The Right to Counsel in Prison Disciplinary Hearings

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THE RIGHT TO COUNSEL IN PRISON
DISCIPLINARY HEARINGS

MICHAEL JACKSON†

I. INTRODUCTION

In 1974 I described the Canadian penitentiary as “an outlaw of the criminal justice system”.1 This judgment was based upon my analysis of the disciplinary system which prevailed in the warden’s courts and the associated practices of administrative segregation and disciplinary transfer. I further concluded that this lawless state was perpetuated by the great reluctance of the Canadian courts to intervene behind prison walls through an effective process of judicial review. Arguing from the twin premises that the penitentiary must adhere to the rule of law and that prison justice must balance the legitimate interests of the keeper and the kept, I advanced a model of reform. The most important elements in that model were that prison disciplinary boards be presided over by independent chairpersons and that a prisoner’s right to representation by counsel be recognized.

Since 1974 significant developments have taken place affecting the administration of prison justice. In 1977 an all-party Parliamentary Subcommittee on the Penitentiary System in Canada, appointed as a result of a series of riots in the fall of 1976 in four maximum security penitentiaries, confirmed my own indictment of the system as lawless. The Subcommittee stated:

There is a great deal of irony in the fact that imprisonment — the ultimate product of our system of criminal justice — itself epitomizes injustice. We have in mind the general absence within penitentiaries

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of a system of justice that protects the victim as well as punishes the transgressor; a system of justice that provides a rational basis for ordering a community—including a prison community—according to decent standards and rules known in advance; a system of justice that is manifested by fair and impartial procedures that are strictly observed; a system of justice that proceeds from rules that cannot be avoided at will; a system of justice to which all are subject without fear or favour. In other words, we mean justice according to Canadian law. In penitentiaries, some of these constituents of justice simply do not exist. Others are only a matter of degree—a situation which is hardly consistent with any understandable or coherent concept of justice.²

To redress this situation the Subcommittee advocated that two principles must be accepted. The first was that “the rule of law must prevail inside Canadian penitentiaries”;³ the second that:

justice from inmates is a personal right and also an essential condition of their socialization and personal reformation. It implies respect for both persons and property of others and fairness in treatment. The arbitrariness traditionally associated with prison life must be replaced by clear rules, fair disciplinary procedures and the providing of reasons for all decisions affecting inmates.⁴

The Parliamentary Subcommittee also had something to say of the relationship between the absence of judicial review and the lawlessness of prison life.

The gross irregularities, lack of standards and arbitrariness that exist in our penitentiaries, by their very quantity, make, and always have made, the possibility of judicial intervention into prison matters a rather impracticable, time-consuming and dismaying prospect, as the judges themselves have pointed out. To open the courts to redress of these conditions would invite inmates to continue to increase the levels of their confrontation with prison staff and management, using the courts for purposes that, just like the present running battle between the opposing sides, are largely unassociated with any genuine interest in improving the operation of the system. By the same argument, however, the present judicial policy invites the perpetuation by the authorities of a system that is so far removed from normal standards of justice that it remains safely within the class of matters in which the imposition of judicial or quasi-judicial procedures would clearly be, in most instances, inconceivable. Further, this would ensure that the sheer immensity

² Report to Parliament by the Subcommittee on the Penitentiary System in Canada (1977) at 85.
³ Id. at 86.
⁴ Id. at 87.
⁵ Id at 86.
of the task of straightening it out is enough to discourage even the most committed members of the judiciary. The worse things are in the penitentiary system, therefore, the more self-evident it is to the courts that Parliament could not possibly have intended for them to intervene. Injustice, as well as virtue, can be its own reward.

The Subcommittee made specific recommendations to bring the rule of law into the prisons, the most important of which were that the rules governing life in the prison should have the force of law and that independent chairpersons should preside over disciplinary proceedings. With these and other legislative and administrative reforms in place, the Subcommittee envisaged an expanded role for judicial review to ensure that those involved in the management and administration of the revised system adhered to general standards of natural justice and due process of law as they substantially exist elsewhere in the criminal justice system.

Following the release of the Report, the Solicitor General announced the appointment of independent chairpersons to preside over disciplinary courts in maximum security institutions. In 1979 the Supreme Court of Canada, in the landmark decision of *Martineau v. Matsqui Institution Inmate Disciplinary Board (No. 2)*, ruled that prison disciplinary decisions were subject to the general administrative law duty to act fairly and to the superintendency of the courts to ensure compliance with that duty. That same year the Supreme Court in *R. v. Solosky* affirmed that prisoners retain all of their rights and liberties except those expressly or explicitly taken away from them by law. In 1980 the Solicitor General extended the system of independent chairpersons to medium security institutions. In 1985 the Supreme Court, in a trilogy of cases — *Cardinal and Oswald v. The Director of Kent Institution*, *The Queen v. Miller*, and *Morin v. National Special Handling Unit Review Committee* — further enhanced the scope of prisoners' rights by ruling that prisoners have the right not to be deprived unlawfully of the relative or residual liberty permitted in the general population of an institution and that any significant deprivation of that liberty could be challenged through habeas corpus.

It has, however, been a pervasive theme of most writing in the field of corrections that law and policy carefully crafted in the

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courtroom and policy makers' offices do not necessarily translate into real change in the daily practice of imprisonment. Has the acceptance by the Solicitor General of the Parliamentary Subcommittee's principles regarding the rule of law and justice as a personal right for prisoners and the establishment of independent chairpersons, coupled with the imprimatur of the Supreme Court of Canada on the legitimacy of judicial review of prison disciplinary decisions, ended the arbitrariness of prison life and made the prison experience a lawful one for the thousands of prisoners who are subjected to it?

It was to answer these questions that in 1983 I revisited Matsqui Institution, the penitentiary which was the subject of my 1974 study. Over a six month period I observed the disciplinary court hearings presided over by an independent chairperson; observed that segregation review and earned remission processes; and interviewed members of the penitentiary administration, line staff and prisoners on their experiences and views on prison justice as it is practised in the 1980s.

Because Matsqui is a medium security institution and the greatest tensions between prison order and justice are to be found in maximum security institutions, I extended the original scope of the 1974 study to include a parallel review, during the same six month period, of the disciplinary practices at Kent Maximum Security Institution, which was opened in 1981 to replace the B.C. Penitentiary. Since the summer of 1983 I have regularly revisited Kent and Matsqui and have continued to observe the disciplinary and related processes.

The purposes of this larger study, which is ongoing, are not only to reveal the changes and continuity in prison disciplinary practices but also to better understand the strengths and limitations of judicial review in a prison setting. With such an understanding it then becomes possible to consider whether further reforms, such as legislated administrative codes, are necessary to entrench the rule of law behind prison walls.

In 1985 the Federal Court of Appeal, in the case of Re Howard and Presiding Officer of the Inmate Disciplinary Court of Stony Mountain Institution, ruled that in certain circumstances a prisoner had the right to representation by legal counsel in prison disciplinary hearings. This right flows from principles of fundamental justice

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now constitutionally entrenched in section 7 of the *Canadian Charter of Rights and Freedoms*.\(^{11}\)

Potentially, this is the most significant prison decision thus far rendered by a Canadian court. The purpose of this article is to locate the *Howard* decision within a dual framework of evolving correctional law and the daily practise of justice in Canadian prisons. In so doing I hope to provide a further opportunity to consider the crucial question of the roles of the law, the courts, and lawyers, within prison walls.

II. THE PRIVATE CRIMINAL CODE OF THE PRISON

The disciplinary code of a federal penitentiary has to be traced through a multi-tiered legal and administrative structure. The Penitentiary Service Regulations,\(^{12}\) made pursuant to authority under the *Penitentiary Act*,\(^{13}\) set out what constitutes a disciplinary offence,\(^{14}\) authorize the appointment of independent chairpersons to preside over disciplinary hearings, and prescribe a range of punish-

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\(^{11}\) Schedule B, *Constitution Act, 1982.*

\(^{12}\) SOR/80-209, ss. 38, 39; am. SOR/85-412; am. SOR/85-631.

\(^{13}\) R.S.C. 1970, c. P-6, s. 29(1).

\(^{14}\) Section 39 of the Penitentiary Service Regulations (as amended in 1985) reads:

Every inmate commits a disciplinary offence who
(a) disobeys or fails to obey a lawful order of a penitentiary officer;
(b) assaults or threatens to assault another person;
(c) refuses to work or fails to work to the best of his ability;
(d) leaves his work without permission;
(e) willfully or negligently damages any property of Her Majesty or the property of another person;
(f) willfully wastes food;
(g) behaves toward any other person, by his actions, language or writing, in an indecent, disrespectful, threatening or defamatory manner;
(h) willfully disobeys or fails to obey any regulation or rule governing the conduct of inmates;
(i) has contraband in his possession;
(i.1) consumes, absorbs, swallows, smokes, inhales, injects or otherwise uses an intoxicant;
(j) deals in contraband with any other person;
(k) does any act that is calculated to prejudice the discipline or good order of the institution;
(l) does any act with intent to escape or to assist another inmate to escape the institution;
(l.1) is in an area prohibited to inmates;
(m) gives or offers a bribe or reward to any person for any person;
(n) contravenes any rule, regulation or directive made under the Act; or
(o) attempts to do anything mentioned in paragraphs (a) to (n).
ments.\textsuperscript{15} The authorized punishments move up on an escalating scale depending upon whether the disciplinary offence is classified by staff as minor, intermediary or serious.\textsuperscript{16} The Regulations further provide that, where a hearing is presided over by the independent chairperson, assistance shall be provided by institutional staff advisers whose role is limited to providing advice on the appropriate punishment. The Regulations, however, provide only a skeletal framework of the internal disciplinary world of the prison. The fleshing out of the skeleton is left to what are termed Commissioner’s Directives and Divisional Instructions which are issued by the National Headquarters of the Canadian Correctional Service in Ottawa pursuant to authority contained in the Penitentiary Act.\textsuperscript{17} Although these Commissioner’s Directives and Divisional Instructions have been held by the courts not to have the force of law,\textsuperscript{18} it is within the volumes of these Directives and Instructions that the detailed procedures for disciplinary hearings are to be found.

They contain detailed provisions relating to the laying of a formal charge, the determination of the category of the offence and the provision for advance written notice to the prisoner of the charge.\textsuperscript{19} Where the charge is designated as minor the hearing is held by staff members. For those offences designated serious or intermediary the Directives provide for a hearing before the independent chairperson. The Directives and Instructions also deal with the conduct of the hearing. They provide for a formal plea, an opportunity for the prisoner to be heard, including the presentation of relevant documents, the questioning of witnesses through the chairperson and, where the chairperson deems it necessary, the calling of witnesses on behalf of the prisoner and, upon an admission or finding of guilt, guidelines for the awarding of appropriate punishment.

\textsuperscript{15} The independent chairpersons who have been appointed generally are practising or retired lawyers or judges.

\textsuperscript{16} Until 1985 there was only a dual classification of minor and serious. The intermediary category was introduced after the Federal Court of Appeal decision in \textit{Howard}, \textit{supra}, note 10. See also text accompanying note 109.

\textsuperscript{17} \textit{Supra}, note 13, s. 29(3).

\textsuperscript{18} \textit{Martineau} and \textit{Butters v. Matsqui Institution Inmate Disciplinary Board (No. 1)} [1978] 1 S.C.R. 118, 74 D.L.R. (3d) 1; \textit{Martineau (No. 2), supra}, note 6; \textit{In Re Morin and National SHU Review Committee} (1985) 20 C.C.C. (3d) 123 (Fed. C.A.), MacGuigan J. A. stated at 130: "In light of the majority decision in the Supreme Court of Canada in \textit{Martineau (No. 1)}], commissioner's directives live at best in a kind of legal twilight, 'clearly of an administrative, not a legislative nature'”.

\textsuperscript{19} The current Commissioner’s Directives and Divisional Instructions are referenced as 600.7.03.1, 1985-07-05.
They also provide that the technicalities of the rules of evidence in criminal matters do not apply and that any evidence may be admitted which the chairperson considers reasonable or trustworthy. Any evidence given must be recorded.

The Regulations themselves, as I have indicated, authorize or prescribe punishments by reference to the category of the offence. For minor offences the authorized punishments are a warning, loss of privileges, restitution up to a maximum of $500 where the prisoner has been convicted of wilfully or negligently damaging property. For an intermediary offence, in addition to the above punishments, the prisoner may be fined not more than $50 or sentenced to punitive dissociation not exceeding thirty days except, where a prisoner is convicted of more than one offence, a greater sentence may be imposed if approved by the Deputy Commissioner of the region. In the case of serious offences, in addition to all those punishments authorized for intermediary offences, a prisoner may be sentenced to forfeit his remission. Although no maximum limit is imposed on this punishment in the Regulations, it is provided in the Commissioner’s Directives and Divisional Instructions that no forfeiture of remission more than thirty days shall be valid without concurrence of the Deputy Commissioner of the region, nor more than ninety days without the concurrence of the Solicitor General. It is also provided that any sentence may be suspended on the condition that the prisoner is not found guilty of another intermediary or flagrant offence during a specified period not exceeding ninety days.

In order to understand what is at stake in prison disciplinary hearings it is necessary to convey some sense of what these punishments involve. At Kent the privileges most commonly affected are night recreation (the loss of which involves the prisoner being confined to his cell after the evening meal) and open visiting privileges. The prisoner, instead of being able to visit with friends and family across a table where physical contact is permitted, is restricted to contact by telephone through a screened partition. Prisoners, especially those with young children, view it as a severe punishment.

Punitive dissociation is a euphemism for solitary confinement, otherwise known as “the hole”. Prisoners sentenced to dissociation are detained in a special wing of the prison and are locked up in their cells for twenty-three hours a day. The remaining hour is for exercise during which time they are permitted a limited form of association with other prisoners in the exercise yard. At both Kent
and Matsqui Institutions exercise takes place in small enclosed
yards which permit a prisoner to do no more than pace up and
down. Prisoners are not permitted any vocational or hobby privileges
and any visit they receive are closed screen visits.\textsuperscript{20}

In \textit{Martineau (No. 2)} Dickson J. referred to a sentence of punit-
tive dissociation this way:

\begin{quote}
[T]he Board's decision had the effect of depriving an individual
of his liberty by committing him to a "prison within a prison".\textsuperscript{21}
\end{quote}

At both Kent and Matsqui Institutions, because of pressures of
overcrowding, a sentence of punitive dissociation will also result in
a prisoner losing his individual cell in the general population to-
gether with his job, so that when he has served his sentence he is
required to go into the induction range where he will be double
bunked. Next to solitary confinement, double bunking is viewed
by prisoners as the toughest form of imprisonment. Whereas solitary
is a major deprivation of association and communication with other
prisoners, double bunking is a major deprivation of privacy, a value
which more than any other is at a premium in prison. For men
serving long sentences (as most of them are at Kent Institution),
who have established routines in the general population, the regres-
sion to solitary confinement followed by double bunking is a deeply
resented serial punishment.\textsuperscript{22}

A prisoner sentenced to forfeit remission has his liberty interest
more directly affected. Under the provisions of the \textit{Penitentiary
Act} a prisoner can earn up to one-third of his sentence as remission.
This entitles him under the provisions of the \textit{Parole Act} to be
released from prison on mandatory supervision after serving two-
thirds of his sentence.\textsuperscript{23} If he is sentenced to forfeit remission he
has already earned, this will set back his mandatory supervision
release date.

