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# A Prisoners' Charter? Reflections on Prisoner Litigation Under the Canadian Charter of Rights and Freedoms

Debra Parkes

*Allard School of Law at the University of British Columbia, parkes@allard.ubc.ca*

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**A PRISONERS' CHARTER?: REFLECTIONS ON  
PRISONER LITIGATION UNDER THE CANADIAN  
CHARTER OF RIGHTS AND FREEDOMS**

DEBRA PARKES<sup>†</sup>

At the end of the *Charter's* 20th anniversary year,<sup>1</sup> the Supreme Court of Canada decided what may be its most significant prisoners' rights case to date.<sup>2</sup> By a 5 to 4 margin, the Court struck down a law that barred prisoners serving two years or more from voting in federal elections.<sup>3</sup> The decision was heartening for advocates of prisoners' rights. A majority of the Supreme Court held that prisoners are not second-class citizens, at least in relation to democratic rights. The Canadian government is not permitted to make prisoners "temporary outcasts from our system of rights and democracy."<sup>4</sup> However, when one looks back on nearly a quarter century of *Charter* litigation by prisoners, it is evident that prisoners have, in some significant ways, been treated by courts and legislatures as temporary outcasts from a meaningful form of rights protection.

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<sup>†</sup> Associate Professor, Faculty of Law, University of Manitoba. My grateful thanks are owed to the Manitoba Legal Research Institute for its support of this project. I also thank Kim Pate and the *U.B.C. Law Review's* anonymous reviewers for their comments on earlier drafts, as well as Beth Tait, Ainslie Shroeder, Dan Rempel, and Sharon Scharfe for their research assistance at various stage of this article's progress. All remaining errors and omissions are mine.

<sup>1</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

<sup>2</sup> *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519, 218 D.L.R. (4th) 577 [*Sauvé* cited to S.C.R.].

<sup>3</sup> *Canada Elections Act*, R.S.C. 1985, c. E-2, s. 51(e).

<sup>4</sup> *Sauvé*, *supra* note 2 at para. 40.

I am reminded of an anecdote<sup>5</sup> related by Kim Pate, Executive Director of the Canadian Association of Elizabeth Fry Societies and a leading advocate of prisoners' rights in Canada. Kim describes a phone conversation she had with a woman who was, at the time, incarcerated in a segregated maximum security unit inside a men's prison. Kim mentioned that she was going into a meeting to discuss the application of the *Canadian Charter of Rights and Freedoms* to prison issues and the woman responded, "Really? Great! Do you think you will be able to get it to apply to us?" The fact that it had applied for fourteen years at that point was unknown to this woman and to many other prisoners. The experience of daily life in prisons and jails across this country belies the existence of an entrenched bill of rights, which one might expect, at a minimum, to act as a check on the excesses of state power in closed institutions.

Michael Jackson, a law professor at the University of British Columbia, has said that "the principal benefit flowing from a constitutionally entrenched Charter of Rights and Freedoms is not to be found in the litigation it spawns, but rather in the climate and culture of respect it creates amongst both governments and citizens for fundamental human rights and freedoms."<sup>6</sup> Indeed, legislative changes such as the articulation of certain prisoners' rights made in the 1992 federal *Corrections and Conditional Release Act*<sup>7</sup> may have had as much, if not more impact on the

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<sup>5</sup> Kim Pate, *50 Years of Canada's International Commitment to Human Rights: Millstones in Correcting Corrections for Federally Sentenced Women* (Ottawa: Canadian Association of Elizabeth Fry Societies, 1998), online: Canadian Association of Elizabeth Fry Societies ("CAEFS") <<http://www.elizabethfry.ca/50years/50years.htm>>.

<sup>6</sup> Michael Jackson, *Justice Behind the Walls* (Toronto: University of Toronto Press, 2002) at 62.

<sup>7</sup> *Corrections and Conditional Release Act*, R.S.C. 1985, c. P-5 [CCRA]. The CCRA provides that prisoners "retain the rights and privileges of all members of society, except those rights and privileges that are necessarily removed or restricted as a consequence of sentence" (s. 4(e)) and are entitled to "the least restrictive measures consistent with the protection of the public, staff members and offenders" (s. 4(d)). The CCRA also contains a number of specific rights to, for example, health care (ss. 85-89), religion (s. 75), grievance procedures (ss. 90-91), and a right to consultation concerning significant decisions other than those involving security (s. 74).

daily lives of prisoners than any decision to date by a court in a *Charter* case.<sup>8</sup> However, internal reforms have not proven sufficient to bring prison conditions and practices into compliance with the Rule of Law. As Justice Arbour found in her 1996 *Report of the Commission of Inquiry into Certain Events at the Prison for Women in Kingston*, “[t]he Rule of Law is absent, although rules are everywhere.”<sup>9</sup> It is for this reason that Jackson,<sup>10</sup> Arbour, the Canadian Human Rights Commission<sup>11</sup> and others have called for various forms of independent accountability and oversight of corrections in Canada, including more rigorous judicial review and remedies.<sup>12</sup>

This paper examines nearly a quarter century of *Charter* litigation by prisoners, beginning with a brief consideration of the social and political context for prisoners into which the *Charter* was entrenched in 1982, before moving on to consider a variety of successful and unsuccessful prisoners’ *Charter* claims. In the process, the author briefly explores some of the ways in which the impact of the *Charter* has been diminished at the prison walls, such as through a lack of full and meaningful access by prisoners to courts or other means of independent review of prison decisions

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<sup>8</sup> Jackson cites, as an example, new statutory limits on the power to search prisoners which were structured to reflect principles articulated in *Charter* jurisprudence outside the prison context:

The *CCRA* replaced the very broad and untrammelled power contained in the Penitentiary Service Regulations with a detailed set of provisions which distinguished among routine, investigative, and emergency search powers, established threshold criteria for each and differentiating among non-intrusive, strip, and body cavity searches (Jackson, *supra* note 6 at 66).

<sup>9</sup> The Hon. Louise Arbour, *Report of the Commission of Inquiry into Certain Events at the Prison for Women in Kingston* (Canada: Public Works and Government Services, 1996) at 181.

<sup>10</sup> Michael Jackson, “The Litmus Test of Legitimacy: Independent Adjudication and Administrative Segregation” (2006) 48 *Canadian Journal of Criminology and Criminal Justice* 157.

<sup>11</sup> Canadian Human Rights Commission, *Protecting Their Rights: A Systemic Review of Human Rights in Corrections for Federally Sentenced Women* (Ottawa: Canadian Human Rights Commission, 2003) at 67, online: Canadian Human Rights Commission <<http://www.chrc-ccpd.ca/pdf/reports/FSWen.pdf>>.

