

***Corrections & Conditional  
Release Act Review***

**CANADIAN BAR ASSOCIATION**



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## **PREFACE**

The Canadian Bar Association is a national association representing over 35,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the Committee on Imprisonment and Release of the National Criminal Justice Section of the Canadian Bar Association. The Committee has been involved in numerous federal government consultations and has formally responded to several legislative initiatives pertaining to sentencing, detention and conditional release. Assistance was provided by the Legislation and Law Reform Directorate at National Office.

This submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Criminal Justice Section of the Canadian Bar Association.



# *Corrections & Conditional Release Act Review*

## **I. INTRODUCTION**

In June 1988, the Canadian Bar Association (CBA) released *Justice Behind the Walls*, prepared by the Committee on Imprisonment and Release of the National Criminal Justice Section (The Committee).<sup>1</sup> This report and companion reports<sup>2</sup> formed the basis for several resolutions pertaining to corrections and conditional release adopted by the Canadian Bar Association at its 1988 Annual Meeting, over ten years ago. As CBA policy, those resolutions provide the orientation for our comments in this periodic evaluation of the correctional system. The Committee, comprised of legal academics and practising lawyers with years of specialization in the area of imprisonment and release, is pleased to participate in the five year review of the *Corrections & Conditional Release Act*, on behalf of the National Criminal Justice Section and the Canadian Bar Association.

Since 1988, the Committee on Imprisonment and Release has participated in a comprehensive examination of a proposed draft of the 1992 *Corrections and Conditional Release Act*, coordinated through Solicitor General Canada. During the consultation process, the *Justice Behind the Walls* resolutions met with relatively little success. The CBA nevertheless hoped those resolutions, along with increased implementation of the Rule of Law in disciplinary, segregation and parole proceedings, would be adopted and enforced with the legislative reform.

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<sup>1</sup> Jackson, Michael, *Justice Behind the Walls* (Ottawa: Canadian Bar Association, 1988).

<sup>2</sup> *Locking up Natives; Parole and Early Release* (Ottawa: Canadian Bar Association, 1988).

Over approximately the same period, the Committee prepared the Canadian Bar Association's response to the *Archambault Report*,<sup>3</sup> the Daubney Committee Report<sup>4</sup> and the 1990 *Green Paper*.<sup>5</sup> More recently, the Committee prepared the Association's response to Bill C-7 (the *Controlled Drugs and Substances Act*), Bill C-41 (*Criminal Code* amendments - sentencing), Bill C-45 (*Corrections and Conditional Release Act* amendments), and Bill C-45 (*Criminal Code* amendments - judicial review of parole eligibility).<sup>6</sup>

To have a coherent and comprehensive approach to corrections and release, we must examine the overall system of criminal justice and punishment and scrutinize the Government's intentions in legislation pertaining to sentencing, corrections and parole. With important recent amendments to criminal law and corrections, the Government has had the stated intent to "contribute to the respect of the law and the maintenance of a just, peaceful and safe society."<sup>7</sup> These amendments were also intended to decrease the correctional population and solve the painful and costly problem of the over use of incarceration.

In our view, these objectives have not been met, and provide inadequate justification for recent contradictory policies in the field of sentencing, corrections and release. For example, the Committee on Imprisonment and Release supported legislation

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<sup>3</sup> *Sentencing Reform: A Canadian Approach* (Ottawa: Minister of Supply and Services Canada, 1987).

<sup>4</sup> *Taking Responsibility: The Report of the Standing Committee on Justice and Solicitor General on its Review of Sentencing, Conditional Release and Related Aspects of Corrections* (Ottawa: Queen's Printer for Canada, 1988).

<sup>5</sup> Department of Justice, *Sentencing, Directions for Reform* (Ottawa: Minister of Supply and Services Canada, 1990); Government of Canada, *A Framework for Sentencing, Corrections and Conditional Release, Directions for Reform* (Ottawa: Minister of Supply and Services Canada, 1990); Solicitor General, *Corrections and Conditional Release: Directions for Reform* (Ottawa: Minister of Supply and Services Canada, 1990).

<sup>6</sup> Bill C-7, Submission to the Standing Committee on Health (Ottawa: Canadian Bar Association, 1994); Bill C-41, Submission to the Standing Committee on Justice and Legal Affairs (Ottawa: Canadian Bar Association, 1994); Bill C-45, Submission to the Standing Committee on Justice and Legal Affairs (Ottawa: Canadian Bar Association, 1994) and; Bill C-45, Submission to the Standing Committee on Justice and Legal Affairs (Ottawa: Canadian Bar Association, 1996).

<sup>7</sup> *Corrections and Conditional Release Act*, (Bill C-36) S.C. 1992, c. 20, now section 100a) *CCRA*; *Criminal Code* amendments (*Sentencing*) (Bill C-41), part. XXIII, S.C. 1995 c. 22, now section 718 *Criminal Code*; *The Controlled Drugs and Substance Act*, S.C. 1996, c. 19, now section 10 of the *Act*.



mandating judicial restraint in sentencing, which required judges to consider alternatives before considering imprisonment, especially towards Aboriginal offenders.<sup>8</sup> However, the Government simultaneously adopted *ad hoc* legislation extending detention for a larger group of dangerous criminals, introducing a new sanction which attaches a lengthy period of supervision to a long penitentiary term,<sup>9</sup> created mandatory minimum terms of imprisonment for specified crimes committed with firearms, regardless of the facts of the particular case, and proposed further minimum sentences.<sup>10</sup> Finally, it is trying more juveniles in adult court and has adopted what we believe to be an overly punitive attitude towards the criminal responsibility of youth, which has a disproportionate impact on Aboriginal youth.<sup>11</sup>

The Government's expressed goal has also been used to justify presumptive imprisonment for many drug offences. The *Controlled Drugs and Substances Act* appears to stress rehabilitation and treatment of drug offenders and suggest less systematic exemplary sentences for addicted offenders than in the past.<sup>12</sup> However, section 10(2) contains a list of factors considered to be aggravating in the commission of a drug offence that applies to so many drug offenders and drug offences that courts in some parts of the country seem to believe they are almost

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<sup>8</sup> *Criminal Code* section 718.2d)e) (Bill C-41).

<sup>9</sup> *Criminal Code* section 753.1.

<sup>10</sup> See *Criminal Code* sections 220, 236, 239, 244, 272, 273, 279, 279.1, 344, 346 and recent Bill C-27, *Criminal Code* amendments (child prostitution, child sex tourism, criminal harassment and female genital mutilation) (45 Eliz., II 1996), which created an offence with a severe mandatory penalty of five years of imprisonment (now *Criminal Code* section 212. (2.1)).

<sup>11</sup> See *Young Offenders Act*, sections 16 (1.01) - 16 (1.11), Bill C-17, S.C. 1997, c. 18; *Criminal Code* section 745.3.

<sup>12</sup> See section 10 of the *Act*, for example.

mandated to order imprisonment.<sup>13</sup> In short, the *Act* tends to encourage the over reliance on incarceration,<sup>14</sup> rather than the opposite effect.

The comprehensive review of the *CCRA*'s provisions and operations has been undertaken with the same theme, of creating a "just, peaceful and safe society." The *Act* was initially presented as a comprehensive and well-balanced reform of corrections and parole. While section 100 states that the purpose of parole is "to contribute to the maintenance of a just, peaceful and safe society by means of decisions on the timing and conditions of release that will best facilitate the rehabilitation of offenders", section 101 asserts that the protection of society is the paramount consideration in the determination of any case. That principle is reiterated in section 4, which reads "that the protection of society be the paramount consideration in the corrections process." Doing justice to prisoners and re-establishing peace between society and its offenders by promoting a re-integrative and fair release process for parolees are clearly not considered equal priorities. When Bill C-36 was presented to Parliament in 1991, the Solicitor General made a very clear statement about the paramount and only legislative operating principle of

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<sup>13</sup> *Controlled Drugs and Substance Act*, section 10(2):

[Factors to be considered]. Where a person is convicted of a designated substance offence, the court imposing sentence on the person shall consider as an aggravating factor that a person,

- a) In relation to the commission of the offence,
  - (i) carried, used or threatened to use a weapon,
  - (ii) used or threatened to use violence,
  - (iii) trafficked in a substance included in Schedule I, II, III, or IV or possessed such a substance for the purpose of trafficking, in or near a school, on or near school grounds or in or near any other public place usually frequented by persons under the age of eighteen years, or
  - (iv) traffic in a substance included in Schedule I, II, III, or IV, or possessed such a substance for the purpose of trafficking, to a person under the age of eighteen years, or
- b) was previously convicted of a designated substance offence; or
- c) used the services of a person under the age of eighteen years to commit or involved such a person in the commission of a designated substance offence.

See also Jean-Paul Brodeur, "Sentencing Reform: Ten years after the Canadian Sentencing Commission" in J. Roberts and D. Cole, *Making Sense of Sentencing* (Toronto: University of Toronto Press, 1999).

<sup>14</sup> *Controlled Drugs and Substance Act*, section 10(3):

Where pursuant to subsection (1), the judge is satisfied of the existence of one or more of the aggravating factors enumerated in that subsection, but decides not to sentence the offender to imprisonment, the court shall give reasons for that decision.

*CCRA*: to protect Canadian society and to calm its fear with a simplistic custodial solution:

The interpretation of this one important principle is this — if the release of an offender threatens society, the offender will not be released. The government wants to get a message to two groups. First of all, the government wants to assure the public that from this point forward, they, instead of offenders, will get the benefit of the doubt. The government also wants to send a strong message to all those who work in the parole and prison system that law-abiding citizens come first and that at no time should public safety be put in jeopardy.

