SHIFTING THE ORBIT

Human Rights, Independent Review and Accountability in the Canadian Corrections System

A Discussion Paper prepared by
The Office of the Correctional Investigator

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Dear Sir,
Dear Madam,

As the ombudsman agency for persons under federal sentence in institutions or the community our Office's mandate, under the **Corrections and Conditional Release Act,** S.C. 1992 c.20, is to investigate the conduct of Correctional Service Canada (CSC) in order to resolve the problems of offenders.

Over the past eight years we have found that a significant problem is how CSC makes decisions affecting important legal rights in compliance with the law. Faced with a number of competing internal interests CSC has at times taken measures that have limited or ignored offenders' human rights and other legislative entitlements without just cause.

Our findings have been shared to varying degrees by a number of learned observers of the correctional system, beginning with the 1996 *Report of the Commission of Inquiry into Certain Events at the Prison for Women* (the Arbour Commission) and culminating with the January 2004 Report of the Canadian Human Rights Commission, *Protecting their Rights ,a Systemic Review of Human Rights in Correctional Services for Federally Sentenced Women* . In essence, these experts have concluded that the Service's internal decision-making processes do not adequately promote the accountability for human rights that should characterise corrections in the post-Charter of Rights and Freedoms era.

To address this important issue a key recommendation of the various reports, including our own, has been the implementation of some form of review of CSC decisions by outside independent adjudicators. To date, there has been no action on this recommendation. Our Office takes the view that this impasse must not continue. Failure to address the matter would result in ongoing fundamental abuses of human and legal rights.

Accordingly we have decided to invite a broad range of stakeholders to discuss the issue and, hopefully, to help bring some resolution to it. The first step in this process is the attached Discussion Paper. Your organization would bring an important perspective to the consultation that will ensue. Accordingly we ask you to read the Paper and to join us in bringing forward this vital matter.

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If you have questions or comments, please do not hesitate to communicate with me at your convenience. Please find enclosed the English and French version of our Discussion Paper which is also available, in both official languages, on our Web Site www.oci-bec.gc.ca.

Thank you.

Yours truly,

Howard Sapers
Correctional Investigator of
Canada

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THE PURPOSE OF THE DISCUSSION

In the last decade a number of experts have reviewed the legal compliance and fairness of Correctional Service of Canada ("CSC") decisions. While their precise perspectives on correctional operations may have varied, the commentators have shared the view that independent adjudication of CSC decisions is an essential means of enhancing the Service's accountability.

Despite these findings CSC continues to reject independent adjudication and the Department continues to endorse this position.

This contradiction is the basis for this paper, and we hope for the consultation process that will follow – a process that bears directly on the accountability of the Correctional Service of Canada ("CSC") for the decisions that it takes affecting the human rights, legal entitlements and, ultimately, the safe reintegration of offenders into the community.

As stated in our 2002-2003 Annual Report
"accountability involves both an internal and an external facet. The accountable organization must do more than optimize its focus on fundamental values and its ability to address these within its own structure and decision-making processes. It must also be open to independent oversight in order to assure persons affected by its decisions, and the larger community, that any failures of the internal processes will be reviewed and corrected before significant harm is done to the values in question, and to the perceived integrity of the organization. This is even more the case within the correctional environment where rights and liberties are often at stake[1]

This has been a central theme of the above-mentioned commentaries, beginning with the recommendations of the Arbour Inquiry [2] and culminating in the January 2004 Report of the Canadian Human Rights Commission on Federally Sentenced Women [3]. Each has found that some form of independent review should at least be appraised in order to improve the transparency, timeliness, legal compliance and effectiveness of correctional decision-making.

The Correctional Service and the Ministry have steadfastly resisted adopting recommendations for truly independent adjudication and, in our view, this has resulted in an ongoing lack of responsiveness to the needs and rights of offenders, especially Aboriginal offenders.

The central issue to be addressed is whether Correctional Service, as a key element of the Criminal Justice System, can ensure, without independent adjudication:

- **Policies and decision-making consistent with the Rule of Law and respectful of Human Rights**
- **Timely and appropriate remedies in case of violations**
- **Accountability for their actions**

In this Paper:

- We will present the comments, consistently in support of independent adjudication, that have been provided over several years. We include the quotations that we believe are most relevant to this discussion, nevertheless encouraging readers to refer to the original texts, using the links or references provided at Appendix A, in order to gain an in-depth appreciation of the commentaries.
- We will present our own position in support of independent adjudication
- We will summarize other perspectives on the independent adjudication issue and our reaction to these
- We will list issues and options that readers may wish to consider in responding to the Paper

It is hoped that, armed with this information, the broadly-based group of stakeholders whose views we seek (including both groups who have contributed before and groups who have not previously commented) will become involved in this longstanding debate.

This discussion may bring closure to the issue. At least it will help our Office to ensure that it is fully informed before deciding what further steps to take.

The consultation will consist of three steps, one of which will have taken place before this paper is published.

First, the Correctional Service will be afforded, as provided in s.195 of the Corrections and Conditional Release Act ("the CCRA")[4], a reasonable opportunity to make representations respecting any comment or information included in the final draft of this Paper that they feel might reflect adversely on CSC or any individual. We will include in the Paper a fair and accurate summary of those representations.

Second, all stakeholders (including the Service) will be asked to consider the paper and return written comments to us by the end of October 2004 as a basis for further discussion. The responses will be shared with all participants

Finally, we will invite the Correctional Service to join us in convening a consultation meeting in 2004 to discuss the issues and to arrive at findings and recommendations for the appropriate action of our Office, the Correctional Service, the Department or Parliament.

What was said – Independent Comments on Independent Review

1. The Corrections and Conditional Release Act, 1992

Many of the provisions of the Canadian Charter of Rights and Freedoms, and related case law were either directly or inferentially incorporated into the Corrections and Conditional Release Act. This was consistent with the recommendations of the Correctional Law Review [5] project that were the basis for the CCRA legislative process.

In effect the CCRA implemented the concept that the administration of prisons in Canada should be grounded in legislation rather than in the administrative discretion that had previously characterized operations. For example, in the 1984 *Carson Report* the Chair stated:

The Service must clearly enunciate the philosophy and policy which reinforces the rule of law in all institutions, at all times, under all circumstances. 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.[6]

Numerous other reports and reviews have dealt with the need to subject correctional operations and decisions in the Rule of Law. Although these are too numerous and lengthy to describe in this Paper, we refer the reader to Professor Michael Jackson's book *"Justice Behind the Walls"* which, at Sector 1, Chapter 3, presents a concise review of pre-CCRA commentary and case law.[7]

Prior to 1992 - in recognition of fairness rights afforded by Parliament and the Courts - the government had seen fit to introduce independent adjudication to two processes involving central rights - conditional release, by means of the National Parole Board and inmate disciplinary proceedings by means of Independent Chairpersons, appointed by Cabinet.

Moreover, Part III of the CCRA provided statutory confirmation of the Office of the Correctional Investigator, which had subsisted as a "Departmental Investigation" under the Inquiries Act [8] since 1973.

The CCRA provides the OCI **most** of the duties, functions and authority of analogous legislative ombudsman agencies. Three notable exceptions are:

- the CI is not an Officer of Parliament, but is named by Cabinet
- the Office cannot report to Parliament on findings and recommendations resulting from individual complaints or investigations. These must be incorporated into the Annual Report or interim Special Reports.

- Annual and Special Reports, must be submitted to the Minister, who must then table them in Parliament

The CCRA further excludes certain tools of federal Parliamentary Commissioners (Official Languages, Privacy, Information). Contrary to these organizations the OCI is not expressly provided access in certain circumstances to the Courts to resolve problems.

The net effect of these limits is that we are not administratively independent from the Minister that supervises and is accountable for CSC's performance. Moreover we are prevented from raising matters in a timely fashion before the body to which Ministers are accountable.

Since the CCRA came into force the debate has continued on whether independent review should go beyond the aforementioned mechanisms. For certain eminent commentators, as well as our Office, events have disclosed that the answer should be in the affirmative.