Superimposed upon all of these discrete consequences of convic-
tion for a disciplinary offence is the impact which such a conviction
will have upon a whole range of institutional decisions affecting the

\textsuperscript{20} For a description of the rigours of dissociation, see Jackson, \textit{supra}, note 9.
\textsuperscript{21} \textit{Supra}, note 6 at 622.
\textsuperscript{22} Double bunking has been the subject of a constitutional challenge on the
basis that the practice constitutes cruel and unusual punishment or treat-
ment contrary to section 12 of the \textit{Charter}. The challenge was dismissed at
(F.C.T.D.). The case is now on appeal.
\textsuperscript{23} R.S.C. 1970, c. P-2, s. 15(1).
life of the prisoner. Quite independent of the disciplinary board sentence, under the earned remission scheme a prisoner convicted of an offence will fail to earn remission for the month in which the offence is committed or, in the case of punitive dissociation, the sentence is served. Under this scheme a prisoner is eligible to earn up to fifteen days a month remission. The decision to credit or fail to credit is made by an internal board consisting of an assistant warden and two staff members. The board conducts a review of all prisoners who have been convicted of disciplinary offences. For minor offences the prisoner may fail to earn up to two days for each offence. For serious or intermediary offences he may fail to earn up to the maximum of the fifteen days he is eligible to earn. Furthermore, for every three days served in punitive dissociation a prisoner will fail to earn one day's remission. Conviction in disciplinary court may also trigger a transfer up to higher security, substantially delay transfer down to lesser security and limit access to socials and family visits. Perhaps most damaging of all, conviction in disciplinary court may fatally undermine a prisoner's prospects for parole or other form of conditional release.

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24 C.D. 600-2.06.1, 1985-03-29. Prisoners do not appear personally before the Earned Remission Board. The Board's assessment of the gravity of the offence for remission purposes is based upon a review of the charging officer's written offence report plus any personal knowledge Board members may have of the offence. They do not review any transcript of the disciplinary hearing; therefore they may not be aware of mitigating factors which the independent chairperson may have taken into account. The Board does not feel bound by the sentence of the disciplinary court in making its decision. Cases in which the independent chairperson gave lenient sentences frequently were visited with serious consequences by the Earned Remission Board. The Board's procedures raise serious legal issues relating to lack of fairness and double jeopardy.

25 A prisoner who is convicted of a serious or intermediary offence is not eligible for transfer to lesser security or to family visits for a period of six months. For minor offences the period is three months. In practice, the periods may be much longer.

26 For prisoners serving very long sentences (and particularly for those serving life sentences to which remission does not apply) the effect of a disciplinary conviction on transfer and conditional release overshadows all others. Within the Canadian correctional system there exists a process referred to as "cascading" whereby a prison is expected to cascade down through the hierarchy of the seven security levels. The rigours of the prison regime and the extent of the restrictions on a prisoner's institutional liberty are related to the security level of the institution. Except under the most exceptional circumstances a prisoner will not be granted any form of conditional release program while in a maximum security institution. For prisoners in the S-6 Kent Institution or the S-5 Matsqui Institution a disciplinary conviction which delays their transfer down or precipitates their transfer up the security ladder will directly affect their prospects for return to the community on a conditional release program.
III. THE RIGHT TO COUNSEL IN CORRECTIONAL LAW: A STUDY OF EVOLUTION

The first independent chairpersons were appointed to preside over disciplinary hearings of serious offences in maximum security institutions in 1977. In 1979 the Supreme Court, in *Martineau (No. 2)*, definitively ruled that prison disciplinary proceedings were subject to the common law duty to act fairly. That same year the Commissioner’s Directives were amplified to reflect the Correctional Service of Canada’s understanding of the procedural implications of *Martineau*. That amplification contained for the first time a specific reference to representation by counsel. Annex A to the Commissioner’s Directive provided:

Occasions have arisen where an accused has made a formal or informal demand that he be represented by counsel. Such demands shall be met with the response that he is not entitled to counsel, and that the hearing will proceed without the accused person being represented.

This exclusionary provision was the subject of judicial scrutiny in a series of cases before the Federal Court in 1981 and 1982, the common result of which was a determination that since a disciplinary hearing must be conducted in accordance with the duty to act fairly, the independent chairperson had a discretion to permit representation by counsel where it was necessary to ensure a fair hearing. To the extent that the Commissioner’s Directive sought to apply a blanket policy of exclusion of counsel it was not legally effective to limit the chairperson’s discretion. The courts made it clear that they were not creating a right to counsel and that the circumstances in which counsel would be necessary were circumscribed by the nature of prison justice. In *Re Davidson and Disciplinary Board of Prison for Women and King*, Cattanach J. stated:

The very nature of a prison is such [that] prison officers must make immediate decisions, the disobedience of which by inmates will necessarily result in charges being laid and restrictions and penalties imposed. This is essential and must be made as part of the routine process. Disobedience to legitimate orders in this regard must be followed by swift and certain punishment. If the powers and authority of the prison officers are curbed and the deterrent of

27 *Supra*, note 6.
speedy and sure punishment removed the consequences will be chaotic.  

As to the circumstances where fairness would require representation by counsel, Cattanach J. had this to say:

For my part I find it difficult to envision circumstances where, upon a trial for breach of military or prison discipline, the presence of counsel is essential to ensure that the duty of fairness is observed. These breaches of discipline in by far the greater number of cases are simply questions of fact. Did the soldier or inmate do the act alleged? In few instances are there questions of law involved.

... In this instance the presiding officer of the Disciplinary Court was a barrister and solicitor. ... Being qualified as she is, I am certain that, before convicting the applicant of the offence with which she was charged, the presiding officer satisfied herself that every ingredient essential to the charge was established.

In Re Blanchard and Disciplinary Board of Millhaven Institution Addy J. expressed this view on legal representation for a prisoner before the disciplinary court:

There is no right to counsel; whether counsel representing the prisoner is to be allowed to be present is a matter for the discretion of the chairman conducting the inquiry. Occasions might possibly arise where matters are so complicated from a legal standpoint that the duty to act fairly might require the presence of counsel, but I cannot at the moment envisage such a situation, especially where the person conducting the inquiry is a legally qualified barrister and solicitor, as in the present case. Furthermore, the questions arising in these disciplinary proceedings are, generally, of a factual nature. The prisoner must be mentally and physically capable of understanding the proceedings and the nature and details of the accusa-

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30 Id. at 534.
31 Id. at 535. This view of the limited role of counsel in prison disciplinary proceedings bears a remarkable similarity to the common law position regarding criminal proceedings in the sixteenth and seventeenth centuries. As described by Professor Baker,

The defendant could not have the assistance of counsel in presenting his case, unless there was a point of law arising on the indictment; since the point of law had to be assigned before counsel was allowed, the unlearned defendant had little chance of professional help. This harsh rule was defended on the grounds that ... the judges would ... ensure that the trial proceeded according to law. Another reason, if not expressly articulated, was the fear that trials would be lengthened if advocates took part. If counsel were allowed, it was pointed out with some alarm in 1602, every prisoner would want it.

tions, of taking cognizance of any oral or written evidence presented, of questioning witnesses and of presenting his version of the matter. Where there is any doubt as to the prisoner's capability to so take part in the proceedings, then, in order to act fairly, the chairman must first satisfy himself on that issue before proceeding with the hearing.33

It is important to note that the judgments of both Cattanach and Addy J. rest on three tacit assumptions, the validity of which I will be examining later: (1) Legal representation in prison disciplinary hearings would undermine the efficacy of punishment; (2) most cases turn on questions of fact, therefore advocacy skills are not required; and (3) the legal expertise of the decision maker is sufficient to ensure proper consideration of jurisprudential principles favouring the accused's case.

In the United Kingdom the law has developed in a similar progression, from total exclusion of counsel to one of discretionary admission where required by the fairness principle. In 1975 in *Fraser v. Mudge*,34 a decision of the Court of Appeal, Lord Denning M.R. stated, in rejecting the argument that the prisoner had a right to counsel:

If legal representation were allowed, it would mean considerable delay. So also with breaches of prison discipline. They must be heard and decided speedily. Those who hear the cases must, of course, act fairly. They must let the man know the charge and give him a proper opportunity of presenting his case. But that can be done and is done without the matter being held up for legal representation. I do not think we ought to alter the existing practice.36

However, nine years later the Divisional Court, in *R. v. Secretary of State for the Home Department ex parte Tarrant*,36 held that, while *Fraser v. Mudge* stands for the proposition that a prisoner has no absolute right to counsel, the disciplinary court has authority to exercise a discretion to allow counsel. Webster J., in the course of his judgment, gave a list of six matters for consideration in exercising such a discretion: (1) the seriousness of the charge and of the potential penalty; (2) the likelihood of any points of law arising; (3) the capacity of the particular person to present his own case; (4) procedural difficulties; (5) the need for reasonable speed in

35 Id. at 1133-34.
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making the adjudication; and (6) the need for fairness as among prisoners and between prisoners and prison officers.

The Canadian and English position as reflected in the Davidson and Tarrant cases respectively was less restrictive than the position taken by the United States Supreme Court in its decision in Wolff v. McDonnell.37 There the Court said, on the issue of the right of the prisoner to counsel:

The insertion of counsel into the disciplinary process would inevitably give the proceedings a more adversary cast and tend to reduce their utility as a means to further correctional goals. There would also be delay and very practical problems in providing counsel in sufficient numbers at the time and place where hearings are to be held. At this stage of the development of these procedures we are not prepared to hold that inmates have a right to either retained or appointed counsel in disciplinary proceedings.38

One of the intriguing things about the evolution of Canadian correctional law is the way in which judicial developments in the area of the internal management of the police have been followed by a parallel development in the management of Canada's prisons. Thus the recognition of the duty to act fairly in prison decision making reflected in Martineau (No. 2) was heralded by the prior decision of the Supreme Court of Canada in Nicholson v. Haldimand-Norfolk Regional Bd. of Commissioners of Police,39 a case dealing with the internal management of a police force. We can now observe a similar progression in the right to counsel cases.

In Re Husted and Ridley and The Queen40 two R.C.M.P. officers were charged with major service offences. Under the R.C.M.P. Act the punishments authorized ranged from imprisonment up to one year, a fine of not more than $500, loss of thirty days' pay, reduction in rank, loss of seniority, or a reprimand. The officers were brought before an R.C.M.P. Service Court and denied representation by counsel. Addy J. ruled the constables were entitled to counsel be-

38 Id. at 570. As noted by Thurlow C.J. in Howard, supra, note 10 at 259, the Supreme Court in Wolff pointed out that, under the relevant Nebraska statute, the loss of remission, which was the disciplinary sanction at issue, would not necessarily extend the prisoner's time in prison because there was authority in the correctional authorities to restore lost good time. However, under the current Canadian statutory scheme, earned remission once forfeited cannot be restored, which makes the decision of the disciplinary court a final and irrevocable deprivation of the right to liberty.
cause of the following factors: (1) the interests at stake were high; (2) the potential penalties were serious; and (3) the nature of the proceedings was formal. He further ruled that the Regulations made under the \textit{R.C.M.P. Act} which purported to preclude a right to counsel were ultra vires. In the course of his judgment he reviewed the competing policy concerns raised by this issue:

There is no absolute common law right to counsel in all cases where an individual is subject to some penalty. The Courts have consistently refused to intervene on the grounds that representation by counsel was denied in certain service disciplinary matters where the hearing is, by the nature of the subject-matter or the alleged offence, of an internal administrative nature and concerns a disciplinary matter within a special body such as a branch of the armed services or a police organization. In most of these cases it has generally been long established by custom that such disciplinary matters would be settled within the force or organization, informally and without outside intervention. The exigencies of the service require this degree of informality without which the day to day administration of the force and the maintenance of discipline within it would become so cumbersome and time-consuming as to be ineffective. On the other hand, the common law recognizes that wherever a person's liberty or livelihood is at stake in a legal trial, he should not unreasonably be deprived of the services of the duly qualified legal counsel of his choice unless the employment of any particular counsel would unduly delay or impede the administration of justice. It is a natural corollary of the principle that an accused is entitled to a full and fair defence.\footnote{Id. at 159-60.}

In \textit{Joplin v. Chief Constable of Vancouver Police Department}, a Vancouver police officer was charged with being discourteous to a member of the public. Under the relevant regulations he was subject to a maximum fine of $200 and suspension without pay for five days, but could not be dismissed, required to resign, or reduced in rank. Section 18(2) of the Police (Disciplinary) Regulations contains special provisions relating to representation by counsel. While permitting such representation in a case where the offence carried a penalty of dismissal, requirement to resign or a reduction in rank, it denies police officers the right to counsel in other cases.

While the challenge to the regulation was based broadly on section 7 of the \textit{Charter} McEachern C.J. dealt with the case within the context of the common law principle of fairness. The Chief Justice concluded that section 18(2) was ultra vires because the

Legislature could not be assumed to have conferred upon the Lieutenant Governor-in-Council the power to make regulations which were unjust or unfair. In concluding that the denial of representation by counsel in this class of case was unfair the Chief Justice stated:

I do not think it possible to treat any disciplinary proceedings under this Disciplinary Code (except those conducted formally on a man-to-man basis where no entry is made in an officer's record) as other than serious... where good conduct is obviously an important actor in promotion and therefore in salary.... If a senior officer of this police force considers the complaint serious enough to engage this formal hearing procedure with its full panoply of legalities, then it is per se serious, and this is so regardless of the nature of the alleged offence or the maximum penalty which is recommended. I prefer to look broadly at the nature of the proceedings, and the consequences or potential consequences of those proceedings rather than just the form of the regulations in deciding what is serious.... When the Lieutenant Governor in Council established a formal legal procedure he could not, with fairness, leave out the most important safeguard in the legal process, that is, the right to counsel. I am satisfied that justice and fairness cannot tolerate a procedure where a layman is expected to deal with legal concepts which are strange to him, and at the same time advise himself objectively.

Prisoners sought to apply the principles of Husted and Joplin to prison discipline in the case of Re Howard and Presiding Officer of Inmate Disciplinary Court of Stony Mountain Institution.

On 31 December 1982, Howard was involved in an incident with officers at Stony Mountain Institution, as a result of which five serious charges were laid against him. These were possession of contraband, using indecent or disrespectful language, doing an act calculated to prejudice discipline or good order, disobeying a lawful order and threatening to assault. The first three offences occurred at 8:40, the fourth at nine o'clock and the fifth at 9:20, all on the same day. On January 6 Howard appeared before the disciplinary court and pleaded guilty to two of the charges and entered pleas of not guilty on the remaining three. He was subsequently charged with two further counts, possession of contraband on January 4 and failure to obey a lawful order on January 18. On January 20 he was interviewed by a legal aid lawyer and subsequently had legal aid counsel appointed to represent him with respect to the proceed-

ings before the independent chairperson. On February 3, his next
court appearance, he was granted an adjournment in order to allow
his counsel time to prepare a written submission on the issue of
having counsel represent him at the hearing. Further adjournments
were granted to permit representations from the Department of
Justice.

After considering the written representations, the independent
chairperson issued written reasons denying the applicant the right
to be represented by counsel. In those reasons the independent
chairperson rejected the arguments made by Howard’s counsel that
sections 7 and 11(d) of the Charter now guaranteed a right to
counsel at disciplinary board hearings. He concluded that the
Davidson decision still accurately stated the relevant law regarding
representation by counsel and the issue therefore was whether repre-
sentation ought to be allowed in order to ensure a fair hearing. On
this question he concluded: "I have not been persuaded that there
exists any circumstances in this particular case which preclude the
possibility of a fair hearing in the absence of counsel. Therefore I
exercise my discretion in denying the application of Howard to be
represented by counsel at the hearing."

