of care.[57]

53 *United Nations Declaration on the Rights of Indigenous Peoples*, UNGA, 61st Sess, UN Doc A/RES/61/295 (2007), art 2 [*UNDRIP*].

54 *UNDRIP*, art 8(1)

55 *UNDRIP*, art 11(1).

56 *UNDRIP*, art 12(1).

57 *Mustapha v Culligan of Canada Ltd,* 2008 SCC 27 at para 3.

A claim for systemic negligence requires the same criteria to be met.[58] What makes it systemic is that the failure to meet a standard of care is due to systemic issues and not one-off decisions or actions.[59]

It is well-established that provinces owe a duty of care to inmates in provincial custody.[60] In other words, the Province has a duty to take reasonable care not to harm inmates, including those who are Indigenous.

This gives rise to the question of what constitutes "reasonable care." The Province's *Correctional Services Act* now recognizes that Indigenous offenders have unique needs and that it is important for policies, programs, and practices to be responsive to those needs, and, where possible, be evidence-based.[61] This all suggests that reasonable care includes taking active steps to respond to these unique needs, drawing on existing evidence about what these needs are and how they can be met. Failing to provide or fund cultural programming falls far short of this standard.

Additionally, even without this legislated recognition, the Province will have known of these specific needs in its conversations with First Light and other Indigenous organizations. In this respect, it would have been reasonably foreseeable that failing to fund or provide cultural programming would cause harm to Indigenous inmates by leaving needs unmet. This knowledge could also come from various other sources, including the Truth and Reconciliation Commission's final report and Calls to Action.[62]

Is the denial discriminatory?

First Light believes any failure on the part of the Province to provide or otherwise make available cultural services to Indigenous inmates likely amounts to discrimination both under the *Charter* and under the *Human Rights Act*.

Section 15(1) of the *Charter*

Any failure on the part of the Province to provide or fund cultural services to Indigenous inmates likely amounts to a breach of their equality rights under the *Charter.*

Not funding or otherwise providing cultural services for Indigenous inmates appears to create a distinction on the basis of race, religion, and national or ethnic origin. The distinction is that non-Indigenous inmates have access to culturally appropriate and religious supports while in custody,[63] whereas Indigenous inmates do not.

This differential treatment, denying Indigenous inmates the benefit of access to our culture and religion at a time when such supports are acutely needed, perpetuates and exacerbates disadvantage. The history of colonization in the Province, including through forced relocation, forced sedentarization, and removal from community and culture through Residential Schools and the child protection system, has placed Indigenous individuals in the Province at great disadvantage, as evidenced in

58 *Canada v Greenwood*, 2021 FCA 186 at para 153.

59 *Central Regional Health Authority v Welshman*, 2025 NLCA 31 at para 30.

60 See e.g. *Francis v Ontario*, 2021 ONCA 197 at para 102, citing *MacLean v R*, 1972 CanLII 124 at 7 (SCC).

61 *Correctional Services Act*, ss 4, 45.

62 See 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* (Winnipeg: The Truth and Reconciliation Commission of Canada, 2015), online: https://nctr.ca/wp-content/uploads/2021/01/Executive_Summary_English_Web.pdf.

63 Jenna Head, "'This can't be allowed to continue': Chaplaincy is the only option for inmates, backbone of programs still running at HMP in St. John's" (5 December 2023), online: https://www.saltwire.com/atlantic-canada/this-cant-be-allowed-to-continue-chaplaincy-the-only-option-for-inmates-backbone-of-programs-still-running-at-hmp-in-st-johns-100917902, and *Sisters of Mercy of Newfoundland*, "Prison Ministry" (2026), online: https://www.sistersofmercynf.org/mercy-in-action/prison-ministry/.

disproportionate representation on several measures. This history of disconnection and related harms is exacerbated when inmates are denied access to their culture and religion/spirituality within the prison system.

Because of evidence that links cultural programming to reduced recidivism rates for Indigenous offenders, any failure to provide Indigenous inmates with access to cultural programming also arguably denies them access to services that improve successful reintegration and reduce the likelihood of recidivism. Such services are available to non-Indigenous inmates, and denying access to cultural services deprives Indigenous inmates of equivalent services. This contributes to over-representation of Indigenous inmates by failing to reduce recidivism rates, thereby exacerbating existing disadvantage.