<sup>12</sup> See *infra* text accompanying notes 162-187.

and conditions, as well as by the persistence, at least in a significant number of cases, of the pre-*Charter* tendency toward paying deference to prison officials and policies in claims that do make it to court. Some promising developments in recent prisoners' rights cases are discussed before attention is turned briefly to the future of prisoners' rights claims in Canada. Examining the viability of judicial review as a means to foster a "*Charter* culture" within prisons and by considering the extent to which judges give effect in prisoner litigation to the rights and values enshrined in the *Charter* enables us to reflect on the climate and respect for rights in Canada, as well as the problems and contradictions of giving meaning to rights in a penal context.

## I. THE *CHARTER*'S PROMISE

In 1982, it was reasonable to think that prisoners might benefit substantially from an entrenched bill of rights.<sup>13</sup> It is difficult to imagine a class of people more vulnerable to majoritarian indifference and excesses of state power than prisoners.<sup>14</sup> The strip-searching of women prisoners by male guards at the Prison for Women in Kingston in 1994 and subsequent illegal detention in segregation for many months<sup>15</sup> is unfortunately just one example of the abuses of power that take place in Canadian

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<sup>13</sup> However, at that time, there were also those who were pessimistic about the likelihood that such "legalistic" change would amount to much for prisoners. See e.g. Christopher Millard, "The Philosophy, the Politics and the Practice of Prisoners' Rights" (1982) 5 Can. Crim. Forum 11.

<sup>14</sup> A majority of prisoners come from disadvantaged backgrounds characterized by poverty, substance abuse, low levels of education, and high levels of depression and attempted suicide. See Canadian Centre for Justice Statistics, *A One-Day Snapshot of Inmates in Canada's Adult Correctional Facilities* by David Robinson *et al.*, vol. 18:8 (Ottawa: Canadian Centre for Justice Statistics, 1998) at 5. Mary Campbell has observed that incarceration "puts dysfunctional, unhappy, angry, occasionally mentally ill offenders together in close quarters, away from family and friends, with little or no privacy, branded with the shame of society – these are the breeding grounds for callousness at best, brutality at worst. ... The law serves as a crucial counter-weight to that natural drift." Mary Campbell, "Revolution and Counter-revolution in Canadian Prisoners' Rights" (1996) 2 Can. Crim. L. Rev. 285 at 327.

<sup>15</sup> Arbour, *supra* note 9.

prisons,<sup>16</sup> usually far from the public eye. The events into which Justice Arbour inquired took place under a regime of newly-legislated rights and a *Charter* that had been entrenched for over a decade, all of which point to the often troubling gap between legislated norms and practice.<sup>17</sup>

Not so long ago, prisoners were treated as people without any rights at all. "Civil death," the concept that prisoners lost all civil and property rights, was abolished by English legislation in the late 19th century.<sup>18</sup> However, the 20th century pre-*Charter* history of corrections in Canada was largely characterized by a legislative and judicial "hands off" doctrine that entailed a broad delegation of power to administrative officials and a reluctance by courts to intervene in the affairs of prisons where prisoners claimed inhumane conditions or treatment.<sup>19</sup> However, widespread rioting in prisons in the 1970s, combined with a growing domestic and international awareness of human rights, led to numerous reports, such as a House of Commons Report in 1977,<sup>20</sup> which was damning of the Canadian prison system. The principal recommendation of the 1977 House of Commons Report, known as the MacGuigan Report, was that the Rule of Law must prevail inside Canadian penitentiaries. The release of the MacGuigan

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<sup>16</sup> The Annual Report of the Correctional Investigator provides a small window into uses of force, prisoner injuries, allegations of sexual harassment by staff, and other misconduct in federal prisons. See e.g. *Annual Report of the Office of the Correctional Investigator of Canada, 2005-2006* (Ottawa: Office of the Correctional Investigator of Canada, 2006), online: The Correctional Investigator Canada <[http://www.oci-bec.gc.ca/reports/AR200506\\_e.asp](http://www.oci-bec.gc.ca/reports/AR200506_e.asp)>.

<sup>17</sup> Campbell, *supra* note 14 at 323.

<sup>18</sup> *Forfeiture Act, 1870* (U.K.), 33rd & 34th Vic., c. 23. Prisoner disenfranchisement was the last vestige of civil death in Canadian law, at least until the recent decision in *Sauvé*, *supra* note 2.

<sup>19</sup> Campbell, *supra* note 14 at 291-95. The few "prisoners' rights" cases that made it to Canadian courts in the first 60 years of the 20th century, generally met with the "hands off" policy. See e.g. *R. v. Huckle* (1914), 19 D.L.R. 359, 23 C.C.C. 73 (Ont. H.C.) where the Court held that prisoners were not entitled to be given notice of prison rules before they could be punished for breach of them. The prisoners' claim to such a right of notice was a "fundamental misconception."

<sup>20</sup> House of Commons Sub-Committee on the Penitentiary System in Canada, *Report to Parliament* (Ottawa: Minister of Supply and Services, 1977), Sub-Committee Chair Mark MacGuigan [MacGuigan Report].

Report also coincided roughly with the beginnings of a judicial move away from a pure “hands off” approach to judicial review of prisoners’ claims. The Supreme Court of Canada held that prison officials were bound by a procedural duty to act fairly in correctional decision-making,<sup>21</sup> that prisoners had a limited right to privileged communication with their lawyers,<sup>22</sup> and that prisoners had “residual liberty interests” as members of the general prison population.<sup>23</sup>

Enter the *Charter*, with its explicit guarantees of freedom of expression, religion, association and conscience, as well as freedom from unreasonable search and seizure, and rights to equality and security of the person. Canada did not entrench prisoner-specific *Charter* rights like those contained in the South African *Bill of Rights* providing that “everyone who is detained ... has a right to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.”<sup>24</sup> The significance of this provision is that prisoners might have greater, not lesser, rights than non-incarcerated citizens (such as, for example, a potentially more robust right to medical treatment) which presumably is based on a recognition of the additional responsibility assumed by the state when it takes physical custody of individuals.<sup>25</sup> Nevertheless,

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<sup>21</sup> *Martineau v. Matsqui Institution* (No. 2), [1980] 1 S.C.R. 602, 106 D.L.R. (3d) 385.

<sup>22</sup> *Solosky v. R.*, [1980] 1 S.C.R. 821, 105 D.L.R. (3d) 745.