Howard then sought an order from the Federal Court prohibiting
the independent chairperson from continuing the hearing in the
absence of legal counsel. Howard argued that the Husted and
Joplin line of cases, buttressed by section 7 of the Charter, now
gave the prisoner the right to be represented by counsel in a case
where he was charged with a serious offence for which he could be
subjected to loss of remission or punitive dissociation. In refusing
the order, Nitikman J. distinguished Joplin and Husted principally
on the basis that both the R.C.M.P. and the Vancouver Police
Disciplinary Codes contain provisions which incorporated into the
hearing the rules of evidence which were specifically excluded in
the Commissioner’s Directives dealing with prison disciplinary of-
fences. As to the Charter argument, Nitikman J. held that section 7,
while constitutionally entrenching common law rights to fairness,
did not create a new principle of law insofar as to the right to
counsel was concerned.

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45 His Lordship rejected the alternative argument made by Howard that sec-
tion 11(d), which provides that any person charged with an offence has
the right to be presumed innocent until proven guilty according to law in a
fair and public hearing by an independent and impartial tribunal, also
carried with it the right to be represented by legal counsel. Mr. Justice
Nitikman rejected this argument principally on the basis that the definition
Two days after Mr. Justice Nitikman's refusal to grant the order of prohibition the hearing against Howard proceeded and, having been found guilty on six of the seven counts, he was sentenced to forfeit seventy days of his earned remission.

The case was then appealed to the Federal Court of Appeal where the Court overruled the trial judge, holding that Howard was entitled to counsel for defence of the charges against him. As stated by the Chief Justice, the issue before the Appeal Court was "solely whether the appellant had an undeniable right to counsel and more particularly whether section 7 of the Canadian Charter of Rights and Freedoms guaranteed him that right."47

Chief Justice Thurlow held that the case attracted section 7 of the Charter in that Howard's liberty was at stake because his earned remission was in jeopardy in the disciplinary hearing of a serious charge. Howard had also argued that his security of the person was in jeopardy in that solitary confinement was also one of the possible sanctions for serious offences. The Chief Justice, without rejecting this argument, felt it sufficient to deal with the case solely on the basis of the liberty interest involved in the loss of remission. As to the effect of section 7, the Chief Justice had this to say:

I am of the opinion that the enactment of s. 7 has not created any absolute right to counsel in all such proceedings. It is undoubtedly of the greatest importance to a person whose life, liberty or security of the person are at stake to have the opportunity to present his case as fully and adequately as possible. The advantages of having the assistance of counsel for that purpose are not in doubt. But what is required is an opportunity to present the case adequately and I do not think it can be affirmed that in no case can such an opportunity be afforded without also as part of it affording the right to representation by counsel at the hearing.

Once that position is reached it appears to me that whether or not the person has a right to representation by counsel will depend on the circumstances of the particular case, its nature, its gravity, its complexity and the capacity of the inmate himself to understand the case and present his defence. The list is not exhaustive. And

46 Supra, note 10.
47 Id. at 250.
from this, it seems to me, it follows that whether or not an inmate's request for representation by counsel can lawfully be refused is not properly referred to as a matter of discretion but is a matter of right where the circumstances are such that the opportunity to present the case adequately calls for representation by counsel.\footnote{Id. at 262-63.}

The significance of the shift in the characterization from one of discretion to one of a prisoner's right to counsel where the circumstances are such that it is necessary for the proper presentation of the case is highlighted in a later part of the judgment where its impact on the respective roles of the independent chairperson and the court is described:

[The independent chairperson] will no doubt have to consider and take a position on whether the case is one in which the request for counsel can be denied. And he must be prepared to act on his view. But, in my opinion, his denial of such a request cannot be regarded as an adjudication of the right and cannot prevent a superior court in the exercise of supervisory jurisdiction from determining the question on its own. I may note as well that for a presiding officer to decide that he can accord the inmate a fair hearing in accordance with the principles of fundamental justice without permitting counsel would seem to me to indicate that he already has preconceived ideas about the case and the defence and that the need to decide would put him in the embarrassing position of determining his own capacity to accord the inmate his rights without knowing what they are. That, in my view, makes him an unsuitable person to decide such a question.\footnote{Id. at 263-64.}

As to whether the particular circumstances in the \textit{Howard} case required representation by counsel, the Chief Justice concluded that they did.

[T]he whole of the appellant's 267 days of earned remission were in jeopardy. In my view that alone suggests his need of counsel. Next there is the lack of particulars of offences of which three are alleged to have occurred at the same instant. Convictions on the two of the charges to which he pleaded not guilty might result in consecutive losses of 30 days' remission without reference to the commissioner for what not inconceivably may have been the same act. Moreover, one of the three charges is that of an act calculated to prejudice discipline and good order, a notoriously vague and difficult charge for anyone to defend. These features, as well, suggest the need for counsel to protect the inmate.

There is not in the record anything that would indicate that the appellant suffered from physical or mental incapacity which would
disable him from conducting his own defence as well as might be expected of any ordinary person without legal training. But he obviously felt the need for counsel because he obtained legal aid assistance promptly. ... Moreover, in a social system which recognizes the right of anyone to counsel in any of the ordinary courts of law for the defence of any charge, no matter how trivial the possible consequences may be, it seems to me to be incongruous to deny such a right to a person who, though not suffering from any physical or mental incapacity to defend himself, is faced with charges that may result in a loss of his liberty, qualified and fragile though it may have been, for some 267 days.\(^{50}\)

In a separate concurring judgment MacGuigan J.A. traced the developments in the disciplinary system since the Supreme Court rendered its judgment in Martineau (No. 2) (principally the appointment of independent chairpersons) for the purpose of addressing Howard’s argument that Mr. Justice Dickson’s statement that “an inmate disciplinary board is not a court” was no longer an appropriate characterization of the disciplinary process in 1984. On this point he concluded that although the changes in the Penitentiary Regulations and the Commissioner’s Directives since Martineau were not merely nominal,

\[\text{[I]}\text{t would be excessive to view them as having already created a court. There is no prosecution in the strict sense and no prosecuting officer. The presiding officer, who is assisted by two correctional officers whose unusual function was rationalized by Cattanach J. in Davidson as being like that of “assessors in Admiralty action before the Federal Court of Canada”, has something of an inquisitorial role. Certainly, the whole procedure lacks a fully adversarial character.}\(^{51}\)

Furthermore, the procedural structure was still incomplete in its legality in view of the fact that the procedure at hearings was to be found in the Commissioner’s Directives which do not have the status of law:

In the result, while a new legal system in prison disciplinary hearings may be in the process of evolution, it has not yet emerged. Legally speaking, the only advance has been to a fairer version of the same basic model considered by the Supreme Court in the two Martineau cases.\(^{52}\)

MacGuigan J.A., in reviewing a number of Canadian and American cases, concluded:

\(^{50}\) Id. at 264.

\(^{51}\) Id. at 270.

\(^{52}\) Id.
What both the Canadian and the American cases indicate is that there are degrees of liberty, all protected in some way by a rule of due process or natural justice or fundamental justice, but not in the same way. What there must always be is an opportunity to state a case which is adequate for fundamental justice in the circumstances. In other words, there is a sliding standard of adequacy which can be defined only in reference to the particular degree of liberty at stake and the particular procedural safeguard in question. The resolution may involve the balancing of competing interests. Here, the penitentiary setting is of capital importance in sorting out the interests in competition.53

His Lordship noted that in the prison,

In such an atmosphere of discord and hatred, minor sparks can set off major conflagrations of the most incendiary sort. Order is both more necessary and more fragile than in even military and police contexts, and its restoration, when disturbed, becomes a matter of frightening immediacy.

It would be an ill-informed court that was not aware of the necessity for immediate response by prison authorities to breaches of prison order and it would be a rash one that would deny them the means to react effectively.

But not every feature of present disciplinary practice is objectively necessary for immediate disciplinary purposes. The mere convenience of the authorities will serve as no justification; as Lord Atkin put it in Gen. Medical Council v. Spackman . . . “Convenience and justice are often not on speaking terms.” Even what may be necessary but nevertheless delayable cannot be given priority. All that is not immediately necessary must certainly yield to the fullest exigencies of liberty.

On the basis of these criteria of necessity and immediacy, on-the-spot administrative dissociation may arguably be required to segregate inmates involved, e.g., in hostage-taking, but punitive dissociation as a consequence of a disciplinary court has much less immediate necessity, and revocation of earned remission seems not to be immediately necessary at all.64

In MacGuigan J.A.’s judgment, section 7 had the legal effect of enhancing the previous requirement stressed in the fairness cases of an adequate opportunity of answering the charge.55 Whether it

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53 Id. at 277.
54 Id. at 277-78.
55 Id. at 280. The court’s conclusion that s. 7 enhanced the procedural content of the common law duty to act fairly has been developed in a number of lower court decisions dealing with the parole process. See also Re Cadeddu and The Queen (1983) 4 C.C.C. (3d) 97, 40 O.R. (2d) 128 (H.C.); Collins v. Lussier [1983] 1 F.C. 218, 5 C.R.R. 89 (T.D.). See F. O’Connor, “The Impact of the Canadian Charter of Rights and Freedoms on Parole in Canada” (1985) 10 Queen’s L.J. 336.
necessitated representation by counsel in any set of circumstances was dependent upon a full analysis of the circumstances. In this regard, His Lordship referred to the considerations listed by Webster J. in the *Tarrant* case. Dealing with the specifics of the *Howard* case, MacGuigan J.A. pointed to several factors requiring the presence of counsel.

One of the charges... that of conduct “calculated to prejudice the discipline of good order of the Institution” is a catch-all charge of such vagueness that the need for counsel to clarify the facts and to challenge the arguments is strikingly apparent, but counsel is hardly less necessary to deal with charges such as being “indecent, disrespectful or threatening” in “actions, language or writing”, or possessing “contraband”, which is defined as anything that an inmate is not permitted to have in his possession. Even the charges of disobeying a lawful order or threatening to assault another person can easily give rise to legal issues of some complexity. On the two guilty pleas counsel may have been necessary to plead exonerating factors.\(^{56}\)

MacGuigan J.A. disagreed with Webster J. in *Tarrant* that one of the relevant factors should be the capacity of the particular prisoner to present his own case. The basis of the disagreement here lay in the fact that “no presiding officer could be in a position, at the outset of the disciplinary proceedings, to make a summary judgment of such a kind before a prisoner had been heard by him.”\(^{57}\)

In response to the question which naturally springs to mind from reading the *Howard* case as to what circumstances would not necessitate counsel, MacGuigan J.A. in his judgment gave this sweeping answer:

> In sum, other than, perhaps, in fact situations of unique simplicity, I cannot imagine cases where a possible penalty of earned remission would not bring into play the necessity for counsel. Indeed, in my view the probability that counsel will be required for an adequate hearing on charges with such consequences is so strong as to amount effectively to a presumption in favour of counsel, a departure from which a presiding officer would have to justify. The right-enhancing effect of the Charter thus greatly increases the ambit of protection afforded.\(^{58}\)

Neither MacGuigan J.A. nor Thurlow C.J. felt it necessary to address the question of whether any limits on the right to counsel

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56 *Supra*, note 10 at 283.
57 *Id.*
58 *Id.*
could be justified under section 1 of the *Charter*, since the Department of Justice had not sought to discharge any onus to demonstrate the existence of reasonable limits. *Howard* is under appeal to the Supreme Court of Canada.

**IV. THE RIGHT TO COUNSEL UNDER HOWARD: THE MAKING OF A FAIR PROCEDURE OR THE BREAKING OF PRISON DISCIPLINE**

The *Howard* case was decided with the backdrop of a single cluster of facts. The adjudication of legal principle in the crucible of a specific case is of course regarded as a strength of the common law tradition. But the individual trouble case can never give us more than a legal fix on part of the correctional reality. It is here that empirical legal research can play a significant role. The ability to view the full flow of cases over time in different institutions, both medium and maximum security, can provide a closer approximation to the spectrum of the disciplinary process. Such a spectrum analysis can in this way supplement the fixed point on which judicial scrutiny is focused.

Before locating *Howard* in the daily practices of prison justice, it is instructive to review the application of the pre-*Howard* legal position on representation by counsel. As I have explained, that legal position, established since 1981 through the *Davidson* line of cases was that, notwithstanding the provision in the Commissioner's Directives to the contrary, the independent chairperson had a discretion to permit representation by counsel where such representation was necessary to ensure a fair hearing. On the basis of my observations of disciplinary courts from 1983 to 1985 this legal principle did not influence the practice of the independent chairpersons at either Kent or Matsqui. On those occasions when a prisoner requested that he be represented by counsel, he was met with the answer “You can’t have a lawyer. The law says they can’t be here” or “Ottawa doesn’t allow it”. The chairpersons were, however, prepared in these cases to adjourn the case in order to permit the prisoner to consult with counsel. The following case study not only illustrates the limited impact of judicial intervention on administrative practice pre-*Howard* but provides some insight into one of the categories of cases where legal representation is essential to a fair hearing.

Prisoner Peters, on 27 July 1983, was transferred for his own protection into the segregation unit at Kent. On August 22 he was
charged with possession of contraband and on September 5 with two further counts of assaulting guards. On September 13 he was convicted of all three offences and sentenced to thirty days punitive dissociation and fifteen days loss of remission. I was present at that hearing and the prisoner was extremely agitated and hostile. As the result of his conduct in the disciplinary court he was charged with two further counts of assault, a third count of threatening to assault and a fourth count of being indecent, disrespectful and threatening in his language. On September 22 the prisoner had a brief telephone interview with a legal aid lawyer and requested that she represent him. The lawyer then wrote to the independent chairperson in the following terms:

I spoke to Mr. Peters by telephone on 22nd September and frankly I am concerned about the state of his mental health. He was unable to communicate with me the nature of his charges, but did instruct me that he wished me to represent him at the hearing of these offences. I understand that Mr. Peters has been in segregation since the end of July and perhaps his present confused state is a result of this continued isolation. In any event, I am concerned about his ability to properly defend himself in these matters and would appreciate it if you could contact me to see what arrangements can be made.59

On October 4 Peters appeared before the independent chairperson. What follows is taken from the transcript of that hearing:

CHAIRPERSON: Well, what you're saying is that you are requesting a lawyer for legal aid, isn't that right?

PRISONER: Yes.

CHAIRPERSON: The other judge's notes say remanded until today to see a lawyer. And you haven't seen a lawyer?

PRISONER: They came in yesterday and I was told she was kept waiting 45 minutes.

CHAIRPERSON: Well that's not relevant. The question is, did you see her?

PRISONER: No. I put the request in; because of the situation here she didn't see me.

CHAIRPERSON: What do you expect to gain from seeing a lawyer? It's a matter of evidence. Did you or didn't you? Are you going to get witnesses? The main thing in a court is witnesses.

PRISONER: I'd just like some advice as to the best approach.

CHAIRPERSON: Well, I can advise you right here.

PRISONER: I don't understand all the implications involved in Warden's Court and I get pretty upset when people start going over my head with legal jargon. Last time they had me in here I was spitting at the judge. My hands were behind my back and I started getting pretty mad. I tend to do that when I don't understand all the implications.