Human Rights Act

Failure on the part of the Province to provide or ensure provision of Indigenous cultural programming likely constitutes discrimination in the provision of services, contrary to section 11(1)(b) of the *Human Rights Act, 2010.*[64] This argument would be similar to the argument under section 15 of the *Charter*, though the claim would be made in a different forum (Tribunal instead of Court).

There have been several decisions from the Canadian Human Rights Tribunal (CHRT) relating to services for First Nations people living on reserve that could prove persuasive in Newfoundland and Labrador. These decisions make it clear that, as with section 15(1) of the Charter, human rights law is concerned with ensuring substantive equality.

The most notable decisions are those in the *Caring Society* case regarding on-reserve child and family services, and in the Dominique case regarding on-reserve policing. While the 2016 decision in the *Caring Society* case[65] was not challenged by Canada, the more recent decision in *Dominique* was – and we now have the benefit of a decision from both the Federal Court and the Federal Court of Appeal upholding the CHRT's finding of discrimination in that case.[66]

In both cases, Canada was found liable for discrimination in the provision of services because of the way it *underfunded* and structured the on-reserve services in question.[67] Both cases emphasize the importance of ensuring that First Nations people receive culturally appropriate services, and in both cases, the CHRT found that despite Canada having a policy objective of ensuring culturally appropriate services of a comparable level to those provided off-reserve, the funding and structure of the programs in question prevented this objective from being met.

When it comes to cultural services for Indigenous inmates in the Province's custody, there are parallels that can be drawn: the Province has recognized the importance of ensuring access to services that respond to the unique needs of Indigenous inmates, but the current funding and structure of its services for inmates may be preventing such access.

64 *Human Rights Act*, s 11(b).

65 *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 [*Caring Society*].

66 *Dominique (on behalf of the members of the Pekuakamiulnuatsh First Nation) v Public Safety Canada*, 2022 CHRT 4, [*Dominique*], aff'd *(Attorney General) v Pekuakamiulnuatsh First Nation*, 2023 FC 267, aff'd *Canada (Procureur général) c Première Nation des Pekuakamiulnuatsh*, 2025 CAF 24.

67 *Caring Society; Dominique.*

While not dealing with Indigeneity or inmates, a recent decision from the Newfoundland and Labrador Human Rights Commission does affirm relevant human rights principles. It found that when services are being provided to individuals, the service provider has obligations to take into account the unique needs of individuals it is serving and this may require making accommodations to ensure an individual can access those services.[68]

In the context of rehabilitative services, then, the Province would seem to be obligated under human rights legislation to take into account the unique needs of Indigenous inmates. It is arguably required to make accommodations to ensure Indigenous inmates can access rehabilitative services that would be as effective for them as rehabilitative services offered to non-Indigenous inmates.

Is the denial cruel and unusual treatment?

Failure on the part of the Province to provide or Indigenous inmates with (or ensure the provision of) access to cultural programming and services while incarcerated, forcing them to turn to Christian services when seeking religious/spiritual services, may amount to cruel and unusual treatment or punishment. However, there is a high bar to establish a breach of section 12 *Charter* rights, and this would be a novel (or new) claim, meaning it has not been made before. It is hard to predict how a court might receive the argument.

Additionally, being able to prove a breach of this *Charter* right would depend in part on one's specific personal history with larger colonial forces and trends, and on one's experience with and relationship to Christianity. For example, for a person who is Christian and wants to access Christian services, a s. 12 claim might be hard to make out. If one is not Christian and has had negative personal, family, or community experiences with Christian authority figures, it may be more likely that such a person could make out a s. 12 claim.

It is possible that a court could find the effect of denying Indigenous inmates access to cultural services and forcing them to rely on Christian services has an effect that is grossly disproportionate to what would be appropriate treatment of inmates. What is considered proportionate treatment of Indigenous inmates might be different from what such treatment of non-Indigenous inmates looks like given the long, traumatic history between Indigenous Peoples and government and Christian authority figures.

Successive governments created and implemented assimilationist policies that disrupted Indigenous Peoples' access to culture and spirituality, such as residential schools, day schools, forced sedentarization, and bans on traditional ceremonies. Part of this state action involved placing Christian religious figures in positions of authority over Indigenous children and families; these figures sometimes misused their positions of authority to physically and sexually abuse Indigenous individuals. This cultural and spiritual disruption, including the history of abuse by Christian religious figures, is widely accepted as a direct contributing factor to the disproportionate number of Indigenous offenders.[69]

A court might find that denying Indigenous individuals access to their culture and spirituality, given individual and intergenerational trauma caused by such state-imposed denial, is something that

68 *Churchill v Newfoundland and Labrador English School District*, 2023 CanLII 16071 (NLHRC).