2. Post-CCRA

a) The Arbour Inquiry

Madam Justice Arbour in her 1996 Report on the Inquiry into Certain Events at the Prison for Women found that CSC was characterized by a "culture of non-compliance" with law, and in particular law related to human rights.

"In terms of general correctional issues, the facts of this inquiry have revealed a disturbing lack of commitment to the ideals of justice on the part of the Correctional Service. I firmly believe that increased judicial supervision is required. The two areas in which the Service has been the most delinquent are the management of segregation and the administration of the grievance process. In both areas, the deficiencies that the facts have revealed were serious and detrimental to prisoners in every respect, including in undermining their rehabilitative prospects. There is nothing to suggest that the Service is either willing or able to reform without judicial guidance and control." [9]

Madam Justice Arbour strongly advocated a shift to a rights - based approach to correctional administration where compliance with law is the overriding priority.

"The absence of the Rule of Law is most noticeable at the management level, both within the prison and at the Regional and National levels. The Rule of Law has to be imported and integrated, at those levels, from the other partners in the criminal justice enterprise, as there is no evidence that it will emerge spontaneously." [10]

"This dual characteristic of the role of legal norms in a penal institution was amply demonstrated throughout this inquiry. On the one hand, the multiplicity of regulatory sources largely contributed to the applicable law or policy being often unknown, or easily forgotten and ignored. On the other hand, despite this plethora of normative requirements, one sees little evidence of the will to yield pragmatic concerns to the dictates of a legal order. The Rule of Law is absent, although rules are everywhere.

The major reform with respect to the law governing incarceration, which took place with the enactment of the Corrections and Conditional Release Act of 1992, has been described as an important transition from an administrative to a legislative legal order. The new Act and the regulations thereunder, overrode numerous Commissioner's Directives which are now often merely repetitive of the legislative text and, at best, add an occasional detail. This transformation followed a decade or so of judicial pronouncements which laid the foundation for the prisoners' rights which were eventually incorporated into the CCRA. After a long history of running penal institutions through a process of administrative discretion which utilized discipline and the granting of privileges as management tools, the correctional system is obviously going through the growing pains of having to yield to judicial supervision and the dictates of the legislator."[11]

Madam Justice Arbour found that the need for supervision could best be addressed by three principle mechanisms involving external adjudication of administrative decisions:

- The creation of a judicial remedy for "correctional interference with the integrity of the sentence", which would permit the Courts to reduce sentences in cases of significant abuse of offenders' legal entitlements.
- Judicial determination of maintenance of inmates in segregation longer than 60 days, or alternatively independent determination by a lawyer at thirty day intervals
- The option of independent adjudication of offender grievances once these reached the level of the Commissioner of Corrections

The Judicial Remedy

With respect to the judicial remedy Madam Justice Arbour clearly concluded that accountability for conduct in breach of law could only be ensured by an external sanction. The sanction must bring home to the Service the importance the safe and humane implementation of sentences that Courts impose and expect to see carried out.

"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. As a corrective measure to redress the lack of consciousness of individual rights and the ineffectiveness of internal mechanisms designed to ensure legal compliance in the Correctional Service, I believe that 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." [12]

"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 a sentence by mismanaging it. The administration of a sentence is part of the administration of justice. If the Rule of Law is to be brought within the correctional system with full force, the administration of justice must reclaim control of the legality of a sentence, beyond the limited traditional scope of habeas corpus remedies"[13].

A proposed model

"J*udges who impose sentences expect that their sentence will be administered in accordance with the law. If that is departed from, the integrity of the sentence is at stake, and may need to be restored*."

"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."14[14]

Independent Adjudication of Administrative Segregation

After discussing the negative effects on inmates of prolonged segregation and underlining the need to search constantly for alternatives to segregation in every case, Madam Justice Arbour provides the basis for her recommendation that segregation terms be limited by means of independent adjudication, preferably by the Courts.

"In my opinion, the most objectionable feature of administrative segregation, at least on the basis of what I have learned during this inquiry, is its indeterminate, prolonged duration, which often does not conform to the legal standards. The management of administrative segregation that I have observed is inconsistent with the Charter culture which permeates other branches of the administration of criminal justice. In keeping with the notion that a sentence served in unduly harsh conditions may deserve to be reconsidered by the courts, I would recommend that there be a time limit imposed on an inmate being kept in administrative segregation, along the following lines.

An inmate could be segregated for up to three days, as directed by the institutional head, to diffuse an immediate incident. After three days, a documented review should take place, in contemplation of further detention in segregation. The administrative review could provide for a maximum of 30 days

in segregation, no more than twice in a calendar year, with the effect that an inmate could not be made to spend more than 60 non-consecutive days in segregation in a year. After 30 days, or if the total days served in segregation during that year already approached 60, 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 proved unavailable, or if the Correctional Service was of the view that a longer period of segregation was required, they would have to apply to a court for a determination of the necessity of further segregation. Upon being seized of such matter, the court would be required to consider all the components of the sentence, including its duration, and make an order consistent with the original intent of the sentence. In cases where long-term, involuntary segregation was contemplated, a temporary order could be sought, pending the completion of documentation akin to the type prepared for an application for dangerous offender status."[15]

Failing a willingness to put segregation under judicial supervision, I would recommend that segregation decisions made at an institutional level be subject to confirmation within five days by an independent adjudicator. Such a person should be a lawyer, and he or she should be required to give reasons for a decision to maintain segregation. Segregation reviews should be conducted every 30 days, before a different adjudicator, who should also be a lawyer. It should be open to an inmate to challenge the legality or fairness of her segregation by applying to a court for a variation of sentence in accordance with the principle set out earlier. "[16]

Adjudication of offender grievances

The Arbour Report underlines the need for *a "change in the mindset of the Correctional Service towards being prepared to admit error without feeling that it is conceding defeat"* [17]

This vital aspect of accountability could be buttressed, according to Madam Justice Arbour by ensuring that responses to offender grievances were treated as a priority and addressed in a timely fashion. Moreover redress for grievances that are upheld (including admission of fault and an apologee, where applicable) should be provided at an early juncture. Only in this way can the Service avoid *"the worst possible scenario…"*

"to have a complaint and grievance process which is so deficient, both in time and in substance, that it becomes itself a source of further frustration and resentment." [18]

To ensure accountability with respect to grievances, Madam Justice Arbour recommends that the Commissioner of Correction himself review grievances with the above standards

in mind or, if he were not willing to do so, for outside binding arbitration of some grievances to be implemented.[19]

Investigations

The Arbour report also advocated independent, community participation on CSC's national boards of investigation – a "window" that Madam Justice Arbour hoped would improve the actual and perceived impartiality of investigations into major infringements of rights[20]

3. The Task Force on Administrative Segregation [21]

In 1997 the Service's own Task Force on Administrative Segregation - created to enhance the legal compliance and the effectiveness of the administrative segregation process in response to Arbour – recommended that a pilot project be conducted on the use of independent adjudication in segregation review. The Task Force was composed of representatives of CSC and the OCI, as well as two outside experts, Professor Michael Jackson and Professor Patricia Montour Angus.

There was consensus that the Service could improve staff compliance with the **procedural** protections of the Act and Regulations by training and strict monitoring of performance.

On the issue of **effectiveness** of the segregation process, however, there were two views.

CSC representatives believed that an enhanced internal decision-making system was all that was necessary to ensure effectiveness - the minimum use of segregation consistent with safety and security.

The outside representatives and the OCI believed that effectiveness could only be achieved if, at some point in the segregation review process, an independent adjudicator (either the Courts or a community expert) stepped in to resolve problems.

The Task Force did agree that the issue of outside adjudication was important enough to warrant at least a pilot project to test the effectiveness of independent adjudication. There was consensus that independent adjudication contributed to accountability.

