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Dear Commissioner and Chairperson:

**Re: Prisoners' exercise of right to counsel**

We are writing on behalf of the Canadian Bar Association's Criminal Justice Section and its Committee on Imprisonment and Release (CBA Section) about the difficulties federal prisoners have in exercising their right to counsel. We request a meeting with you at your earliest convenience to discuss how we can work together to solve these concerns.

The Canadian Bar Association is a national association of 37,000 members, including lawyers, notaries, academics and students across Canada, with a mandate to seek improvements in the law and the administration of justice. Criminal Justice Section members include prosecutors, defense counsel and legal academics specializing in criminal law. The Committee consists of lawyers specializing in prison law and sentencing.

CBA Section members who practice prison law consistently report that their clients face significant barriers to exercising their right to counsel. For people in federal custody, these rights are enshrined in the *Corrections and Conditional Release Regulations* and the *Charter*. People in federal prison must rely on Correctional Service Canada (CSC) to facilitate their right to counsel for prison law matters. However, CSC makes it difficult to uphold that right and the Parole Board of Canada (PBC) perpetuates those difficulties.

Lawyers are prevented from effectively representing their incarcerated clients by CSC's position that the responsibility to share information and disclosure with a lawyer rests with the client. Lawyers are treated as "third parties" by CSC, not as legal representatives acting on behalf of clients. CSC refuses to give basic information to lawyers, such as the time and date of a hearing or the deadline to make submissions, instead telling counsel to ask their client. Disclosure is generally only made to the client, who then must request that the institution send the documents to their lawyer by fax or mail (people in prison have no access to email or the internet). The delays and challenges caused by this approach are significant.

Refusing to communicate directly with lawyers contravenes the right to counsel and compromises the lawyer's ability to effectively represent their clients in custody. Untold hours are spent struggling with basic procedural matters. Often information comes too late or not at all, leaving clients unrepresented or subject to a procedurally unfair hearing.<sup>1</sup>

Thirty-two percent of people in federal prisons are Indigenous.<sup>2</sup> Black people are also disproportionately represented.<sup>3</sup> Pre-existing trauma from child abuse among prisoners is high.<sup>4</sup> People with pre-existing mental health disabilities and drug users are disproportionately incarcerated.<sup>5</sup> People in prison routinely experience compounding trauma in prison through isolation and violence, including solitary confinement and use of force by officers. This context calls for a high level of procedural fairness.

After their initial incarceration, people in prison may be subject to discipline and other deprivations of liberty, such as involuntary transfer to higher levels of security, or placement in a dry cell or in a Structured Intervention Unit (SIU). These high-stakes administrative proceedings often happen on short notice, requiring fast facilitation of access to counsel.

In addition to the administrative matters for which CSC is the decision maker, it is also responsible for facilitating disclosure of documents for PBC hearings, Independent External Decision Makers' reviews of placement in SIUs and serious disciplinary hearings conducted by Independent Chairpersons. CSC staff are responsible for scheduling disciplinary hearings and SIU reviews.

The PBC arranges its hearing dates, but also takes the position that it is the incarcerated person's responsibility to share that information with their lawyer if they are represented.

### **The right to counsel is enshrined in the *Charter* and legislation**

The common law duty of procedural fairness applies to disciplinary decisions and other decisions affecting liberty within prisons.<sup>6</sup> The right to counsel is a component of procedural fairness,<sup>7</sup> which is protected by s. 7 of the *Charter*<sup>8</sup> and given specific protection by s. 10.

CSC is also required to uphold the right to counsel under its statutory scheme. The *Corrections and Conditional Release Regulations* (CCRR) require CSC to "ensure that an inmate has reasonable access to legal counsel"<sup>9</sup>, and to provide a "reasonable opportunity to retain and instruct legal counsel" for disciplinary proceedings<sup>10</sup> and other specified actions engaging liberty interests (confinement in SIU,<sup>11</sup> involuntary transfer<sup>12</sup> and placement in a dry cell<sup>13</sup>). *Commissioner's Directive 084 – Inmates' Access to Legal Assistance and the Police* recognizes that s. 10 of the *Charter* applies to these situations (excluding discipline), triggering the right to retain and instruct counsel without delay.<sup>14</sup>

There is also a right to counsel in PBC hearings. Lawyers may attend as a person's "assistant."<sup>15</sup> An assistant is entitled to advise the client throughout the hearing and address the Board on their behalf.<sup>16</sup> However, the PBC Decision Making Manual specifies that "[t]he offender is responsible for making the necessary arrangements for the assistant to attend the hearing"<sup>17</sup> regardless of whether the assistant is a lawyer representing them in the proceeding. According to policy, Board members have the discretion to proceed with the hearing if the assistant (or lawyer) cannot attend.<sup>18</sup>

### **Obstacles to exercising the right to counsel**

Unlike clients in the community, clients in prison face significant delays and challenges when attempting to contact their lawyer. Access to private (and non-private) phones is limited. People may only be allowed out of their cell for a short time each day, which may not be in office hours.