<sup>23</sup> In a trilogy of cases, the Supreme Court held that prisoners have certain procedural rights when prison officials decide to transfer them to administrative segregation or to high maximum security units: *Cardinal and Oswald v. Director of Kent Institution*, [1985] 2 S.C.R. 643, 24 D.L.R. (4th) 44; *R. v. Miller*, [1985] 2 S.C.R. 613, 52 O.R. (2d) 585; and *Morin v. Canada (National Special Handling Unit Review Committee)*, [1985] 2 S.C.R. 662, 24 D.L.R. (4th) 71.

<sup>24</sup> *Bill of Rights, Constitution of the Republic of South Africa 1996*, no. 108 of 1996, c. 2, s. 35(2).

<sup>25</sup> The entrenchment of explicit rights for prisoners in South Africa is not surprising given the history of discriminatory use of the criminal law and imprisonment to suppress opposition to Apartheid, and the fact that many of the country’s post-Apartheid leaders were themselves former prisoners. See Pierre de Vos, *Prisoners’ Rights Litigation in South Africa since 1994: a Critical Evaluation*, (Research Paper No. 3) (Cape Town, South Africa: Civil Society

the text of the *Charter* provides that most key rights are held by “everyone” or, in the case of equality, “every individual,” meaning that prisoners are not excluded from their protection. Clearly, on paper, prisoners are not “temporary outcasts” from the *Charter*'s reach. However, the extent to which these rights on paper have proven amenable to enforcement in the courts must be considered.

## II. POLITICAL AND LEGISLATIVE CONTEXTS FOR PRISONERS' RIGHTS CLAIMS UNDER THE *CHARTER*

The number and kind of claims brought by prisoners in the post-*Charter* era has increased,<sup>26</sup> but we have not witnessed an avalanche of *Charter* claims, let alone successful ones. The entrenchment of the *Charter*, with its liberal, universal human rights-based approach also coincided with a popular and political trend toward a “new punitiveness” (i.e. popular support for longer sentences, “no frills” imprisonment, shaming, “three-strikes” laws and the like), implying a rejection of earlier penal reform movements<sup>27</sup> in countries such as the U.S., Britain,<sup>28</sup> and perhaps to a lesser degree, Canada.<sup>29</sup> Through the 1980s, 1990s and into the twenty-first century, Canadians have been confronted regularly with media stories lamenting that this country has become “soft on

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Prison Reform Initiative, 2003) at 6-8, online: Community Law Centre, University of the Western Cape <[http://www.communitylawcentre.org.za/Projects/Civil-Society-Prison-Reform/publications/cspri-publications/prisoners\\_rights\\_litigation\\_no\\_3.pdf](http://www.communitylawcentre.org.za/Projects/Civil-Society-Prison-Reform/publications/cspri-publications/prisoners_rights_litigation_no_3.pdf)>.

<sup>26</sup> One commentator has noted an “intense period of inmate litigation following the proclamation of the Canadian Charter of Rights and Freedoms.” Mary Campbell, “Gone But Not Forgotten: Should Judges Be Allowed to Remedy at Re-sentencing?” (2006) 48 *Canadian Journal of Criminology and Criminal Justice* 305 at 306.

<sup>27</sup> “Introduction” in John Pratt *et al.*, eds., *The New Punitiveness: Trends, Theories, Perspectives* (Collumpton: Willan Publishing, 2005) at xii.

<sup>28</sup> David Garland, *The Culture of Control* (Oxford: Oxford University Press, 2001).

<sup>29</sup> Debra Parkes, “Prisoner Voting Rights in Canada: Rejecting the Notion of ‘Temporary Outcasts’” in Christopher Mele & Teresa Miller, eds., *Civil Penalties, Social Consequences* (New York: Routledge, 2005). See also Jeffrey Meyer & Pat O’Malley, “Missing the punitive turn? Canadian criminal justice, ‘balance’, and penal modernism” in Pratt, *supra* note 27 at 213 (for a discussion of how and why Canada’s criminal justice policy “cannot be subsumed under a general model of a global punitive turn”).



crime” and that prisoners are living the high life in “Club Fed”-type prisons, with all the comforts of home.<sup>30</sup> However, at the same time, we have not witnessed the kind of sustained political backlash against prisoner litigation itself that resulted in the 1996 U.S. statute, the *Prison Litigation Reform Act*<sup>31</sup> (“PLRA”), which radically reduced the rights of prisoners to bring claims to court in that country.

The PLRA was enacted in response to perceptions that American prisoner litigation was typically frivolous and a waste of the courts’ time. Famously, a case that involved a prisoner allegedly claiming a right to creamy peanut butter, rather than chunky, was held up as typical of prisoner litigation.<sup>32</sup> Armed with the myth of peanut butter litigation,<sup>33</sup> the U.S. Congress passed the PLRA which essentially treats prisoners as a special class of

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<sup>30</sup> See e.g. Allison Dunfield, “Police Seek Change in Prison Policies” *The Globe and Mail* (28 August 2002), online: globeandmail.com <<http://www.theGlobeandMail.com>>.

<sup>31</sup> *Prison Litigation Reform Act*, Pub. L. No. 104-134, 110 Stat. 1321-66 (1996).

<sup>32</sup> Susan Herman, “Slashing and Burning Prisoners’ Rights: Congress and the Supreme Court in Dialogue” (1998) 77 *Or. L. Rev.* 1229 at 1296-99.

<sup>33</sup> The “myth of peanut butter litigation” was coined by Susan Herman, *ibid.* at 1297. See also Jon Herman, “Pro Se Prisoner Litigation: Looking for Needles in Haystacks” (1996) 62 *Brooklyn L. Rev.* 519 at 521, where Justice Herman discusses his research into the facts of the “peanut butter case,” showing that the prisoner was really complaining about the fact that the prison had incorrectly debited his prison account for a number of items including a jar of peanut butter he did not order (because it was chunky, not smooth). Other cases held up as typical of frivolous prisoner litigation were also revealed as inaccurately described or anomalous. For example, at 520, one that had been described by four state attorneys general in a *New York Times* article as prisoners suing “because there were not salad bars or brunches on weekends or holidays” was revealed by Justice Herman to involve much more serious allegations:

In the “salad bar” case, forty-three prisoners filed a twenty-seven page complaint alleging major prison deficiencies including overcrowding, forced confinement of prisoners with contagious diseases, lack of proper ventilation, lack of sufficient food, and food contaminated by rodents. The prisoners’ reference to salads was part of an allegation that their basic nutritional needs were not being met, and they mentioned, in passing, that at their prison a salad bar is available to prison guards and, at other state prisons, is available to prisoners. The complaint concerned dangerously unhealthy prison conditions, not the lack of a salad bar.

litigants who are subject to additional procedural obstacles (more onerous “exhaustion of administrative remedies” rules, fewer remedies available in successful cases) and financial obstacles (exclusion from filing fee exemptions as indigents, and no entitlement to costs in successful cases). The law also includes a “three strikes” provision barring prisoners from using any indigent provisions if they have had three or more unsuccessful complaints or appeals, including those dismissed on technical grounds or before the *PLRA* came into force.

