International Society for the Reform of Criminal Law

Crime and Punishment – Back to the Future for Sentencing and Corrections Reform June 22 – 26 2014

Plenary: Corrections

The Roadmap to Public Safety: A Flawed Compass

Professor Michael Jackson Q.C. Faculty of Law, UBC

Introduction

Fourty two years ago I first entered the gates of the Canadian penitentiary. Since that day I have spent a significant part of my professional career bearing witness and exposing the darkest places in this country to legal and public scrutiny. In doing so I have researched and written about imprisonment, advocated for reform, litigated against abuse of human rights and done my fair share of ranting and railing against injustice. I would have hoped at this point that my reflections might be what the British criminologist Stanley Cohen referred to as one of the "good stories" of corrections, a story of steady progress and advancement under difficult circumstances. Whilst not always agreeing with governments' definition of the nature of justice in the correctional and Aboriginal context, for most of my career I have subscribed to Martin Luther King's judgment "that the arc of history is long but it bends towards justice". Recent developments in the Canadian Government's approach to criminal justice, which include lengthening and deepening the use of imprisonment, severely challenge the historical trajectory of the arc of justice. We are in Canada in danger of bending justice out of shape. In these reflections I will identify come of the indicia of this disturbing and dangerous regression to the mean.

The 1992 CCRA and The 2007 Roadmap to Strengthening Public Safety

2012 marked the 20th anniversary of Canada's *Corrections and Conditional Release Act.* The CCRA was widely regarded within Canada and in international fora as one of the most progressive legislative codes for Corrections, one which reflected a commitment to implementation of domestic and international human rights standards in carrying out the sentences of the courts. The CCRA was one of the good stories that a Commissioner of Corrections could tell about Canadian corrections. Indeed at a conference held in Saskatoon in 1999 to mark the 30th anniversary of the publication of the Ouimet Committee Report on Corrections the then Commissioner of Corrections, Ole Ingstrup and I were part of a panel with the theme "The Ongoing Struggle for

Justice." The Commissioner, in reflecting on changes within the Correctional Service of Canada, began with a quotation from the 1977 report of the House of Commons Sub-Committee on the Penitentiary System in Canada.

> *[The] fundamental absence of purpose or direction creates a corrosive ambivalence that subverts from the outset the efforts, policies, plans and operations of the administrators of the Canadian Penitentiary Service, saps the confidence and seriously impairs the morale and sense of professional purpose of the correctional, classificational and program officers, and ensures, from the inmate's perspective, that imprisonment in Canada, where it is not simply inhumane, is the most individually destructive, psychologically crippling and socially alienating experience that could conceivably exist within the borders of the country. (Report to Parliament at 156)*

The Commissioner went on to make the case that corrections in Canada had come a long way since 1977, and that nobody today could use those words to describe imprisonment in a federal institution. In place of a corrosive "absence of purpose," there was now the Mission Statement -- which he had animated -- and the statement of purpose and principles set out in the *Corrections and Conditional Release Act.* He pointed to minimum security healing lodges for Aboriginal women and men; a correctional strategy based on the earliest reintegration of the prisoner back into the community; a research-based spectrum of correctional programs designed to address prisoners' needs and risks; and an array of oversight mechanisms that included the Auditor General of Canada and the Office of the Correctional Investigator in addition to the Service's internal grievance mechanisms and audit procedures. Altogether, it was an impressive list. Indeed, the Commissioner ventured to suggest to an audience including representatives from both the judiciary and law enforcement that federal corrections had changed more than any other part of the criminal justice system.

As I listened to Commissioner Ingstrup, I thought about the history of the penitentiary and the different ways that history can be read. The Commissioner had told what "a good story," the latest chapter in the progression from barbarism to civilization, from arbitrary and inhumane imprisonment to principled corrections. When it was my turn to speak, I acknowledged that much in the Commissioner's story deserved recognition, and that on the basis of those changes Canada was seen as an international leader in corrections. I suggested, however, that his story, while an important tributary of change, had to work hard against the main flow of penitentiary history. That history had demonstrated that "conscience" -- whether manifest in the professed desire to rehabilitate prisoners or the professed commitment to protect their human rights -- seemed time and again to be trumped by "convenience," in which the exigencies of prison administration prevailed over the practice of justice. As a counterbalance to the Commissioner's story, I offered some of findings that were later published in my 2001 book *Justice behind the Walls: Human Rights and Canadian Prisons.*

If at that 1999 Conference I had been asked to predict where Canadian corrections and correctional law would be on today 22 years after the *CCRA*, I would never had imagined we would be facing legislative and administrative initiatives that undermine the essential elements of the process that led to this landmark legislation and assail many

of the most important features for which the legislation has been justly lauded. In light of the progressive criminal justice and correctional reforms that, as we approached the third millennium, Federal Governments, both Conservative and Liberal, on a principled and non-partisan basis embraced, I could not have imagined that a Canadian Government would demonstrate a contemptuous disregard for a generation of reform, discount the relevance of evidence-based corrections, and dismiss the promotion of a legal and correctional culture that respects the human rights of offenders as out of fashion with the times and the demands of a punishment driven ideology. The Canadian future of Corrections, in the face of lower crime rates now envisages increased prison populations, longer sentences and more repressive and oppressive correctional regimes

As a matter of operational reality both at National Headquarters, in Wardens offices and on the correctional line the *CCRA* is no longer the measure of good corrections. It has been displaced by the "2007 Roadmap to Strengthening Public Safety" and the Transformation Agenda to which it gave birth. Together with Graham Stewart, in "A Flawed Compass" I delivered a critique of the "Roadmap", the process through which the Panel made its recommendations, and the problems, both of constitutional law, correctional policy and practice their recommendations create and aggravate. Today I will deal with just a few of the deeply disturbing directions in which Canada is shamefully moving in the wake of the Roadmap.