Lawyers cannot phone clients directly, they must put in a "call-back request." This is usually done through the institution's Visits and Correspondence office which sometimes has limited office hours. It

can take days to get through to someone to leave a call back request. Some institutions require call back requests be sent by fax and will not accept them by phone. Clients in some institutions often report that they do not receive call-back requests for days or at all.

Once clients receive the lawyer's call-back request, they may have to put in a written request to make a confidential phone call and may have to wait 24 hours or more for the call to be facilitated.

People in prison have no internet access, and most do not have access to computers or printers. They often must rely on staff for access to photocopiers and faxing, and other than during the COVID pandemic, fax charges have been prohibitively expensive.

People in prison affected by mental health disabilities, learning disabilities and intellectual disabilities are even more challenged to relay pertinent information and keep track of documents, hearing dates and time limits.

Additional hurdles include the challenge of depending on people in prison to know which documents are needed by counsel, the fact that people in prison often only have one copy of important documents that they may not wish to part with (as it can take a long time to receive an additional copy), and the prevalence of people in prison to lose or throw away their documents in anger after receiving them. Sometimes documents are destroyed by officers spraying people with pepper spray in their cells or lost when people are transferred to different cells or institutions.

Many people in prison suffer from trauma, symptoms of which can include hopelessness, feeling detached, self-destructive behaviour, and problems with attention, concentration and memory. For clients dealing with these issues, gathering documents, requesting they be mailed or faxed, making phone calls to relay information to counsel, and other steps that are straightforward for a person in the community can quickly become insurmountable obstacles to accessing counsel in prison. CBA Section members sometimes receive calls from clients asking for assistance, who then do not follow up for weeks or months, reporting later that they gave up on fighting a disciplinary charge or other proceeding because procedures for arranging legal calls and sending documents were too stressful or frustrating.

CBA Section members also report that they frequently do not receive a copy of the decision after representing a client.

CBA Section members report instances where prison administrators call them at the start of a hearing without informing them in advance of the date and time. In some cases, the lawyer may have received the wrong date from the client. Sometimes the lawyer has not had the opportunity to speak with the client or receive the relevant documents prior to the hearing, and requests for a brief adjournment to speak with the client privately to receive instructions are denied. In some cases, documents are received after the hearing has taken place.

When lawyers do not receive documents necessary to adequately represent a client, these administrative bodies may refuse to adjourn a matter and proceed with the hearing, or often the client wishes to have the matter dealt with and chooses to proceed with the hearing. Lawyers are left with the ethical dilemma of either withdrawing as counsel or representing the client without being able to adequately prepare the case.

### **The right to counsel includes an obligation on the tribunal to communicate with and provide disclosure to counsel**

It is not adequate to require prisoners to share documents and information about administrative hearings with their lawyers. The right to counsel implies a duty on administrative tribunals to treat the

lawyer as acting in the place of the client, and to facilitate the right to counsel by communicating and sharing disclosure and information with lawyers.

Counsel cannot adequately advise or represent a client without a full understanding of the case against their client. This is how legal disclosure works in other contexts. For example, counsel in criminal proceedings receive particulars from the Crown on behalf of their client. Counsel need not wait for the Crown to provide disclosure to their client, who in turn is expected to provide it to their counsel. This would create unnecessary delays and reduce the efficiency and quality of the service.

Once informed by counsel that they represent a prisoner, CSC (or the tribunal) should send documents directly to counsel. Lawyers are required by law society codes of professional conduct to maintain confidentiality and act only on clients' instructions. If lawyers fail to abide by professional ethics, disciplinary procedures through their law societies can ensure compliance.