69 Truth and Reconciliation Commission of Canada, "Chapter 5: A Denial of Justice," *The Final Report of the Truth and Reconciliation Commission of Canada: Canada's Residential Schools: The Legacy,* vol 5 (Winnipeg: The Truth and Reconciliation Commission of Canada, 2015), esp pp. 186, 218-234.

should outrage society's sense of decency. It repeats and exacerbates these traumatic patterns of denial of culture and spirituality. Furthermore, it forces Indigenous inmates seeking religious/spiritual services to turn to Christian services. While this may be comfortable for some Indigenous inmates who are Christian, it may very well be traumatic for those who are seeking Indigenous spiritual/religious services and/or those who have individual, family, or community histories of abuse by Christian authority figures.

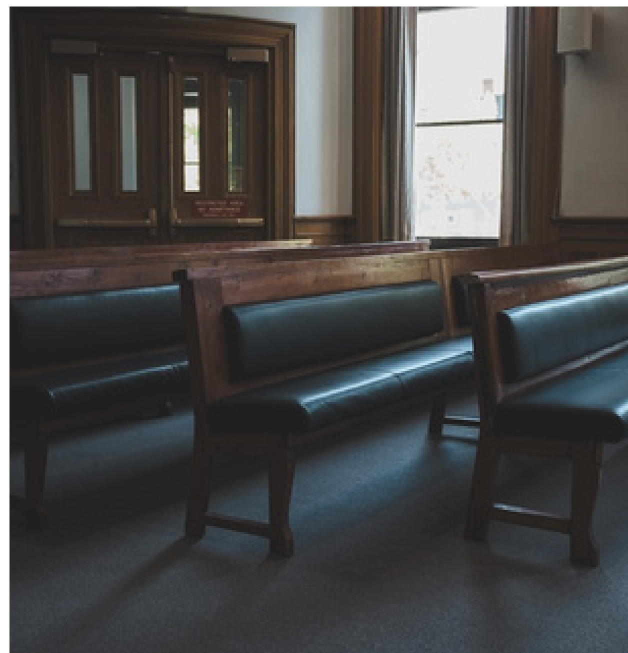
Is the denial a breach of freedom of religion?

Failure on the part of the Province to provide (or ensure the provision of) cultural programming and services during incarceration may amount to a breach of Indigenous inmates' freedom of religion. Specifically, if access to spirituality is important to an Indigenous person and their needs are not met through the available Christian services, then there may be a breach of their freedom of religion.

To successfully argue a breach of freedom of religion, an inmate would first have to prove that they have a sincere belief in a particular cultural service or practice and that it is connected with religion/spirituality. The SCC has recognized "the importance of protecting Indigenous religious beliefs and practices, and the place of such protection in achieving reconciliation between Indigenous peoples and non-Indigenous communities." [70]

The second step of the test would require showing that the act of being imprisoned and denied access to spiritual services interferes with the inmate's religious beliefs in a more than trivial way. Trivial or insubstantial interference has been described as interference that does not threaten actual religious beliefs or conduct.[71] It is possible that a court would find that an Indigenous individual's ability to practice their religion has been interfered with in a very significant way: Indigenous inmates are effectively denied the ability to exercise their sincerely held Indigenous beliefs and practices.

Courts are reluctant to find a positive obligation for the state to act.[72] However, the SCC has also recognized that a situation might arise in which, in order to make a fundamental freedom meaningful, positive governmental action might be required.[73] If an Indigenous person is unable to practice their culture or religion/spirituality because they have been removed from their community by the state, these circumstances may mean that the Province must take positive steps to ensure the inmate in question can meaningfully exercise their spirituality/religious beliefs.



70 *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at para 10.
71 *Hutterian* at para 32.
72 *Hutterian* at para 95.
73 *Dunmore v Ontario (Attorney General)*, 2001 SCC 94, at para 23.

Could any *Charter* breach be justified by the government?

As explained earlier, under the *Charter,* once a breach of any *Charter* right has been established, the government can try to legally justify the breach. It can do this by showing that the breach was based on a pressing and substantial government objective and that the objective was pursued in the manner that would cause the least infringement on a *Charter* right as possible.