CHAIRPERSON: The main object of a chairperson is to conduct a fair court in a quasi-judicial hearing.... We do conduct fair hearings. There must be fair hearings where there are acquittals. It's a question of evidence. Now what's a lawyer going to do? (The Chairperson then read the letter from the legal aid lawyer and continued)

It's not the policy of the chairpersons of this court to allow legal counsel into the court to defend inmates on charges. You can see legal counsel as much as you want or as much as is available, preceding court, but legal counsel has up until now in this court not been allowed in and we base that on the ruling of Judge Cattanach of the Federal Court in the Davidson case. So as far as a lawyer coming in, I'm not allowing that. O.K., we're back to "have you had a fair chance to speak to your lawyer?" That becomes the question. Now you must have talked to your lawyer by phone.

PRISONER: For approximately five minutes.

CHAIRPERSON: From that she gathers you can't defend yourself. But I'm not overawed by that.

PRISONER: I haven't seen her. I'd like to see her.

CHAIRPERSON: I think I'm conducting a fair hearing. She's asked about coming in. I won't be going along with that request but I'll consider your request to speak to your lawyer verbally eight days from now.

The case was then adjourned to permit the prisoner to see legal counsel. On October 18, in the absence of counsel, Peters was convicted of one of the counts of assault and sentenced to thirty days punitive dissociation. On the first of November, again in the absence of counsel, he was convicted of the other count of assault, being indecent or disrespectful and threatening to assault, and sentenced to three consecutive terms of thirty days in punitive dissociation.60

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60 These disciplinary decisions were challenged in federal court on the basis that the chairperson had failed to exercise the discretion vested in him to allow counsel. The Department of Justice conceded that the independent
The *Peters* case well illustrates one class of case in which prisoners, by virtue of their mental state, are unable to represent themselves effectively and where the representation by counsel is an essential prerequisite to a fair hearing. In some cases, as in *Peters*, there is a history of psychiatric illness exacerbated by a long period in administrative or punitive dissociation. For some prisoners like Peters this manifests itself at the hearing in aggressive behaviour leading to yet more disciplinary charges. In others, prejudice to a fair hearing is not caused by the prisoner's intransigence and hostility but rather a total apathy that anything he could say or do could influence his fate.

The next case study illustrates both the nature of the prejudice suffered by a prisoner unable to adequately represent himself and points up the ways in which representation by counsel would avoid that prejudice. Prisoner Redwood first appeared in disciplinary court on 11 August 1983, facing seven charges arising out of an incident which occurred a week earlier. The charges were:

1. 2130 hours: Contraband shampoo bottle filled with strong smelling substance.

Chairperson had misapplied the *Davidson* case and advised Kent Institution to release Peters from punitive dissociation on December 13, at which point he had already served over eight weeks in solitary confinement. The lack of familiarity by the independent chairpersons at Kent and Matsqui with federal court decisions directly related to the discharge of their offices, which this case so clearly reveals, was not limited to the *Davidson* ruling. In June 1983 Collier J. in *Re Blanquiere and Director of Matsqui Institution* (1983) 6 C.C.C. (3d) 293 (F.C.T.D.) ruled that the duty to act fairly required that prior to passing sentence the independent chairperson must give prisoners an opportunity to make submissions as to sentence. In several cases at Kent prisoners were not asked whether they wished to make submissions and in one case when a prisoner stated "I want to say something about sentence. It's my fate." the independent chairperson replied, "No. You've had a good kick at the cat." and ordered him to leave the room while he sought the advise of the advisers.

The distinction between the two forms of dissociation is this: punitive dissociation can only be imposed for breach of a disciplinary offence and for a specific period. Administrative dissociation can only be authorized by a warden pursuant to s. 40 of the Regulations where the warden deems it necessary "for the maintenance of good order and discipline and in the best interests of an inmate." There is no maximum term, but the prisoner's case must be reviewed every thirty days. In practice, prisoners in either punitive or administrative dissociation are kept in the same unit and live under the same regime save that prisoners in administrative dissociation are permitted televisions and radios in their cells. For a further discussion see Jackson, *supra*, note 9.

In one case I observed, the prisoner, having been found guilty of possession of a sharpened knife, was sentenced to thirty days in dissociation, no mention being made by the advisers of the fact that the prisoner had tried to kill himself a few days before the hearing nor of the fact that he had spent the twenty days prior to the hearing in solitary confinement.
(2) 2135 hours: Ordered to lock up and did not.

(3) 2155 hours: Refused direct order to lock up, suspected of being under the influence.

(4) 2155 hours: When ordered to lock up, was threatening in his actions.

(5) 2155 hours: Was indecent and disrespectful when ordered to lock up.

(6) 2155 hours: Was threatening in his actions towards another.

(7) 1630 hours (next day): Assault on another person: spat on officer through the slot of solitary confinement cell when officer was reading charges (1) to (6).

When the handcuffed prisoner was brought into the hearing room he was angry and threatening. The following transcript is taken from my notes of the hearing:

CHAIRPERSON: How do you plead?

PRISONER: I don't think I should have to obey anyone here. I don't have to obey every little screw that runs this joint.

CHAIRPERSON (interjecting): This is irrelevant.

PRISONER: You are f...ing senile.

CHAIRPERSON: We have multiple charges here. I will talk to the Warden and see what can be done.

PRISONER: I'd like to explain something.

CHAIRPERSON: Well, you wouldn't talk before.

PRISONER: I do want to now. I want to explain but you wouldn't give me a chance.

CHAIRPERSON: I'll talk to the Warden and resume the hearing in the afternoon.

The hearing was resumed after lunch.

CHAIRPERSON: I've talked to the Warden and we have decided to proceed with the case. I recommended that three of the charges be withdrawn. He agreed. Multiple charges are inappropriate. We are withdrawing charges #2, 3 and 6.

Dealing first with the contraband charge, how do you plead?

PRISONER: I don't want to take part.

CHAIRPERSON: Enter a plea of not guilty (at this point the prisoner attempted to leave the hearing room. He was given a direct order by his escorting officer to remain.)
PRISONER: I don't care if you give me fifty charges, but don't I have a right to seek legal counsel?

CHAIRPERSON: You are challenging the jurisdiction of the court?

PRISONER: I want legal counsel.

CHAIRPERSON: The rule for legal counsel is that it is provided only if you don't understand the legal issues.

PRISONER: I don’t understand any of the issues.

CHAIRPERSON: You don’t have a right to counsel in these circumstances. Not at this stage. I’m not convinced you’re sincere. You are trying to frustrate the court.

PRISONER: I am the one who is frustrated. I am the one that was left in the hole for three hours naked. (The prisoner became very agitated and was escorted out of the room by an officer.)

CHAIRPERSON: What shall we do — shackle him?

ADVISER: There’ll be one hell of a fight if we do.

CHAIRPERSON: I see no choice but to proceed without him.

At this point I suggested to the chairperson that he might consider adjourning the case for a week in order to permit the prisoner to consult with a legal aid lawyer. The independent chairperson agreed to the procedure and adjourned the case.

After the hearing a further charge was laid against Redwood arising from his conduct during the hearing in that he was indecent, disrespectful or threatening in his language. The hearing on the original four outstanding charges was resumed on August 31, again without counsel. As various officers testified the prisoner became more and more agitated. When given an opportunity to cross-examine he called the witnesses f...ing liars. During the evidence of one guard in particular the prisoner became extremely abusive and started to move towards the officer but was physically restrained by his escorts. On the charge of spitting at an officer the prisoner stated that he wished to call as a witness a prisoner who was in the cell next to him in the segregation unit to give evidence that the officer had deliberately taunted and provoked him. The independent chairperson asked the clerk whether the prisoner had filed a written request to call a witness and when informed that he had not he disallowed the prisoner’s oral request. The independent chairperson then stated, “There being no defence and no witnesses, I find you guilty.” The prisoner responded angrily, “You just kangarooed me, you f...ing old fart. You senile bugger.” The prisoner was not asked whether he had any submissions on sentenc-
ing and after a discussion with the advisers, in the absence of the prisoner, he was brought back into the room and sentenced to a total of sixty days in punitive dissociation. A week later, on September 8, he was sentenced to a further consecutive fifteen days punitive together with forfeiture of ten days remission on the charge of being disrespectful to the judge.

It is my opinion that, had this prisoner been afforded the right to legal representation, the case would have proceeded quite differently. The prisoner would have had the opportunity to speak to his lawyer before the proceedings to discuss the precise nature of the charges and to discuss the possible defences. Given that there were multiple charges arising from the same incident, the lawyer would no doubt have spoken to the warden about the unfairness of this and some of the charges would have been dropped by consent before the hearing started.63 All of this pre-hearing work would have given the prisoner some confidence that his interests were being safeguarded and would likely have diffused his anger and frustration. If counsel was not successful in this regard he would at least have been able to make a submission for an adjournment on the basis that his client was not in a proper state of mind to proceed with the hearing, thus avoiding the charges that were laid arising out of the prisoner's abusive conduct at the first hearing. Assuming that the hearing had proceeded, counsel and not the prisoner would have conduct of the defence. Cross-examination would have consisted of something more than a tirade against the officers.

In my discussions with the prisoner after the hearing he told me that the reason he had got particularly abusive and threatening

63 The issue of multiple charges was the subject matter of judicial comment in the case of Lasalle v. Disciplinary Tribunal of Leclere Institute (1983) 37 C.R. (3d) 147 (F.C.T.D.). Lasalle, while in a state of advanced intoxication, was involved in an altercation with prison staff. On March 7 he was charged with being in an abnormal state and assaulting an officer. On March 9 he was charged with threatening staff, and on March 11 with disobeying an order. In the course of his judgment Walsh J. stated at 155, “There is no valid or reasonable explanation as to why [the third and fourth charges] were not laid at the same time as the initial charges, if, in fact, there is any justification for laying an excessive number of charges arising out of the same incident.” The 1985 Divisional Instruction on Discipline now contains specific provisions dealing with this issue. Paragraph 18 provides that “Where more than one misconduct constitutes an incident as defined in paragraph 5, no more than two charges shall be laid against an inmate. In most cases the two charges shall be the most serious breaches of conduct.” Paragraph 5 provides that “incident means an occurrence taking place over a period of time during which an inmate has committed misconducts that are part of a single transaction or are contemporaneous in time to one another and which, taken together, constitute a single invasion of the same legally protected interest.” D.I. 600.7.09.i, July, 1985.
towards one of the officers was because he believed this officer had
beaten one of his friends while the man was handcuffed. He said
that he could not bear to be in the same room with the officer.
Whatever the merits of the prisoner’s belief, it is quite clear that
he was incapable of conducting a reasoned and restrained cross-
examination. Had counsel been present to conduct the cross-
examination the prisoner would have been distanced from the hostile
relationship with the officer. Counsel would also have been aware
of the prisoner’s witness on the spitting incident and would have
interviewed that prisoner to assess whether he had relevant evi-
dence to give and if so to ensure that the requisite notice to call
the prisoner was served.

Finally counsel would have been able, in the event of a guilty
verdict, to make a submission as to sentence. As I have indicated,
the independent chairperson did not ask the prisoner whether he
had anything to say on sentence (contrary to the Blanquiere ruling),
yet there were some highly significant matters which ought to have
been raised. Redwood was a native, and prior to this incident had
been participating in native spiritual practices, particularly the pipe
ceremony, which had recently been established at Kent Institution.
The prisoner, like many of the other native prisoners at Kent, had
had little previous experience of these ceremonies. It is the belief
of native elders that helping prisoners discover or rediscover the
strengths of native spirituality will give them healthy and non-violent
ways to respond not only to the pressures of life in prison but to
their future lives in the community. A submission on sentence by
counsel could have acquainted the chairperson with the nature of
the native spiritual program, highlighted the fact that Redwood
had already spent over a month in segregation awaiting disposition
of the charges, and argued that any more time in segregation would
be counterproductive.

There is little doubt in my mind, having spent considerable time
with Redwood since the hearing, that had he been represented by
competent counsel he would not have felt the need to engage in the
outbursts he did in the courtroom. These outbursts clearly influenced
the independent chairperson in terms of the very heavy sentences
he handed down, sentences which indeed were among the longest
given during the period of my observations.

But the cost of not having counsel is not limited to the fact that
Redwood received a far more severe sentence than his offences
warranted. The institution was left to deal with a prisoner who was
even more angry after the hearing than before and who simply
refused to accept the legitimacy of the process. Predictably, Redwood’s experience in punitive dissociation was stormy. Further charges of assault (throwing water out of the cell at an officer) and disrespectful language resulted in his being sentenced to a further loss of thirty days remission in September. Clearly no one’s interest was served. As was astutely stated by Hufstedler J. in the American case of Clutchette v. Procunier, \(^{64}\) “A prisoner who receives what he reasonably views as unfair or arbitrary treatment from prison authorities is likely to become a difficult subject for reformation or even for efficient custody.” \(^{65}\)

Although the prejudice to a fair trial caused by the absence of counsel is highlighted in cases such as Peters and Redwood where the prisoner is mentally unstable or very frustrated, it is not limited to such cases. The importance of counsel to the defence of a charge or allegation of misconduct is one which the courts have acknowledged. Lord Denning M.R. in Pett v. Greyhound Racing Association Ltd., \(^{66}\) in what may be regarded as the grandfather of the modern cases on the right to be represented by counsel before an administrative tribunal, stated:

> It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weaknesses in the other side. He may be tongue-tied or nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man: “You can ask any questions you like”; whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for the task? I should have thought, therefore, that when a man’s reputation or livelihood is at stake, he not only has a right to speak by his own mouth, he also has a right to speak by counsel or solicitor.” \(^{67}\)

Mr. Justice Sutherland in the United States Supreme Court decision on Powell v. Alabama \(^{68}\) had developed this point some thirty years before.

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He lacks both the skill and knowledge adequately to prepare his defence, even though he may have

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64 497 F. (2d) 809 (1974).
65 Id. at 817.
67 Id. at 549.
68 287 U.S. 45 (1932).
the perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.69

More recently, the United States Supreme Court in Goldberg v. Kelly70 adopted the reasoning in Powell and allowed counsel to represent an applicant in evidentiary hearings contesting the discontinuance of public welfare benefits. Brennan J. had this to say on the importance of counsel to a fair hearing:

The right to be heard would be, in many cases, of little avail, if it did not comprehend the right to be heard by counsel.... Counsel can help to delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination and generally safeguard the interests of the recipient. We do not anticipate that this assistance would unduly prolong or otherwise encumber the hearing.71

Given that a prison disciplinary court's decision frequently turns on disputed questions of fact, most often reduced to the institutional witness's word against that of the prisoner, the need for skilled cross-examination to reveal mistakes of identity, faulty perceptions or cloudy memory becomes a critical issue. The protection afforded by cross-examination is meaningless if it is not exercised by someone with the skill and training to comprehend and maximize its utility. Further, the stigma of suspicion which often plagues a prisoner when rebutting incriminating evidence can be displaced by the simple fact that a lawyer is conducting the questioning. Consider the following statement taken from an interview with a prisoner at Matsqui Institution.