It is worth noting that instead of the legislative backlash to prisoners' rights experienced in the U.S. in the 1990s, Canadian prisoners saw the introduction of new legislation governing federal prisons in 1992—the *Corrections and Conditional Release Act* (“*CCRA*”). The *CCRA* requires that federal corrections be administered according to a set of principles, a number of which are particularly important to a discussion of prisoners' rights, including that the Correctional Service of Canada (“*CSC*”) must “use the least restrictive measures consistent with the protection of the public, staff members and offenders” (subsection 4(d)), that “offenders retain the rights and privileges of all members of society, except those rights and privileges that are necessarily removed or restricted as a consequence of sentence” (subsection 4(e)), and that correctional decisions must “be made in a forthright manner, with access by the offender to an effective grievance procedure” (subsection 4(g)). The *CCRA* also contains a number of specific rights such as an unqualified right to counsel in serious prison disciplinary matters (although no right to legal aid), a right to health care, and a right to notice and/or consultation concerning significant decisions other than those involving security. These rights are more specific than *Charter* rights and, therefore, may be more amenable to judicial review.<sup>34</sup> In addition, the office of the

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<sup>34</sup> For example, in a 1993 British Columbia case in which prisoners claimed a right to educational programs and sought an order that the *CSC* breached that right by cancelling a university education program, the British Columbia Supreme Court found a breach of the duty to consult found in s. 74 of the *CCRA*, but did not find a substantive right to the university education program (or any other particular program). The decision to cancel the program was quashed and the *CSC* was ordered to take any such decision in accordance with the *CCRA* (i.e. with the appropriate level of consultation with inmates). See *William Head*

federal ombudsperson for prisoners, the Correctional Investigator, originally created in 1973, has played a role in seeking to bring more accountability and transparency to correctional decision-making, as well as performing the function of alerting government and the public to some serious abuses in the federal prison system.

A similar overhaul and improvement of statutory rights of prisoners has not taken place at the provincial level, where the majority of prisoners are incarcerated.<sup>35</sup> While there have been some amendments to provincial correctional law, such as the Manitoba *Correctional Services Act* (“CSA”)<sup>36</sup> in 1998, the principles and purposes articulated in provincial corrections legislation are generally less ambitious than those in the federal *CCRA*. For example, the Manitoba *Act* does not contain specific entitlements such as rights to counsel, health care, and/or consultation found in the federal *Act*. At the same time, during the 1990s, the Conservative Party in Ontario swept to power on the strength of its “common sense revolution” that featured, among other neo-liberal and neo-conservative policies, a plan to replace all adult jails in the province with “super jails,” some of which would be privatized.<sup>37</sup> In 2004, British Columbia passed a new

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*Institution Inmate Committee et al. v. Canada (Correctional Service)*, 24 C.R. (4th) 399, 66 F.T.R. 262, [1993] F.C.J. No. 821 (T.D.). In a case where a prisoner claimed a right to education *per se* (albeit as an unrepresented litigant), his *Charter* claim was rejected. See *Pawliw v. Canada*, [1997] F.C.J. No. 379 (T.D.). For a discussion of the benefits of prisoner education programs, both to prisoners and to society, see Stephen Duguid, *Can Prisons Work? The Prisoner as Subject and Object in Modern Corrections* (Toronto: University of Toronto Press, 2000).

<sup>35</sup> In 2003 to 2004, of all admissions to correctional services in Canada (including custody, probation, and community sentences), 68.7% were to provincial custody, while only 2.1% were to federal custody. Canadian Centre for Justice Statistics (Juristat), *Adult Correctional Services in Canada, 2003/04*, by Karen Beattie vol. 25:8 (Ottawa: Canadian Centre for Justice Statistics, 2005) [Beattie].

<sup>36</sup> *Correctional Services Act*, S.M. 1998, c. 47-Cap. 230.

<sup>37</sup> Kim Richard Nossal & Phillip J. Wood, “The Raggedness of Prison Privatization: Australia, Britain, Canada, New Zealand and the United States Compared” (Paper presented at the Prisons 2004 conference on Prisons and Penal Policy: International Perspectives, London, June 2004) at 11-12, online: Queen’s University <[http://post.queensu.ca/~nossalk/papers/nossal\\_wood\\_prisons\\_0604.pdf](http://post.queensu.ca/~nossalk/papers/nossal_wood_prisons_0604.pdf)>.

*Correction Act*<sup>38</sup> and associated regulation, the *Correction Act Regulation*<sup>39</sup> (“*B.C. Regulation*”) which is remarkable for its lack of any mention of guiding principles or prisoners’ rights. Section two of the *B.C. Regulation*, which is headed “Inmate Privileges,” lists as privileges such basic entitlements as “clothing, a mattress and bedding,” “access to personal visits,” and “access to health care.” Similar “tough on crime” approaches at the provincial level have been more common than at the federal level, at least until recently.<sup>40</sup> In the current political climate, provincial and federal politicians undoubtedly perceive that they have nothing to win and everything to lose by embarking on prisoner’s rights reforms, if indeed, the matter crosses their minds. It is in this socio-political context that prisoners’ *Charter* claims must be considered.

### III. A BRIEF TOUR THROUGH PRISONER LITIGATION UNDER THE *CHARTER*<sup>41</sup>

In keeping with pre-*Charter* trends, the most significant successes in prisoner litigation have come in claims for procedural, not substantive, rights (with the exception of prisoner voting rights,

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<sup>38</sup> *Correction Act*, S.B.C. 2004, c. 46.

<sup>39</sup> *Correction Act Regulation*, B.C. Reg. 58/2005.

<sup>40</sup> Since the Conservative Party formed a minority government in Ottawa in January 2006 it has announced its intention to be “tougher on crime” than its Liberal predecessors. See e.g. Kathleen Harris, “Crime Crackdown Time: Harper Vows to Fast-forward Government’s Popular Justice Initiatives” *Calgary Sun* (4 April 2006) 7.