It is difficult to imagine what the Province might argue if it found itself in court trying to justify a *Charter* breach caused by a failure to ensure Indigenous inmates have access to cultural services. However, we know that the SCC has said that cost and/or administrative convenience alone are not generally accepted as pressing and substantial objectives for the justification of an infringement.[74] In other words, the Province would need to show that denying Indigenous inmates access to cultural services serves a pressing and substantial objective beyond cost or administrative inconvenience.

If the Province could convince a court it has a substantial and compelling objective, it would then have to show that (1) the limit on the *Charter*-protected right is rationally connected to that objective; (2) the limit impairs the right as little as possible; and (3) the benefits from the impairment outweigh the negative impacts.[75] This part of the analysis would be very dependent on the pressing and substantial objective asserted by the Province.

Legal Avenues to Vindicate Rights

In the event that an Indigenous inmate's rights may have been breached, it is always a good idea for those directly affected to seek legal advice specific to their unique circumstances. Below, we set out different legal avenues that could be pursued to assert one's rights.

1. Pursuing an Individual Claim at the Supreme Court of Newfoundland and Labrador

An individual directly affected by a lack of cultural programming could file a claim at the Supreme Court of Newfoundland and Labrador ("the **Court**"). This claim could assert any or all of the grounds explored above, except the claim relating to the *Human Rights Act*. That claim would have to follow a different process, discussed further below.

2. Pursuing a Class Action at the Supreme Court of Newfoundland and Labrador

It would also be possible for current or former inmates who are Indigenous to pursue a class action at the Court for any failure of the Province's to ensure access to cultural services for Indigenous people in provincial correctional institutions – now or even in the past. Generally, a class action involves:

1. A representative plaintiff bringing forward the class action.[76] A representative plaintiff is someone who belongs to the proposed

[74] *Conseil scolaire francophone de la Colombie-Britannique v British Columbia*, 2020 SCC 13 at paras 152–53.

[75] See *Oakes*.

[76] *Class Actions Act*, SNL 2001 c C-18.1, s 3(1) [*Class Actions Act*].

class and brings forward a claim on behalf of the entire class. The "class" is a defined group that all suffered the same harm claimed by the representative plaintiff.

2. A certification hearing where the Court determines whether to certify (approve) the action as a class action based on the following considerations:

   a. Do the pleadings disclose a cause of action?

   b. Is there an identifiable class of two or more persons?

   c. Do the claims of the class members raise a common issue?

   d. Is a class action the preferable procedure to resolve the common issues of the class?

   e. Is there an appropriate representative plaintiff? [77]

3. If the certification motion is granted, the Court will then hold a hearing to decide on the common issues identified in the certification order and specify any relief. [78]

Please see Appendix A for brief discussion of two existing class actions that may be particularly relevant for anyone considering pursuing a class action about a lack of access to cultural services for Indigenous inmates in the Province. In particular, a class action against the Province would likely look similar to a proposed class action started at the Federal Court of Canada in January 2025 ("**Federal Court Claim**"), discussed in the appendix.

3. Filing a Human Rights Complaint

Anyone who wanted to pursue a claim based on discrimination contrary to the *Human Rights Act* would have to follow a process with the Newfoundland and Labrador Human Rights Commission ("the **Commission**"). This process involves filling out a human rights inquiry that the Commission then considers to determine if the issue falls within its jurisdiction. If the issue is within the Commission's jurisdiction, the Commission then offers a pre-complaint resolution process for the parties to try to resolve the matter. Once these processes are complete, and if the issue has not been resolved, an individual can proceed with a human rights complaint. There is then an investigation process and the possibility of a hearing, depending on the outcome of the investigation.[79]

Note that the Commission would not be able to address the other grounds explored above. These other claims would have to be brought before the Supreme Court of Newfoundland and Labrador.

77 *Class Actions Act*, s 5.

78 *Class Actions Act*, ss 12, 25.

79 For further information, see: Human Rights Commission Newfoundland and Labrador, "Complaint Process" (online), https://thinkhumanrights.ca/complaint-process/.

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For Leaders of Indigenous Nations

A Novel Argument Rooted in the Honour of the Crown

The Province may owe certain obligations under the honour of the Crown to section 35 rights-holders regarding access to cultural services. The honour of the Crown and how it relates to services is an evolving area of law. Any argument that could be made in relation to the honour of the Crown would be novel, and it is hard to predict how a court might receive it.

What is the Honour of the Crown?