And he continued:

Parole is not a right but an earned privilege. If a parolee is reincarcerated for violations of his conditions of release he will later have a hearing but before very sceptical commissioners.<sup>15</sup>

In other words, custody, parole and supervision are totally organized to carry out judicial sentences of imprisonment with no guiding principles logically relevant to rehabilitation and reintegration to society, but only with principles logically relevant to punishment and imprisonment.<sup>16</sup>

The legislation also distinguishes between violent and non-violent offenders, assimilating the first group with high risk offenders and the second group with low risk offenders. By implementing a policy to increase punishment for violent offenders but soften the release policy for non-violent prisoners the Government promised to save one billion dollars.<sup>17</sup> However, five years experience with the *CCRA* has not delivered the intended results.<sup>18</sup>

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<sup>15</sup> House of Commons Debates, November 4, 1991, at 4430.

<sup>16</sup> Hélène Dumont, *Less is best: The sentencing reform unattained goal?* Canadian Judicial Institute - Halifax Criminal Law Session, March 1997; Jean-Paul Brodeur, *supra*, note 13.

<sup>17</sup> In 1996-1997, the Adult Correctional Services budget in Canada was 1.97 billion of dollars (STATCAN, Feb. 18, 1998). The Solicitor General's, *Towards a Just, Peaceful and Safe Society, Report of Consultations*, notes that some of those consulted criticized the classification of prisoners, arguing that the distinction between violent/non-violent offenders cannot be equivalent to high risk/low risk offenders.

<sup>18</sup> Solicitor General, *Towards a Just, Peaceful and Safe Society, The Corrections and Conditional Release Act, Five years later*, Consultation Paper, at 9: "Federal full parole reviews have declined steadily since the implementation of the *CCRA*. Between 1992/93 and 1996/97, federal full parole reviews decreased from 7,200 to 4600 (i.e. by 35%). During the same period, the federal full parole population declined by 9% while the

Since 1992, Canada has witnessed many changes to its criminal law. There are more detention orders and fewer early and conditional release decisions, restrictions or a complete removal of the judicial review of parole eligibility after 15 years of incarceration,<sup>19</sup> increased initial periods of parole ineligibility for dangerous offenders, as well as an extended category of high risk offenders.<sup>20</sup> Other amendments have narrowed access to parole and statutory release.<sup>21</sup>

The Solitor General's consultation paper on the *CCRA* reveals a decrease of admissions to institutions coupled with a growth of the daily count of prisoners. Possible explanations include an increase in the duration of custodial sentences, changes in practices related to conditional release, fewer persons being granted parole, an increased period of parole ineligibility for more offenders, and a greater number of readmissions for breaking release conditions.

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incarcerated population increased by 12%"...

[...]

Accelerated Parole Review could not have a significant impact on decarceration: at 4 : "In 1986/87, 58% of the incarcerated population were serving a sentence for a violent offence. By 1995/96, almost 8 of every 10 incarcerated offenders were in custody for a violent offence."

[...]

At 13-14: "Since the *CCRA*, day parole and full parole releases have declined in number, and a proportion of total conditional releases.

- Day parole releases have declined to 2, 693 (28% of releases).
- Full parole releases declined to 1,737 (18% releases).
- Releases on statutory release have grown steadily to a total of 4,801, or 50% of all releases.
- Warrant expiry releases (e.g. offenders detained) have ranged from 3% to 7% of all releases."

[...]

At 13-14: "Following implementation of the *CCRA* the number of detention referrals each year rose steadily to a high of 529 in 1995/96 [...]. From 1989/90 to 1995/96, the rate of referral increased from 4.2% to 10.7%. The proportion declined in 1996-97 of 8.8%. [...] The increased number of referrals can be explained, in part by the rapid growth in the federal sex offender population. Detention referrals tend to target sex offenders (e.g. about 60% of offenders referred had at least one sex offence). Between 1989/90 and 1994/95, annual admissions of sex offenders to penitentiary increased by 39%. Aboriginal offenders are over-represented in detention referrals however, once referred, they are detained at the same rate as non-Aboriginals."

<sup>19</sup> Bill C-45, *Corrections and Conditional Release* amendments, in force: Jan. 9, 1997.

<sup>20</sup> Bill C-55, An Act to amend the *Criminal Code* (high risk offenders), the *Corrections and Conditional Release Act*, the *Criminal Records Act*, the *Prisons and Reformatory Act* and the *Department of the Solicitor General Act*. Now *Criminal Code* sections 752-753.

<sup>21</sup> S.C. 1993, c. 34; S.C. 1995, c. 22; S.C. 1995, c. 39; S.C. 1995, c. 42; S.C. 1994, c. 19, S.C. 1997, c. 17.

Together, these factors demonstrate that decarceration has not resulted from recent legislative reforms,<sup>22</sup> in spite of a significant decrease in criminality for the same period. In our view, the Government is relying too heavily and too exclusively on incarceration as the only tool for the protection of society. The official policy may be to use less restrictive sanctions than imprisonment, but the Government is actually using more minimum and indeterminate sentences of imprisonment and more detention orders. The official position may be to use decarceration and restorative justice for Aboriginal people, but by enacting harsher penalties for violent offenders using firearms and for young offenders, Aboriginal people are targeted in a disproportionate way.

In summary, we have not seen the coherent legislative innovations to sentencing, corrections and parole that we believe will ultimately promote a just, peaceful and safe society. After five years of the *CCRA*, we are profoundly disappointed that recommendations from *Justice Behind the Walls* have not been more influential and believe that the Rule of Law is not as central to correctional and parole decisions as it should be. Openness and accountability are still lacking in penitentiary settings. In the remainder of this submission, we focus on the issues we believe most critically call for reform; openness and accountability, independent adjudication and the segregation process, and adherence to the Rule of Law and fairness in parole hearings.

## II. OPENNESS AND ACCOUNTABILITY

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*Supra*, note 18; Canadian Center For Justice Statistics, *Juristat, Adult criminal court statistics 1997-98*, vol. 18:14, at 1 (Candace Brookbank and Bob Kingsley). “During 1997-98, adult criminal courts in the nine participating jurisdictions disposed of 411,576 cases involving 864,837 charges. This represents an 8% decrease in cases since 1994-95.”

“A prison sentence was imposed in 33% of cases with convictions (incarceration rate). This figure has remained stable since 1994-95 when it was 34%.”

The median length of prison sentences, excluding one day prison sentences, was 60 days. This figure represents a sharp increase from a median prison length of 45 days in 1994-95 and from a median prison length of 30 days in 1991-92.

In general, offences with the longest median prison sentences also had the highest rates of incarceration. For example, homicide (excluding murder) had a median sentences of 7 years for 1997-98. In 1991-92, the median sentence was 4 years for homicide: see John Turner, *Sentencing in Adult Criminal Provincial Courts: a study of six Canadian jurisdictions, 1991-1992* (Ottawa: Canadian Center for Justice Statistics, 1993) table 8.

## A. Historical Perspective

“The Perspective from History” portion of *Justice Behind the Walls* summarizes the historical record of correctional systems and questions of “openness and accountability.”<sup>23</sup> In the 1770s, somewhat like today, there was widespread scepticism about the effectiveness of criminal punishment and, the public perception was of a continuing crisis in the criminal justice system. In *The State of the Prisons in England and Wales*,<sup>24</sup> John Howard set out a reform model based on the establishment of a rational and legal system of authority within a prison. Rules would be applied to both staff and prisoners to limit the absolute discretion of the keepers and subject the prisoners to a routine of institutionalized order. To prevent abuse of power, this authority of rules would be enforced by inspection through the superintendency of magistrates and by the democratic overview of the general public.

Bentham’s 1791 plan for the penitentiary involved both prisoners and guards being under the surveillance of inspectors. The public would have free admission to inspection towers to keep the inspectors themselves under surveillance. The proposals of these eighteenth century reformers reconciled the interests of the state, the custodians and the prisoners by binding both the keepers and the kept to an impartial code enforced from the outside.

The need to control abuse of power within the prison by delineating rules enforced by inspection from outside has resonated throughout the history of the Canadian penitentiary. In 1834, Canada’s first *Penitentiary Act* set the legislative stage for our country’s first penitentiary. The opening of the Kingston penitentiary was expected to usher in a new era of imprisonment or punishment. However, a 1848 Royal Commission (the *Brown Commission*), found that the warden had frustrated the fundamental purpose of the penitentiary as conceived in the 1834 *Act*, and that the treatment of the prisoners continued to be “barbarous and inhumane.” On the principle of outside inspection, the new *Act* had established a local board of

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<sup>23</sup> *Supra*, note 1, at 23.

<sup>24</sup> (London: J.M. Dent, 1929), first published in 1777.

inspectors with a general jurisdiction to superintend the administration of Kingston, but this board had proved inadequate for controlling the abuses and excesses of the warden. The Commission recommended that a national board of inspectors be appointed instead, with expanded authority to make rules and regulations and with clearly defined duties to visit and inquire into the management of the penitentiary. The Board would be directly responsible to the Executive of Government. Consistent with the position of John Howard, this meant the warden was accountable to the authority of rules and outside inspection and that any punishment imposed had to meet the strictest standards of justice.

A century later, the Report of the Parliamentary Sub-Committee in 1977 (*McGuigan Committee*) and the Report of the Canadian Sentencing Commission in 1987 (*Archambault Commission*) demonstrated little had changed.

There is a great deal of irony in the fact that imprisonment - the ultimate product of our system of criminal justice - itself epitomises injustice. We have in mind the general absence within penitentiaries of a system of justice that protects the victim as well as punishes the transgressor; a system of justice that provides a rational basis for order in a community - including a prison community - according to decent standards and rules known in advance; a system of justice that is manifested by fair and impartial procedures that are strictly observed; a system of justice that proceeds from rules that cannot be avoided at will; a system of justice to which all are subject without fear or favour. In other words, we mean justice according to Canadian law. In penitentiaries, some of these constituents

of justice simply do not exist. Others are only a matter of degree - a situation which is hardly consistent with any understandable or coherent concept of justice.<sup>25</sup>

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Report to Parliament, *The Sub-Committee on the Penitentiary System in Canada* (Ottawa: Supply and Services, 1977) at 85.