Today there are few Canadians and not that many members of the Correctional Service of Canada who realize what went into the genesis and gestation of the *CCRA*. The genesis of this legislation was the Federal Department of Justice's publication in 1982 of *The Criminal Law in Canadian Society* which set out a comprehensive vision of the federal government's policy on the purpose and principles of criminal and correctional law. Along with the publication**,** the Department of Justice launched the Criminal Law Review, which included as a component the Correctional Law Review (CLR) conducted by the Ministry of the Solicitor General. Over the course of several years, the CLR published a series of working papers which were widely circulated and the subject of public consultation. In its working papers, the CLR specifically addressed the need for new correctional legislation that would incorporate the values of the *Charter* and work out the appropriate balance between correctional authority and prisoners' rights as mandated by the *Charter.* Greg Hanson, a man who has and continues to experience the face of imprisonment, has paid appropriate recognition to the remarkable collaborative energy that went into the body of work that culminated in the *CCRA*:

> *This new body of law would take 6 years to create, span the mandate of two separate governments, and involve the labours of hundreds of lawmakers, social workers, International partners, university professors, CSC staff, lawyers, and community liaisons. The working papers alone for this project cover 481 pages of summary reports. I know, I've read all of them. The final result was the CCRA – The Corrections and Conditional Release Act and the accompanying Regulations. (A Flawed Compass, p.21)*

What is also not understood, even by lawyers who practice in this field, is that in assessing developments in correctional law since the enactment of the *Charter of Rights and Freedoms* in 1982 a strong case can be made that the most significant impact of the *Charter* has been in the development of new correctional legislation,

culminating in the *CCRA. M*ore so than any other piece of federal legislation the CCRA was driven by a Charter inspired culture of rights and responsibilities. As the Correctional Law Review stated, its provisions were intended to "play a crucial role in articulating and clarifying *Charter* rights and any restrictions on them that are necessary in the corrections context".

Mary Campbell, has suggested that the enactment of the *CCRA* "marked the pinnacle of reform in the modern era".[1] (Mary E. Campbell, "Revolution and Counter-Revolution in Canadian Prisoners' Rights" [1996] 2 *Canadian Criminal Law Review* 285 at 320). She highlights the statutory recognition of three principles of corrections which are of particular relevance to the protection of prisoner rights: that "the Service use the least restrictive measures consistent with the protection of the public, staff members and offenders"; 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"; and that "correctional decisions be made in a forthright and fair manner, with access by the offender to an effective grievance procedure" .

In Mary Campbell's assessment, "these statements reflect a truly fundamental, indeed revolutionary turning point in statutory protection of inmates' rights. Just these restatements on their own sent a clear and unequivocal message to all players in the system, whether legislators, judges or correctional authorities" (at 321).

Let me now briefly review in a comparative framework the recent history that gave rise to the new framework for corrections embodied in the "Roadmap" and the Transformation agenda and their legislative accompaniments in the amendments to the *CCRA* contained in the 2012 *Safe Streets and Communities Act.*

The mandate of the 2007 Roadmap Panel was extensive, yet the Panel was given what most observers believed to be an unreasonably short 50 day window (later extended to six months) within which to report to the Minister. Now there is nothing to require that "transformation" necessarily takes all the years that went into the *CCRA* but 6 months to makeover the corrections and parole system. You can't even get a decision out of the Appeal Division of the Parole Board in less than 4 months!

Although extensive, the terms of reference had obvious gaps. Of particular significance they did not explicitly include CSC's performance in and accountability for maintaining respect for the rule of law and human rights as an integral part of its mandate. The terms of reference make no mention of the principles for corrections that are expressed in CSC's own Mission Statement or the relevance to correctional operations of the *Charter of Rights and Freedoms* , the centerpiece of the work that informed the *CCRA.*

The Panel was expected to make recommendations in some definitive way in a few months on a broad range of issues, some of them complex that others had spent years studying. Not unreasonably, informed observers raised serious concerns about the entire process and the degree to which the Panel was intended to give expert advice or just confirm the Government's already announced intentions. Our skepticism proved to be well founded.

[1] Mary E. Campbell, "Revolution and Counter-Revolution in Canadian Prisoners' Rights" [1996] 2 *Canadian Criminal Law Review* 285 at 320.

Prior to the 2006 federal election the Conservative party, at the urging of police, victim and prison guard associations made promises to examine the operation of the Correctional Service of Canada. Much of the pressure came through the "Club Fed" campaign that presented to the public the distorted notion that life for those in our federal prison system was equivalent to a holiday resort.

You Review Panel was announced then Minister of Justice, Vic Toews acknowledged and agreed with the "Club Fed" rhetoric when he said:

> *I believe that it is time to get tough when it comes to incarcerating violent offenders, and I applaud the efforts that have been made to put an end to what has been referred to as "Club Fed.(cited in A Flawed Compass p.5)*

After the 2006 election the government made no effort to hide their intention to make the operation of our justice system much tougher. The Prime Minister also articulated his disdain of academics and others who use "statistics" and lawmakers who recognize that prisoners do not forfeit their human rights.

In stark contrast to the CCRA process where full consultation took place, the time constraints under which the Panel operated severely limited the ability of NGOs, offenders, other citizens (including academics) interested in the future of corrections to fully participate and contribute to the Panel's work. Unlike previous major reviews into the correctional system, no consultation documentation containing questions or proposals was prepared that would guide those interested in making a submission. Hearings were quickly arranged, and those wishing to make written submissions were given short lead times and limits of 20 pages within which to make them.