The honour of the Crown is a principle that governs the relationship between the Crown and Aboriginal peoples.[80] It requires the Crown to act honourably in its dealings with Indigenous Peoples.[81] This principle arises from "the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people".[82]

The honour of the Crown is always at stake in its dealings with Indigenous Peoples but is not itself a cause of action.[83] Instead, the honour of the Crown can give rise to certain duties depending on the circumstances.[84] The honour of the Crown is engaged when circumstances relate to the reconciliation of specific Indigenous claims, rights, or interests with the Crown's assertion of sovereignty.[85] The following are examples of types of duties that courts have recognized can flow from the honour of the Crown:

- **to consult and accommodate** when the Crown contemplates conduct that may affect a claimed or proven section 35(1) right;[86]
- **to act in a way that accomplishes the intended purposes of treaty and statutory grants** to Aboriginal peoples;[87]
- **to interpret constitutional obligations broadly and purposively**;[88]
- **diligent implementation** (so far applied to Treaty and constitutional promises);[89] and
- **to act with honour and integrity** in negotiating and performing an agreement with Aboriginal peoples.[90]

As with the application of the *United Nations Declaration on the Rights of Indigenous Peoples* in Canadian law, the law regarding the application of the honour of the Crown to the topic of services to Indigenous peoples is an evolving area of law. In 2024, the SCC confirmed that the honour of the Crown is engaged in the context of negotiation of an agreement regarding on-reserve services.[91]

80 *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para 21 [*Mikisew Cree*].

81 *Quebec (Attorney General) v Pekuakamiulnuatsh Takuhikan*, 2024 SCC 39 at para 147 [*Takuhikan*].

82 *Mikisew Cree* at para 21.

83 *Mikisew Cree* at paras 23, 60.

84 *Mikisew Cree* at para 24.

85 *Takuhikan* at para 156.

86 *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 27; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at paras 67–69.

87 *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at para 73 [*MMF*].

88 *MMF* at paras 75–76.

89 *MMF* at paras 71–72, 75, 91, 94 ("duty of diligent, purposive fulfilment").

90 *Takuhikan* at paras 187.

91 E.g. for application of the honour of the Crown in the context of on-reserve policing agreements, see *Takuhikan*; for application of the honour of the Crown in the context of on-reserve housing, see *St. Theresa Point First Nation v Canada (Attorney General)*, 2025 FC 382, appeal as of right to the FCA.

It remains to be seen how courts will treat arguments regarding off-reserve services to Indigenous Peoples.

A Novel Argument

A Nation in the Province could advance novel legal arguments drawing on the honour of the Crown to try to hold the Province to account for ensuring Indigenous inmates have access to cultural programming.

One potential line of argument could look like this:

- A Nation claiming that the honour of the Crown is engaged could try to convince a court that the *Correctional Services Act* provisions "relate to the reconciliation of specific Indigenous claims, rights or interests with the Crown's assertion of sovereignty." [92]
- A Nation could argue that the Indigenous claim, right, or interest at stake is the right or interest to access to culture and to be free from forced assimilation.
- A Nation could argue further that the Crown's criminal and penal systems rely on its assertion of sovereignty, and these recent *Correctional Services Act* provisions are an attempt to reconcile that sovereignty with our collective right to culture and to be free from forced assimilation.
- In this context, where the Province has enacted legislative provisions aimed at such reconciliation, the Province is bound by the honour of the Crown to diligently implement the promise of cultural services set out in the *Correctional Services Act*.
- Such diligent implementation may require taking a realistic look at what it costs to ensure access to cultural services for Indigenous inmates and then working to make such funding available.[93]

Whether an Indigenous Nation could advance an argument that the Province has a duty to honourably negotiate agreements providing for cultural services to Indigenous inmates could depend in large part on what the discussions have been with the Province regarding access to cultural services for Indigenous inmates.

Could one of our Nations bring a legal claim?

An Indigenous Nation in the Province could potentially bring a claim at the Supreme Court of Newfoundland and Labrador, either by claiming breach of a duty flowing from the honour of the Crown owed to the Nation (outlined above), or by claiming public interest standing to advance claims on behalf of individuals directly affected by any absence of cultural programming.

For issues not directly affecting a Nation (anything other than duties flowing from the honour of the Crown), they could seek public interest standing to bring a claim to court. The court can grant public interest standing by exercising its discretion to permit an individual or organization who is not directly affected by the targeted state action to bring a claim challenging the action. In deciding whether to grant public interest standing, the Court must consider the following:

1. whether there is a serious justiciable issue raised;

92 *Takuhikan* at para 156.