I don't know, with Warden's Court there was a lot of truth in what people say—it's a kangaroo court. A lot of times it comes down to your word against his [the institutional witness]. A lawyer would help in these situations. You get choked when you're telling the truth and you're not believed...a lawyer could help you prepare. A lot of times you really don't know what the charge is. The judge might listen to a lawyer more because he's not in the can and I am...I don't feel I have a fair chance to present my case. I can tell my story but as soon as the security officer is up, that's it.72

Not only cross-examination, but also the manner in which evi-
dence is presented, can be the full measure of an effective defence. In one of the first cases observed at Matsqui Institution, two prisoners faced the serious charge of assaulting another prisoner. The principal witness was the victim who positively identified both prisoners. The assault had taken place in the induction area and the defence was that the two accused prisoners had, at the time of the alleged assault, been in other parts of the institution. They both called prisoner witnesses to testify to this effect. The questions put by the accused prisoners to the witnesses were both leading and vague. One prisoner/witness was asked “Was I with you on the evening this happened?” to which the answer given was “yes”. Another was asked, “Isn’t it true that when this happened I was with you all evening except to go to the bathroom for a few minutes?” to which the answer again was a simple affirmative. The manner in which the questions were posed heavily discounted any weight which may have been given to the answers. Furthermore, the questions were not well calculated to pinpoint the precise times at which the assault took place and therefore it was not surprising that the independent chairperson concluded that the evidence was indefinite and not inconsistent with the prisoners committing the assault and spending most of the evening on their ranges. Had the questions been asked in a proper manner and had there been some preparation of the witnesses by someone skilled in this matter, the result may have been different.

It is cases such as this which belie Mr. Justice Cattanach’s assertion in Davidson that, because most disciplinary cases involve simple questions of fact, representation by counsel is unnecessary. The delineation of material facts is as much a product of advocacy as the presentation of legal argument. Given the educational level of many prisoners it is unrealistic to expect them to effectively engage in such a process. The absence of counsel can frustrate the prisoner’s opportunity to present a full answer and defence, transposing the doctrine of fairness to a purely mythical plane.

An important category of cases in which counsel has an important role to play are those in which the charge raises legal issues. Despite Mr. Justice Cattanach’s confident assertion that “in few instances are there questions of law involved” during the course of my observations these arose with some frequency. The following examples illustrate the diversity and complexity of legal issues that can and do arise in prison disciplinary hearings.

73 Supra, note 32.
In a number of cases prisoners raised as a defence to a charge of possession of contraband that they did not know the unauthorized object was in their cell. Contraband is defined as “anything that an inmate is not permitted to have in his possession”. Neither the Regulations nor Commissioner's Directives contain any further definition of possession. The relevance of a defence of lack of knowledge depends upon how the offence under the Penitentiary Service Regulations is classified. In *R. v. City of Sault Ste. Marie* the Supreme Court of Canada set out a tripartite classification of *mens rea*, strict liability and absolute liability offences. If the offence is classified as one of *mens rea*, it can be argued that the Criminal Code definition of possession, which is a codification of common law principles, applies. That definition provides, in section 3(4):

(4) For the purposes of this Act,

(a) a person has anything in possession when he has it in his personal possession or knowingly

(i) has it in the actual possession or custody of another person, or

(ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or another person; and

(b) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

The Supreme Court of Canada in *Beaver v. The Queen* has established that in an offence requiring *mens rea*, possession in law requires not only physical control but also knowledge of the nature of the forbidden object, for example in the *Beaver* case, knowledge that the substance which was in the accused's control was heroin as opposed to sugar. If the offence is classified as strict liability the Crown need only prove that the object was within the accused's physical control but it is open to the accused to show on a balance of probabilities that he exercised due diligence, or, put another way, that he was not negligent in failing to acquire knowledge of the nature of the forbidden object. If the offence is viewed as imposing absolute liability, the Crown need only establish that the object was

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74 Penitentiary Service Regulations, s. 2.
76 R.S.C. 1970, c. 34.
within the accused's physical control and it avails the accused nothing that he was unaware of the nature of the forbidden object.

Where a prisoner raised a defence of lack of knowledge, it was dealt with in quite different ways by the various independent chairpersons. In no case, however, was any reference made to Sault Ste. Marie nor was there any articulation that a classification of the offence was required. The issue came up on a number of occasions where prisoners were double bunked. In one case at Kent two prisoners who shared a cell were charged with possession of contraband home brew. The brew was found in a garbage bag in a metal pail on the floor of the cell, with a cardboard box over the top of it. One of the prisoners admitted that the brew was his and said his cellmate knew nothing about it. Addressing the issue of the culpability of the cellmate, the chairperson took the position that the institution had to show both physical control and guilty knowledge and was satisfied that both elements had been established. Physical control was present because the pail was in a common area of the cell and not, for example, in a cupboard which contained exclusively the physical possessions of only one of the prisoners. As to knowledge, the chairperson was satisfied that, given the small area of the cell and the evidence that the prisoner had been in the cell all morning prior to the discovery of the brew, it was highly unlikely that the prisoner could not have known of its presence. The chairperson in this case was quite specific in stating that “Knowledge is what I'm really concerned about. I would have to conclude that they both knew of this material in the cell.”

Had counsel been representing the prisoner it could have been argued that, in a case like this involving allegations of joint possession, section 3(4)(b) of the Criminal Code definition as interpreted in the recent Supreme Court of Canada decision of Terrence requires that there be not only knowledge and control but also consent. An analogous situation can be found in the Marshall case. In R. v. Marshall the accused was a passenger, as a hitchhiker, when the driver and other passengers produced marijuana which they proceeded to smoke. The accused himself did not smoke any, nor exercise any control over it. The court held that there was no proof that the accused consented to the presence of the marijuana, though clearly he had knowledge. Consent is clearly a difficult issue to prove but it means something more than knowledge or even pas-

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sive acquiescence. In *Marshall* the accused's only choices were to remain in the car with the marijuana or get out at some deserted spot on the highway. While the court declined to define the scope of consent, it was implicit in the judgment that it means knowledge plus some element of positive participation in the act of possession. One commentator has suggested that consent in this context is "knowledge of the identity of the thing possessed by the other person or persons, together with some act (or omission) that demonstrates a willingness to acquiesce in the other's possession." Counsel would argue that the fact that the cellmate in this case was in the cell all morning could not be interpreted as consent. His choices — remaining out of the cell for as long as the brew was in it or informing on the other prisoner — were no more realistic or reasonable than the choices confronting Marshall.

In other cases even the relevance of knowledge was significantly downgraded by the independent chairperson. In the *Pelton* case, officers in the course of a regular search of the cell had examined a black felt pen which they found in a cup containing other pens. Upon removing the end of the pen they found inside the plastic barrel a hype kit wrapped in cellophane. At the beginning of the case the independent chairperson informed the prisoner,

I've had a lot of close cases on contraband.... The rule of it is that if it's in your cell, you're guilty.... Now I just ruled the other way this morning because the guy would have to have been a mechanical genius in a way or would have had to have the tools to remove the electrical plates to find out whether things were hidden in there. I think that was going a little too far. An inmate wasn't expected to do that. But the rule still holds, the general rule, if it's around your cell, if it's in a reasonably accessible place, which is most everywhere, you are held guilty. That's just telling you a general rule. I'm not prejudging the case.

The prisoner, in his defence, stated that he had obtained the pen in the library where he was using it to underline passages from reported court cases which were relevant to his appeal and had taken it back to his cell to finish the work. The pen had been placed in his cup and was sitting on his desk in full view. There was no attempt made by him to hide it because, he said, he had no knowledge that the hype kit was inside it. He stated further that he had never used a needle to inject drugs in his life. At the conclusion of the evidence, the following exchange took place between the prisoner and the independent chairperson:

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CHAIRPERSON: Well, if you’re found guilty it will be on the basis of the fact that if it’s in your possession you have to take responsibility for it.

PELTON: I had no knowledge of it.

CHAIRPERSON: Well that’s a defence in a narrow sense, in a very narrow sense. Now we had one case this morning that was defended successfully on that ground. But they don’t occur very often. You can step down and we can finish this up very quickly. Guilty of contraband. The sentence is just a warning.

It is quite clear from this case that the chairperson approached this case as one of strict if not absolute liability. It would appear from the chairperson’s comments that the only kind of case in which the prisoner would have a defence would be one paralleling the situation where the prisoner would have to have special tools or extraordinary skills to discover the presence of contraband secreted in his cell.

The issue of proper classification of an offence within Sault Ste. Marie is a difficult one at the best of times. It continues to spawn much litigation. It requires an assessment of the subject matter of the legislation, whether the offence is criminal in the true sense or regulatory in nature, the seriousness of the penalty (including collateral consequences) and the precision of the language. It is self-evident that it is one upon which legal argument is critical to a proper determination.81

The aftermath of this case is also very significant in pointing up the role of counsel behind prison walls. Because of the institution’s belief that drug use was increasing at Kent, the Warden, shortly before this case, had issued a notice advising prisoners:

If an inmate is charged and convicted of an offence relating to drugs, he can expect to receive the maximum penalty which can be imposed here if we do not proceed with outside charges. He will also be placed on screened visits for a period of three months after which time his case will be reviewed. He will not be permitted to attend any socials while he is on screened visits.82

81 The recent decision of the Supreme Court of Canada in Reference re Section 94(2) of the B.C. Motor Vehicle Act (1986) 48 C.R. (3d) 289, 63 N.R. 266, that the imposition of absolute liability where imprisonment is a possible punishment violates section 7 of the Charter, provides a strong basis upon which to argue that no offence under section 39 of the Penitentiary Regulations which has been designated serious or intermediary can impose absolute liability because the sentences authorized either lengthen the time a man will remain imprisoned (if remission is forfeited) or result in his being confined to a prison within a prison (if punitive dissociation is imposed).

82 Notice dated 1 April 1985.
Even though the prisoner in this case received only a warning from the independent chairperson, he was informed that visits with his common law wife would be screened for the next three months in accordance with the notice.

Several legal issues arise from this notice. First, to the extent that the Warden purports to restrict visiting privileges as a disciplinary response to conviction of a drug charge, it is arguably in excess of his jurisdiction. The Penitentiary Service Regulations specifically refer to loss of privileges as one of the punishments which the independent chairperson is authorized to impose. The proper way for the Warden to make known his views on the seriousness of contraband drugs is through his advisers on the disciplinary board who can make recommendations to the independent chairperson as to appropriate sentence. These recommendations can stress the need for deterrence and the chairperson can take those recommendations into account in imposing sentence.

Secondly, to the extent the Warden's notice is an administrative as opposed to a disciplinary response, it is arguable that it is an unlawful fettering of discretion. The Warden has the authority to restrict visiting privileges in the case of a prisoner convicted of drug use but his discretion must be exercised after a consideration of all relevant factors. Of particular relevance would be the existence of reasonable grounds to believe that the prisoner is involved in the introduction of the drugs into the prison through visitors. This, however, requires a case by case examination. What the Warden has done in his notice is to impose a blanket rule without regard to the individual circumstances of each case.\textsuperscript{3} If the prisoner in this case had been represented by counsel, these arguments could have been immediately raised with the Warden and, in the event that the Warden was not prepared to deal with the case on an individual basis, the matter could have been referred to the Federal Court for a ruling.

Another charge to which prisoners raised defences which were deserving of informed submissions by counsel was section 39(g), which during the time of my observations provided that a prisoner commits an offence who "is indecent, disrespectful or threatening in his actions, language or writing towards any other person."\textsuperscript{4} In


\textsuperscript{4} As a result of the 1985 amendments the charge now reads "behaves toward any other person, by his actions, language or writing, in an indecent, disrespectful, threatening or defamatory manner". SOR/1985-631.
several cases at Matsqui, prisoners stated in their defence that disrespectful words which had been overheard by a guard were not directed at that guard but were private expressions between prisoners of their general opinion of penitentiary staff, and therefore were not prohibited by the section. In one case the prisoner also argued that his conversation was the exercise of his freedom of expression and was protected speech under the Charter. In no case were these arguments accepted as a defence to the charge, nor did the chairperson give reasoned decisions as to their rejection. However, these arguments do raise important and complex legal issues. Subsection (g), by its express wording, requires that the actus reus be directed "to any other person". In light of the general rule of construction that a penal statute should be construed strictly in favour of the liberty of the subject, it is not an unreasonable argument that generalized derogatory comments made about the staff are not caught by the section. There is also the constitutional argument based upon the Charter that subsection (g), at least so far as it seeks to prohibit disrespectful language, is not a reasonable limit upon freedom of expression demonstrably justifiable in a free and democratic society.

In Justice Behind the Walls I raised the question of whether, given the correctional purposes of a penitentiary, it was appropriate to seek to compel respect through punitive measures. People are not sent to prison to clean up their language. Given the limited verbal skills of many prisoners, based in part on low educational levels and in part on the cultural milieu in which they have grown up, and given the restrictions placed upon them by life in prison, it is not altogether quixotic to argue for a prisoner's right to swear. At the very least it is arguable that it is not demonstrably justifiable that the need to punish verbal disrespect by prisoners, where it does not take the form of refusing to obey a lawful order, is integrally related to the operation of a penitentiary. There is no doubt that life is more civilized where people accord one another respect and common courtesy, but on the street we do not view it as necessary to visit legal sanctions upon those who are disrespectful in their language to the police. Why is it necessary to do so in the prison? A

85 Nor, it can be argued, would their comments be caught by the broadening of the offence in the 1985 amendments to include "defamatory" language. In tort law, comments directed at a group or class where there is no innuendo that the plaintiff is specifically being referred to are not actionable as defamation.

86 Supra, note 1.
counter argument would no doubt focus on the spectre of escalation from verbal disrespect to disobedience and loss of control by the authorities if prisoners are not punished for the lesser violations of disrespect for authority, but with the advent of the Charter the correctional authorities have the onus of justifying this restriction on freedom of expression. Suffice it to say that it is an eminently arguable legal issue upon which the submissions of counsel would inform a principled decision.

It would seem that another mode in which this offence can be committed, through the use of threatening language, would more easily bear the burden of justification as a reasonable limit on freedom of expression. But even here there may be legal penumbras of uncertainty around which issues of protected speech may be arguable. In one case a prisoner, Mr. Chester, was charged with being "threatening in his language or writing towards another person" as the result of a letter he had written to an officer working in the visiting and correspondence office. It concerned an incident in the visiting area involving this officer which had precipitated Chester's transfer to the super-maximum security Special Handling Unit in 1982. That transfer was actually set aside by the courts, but not until Chester had served almost two years in the SHU. The letter, in relevant part, stated,

[With regard to] loss of mail and difficulty in clearing my visits, including [my common law wife] for full regular and family visits, we shall be going to court.... So being I have to wait until you will abide me with an opportunity to deal with you as your past actions deserve. Nothing is forgiven, forgotten or finished. You are still employed and solvent.

Chester argued at his hearing that the threat was directed to a civil law suit he was contemplating and that he could not be punished for giving notice that he intended to exercise his rights to pursue a remedy in the courts. The independent chairperson dismissed this argument in the following way:

I think he is threatening to affect the nature of employment and solvency of an officer. . . . There is no threat of violence in this that I see. . . . We never had one before but I think that it is a threat. I think the letter is threatening and I find him guilty as charged.

Mr. Chester is not a man well known for his temperate language and if the document had been written by a lawyer as a letter before suit it would certainly have been subject to censure. But Mr. Chester

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is not a lawyer and one can hardly expect him to frame his notice of intention to commence civil process in gentlemanly terms. That should not deprive him of the protection which would adhere to a letter before suit which inevitably threatens its addressee with the potential of having to pay damages. There is very little doubt that the uncompromising and highly contentious nature of Mr. Chester’s presentation at the hearing significantly reduced the weight of his arguments. Those same arguments, had they been the subject of a more amplified and more respectful submission, could have formed the foundation for a successful defence of the charge.