Most importantly, no opportunities were made available for consultation on the actual recommendations coming from the Panel - many of which are far reaching, unanticipated, and had major implications that appear not to have been considered by the Panel.

Instead of broad and deep consultation on the Panel's recommendations, almost immediately the Minister and the Correctional Service of Canada indicated that they had adopted a new "Transformation" agenda based on the Panel recommendations. Within months the Government announced that $122M dollars had been allocated to fast track the changes. The total investment over five years amounted to $478.8. Since then many more millions have driven the transformation.

But the greatest contrast between the underlying framework for corrections that informed the *CCRA* process and that of the Roadmap/Transformation is that in the *Roadmap's* latest rendition of public policy there is no reference to human rights. Nor do we find any reference to the *Charter of Rights and Freedoms* or to the common law and *Charter* jurisprudence of the Supreme Court of Canada which together give Canadian legal content to the international human rights standards set out in the Universal Declaration of Human Rights and other international covenants to which Canada is a signatory. The *Roadmap's* only references to legal rights are presented in the context of diminishing them. That alone is a very serious development. In this case, what makes the policy framework for transformation so alarming has been the fact that the Ministry responsible for overseeing the correctional system, rather than encouraging the

broadest public consultation on recommendations that would undermine much of the human rights work of the last 30 years, completely endorsed them after only a few weeks of closed internal review. Packaged as the "transformation agenda" CSC officials and employees (including those who privately have grave reservations about the agenda) have felt obliged to accept the proposed changes uncritically. With no public review or consultation, the plethora of recommendations – some good, some trivial but many with draconian implications for the protection of human rights, public safety and the public purse, have been presented and are being implemented as the future of federal corrections in Canada.

Because of the lack of any public knowledge or debate and the absence of any critical response from within the correctional establishment, I together with Graham Stewart, the former executive director of the John Howard Society of Canada, authored and published our 2009 report, "A Flawed Compass", a 200 page critique of the process through which the Panel made its recommendations, and the problems, both of constitutional law, correctional policy and practice their recommendations create and aggravate.[2] We argued that the fundamental flaw in the Roadmap is that its discussion under the key area of "offender accountability" and its recommendations for changes in the *CCRA* demonstrate a lamentable and unacceptable ignorance and/or misunderstanding of the legal history of Canada's correctional legislation, the pivotal role of the *Charter of Rights* and the recommendations of other commissions of inquiry and task forces that call for greater commitment from CSC to promoting a culture of respect for human rights within Canadian prisons. For many of those involved in the history of human rights and corrections in Canada, it was almost unbelievable that a *Roadmap* for the 21st century makes no mention of the *Charter of Rights and Freedoms*, CSC's Mission Statement, no reference to leading Supreme Court of Canada judgments dealing with prisoners' rights, nor the recommendations of the Arbour commission. Nowhere is there any mention of CSC's own 1997 report of the Working Group on Human Rights, and that report's major recommendation that CSC must adopt a human rights strategy as the centrepiece of its strategic planning. This was my indictment of the *Roadmap* in *A Flawed Compass*:

> *To its great discredit the Panel makes no mention of Canada's international human rights obligations or of the application of the Charter to Canadian prisons, and has no regard for or apparent awareness of the well-documented record of how difficult it has been to entrench a culture of respect for rights within CSC. Instead of a clarion call for greater vigilance in protecting human rights we find a virtual open invitation to CSC to dismantle the existing legal and administrative framework and redefine the definition of rights by introducing an ill-conceived hierarchy of rights and conditions of confinement dependent upon how well prisoners participate in their correctional plan. The Roadmap undermines the fundamental nature of Canada's human rights commitments and puts Canada on a path out of step with the relevant international and domestic human rights norms.* [3]

2 Michael Jackson and Graham Stewart, *A Flawed Compass*: A Human Rights Analysis of the Roadmap to Strengthening Public Safety (2009) online at http://justicebehindthewalls.net/news.asp?nid=78

3 *A Flawed Compass* at 18

The legislative process through which some of the recommendations of the Roadmap were translated into the 2012 amendments to the *CCRA* stands in further stark contrast to the first enactment of the Act in 1992.The amendments were introduced as part of C-10, the Omnibus *Safe Streets and Communities Act* .While other parts of this legislation had been before the House and Senate Committees in previous iterations, the CCRA amendments were discussed for the first time in Committee as part of C-10. The combination of many diverse amendments to different Acts, linked only by convenience to enable swift passage to deliver on election promises, made it difficult, indeed impossible for the House and Senate Committees to give the kind of parliamentary review and analysis necessary to the range of issues involved. I helped in the preparation and presentation of the Canadian Bar Association's submission to both the House of Commons Justice and Human Rights and the Senate Constitutional Affairs Committees. The CBA submission, covering eight separate pieces of legislation, was 90 pages. The submission on the *CCRA* amendments alone occupied 25 pages. As with other witnesses the CBA was given 5 minutes to make its points. In my submission for the CBA I made the case that the proposed amendments to the *CCRA* undermined the protective umbrella of law to prevent abuse of authority and legitimated, under the colour of benign language, more repressive regimes.

Of particulars significance in this historical review, the CCRA amendments in Bill C-10 changed two of the three most important principles identified by Mary Campbell in her previous assessment of the *CCRA* that she rightly believed "sent a clear and unequivocal message to all players in the system, whether legislators, judges or correctional authorities". The changes in C-10 exorcised all references to the constitutional principle that "that the Service use the **least restrictive measures** consistent with the protection of the public, staff members and offenders" and limited the principle that offenders "retain all the rights and privileges that adhere to members of society except for those necessarily removed as a result of their imprisonment" by removing the reference to privileges.