To redress this situation, the Sub-Committee advocated that two principles be accepted. First,

The Rule of Law establishes rights and interests under law and protects them against the illicit or illegal use of any power, private or official, by providing recourse to the courts through the legal process. The administrative process, however, may or may not protect these things, or may itself interfere with them, depending on the discretion of those who are given statutory administrative powers. In penitentiaries, almost all elements of the life and experience of inmates are governed by administrative authority rather than law. We have concluded that such a situation is neither necessary for, nor has it resulted in, the protection of society through sound correctional practice. It is essential that the Rule of Law prevail in Canadian penitentiaries.<sup>26</sup>

Second,

Justice for inmates is a personal right and also an essential condition of their socialization and personal reformation. It implies both respect for the person and property of others and fairness in treatment. The arbitrariness traditionally associated with prison life must be replaced by clear rules, fair disciplinary procedures and the providing of reasons for all decisions affecting inmates.<sup>27</sup>

In a perceptive analysis, the Sub-Committee reflected on the relationship between the judicial “hands-off” doctrine and the lawlessness of prison life.

(T)he present judicial policy invites the perpetuation by the authorities of a system that is so far removed from normal standards of justice that it remains safely within the class of matters in which the imposition of judicial or quasi-judicial procedures would clearly be, in most instances, inconceivable. Further, this would ensure that

the sheer immensity of the task of straightening it out is enough to discourage even the most committed members of the judiciary. The worst things are in the penitentiary system, therefore, the more self-evident it is to the courts that Parliament could not possibly have intended for them to intervene. Injustice, as well as virtue, can be its own reward.<sup>28</sup>

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<sup>26</sup> *Ibid.*, at 86.

<sup>27</sup> *Ibid.*, at 87.

<sup>28</sup> *Ibid.*, at 86.



To bring the Rule of Law into prison, the Sub-Committee recommended that the Commissioner's Directives be consolidated into a consistent code of regulations having the force of law for both prisoners and staff, that independent chairpersons be appointed in all institutions to preside over disciplinary hearings, and that an inmate grievance procedure be established giving prisoners a substantial role. With these legislative and administrative reforms in place, the Sub-Committee envisaged a vital but focused role for the courts.

It should then lie with the courts to ensure that those individuals and agencies involved in the management and administration of the revised system adhere to general standards of natural justice and due process of law as they substantially exist elsewhere in the criminal justice system...

We suggest that it would be both reasonable and appropriate to proceed in such a way as to allow a much greater scope for judicial control over official activity and that the conditions of correction in a reformed penitentiary system than is now feasible. Assuming that the system is definitive in its commitment, clear in its intentions, and effective in its prescription, then the nature of the task remaining to be done by the courts in ensuring that the Rule of Law prevails within penitentiaries should not be disproportionate to what they do outside prison walls on an on-going basis. Abuse of power and denial of justice are always possible under any system, no matter how well conceived or organized it may be. These things are felt no less keenly in prisons than elsewhere, and their consequences in a penitentiary setting are often far more severe.<sup>29</sup>

## B. Supreme Court Rulings

Three years after the tabling of the Parliamentary Sub-Committee report, the Supreme Court of Canada responded to the challenge that the courts assume greater responsibilities over the exercise of correctional authority. In its landmark ruling in *Martineau v. Matsqui Institution Inmate Disciplinary Board*,<sup>30</sup> the Court held that prison authorities were subject to a general administrative law duty to act fairly and to the superintendency of the courts to ensure compliance with it. The next year, the Supreme Court took another significant step in *R.v. Solosky*<sup>31</sup> by expressly endorsing

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<sup>29</sup> *Ibid.*, at 87.

<sup>30</sup> (No. 2) (1979), 50 C.C.C. (2d) 353.

<sup>31</sup> (1980), 50 C.C.C. (2d) 495.

the proposition that “a person confined in prison retains all of his civil rights, other than those expressly or impliedly taken away from him by law.”

In a trilogy of 1985 cases – *Cardinal and Oswald v. The Director of Kent Institution*, *The Queen v. Miller* and *Morin v. National Special Handling Unit Review Committee*<sup>32</sup> – the Court recognized the concept of “residual liberty,” the liberty prisoners retain as members of the general prison population. It held that any significant deprivation of that liberty, such as being placed in administrative segregation or transfer to the Special Handling Unit, could be challenged either under prerogative writs in the Federal Courts or an *habeus corpus* in the provincial Superior Courts, to ensure accountability to the Rule of Law by correctional administrators.

### C. Correctional Law Review Project

The important role of the judiciary in recognizing and protecting the rights and residual liberties of prisoners was enhanced by the enactment of the *Canadian Charter of Rights and Freedoms* in 1982. The *Charter*'s significance was less in the context of prison litigation than in the impetus it gave to the development of new corrections and conditional release legislation: legislation that reflected a culture of respect for fundamental rights and freedoms, and ensured that correctional authority was exercised with full regard to the *Charter* and that any limitations on rights were, in the words of section 1 of the *Charter*, “demonstrably justified in a free and democratic society.”

The main vehicle for bringing correctional legislation into the *Charter* age was the Correctional Law Review Project, conducted by Solicitor General Canada. The project produced a series of working papers and ultimately proposals for what was to become the *Correctional and Conditional Release Act* of 1992. The CBA Committee on Imprisonment and Release participated extensively in the Correctional Law Review and responded to the Working Papers and to various drafts of the

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<sup>32</sup> (1985), 23 C.C.C. (3d) 119, *et seq.*

legislation.<sup>33</sup> While endorsing many of the proposed changes, the Committee also identified where the proposals inadequately protected against abuse of correctional power, and gave insufficient recognition to common law and *Charter* rights.

#### D. Introduction of the *CCRA*

Following completion of public consultations, Justice Canada and Solicitor General Canada produced a draft of a new *Corrections Act*, as part of a *Green Paper*, followed by draft Regulations. Although the reform package was presented as a development and refinement of the work of the Correctional Law Review, there were substantial differences between the two projects. The draft legislation relegated provisions proposed by the Correctional Law Review for inclusion in the statute to the Regulations. Of even greater concern, important criteria and procedures to control the exercise of correctional discretion, particularly in the area of administrative segregation, were either removed or watered down. As a result, the CBA, in its submission to the House of Commons Committee on Justice and Legal Affairs, concluded:

The proposed *Corrections Act* and draft regulations have diluted, and in some cases eviscerated, the Correctional Law Review proposals. In our opinion, the Correctional Law Review proposals constitute a necessary, although not entirely sufficient, blueprint for law reform. The proposed *Corrections Act* and draft regulations fall below the minimum threshold for law reform and are therefore unacceptable.<sup>34</sup>

Most of the CBA recommendations to strengthen protection of prisoners' rights and reinstate the substantive and procedural protections set out in the Correctional Law Review proposals did not result in amendments to the legislative package. In spite of this, the new legislation was a very significant advance in the field of correctional law. The legislative statement of the purpose of the correctional system, and the principles to guide the Correctional Service of Canada (CSC) in achieving that

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<sup>33</sup> See, *Justice Behind the Walls*, *supra*, note 1, which critically reviewed the recommendations of the Correctional Law Review.

<sup>34</sup> *Submission on Directions for Reform and the Green Paper on Sentencing, Corrections and Conditional Release* (Ottawa: Canadian Bar Association, 1991) at 62.

purpose, were taken from the Correctional Law Review proposals and reflected the core values contained in the CSC's *Mission Document*.

In particular, the *CCRA* provides statutory recognition to three principles of corrections with particular relevance to the protection of prisoners' rights: that "the service use the least restrictive measures consistent with the protection of the public, staff members and offenders;"<sup>35</sup> that "offenders retain the rights and privileges of all members of society; except those rights and privileges that are necessarily removed or restricted as a consequence of the sentence;"<sup>36</sup> and that "correctional decisions be made in a forthright and fair manner, with access by the offender to an effective grievance procedure."<sup>37</sup>

Significant changes were also introduced in the power to search. The *CCRA* replaced the very broad, untrammelled power contained in the Penitentiary Service Regulations with a detailed set of provisions which distinguished between routine, investigative and emergency search powers, establishing threshold criteria for each and differentiating between non-intrusive, strip and body cavity searches. The statutory scheme was specifically structured to reflect Supreme Court jurisprudence on the guarantee against unreasonable search contained in the *Charter*.

In many areas, the provisions of the *CCRA* did not change either the substance or the procedure of decision-making affecting prisoners, but moved them from their previous status as policy guidelines in the Commissioner's Directives to legally binding provisions of the legislation and regulations. However, this move was significant in that it increased their visibility and their enforceability.

Measured against the standard of the previous *Penitentiary Act*, the *Corrections and Conditional Release Act* was a significant reform. However, the legislation ignored one of the CBA's principal recommendations: that there be significant expansion of

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<sup>35</sup> (section 4(d)).

<sup>36</sup> (section 4(e)).

<sup>37</sup> (section 4(g)).

the role of independent adjudication to ensure that the Rule of Law was reflected not just in the statute book, but also in every warden's office and every cell in Canadian prisons. We emphasized the need to expand independent adjudication beyond disciplinary court proceedings to include administrative segregation and involuntary transfers to a higher security institution, including transfer to the Special Handling Unit.<sup>38</sup> However, the Correctional Service of Canada argued that such an expansion was unnecessary to ensure fairness, as the *CCRA* reforms were sufficient to ensure that CSC staff carried out their authority in conformity with the Rule of Law.