The charge of disobeying a lawful order is rarely absent from the docket of the disciplinary court. It often can raise serious legal issues. An important example of this occurred at Kent Institution where a prisoner was charged with refusing to bend over to permit a visual inspection of his buttocks area during a general search of the institution. The general procedure taken when this type of search is ordered is that prisoners are asked to leave their cells, are examined visually, and any clothing is checked to ensure that the prisoner has no contraband in his possession. The prisoner’s cell is also searched. Prisoner Jobson, who was the inmate committee member for one of the units, when asked to bend over and expose his buttocks, refused on the basis that it was his belief that, considering the judgment of Cattanach J. in Gunn v. Yeomans (No. 2), unless a staff member had reasonable and probable grounds to suspect that a prisoner was in possession of contraband, it was illegal to order a prisoner to expose his buttocks in the manner ordered on a general and random basis. The living unit officer phoned the Warden and then told the prisoner that he had been told to continue the strip search and that, if necessary, physical means were to be used to search buttocks areas of prisoners. The prisoner restated his position that he would strip and permit a visual search of his body but he would not bend over and spread his buttocks. The prisoner was then told to get dressed, handcuffed behind his back, and escorted to the segregation unit. Once there he voluntarily stripped naked and exposed himself to be visually searched. When ordered to bend over he again refused to do so, and reiterated his belief that the order being given to him was not legal. The segregation staff were then told by the officers in charge to physically take hold of the prisoner and bend him over to expose his buttocks area. The staff took hold of the prisoner’s legs and arms, spread-eagling his body.

The officer in charge then grabbed the prisoner's left leg and pried it from the rest of his body to permit the visual search. The prisoner was re-handcuffed behind his back and placed back in his cell where he remained in this condition for about an hour. The prisoner was then charged with refusing to obey the direct order to bend over during a skin frisk.

The lawfulness of the officer's order is a complex issue. At the time of the *Gunn* decision the only search authority contained in the Penitentiary Service Regulations was as follows:

> Where the institutional head suspects, on reasonable grounds, that an...inmate...is in possession of contraband he may order that person to be searched.

Cattanach, J. on an interlocutory injunction application, held that this regulation required specific suspicion of a given individual "on reasonable grounds" before he may be searched. Moreover, the word "inmate" is used in the singular; the word "is" in possession and not "may be" is used; and the words "that person" are used. Cattanach J. said that stronger wording was required to justify a general body search on a routine basis.

Following the decision the regulations were amended. They now read in relevant part:

> Any member may search
> (a) any visitor, where there is reason to believe that the visitor has contraband in his possession...;
> (c) any inmate or inmates, where a member considers such action reasonable to detect the presence of contraband or to maintain the good order of an institution....

Assuming without accepting that the amended language is broad enough to permit routine searches of the kind in question in this case, there is the further question whether a departure from the common law requirement of reasonable and probable grounds for a search can be authorized by delegated legislation. There is a line of authorities to the effect that delegated legislation cannot be used to abrogate long-standing common law rights. Thus in *Circosta v. Lilly* where the abrogation of the common law rule regarding confidentiality of documents was in issue, Kelly J.A. stated

> [I]t is a substantive right to be adversely affected only by the direct action of the Legislature rather than one which could be taken away by a procedural rule or regulatory provision enacted by the

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89 Section 41(2) SOR/80-462.
Rules Committee in the exercise of the authority delegated to it.... Such a fundamental alteration of well-settled principles of law lies within the exclusive jurisdiction of the Legislature.90

More recently the principle was affirmed by McEachern C.J. in the *Joplin* case,91 where His Lordship stated,

[I]n the absence of clear language, the legislation is not to be presumed to have authorized the Lieutenant Governor in Council to make a regulation which abrogates the common law rights of our citizens to justice and fairness.92

Beyond this issue is the larger question of whether, under section 8 of the *Charter*, such a search would be a reasonable one and, if not, whether searches of this kind are nevertheless demonstrably justifiable within section 1 of the *Charter*, given the need to balance security interests of the institution against the privacy interests of prisoners.93 It is patently ludicrous that arguments of this order should be argued and decided on the basis of lay submissions. Nor can the demurrer be accepted that the issue will eventually have to be determined by the courts and, so long as lawyers are available at that stage, nothing much will be lost by their absence at the hearing before the disciplinary court. It is a lesson best learned early on in the professional training of a lawyer that the factual matrix of a case is often determinative of the success of legal arguments, particularly in a test case situation. If counsel is not at the disciplinary hearing, he cannot ensure that the factual foundation is laid for legal arguments he may wish ultimately to have determined by the courts.

I have reserved for last a discussion of the legal issues which can arise under section 39(k) of the Regulations, "doing an act calculated to prejudice the discipline and good order of the institution". This was the charge which Chief Justice Thurlow, in *Howard*, described as "a notoriously vague and difficult charge for anyone to defend" and MacGuigan J.A. characterized as "a catch-all charge of such vagueness that the need for counsel to clarify the facts and to challenge the arguments is strikingly apparent. . . ."94 Consider

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91 *Supra*, note 42.
92 Id. at 59.
93 For a discussion of these issues in the U.S. Constitutional context see D. James, "Constitutional Limitations on Body Searches in Prisons" (1982) 82 Colum. L. Rev. 1993.
94 *Supra*, note 10 at 264 and 283.
the following case. On 5 August 1985, Prisoner Linden was charged with doing an act calculated to prejudice good order in that he was under the influence of an unknown substance. The charge sheet indicated that Linden's speech was slurred, his eyes glazed and his gait unsteady. Linden, having discussed the matter with the prison law librarian, made several motions at the conclusion of the institution's case. These motions asked that the case be dismissed on the basis that: first, no evidence had been led that the defendant's conduct was calculated to prejudice the good order and discipline; and secondly, that the prisoner had been denied natural justice in that he had not been given an opportunity by the charging officer to demonstrate his sobriety, in that the officer had never spoken to him directly nor confronted him with his belief that he was under the influence. The motions were not supported by any legal arguments and were dismissed by the independent chairperson.

Let us consider the plethora of legal issues embedded in these motions as well as some issues which were not raised by the prisoner. On the issue of whether the defendant's conduct was calculated to prejudice the good order and discipline, the independent chairperson in rejecting the motion for dismissal referred to the judgment of Dube J. in *Belmont v. Millhaven Institution Disciplinary Court*. In that case the offence report indicated that "Belmont was sitting at a picnic table where there was evidence of brew. On the ground we found three empty cups." He was charged not with possession of contraband but with an offence under subsection (k). Mr. Justice Dube in the course of his judgment stated that:

> At best, the evidence demonstrates that the applicant was sitting at a picnic table where some brew may have been drunk by someone. It is very difficult to find a link between the evidence adduced... and the offence for which the applicant was charged. The natural meaning of the words of the charge can be found in any English dictionary. An act is "an operation, a thing done". To calculate is to "plan deliberately". In other words, the applicant was charged with and convicted of having planned and done something deliberately for the very purpose of prejudicing the good order and discipline of the institution. There is no evidence of any such act carried out by the applicant. There is not a scintilla of evidence from the only witness called by the chairman, that the applicant did anything calculated to prejudice the discipline or good order of the penitentiary.

It is not for this court, on a certiorari motion, to weigh the evidence as a Court of Appeal would, so as to assess whether or not...
there was sufficient evidence to convict the accused. But certiorari will lie where there is no evidence at all to support a particular charge.\footnote{Id. at 95.}

The chairperson in Linden's case stated that, in contrast to \textit{Belmont}, there was some evidence of the defendant's conduct in this case in terms of the slurred speech and unsteady gait. As to the meaning of "calculate" he inclined to the definition of Webster that it meant "to determine by a process of reasoning" and was to be applied from the perspective of the charging officer, not the prisoner. In other words, if the officer determined by a rational process that the defendant's behaviour was prejudicial to good order and discipline then that was sufficient for the charge. On this latter question of prejudice to good order, the chairperson commented "We all know what comes of taking alcohol and drugs."

The position taken by the independent chairperson is in direct conflict with the view expressed by Dube J. in \textit{Belmont} which imports a \textit{mens rea} element into the offence determined from the subjective position of the defendant. The prisoner in this case was not aware of the \textit{Belmont} case and so obviously was not in a position to make any submissions on the proper interpretation of that case.

It is clear from the statement of the independent chairperson that he assumed that being under the influence was prejudicial to good order and discipline. However, at Kent Institution, in most cases where prisoners are found in an impaired state but otherwise are not causing problems they are told to go to their cells and lock up and are not charged. The fact that Linden was charged might be attributable to the fact that he had been causing some problems on the range or that this particular charging officer took a stricter view of discipline than some of his colleagues. Had counsel been at the hearing an appropriate line of cross-examination of the charging officer would have been to explore the normal practices at Kent when dealing with impaired prisoners, for they clearly suggest that being impaired, so long as the prisoner complies with an order to lock up, is not prejudicial to good order and discipline. What was different about Linden's case? Had he attempted to disrupt the living unit officer's conversations with other prisoners? Had he interfered with the officer in carrying out his duties or in some other way overtly threatened good order or discipline? Once again, in the
absence of counsel these questions were not asked and the chair-
person was left to treat the case as one of \textit{res ipsa loquitur}.

There is also more merit than the independent chairperson was
prepared to give credit for in the second submission of the prisoner —
that he was denied natural justice in not being given the oppor-
tunity to demonstrate his sobriety at the time of the alleged offence.
Although the prisoner did not elaborate upon this submission,
counsel no doubt would argue along these lines: that in a case
where the offence is based upon an officer’s observations of the
prisoner the most effective way in which a prisoner can defend
himself against the charge is to present, at that time, a reasonable
explanation for his behaviour. For example, he might have been
suffering from dizziness, having a medical history of such a condi-
tion, which explanation could then be verified by medical examina-
tion. Alternatively, the officer could have been mistaken in the
conclusions he was drawing, which the prisoner could demonstrate
by performing certain tasks inconsistent with being drunk or high,
the performance of which tasks could be witnessed by other officers
and prisoners. In the absence of such an opportunity at the time of
the alleged offence, in most cases the prisoner would be left to
raise his defence at the hearing and try to rely upon his own
assertions of innocence or the evidence of other prisoners to verify
his sobriety. In a straight conflict of evidence between a staff mem-
ber and prisoners, an independent chairperson rarely favours the
prisoners. Under these circumstances the prisoner’s right to make
full answer and defence is effectively denied by depriving him
of an opportunity to show his defence at the time when he can
most effectively provide evidence which will be probative.

The vagueness inherent in the charge under subsection (k),
particularly where the particularized facts are “being under the
influence of an unknown substance” could also be the subject of a
challenge that the charge is unconstitutionally vague. Such an
argument would be founded upon section 7 of the \textit{Charter} and
would involve the submission that the principles of fundamental
justice include the requirement that penal statutes be defined with
sufficient precision so that those to whom they are addressed will
have advance notice of what is prohibited and those who are re-
quired to adjudicate on violations of the prohibition have clear
standards upon which to base their adjudication in order to avoid
arbitrariness.\footnote{See \textit{Re Hamilton Independent Variety & Confectionery Stores Inc. and}}
It can be anticipated that a constitutional defence of subsection (k) of the disciplinary code would be that in the special world of the prison such a subsection is a necessary crime control provision and therefore, despite its vagueness, constitutes a reasonable limit on section 7. In 1972, in order to test the argument that the catch-all provision of section 39(k) was necessary to the smooth running of the disciplinary process in a prison, I analyzed all charges over a five-year period to see what kinds of behaviour were the subject of a subsection (k) charge. I found that the subsection had been of declining significance in terms of the overall percentage of cases brought under the section and that, in all but a handful of cases, the behaviour was more properly the subject of another more specific charge under the Regulations.

Is the case for subsection (k) any more compelling in 1986? A review of the disciplinary records from 1981 to 1983 reveals that the section is even less used than it was ten years earlier: in Matsqui in 1981, 18.8%; 1982, 17%; in Kent 1983, 14%. Apart from one case in which the prisoner was charged with having a dummy in his cell (the charge should more properly have been dealt with as one of contraband) the particularized facts in all the subsection (k) charges were being under the influence of an unknown substance or being in a condition other than normal. In 1985 the Regulations were amended to create a new offence category in terms of a prisoner who “consumes, absorbs, swallows, smokes, inhales, injects or otherwise uses an intoxicant”. This more specific offence removes the last vestiges of justification for the continued presence of subsection (k) in the disciplinary lexicon.

98 Section 39(i.1), supra, note 14.
99 However, the new offence brings a myriad of other legal problems in its wake. The new Regulations also provide:

41.1
(1) Where a member considers the requirement of a urine sample necessary to detect the presence of an intoxicant in the body of an inmate, he may require that inmate to provide, as soon as possible, such a sample as is necessary to enable a technician to make a proper analysis of the inmate’s urine, using an approved instrument.

(2) In any hearing in relation to a contravention of paragraph 39(i.1), evidence that a sample of urine taken and analysed in the manner referred to in subsection (1) contains an intoxicant establishes, in the absence of evidence to the contrary or in the absence of a reasonable explanation of the presence of the intoxicant, that the
There remains to be considered the role of counsel in making submissions as to sentence. That role is most clearly justified in those cases where the prisoner, by reason of emotional distress, is unable to properly present his own submission, but it is not limited to them. Defence counsel could be of considerable assistance in fashioning dispositions that would reduce the likelihood of prisoners reoffending against the disciplinary code. Based upon my own involvement in a number of “trouble” cases, defence counsel, with the independence he can demonstrate and the reciprocal confidence the prisoner places in him, can at times come up with a disposition more

inmate who provided the sample has contravened section paragraph 39(1) SOR/85-412.

It seems clear that the demand for a urine sample under section 41.1(1) amounts to a search or seizure. However, the section does not require reasonable and probable grounds that a prisoner has committed an offence as a precondition to the demand. Arguably this renders the section unconstitutional as contrary to section 8 of the Charter since the decision of the Supreme Court of Canada in Hunter v. Southam Inc., [1984] 2 S.C.R. 145, 6 W.W.R. 577. Even if section 1 of the Charter could be invoked to justify a lesser standard for a prison search there is a further question of the constitutionality of the reverse onus clause in section 41.1(2) in light of the reliability of urinalysis. The courts have dealt with reverse onus clauses in the context of section 11(d) of the Charter guaranteeing the presumption of innocence. As I have indicated earlier, there is a judicial debate, so far unresolved by appellate authority, as to whether a prison disciplinary offence falls within the protective umbrella of section 11(d). However, a strong argument can be made that the presumption of innocence is a principle of fundamental justice within section 7 of the Charter that is applicable to the adjudication of a disciplinary offence where a prisoner’s remission is at stake or he can be sentenced to a prison within a prison. See the Supreme Court judgment in Reference re Section 94(2) of the B.C. Motor Vehicle Act, supra, note 8r for an expansive reading of section 7. In considering the validity of reverse onus clauses a crucial question posed by the courts is whether the presumption of guilt is logically probative in the sense that there is a rational and not arbitrary connection between the proven fact and the presumed fact; for example, see R. v. Oakes (1985) 32 C.R. (3d) 193, 40 O.R. (2d) 660 (Ont. C.A.), affd. S.C.C. (28 February 1986) (File No. 17550) [unreported]. In Justice Behind the Walls, supra, note 1 at 23, see especially n.49, I reviewed the scientific literature which cast the gravest doubts on the reliability of urinalysis:

The performance of even the “best” toxicology laboratories on urine drugs screens is grossly defective with frequent false-positive and false-negative results and mis-identifications... There is a serious question whether urine screens should be done at all under current circumstances.