The *Roadmap* had suggested amending the least restrictive measures to read "***appropriate measures"*** which, as I pointed out in *the Flawed Compass,* would substitute a policy and operationally derived standard left entirely to the discretion of correctional authorities for a constitutionally derived standard based on restraint in the exercise of state power. Thankfully those in involved in drafting the amendments recognized that the Roadmap' recommendation was unprincipled and the change proposed and adopted in Bill C-10 was that the Service "use measures that are consistent with the protection of society, staff members and offenders that are limited to only what is necessary and proportionate to the purposes of this Act".

While this is language which incorporates a constitutionally sufficient standard of restraint, there was a compelling case for maintaining "the least restrictive measures standard" as part of the legislative framework for corrections. The unfortunate reality is that the exercise or correctional authority is situated in the context of a documented history of abuse of human rights in prisons, and the judicially recognized resistance of CSC to incorporate a culture of respect for rights. Even without legislative change, the

Roadmap's statement that "it believes that [the least restrictive measures] principle has been emphasized too much by the staff and management of CSC" had legitimized within CSC an almost visceral reaction to, and organizational rejection of the least restrictive measures language. Correctional managers and staff were informed that Bill C-10 would abolish the least restrictive measures test and that henceforth they will not be constrained by this standard and were incorrectly told they can use appropriate measures. Given the waning commitment for respect for human rights within prisons, constitutional and operational restraint should actually be reinvigorated. As a result of the amendment and CSC's take on it, a whole new "conversation", ultimately likely to be resolved in the courts, will now ensue to interpret the new amended principle of restraint.

The removal of privileges from the retained rights and privileges principle is intended to advance the Roadmap's vision of "transforming" corrections by distinguishing between rights and privileges in order to create incentives; in the language of the Panel's original recommendation, "to encourage the offender to begin to and continue to engage in his or her correctional plan". Replacing "privileges" with "incentives" linked to discretionary decision making is feared to be semantic camouflage for toughening up correctional regimes, just as the Government has promised. To prove the point in the wake of the amendments the then Minister of Public Safetyannounced that prisoners will be charged more for room and board and that CSC will be eliminating "incentive pay" for inmates who work in the industrial arm of CSC (CORCAN).

Human rights principles have been fundamental to correctional policy in Canada for about three decades and while compliance with those principles has always been a challenge, they are the keystone that holds corrections policy together in a coherent whole. Today they are under serious assault.

The receding prospect of a correctional culture of respect for human rights?

A large part of my motivation in writing *A Flawed Compass* was my concern that the Roadmap and the transformation agenda signaled a retreat from what had always been the very difficult task of entrenching a culture of rights within the correctional system. Some of the Roadmap's recommendations for diminishing the rights and privileges of prisoners have now found their way into amendments to the *CCRA,* but beyond the legislative changes there has been a much more pervasive and disturbing shift in the climate within correctional institutions. Those of us who go into these institutions, as lawyers, advocates or community support, have seen and felt the shift. Not surprisingly correctional staff and managers, taking their cues from the political class, see their mandate as toughening up prison regimes in the name of prisoner accountability, exercising greater control of prisoner movement in the name of public safety, generating greater intrusion on visits with the use of so-called non-intrusive search procedures of ion-scanning and drug dogs in the name of drug interdiction. Long confinement to cells has become the new normal in maximum-security institutions like Kent which are now run more like the super max Special Handling Unit. In a recent visit with my law

students at Matsqui, a medium security institutions, prisoners described the hardening of staff attitudes and confrontational and disrespectful behaviour, how prisoner movement, access to the yard, the gym and other recreational opportunities were now more restricted than they used to be at maximum security and routine strip searching after visits casts a long shadow over the few hours of sharing with loved ones the window of life outside prison. The federal prison is closing in on itself and many of the hallmarks of what was thought to be liberalization are now in jeopardy, if not already jeopardized.[4]

This pervasive systemic impact of the new political climate that is pushing the federal correctional system down a deeply regressive re-militarized path is reflected in the Correctional Investigator's 2011 report on the unauthorized use of force at Kent Institution.[5] Howard Sapers analyzed the way in which two exceptional searches were managed by members of an armed tactical team that was operating outside of both law and policy. The team "basically assumed control of a maximum security facility and followed their own rules … that resulted in serious human rights breaches, in the form of inappropriate, unwarranted and dangerous use of force, serious infringements to privacy and dignity and unnecessary physical and mental deprivation over several days". Mr. Sapers saw this disregard of law and policy in the larger context:

> *Other changes in policy, procedure and climate have contributed to the kind of challenging environment and escalated response witnessed at Kent Institution in January 2010. Correctional officers now carry inflammatory chemical agents as routine standard issue, the result of a protracted labour challenge first initiated by correctional officers at Kent Institution. As this case illustrates, dynamic security principles and practices have been eroded, replaced by static modalities that rely on electronic gates and barriers and remote detection and surveillance technologies. Frontline staff, especially in higher security institutions such as Kent, have moved from positions of direct observation and interaction with inmates to more secure command posts or security bubbles[6].*

It is in the context of a political and operational shift, in which there is an underlying attitude that prisoners have less entitlement to human rights, and that the human rights movement has been a "con" and has compromised public safety, that we must consider the implications for the use and abuse of correctional authority. To illustrate both this and also the manner in which correctional policy is now being driven by a Roadmap that

4 The work of British criminologist Alison Liebling is grounded on a thesis that the quality of imprisonment can be reliably measured and analyzed. Liebling uses diagnostic tools to capture what she calls the "moral quality" of a given institution, along the dimensions of relationships, regimes, social structures, meaning and overall quality of life. Liebling is able to measure and elaborate on important factors that are difficult to quantify, such as: "how material goods are delivered, how staff approach prisoners, how managers treat staff, and how life is lived, through talk, encounter, or transaction." Alison Liebling, *Prisons and their Moral Performance*, (Oxford University Press, 2004).