### **E. The *Arbour Report***

The Correctional Service's capacity to carry out its responsibilities without the safeguard of independent adjudication went through its most severe test at the Prison for Women in Kingston two years after the enactment of the *CCRA*. In April 1994, events at that prison exposed the relationship between the Rule of Law and operational reality to public view and scrutiny in a manner unprecedented in Canadian history. A video of those events - the strip searching of women prisoners by a male emergency response team - was shown a year later on national television, shocking and horrifying many Canadians, including correctional staff.

The manner in which the strip searching was carried out, and the subsequent long-term segregation of the prisoners, became the subject of both a special report by the Correctional Investigator and a report by a Commission of Inquiry conducted by Madam Justice Louise Arbour of the Ontario Court of Appeal. Both reports unambiguously condemned the correctional practices that occurred in the Prison for Women, but Madam Justice Arbour's report contained the clearest indictment of the Correctional Service of Canada as a culture without respect for the rights of prisoners or the Rule of Law.

The *Arbour Report* is a critical document in the history of Canadian corrections, exposing correctional practices and attitudes beyond the narrow and little publicized

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See, *Justice Behind the Walls*, *supra*, note 1.

view provided by individual judicial challenges by prisoners. In many respects, the *Report* provides for the 1990's what the Report of the Parliamentary Committee on the Penitentiary System in Canada did for the 1970's. The findings of the *Arbour Report* measure how far the correctional system has (or has not) progressed in bringing its operations into compliance with two of the fundamental principles contained in the Parliamentary Committee Report, that "The Rule of Law must prevail inside Canadian penitentiaries" and "Justice for inmates is a personal right and also an essential condition of their socialization and personal reformation."<sup>39</sup>

Madam Justice Arbour found that correctional staff at the Prison for Women violated the *CCRA* in the areas of strip searching and body cavity searching, transfer, administrative segregation and the internal grievance process. Most significantly, she found that these violations were not simply individual examples of a failure to understand or respect the law, but were symptomatic of a corporate culture without respect for the Rule of Law:

Significantly in my view, when the departures from legal requirements in this case became known through this enquiry's process, their importance was downplayed and the over-riding public security concern was always relied upon when lack of compliance had to be admitted. This was true to the higher ranks of the correctional service management, which leads me to believe that the lack of servants of individual rights is not an isolated factor applicable

only to the Prison for Women, but is probably very much part of CSC's corporate culture.<sup>40</sup>

The *CCRA* requires that "an effective grievance procedure" be in place.<sup>41</sup> Madam Justice Arbour noted that "virtually all of the issues that have arisen in the course of this inquiry were raised in the first instance by the inmates in complaints, grievances, and in some cases, in letters addressed to senior Correctional Service officials."<sup>42</sup>

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<sup>39</sup> Report to Parliament, at 86-7.

<sup>40</sup> Honourable Louise Arbour, *Commission of Inquiry into Certain Events at the Prison for Women in Kingston*, 1996, at 57.

<sup>41</sup> Sections 4 and 90.

<sup>42</sup> *Supra*, note 40, at 150.

Some of her harshest criticisms of the Correctional Service were directed to the manner in which the grievance procedures failed to effectively address the issues raised by the prisoner. She found that some grievances were never answered at all, or were answered late. Often, an inappropriate person responded to grievances and there was no mechanism to give priority to grievances requiring an urgent response. Most troubling was the frequency in which responses failed to deal with the actual issues raised, giving the impression that an inmate's version of events was inherently unreliable, and that to grant a grievance was seen as admitting defeat by the Correctional Service.<sup>43</sup>

Madam Justice Arbour made recommendations on broad policy issues underlying her examination, particularly the role of the Rule of Law in the correctional corporate philosophy within the Correctional Service of Canada. She began with an analysis of the fundamental values underlying the Rule of Law:

The reliance on the Rule of Law for the governance of citizens' interactions with each other and with the State has a particular connotation in the general criminal law context. Not only does it reflect ideals of liberty, equality and fairness, but it expresses the fear of arbitrariness in the imposition of punishment. This concept is reflected in the old legal maxim: *nullum crimen sine lege, nulla poena sine lege* - there can be no crime, nor punishment, without law. In the correctional context, "no punishment without law" means that

there must also be legal authority for all State actions enforcing punishment...The coercive actions of the State must find their justification in a legal ground of authority and persons who enforce criminal sanctions on behalf of the state must act with scrupulous concern not to exceed their authority.<sup>44</sup>

Madam Justice Arbour distinguished between the Rule of Law and the existence of rules, saying that the evidence at the inquiry demonstrated that "the Rule of Law is absent, although rules are everywhere."<sup>45</sup> The multiplicity of rules and the proliferation of Commissioner's Directives and standing orders obscured "the

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<sup>43</sup> *Ibid.*, at 150-1.

<sup>44</sup> *Ibid.*, at 179.

<sup>45</sup> *Ibid.*, at 181.

fundamental premise that all correctional authority must find its roots in enabling legislation, and it must yield to the legislative rights of prisoners.”<sup>46</sup> Ironically, the very multiplicity of rules “largely contributed to the applicable law or policy being often unknown, or easily forgotten and ignored.”<sup>47</sup> In finding “little evidence of the will to yield pragmatic concerns to the dictates of the legal order,” she concluded that the absence of the Rule of Law was not something confined to line staff at the Prison for Women but was “most noticeable at the management level, both within the prison and at the Regional and National levels.”<sup>48</sup>

From the evidence at the inquiry, (including that of the then Commissioner of Corrections) and her review of the literature, Madam Justice Arbour concluded that the enactment of the *CCRA*, the existence of internal grievance mechanisms and existing forms of judicial review had not succeeded in developing a culture of rights within the Correctional Service of Canada. Expressing deep scepticism that the Service was able to put its own house in order, she cited a 1984 report prepared by the Service for the Solicitor General:

It must be made clear to staff and inmates alike, while the Service will protect them, it will not condone any unwarranted and unlawful use of force. Both staff and inmates must realize that violations will be resolved in swift and certain disciplinary action.<sup>49</sup>

Madam Justice Arbour’s response to this left little room for ambiguity.

In my view, if anything emerges from this inquiry, it is the realization that the Rule of Law will not find its place in corrections by “swift and certain disciplinary action” against staff and inmates....**The Rule of Law has to be imported and integrated...from the other partners in the criminal justice enterprise as there is no evidence that it would emerge spontaneously.**<sup>50</sup>

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Ibid.*, at 180.

<sup>49</sup> Report of the Advisory Committee to the Solicitor General of Canada on the Management of Correctional Institutions, 1984, cited in the *Arbour Report*, *ibid.*, at 180.

<sup>50</sup> *Ibid.*, at 180, emphasis added.



Her recommendations for change have several elements. First, she suggested that there be more cross-fertilization between the Correctional Service and other partners of the criminal justice system in recruiting and training at all levels. For example, the Correctional Service should seek assistance from the police, bar associations and the National Judicial Institute in developing initial and continuing education for correctional officers that emphasizes the supremacy of the *Charter* and the fact that all authority comes from the law. She also identified the need for educational programs for judges to become “more conscious of the need to maintain some ownership of the integrity of their sentence after it is imposed and of their right under section 72 of the *CCRA*, to visit penitentiaries, which very few exercise.”<sup>51</sup>

A second element to her recommendations addressed the need for an effective sanction for breach of the law. Madam Justice Arbour’s rationale is directly related to her views on the importance of prisoners’ rights and the integrity of the criminal justice system:

Ultimately, I believe that there is little hope that the Rule of Law will implant itself within the correctional culture without assistance and control from Parliament and the courts...it is imperative that a just and effective sanction be developed to offer an adequate redress for the infringement of prisoners’ rights as well as to encourage compliance...**One must resist the temptation to trivialize the infringement of prisoners’ rights as either an insignificant infringement of rights or as an infringement of the rights of people who do not deserve any better. When a right has been granted by law, it is no less important that such a right be respected because the person entitled to it is a prisoner. Indeed, it is always more important that the vigorous enforcement of rights be effective in the cases where the right is the most meaningful...**

Respect for the individual rights of prisoners will remain illusory unless a mechanism is developed to bring home to the Correctional Service the serious consequences of interfering with the integrity of the sentence by mismanaging it...As a means of preserving the integrity of a sentence which can be threatened by illegality, a provision should be enacted to give effect to the following principle:

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<sup>51</sup>*Ibid.*, at 182.

**If illegalities, gross mismanagement or unfairness in the administration of a sentence renders the sentence harsher than that imposed by the court, a reduction of the period of imprisonment may be granted, such as to reflect the fact that the punishment administered was more punitive than the one intended.**

This proposed remedy is in some ways akin to the exclusionary rule contained in s.24(2) of the *Charter* which provides for the exclusion of illegally obtained evidence. It is akin to such rule in that it provides an effective redress which is responsive to the infringement of right that has occurred. Indeed, the enactment of the exclusionary rule in the *Charter* has been the single most effective means ever in Canadian Law to ensure compliance by state agents with the fundamental rights in the area of search and seizure, arrest and detention, right to counsel, and the giving of statements to person in authority. The exclusionary rule has served to affirm a norm of expected police behaviour, at the real and understood social cost of allowing a potentially guilty person to escape conviction. The rule that I am advocating here is nowhere near as drastic a form of redress as the *Charter* exclusionary rule. It creates no “windfall” for the benefit of the inmate as the exclusionary rule is often perceived to do for the accused. Rather, a reduction of the term of imprisonment to

reflect the illegally or unjustly imposed harsher conditions of imprisonment merely restores the original sentence to its full intended effect. There is truly no “windfall” for the inmate.<sup>52</sup>

The drafting of such a remedy should take into account a number of factors. For example, for those serving life or indeterminate sentences, alternatives to shortening the sentence could include reducing parole ineligibility dates and prioritized access to treatment programs; for those whose earlier release would pose a high risk to public safety, financial compensation could be provided.

#### **RECOMMENDATION:**

- 1. The Canadian Bar Association recommends that a provision recognizing a breach of prisoner’s rights by a reduction in sentence, along the lines of that suggested by**

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<sup>52</sup>

*Ibid.*, at 182-4, emphasis added.