"Some opinion supported the requirement for CSC to retain the responsibility and accountability for the management of these processes within specific time frames, before independent adjudication is invoked to ensure that unjustified and

prolonged segregation does not occur. An independent adjudication model had to be implemented to ensure that inmates are treated fairly under the law when circumstances can create conflicts between effective due process and operational expediency. Other opinion supported the position that CSC should move directly to judicial review. 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 and 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 adjudicator's 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 law.

These observations have contributed significantly to the deliberations and recommendations of the Task Force on independent adjudication. " [22]

This recommendation was initially accepted but later rejected by CSC, primarily on the bases that:

- Outside review would detract from CSC's accountability and
- There was insufficient indication that outside reviewers would have the skills, knowledge and experience necessary to the taking of such sensitive decisions.

As an alternative, CSC has carried out a pilot programme involving the participation of a community representative in segregation review boards, which make recommendations to Wardens on segregation placements and releases.

4. The Yalden Report [23]

In 1997, Max Yalden, former Chief Commissioner of the Canadian Human Rights Commission was engaged by the Service to review its treatment of human rights issues. The Report placed great emphasis on grounding the actions of the Correctional Service that affect human rights in the Rule of Law.

"Correctional systems are by their nature heavily dependent on rules, not just for the fair and humane treatment of offenders, but for the orderly conduct of a difficult social relationship. The strategic task is to integrate human rights considerations within that rule-bound environment in such a way that their rationale can be readily understood and their requirements intelligently met. This means that the first step towards ensuring the rule of law in human rights matters must be an explicit recognition that the correctional authority holds itself bound

by international, constitutional and statutory obligations that have been accepted by the state. " [24]

Mr. Yalden underlined that accountability for this organizational obligation involved more than the Service's internal monitoring and supervision of compliance with procedures. It also required public transparency and acknowledgement of successes and failures. In appropriate cases this must be regulated by independent decision-making bodies.

"There is more to achieving accountability than simply measuring the extent to which a particular correctional system possesses and follows procedural safeguards. Important though these are, they cannot in and of themselves either guarantee full human rights compliance or satisfy the need for public scrutiny. The correctional authority needs not only to evaluate its own compliance but also to demonstrate compliance to the legislature and to society." [25]

He went on to specify the rationale for and characteristics of effective "external monitoring" of human rights compliance.

"Many modern correctional systems recognize and reflect a duty to be both "forthright and fair". Such considerations are obviously of paramount importance when it comes to safeguarding human rights, not least because corrections are conducted in the name of the larger society. To meet that standard of accountability, it is not sufficient that the system have appropriate internal monitoring mechanisms; it must also be able to satisfy the public authorities that its performance is at all times fully consistent with the rule of law.

That is why many monitoring arrangements call for an official public watchdog or, in some cases, continuing judicial oversight to provide an independent external evaluation of a correctional authority's compliance with its lawful obligations in carrying out sentences. The following principles apply:

- *independent oversight provides an unbiased reading on the extent of a system's compliance with its lawful obligations; it is not intended to provide an additional level of operational management;*
- *to meet the test of independence in a credible way, an external body must be able to submit its findings to the legislature as directly as possible, without interference or the appearance of interference from within the system;*
- *in the event of serious incompatibility between the monitoring agency and the correctional authority's judgment about compliance with human rights obligations, provisions should exist whereby the matter can be submitted to adjudication;*

- *an external monitoring body must have sufficient resources, not only to respond to allegations of non-compliance, but also to initiate and conduct its own investigations.*

To ensure the fullest possible respect for inmates' rights, a complete compliance-monitoring model will therefore provide for an external monitor, whether it be part of the judiciary or a prisons ombudsman.

Such a monitor must be recognized in law, and the person appointed should be removable only for cause, preferably only by the legislature. The office should have the following powers or duties:

- *to ensure that its services are well known and readily accessible to the inmate population;*
- *to have the fullest possible access to all relevant documentation, as well as the authority to interview parties as and when required;*
- *to receive, investigate and, whenever possible, informally resolve complaints or grievances from inmates who believe that lawful rules regarding prison conditions or correctional procedures have been breached;*
- *in cases where, following investigation, a complaint or grievance is judged to have merit, to promptly to inform the parties of that finding and make such recommendations to the correctional authority as are considered necessary to remedy the situation; and*
- *to report to the legislature on a regular basis, highlighting significant findings and recommendations, and in particular drawing attention to any unresolved disputes with the correctional authority that may require further action or adjudication.*

In instances where significant loss of prisoners' rights is at stake, the simple monitoring of a correctional authority's decisions by an external entity may not be sufficient to ensure compliance; it is arguable that the decision itself should be made by some external entity."" [26]

Based on these considerations Mr. Yalden made a number of recommendations geared towards ensuring that effective monitoring of human rights compliance took place.

He suggested means to enhance our Office's ability to resolve offender problems involving human rights, as follows:

"With regard to the role of the Correctional Investigator, it is recommended that:

- *he be authorized to report directly to Parliament;*
- *the Office of the Correctional Investigator be given the resources necessary to carry important cases/issues to adjudication, and to play a more active public role in communicating the social rationale for respecting inmates' rights; and*

With regard to the relationship between internal and external monitoring functions, it is recommended that:

- *CSC and the CI jointly establish working criteria and guidelines for prioritizing and filtering complaints and for minimizing investigative or other overlaps;*
- *the two agencies collaborate on regular reviews of systemic issues for the purpose of determining what action is required to resolve them;*
- *in those exceptional cases where a resolution compatible with CSC's human rights obligations cannot be agreed, steps be taken to submit the matter to adjudication without delay; and*
- *the effectiveness of the working relationship between the CI and CSC, in terms of its ability to deliver prompt and credible remedies for legitimate inmate grievances, be the focus of a separate and specific review. "* [27]

With respect to administrative segregation review the Report went further, supporting the recommendation of the Task Force on Administrative Segregation to pilot binding independent decision-making in cases of such basic intrusion on liberty.

5. Legislative Renewal

In May 2000 the Report of the Parliamentary Sub-Committee on Review of the CCRA [28]added further support for independent adjudication of administrative segregation and a direct reporting relationship with Parliament for the CI.

The Sub-committee's Position on Administrative Segregation

"5.35 The impact of administrative segregation on inmates has been graphically described by Madam Justice Arbour in the extract from her report quoted earlier in this chapter. As well, the physical and program constraints on administratively segregated inmates are severe. This was obvious to the Sub-committee in each of the segregation units it visited during its penitentiary tours. It must also be recognized, however, that the inmate population being managed by the

Correctional Service in its administrative segregation units is a difficult one, posing serious challenges on a day-to-day basis.

5.36 Since 1997, the Correctional Service has taken important steps to enhance and monitor the segregation review process, find alternative approaches, and effectively reintegrate long-term administratively segregated offenders back into the general prison population. These enhancement and monitoring efforts should be continued and extended by the Correctional Service. They are, however, a complement to, and not a replacement for, the independent adjudication of actions affecting the residual rights and freedoms of inmates."

The Sub-committee recommends that the Corrections and Conditional Release Act be amended to provide for the adjudication (by independent chairpersons appointed by the Solicitor General as part of the inmate discipline process) of involuntary administrative segregation cases every 30 calendar days and of voluntary administrative segregation cases every 60 calendar days. " [29]

The Sub-Committee also recommended a direct reporting relationship with Parliament for the CI. It was proposed that the CI report to the Solicitor General and to Parliament simultaneously.

6. Cross Gender Monitoring Project – Third and Final Report (2000) [30]

The Cross Gender Monitor was appointed by CSC to provide an independent review of the policy and operational impacts of cross-gender staffing in federal women's penitentiaries. The appointment of an independent monitor for a three-year period was recommended by the Arbour Commission.

In its discussion of the process for investigating inmate complaints of sexual harassment the Report recommended the creation of an independent body to investigate allegations of misconduct as well as supporting the CI's direct reporting relationship.