5 Unauthorised Force: an Investigation into the Dangerous Use of Firearms at Kent Institution between January 8 and January 10, 2010 online at http://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20110321-eng.aspx

6 para 135

undermines any commitment to either human rights or evidence based corrections let me let me turn to the most recent changes proposed by CSC to ramp up the war on drugs.

Arbitrariness at the front gate

Over a decade ago, in 1996, the Correctional Service of Canada joined in the War on Drugs and under the rubric of a National Drug Strategy implemented "administrative" sanctions to buttress the deterrent effect of the disciplinary code that prohibits the use or possession of drugs. Part of the artillery in the war were increased use of drug dogs and the introduction of devices that use “ion mobility spectrometry” to detect minute particles of substances associated with the production of illegal drugs on items submitted for analysis by the scanner.

As part of my research for *Justice behind the Walls* in the years following the launch of the National Drug Strategy, I reviewed at two federal penitentiaries the way internal Visits Review Boards made decisions authorizing or restricting visits based on safety or security concerns, and whether these decisions were consistent with the governing legislation or reflected a pattern of pre-1992 customary law in which visits were seen as privileges rather than legal entitlements. The research findings were that visit review boards used drug dog and ionscan hits as virtual proof of a visitor’s drug involvement resulting in visitors being unfairly stigmatized and visits unfairly restricted. The implications for the prisoner whose visitor was identified as having contact with drugs can have an adverse impact on his security status and ultimately, release on parole. The use of the results of a ‘hit’ on the ionscan, or a ‘sit’ by a drug dog demonstrated that inside the walls in the War Against Drugs, armed with the new drug detection technology, one of the casualties was fairness.[7]

Perhaps the most glaring and high-profile example of the inherent risk of false positives took place in 2005 at Matsqui institution in the course of a mediation of a grievance rising from a positive hit on the ionscan. Participating in the mediation were officials from CSC's national and regional headquarters and the Office of the Correctional Investigator. As part of a demonstration of the ionscan procedures, test were performed by the senior officer in charge of ionscan staff training in the Pacific region on the watches of two the national headquarters officials, counsel for the Correctional Investigator and myself, who was participating in the mediation as counsel for the prisoner. One CSC official hit above the threshold for cocaine, the other above the threshold for methamphetamines; counsel for the Correctional Investigator hit above the threshold for heroin and only my test gave a negative result. On this occasion it was readily accepted that the positive hits were false-positives, an acceptance that is entirely absent in the day-to-day front gate operations for ordinary visitors.

On the same day that these false positives occurred there was a tragic event at Matsqui that further underscored the fallibility of the ionscan. During regular visiting

7 *Justice Behind the Walls, Human Rights in Canadian Prisons*, Internet Edition Sector 4 Ch. 3 http://justicebehindthewalls.net/book.asp?cid=207

hours a visitor came through the front gate, was subjected to the ionscan with negative results and proceeded to the open visiting area. At some point during the visit, the visitor orally passed to the prisoner being visited a balloon that had been secreted in the visitor's body containing a mix of heroin and cocaine. The prisoner asphyxiated and died. Thus, on the very same day as the ionscan produced false positives on CSC officials for cocaine, methamphetamines and heroin, it failed to identify a visitor actually carrying heroin and cocaine on her person. While this incident demonstrates the very real dangers of drug trafficking, it just as clearly demonstrates that the ionscan is not a technological panacea to its eradication.

Since the publication of *Justice behind the Walls* mounting evidence shows that, notwithstanding national guidelines on the use of ionscan and drug dog hits, the presence of the ionscan device and the drug dog at the front gate of an institution has become a new site for the development of customary practices that vary from institution to institution, from manager to manager, that convey to offenders and their visitors a pervasive arbitrariness in the exercise of power. As opposed to other examples of arbitrariness, this latest one is dramatically affecting innocent citizens whose only crime is offering support to the imprisoned.[8]

From a legal perspective the arbitrariness at the front gate is the most troubling. Judicial challenges are particularly difficult because the relief against suspension of visits is not within the *habeas corpus* jurisdiction of Provincial superior courts and by the time it takes to get before the Federal court (quite apart from the expense) the restriction or suspension of visits has been served, making any remedy moot. The grievance system has also proven to offer only a faint hope of redressing the decisions of visit review boards.

The Roadmap in its recommendations to CSC which included the "use of more stringent control measures and if necessary the elimination of contact visits, supported by changes in legislation; the increase in the number of drug detection teams in each penitentiary; and the purchase of new technologies to detect the presence of drugs", made no mention of the mounting evidence of the arbitrariness of these measures in practice nor their negative effects on offender rehabilitation. CSC's uncritical endorsement of the Panel's recommendations on stepping up the war against drugs coupled with the allocation of new money to introduce more ionscan equipment, more drug dogs and more security intelligence officers, has had the effect of encouraging correctional managers and visit review boards to be more aggressive in this ongoing war, minimizing the evidence of the fallibility of the technology and giving short shrift to visitors who plaintively protest their innocence of any involvement or association with drugs. I have been told of visitors who with great reluctance have decided to limit even terminate their visiting of loved ones, for fear both of the embarrassment and demeaning consequences of false positive hits and also that this will build a record which will prejudice their loved ones' transfers to lower security or the grant of parole.