**Madam Justice Arbour, should be included in an amendment to the *CCRA*.**

A second body of recommendations from the *Arbour Report* specifically addressed the issue of segregation and the legal and administrative regime necessary to bring the management of segregation into compliance with the law and the *Charter*. Madam Justice Arbour recommended that the management of administrative segregation be subject, preferably to judicial oversight, but alternatively to independent adjudication. Her preferred model would permit the institutional head to segregate a prisoner for up to three days to diffuse an immediate incident. After three days, a documented review would take place, and if further segregation was contemplated, the administrative review would provide for a maximum of thirty days in segregation, no more than twice in a calendar year. In other words, a prisoner could not be made to spend more than sixty non-consecutive days in segregation in a year. After thirty days, or if the total days served in segregation during that year already approached sixty, the institution would have to consider and apply other options, such as transfer, placement in a mental health unit, or other forms of intensive supervision, but involving interaction with the general population.

If these options were unavailable, or if the Correctional Service believed that a longer period of segregation was required, it could apply to a court for a determination of the necessity of further segregation.<sup>53</sup> Absent judicial supervision, Madam Justice Arbour recommended that segregation decisions be initially made at the institutional level, subject to confirmation within five days by an independent adjudicator, who should be a lawyer required to give reasons for a decision to maintain segregation. Thereafter, segregation reviews would be conducted every thirty days before a different adjudicator.<sup>54</sup>

There are several strands underlying Madam Justice Arbour's proposals for judicial oversight or independent adjudication. First, she found that the current segregation

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<sup>53</sup> *Ibid.*, at 191.

<sup>54</sup> *Ibid.*, at 192 and 255-6.

review process and conditions in segregation did not comply with the principles of fundamental justice or the provisions of the *CCRA* and its *Regulations*. This failure to comply with the requirements of the *Charter* and the legislative framework was seen as a reflection of a corporate culture within CSC which did not respect the Rule of Law and individual rights. Stated baldly, she found that the CSC, on its track record, could not be trusted to comply with the law in relation to segregation.

There are two other strands to *Arbour's* support for independent adjudication. Firstly, given the Supreme Court's rulings in *Martineau No. 2* and the *Oswald and Cardinal, Miller and Morin* trilogy that placing a prisoner in segregation represents a significant deprivation of the residual liberty retained by a prisoner and constitutes a placement "to a prison within a prison," it is appropriate that there be judicial input. Secondly, because on her assessment of the evidence and the literature "there is no rehabilitative effect from long-term segregation, and every reason to be concerned that it may be harmful," placing a prisoner in long-term segregation subjects that prisoner to greater deprivation than originally envisaged by the sentencing court. Therefore, the use and the overuse of long-term segregation, must be subject to independent oversight.

## **F. Task Force on Segregation and Independent Adjudication**

The *Arbour Report* indictment that the Correctional Service of Canada was entrenched in a corporate culture without respect for the Rule of Law led to the resignation of the then Commissioner of Corrections, and the return of the former Commissioner who had been at the helm during the development and passage of the *CCRA*. Because the *Arbour Report* had characterized the way in which CSC had dealt with the segregation of women at the Prison for Women as "a profound failure of the custodial mandate of the Correctional Service," the new Commissioner established a Task Force on Segregation. This Task Force was to address the issues and recommendations raised by the *Arbour Report*: to examine the extent to which the *Arbour* findings relating to segregation at the Prison for Women were systemic and applicable to other institutions; to ensure that all staff were knowledgeable of

legal and policy requirements; and to see that the necessary measures were taken to ensure compliance with those requirements.

The Task Force included members from within and outside the Correctional Service. It went to every federal penitentiary with a segregation unit, in conjunction with a series of audits to determine the state of compliance with the law. Following this initial audit and visits to the institutions, the Task Force reported:

The findings of the preliminary assessment confirmed Madam Justice Arbour's findings that CSC did not fully appreciate the obligation to rigorously comply with legislative and policy provisions in its management of administrative segregation. Overall, CSC staff members and managers demonstrated a casual attitude towards the rigorous requirements of the law.<sup>55</sup>

The CBA in 1988, and Madam Justice Arbour in 1996, were unambiguous that ensuring compliance with the law required some form of independent adjudication or judicial supervision. In the initial meetings of the Task Force on Segregation, a split emerged between those members from within and outside the ranks of the Service about the need for, and the implications of, the concept of independent adjudication.

CSC members argued vigorously that the necessary reforms to the segregation process to guarantee conformance with the procedural and substantive requirements of the law could be achieved by "enhancing" the existing internal model of administrative decision making, in which the warden has ultimate authority and the segregation review board, chaired by institutional managers, is charged with the mandate of making recommendations to the warden.

Their argument had several themes. Firstly, under the existing law, the warden of the institution is accountable for the security of the institution and the safety of staff and prisoners. The decision to segregate a prisoner involved critical issues of safety and security. The staff's experience and understanding of the dynamics of an institution and the personalities of the prisoners was integral to making the right

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*Commitment to Legal Compliance, Fair Decisions and Effective Results*, Report of the Task Force Reviewing Administrative Segregation, March 1997, at 12.

decision. A wrong decision could be fatal. Further, transferring authority for segregation decisions from institutional managers to outside adjudicators would have a corrosive effect on institutional morale and exacerbate dissatisfaction amongst staff because of the current independent adjudication in relation to disciplinary hearings. The final argument was that the Service should be given the opportunity to put its own shop in order before resorting to judicial supervision or independent adjudication as proposed by the *Arbour Report*.

Task Force members from outside the Service argued for independent adjudication, pointing out that the Service's internal efforts at reform have consistently failed to meet the requirements of the law and resulted in a systemic abuse of the segregation power. The verdict of Madam Justice Arbour was unequivocal on the issue of whether compliance with the law, as an on-going and every day priority, is more likely to be achieved with a segregation review board chaired by an independent adjudicator with a demonstrated respect for and commitment to the law. External members also argued that principles of fairness require that the legislative criteria for decisions affecting the institutional liberty of prisoners and consigning them to "a prison within a prison," should be applied free from the pressure of institutional bias, with the objective weighing of the competing interests of prisoners and prison administrators only ensured by independent adjudication. Principles of fairness were the foundation for introducing independent adjudication of serious disciplinary offences and are no less compelling in the case of administrative segregation. Under the existing model of segregation review, justice was mediated by institutional politics and convenience, rather than by the law.

The consensus eventually reached was that the Task Force would recommend reform of the segregation process along parallel paths – the enhancement of the internal review process and an experiment with independent adjudication. The Task Force's enhanced internal model for segregation review had eight elements. The most significant relate to a continuous legal education initiative, more formal and disciplined procedures for segregation review hearings, the development of more alternatives to segregation and the establishment of regional segregation review and

transfer boards. The legal education initiative responded to recommendations in the *Arbour Report* and feedback received by the Task Force that correctional staff and managers received insufficient support and training in the principles of administrative law and the principles enshrined in the *Charter*. In the Task Force's view, and based upon its interviews with Native Brotherhoods across the country, that legal education must include training on the distinct constitutional and legal rights of Aboriginal people, and more specifically on their access to spiritual and cultural possessions and ceremonies and their access to spiritual and cultural support provided by elders and native liaison officers. The development of real alternatives to segregation was seen as another important element of an enhanced segregation review model.

The Task Force recommended that the experiment with independent adjudication take place in four institutions. Two would have independent adjudicators while the other two would not. The independent adjudicators could be drawn from the judiciary, experienced arbitrators or individuals from a law school or criminology department with expertise in correctional law. The Task Force recognized that it was important to develop criteria to assess the issues of both fairness and effectiveness. Does independent adjudication result in a fairer process than that provided by an enhanced internal segregation review? Which process provides for greater sharing of information required under the legislative and regulatory framework? Which process reduces the use of segregation and results in prisoners justifiably segregated, spending less time in segregation? Which process best promotes the development of viable alternatives to segregation?

Before finalizing its report, the Task Force held a two day consultation meeting with key stakeholders to discuss its proposals for enhanced internal segregation review and independent adjudication.

Overall opinion supported the introduction of independent adjudication as a necessary step to regaining public credibility and demonstrating departmental accountability. There was support for the proposal that CSC take the time to develop an experiment with an independent adjudication model. It was felt that the experiment should provide decision-making authority to the adjudicator and that consideration should be given to appointing a provincial or federal judge to participate full-time in the experiment. Such an appointment would provide ready-made credibility in terms of the adjudicators possessing skills in conflict resolution and risk-balancing, as well as being able to be trained quickly on the segregation review process in the context of the law.<sup>56</sup>

The Task Force concluded that its proposed model of reform, encompassing an enhanced internal review process and an experiment with independent adjudication, would contribute to the development of a fair and effective segregation process and the development and strengthening of a correctional culture and operational practice that respected the Rule of Law.

Soon after the Report of the Task Force on Segregation was filed, the Commissioner also received the Report of the Working Group on Human Rights. The Working Group was chaired by the former Chief Commissioner of the Canadian Human Rights Commission, with a mandate to “review CSC systems for ensuring compliance with the Rule of Law in human rights matters, to provide a general strategic model for evaluating compliance within any correctional context; and to present recommendations concerning the service’s own ability to comply and to effectively communicate such compliance.” It reviewed the balance between internal and external mechanisms necessary to ensure compliance with human rights



obligations, specifically addressing the recommendation of the Task Force on Segregation that there be an experiment on independent adjudication.