The conditions under which urinalysis is authorized by the new amendments which say no more than that the test be made by an instrument approved by Directives and analyzed by a technician, meaning a person designated by the Commissioner, are hardly sufficient to ensure that the urinalysis is done under conditions which minimize the high risks of error. It is therefore arguable that the presumption of guilt flowing from a positive urinalysis is not logically probative but rather arbitrary. Also, given the general principle that an offence must be specific enough to allow the accused to identify the transaction, the question arises whether urinalysis can be probative of an offence on a specified date. Expert evidence suggests that a positive finding leaves open a great deal of ambiguity as to when a particular drug may have entered the body.
responsive to the problems which the prisoner poses. As an example, in a case in a women’s prison where the authorities had all but resolved to transfer a prisoner to maximum security because of her violent and recalcitrant behaviour which seemed immune to disciplinary action, I suggested that the prisoner give a series of undertakings as to the specific behaviours from which she would refrain, coupled with her compiling a journal of her relationships with staff which she was to share with the deputy warden. The purpose of this was to identify problems before they occurred and to seek appropriate preventive action. This disposition worked where no other had. Again, as I suggested in the Peters case, dispositions which rely upon the strength of native spiritual programs may be more positive vehicles for creating a climate of respect for staff and institutional rules than can a term in solitary confinement.

There are several other sentence-related matters where counsel for the prisoners would play an important role. The first relates to consistency. In Justice Behind the Walls I concluded that consistency of sentencing principles was conspicuous by its absence in the proceedings before warden’s court. One of the benefits I advanced to reinforce the recommendation to have independent chairpersons preside over disciplinary hearings was that legally trained chairpersons would bring with them an understanding of the importance of treating like cases alike and be in a better position to develop a consistent set of sentencing practices. Unhappily this has not come about. Based upon cases I have observed at Kent and Matsqui from 1983 to 1985, my conclusion is that sentencing by the independent chairpersons is as capricious as the warden’s court, and bears no greater resemblance to a fair, consistent and coherent system of justice than it did. This is a serious issue because disparity of sentencing assumes particular importance in the prison. It is not that disparity does not exist outside of the prison; it does and it is a serious problem. However, its impact is diffused over a much larger number of cases. Apparent disparity often is explained by the wide range of mitigating or aggravating factors which courts take into account in dealing with the whole spectrum of criminal charges. Disparity in sentencing inside a prison is there for everyone to see and rather than being diffused it is concentrated. Furthermore, the disparity is usually more real because of the much narrower range of offences and the more circumscribed nature of the factors which can aggravate or mitigate the offence. In the prison there is a

100 Supra, note 1 at 54.
greater need to give priority to the principle of equality of sentencing and it is a goal which is more easily contained and demonstrated than in the larger criminal justice system.

The principal reason for the disparity I observed is that advisers, who play a significant role in shaping the sentence of the independent chairperson, do not give high priority to the principle of treating like cases alike. Although the disciplinary records are available and they provide a bird’s eye view of broad trends in sentencing for particular offences, neither the staff nor the independent chairperson saw fit to use these records to provide informational feedback. Rather, they developed what might be termed the custom of individual cases; each adviser bringing to bear his sense of what the right sentence should be. The fact that the advisers change weekly compounds this problem. An important function of counsel for the prisoner would be to urge a more principled basis to sentencing in disciplinary court and to help provide an informational framework to ensure its implementation.\(^{101}\)

Another sentence-related matter concerns the relationship between the disciplinary board’s sentence and the decision of the Earned Remission Board. The independent chairpersons at Kent and Matsqui had little if any understanding of the earned remission consequences of a conviction in disciplinary court with the result that, in many cases, prisoners received greater punishment than the chairperson intended. For example, in one case a prisoner convicted of assault, who was nearing the end of a very lengthy sentence, was told by the chairperson that in lieu of a sentence of twenty-five days dissociation and twenty-five days loss of remission he would be sentenced to forty days dissociation so as not to delay the date of his release. At the Earned Remission Board the month following he failed to earn fifteen days based on the seriousness of the offence and the twenty-two days spent in dissociation. The next month he failed to earn six days for the remaining eighteen days spent in dissociation. In total, therefore, he failed to earn twenty-one days loss of remission as well as serving forty days in solitary confinement. Counsel for the prisoner would ensure that the chairperson was...

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101 One of the most glaring examples of disparity relates to giving a prisoner credit for time spent in administrative dissociation awaiting the disciplinary hearing. When a prisoner raised this issue, no, some or full credit was given on a completely random basis. The 1985 amended Commissioner’s Directives on discipline now contain some guidelines for appropriate sentences for minor, intermediary and serious offences. However, based on my observations since the coming into force of these Directives, there has been no significant change in sentencing practices.
I have concentrated so far on specific examples of the type of cases in which representation by counsel is demonstrably related to the conduct of a fair hearing. There is another dimension to legal representation. I have illustrated how at Matsqui and Kent judicial rulings were not adhered to in the daily practice of administrative decision making within the walls. A powerful incentive for adherence to the rule of law will, in my judgment, flow from the knowledge that lawyers will, on a regular basis, be standing vigilant to ensure that the rules are followed.

In the Davidson case, Cattanach J. suggested that the legal expertise of the independent chairperson was sufficient to ensure a proper consideration of the facts and legal principles favouring the accused’s case, rendering it unnecessary to have counsel in all but exceptional circumstances. The judgment envisages that the independent chairperson can function as both judge and advocate in the same proceedings. In a number of the cases I observed, the independent chairpersons sought to play this dual role. The chairpersons would, on occasions when a prisoner was having difficulty framing questions, conduct a limited form of cross-examination for the prisoner. In several cases the chairpersons advised the prisoner at the plea-taking stage of the proceeding that, in the light of what the prisoner had said on the issue of plea, he should enter a plea of not guilty under circumstances where, in the absence of this advice, the prisoner would have pleaded guilty against his best interests. Notwithstanding these interventions, it is my judgment that, overall, the independent chairpersons viewed their responsibilities principally as adjudicators and there was a limit to how much help they were able to offer the prisoner. The limitation resulted not only from their own perception of their role but also from the institutional context in which they operated. The chairpersons have no knowledge of the facts of each case before the hearing begins and have not interviewed witnesses. Thus they have a limited ability to assess which questions should be asked and what information should be exposed relevant to the defence of the prisoner.

The independent chairperson’s lack of knowledge of any facts except those that come up at the hearing is particularly prejudicial to the prisoner who, because of depression or hopelessness, refuses or is unable to defend himself. As several of the cases I have documented illustrate, it is vital to a fair hearing in these cases that counsel be able to interview other prisoners and staff to enable him
to assess whether there is any defence and to determine which submissions are appropriate on the question of disposition of the case. Furthermore, since the independent chairperson is seen by most prisoners as an agent of the institution and not there to represent their interests, the chairperson is quite unable to assist the prisoner who is already having great difficulty in controlling his feelings towards the authorities. In these cases the chairperson, because of the overt hostility of the prisoner, is ineluctably forced to take a position adverse to the prisoner.

It will be recalled that in *Howard* the Department of Justice did not argue there were reasonable limits, prescribed by law, that pursuant to section 1 of the *Charter* could circumscribe the right to counsel. Are there legitimate institutional interests that a prisoner’s right to counsel at prison disciplinary hearings might jeopardize which could qualify as reasonable limits to the right? There are two such interests which have been articulated by the courts and which also have featured in my own interviews with staff. They are, first, that a right to counsel will lead to inordinate delay in the hearing of cases with the result that the disciplinary process will be rendered inefficacious, and second, that the presence of counsel will increase the adversarial aspect of the process with the result that the lines between prisoners and staff will be further reinforced in a way which would have a negative impact on rehabilitative and other correctional goals.

A number of judicial pronouncements involving the disciplinary process are quite explicitly based on a model of prison justice in which the disciplinary response is swift and necessarily so in order to maintain correctional order. The Commissioner’s Directives support this model of speedy disposition of cases by providing that “the hearing of a charge shall commence, as far as practical, within seven working days from the date the charge was laid unless a justifiable reason warrants delay.”

The facts, however, reveal a rather different profile of the efficiency of prison justice. At both Kent and Matsqui during the period of my observations (at a time when counsel were not permitted at hearings) it was the exception rather than the rule that a case was heard within the seven working day period. Adjournments were readily granted, principally at the request of the institution, on the basis that witnesses were not available due to their being on afternoon or evening shift, on rest day, on vacation, or otherwise.

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102 C.D. 600.7 3.1 para. 22.
unavailable. Indeed it was not uncommon for there to be several adjournments on this basis. Prisoner requests for adjournments were also regularly granted. Such requests were usually based on an expressed need for more time to prepare a defence. In many cases there would be a combination of adjournments, some emanating from the institution and some from the prisoners. On several occasions the independent chairpersons expressed some concern about delays in bringing a case forward, and indeed it was the practice of the chairperson at Matsqui to dismiss a case when he had already granted two adjournments at the request of the institution and they were still not ready to proceed at the third appearance. In order to get a better overall picture of the time frame within which cases were adjudicated, I reviewed the disciplinary records at both Kent and Matsqui for 1983. The following table shows the results of that analysis.

<table>
<thead>
<tr>
<th>Number of Days Until Final Disposition</th>
<th>% of Total Cases Kent</th>
<th>% of Total Cases Matsqui</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 to 7 days</td>
<td>29.5</td>
<td>28</td>
</tr>
<tr>
<td>8 to 14 days</td>
<td>29</td>
<td>38</td>
</tr>
<tr>
<td>15 to 21 days</td>
<td>19</td>
<td>19</td>
</tr>
<tr>
<td>more than 21 days</td>
<td>22.5</td>
<td>15(^{103})</td>
</tr>
</tbody>
</table>

It is within this profile of the disciplinary process that the issue of representation by counsel must be placed. It is not an unduly onerous task to construct a system of legal representation to function within a system in which, in two out of three cases, there is an adjournment beyond the seven day period. It is my impression that the highest percentage of guilty pleas occurs in those cases which are disposed of within the first week after a charge has been laid. It is likely that, within this class of case, there will be the least demand for legal representation. For the rest of the caseload it is now part of the procedure to grant prisoners adjournments to permit them to consult with counsel.

Extending the purpose of the adjournment to permit the actual attendance of counsel need not pose any additional delay. The only

\(^{103}\) A quite different profile is presented from an analysis of the disposition of minor offences, which are handled by living unit officers in a more informal manner. Of these, 44\% were dealt with within 7 days, 46\% within 14, 12\% within 21, and only 4\% in excess of 21 days. Speedier adjudication of minor offences is principally due to the fact that there is a much higher percentage of guilty pleas (obviating the need for any witnesses); where witnesses are required the hearing is scheduled to accord with times in which they are available.
problems which would arise would be if the prisoner selected counsel who had a heavy trial calendar which precluded counsel from attending before the disciplinary board until sometime in the distant future. Here, in the interests of speedy adjudication, it would be justifiable to impose some constraints on the question of the choice of legal representative. One possible solution to accommodate the institutional need for cases to be dealt with within a reasonably approximate relationship to their occurrence would be to make legal representation available through a panel of lawyers acting as duty counsel. Already, in the wake of the *Howard* decision, several such systems have been put in place in Ontario and Manitoba and are working without causing significant problems to the scheduling of cases.

If the intervention of lawyers will not prejudice the early scheduling of cases, will it have a negative impact by increasing the adversarial nature of the proceedings? Here also it is necessary to separate the way in which disciplinary court proceedings are sometimes ideally characterized by the courts from the real system in operation. The facts of the matter are that disciplinary hearings before the independent chairpersons are already adversarial in nature. This reality is a function of both the dynamics of the power relationship between prisoners and guards and the structure and format of the proceedings. The Commissioner’s Directives themselves provide for a trial-like process in which the institution’s case is presented with an opportunity for the prisoner to cross-examine witnesses and give evidence in his own defence. It was the common practice for one of the independent chairpersons at Kent to refer to the institution as “the Crown” and institutional witnesses as “Crown witnesses”. For their part the prisoners are in no doubt that what is being invoked against them in the disciplinary court is the same authority that sent them to the “pen”, its relationship to them more intense and pervasive but no less adversarial.

From my interviews with correctional staff the fear of increased adversariness is the spectre of criminal lawyers coming into the prison and demeaning them in front of the prisoners through aggressive and intimidating cross-examination. That spectre is one heavily based upon television dramatizations of the role of counsel. This is a far cry from the normal way in which criminal counsel operate. The nature of the charges which form the typical docket of disciplinary court is not the stuff of which dramatic cross-examination is made. Indeed, far from increasing the adversarial nature of proceedings, it is my view that in many cases the participation of
counsel would have quite the opposite effect. I have already pointed out that, in some of the cases I observed where prisoners were extremely hostile to the witnessing officers, the very fact of their hostility impaired their ability to conduct their defence. Not only would representation by counsel result in a fairer hearing in such cases but the very fact of counsel conducting the cross-examination would avoid what often happens under the present arrangement where the hearing process aggravates and intensifies an already hostile relationship. Not only would counsel's participation reduce the level of personal hostility, it is also likely in such cases to result in a more efficient and orderly hearing. As several of the transcripts indicate, unruly or hostile prisoners pose considerable problems for the conduct of a disciplinary hearing which becomes interspersed with long harangues by the prisoner and futile attempts to cross-examine, and often further charges with the need for yet more hearings.

In Justice Behind the Walls" I reported an experiment I conducted at the U.B.C. law school to test the hypothesis that the involvement of counsel, far from rendering hearings less manageable and more time-consuming, would result in a more expeditious conduct of the trials. The experiment affirmed this hypothesis. Further confirmation as to the effects of counsel's participation can be gleaned from the accumulated experience before the National Parole Board where, since 1978, counsel have been permitted to act as assistants. I have represented prisoners in this capacity on many occasions, particularly in cases where there are complicated issues of fact and law. It has been my experience and that of members of the National Parole Board that participation of counsel does contribute to the orderly presentation of the prisoner's case and helps frame the relevant issues for the Board's decision. Again, from my own experience of dealing with several prisoners who have had stormy experiences within the institutions, counsel's participation also has the effect of instilling in the prisoner some confidence that his voice and his case will be heard and dealt with on the merits.

A strong case can be made that, far from disrupting the correctional mission, the introduction of the right to counsel may have a positive role in furthering the correctional goals of maintaining institutional order and prisoner rehabilitation. Counsel's intervention would increase the likelihood that punishment would be imposed only when that punishment is due. Unacceptable behaviour

104 Supra, note 1.
would still be met with an appropriate disciplinary response, yet the prisoner would gain a sense that the proceedings were conducted fairly. In Palmigiano v. Baxter the United States Federal Court of Appeal stated:

The orderly care with which decisions are made by the prison authority is intimately related to the level of respect with which prisoners regard that authority. There is nothing more corrosive to the fabric of a public institution such as a prison than a feeling among those whom it contains that they are being treated unfairly.

A prisoner's perception of the fairness of the disciplinary proceedings will favourably influence his willingness to accept that decision. Under the present arrangements the disciplinary hearing is still viewed by many prisoners as a kangaroo court. Discipline imposed under what they perceive to be an oppressive and unfair regime only serves to increase their hostility as well as the frequency with which they are likely to be charged and brought back before the court. It is a downward spiral which further undermines good order in the institution as it increases the likelihood of the prisoner emerging from imprisonment further embittered against the society in whose name he has been punished.