8 See *A Flawed Compass*, Ch 6, A Flawed Compass refers to a 2006 audit by CSC's Internal Audit Branch of 13 institutions' compliance with law and policy in relation to restrictions on visits. The audit revealed that in many instances CSC was not in compliance with policy and procedures and that visits were being denied on the basis of false positive ionscan testing alone

Unfairly inhibiting the rights and ability of prisoners, their families and their support networks to maintain the bonds of family and community necessary for their reintegration into society, was not the promise of a fair and balanced system that the *CCRA* promised. [9]

In the face of a documented record of abuse of discretion, recent proposed amendments to the *Corrections and Conditional Release Regulations* would now lower the standard from "believes" on reasonable grounds to "suspects" on reasonable grounds that a closed visit is necessary for the security of the institution or safety of any person; and allow the warden or designated staff to refuse or suspend a visit on the lower standard of suspicion.

The message behind these proposals could not be clearer to officers at the front gate and prison administrators. It is that they now have an enlarged legal mandate to ramp up interdiction policies and restrict visits in the name of public safety. For prisoners who are fortunate enough to have friends and family members able and willing to visit with them, legislation that allows for further restrictions on visits would have a devastating effect on their wellbeing, and ultimately, their ability to rehabilitate and reintegrate successfully into society. Further limits would make it even more difficult for prisoners to establish or maintain community support that is necessary for a successful return to society. The arbitrariness of the front gate, far from being addressed, is being amplified.

But the problem posed by the amendments are not just the amplification of arbitrariness. The amendments address only one part of a drug strategy. The regulations do not take into account the full spectrum of the Correctional Service of Canada's own drug strategy, which includes prevention, treatment and enforcement. The proposed amendments focus exclusively on enforcement, to the extent that prisoners' entitlement to visits are further diminished. The proposed amendments do nothing to improve harm reduction or treatment which are essential to assisting prisoners to overcome addiction.

There is no denying the fact that drugs are a problem for the majority of prisoners, and that drug use contributes to crime and health care problems in Canadian society. It is estimated that 80% of federal prisoners in Canada have problems with drugs and/or alcohol, many of whom committed a crime under the influence of drugs or to support a drug habit, and many of whom suffer from additional mental health problems. Canadian

9 *A Flawed Compass* cites Florida State University research conducted in 2008 as "the most comprehensive study to date on the relationship between visiting and recidivism". According to this study, visitation reduces recidivism: "any visitation and more frequent visitation were both associated with a lower likelihood of recidivism." CSC's own research confirms the importance of visitation "The results of these analyses conclusively demonstrated that a positive association exists between receiving visits (including private family visits) and lower likelihoods of readmission, after accounting for the influence of ethnicity, gender, age at release, sentence type, offence type, and assessed risk". D.Derkzen,R.Gobeil & J.Gileno, Visitation and Post Release Outcome among Federally Sentence Offenders, (Correctional Service of Canada) June 2009

prisoners are 7-10 times more likely to be HIV positive and 30 times more likely to have hepatitis C than other Canadians.[10]

Despite compelling evidence that a zero-tolerance approach to drugs in prison is not an achievable goal, and compelling evidence that drug treatment and harm reduction strategies are successful, CSC has responded to the drug crisis by focussing on strategies to control the flow of drugs from entering prisons. The Standing Committee on Public Safety and National Security was critical of this approach in its 2010 report *Mental Health and Drug and Alcohol Addiction in the Federal Correctional System*.

According to that report, in 2008, the Minister of Public Safety was provided $122 million over five years to spend on CSC's drug strategy which included interdiction measures, as well as substance abuse programs for prisoners. The Committee refers to evidence before it that all of this funding was directed toward drug control efforts, such as drug dogs, ion scanner and x-ray machines. The Committee notes that this was "to the detriment of substance abuse programs and harm reduction initiatives".

Evidence presented by Don Head, the Commissioner of CSC, to the Standing Committee in advance of its 2012 report *Drugs and Alcohol in Federal Penitentiaries: An Alarming Problem* demonstrated that the $122 million dollars spent on interdiction tools since 2008 did not lead to any reduction in drug use in Canadian prisons, and that the spending was "largely ineffective" according to CSC's report on drug-testing.[11]

In its 2010 report *Mental Health and Drug and Alcohol Addiction in the Federal Correctional System*, the Committee encourages CSC to take an approach that balances interdiction efforts with rehabilitation and prevention efforts. In addition to drug interdiction monitoring activities, the Committee recommends that the federal government and CSC:

- Explore all program options that are most effective at reducing the spread of infectious diseases in prisons (for example, a needle exchange program was proposed by the Canadian HIV/AIDS Legal Network) (Recommendation 29);
- Expand the use of 12 Step programs in prisons to deal with addiction (Recommendation 30);
- Encourage the creation of drug treatment units in prisons (Recommendation 31); and
- Allocate additional resources for drug treatment, harm reduction and prevention (Recommendation 32);

The proposed amendments are limited to stepped up drug interdiction strategies that on the best evidence promote arbitrariness. Meanwhile drug treatment and harm

10 Mental Health and Drug and Alcohol Addiction in the Federal Correctional System. Report of the Standing Committee on Public Safety and National Security, House of Commons Canada, December 2010, 40th Parliament, 3rd Session.