(I)n Canada, administrative segregation may affect inmates' liberties even more than disciplinary segregation, which has an upper limit of 30 days, and given the fact that institutional authorities may have a vested interest in the outcome of their decisions, we believe the [Task Force] recommendation should be pursued.<sup>57</sup>

In spite of the recommendations, the Commissioner decided not to experiment with independent adjudication, pointing to existing initiatives designed to improve performance, reduce the use of segregation and enhance the fairness of the process. Certainly, the Service has undertaken important initiatives to enhance the internal segregation review process. The development of legal training for staff, improvements to the written information to prisoners about reasons for their segregation and initiatives to develop better alternatives to segregation are all important steps in reducing the use of segregation and ensuring that when used, it is used fairly.

However, these steps are only half the equation. The other half is clearly set out in Madam Justice Arbour's report, the Task Force on Segregation's recommendations and their endorsement by the Working Group on Human Rights. In our view, resistance to implement independent adjudication in the face of this trilogy is a symbol of operational reality failing to conform to the principles of openness, integrity and accountability, principles enshrined in the Service's own *Mission Statement* and the *CCRA*. As Madam Justice Arbour observed, placing a prisoner in segregation is the most intrusive decision the Service can make affecting a prisoner's liberty. The legitimacy of that decision in terms of fairness and conformity with the law is in many ways a litmus test for the legitimacy of the Correctional Service itself. The Commissioner's decision not to implement the experiment with independent adjudication should also be judged as a litmus test of the Service's commitment to

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*Human Rights and Corrections: A Strategic Model*, Report of the Working Group on Human Rights, December, 1997, at 33.

changing its corporate culture to one which not only professes but demonstrates its respect for the Rule of Law.

It should be noted that the experiment with independent adjudication recommended by the Task Force on Segregation did not go as far as the recommendation of Madam Justice Arbour, who unambiguously recommended either judicial supervision or independent adjudication in terms of a full scale implementation of what she believed to be a necessary means to ensure compliance with the law. Unfortunately, the Task Force's suggestion that the experiment be fast-tracked to coincide with the *CCRA* five year review, so that possible legislative amendments could be drafted as the experiment was ongoing, also went unheeded.

In our view, experimentation to see whether independent adjudication is a preferred method to ensure fairness and compliance with the law is unnecessary. Independent adjudication is a foundation of our criminal justice system, underlying the cardinal importance of an independent judiciary and receiving its clearest expression in principles of administrative law.

#### **RECOMMENDATION:**

- 2. The Canadian Bar Association recommends that the *CCRA* be amended to provide for independent adjudication of administrative segregation.**

Adopting this recommendation would not mean an evisceration of the warden's authority, which the Task Force on Segregation acknowledged should extend so far as to permit an initial period of segregation to defuse emergencies, to conduct

necessary investigations into the need for segregation and to consider alternatives. We strongly believe that, at some point in the process, the determination of whether there are legally sufficient grounds to justify segregation, and whether there are reasonable alternatives to it, must be made by an independent adjudicator.

## G. Involuntary Transfers

In our various submissions concerning the drafts leading up to the *CCRA*, we provided extensive comments about the spectrum of correctional decisions affecting the rights and liberties of prisoners. The experience of the members of the CBA Committee on Imprisonment and Release with the administration of the *CCRA* over the past five years has only reinforced our view that the flaws we predicted in the *Act* remain systemic and persistent, further diluting the quality of justice which prisoners receive during the course of their sentence. For example, our original recommendations addressed the issue of involuntary transfers to higher security institutions, still the number one source of complaints to the Office of the Correctional Investigator. In *Justice Behind the Walls*, we wrote:

(T)he current legislative and administrative regime regarding transfers suffers from three primary deficiencies. These are: (1) the lack of clear criteria against which the institution's for transfer to maximum security can be tested; (2) the process in which that case is presented with an opportunity for the prisoner to meet the case against him/her and present a full answer in defence; and (3) a decision maker who can bring to bear an independent judgment on the issue...

We therefore recommended the establishment of:

A transfer code designed specifically to legislate the appropriate balance between the interests of prison administrators (and of society) in the safe and orderly enforcement of correctional authority and the interests of prisoners (and of society) in being free from the arbitrary exercise of that authority.<sup>58</sup>

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*Justice Behind the Walls*, *supra*, note 1, at 183-186.

Far from responding to our recommendations, the *CCRA* did little more than move the existing administrative structure of transfers from the Commissioner's Directives into the legislation and regulations. Little, if any, substantive change in either the criteria or process to the transfer was effected. Not surprisingly, prisoners and their advocates remain critical of the abuse to which the involuntary transfer process has been put under the aegis of the *CCRA*. We do not expect significant improvement absent legislative change along the lines of our original recommendation.

## **H. Grievance Process**

In *Justice Behind the Walls*, we specifically endorsed the Correctional Law Review proposals which, in accordance with principles of openness, integrity and accountability, provided for a grievance to be referred to an independent arbitrator. The subsequent decision would be binding on the institutional authorities unless the Federal Court was satisfied that it would be contrary to law, would represent a clear danger to any individual or group of individuals, or would require funds not available in a current budget. In the latter case, the Commissioner of Corrections would be required to plan for the implementation of the decision in future fiscal years.

Again, the *CCRA* did not incorporate this model procedure. Although the Regulations do provide for a grievance to be referred to an outside review board, that board's recommendation has no legal weight and can be ignored by the warden. As a matter of practice, we are unaware of referrals to outside review boards being used as a regular part of the grievance process. The result is that the grievance procedure remains as inadequate after the *CCRA* as it was before that legislation was enacted.

In his 1993-94 Annual Report, the Correctional Investigator wrote:

The grievance process, despite years of internal review and past commitments, displays, at the national level, little if any evidence of effective management of the system or management commitment to the system. Grievance responses continue to be delayed well beyond the time-frames of the policy, and the thoroughness and objectivity of the reviews undertaken in many instances is wanting...The process is anything but expeditious, with offender grievances taking up to six months to work their way through the process. The current process as well cannot be seen as directed towards fair resolution, it is rather an adversarial, win-lose exercise played out on a very uneven playing field with the offender having limited input at the higher levels of the procedure...

In conclusion on this matter, I return to my comments of 1989, that improvement in the effectiveness and credibility of this process will only happen when the senior management of the service accepts responsibility for the operation of procedure.<sup>59</sup>

The next Annual Report contained a continuing lament about the “excessive delay, defensiveness and non-commitment” of the Service, especially at the National Headquarters level, to reasonably address prisoner concerns. On the Service’s response to his 1992-93 comments about the grievance process, the Correctional Investigator wrote:

The Service acknowledges that “certain problems” exist with the current redress system and has initiated a high levelled review process mandated to “make recommendations for a re-designed process.” I note that this is the third major review of the review process in five years...in the meantime, the number of complaints received by this Office specifically related to excessively delayed processing of grievances during this reporting year has increased from 156 to 258. The number of inmates approaching our Office prior to attempting to resolve their concerns through the grievance process has doubled. Confidence in the procedure’s ability to reasonably and in a timely fashion address concerns has been seriously eroded. The grievance process which I characterized last year as failing to meet the

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Annual Report of the Correctional Investigator 1993/94, at 23.

requirements of the *CCRA* in terms of “fairly and expeditiously resolving offender grievances,” has become bogged down at the Commissioner’s level. Inmates are currently waiting six to eight months for responses from the Commissioner’s level which by policy ought to be responded to within ten working days.<sup>60</sup>

Although the most recent report of the Correctional Investigator suggests there has been some improvement in the Service’s response to grievances, it remains our view that the model grievance process recommended by the Correctional Law Review and endorsed by the CBA Committee on Imprisonment and Release, with its provision for independent review bodies, would make the Service more open and accountable and enhance the legitimacy of the process.

#### **RECOMMENDATION:**

- 3. The Canadian Bar Association recommends that the grievance model recommended by the Correctional Law Review be incorporated into the *CCRA*.**

### **III. ABORIGINAL INMATES**

One area where the *CCRA* is innovative and moves beyond what courts have established as minimal entitlements under the *Charter* is in relation to Aboriginal prisoners. One of the principles in the *CCRA* is that “correctional policies, programs and practices respect gender, ethnic, cultural and linguistic differences and be responsive to the special needs of women and Aboriginal peoples, as well as to the needs of other groups of offenders with special requirements” (section 4(h)). For Aboriginal offenders, the *CCRA* also specifically recognizes that “Aboriginal spirituality and Aboriginal spiritual leaders and elders have the same status as other religions and other religious leaders and authorizes the Solicitor General to enter into

agreements with Aboriginal communities to provide for the provision of correctional services for Aboriginal offenders” (sections 81 and 83).

Sections 81 to 84 of the *CCRA* are intended to address the special needs of Aboriginal inmates. In the five years since the *CCRA*, CSC’s Aboriginal Branch has undertaken a number of initiatives in the implementation of these provisions. However, there have been few completed agreements. In *Locking Up Natives in Canada*, we highlighted the over-representation of Aboriginal offenders in prison. In the ten years since that report, the situation has worsened. According to the figures set out in CSC’s *Consolidated Report on the CCRA*, Aboriginal people (representing 3% of the population) represented 15% of the federal incarcerated population. They are less likely to receive parole and are more likely to be detained to warrant expiry. Given the demographics in many Aboriginal communities, with high percentages of young people in the “at risk” group, the prospects are alarming. CSC must not be content with its present implementation plans for sections 81-84, but must commit greater resources to working with aboriginal communities in developing alternatives to incarceration using restorative justice models.

#### **IV. WOMEN INMATES**

The events at the Kingston Prison for Women in 1994 generated sufficient concern about the mistreatment of women inmates to bring about a Commission of Inquiry into those events. That Commission ultimately found many deviations in CSC practices from the procedures set out in the *CCRA*, and made many recommendations to correct those deviations. However, women inmates continue to be confined in conditions that are more harsh and punitive, with fewer rehabilitation and recreational programs, than their male counterparts. While we are unable to conduct a detailed analysis of the particular situation of women offenders such as that done by the Canadian Association of Elizabeth Fry Societies (CAEFS) for this review, we support the thrust of CAEFS’ submissions.