<sup>41</sup> In the interests of keeping this review of *Charter* litigation manageable and focused, cases involving the parole system have been omitted. The impact of the *Charter* in that context deserves its own study. For a discussion of the early years of *Charter* litigation concerning parole, see generally David Cole & Allan Manson, *Release from Imprisonment: The Law of Sentencing, Parole and Judicial Review* (Toronto: Carswell, 1990) and James O’Reilly, *Prisoners as Possessors of Rights in Canadian Law* (LL.M. Thesis, University of Ottawa, 1989) at 135-59 [unpublished]. Some more recent discussion of specific issues concerning parole and the *Charter* can be found in Allan Manson, Patrick Healy & Gary Trotter, *Sentencing and Penal Policy in Canada: Cases, Materials and Commentary* (Toronto: Emond Montgomery, 2000) at c.19, and, for example, Nathan J. Whitling, “*Comsa v. Canada (N.P.B.)*: The Right to a Timely Post-Revocation Hearing” (2002) 40 *Alta. L. Rev.* 511.

discussed below).<sup>42</sup> Further, the vast majority of challenges, particularly successful ones, have come in the federal system, since the relatively short-term nature of provincial detention makes it less likely that prisoners will be able to mount a *Charter* challenge during that time. What follows is not meant to be a comprehensive or empirical survey of all prisoner litigation under the *Charter*. Rather, it is an impressionistic review of cases this author considers significant, sometimes because of their outcome as positive or negative for prisoners, but more often for what they indicate about judicial approaches to prisoners' rights under the *Charter*, as well as any barriers or challenges to the effective adjudication of prisoners' *Charter* claims.

### A. SECTION 3: THE RIGHT TO VOTE

The most successful single *Charter* right to be litigated by prisoners is section 3, the right to vote, as evidenced by two decades of challenges to prisoner voting bans at both the federal<sup>43</sup> and provincial<sup>44</sup> level. With the Supreme Court of Canada decision in *Sauvé*,<sup>45</sup> all prisoner disenfranchisement laws in Canada, save one,<sup>46</sup> have been repealed or declared invalid.<sup>47</sup> In

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<sup>42</sup> While prisoner voting is characterized here as a substantive right (rather than a right that concerns procedural fairness in correctional decision-making), a right to participate in the political process through voting is, in many ways, analogous to procedural rights that do not necessarily change the substantive outcome for a prisoner litigant. It is a classic participatory right, rather than a right to certain conditions or treatment.

<sup>43</sup> See e.g. *Sauvé*, *supra* note 2, as well as earlier cases such as *Belczowski v. Canada*, [1992] 2 F.C. 440 (C.A.), 90 D.L.R. 330, *aff'd* [1993] 2 S.C.R. 438.

<sup>44</sup> See e.g. *Reynolds v. British Columbia (Attorney General)* (1984), 11 D.L.R. (4th) 380, 53 B.C.L.R. 394 (C.A.); *Badger v. Manitoba (Attorney General)* (1986), 30 D.L.R. (4th) 108, 27 C.C.C. (3d) 158, (Man. Q.B.); and *Byatt v. Dykema* (1998), 158 D.L.R. (4th) 644, (*sub nom. Byatt v. Alberta*) 216 A.R. 100 (Alta. C.A.).

<sup>45</sup> For further discussion of *Sauvé* and its implications, see Parkes, "Prisoner Voting Rights in Canada", *supra* note 29 and Debra Parkes, "Ballot Boxes Behind Bars: Toward the Repeal of Prisoner Disenfranchisement Laws" (2004) 13 Temp. Pol. & Civ. Rts. L. Rev. 71.

<sup>46</sup> The only remaining prisoner voting ban is found in s. 43(c) of the *Alberta Election Act*, R.S.A. 2000, c. E-1 which disqualifies all sentenced prisoners from voting in an Alberta election except for those serving sentences of 10 days or less or for the non-payment of fines. The government of Alberta has demonstrated a

*Sauvé*, a majority of the Court found that the government's objectives for disenfranchising citizen prisoners,<sup>48</sup> namely enhancing civic responsibility and providing additional punishment, were too vague and symbolic to justify limiting the right to vote. The majority rejected the government's attempts to justify the voting ban in a remarkably robust fashion which included, for example, calling the government's arguments a "façade of rhetoric."<sup>49</sup>

The strong language used to denounce both the rights violation and its attempted justification in *Sauvé* sets that decision apart from the majority of prisoners' rights cases, such as those involving legal rights guaranteed by sections 7 and 8, where justifications based on institutional security and deference to prison decision-making tend to be decisive. In *Sauvé*, the government simply could not demonstrate any "specific problem or concern" to which the voting ban was directed.<sup>50</sup> Yet keeping in mind the differences between the voting rights context and most other prisoners' rights cases, there remain some potentially significant aspects of the decision for the future of prisoner litigation under the *Charter* which will be considered later in this paper. They include the Supreme Court of Canada's robust section 1 justification analysis, its clear rejection of the idea of automatic deference for penal decisions and its strong statement that the *Charter* rights of prisoners are just that—rights, not privileges.

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strong commitment to preserving its prisoner voting ban. See *Promoting Responsible Citizenship, Report to the Minister of Justice by the MLA Committee Making Recommendations on Restrictions on Prisoner Voting in the Alberta Election Act* (Edmonton: Alberta Justice, 1998), online: Alberta Justice <<http://www.justice.gov.ab.ca/downloads/documentloader.aspx?id=45189>>. The constitutionality of the Alberta law has not yet been considered in light of the Supreme Court's decision in *Sauvé*.

<sup>47</sup> See e.g. Canadian Press, "A bill introduced Friday in New Brunswick will allow inmates to vote in provincial elections" *New Brunswick Telegraph-Journal* (4 April 2003).

<sup>48</sup> The right to vote in s. 3 of the *Charter* is limited to Canadian citizens.

<sup>49</sup> *Sauvé*, *supra* note 2 at para. 52.

<sup>50</sup> *Ibid.* at para. 21, McLachlin C.J.C.

## B. SECTION 7: THE RIGHT TO LIFE, LIBERTY AND SECURITY OF THE PERSON

Section 7 is the most heavily litigated section of the *Charter* by prisoners, most often as a basis for procedural rights claims, but also occasionally to make substantive rights claims.<sup>51</sup> Many cases involve the requirements of procedural fairness and safeguards in prison decisions implicating the liberty interests of prisoners (i.e. disciplinary hearings in which prisoners can lose earned remission or face time in segregation), while a few cases involve allegations that prisoners' rights to security of the person are violated by practices such as double-bunking or random urinalysis. I will begin with an analysis of the procedural rights cases.