It is against law society rules for a lawyer to communicate with a client whom they know to be represented by counsel.<sup>19</sup> An obligation to communicate directly with counsel in prison hearings when there is a right to counsel is consistent with this rule. The purpose of this rule is to protect the right to be represented by counsel, and to prohibit lawyers from taking advantage of vulnerable people in legal proceedings. This rule is particularly important to protect parties who are "powerless and vulnerable,"<sup>20</sup> which prisoners are in relation to the state. Every aspect of the incarcerated person's life is controlled by CSC. Although CSC is not represented by counsel at prison law hearings, it is a powerful government agency with lawyers at its disposal. The principle of this rule to protect vulnerable individuals in legal proceedings to exercise the right to counsel is equally applicable for people in prison facing punishment or deprivations of their residual liberty rights.

Other administrative bodies communicate directly with lawyers representing people in prison, including bodies not represented by counsel, such as ombuds offices, the Privacy Commissioner of Canada, the Canadian Human Rights Commission, and the Canadian Human Rights Tribunal. For example, the Canadian Human Rights Tribunal's Rules of Procedure state that documents must be served on all parties "or, if a party is represented, on their representative..." and requires communications to be made with a party's representative.<sup>21</sup>

## **Conclusion**

We recommend that CSC, PBC and other federal correctional bodies and decision-makers create and enforce clear policy establishing that staff must communicate directly with counsel where a person in custody is represented, provide documents directly to counsel reasonably in advance of hearing or submission deadlines, address procedural issues that may arise with counsel, and advise counsel of the time, dates and outcomes of hearings. In our view, the *Corrections and Conditional Release Regulations* should be revised to make these obligations clear.

We request a meeting with you at your earliest convenience to discuss our recommendations.

Yours truly,

*(original letter signed by Julie Terrien for Kevin B. Westell and Jen Metcalfe)*

Kevin B. Westell  
Chair, Criminal Justice Section

Jen Metcalfe  
Committee on Imprisonment and Release

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1      *Drennan v Canada*, 2008 FC 10 at para 41.

2      Office of the Correctional Investigator, *Annual Report 2021-22 [OCI Annual Report 2021-22]*, [online](#).

3      *OCI Annual Report 2021-22*.

4      Claire Bodkin, et al. "History of Childhood Abuse in Populations Incarcerated in Canada: A Systematic Review and Meta-Analysis". *Am J Public Health*. 2019 March; 109(3): 31-e11, [online](#).

5      Fiona Kouyoumdjian, Health status of prisoners in Canada, *Can Fam Physician*. 2016 Mar; 62(3):215-222, [online](#),

6      *Martineau (#2) v Matsqui Institution*, [1980] 1 S.C.R. 602; *May v Ferndale Institution*, 2005 SCC 82.

7      Allan C Hutchinson, "How Civil Procedures Fails (And Why Administrative Justice is Better)" (2020) 43-2 *Manitoba Law Journal* 41 at p. 45

8      For s. 7 of the *Charter*, see ex: *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2019 BCCA 228 at para. 206. See also: *New Brunswick (Minister of Health and Community Services) v G. (J.)*, [1999] 3 S.C.R. 46.

9      *Corrections and Conditional Release Regulations*, SOR/92-620 [CCRR], s. 97(3)(a).

10     This right only applies to "serious" disciplinary offences. Section 31(3) also requires CSC to ensure that "the inmate's legal counsel is permitted to participate in the proceedings to the same extent as an inmate pursuant to subsection (1)."

11     The right to counsel with respect to SIU placement is reiterated in "Commissioner's Directive 711: Structured Intervention Units" at paras 150-155, [online](#).

12     The right to counsel with respect to involuntary transfers is reiterated in Guideline 710-2-3.

13     CCRR, s. 97(2)

14     Commissioner's Directive 084 – Inmates' Access to Legal Assistance and the Police (CD 084) at paras 7, 9, [online](#).

15     CCRR, s. 140(7)

16     CCRA, s. 140(8))

17     Parole Board of Canada, *Decision-Making Policy Manual for Board Members* (PBC Manual), Policy 9.3 at para. 6

18     PBC Manual at paras 7-8

19     For example, *Alberta Code of Conduct*, Rule 7.2-8; *Code of Professional Conduct for British Columbia*, Rules 2.1-4 and 7.2-6; Law Society of Ontario *Rules of Professional Conduct*, Rule 7.2-6.

20     *Everingham v Ontario*, 1992 CanLII 7681 (ON SC), [1992] O.J. No. 304 in reference to "detained mental patients."

21     BC Human Rights Tribunal, *Rules of Practice and Procedure*, 8, 11 and 16.