An independent body created by legislative amendment is the favoured option for a number of reasons. Such a body has been recommended by the Correctional Investigator after years of experience with the internal systems of CSC for dealing with such concerns. This model ensures an informed fact finding by persons who are seen by all parties to be impartial. Centralizing the investigative mechanism for serious complaints including sexual misconduct allegations will allow for investigators to be knowledgeable or trained in sexual abuse/misconduct investigations as well as corrections. This process would allow for greater transparency and therefore accountability than an internal CSC investigative process. Centralizing fact finding for these kinds of complaints will also ensure that statistics can be kept of allegations so that trends can be more

easily tracked and processes can be audited. An effective process for fact finding and discipline should also act as a deterrent to prevent sexual misconduct against female prisoners.

The creation of an independent body to investigate allegations of sexual misconduct as well as other serious allegations should in no way be construed to be replacing or limiting the function of the Correctional Investigator's function. Whatever option is chosen for handling of sexual misconduct allegations, there will always have to be a body that monitors or audits the handling of such allegations. Indeed, should the option of changing the mandate of the C.I. such that they are the body to investigate and make enforceable findings on allegations, another body would have to be mandated to monitor the C.I.'s handling of these allegations. The C.I. is the body who is now responsible for auditing the handling of complaints or allegations by inmates. However, they have been chronically under-resourced for this work, particularly with respect to dedicated staff positions for women prisoners. In addition, the independence of the C.I. should be reinforced by amending the CCRA to report directly to parliament. " [31]

7."Justice behind the Walls" 2002 [32]

Michael Jackson, in his recent book "Justice behind the Walls" came to the conclusion that independent adjudication is essential, given the Service's demonstrated inability to address rights problems internally.

Basing his conclusions on his decades of experience in the prison law milieu and hundreds of interviews with offenders, staff and other stakeholders, as well as upon his acknowledged expertise in the fields of human rights and correctional law, Professor Jackson effectively endorsed the Arbour judicial remedy, independent review of offender grievances, an enhanced reporting relationship for our Office and the creation of an independent administrative tribunal to adjudicate offenders complaints.

Perhaps the best depiction of his thoughts on the need for independent review to buttress compliance with the Rule of Law in correctional decision-making is in the Section entitled "Lawyer's Dream or Administrator's Nightmare".

This elaboration of remedies to vindicate prisoners' rights and ensure compliance with the law may seem to some readers a lawyer's dream come true: Independent Chairpersons for serious disciplinary cases; independent adjudicators for segregation, involuntary transfers, and visit reviews; grievance processes with binding arbitration; an administrative tribunal; judicial review; the Arbour remedy of revision of sentence. For correctional administrators, this scenario might seem to evoke a nightmare world in which their principal

preoccupation is preparing for and appearing at a succession of proceedings in which their decisions are challenged and redress for alleged or perceived injustices is sought. In this world, prisoners would become full-time grievors/appellants, with no time left for participating in programs aimed at their rehabilitation.

The way this array of remedies would operate in the real world bears little relationship to either the lawyer's dream or the correctional administrator's nightmare. In the recommendations I have made throughout this book, primary reliance for entrenching the Rule of Law and ensuring compliance with the law is on what lawyers call "first instance" processes. If disciplinary hearings, segregation reviews, and involuntary transfers are conducted with the appropriate balance between correctional expertise and independent adjudication, most cases will not proceed beyond this point. If the grievance process is underpinned by the possibility of independent binding arbitration, the incentive to resolve grievances at an early stage will ensure that only the exceptional case proceeds beyond there. In the same way, recourse to the administrative tribunal proposed by the Correctional Investigator would be reserved for those cases in which the CI has exhausted all other avenues in seeking to have the Service respond to his recommendations. Judicial review is not about second-guessing the decisions of correctional administrators; it interferes only when the decision is unreasonable or where there is a violation of the rules of procedural fairness and will not suddenly take over the agenda in wardens' offices. The judicial remedy proposed by the Arbour Report will be an even more exceptional event, because in most cases non-compliance with the law will not rise to a sufficient level of gravity to meet the threshold test of interfering with the integrity of the original sentence. In those exceptional cases, however, it will provide both an essential form of redress and a judicial indictment of the correctional practice which has made such redress necessary.

A final issue that must be addressed in contemplating enlargement of the remedies for the vindication of prisoners' rights is the cost. The Correctional Investigator has suggested that an administrative tribunal would be cost-effective because, in providing parties with ongoing clarification of the law, it would avoid the needless expense of revisiting unresolved issues with the Correctional Service. In proposing her judicial remedy, Madam Justice Arbour acknowledged the additional burden this could place on the courts but made the trenchant observation, which can be applied to every remedy considered in this chapter, that any additional burden "would only be so in proportion to the Correctional Service's non-compliance with the law" (Arbour Report at 184). The reforms the Correctional Investigator, Madam Justice Arbour and I have proposed all seek to draw the operations of the Correctional Service of Canada into the gravitational

pull of a culture that respects legal and constitutional rights. The more fully the Service brings itself within this legal orbit, the less need there will be for prisoners and the Correctional Investigator to seek redress. [33]

8.The Report of the Canadian Human Rights Commission on Federally Sentenced Women [34]

On January 28 2004 the Canadian Human Rights Commission issued a Report entitled *Protecting Their Rights: A systemic review of human rights in correctional services for federally sentenced women.* This document was the result of three years of research and investigation. It presents an extensive review of how women prisoners are adversely affected by the federal corrections system and makes 19 separate recommendations on how this problem can be resolved.

Among its recommendations are:

"Recommendation No. 6

It is recommended that:

a. the Correctional Service of Canada implement independent adjudication for decisions related to involuntary segregation at all of its regional facilities for women. The impact of independent adjudication on the fairness and effectiveness of decision making should be assessed by an independent external evaluator after two years; [35]

Recommendation No. 19

It is recommended that the Solicitor General of Canada and the Correctional Service of Canada, in consultation with stakeholders, establish an independent external redress body for federally sentenced offenders." [36]

The basis for the Report's advocacy of these measures is perhaps best summed up in the Section on external redress:

"Effective redress for inmates is a critical issue that has implications for human rights compliance. Human rights mean little if they are not respected. It is in the interests of everyone concerned — the Correctional Service, staff, inmates and society — if safeguarding human rights is strengthened by adding an independent oversight function. A specialized oversight function can provide an unbiased and informed view of human rights compliance within the correctional context." [37]

9. OCI Findings and Recommendations

For our part, the OCI has repeatedly advocated all of the Arbour recommendations. We have as well recommended the establishment of an independent tribunal to resolve disputes over significant issues bearing on national - level problems and human rights.

While we have had some success in using voluntary mediation of disputes through the mechanism of a Memorandum of Understanding between the OCI and CSC, we continue to believe that true external adjudication is the most effective way of resolving disputes on fundamental rights and legal compliance issues.

Our rationale for advocating external adjudication mechanisms is set out in the next Section of this Paper. We believe our viewpoint is sound most importantly because it reflects the wealth of expert opinion that has supported this position.

Current Status - Inertia

All of these developments underline the impetus toward resolving rights/entitlement issues through independent means. A number of independent voices have concluded that, in various sectors of its operations, CSC requires independent review of decisions affecting important entitlements.

In our view, though, three major obstacles have prevented serious consideration of establishing independent mechanisms.

First, the Correctional Service has been steadfast in its view that, although it will accept a community "window" on its decision-making processes, it cannot accept direct outside control. Thus, on the one hand, CSC has accepted the Arbour recommendation of community membership on national boards of investigation and has piloted a community representative on segregation review and the National Special Handing Unit Advisory Committee. On the other hand it has rejected any independent review of grievances or a truly independent determination of segregation placements.

Second, there has been no tangible comment on either the Service's position or the various recommendations concerning these issues from the Solicitor General (now the Minister of Public Safety and Emergency Preparedness), to whom the Service is directly accountable. Notwithstanding the wealth of comment on the issue and its importance to the parliamentary review process on the CCRA, the Minister has been silent.