### 1. SECTION 7 AND PROCEDURAL RIGHTS

Section 7 of the *Charter* has been interpreted to provide prisoners with some procedural rights in relation to prison disciplinary hearings, involuntary transfers, and other significant correctional decisions. For example, in *Pickard v. Mountain Institution* where a disciplinary charge was not fully particularized and where the Independent Chairperson relied on hearsay and the testimony of "unidentified speakers," Strayer J. quashed the conviction for possession of contraband and ordered a rehearing.<sup>52</sup> Prisoners have also, on occasion, successfully argued in Federal Court<sup>53</sup> or

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<sup>51</sup> The prevalence of s. 7 cases concerned with procedural rights is not unique to the prison context, but is a trend in the s. 7 jurisprudence more broadly. For example, the argument that s. 7 includes a substantive, positive right to a basic level of social assistance as part of its protection of "security of the person" was rejected by a majority of the Supreme Court in *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429, 221 D.L.R. (4th) 257 [*Gosselin* cited to S.C.R.]. Chief Justice McLachlin stated, at para. 77, "the dominant strand of jurisprudence on s. 7 sees its purpose as guarding against certain kinds of deprivations of life, liberty and security of the person, namely, those 'that occur as a result of an individual's interaction with the justice system and its administration'," although she left open the possibility that s. 7 might one day be interpreted to include positive state obligations.

<sup>52</sup> *Pickard v. Mountain Institution* (1994), 30 C.R. (4th) 399, (*sub nom. Pickard v. Mountain Institution Disciplinary Court (Independent Chairperson)*) 75 F.T.R. 147 (T.D.).

<sup>53</sup> *Storry v. William Head Institution*, 139 F.T.R. 122, [1997] F.C.J. No. 1768 (T.D.). The application was allowed where the Court found the transfer

provincial superior courts<sup>54</sup> that their section 7 rights were violated in decisions to involuntarily transfer them to higher security institutions. In one case, the Court noted that while the general climate in society is against prisoners' rights, the Court could not allow that atmosphere to influence the outcome of the prisoner's request for judicial review.<sup>55</sup> In *DeMaria v. Canada (Regional Transfer Board and Warden of Joyceville Institution)*,<sup>56</sup> Reed J. held that section 7 requires, in addition to procedural fairness, "that decisions not be made in an unreasonable or arbitrary manner." This means that prisoners must be given an opportunity to know the essence of the allegations against them and must be given sufficient information to respond to those allegations. In that case, DeMaria had been transferred from medium to maximum security because he was overheard making a call to his member of parliament. However, it has been suggested by Wayne MacKay that these cases are "the exceptions which prove the rule. In general, the rule is that courts regard the transfer of a prison inmate from one institution to another as the classic example of an administrative decision which the courts should leave to the bureaucrats on the front lines."<sup>57</sup>

These procedural fairness cases can be seen as an extension of the broader pre-*Charter* common law trend toward greater procedural protections in administrative decision-making, and more specifically, the trend toward greater procedural protections in the prison context. For example, since 1980, disciplinary tribunals in federal maximum and medium security penitentiaries have been staffed by Independent Chairpersons from outside the

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decision patently unreasonable. CSC officials relied on the word of an informant who had earlier recanted similar allegations against another prisoner.

<sup>54</sup> *Fitzgerald v. William Head Institution*, [1994] B.C.J. No. 1534, [1994] B.C.W.L.D. 1982 (S.C.) [*Fitzgerald* cited to B.C.J.]. The petition for *habeas corpus* brought in provincial superior court was allowed where the Court found the CSC decision to be "extremely arbitrary and unfair" to the prisoner and, as such, patently unreasonable. The prisoner was not permitted to know the identity of the informant who alleged that he was planning an escape.

<sup>55</sup> *Ibid.* at para. 64.

<sup>56</sup> *DeMaria v. Canada (Regional Transfer Board and Warden of Joyceville Institution)*, [1988] 2 F.C. 480, 62 C.R. (3d) 248 at 254 (F.C.T.D.).

<sup>57</sup> A. Wayne MacKay, "Inmates' Rights: Lost in the Maze of Prison Bureaucracy?" (1988) 11 Dal. L. J. 698 at 702.



Correctional Service, rather than by guards or other correctional staff. This reform was implemented as a result of recommendations made by two Parliamentary committees,<sup>58</sup> which echoed a recommendation initially made by Professor Michael Jackson in 1974.<sup>59</sup> These reports concluded that a disciplinary process in which correctional staff were both accusers and adjudicators simply could never offer fairness to prisoners, let alone the appearance of fairness. According to Jackson, the overarching flaw in the warden's court system was that the very people responsible for maintaining the good order of the institution were the ones judging whether prisoners had committed offences against that good order. The judges, in other words, were the offended parties. Furthermore, in most cases these adjudicators brought considerable personal knowledge of the prisoners to the hearings based on their previous dealings with them, and it was therefore impossible for the adjudicators to approach a particular case free of that bias in such a context.<sup>60</sup>

While Jackson's *Justice Behind the Walls* documents some of the complaints that both prisoners and guards continue to have about the conduct of disciplinary hearings by Independent Chairpersons, his conclusion is that, on balance, the practice of having Independent Chairpersons has improved the level of fairness, impartiality, and consistency in disciplinary proceedings in federal penitentiaries.

Unfortunately, the same cannot be said for provincial disciplinary processes across the country. While the practice of having independent adjudicators in the federal system has been codified in the *Corrections and Conditional Release Act* and its regulations, this author is not aware of any provinces that have followed suit. In British Columbia,<sup>61</sup> Theodore Allard, a prisoner serving provincial time, asked the provincial superior court to find

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<sup>58</sup> MacGuigan Report, *supra* note 20 and *Report of the Study Group on Dissociation* (Ottawa: Solicitor General of Canada, 1975) Chair: James A. Vantour.

<sup>59</sup> Michael Jackson, "Justice Behind the Walls: A Study of the Disciplinary Process in a Canadian Penitentiary" [1974] 12 Osgoode Hall L.J. 1.

<sup>60</sup> Jackson, *Justice Behind the Walls*, *supra* note 6 at 190.