11 Report of the Standing Committee on Public Safety and National Security, House of Commons Canada report Drugs and Alcohol in Federal Penitentiaries: An Alarming Problem, April 2012.

reduction strategies that on the best evidence are demonstrated to be effective in reducing drug use and the harms caused by drug use, remain untapped.[12]

Segregation: The litmus test of legitimacy

It will be no surprise to those of you who know me that in charting the arc of justice I would address the subject of Administrative Segregation, one that have been the subject of particular scrutiny and criticism in the courtroom, in academic commentary, in commissions of inquiry and in the reports of the Correctional Investigator.[13]. My biggest criticism of the *CCRA* was that it made no provision for independent adjudication, which I have long believed to be the necessary foundation for a fair and effective system. I have argued so many times that even I am tired of my own voice, that independent adjudication of segregation decisions is necessary to ensure a fair and unbiased hearing, compliance with the statutory framework, protection of prisoners' rights and privileges while segregated, and the implementation of re-integration plans to ensure that correctional authorities administering the sentence use the least restrictive (or in the new vocabulary necessary and proportionate) measures.

The system of independent adjudication of disciplinary cases in the federal system was introduced in 1980 following recommendations in the 1977 report of the Parliamentary Subcommittee on the Penitentiary System in Canada. Since then, a succession of inquiries and committees have recommended independent adjudication be introduced to the process of administrative segregation. The recommendation for independent adjudication has been advanced by Justice Arbour, CSC's Task Force on Segregation, the Yalden Working Group on Human Rights, the Canadian Human Rights Commission and the Correctional Investigator.[14]

The House of Commons Committee who conducted the five-year review of the *CCRA* and produced, "A Work in Progress", specifically addressing the issue of administrative segregation. The Committee recommended that CSC should appoint independent chairs for administrative segregation similar to the regime for the disciplinary process. The general consensus on this would seem to guarantee CSC recognition that it merited space in the correctional legal landscape, but to date, CSC has maintained implacable and steadfast resistance to these recommendations.

Every one of the reports I have mentioned that has looked at segregation has addressed the human rights implications of the conditions of confinement as central to its deliberations, as well as addressing the importance of fairness in making decisions about placing prisoners in segregation and reviewing these cases to minimize the

12 See, for example, Clean Switch: The Case for Prison Needle and Syringe Programs in Canada, Canadian HIV/AIDS Legal Network, 2009.

13 This issue is also the subject of another paper at this conference that I would presenting in the Workshop on Cruel and Unusual Punishment.

14 For a detailed history of the issue see Michael Jackson, The Litmus Test of Legitimacy: Independent Adjudication and Administrative Segregation, 48 Canadian Journal of Criminology and Criminal Justice, 157 (2006)

duration of segregation. Yet the *Roadmap*, in its conception of transformation, made no reference to any of this body of work, not even CSC's own Task force on Segregation, and had nothing more to contribute to the continuing debate than the need to increase the rigour of conditions in voluntary segregation. Inexplicably, in the light of the analysis of every other report documenting the existing rigours of segregation and the undermining of respect for human dignity, we are told, in the complete absence of any supporting research, that "the Panel believes that the current environment of voluntary segregation diminishes offender responsibility and accountability".

The 20 years of the *CCRA* is anchored at both ends by two events that provide the measure of how far we have come in developing a fair process for segregation. At the front end we have the events in 1994 that gave rise to the Arbour inquiry involving the strip searching and long-term segregation of a group of women offenders, in contravention of virtually every applicable provision in the *CCRA* and *CCRA* regulations; at the other end we have in 2007 the case of Ashley Smith, a nineteen year old girl, who strangled herself to death after over a year of continuous administrative segregation, again in violation of multiple provisions of the applicable law and policy The report of the Correctional Investigator on her case, throws a deadly light on what happens when respect for human dignity appears only in the framed Mission statement at the front entrance of a penitentiary but is eclipsed deep inside the segregation unit. The report also highlights how crucial independent adjudication is to a fair and effective correctional system. Principles of fundamental justice, fairness and human rights cry out for entrenching in law the independent adjudication of segregation decisions. The over twenty years of experience since its omission in the *CCRA* in 1992 has only reinforced the case for its inclusion in the correctional landscape.

Fairness as a disposable and expendable commodity

I have left for last the most recent and in many ways an egregious example of how fairness is becoming an endangered species in corrections. Like many of the decision processes in corrections it lies far beneath the horizon of public scrutiny and indeed of the legal profession, safe for the tiny group of lawyers who practice correctional law. Section 527 of Bill 38, the 2012 Budget Bill, removed the legal requirement that the Parole Board of Canada hold an in-person hearing with the offender in post-suspension hearings that may result in the revocation of parole or statutory release. Further changes to the regulations allows the Board to conduct reviews with only a single member instead of previously required two member person panel. The liberty stakes of revocation are high. For those serving life or long term sentences revocation will usually mean many more years of imprisonment.

In parallel submissions that both I and the Canadian Bar Association made to the House Committee on Finance we maintained that this amendment was unconstitutional. In a consistent and hitherto unchallenged line of cases decided by both Provincial Superior and Federal Courts beginning in 1982, it has been held that s.7 of the *Charter* gives a suspended offender the right, as a fundamental principle of justice, to an in-

person hearing when the issue of revocation is being determined.[15] In testimony before the Committee given by officials from the Board the reason given for the change was that it would save the Board $1.6 million a year in avoiding the travel costs and other associated expenses in the 1500 hearings that the Board currently conducts. By my reckoning that amounts to treating an offender's right to having his liberty determined in accordance with principles of fundamental justice to be expendable at just over $100 dollars a pop. In a number of submissions to the courts and parliamentary committees I have referred to the trenchant comment of an eminent English Court of Appeal judge, recited by Federal Court of Appeal Justice Mark MacGuigan (himself a former Minister of Justice] that "Convenience and justice are often not on speaking terms".[16] According to the Parole Board of Canada, in its conversation about how to trim its budget, "convenience" won out and 'justice" for offenders facing revocation fell under the chopping block.[17]

The great majority of parole suspensions are not based on the parolee's reoffending for a serious crime of violence or even any crime, but for allegations of breach of a condition of parole or for "a deteriorating attitude" towards supervision The alleged breach of conditions contained in a parole officer's report, which constitutes the primary file document upon which the Parole Board conducts its reviews, is often based upon information provided by police authorities. Without an in-person hearing the reliability of this information cannot be properly tested.