Third, none of the other departments or agencies that one would expect to demonstrate an interest in the effective protection of rights and entitlements for federal offenders has yet presented its case:

- Despite being referred the Arbour judicial remedy in 1996 by the Solicitor General[38], the Department of Justice has made no public pronouncement on its merit nor suggested any viable alternatives
- Neither has Justice commented before Parliament on the issue of independent oversight
- House of Commons and Senate Committees, since the Review of the CCRA concluded, have not considered the independent review issue despite its continued mention in our Annual Reports and despite Committees' frequent opportunity to examine the issue with the Correctional Service and our Office.

In short, it has not simply been the unwillingness of the Correctional Service to accept changes that has stymied attempts to effect them. It has rather been the vacuum within which the Service has been permitted to operate

On the Service's behalf it can at least be said that they have participated in debate and expressed some flexibility. As well, they have offered responses to some of the recommendations proposed.

Nevertheless, offender problems persist that need to be addressed by more authoritative oversight. Segregation wings remain full. Dissatisfaction and distrust exists in the grievance procedure and in the fairness of various other investigative mechanisms. There is still no tangible, dissuasive sanction for potential abuse of the sentence as it is expected to be carried out when pronounced by the Court.

While the Service has taken measures to address such issues internally, and while we have cooperated actively in such projects, we simply do not believe the parties can continue to avoid specifically addressing the issues of adjudication and accountability

This is why we have implemented the current consultation process. We hope that by explaining the problem, and fairly outlining the various opposing views, we might stimulate discussion from stake holders on this fundamental issue. We believe that the corrections "community" - offenders, their families, CSC staff, other public servants, community partners and legislators alike – is capable of bringing insight and ideas to the table. We believe that the frustrations involved in this seemingly endless debate and the real needs that persist might permit this process to work where others have not.

If making the attempt addresses offender problems, vindicates their rights and entitlements, even in a small way, then the effort will have been worthwhile.

The Particular Case of Aboriginal Offenders

The effect of a lack of independent review on offenders in general, and on women offenders, is well-canvassed in the materials above. A group whose problems require further comment is aboriginal offenders.

The plight of our Canada's aboriginal communities has been reiterated many times and has been addressed as a special focus by recent Governments, for example in the February 2, 2004 Speech from the Throne:

"Aboriginal Canadians have not fully shared in our nation's good fortune. While some progress has been made, the conditions in far too many Aboriginal communities can only be described as shameful. This offends our values. It is in our collective interest to turn the corner. And we must start now.

Our goal is to see Aboriginal children get a better start in life as a foundation for greater progress in acquiring the education and work-force skills needed to succeed.

Our goal is to see real economic opportunities for Aboriginal individuals and communities.

To see Aboriginal Canadians participating fully in national life, on the basis of historic rights and agreements - with greater economic self-reliance, a better quality of life." [39]

It would be difficult to imagine an environment where the needs of Aboriginal Canadians are less adequately addressed than in prisons. At every stage of the criminal justice process they find themselves at a significant disadvantage compared to white offenders. This is especially the case for aboriginal women. We summed up the status of Aboriginal offenders and the measures needed to address this in our 2002-2003 Annual Report:

"Based own our review of Correctional Service data and offender complaints, it is incontestable that the disproportionate barriers to safe, timely release of aboriginal offenders constitute a continuing crisis and an embarrassment–even more so in the case of aboriginal women.

We have long advocated measures designed to bring a focus to these problems, to ensure an Aboriginal presence and perspective at the Senior Management table and cause an independent and informed review of the Service's policy and procedures as they relate to discriminatory barriers to timely reintegration. [40]

Independent Review of Systemic Discrimination

As indicated above, we have long held the view that systemic discrimination, and an inability or unwillingness to identify and rectify the operational obstacles that contribute to it, exist within the federal correctional system. There is nothing surprising in this conclusion. It mirrors the more general cultural and organizational characteristics that have given rise to non-compliance with law and human rights in the broader corrections context.

Equally unsurprising, our solution to the problem of systemic discrimination has been to recommend an independent review of the issue, in particular to identify the barriers to reintegration that Aboriginal offenders experience in their prison journey.

This position was echoed in the findings of the House of Commons Sub-Committee on Review of the CCRA. The Sub-Committee called for managerial focus and specific accountability regarding Aboriginal offenders and for an independent review by the Auditor General of Canada:

"*3.45 Insofar as Aboriginal offenders are concerned, the figures published in the Solicitor General's report are alarming. Aboriginal persons account for some 3% of the Canadian population overall, but 12% of federally sentenced offenders. Compared with non-Aboriginal inmates they usually serve longer portions of their sentences in institutions rather than in the community, and they are more often referred for detention hearings.*

3.46 Studies have repeatedly shown that existing Correctional Service programs and management practices did not always meet the specific needs of Aboriginal offenders. The Correctional Service must therefore recognize these offenders' special needs and ensure that Aboriginal offenders benefit from correctional services and programs that foster their reintegration into the community as law-abiding citizens.

3.47 The Act now recognizes that the overall Correctional Service approach, rehabilitation programs, and reintegration into the community must be sensitive to Aboriginal culture. A number of witnesses considered this recognition alone to be a significant improvement to the correctional system. Even so, the Sub-committee heard from witnesses who criticized the lack of programs adapted to Aboriginal offenders' special needs, and emphasized the specific problems of federally sentenced Aboriginal offenders.

3.48 Since the Sub-committee believes that programs and services must meet the special needs of Aboriginal offenders and have as their goal effective correctional planning to reduce recidivism, it recommends that, in order to improve correctional services for Aboriginal offenders, a position of deputy commissioner for Aboriginal offenders be created within the Correctional Service

that is similar to the existing deputy commissioner for women position. The deputy commissioner for Aboriginal offenders would be responsible for studying, analyzing and endeavouring to solve problems relating particularly to Aboriginal offenders in the correctional system. In the opinion of the Sub-committee, the deputy commissioner would be responsible for planning and developing policies and programs, monitoring and reviewing Correctional Service operations, and supervising studies on issues affecting Aboriginal offenders. As a member of the Correctional Service executive committee, the deputy commissioner for Aboriginal offenders, like the deputy commissioner for women, would also take part in all decisions that directly or indirectly affect Aboriginal offenders in the correctional system.

RECOMMENDATION 9

The Sub-committee recommends that the Correctional Service of Canada create a deputy commissioner for Aboriginal offenders' position, with powers and responsibilities similar to those of the existing deputy commissioner for women position.

3.49 As mentioned in the introduction to this chapter, the Sub-committee was unable to consider Correctional Service rehabilitation programs in depth. Having noted during its review that the November 1996 and April 1999 Reports by the Auditor General of Canada on offender reintegration did not evaluate the process of reintegration into the community as it applied specifically to women and Aboriginal offenders, the Sub-committee believes that an in-depth evaluation of the programs and services provided for these offender groups would be very helpful to the Correctional Service, these offender groups, and the population as a whole.

3.50 The Sub-committee therefore considers it essential that the Auditor General of Canada carry out an evaluation identifying the strengths and weaknesses of the present process of reintegration into the community that is available to these two offender groups.

RECOMMENDATION 10

Since previous Auditor General of Canada audits of the process of reintegration into the community have not addressed issues specific to women or Aboriginal offenders, the Sub-committee recommends that the Auditor General carry out an evaluation of the process of reintegration into the community available to women, as well as an evaluation of the process available to Aboriginal offenders in the federal correctional system. " [41]

To date no such measures have been implemented.

The Service has maintained that it can rectify Aboriginal problems by means of enhanced programming and services.

While we acknowledge the potential benefits of the Service's undertakings we remain unconvinced that these efforts alone will bring either the required focus or the independence of review necessary to begin addressing the on-going discriminatory situation faced by Aboriginal Offenders. As we have previously indicated, the areas of concern go well beyond the over representation of Aboriginals in federal prisons and necessarily focus on what happens to Aboriginal Offenders while in the care and custody of the Correctional Service. We have seen no measurable improvement in addressing discriminatory barriers to timely reintegration of Aboriginal Offenders.