<sup>61</sup> *Allard v. Nanaimo Correctional Centre*, 2000 BCSC 1159, [2000] B.C.J. No. 1602 (S.C.) [*Allard* cited to BCSC].

the regulations governing provincial disciplinary hearings to be contrary to section 7 of the *Charter*, primarily on the ground that they provided for adjudication by prison officials and not independent decision-makers. In this case, Holmes J. found that serious breaches of natural justice had been committed by the institutional decision-maker. These breaches included the prisoner being asked to leave the room to permit confidential information being read into the record, the tape recording of the hearing containing a three minute blank space during this time, and the prisoner being prevented from calling witnesses because the adjudicator believed that the prisoners had probably collaborated on a story. However, while the decision itself was quashed, the Court found the *Charter* issue moot since the prisoner had since been released and was credited with his lost earned remission time.<sup>62</sup>

In a Manitoba case involving a provincial disciplinary hearing that navigated a variety of procedural barriers, the Court found in favour of the prisoner's section 7 *Charter* claim, quashing the decision of a prison disciplinary board.<sup>63</sup> The Court held that the chairperson of the disciplinary board, who was the Deputy Superintendent of the prison, had committed a number of breaches of natural justice. The Court held that:

when the chairperson of the discipline board explains to the board the evidence from his perspective; when no opportunity is afforded counsel to cross-examine witnesses or otherwise challenge evidence upon which the board obviously relied; when the chairperson gives evidence, albeit unsworn, to the board, I think any reasonable person would have serious, legitimate questions about the impartiality of the board.<sup>64</sup>

While the disciplinary decision was quashed, it does not appear that this case has led to systemic improvements in procedural fairness for provincial prisoners in Manitoba. It would appear that disciplinary proceedings in Manitoba jails continue to operate in a

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<sup>62</sup> *Ibid.* at paras. 30, 31, 43, 44.

<sup>63</sup> *R. v. Brown and Hunter* (29 November 1990), Winnipeg 90-02-00045 (Man. Q.B.) [on file with author], summarized in (1991) 21 C.R.D. 300-03, 13 W.C.B. (2d) 221.

<sup>64</sup> *Ibid.* at 7.

manner not unlike that documented in this 1990 decision, despite proclamation of a new CSA and associated regulation<sup>65</sup> in 1999. For example, the “discipline board” is composed of correctional officers in the same institution (although they must not be those involved in the incident at issue)<sup>66</sup> and no right to counsel is even mentioned for those hearings which might qualify as “serious disciplinary proceedings” engaging a right to counsel under the reasoning of the Supreme Court in *Howard*,<sup>67</sup> discussed below. Instead, the *Manitoba Regulation* simply allows that a prisoner “may request the assistance of a person of the inmate's choice who in the opinion of the chair of the discipline board, is reasonably available and would not present a security concern.”<sup>68</sup>

In *Howard*, the Federal Court of Appeal held that the section 7 right not to be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice, entails a right to be represented by counsel at certain prison disciplinary hearings. The right to counsel in proceedings where prisoners could lose earned remission or be placed in solitary confinement was deemed necessary to insure a fair hearing. Justice MacGuigan<sup>69</sup> in *Howard* commented on the need for judicial inquiry into the procedural rights and protections afforded to prisoners. He held that courts should not micro-manage the administration of prisons, but neither should they allow prison authorities to operate on principles of convenience, necessity and their own “expertise.” In his reasoning, Justice MacGuigan held that, “[a]ll that is not immediately necessary must certainly yield to the fullest exigencies of liberty.”<sup>70</sup>

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<sup>65</sup> *Correctional Services Regulation*, Man. Reg. 128/99 [*Manitoba Regulation*].

<sup>66</sup> *Ibid.*, ss. 9(1), 9(3)(a).

<sup>67</sup> *Howard v. Presiding Officer of the Inmate Disciplinary Court of Stony Mountain Institution*, 45 C.R. (3d) 242, [1984] 2 F.C. 642 [*Howard* cited to F.C.]. The federal government's appeal to the Supreme Court of Canada was quashed as moot: [1987] 2 S.C.R. 687.

<sup>68</sup> *Manitoba Regulation*, *supra* note 65, s. 12(c).

<sup>69</sup> MacGuigan J. was well-versed in these issues, having previously chaired the House of Commons Sub-Committee on the Penitentiary System in Canada, *supra* note 20, in which a chief finding was the absence of the rule of law inside prison walls.

<sup>70</sup> *Howard*, *supra* note 67 at 682.

While there is a right to representation by counsel at important prison disciplinary hearings (now codified in regulations<sup>71</sup> under the *CCRA* for federal prisoners), that right may be more illusory than real. Neither the Supreme Court nor any lower court in Canada has recognized a *Charter* right to publicly-funded legal aid for prison disciplinary matters. The vast majority of prisoners are poor and cannot afford to retain a lawyer. Therefore, without access to legal aid, most prisoners cannot enforce any right they may have to legal representation. A study by Professor Michael Jackson estimated that between 1993 and 1999, less than one percent of male prisoners facing disciplinary hearings in British Columbia's maximum and medium security federal penitentiaries were represented by counsel.<sup>72</sup> This finding is perhaps unsurprising given that a 2003 study commissioned by the federal Department of Justice found legal aid coverage for prisoners across the country to be woefully inadequate to meet the access to justice needs of federal prisoners who suffer serious consequences without legal assistance.<sup>73</sup> However, one might have expected that the rate of legal representation in disciplinary hearings in B.C. would have been higher. Unlike the situation in other provinces, at the time of the Department of Justice study, B.C. had a dedicated legal aid office for prisoners, located near the federal prisons where Jackson's study was conducted.

In 1999, the Supreme Court of Canada in *Winters*<sup>74</sup> held that there was a statutory right under the British Columbia *Legal Services Society Act* to "legal services." This statutory right to legal services was found in connection with the prison disciplinary

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<sup>71</sup> *Corrections and Conditional Release Regulations*, S.O.R./92-620, s. 31(2) provides that "[t]he service shall ensure that an inmate who is charged with a serious disciplinary offence is given a reasonable opportunity to retain and instruct legal counsel for the hearing, and that the inmate's legal counsel is permitted to participate in the proceedings to the same extent as an inmate pursuant to subsection (1)."

<sup>72</sup> Jackson, *Justice Behind the Walls*, *supra* note 6 at 277.

<sup>73</sup> Department of Justice Canada, *Study of the Legal Services Provided to Penitentiary Inmates by Legal Aid Plans and Clinics in Canada* (Ottawa: Department of Justice Canada, 2002), online: Department of Justice Canada <<http://canada.justice.gc.ca/en/ps/rs/rep/2003/rr03lars-10/index.html>>.