The Arbour Commission and an Ontario Court found that the confinement of women inmates in men's institutions is unacceptable. In those situations, women inmates must be kept from the general population, with limited, if any, access to recreation and work programs. There will inevitably be large numbers of sex offenders in the male population. Under such conditions, women inmates are effectively segregated, without the protections of the segregation review provisions of the *CCRA*. Still, federally sentenced women remain confined in men's institutions. We support the position taken by CAEFS that the *CCRA* should explicitly prohibit the incarceration of women in federal penitentiaries for men.

In keeping with the recommendations of a 1990 Task Force on Federally Sentenced Women, a number of regional facilities for women have been built. However, certain categories of women inmates, notably those with mental health problems and those classified as maximum security, have been excluded from the new facilities, and remain incarcerated in men's institutions. Aboriginal women are disproportionately represented in those numbers. We support CAEFS' view that all federally sentenced women should be appropriately accommodated within the regional facilities for women.

Finally, we support CAEFS' submission that a National Women's Advisory Committee similar to the National Aboriginal Advisory Committee should be created to advise CSC on the provision of correctional services to federally sentenced women, and that the *CCRA* should be amended to allow those women to serve their sentences and be released on parole to community facilities providing specialized services to women offenders, again parallel to the special provisions contained in the *CCRA* pertaining to aboriginal offenders.



## V. PAROLE

### A. Introduction

Part II of the *CCRA*, “Conditional Release, Detention and Long-Term Supervision,” deals with the release of prisoners and provides the statutory framework for the operation of the National Parole Board. Section 100 says:

The purpose of conditional release is to contribute to the maintenance of a just, peaceful and safe society by means of decisions on the timing and conditions of release that will best facilitate the rehabilitation of offenders and their reintegration into the community as law-abiding citizens.

Section 101 sets out general principles intended to guide the Board in carrying out its mandate. One principle not expressly listed in section 101 is the obligation to conduct hearings and processes in a fair manner that properly reflects the seriousness of the issues at stake, including the liberty interests of the prisoner. However, there is no doubt that under both general administrative law and relevant *Charter* principles, the Board is bound to act fairly. Prisoners must be given adequate notice and have a meaningful opportunity to respond.

Over the first five years of the *CCRA*, we note a disturbing and dramatic change in how the Board has carried out its statutory mandate, without that mandate being changed. Firstly, both the rate of release and the gross number of prisoners released by the Board on regular full parole has diminished substantially. Several explanations for this shift are possible. To some extent, it is a function of the delay in day parole eligibility from the previous one-sixth of the sentence to six months before parole eligibility under the new *Act*, which means fewer prisoners per year have successfully been on day parole.<sup>61</sup> There are possible explanations for an

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In 1992/93, 5,201 prisoners were released on day parole compared to 3,164 in 1995/96. In 1996/97, the grant rate climbed again to 66% but the gross number was only 2,693 day parole releases: see *Consolidated Report*, Table 47 at 57; See also, B. Grant, *Day Parole: Effects of the CCRA*, Research Branch, CSC at 9.

apparent increase in the granting rate in 1996/97.<sup>62</sup> What is clear is that the number of full paroles has decreased dramatically since 1992.<sup>63</sup>

Secondly, the *CCRA* detention process has resulted in an increasing number of prisoners eligible for release on statutory release being detained.<sup>64</sup> When Parliament passed the detention legislation in 1986, the suggestion was that the change would encompass fifty allegedly dangerous individuals. We are a far cry from that now, as the numbers approach 500 annually rather than 50.

We believe that the entire thrust of the Board's discretion, both as it is exercised and as it is perceived by the CSC, has changed direction from a releasing agency to that of a detention agency. Rather than this change being a reflection of Parliament's will as indicated by the *CCRA*, we respectfully submit that it is a subversion of a statutory mandate which can only be addressed by re-examining the essential elements of the current process.

## B. Fair Hearings and the National Parole Board

The Supreme Court of Canada has held that the National Parole Board is bound by the duty to act fairly:

<sup>62</sup> The *Consolidated Report* (at 67) indicates a decline from 1993/94 to 1995/96 but an increase in 1996/97. The jump in that year is likely attributable to two facts: (1) the high number of Accelerated Parole Releases (776); and (2) declines in the number of full parole application.

<sup>63</sup> The reduction in the gross number of regular full parole grants can be seen from the data in the *Consolidated Report* which shows a decline from 2,575 in 1992/93 and 2,598 in 1993/94 (see Table 60 at 65) to a low of 1,707 in 1996/97 (see Table 67 at 69).

<sup>64</sup> The following table, derived from the *Consolidated Report* data at 89, show the evolution of detention:

	1989/90	1990/91	1991/92	1992/93	1993/94	1994/95	1995/96	1996/97
Referrals	153	228	240	238	307	442	529	460
Detention	109	180	184	200	274	407	483	429
Release	5	9	10	5	4	9	8	21
Other	39	39	46	33	29	26	38	10
("Other" includes residency orders and "one-shot" release)								

The law is well settled that statutory tribunals such as the Parole Board are bound by a duty of fairness in deciding upon the rights or privileges of individuals.<sup>65</sup>

Similarly, the Board “must comply with the principles of fundamental justice in respect to the conduct of its proceedings.” Part II of the *CCRA* refers generally to hearings in the parole context but lacks detail. Certainly, the applicable procedural norms may vary with the type of proceedings.<sup>66</sup> However, within the parole context there is no justification for the way in which many Board hearings are conducted, especially given the requirement in section 101(f) that decisions be part of a “fair and understandable conditional release process.” Too often, how a particular panel conducts a hearing depends on who accompanies the prisoner to the hearing. This is entirely unacceptable, in our view.

While the *CCRA* does not expressly recognize a right to be represented by counsel, the right to legal representation when liberty is at stake is a self-evident implication of fairness and the principles of fundamental justice. Instead, the *CCRA* permits the prisoner to “be assisted by a person of the offender's choice”<sup>67</sup> who is entitled:

- to be present at the hearing at all times when the offender is present;
- to advise the offender throughout the hearing; and
- to address, on behalf of the offender, the members of the Board conducting the hearing at times that they adjudge to be conducive to the effective conduct of the hearing.<sup>68</sup>

Most panels allow “assistants” to make a submission at the end of the hearing and require them to sit silent during the hearing. Lawyers attending parole hearings strive to ensure that their client is properly represented. Accordingly, they will

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<sup>65</sup> *Mooring v. Canada* (National Parole Board) (1996), 45 C.R. (4<sup>th</sup>) 265 (S.C.C.) per Sopinka, J. at 283.

<sup>66</sup> *Ibid.*, at 285.

<sup>67</sup> *CCRA*, section 140 (7).

<sup>68</sup> *CCRA*, section 140 (8).

object to unfair or misleading questions, object to material collected unfairly or not previously disclosed as required by law, scrutinize a claim for non-disclosure to ensure that it conforms with the legal test, and object to remarks which are provocative, prejudicial or not within the Board's statutory mandate.

If the prisoner is not represented by a lawyer, in our experience, the panel too frequently runs rough shod over the participants. Certainly, not all prisoners require legal representation to ensure a fair hearing. However, we believe that the *CCRA* needs more procedural structure to ensure that hearings are conducted fairly, regardless of who accompanies the prisoner. Panel members have acknowledged that they conduct themselves differently when observers are present. One of the *CCRA* review background papers found:

If observers are present approximately half the Board members indicated that they spent more time on case preparation and tend to speak more about the available information at the hearing.<sup>69</sup>

From listening to tapes of hearings, we are convinced that they are conducted differently when there is no legal representation. Without a lawyer, hearings are often truncated in ways that deny fairness to the prisoner. In our view, it is unacceptable that the manner and content of hearings where liberty interests are at stake can be manipulated by the simple question of who from outside the prison is there to scrutinize. Fairness cannot be a contingent value.

### *1. Disclosure*

A number of issues relate to the extent and nature of material considered at a Board hearing. Section 141 provides for disclosure of material relevant to the review to the prisoner and also provides for withholding information from the prisoner in limited circumstances. Again, these provisions seem to be applied differently depending on whether the prisoner is accompanied and by whom. At times panels have, either in the course of the hearing or in subsequent reasons, indicated that they examined

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<sup>69</sup>

See Solicitor General, *CCRA 5 Year Review: Observers at National Parole Board Hearings*, Feb/1998, at 10.

material not disclosed to the prisoner without any claim for non-disclosure. In our view, this is not an acceptable approach to this important issue.

#### **RECOMMENDATION:**

- 4. The Canadian Bar Association recommends that section 141 be amended to explicitly prohibit the panel from considering material not disclosed to the prisoner unless a claim for non-disclosure is expressly made under section 141(4).**
- 5. The Canadian Bar Association recommends that whenever information is withheld under section 141(4), the prisoner must be notified in writing of the non-disclosure and the reasons for it.**

#### ***2. Information and Evidence***

In *Mooring*, the Supreme Court of Canada held that, for the purposes of section 24 of the *Charter*, the Board is not a “court of competent jurisdiction.” While this ruling has remedial implications, it was not intended to affect the fairness at Board hearings. At one point, Mr. Justice Sopinka said that the Board “does not hear and assess evidence, but instead acts on information.”<sup>70</sup> This statement has been misinterpreted in ways that diminish the prisoner’s ability to answer the Board’s concerns. For example, in one case the Board suggested to a prisoner that he had been using an alias by spelling his name differently from the way it was spelled on his original admissions documents. The prisoner replied that the CSC admissions clerk had erred in typing the name and, notwithstanding his subsequent complaints, it was never corrected. Moreover, he asserted that the correct spelling, as he had been using it, was apparent on various official documents like his birth certificate and naturalization papers. The Board responded that it only acted on information

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See *Mooring*, *supra*, note 65, at 281.

and not evidence. Accordingly, it would have looked at the official documents if available because they would be information, but could not listen to the prisoner's testimony because it was evidence. This kind of unthinking and erroneous misapplication of the law cannot go unchecked. Mr. Justice Sopinka's comments were directed to whether the Board had the power to reject evidence on *Charter* grounds. In fact, he added, "wherever information or evidence is presented to the Board, the Board must make a determination concerning the source of that information, and decide whether or not it would be fair to allow the information to affect the Board's decision."<sup>71</sup>

#### RECOMMENDATION:

6. **The Canadian Bar Association recommends that section 141 be amended to include a statement that a prisoner's assertion can, if considered plausible and credible, be accepted as truth of its contents without the need for corroboration.**

#### 3. *Confronting Opinions*

Generally, the Board does not hear oral evidence except for answers provided by the prisoner. On occasion, if a spouse, relative or friend is the "assistant," submissions from that person are heard and treated more as evidence than as submissions. However, the Board is not actually precluded from hearing oral evidence.