There continues to be a wide gap between Aboriginal and non-Aboriginal Offenders in terms of the percentage incarcerated vs. the percentage on conditional release. This gap widens when you look at Women offenders, with 55.5% of non-Aboriginal Women on conditional release compared with only 41.8% of Aboriginal Women on conditional release.

While Aboriginal Offenders tend to have slightly shorter sentences as a group then non-Aboriginal Offenders they on average serve more of their sentence prior to conditional release. The reason for this in large part is the result of decisions taken by the Service related to security classifications and reintegration potential.

In the Prairie Region for example Aboriginal Offenders represent 42.6% of the incarcerated population yet they make-up nearly 55% of the maximum security population and only 29% of the minimum security population. At Stony Mountain Institution Aboriginals make up 56% of the population yet across the street at the minimum security Rockwood Institution Aboriginals represent only 34% of the population. In terms of risk, again using the Prairie Region as the example, the Service identifies 65% of the Aboriginal Offenders as high risk yet only 45% of non-Aboriginal Offenders are so identified. With respect to reintegration potential while 21% of the non-Aboriginal population is rated as high only 7% of the Aboriginal population is identified as having a high reintegration potential. At the other end of the scale 35% of the non-Aboriginal population is seen as having a low reintegration potential yet 58.5% of the Aboriginal population is so identified.

<u>There is something terribly wrong with this picture.</u>

Why, given that Aboriginals are on average being given shorter sentences by the courts, are the decisions of the Correctional Service resulting in Aboriginal Offenders consistently serving a longer portion of their sentence than non-Aboriginals prior to conditional release? Why do Aboriginal Offenders continue to be overrepresented in

maximum security facilities, identified as presenting a higher risk and measured as having less reintegration potential than non-Aboriginal Offenders?

Independent Adjudication of Correctional Decisions

All of the problems associated with restriction of legal entitlements that were discussed above apply all the more so to Aboriginal offenders. Accordingly, measures to provide independent adjudication are all the more necessary for Aboriginal offenders.

Has the Service's failure to reasonably address the above recommendations related to discriminatory practices resulted in the correctional interference with the integrity of Aboriginal sentences within the context of Madam Justice Arbour's judicial remedy?

Would the introduction of independent adjudication in the areas of segregation, security classification and grievances assist in negating the discriminatory impacts currently associated with the management of Aboriginal sentences?

OUR POSITION

IMPLEMENT FUNDAMENTAL JUSTICE

Interests and the Law

Our advocacy of independent adjudication is the natural result of our work as ombudsman in a prison context. Anyone connected with the correctional milieu will quickly become aware that it involves a complex set of competing interests, attitudes, purposes and values. In making a decision affecting an offender, the Warden or other manager is confronted with a host of considerations. Any one of the following may come to bear as a matter of law, policy, experience, common sense or intuition:

- Offender rights and entitlements
- Safety of staff, offenders, visitors and the public
- Institutional security
- Prevention and prosecution of crime
- Budget
- Employee relations
- Fairness
- Time
- Competing priorities

This is a short list. Most practitioners or offenders could easily supplement it with little prompting. Regardless of the numbers of competing interests, the point is that CSC managers, when confronted by such elements, will not always resolve the matter, much less resolve it quickly. In our view this occurs because CSC, in focusing on interests, has failed to focus on the fundamental requirement of complying with the law.

In this respect we do not necessarily impute any bad faith on CSC's part. It may well be that the system itself leads inevitably to the devaluing of human rights and legal compliance. This is the archetypical "systemic" problem.

Intentions aside, though, it is clear to us, and to the aforementioned long series of independent experts, that the problem exists.

In our view the essence of the matter, as so eloquently stated by Madam Justice Arbour is the notion of a "commitment to the ideals of justice". For when all the imputations of responsibility have been argued; when all the specifics of the Correctional Service's actions before and **since** the Arbour commission are addressed; when all the pro's and cons of potential effectiveness of internal and external remedies have been analyzed; this phrase, and its implications remain. It is the acid test of our efforts.

For our purposes, we believe that the issue becomes **whether some form of independent adjudication of the decisions affecting significant human rights and statutory entitlements will further the entrenchment of justice in the care, custody and reintegration of federal offenders.**

We canvass other perspectives on this debate in the next section of the paper. These examine the modalities of independent review based on a range of constructs, purposes and assumptions. While useful, our view is that these considerations are ancillary issues, related more to implementation and consequences than to the core.

Without a focus on the legal foundations of a system that is integral to the administration of justice, we will be focusing more on the "rotation" of the correctional "planet" than on its "orbit" (to paraphrase an image incorporated into Professor Jackson's book).

What then are the relevant aspects of justice that are addressed by the CCRA and how can these be enhanced, if at all, by independent adjudication?

It can be reasonably inferred that most commentators identify two concepts:

- optimal exercise of inherent rights by offenders
- the adaptation of these to a system that balances the goals of public protection and rehabilitation.

Human Rights

As discussed in the previous section of this paper, what distinguishes a rights-based analysis from other approaches is that **rights are seen as the imperative from which all else flows.** Rights are not to be weighed or balanced against supposedly competing interests or values. No such "competing" values or interests can influence rights unless:

- the exercise of **other** rights depends on these values and interests, or
- there exists a legally imposed restriction on the right that is "demonstrably justified in a free and democratic society".

The right is to be **promoted** by the decision or policy to a reasonable extent ,subject only to those restrictions that are necessary to enforce a law that has some legitimate societal purpose.

To the extent that decisions and policies are not effected in this manner, it is the decision or policy, not the rights, that must be adjusted.

One exception to this will occur where the exercise of other rights conflicts. In the prison context, from the institution's perspective, this normally entails security of the person, or safety and security as this has been translated in CCRA terms.
As well it can involve the exercise of other protected rights by offenders, staff, visitors or other persons. The basic premise is that rights are themselves circumscribed by the rights of others.

A second exception is that valid legislative purposes may permit restriction of rights. S.1 of the *Charter* is the operative rule, here. In prison three such purposes predominate - lawful administration of the sentence imposed by the Court, safety of persons in prison and the public and effective reintegration of the offender to the community.

It cannot be overemphasized, however, that the restriction of any right must occur only to the extent necessary to accomplish the legitimate purpose of the restriction.

The Exercise of Rights within Valid Correctional Purposes

It is useful to examine the exercise of rights in the context of what, at first glance, appear to be competing legislative purposes - protection of society and safe reintegration of offenders.

In fact, these purposes are much more complementary than contradictory**. Each one facilitates the other**. This implies, in turn, that both must be kept in mind whenever a correctional decision is being considered.

It follows that rights might be not only circumscribed by these legislation purposes, but also facilitated. Virtually all operational or policy decisions require consideration of custodial against rehabilitative purposes. The balance that arises from these considerations provides a meaningful context for decision-making. It gives direction and purpose - a practical milieu - for the exercise of the rights.

But it does not supplant the need to ensure that the right is protected and enforced.

Implications

When one accepts rights not as **one aspect of** corrections under the CCRA, but **as** corrections under the CCRA, it becomes clear that taking decisions affecting rights on non-rights bases represents more than a choice amongst options. From a rights perspective, it represents a violation of the fundamental grounding of correctional decision-making.

Accordingly, any institutional action or policy that is likely to impede a focus on rights must be revised to correct this shortcoming. Sometimes that impeding feature is not susceptible to modification due to the mind set of decision-makers or the milieu ("culture") within which it exists. When this occurs four options come to mind:

- change the mind set of the decision-maker
- change the culture
- take the decision out of the tainted milieu
- provide effective restitution for the harm incurred by the impediment

It may be that the very nature of an organization precludes the first two options. When this occurs, merely adjusting internal processes and modifying substantive rules to more reasonably accommodate rights will not suffice.

This is the central focus of the debate with CSC on independent review and the Arbour judicial remedy (or analogous mechanisms).

Within a custodial environment there are systemic obstacles to considering rights issues in a manner unfettered by relatively irrelevant considerations.