93 First Light has already completed this work in relation to the three correctional facilities located in its geographical area – HMP in St. John's, the Newfoundland and Labrador Youth Centre in Whitbourne, and the correctional facility in Clarenville. These cost estimates were conveyed to the Department of Justice and Public Safety on March 16, 2026.

2. whether the plaintiff has a real stake or a genuine interest in it; and
3. whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the Court.[94]

Such a claim could be based on the grounds explored above, except for a *Human Rights Act* claim or a claim based on the honour of the Crown.

94 *LaFosse v Witless Bay (Town)*, 2021 NLSC 112 at para 22, citing to *Downtown Eastside Sex Workers United Against Violence Society v Canada (Attorney General)*, 2012 SCC 45 at para 37.

For Concerned Citizens and Non-Profit Organizations

Who can bring a legal claim?

As with an Indigenous Nation, an individual, or an organization that is not personally affected by the absence of cultural programming for Indigenous inmates could potentially bring a claim on behalf of individuals who are affected by relying on public interest standing. Please see the explanation above on pages 30 to 31 about public interest standing.

Conclusion

Indigenous offenders have a right to have a judge consider how colonization has affected the individual's life and circumstances when making decisions such as sentencing. Gladue Reports are an effective way for this information to be presented to a judge. Indigenous individuals and organizations can advocate for increased government funding for ongoing support of Gladue Report programs run either by Nations or by non-profit organizations like Friendship Centres.

Additionally, any absence of cultural programming for Indigenous inmates in Newfoundland and Labrador is more than simply bad public policy – it is also likely a violation of the legal rights of Indigenous inmates. The *Correctional Services Act*, the *Charter*, and the *Human Rights Act* all support the conclusion that Indigenous people in custody have a legal right to cultural programming. The common law of negligence might also support a claim that the Province must ensure such programming is available to meet the standard of care it owes to Indigenous inmates in provincial custody.

Appendix A: Relevant Class Actions

The Federal Court Claim

In January of 2025, a proposed class action was started at the Federal Court of Canada against Canada ("**Federal Court Claim**"). The Federal Court Claim alleges that Canada has "knowingly, systemically, and in a discriminatory fashion underfunded programs, facilities, personnel, and services for Indigenous persons serving sentences administered by Correctional Service of Canada."[95] While this claim is targeted at Canada and not any province, it raises similar issues to those at play in the Province's correctional facilities: in the face of alarming rates of over-representation of Indigenous individuals in the prison system tied to experiences of colonization, and equipped with compelling evidence about how cultural programming can assist with rehabilitation and reduce recidivism rates, the government is failing to act on such evidence. It is failing Indigenous individuals and contributing to sustained over-representation of Indigenous people within the prison system.

The proposed class in the Federal Court Claim is "All First Nations, Inuit and Métis Persons in Canada who were incarcerated in, or on conditional release from, a Federal Institution, between April 17, 1985, and the present." The Federal Court Claim includes claims about systemic negligence and a breach of equality rights guaranteed under the *Charter of Rights and Freedoms*.

The certification motion (i.e. the motion that will decide whether it can proceed as a class action) is scheduled to take place September 14-16, 2026. This is a case worth following for anyone interested in rights of Indigenous inmates to cultural programming and services.

B.C. Class Action Regarding Off-Reserve Indigenous Child and Family Services

In June 2023, a proposed class action was filed in the British Columbia Supreme Court relating to off-reserve Indigenous child and family services in British Columbia.[96] It includes claims relating to systemic negligence and unjustified breach of *Charter* rights. While there has not been a decision on the merits in this action, the court did certify it as a class action, certifying both the issue of systemic negligence and *Charter* breaches as common issues. This means the court found that this s. 15 claim and systemic negligence claim relating to a province's provision of services to Indigenous people off-reserve had at least a reasonable prospect of success.

95 See interim decision in *Sellars v Canada (Attorney General)*, 2025 FC 1477; statement of claim available on-line: https://cbaapps.org/ClassAction/PDF.aspx?id=26523.

96 *Neal v Canada (Attorney General)*, 2025 BCSC 1498 at para 124.

This class action engages similar considerations to those at issue in Newfoundland and Labrador regarding provision of cultural services to Indigenous inmates: the failure of provincial actors to adequately ensure access to effective preventive or rehabilitative-type services by Indigenous individuals. While a British Columbia decision is not binding on courts in Newfoundland and Labrador, it provides precedent that could be persuasive to a court in this province.

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