At the same time, the Board receives a substantial amount of opinion evidence in documentary form. This is especially true with lifers and those serving other indeterminate sentences, where the Board demands a clean psychiatric bill of health and risk is a central issue for parole release. For these offenders, parole is not only the avenue to the street, it is also the opportunity which ensures the constitutional

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*Ibid.*, at 284.

validity of the sentence itself.<sup>72</sup> Seeking a psychiatric opinion which addresses future risk is a highly contentious issue. The American Psychiatric Association has taken the position that the prediction of dangerousness is so fraught with error that its members ought not to offer views on future risk at death penalty hearings.<sup>73</sup> Even those who support the use of actuarial prediction warn that it is often unreliable in an individual case:

The present VPS (Violence Prediction Scheme) embodies within it a good deal of current knowledge and experience. No one claims that its use will guarantee “fairness,” “accuracy” and “absence of bias” in each and every case.<sup>74</sup>

Still, the Board persists in using these opinions as the primary basis for continuing to detain prisoners.

The Board’s ability to consider this material is undisputed. Our concern is whether the Board undertakes this consideration fairly, and in a way that enhances reliability, diminishes speculation and avoids bias. In *MacInnis v. Attorney General of Canada*, the Federal Court of Appeal held that the Board was not obliged to permit the cross-examination of a psychiatrist with respect to the issue of release of a person serving an indeterminate sentence.<sup>75</sup> The core of this decision focussed on the procedures imposed upon the Board by the *CCRA*. This is the context which must be considered when determining whether fairness or the principles of fundamental justice require enhanced procedural protections. As we indicated above, the *CCRA* says little about the manner in which hearings should be conducted. Accordingly, courts logically assume that Parliament intended that “Board hearings are different from judicial proceedings.”<sup>76</sup> Our position is simply that when an opinion is central to the Board’s decision to deny release, especially for someone whose sentence has no warrant expiry date, the Board should be required to hear from that expert in person and to

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<sup>72</sup> See *R.v. Lyons* (1987), 61 C.R.(3d) 1 (S.C.C.) at 32 - 33.

<sup>73</sup> See the *amicus curiae* brief files in *Barefoot v. Estelle* (1983), 463 US 880.

<sup>74</sup> Webster, Harris, Rice, Cormier, Quinsey, *The Violence Prediction Scheme* (Toronto: Centre of Criminology, 1994) at 65.

<sup>75</sup> (1996), 1 C.R. (5<sup>th</sup>) 144 (F.C.A.); leave to appeal to S.C.C. denied.

<sup>76</sup> *Ibid.*, at 152.

permit the prisoner or counsel to question that opinion and adduce material which contradicts it. This is essential unless the process is to become simply a rubber stamp for the views of certain expert witnesses confident of their ability to predict risk, and paid to generate opinions for the Board. We are not necessarily recommending changes to the nature of all parole hearings; nor importing a right to cross-examination. Our comments are limited to situations where a fair opportunity for parole is essential to the constitutional validity of the sentence, and where the documentary opinion addresses future risk and is pivotal to the denial.

#### **RECOMMENDATION:**

- 7. The Canadian Bar Association recommends that section 140 should be amended to add a provision requiring, in cases of those serving life or an indeterminate sentence, that the Board cannot rely on a opinion as to future risk unless it has heard from the expert in person and permitted the prisoner or counsel to question the expert.**

#### **C. Section 135(9.1) and the Absence of a Hearing**

In 1995, the *CCRA* was amended to provide that parole or statutory release is automatically revoked if an offender is incarcerated for a new offence. Before 1977, the *Parole Act* contained a similar provision known as forfeiture, which applied when a released prisoner was convicted of an indictable offence punishable by imprisonment for two years or more.<sup>77</sup> Automatic forfeiture was the subject of much criticism. Its utility is questionable given the Board's existing power to suspend and revoke. At the same time, it produced unfair and unexpected results. It was repealed by the *Criminal Law Amendment Act, 1977*,<sup>78</sup> but has now resurfaced in section 135(9.1).

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See, the discussion in D. Cole and A. Manson, *Release from Imprisonment: The Law of Sentencing, Parole and Judicial Review* (Toronto: Carswell, 1990) at 175.

<sup>78</sup>

S.C. 1976-77, c.53.



Since the repeal of the forfeiture provisions, the law in Canada has been amplified by the recognition of the duty to act fairly and the entrenchment of the *Charter*. The extent to which procedural safeguards are mandated depends on the context, and an important contextual factor is the nature of the interest at stake. For parole or statutory release, the interest at stake is liberty, which inherently deserves a high degree of protection. Consequently, Canadian courts have consistently held that revocation without a hearing is unfair and violates section 7 of the *Charter*.<sup>79</sup> Section 135(9.1) has not yet been challenged in the courts.

Over the past five years, only a small percentage of releases result in new offences.<sup>80</sup> These can easily be handled through the usual suspension and revocation process, allowing the Board to exercise its discretion and statutory mandate. Moreover, the existence of section 135(9.1) produces anomalies. For example, parole or statutory release must be revoked if a person is convicted and incarcerated for a second impaired driving conviction. While section 135(9.2) prevents automatic revocation if the offence occurred prior to the custody which resulted in the release,<sup>81</sup> in other cases there will be revocation which means that the prisoner must return to federal custody to complete her or his remanets even though it was triggered by an offence for which the penalty is but 14 days. In our view, this cannot be justified. We know of no evidence or argument to explain why the Board's ordinary processes cannot deal with appropriate cases of recidivism.

### RECOMMENDATION:

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<sup>79</sup> See *Re Caddedu and the Queen* (1983), 4 C.C.C. (3d) 97 (Ont. H.C.); *R.v. Nunnery* (1983), 5 C.R.R. 69 (Ont. H.C.) at 71-72; *Re Lowe and the Queen* (1983), 5 C.C.C. (3d) 535 (B.C.S.C.) at 537-538; *Re Swan and the Queen* (1983), 7 C.C.C.(3d) 130 (B.C.S.C.) at 139-141.

<sup>80</sup> Looking at the past five years, on average 90% of regular parolees and 85% of persons on statutory release complete their sentences without revocation. Of the revocations, less than 10% of paroles and less than 16% of statutory release, on average, are revoked by reason of new offences: See *Consolidated Report* at 72 and 82.

<sup>81</sup> In cases where the new sentence is produced by an offence which ante-dates the term for which the prisoner was released, parole eligibility is re-calculated. The result can be re-incarceration if a new eligibility date is produced which is "later than the day on which the offender received the additional sentence."

- 8. The Canadian Bar Association recommends that section 135(9.1), 135(9.2) and 135(9.3) should be repealed.**

## **VI. CONCLUSION**

For over twenty years, Canada's framework for sentencing and imprisonment has constructed an increasingly punitive and regressive approach to dealing with those who violate our laws. Since the enactment of the *Corrections and Conditional Release Act*, the size of our federal penitentiary population has grown substantially. The number of prisoners being released annually has diminished. Both the penitentiary environment and the mechanisms for release are entirely regulated by the *CCRA*. In our view, the *Act* has not fulfilled its promise to ensure consistent and fair decision-making processes.

In 1996, Madame Justice Arbour provided a long overdue dose of external scrutiny into events and practises at the Prison for Women. One of her most revealing findings was that the culture of the Corrections Service of Canada did not respect the Rule of Law. The CSC considered the *Act* to be overly complex and possible to avoid when inconsistent with management views.

Such damning findings might be expected to produce a dramatic change in attitude. Instead, we continue to observe the arbitrary exercise of discretion without consistent respect for the paramountcy of the legal regime.<sup>82</sup> While it may be impossible to diagnose the reason for the resistance which seems to permeate the CSC, the *Act* itself is not without defects. Broad operational discretion has been maintained with little opportunity for external scrutiny.

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In 1997, at the last stage of a plan to close the Prison for Women, an attempt was made to transfer a small group of women to a crudely modified range at Kingston Penitentiary which housed only men. Litigation was necessary to stop this move, an earlier version of which had been criticized both by Madame Justice Arbour and the local General Division Judge: see *Beaudry et al v. Commissioner of Corrections et al*, Ontario Court of Appeal, December 12, 1997, dismissing challenge to court's jurisdiction to hear the case by way of *habeas corpus*.

More recently, at the inquest into the death of Robert Gentles, a prisoner at the Kingston Penitentiary, the existence of relevant official documents and files was denied only to have the material inexplicably appear at a later date: see *Attorney General Canada v. Bechard*, Coroner, decision of Campbell, J, Ontario Court, General Division, November 23, 1998.

We have raised a number of issues for consideration in this submission. In general, we believe that Parliament has two options for adjusting the *CCRA* so that it indeed fulfills its mandate. Either decision-making processes can be more carefully structured to ensure a consistent degree of fairness, or broader and more frequent opportunities for external scrutiny and redress need to be enacted. These are not matters for administrative attention; they call for legislative action.