We are conscious of the Service's efforts to resolve this problem by realignment of internal processes and re-education of staff and of the positive results of these measures. As well, we are sensitive to the Service's concerns that

- independent review will dilute accountability and even the motivation to take appropriate decisions that should be required of internal decision-makers
- there are a vast number of redress, independent review and dispute resolution mechanisms available to offenders
- independent reviewers will never possess the requisite knowledge, skills and "feel" for correctional operations that experienced CSC staff and managers possess
- absence of a thorough, objective and timely internal investigation process

While there is some validity in these concerns, they **cannot** negate the fundamental principles of legal compliance and fairness.

We firmly believe that, despite changes to internal procedures effected by the Service, identifiable, disproportionate and long-standing restrictions on human rights persist in many aspects of the federal correctional system. We have reiterated our concerns in our Annual Reports, to wit:

- a consistent full occupancy in segregation units
- ongoing disadvantages with respect to all forms of restrictive custody of aboriginal offenders
- continued delays and dissatisfaction with the offender complaints and grievance system, as well as with its use as a precedent by managers to effect change
- consistent level of institutional violence and inmate injury and death
- absence of thorough, objective and timely internal investigative processes

We believe that these results cannot simply be attributed to unforeseeable or uncontrollable events, or even to the Service's management of its resources and processes. It is not even any lack of good faith. **We believe that a central contributing factor, which must be addressed, is the very nature of the Service's structure and culture - which make it unlikely that decisions based predominantly, much less exclusively, on human rights will prevail.**

Recourses

We underline our continued support for the Arbour judicial remedy and for judicial involvement, at a reasonable juncture, into decisions on segregation placement.
The involvement of the Courts remains, in our view, the surest way of ensuring early and effective declaration of the law and of what must be done to comply with it. Moreover, the judicial remedy of adjusting the length of sentences that Madam Justice Arbour recommended would provide a remedy for correctional interference with the integrity of the sentence - a dissuasive device to encourage CSC compliance with the Rule of Law and the privileged position of human rights in the correctional context.

In addition to the judicial remedy, we favour the establishment of an administrative tribunal with authority to adjudicate and implement resolutions on significant areas of concern arising from our Office's investigations.

It may be that such a vehicle will provide a breadth and depth of consideration that the Courts could not.

For reasons already stated we favour, and have long recommended, arbitration of significant third level grievances, community presence on investigative panels at all levels of CSC operations and an independent inquiry into the problems of aboriginal offenders.

With respect to our own mandate, we believe, notwithstanding the addition of any dispute-settlement mechanisms, that it is essential that we be seen to be independent of governmental influence and that we be organisationally related to the body that itself oversees the actions of government - Parliament. This can only be accomplished by providing us with a direct reporting relationship on any matters.

It is clear that none of these changes could occur in a vacuum. The correctional context and the need to carry out custody in keeping with the wishes of the Courts, and in recognition of the essential ends of public safety and successful reintegration are the environment within which rights-based decisions must take place. All of these will condition the application of a rights-based approach. Moreover, it would be naïve to suggest that the needs and interests of staff, offenders, managers and other stakeholders should not be considered in decision-making.

What we propose are solutions that will ensure that respect for the Rule of Law is the mandatory prerequisite to these operational considerations.

PERSPECTIVES

The debate surrounding independent review and accountability has a number of dimensions. While we have concentrated on the need for a rights-based approach and how this relates to independent review it would be fair, and perhaps helpful, to canvass some other perspectives to round out the discussion. What follows is a précis of the most frequently-voiced of these as we understand them - intended to be neither exact nor complete, but rather to suggest common starting points.

Since the perspectives overlap, some of what follows will necessarily have been canvassed in the principle section of the paper. Nevertheless we hope that a more complete depiction of the basic thrust of each would be useful

We repeat our recommendation that readers review the accompanying CSC document on the enhanced internal segregation system.

1. Political Accountability

In a parliamentary democracy the construct of residual authority of the sovereign, as opposed to the presidential construct of sovereignty arising from the people, is frequently suggested as the reason, if not the justification, for government's hesitancy to surrender decision-making authority.

The notion is Ministers and their agents, as the instruments of the sovereign, subject only to what Parliament has otherwise mandated, will attempt to preserve their authority and discretion.

The Courts have traditionally deferred to this administrative latitude, not just in recognition of the expertise of government officials and tribunals, but also in support of the role of government per se as a branch of the democratic process.

To curtail this role, the argument runs would be ill advised to the extent that it unduly hampered the ability of ministries to do their jobs.

The arguments in favour of independent review would be:

- That it is within Parliament's mandate and the concept of parliamentary supremacy to enact oversight mechanisms where these are required to police functions that the legislature has targeted as critical to the objects and effectiveness of statutes.
- That this is particularly the case where the oversight agency reports to, or is an officer/agent of parliament

- That administrative and policy decisions that affect human rights have traditionally warranted careful judicial scrutiny and that Parliament has an interest in ensuring that the fairness and impact of such decisions are optimized

2. Managerial Accountability

In combination with transparency this is a central value of public service administration. Being responsible for outcomes of decisions and for attaining operational and policy goals not only permits the government to take appropriate staffing, training, compensation and other decisions on managers, but also motivates the manager in question to take appropriate, legally compliant decisions. Accordingly, taking decisions out of the hands of managers, indeed out of the control of the public organization, will diminish accountability and harm sound management.

Those promoting independent review would respond that:

- Certain rights and entitlements are so important and fragile in a prison environment that their protection requires early intervention unencumbered by organizational interests and processes that could impair a rights-based approach.
- The Service has possessed the mean to demonstrate accountability for more than a century and yet has consistently been cited for being incapable of consistently taking fair and legally compliant decisions.
- Most commentators would not remove the Service's decisional authority at the initial stages of its exercise, but rather would bring in independent adjudication where a rights issue remains unresolved for a significant period.

3. The Sufficiency of Current Oversight, Redress and Support Mechanisms

CSC decisions, especially those affecting important rights and entitlements, are subject to review under a vast array of external and internal processes, such as:

- The Courts
- The Canadian Human Rights Commission
- The Auditor General
- The Information Commissioner
- The Privacy Commissioner
- The Commissioner of Official Languages
- The Correctional Investigator
- Provincial Colleges of health service professionals
- The offender complaints and grievance system
- Claims against the Crown
- The local Bar
- Prisoners advocacy organizations
- The Independent Chairperson

- The Citizens Advisory Committee

It has been contended that the above options already provide sufficient redress, much of it independent and expert and, not incidentally, require CSC to expend significant resources addressing offender problems. Moreover, Government policy in recent years has been against the further proliferation of oversight mechanisms.

Advocates of independent review will underline that none of these mechanisms combines the elements necessary to adequate protection of rights in a prison context, namely:

- Timeliness, of initial intervention, duration of review, findings and execution thereof
- Relevant legal and policy expertise
- Independence from the Service and government
- Authority to conduct unrestricted investigations
- Authority to impose a solution

Moreover, independent review with the prospect of a sanction, such as provided by the Arbour-recommended judicial remedy against correctional interference with the integrity of the sentence would present another element not present in any of the listed recourses, above.

4. Correctional Experience and Expertise

This position asserts that only staff with considerable experience in the milieu is aware of the complexities of institutional "politics" and administration, especially those surrounding the safety and security of the prison and those associated with it. Such staff has developed knowledge and skills and even a type of intuition that permits them to resolve issues safely and with some immediacy and closure.

The counter-position would be that these skills and knowledge, with their inherent preoccupation with a range of processes, could lead decision-makers away from the necessary focus in a rights-based perspective. As well, what is believed to be familiarity with the milieu may in fact include biases.

5. Safety and Security as Paramount

A close cousin of the previous perspective, with a nod to the accountability argument, this position holds that the stakes are simply too high to risk letting a lay person who is detached from the situation, and its potential consequences, decide issues in a high risk setting. Even if the independent adjudicator could be adequately schooled in risk evaluation in a reasonable time, s/he would not necessarily have the "stake" in the situation that would ensure necessary thoroughness and caution.