In the Howard case Mr. Justice MacGuigan pointed out that the recognition of the right to counsel, bespeaking the fullness of the adversary process, would lead inevitably to the introduction of a prosecuting officer, the complete disappearance of any inquisitorial aspect of the process, and the full acceptance of an adversarial system. He concluded:

I accept this as an accurate estimate of the likely consequences, but not as an argument in terrorem. If it is what fundamental justice requires, it is a step forward rather than a limitation.

This conclusion is supported by my own observations. Just as I have documented the cases where the absence of counsel prejudiced a fair hearing for the prisoner, so it is possible to identify parallel cases in which the absence of counsel representing the institutional interests was prejudicial to a proper presentation of the case against the accused. Typically this occurred when proof of the offence required the evidence of a series of institutional witnesses. Under the present procedures no staff member is charged at the hearing with

105 487 F. 2d 1280 (1973).
106 Id. at 1283.
107 Supra, note 10 at 280.
the task of calling witnesses or examining them in chief. In a number of cases the witnesses were summoned from their security posts or living unit duties and the order of presentation of witnesses corresponded to the order in which they arrived at the courtroom. Predictably this resulted in a lack of continuity in the chronology of events which militated against the chairperson having a full understanding of the incident. Another deficiency resulting from the absence of a person charged with the presentation of the case for the institution was that not infrequently one officer would give evidence, omitting important details because he assumed, incorrectly, that another officer had already covered that material in prior testimony. The result here was that critical elements in the institution's case failed to be proved. The resulting acquittal of the prisoner under these circumstances inevitably led to considerable bitterness on the part of the staff because, in their minds, their collective evidence should have resulted in a conviction.

The most graphic example of this phenomenon is seen in a case involving a prisoner charged with doing an act with intent to escape. The charge arose from the presence in the prisoner's cell of a plexiglass shelf with one corner cut out and the concomitant discovery, secreted in an adjacent area of the prison, of a bag containing a small piece of plexiglass in the process of being fashioned into a key, and two pairs of wire cutters. In that case the living unit supervisor who had co-ordinated the search operation was not available at the beginning of the hearing and only gave testimony at the very end, by which point the chairperson had already expressed his serious doubts about the institution's case. The chairperson acquitted the prisoner, having concluded that the two pieces of plexiglass were not related because the small piece was half the thickness of the larger piece.

After the hearing the living unit supervisor approached me with the two pieces of plexiglass and pointed out that the bevels on the two pieces matched perfectly and the explanation for the smaller piece half the width of the larger was that it had been cut in half with a hack-saw blade. I pointed out to him that he had not explained to the chairperson the basis upon which he had formed the opinion that the two pieces were related and had therefore left the chairperson to draw his own conclusion.

Had there been counsel for the institution this officer's evidence would have been presented, not as a postscript, as it was, but as the foundation for the institution's case. Proper examination in chief by counsel would have laid the basis for the officer's judgment as
to the relationship between the two pieces of plexiglass. Counsel for the institution, in presenting the institution's case, would also have led evidence relevant to the exculpatory statement made by the prisoner that he had taken the large piece of plexiglass from the prisoners' washroom where it served as a shelf and that it already had the corner piece cut out. Evidence by officers of searches they made of that washroom during the period when the offence was alleged to have taken place could establish whether they observed the shelf in place, undamaged or damaged. This is not to say that the prisoner would necessarily have been convicted, but that it would have ensured that all of the institution's evidence was properly presented. As it was, the acquittal was seen by the staff as a travesty of justice rather than as an inevitable consequence of the inadequacy of the presentation of the evidence.108

Counsel for the institution could serve other important functions related to the efficiency of the proceedings. Counsel charged with the conduct of the institution's case would be able to do a better job of scheduling cases so as to avoid as much as possible adjournments due to the absence of witnesses or to the prisoner's need to consult with defense counsel. The institution's case would also be presented in a more efficient way, avoiding unnecessary duplication of staff witnesses but ensuring that the evidence was appropriately co-ordinated to establish each essential element of the case. The staff's concern that defence counsel might intimidate them would be offset by the knowledge that they had a representative at the hearing. Counsel would also be the principal voice through which submissions as to appropriate sentence were made. This would relieve the staff from sitting on the board as advisers, freeing them for other responsibilities. It would also be more effective in assuring some continuity and consistency in sentencing options. Institutional counsel would also, of course, have the important role of making or responding to legal submissions made by counsel for the prisoners.

The involvement of both institutional and defence counsel in cases where important issues of law are involved could lead to

108 This case also illustrates the need for legal representation of the prisoner. The charge of doing an act with intent to escape is one of the most serious in the disciplinary calendar. In the particular circumstances of this prisoner, conviction would have triggered a transfer to the Special Handling Unit, the most restrictive form of imprisonment in the Canadian carceral archipelago. Difficult legal issues arise relating to the actus reus of the charge, particularly whether the Criminal Code definition of attempt as "an act beyond preparation" applies, and what tests should be used to determine if an act is beyond preparation. See my discussion of this issue in supra, note 1 at 45.
matters being referred to the courts under a specially legislated procedure to give the independent chairpersons the power to state a case on points of law. This would be particularly appropriate where similar legal issues had arisen before several independent chairpersons and had resulted in conflicting rulings.

V. THE IMPLEMENTATION OF HOWARD: JUSTICE DELIVERED OR JUSTICE DENIED?

I have already made the point that in the world of the penitentiary, rules, whether laid down by the Correctional Service itself through directives or prescribed by the court, do not necessarily translate into administrative practice. A final matter I will review is the way in which the Federal Court of Appeal decision in Howard has been received by the Correctional Service and some of the problems of implementation at Kent Institution. Such review permits us to understand some of the limitations of litigation as a strategy of reform and the limited vision which the Correctional Service itself has of the rule of law.

The Federal Court of Appeal decision in Howard was handed down on 1 March 1985. Four months later amendments to the Penitentiary Service Regulations were passed introducing, in place of the dual classification of serious and minor offences, a tripartite one of serious, intermediary and minor. As I have expressed, both serious and intermediate offences come before the independent chairperson. The difference between the two categories hinges upon the fact that the prisoner can be sentenced to loss of remission only following conviction of a serious offence. On my first visit to Kent Institution following the promulgation of the amendments I asked several of the assistant wardens what they understood to be the reason for the introduction of the new intermediary offence. Their response was that it was designed to get around the Howard decision, since the right to counsel for the prisoner was only applicable for serious offences. My initial impression of this response was that it was an overly cynical one. My view, however, quickly changed when I was shown by one of the independent chairpersons a memorandum he had received from the Correctional Services' legal counsel explaining the new amendments. It stated in relevant part:

The amendments are very important with respect to the classification of offences. There will be three categories of offences, only the cases falling into the flagrant or serious offence category will qualify
for representation by counsel, inasmuch as the accused inmates have remission to their credit.\textsuperscript{109}

To interpret the \textit{Howard} case is limiting the right to counsel to one in which prisoners' remission is in jeopardy is to read the case in its narrowest form. Howard in fact was sentenced to a loss of remission and the Court therefore naturally focused its analysis on the liberty interest such forfeiture involved. But the Court, in speaking of the circumstances in which the prisoner would have a right to representation, stated that this would depend "on the circumstances of the particular case, its nature, its gravity, its complexity and the capacity of the inmate himself to understand the case and present his defence. The list is not exhaustive."\textsuperscript{110} Even if \textit{Howard} can be read as affording a right to counsel only where remission is at stake, to see the intermediary offence category as a means to avoid the implications of the decision is flawed. While a prisoner cannot be sentenced at the disciplinary board hearing to loss of remission for an intermediary offence, he will nevertheless have his liberty interest affected by failing to earn remission arising directly from the commission of the offence as a result of the earned remission scheme. As I have explained, for every three days in punitive dissociation a prisoner will fail to earn one day of remission and, depending upon the gravity of the offence, the Earned Remission Board can fail to credit up to the maximum of fifteen days remission for that month.

In my review of the earned remission awards for Kent Institution in the month following the new amendments introducing the intermediary offence category, the prisoners who were convicted of intermediary offences were dealt with very severely by the Earned Remission Board. In one case the prisoner was charged under sub-section (k) with doing an act calculated to prejudice the discipline and good order in that he was found in another prisoner's cell at 5 o'clock in the morning. At the hearing before the disciplinary board, the prisoner received a suspended sentence of fifteen days dissociation. As a result of the decision of the Earned Remission Board he failed to earn ten days remission. In two other cases, prisoners charged with threatening officers who received disciplinary sentences of ten days loss of recreation privileges in the one case and ten days punitive dissociation in the other, both failed to earn the

\textsuperscript{109} Memorandum from Suzanne Poirier, 24 June 1985.

\textsuperscript{110} \textit{Supra}, note 10 at 262.
maximum fifteen days remission. For these prisoners and indeed for all prisoners who inevitably fail to earn remission following conviction of an intermediary offence, to be told that they do not have the right to counsel because, at the disciplinary hearing, the independent chairperson could not sentence them to loss of remission, is calculated to do nothing but further prisoners' disdain for the Correctional Service's claim that justice now runs behind prison walls.

The clear message of the memorandum from the Correctional Services' lawyer, that the right to counsel could be avoided through the vehicle of the intermediary offence, did not fall on deaf ears. By the end of August nearly every offence which came before the independent chairperson at Kent Institution was designated an intermediary one with the result that prisoners were told that they had no right to counsel. This was the answer they had been given prior to the Federal Court of Appeal decision in Howard, based on the independent chairperson's misunderstanding of the law as set down in the Davidson line of cases. The same response in September 1985 is much more clearly based upon the correctional authorities' intent to limit the application of the law as set out in the Howard case.

Even before introduction of the intermediary offence, the right to counsel proclaimed in Howard had not in fact resulted in representation for federal prisoners in British Columbia. This flowed principally from the refusal by the British Columbia Legal Services Society to extend legal aid to prisoners for disciplinary hearings. Under the Legal Services Society Act, a person would qualify for

111 A review of the Earned Remission Board minutes for July-December 1985 at Kent Institution reveals that the average failure to earn remission award flowing from conviction of an intermediary offence was ten days.

112 The Correctional Service's interpretation of Howard as not applying to offences where the disciplinary board can only impose dissociation as opposed to loss of remission because only remission affects a prisoner's liberty interest under section 7 of the Charter is further undermined by the recent decision of the Supreme Court of Canada in Cardinal and Oswald v. The Queen, supra, note 8. The Court there held that confinement in dissociation constituted a deprivation of the relative or residual liberty of a prisoner, the legality of which could be challenged through habeas corpus. The Service's interpretation of Howard discriminates against prisoners who are serving life or indeterminate sentences. Such prisoners are not eligible to earn remission. For them, the most important elements of residual liberty are their security matrix and parole prospects. Conviction of an intermediary offence may have a significant impact on both.

113 A review of the disciplinary board minutes for September-December 1985 confirms this initial trend. All offences coming before the Board were classified as intermediary with the exception of assaults on staff or assaults on other prisoners where bodily harm was caused.
legal aid if he were (a) the defendant in criminal proceedings that could lead to his imprisonment, or (b) might be imprisoned or confined through civil proceedings, or (c) has a legal problem that threatens his livelihood.

Following the denial of eligibility by the Legal Services Society to a prisoner charged with the serious offence of doing an act with intent to escape, the matter came before Mr. Justice Meredith of the B.C. Supreme Court. His Lordship, while conceding that the prisoner faced with a loss of remission or punitive dissociation could be said to be involved in proceedings that could lead to his imprisonment (in the one case by extending the length of time he would remain confined and in the other case by being confined in a prison within a prison), ruled that the proceedings were neither criminal nor civil but disciplinary. In the course of his judgment Mr. Justice Meredith pointed out that, while Howard might give the prisoner the right to counsel, "nothing is said of any reciprocal obligation to provide and pay for counsel".1 The result of this decision is that unless the prisoner can afford to retain private counsel his admitted right to representation is an empty one.

A number of consequences have been flowing from the fact that prisoners have an acknowledged right to counsel but there is no reciprocal obligation on the part of the Legal Services Society to provide it. Prisoners ineligible for legal aid have been forced to cast around in an attempt to find lawyers who will represent them based upon some moral obligation flowing from having been their counsel during a criminal trial, or on the basis of a future promise to pay when they are released. This has resulted in prisoners coming to the disciplinary hearing and requesting adjournments in order to consult with counsel almost as a matter of course and having to make further application when their initial approaches do not yield positive results. These requests for adjournment, coupled with the institution's requests based on co-ordinating the hearing with witnesses' work schedules have resulted in inordinately long delays before final adjudication.

The result is a shared sense of frustration among everyone involved in the process. The prisoner is frustrated by the right he is said to have but cannot realize; the staff is frustrated by what they see as the games prisoners play in seeking adjournments; the warden and his senior administrators in not having disciplinary problems resolved quickly; and the independent chairpersons who know that

their decisions rendered in the absence of counsel may be vulnerable to judicial nullification.

It is very important to understand that these consequences flow not from the Howard ruling that there is a right to counsel but from the failure to implement the right. For the Howard case to be effective in improving the quality of prison justice, it must be accompanied by the availability of counsel to all prisoners whose right it is to have counsel represent them. This reflects one of the limitations of a reform strategy which relies exclusively upon court intervention. The impetus for reform comes from outside the system, and is itself the outcome of an adversarial process. As such it is resisted by the correctional authorities as an intrusion. The laying of the informational base to ensure that the rationale for reform is understood by correctional staff and the creation of a resource base to ensure that the reform is implemented are not part of the relief courts are asked to grant. It is more likely that a legislated right to counsel, where the necessary foundation work has been done in advance to ensure that the resources are available to translate the law into the life of the prison, will achieve real reform in the practice of prison justice. Such a legislated right would have to face the fact that, since representation by counsel is an essential part of the disciplinary process its cost is an integral part of running a prison system. Justice behind federal penitentiary walls must not be dependent upon the vagaries of provincial legal aid legislation just as it cannot depend upon the restrictive interpretation by correctional authorities of judicial decisions.

I do not wish to be interpreted as gainsaying the utility of a litigation strategy. For the most part it is all lawyers have to offer prisoners. But as this analysis shows, rights wrested from the courts can be negated in practice all too easily. My experience and research have led me ineluctably to the conclusion that only if the recognition of those rights is mandated as part of the legislative structure of Canadian penitentiaries and enforced on a daily basis through the vigilance of the legal profession, will there be any real change in the nature of prison justice.\footnote{For a similar conclusion in relation to the reform of administrative disassociation see Prisoners of Isolation, supra, note 9.}

This gives rise to a strategic dilemma for reformers. In times of economic restraint and public antipathy for the rights of prisoners, legislators have little incentive to place the codification of prison administrative law high on their reform slates. Most lawyers, there-
fore, continue to litigate, because at least the ear of the court can be gained, even though things may not change very much inside the walls. While this is not exactly a counsel of despair, it is not an energizing prospect. What it suggests is the need for a dual initiative. A legislative strategy must buttress a litigation one. The legal profession, as it identifies issues of fundamental justice which require articulation and redress in the judicial forum, must also play a leadership role in the development of comprehensive prison administrative codes and must press hard for their passage into legislation. Two developments give cause for some optimism in this regard. The Ministry of Justice and the Ministry of the Solicitor General have, as part of the overall criminal law reform project, identified correctional law as a special area of review. More recently the Canadian Bar Association has established a special committee to review and make recommendations on correctional law. It is to be hoped that through these initiatives, paralleling the continued vigilance of the courts, the rule of law will become entrenched, not only in the Canadian Constitution, but also in the Canadian prison.