I provided the Finance Committee with examples of actual cases that demonstrate the importance of the in-person hearing and where, without the right to such a hearing and the ability to challenge the police and parole officer's version of the facts, the offender would almost certainly have been revoked, unfairly and needlessly.

The importance of the in-person hearing is not limited to ensuring fairness to the offender. The likelihood the Board will have before it accurate and complete information and relevant arguments needed to make decisions regarding the risk to public safety is considerably enhanced, as is the Board's ability to demonstrate the reasonableness and transparency of its decisions. Hearing the offender in person is therefore an essential element of the process to protect both the interests of fairness to the offender and to the Board's ability to fairly assess the risk to the public.[18]

---

15 See R. v. Cadeddu (1982) 4 CCC (3d) 97; Illes v Kent Institution [2001] B.C.J. No.2144

16 *Howard* v. *Presiding Officer of the Inmate Disciplinary Court of Stony Mountain Institution* [1984] 2 F.C. 642 at 688)

17 The justification of avoiding travel costs not only fails on constitutional grounds to be a reasonable limit on a *Charter* right under section 1 of the Charter, but is demonstrably flawed as a matter of logistics. While long-distance travel maybe an issue in some regions, in the Pacific region, the majority of the post-suspension hearings take place in institutions which are only a 5 minute drive from the Parole Board's office.

18 The House of Lords (now The Supreme Court) in the UK, has specifically addressed this issue. In *R. (West) v Parole Board; R (Smith) v Parole Board (No 2)* ([2005] UKHL 1) the Court stated that while not mandated by the relevant legislation, oral hearings ought to be the predisposed course in revocation cases given the circumstances of parole suspensions and the nature of the review process. Lord Bingham of Cornhill, the Senior Law Lord, gave the lead opinion in the case. In his decision Lord Bingham emphasized the potential integral value of a hearing even though one may not be required in every case.

The assault on fairness will be particularly felt by Aboriginal offenders who already, as a result of systemic discrimination have higher rates of imprisonment, lower rates of conditional release and higher rates of revocation.[19] In its recent decision in *Ipeelee*, the Supreme Court reaffirmed its decision in *Gladue* that the courts must take into account the special circumstances of Aboriginal offenders. The Parole Board has previously responded to this challenge by introducing Elder assisted hearings where the hearing is held in accordance with Aboriginal protocol in a circle, where a Board appointed Elder counsels the offender and provides advice to Board members. This Canadian initiative has received international recognition as a way to enable Aboriginal offenders to present their cases at parole hearings and to answer the case against them at post suspension hearings. The involvement of Elders also provides a valuable opportunity to introduce traditional teachings and the positive involvement of Aboriginal Communities. C-38, by abolishing the mandatory requirement of a post suspension hearing, impairs the possibility of an Elder-assisted hearing in the post-suspension context. In doing so, the Board and Parliament will be aggravating not alleviating the systemic discrimination referred to by the Supreme Court.

Perhaps the Board intends as a matter of policy to make an Aboriginal exception. We would then have a system where only Aboriginal offenders get a post-suspension hearing. This is not what the Supreme Court had in mind. Everyone under s.7 has the right to the application of principles of fundamental justice in decisions affecting their liberty. It is the form of the Elder assisted hearing that tailors the application of those fundamental principles to the special circumstance of Aboriginal offenders. Elder assisted post-suspension hearings cannot be a trade-off for abrogating the right to a hearing for every non-Aboriginal offender.

This latest amendment to the *CCRA*, buried deep in the Budget Bill, which was not the subject of any consultation with anyone in the correctional community, governmental or NGO, outside of those involved in the secrecy laden budget process, will be challenged, and I believe successfully challenged, in the courts. But, the Department of Justice no doubt will exhaust all its appeal avenues and when all is said and done the $1.6 million will quickly disappear.

In the meantime, offenders will be unfairly revoked, injustice for Aboriginal peoples compounded, and as Ministers of Justice and Public Safety ratchet up the punishment chain, more prisoners and visitors will have their visits unfairly restricted, and as the

---

While an oral hearing is most obviously necessary to achieve a just decision in a case where facts are in issue which may affect the outcome, there are other cases in which an oral hearing may well contribute to achieving a just decision (para 31).

Even if important facts are not in dispute, they may be open to explanation or mitigation, or may lose some of their significance in the light of other new facts. While the Board's task certainly is to assess risk, it may well be greatly assisted in discharging it (one way or the other) by exposure to the prisoner or the questioning of those who have dealt with him. It may often be very difficult to address effective representations without knowing the points which are troubling the decision-maker. The prisoner should have the benefit of a procedure which fairly reflects, on the facts of his particular case, the importance of what is at stake for him, as for society. (para 35)

19 The issue of Aboriginal overrepresentation is addressed in my paper for the this Conference Plenary on Restorative Justice, *Bridging the Cultural Divide:The Challenge to Justice Unanswered*.

physical and psychological razor wire of imprisonment intensifies, the clock will be ticking, ticking, but backwards…