A variation on this theme is the prediction that an independent adjudicator would be so overly concerned and cautious about risk assessment that s/he would take decisions that are more restrictive than those normally taken by staff.

Advocates of independent review might respond that the independent person could rely on the advice of staff where their expertise and experience were better and could make reasonable inferences from that advice. Moreover, the outside adjudicator would seldom take issue with the staff evaluation per se. Rather s/he would attempt to discover new information to supplement that evaluation or, even more likely, new alternatives to resolve the situation.

6. Balancing of Interests

The premise of this approach is that an analysis based strictly on legal compliance, or any specific factual or policy analysis (e.g. risk assessment) ignores the real context in which decisions must take place. Accordingly the decision-maker, be this an "inside" or "outside" person, should attempt to take decisions that accommodate the interests and attitudes of various groups in the milieu. The result would be, hopefully, that the restriction on rights or entitlements could be resolved in a manner that all parties would perceive as fair (even if not satisfactory) and where basic concerns for safety and security were addressed.

Problems with this type of approach might include:

- That the concentration on interests and negotiations might seriously detract from a serious considerations of rights and legal entitlements
- That the results of negotiation and mediations can be less favourable to parties in a disadvantageous power position

7. Cost

Persons named to provide independent adjudication would bring with them significant costs for salaries and for operational expenses. CSC has estimated that the presence of community members on all segregation review boards, for example, would cost upwards of $4 million annually.

Even if the Courts were used to adjudicate disputes, this would involve increased expense for the Judges, lawyers and other litigation-related persons involved. Moreover, there would be CSC expenses for escorts and temporary accommodations and the like.

Professor Jackson has canvassed this issue and in his opinion the test becomes:

- Whether the savings effected by dispute resolutions, both internal and with respect to the offender's safe and effective reintegration outweigh the costs of the adjudication

- Whether there is an intrinsic value (or value-added) to the benefits of independent adjudication, as a matter of justice and fairness, that is simply worth paying

ISSUES AND OPTIONS

In preparing for further dialogue, it may be useful to the reader to review some of the issues that we see arising from the discussion and some of the options that might be chosen to resolve the problem. We have set out some of these below, only those that we see as fundamental. We have attempted not to advocate or suggest solutions. Doubtless readers will identify others, as will the persons attending our consultation meeting.

Issues

- Is a strictly rights-based approach a realistic solution as compared to one which more actively attempts to balance legal entitlements against competing interests?
- How much weight should the goals of safety and security be given where these conflict with the protection of (other) offender rights?
- Can the following be accomplished in a cost-effective fashion:
- training staff to consistently comply with law?
- Introducing community representation to processes such as administrative segregation review, grievance adjudication, CSC investigations?
- Implementing Court review of segregation?
- Implementing Madam Justice Arbour's proposed remedy for correctional interference with the integrity of the sentence?
- Establishing an administrative tribunal to adjudicate complaints about important CSC decisions that affect rights?
- Will the independence and competence of outside adjudicators provide sufficient "value added" to the knowledge, skills and experience of CSC staff to warrant independent review?
- Could staff competencies and attitudes be sufficiently enhanced to nullify the benefit of outside adjudication?
- Are the Courts the best vehicle to review issues arising in a correctional context?
- How could Court proceedings be modified to deal with cases in a summary or expedited fashion where necessary?
- Would an administrative tribunal be more effective?
- Where would Judges or Tribunal members hear cases?
- What role, if any, should voluntary mediation have in resolving disputes over compliance with law?
- If CSC is, in effect, allowed to jettison difficult decisions by passing them along to outside adjudicators, how will this affect their management, control and accountability?
- Is there a value to the culture of CSC in the sense that this promotes mutual trust and support - a sense of community- among staff and will this be endangered by more outside incursions into internal decision-making?

- How often will an outside adjudicator disagree with the informed positions of staff, especially where staff raise the possibility of adverse safety or security consequences?
- What is the importance of intuition in staff decision-making and could independent review ever accommodate the loss of this capability?
- Could independent review be implemented without exacerbating the delays and procedural "thickness" that already exist internally?
- Will the existence of a remedy ordering the shortening of a sentence induce staff to more actively comply with law?
- With specific regard to segregation, how could outside adjudication enforce solutions affecting more than one institution or Region? How can the oversight role be positioned high enough within the organization to effect systemic change?
- How do the above issues apply in the specific context of Aboriginal offenders?

Options

- Enhanced internal CSC processes to ensure compliance with law
- Enhanced internal CSC oversight and review mechanisms
- Access of offenders to the Courts on administrative segregation reviews after various periods
- Independent review of segregation by lawyers on placement in segregation and after various periods
- Binding arbitration of third level offender grievances by an independent arbitrator
- on all cases
- on cases involving violations of rights
- on issues determined to be of national importance
- Legislation of the Arbour court remedy for correctional interference with the integrity of the sentence, including the possibility of reduction of the sentence, or some variation thereof
- Legislation of an independent administrative tribunal, with power to impose solutions, to adjudicate complaints of significant importance
- Enhanced use of non-binding mediation (ADR) to resolve disputes at the institutional, regional and national levels
- Community representation on all investigations of serious harm, criminal conduct or breaches of rights
- Change the reporting relationship of the OCI
- Permitting the CI to submit certain disputes to the Courts, or to binding arbitration
- Enhancing the system of non-binding dispute settlement between CSC and the OCI
- A human rights based analysis of the problems encountered by Aboriginal offenders at each stage of their progression through the correctional system
- Special enhancements of independent review and adjudication mechanisms to respond to the cultural and spiritual needs of Aboriginal offenders

END NOTES

(wherever possible, these are provided as internet sites for ease of reference)

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[1] http://www.oci-bec.gc.ca/reports/AR200203_e.asp#7
[2] http://www.justicebehindthewalls.net/resources/arbour_report/arbour_rpt.htm
[3] http://www.chrc-ccdp.ca/legislation_policies/consultation_report-en.asp
[4] S.C. 1992 c.20
[5] www.sgc.gc.ca/publications/corrections/correctional-review_e.pdf - 1798k
6 Report of the Advisory Committee to the Solicitor General of Canada on the Management of Correctional Institutions, 1984
[7] http://www.justicebehindthewalls.net/
[8] R.S. 1985, c.I-11
[9] Above, note 1, at Section 3.5
[10] Ibid. at Section 3.1.2
[11] Ibid.
[12] Ibid. at Section 3.2.1.
[13] Ibid.
[14] Ibid. at Section 3.2.2
[15] Ibid. at Section 3.3.5
[16] Ibid.
[17] Ibid. at Section 3.4.1.2
[18] Ibid.
[19] Ibid.
[20] Ibid. at Section 3.4.1.1
[21] http://www.csc-scc.gc.ca/text/pblct/taskforce/toc_e.shtml
[22] Ibid. at Section H.
[23] http://www.csc-scc.gc.ca/text/pblct/rights/human/toce_e.shtml
[24] Ibid. Chapter 4 at "*Human Rights*"
[25] Ibid. Chapter 4 at "*Monitoring Compliance with Human Rights"*
[26] Ibid.
[27] Ibid. Annex H
[28] http://www.parl.gc.ca/InfoComDoc/36/2/SCRA/Studies/Reports/just01-e.html
[29] Ibid. at Section 5.3.5 and following
[30] http://www.csc-scc.gc.ca/text/prgrm/fsw/gender3/toc_e.shtml
[31] Ibid, at Section 5(d)(iv)
[32] Above , note 7
[33] Ibid. at Sector 6
[34] Above, note 3
[35] Ibid. at Section 5.2.2.
[36] Ibid. at Chapter 8
[37] Ibid.
[38] http://www.psepc-sppcc.gc.ca/publications/news/19960604_e.asp
39 http://www.parl.gc.ca/information/about/process/info/throne-e.htm
40 http://www.oci-bec.gc.ca/reports/AR200203_e.asp
[41] Above, note28 at 3.45