<sup>74</sup> *Winters v. Legal Services Society*, [1999] 3 S.C.R. 160, 66 C.R.R. (2d) 241.

hearing of Arthur Winters, where the punishment upon conviction was solitary confinement. However, the instability of such a statutory right was clearly demonstrated in B.C. in recent years when legal aid cuts forced the closure of the Prisoners' Legal Services legal aid clinic. Some prisoner legal services are now being provided through a not-for-profit society, the West Coast Prison Justice Society, which receives a minimal level of legal aid funding to provide services only "as required under the *Canadian Charter of Rights and Freedoms*."<sup>75</sup> The Canadian Bar Association ("CBA") has launched a *Charter* challenge on the basis that inadequate funding of legal aid in B.C. violates various *Charter* rights of poor people.<sup>76</sup> However, that claim was recently struck on the grounds that the CBA has no standing to bring the claim and because the claim fails to disclose a reasonable cause of action pursuant to any of the constitutional provisions pleaded.<sup>77</sup> It remains to be seen if a solution to the lack of legal aid for prisoners, in particular, can be found in the courts,<sup>78</sup> since a political solution seems unlikely at present. The reality is that without adequate legal aid funding, prisoners simply do not have

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<sup>75</sup> See Legal Services Society of British Columbia, *Fact Sheet* (Vancouver: Legal Services Society of British Columbia, 2007), online: Legal Services Society of British Columbia <[http://www.lss.bc.ca/assets/newsroom/fact\\_sheets/LSS\\_servicessummary.pdf](http://www.lss.bc.ca/assets/newsroom/fact_sheets/LSS_servicessummary.pdf)>.

<sup>76</sup> See resources concerning this legal challenge, online: Canadian Bar Association <<http://www.cba.org/CBA/Advocacy/legalAid>>.

<sup>77</sup> *Canadian Bar Association v. British Columbia*, 2006 BCSC 1342, [2006] B.C.J. No. 2015 (S.C.).

<sup>78</sup> It would be open to a court to find in a prisoners' case that the combined impact of previous decisions such as *Rowbotham* and *J.G.* amounts to a right to publicly-funded legal aid where a prisoner will not receive a fair disciplinary hearing without representation by counsel. In *R. v. Rowbotham* (1988), 63 C.R. (3d) 113, 41 C.C.C. (3d) 1 [*Rowbotham*], the Ontario Court of Appeal held that accused persons have a right to legal aid where the Court determines that they will not receive a fair trial without representation by counsel. In *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, 26 C.R. (5th) 203, [1999] 3 S.C.R. 46 [*J.G.*], the Supreme Court of Canada held that a mother facing the apprehension of her child by the province was entitled to publicly-funded legal aid as part of her s. 7 right to security of the person. In a future case brought by a prisoner, it is conceivable that a court could order legal aid to be provided to the prisoner as the remedy under s. 24(1) for a breach of s. 7 of the *Charter*.

meaningful access to the courts to enforce the *Charter* in Canada's prisons.

## 2. SECTION 7 AND SUBSTANTIVE RIGHTS

Section 7 of the *Charter* has had relatively little impact on prisoners outside the procedural rights context. For example, the practices of double-bunking<sup>79</sup> and compulsory urinalysis without individualized suspicion<sup>80</sup> have been found not to violate prisoners' section 7 right to security of the person. On the other hand, a potentially significant section 7 case involving prisoners' access to health care was settled before a trial decision could be rendered.<sup>81</sup> Barry Strykiwsky, a prisoner at Stony Mountain Institution in Manitoba sought a declaration that the CSC's refusal to provide methadone treatment for his heroin addiction violated his rights under sections 7, 12, and 15 of the *Charter*.<sup>82</sup> He sought an order that the CSC had a legal duty to provide methadone treatment to him and to all medically-eligible prisoners who

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<sup>79</sup> *Piche v. Canada (Solicitor General)* (1984), 17 C.C.C. (3d) 1, aff'd (1989), 47 C.C.C. 495 (C.A.) [*Piche*]; *Williams v. Canada (Commissioner of Corrections)*, [1993] F.C.J. No. 646 (T.D.); *Protective Custody Inmates, Kent Institution v. Kent Institution*, 2 W.D.C.P. (2d) 193, [1991] F.C.J. No. 221 (T.D.); and *Sweet v. Canada* (1999), 249 N.R. 17, [1999] F.C.J. No. 1539 (C.A.), all of which were unsuccessful. However, there may be circumstances where a prisoner can establish that he or she will be personally affected by a policy of double-bunking. See e.g. *R. v. K.R.P.*, [1994] B.C.J. No. 2405 (Prov. Ct.) where the Court said that:

double bunking as it is practiced at [Prince George Regional Correctional Centre], based on the evidence before me, is not acceptable treatment. It borders on outrageous and cannot be condoned by the Courts ... Government must provide sufficient financial resources to prisons to avoid double bunking. As to Mr. P., although I am not satisfied on the evidence that he has been, or will be, subjected to cruel and unusual treatment, I direct that he be housed in a cell where there is no double bunking.

<sup>80</sup> *Fieldhouse v. Canada* (1995), 40 C.R. (4th) 263, 98 C.C.C. (3d) 207 (B.C.C.A.).

<sup>81</sup> *Strykiwsky v. Stony Mountain Institution*, 193 F.T.R. 59, [2000] F.C.J. No. 1404 (T.D.).

<sup>82</sup> The claim also relied on s. 86 of the *CCRA*, *supra* note 7, which requires CSC to provide every prisoner with "(a) essential health care; and (b) reasonable access to non-essential mental health care that will contribute to the inmate's rehabilitation and successful reintegration into the community."

wished to have that treatment. In the settlement, the CSC acknowledged that prisoners with opiate addictions have a “right to receive methadone maintenance treatment as essential health care” in accordance with a set of new treatment guidelines.<sup>83</sup> The settlement was significant because it applied to the whole class of prisoners represented by Strikiwsky. Therefore, instead of granting one particular prisoner access to methadone treatments, the settlement involved a significant policy change to prison health care treatment generally.<sup>84</sup>

In a recent section 7 case,<sup>85</sup> the Alberta Court of Queen’s Bench declared that limiting remand prisoners’ phone access to only collect calls violated their section 7 liberty right to a fair trial in accordance with the principles of fundamental justice, as well as the presumption of innocence guaranteed by subsection 11(d). The decision is significant for its consideration of the way that prison rules and decisions may affect remand prisoners and sentenced prisoners differently, as well as for the way in which it addresses the objection that section 7 does not protect purely “economic interests.”<sup>86</sup> Distinguishing two previous decisions by the Federal Court that had rejected section 7 challenges to prison telephone restrictions, the Court held:

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<sup>83</sup> See *Courting Rights: Case Studies in Litigating the Human Rights of People Living with HIV* (Toronto: Canadian HIV/AIDS Legal Network, 2006), online: Canadian HIV/AIDS Legal Network <<http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=1013>>.

<sup>84</sup> See also an interlocutory decision of the Alberta Court of Queen’s Bench allowing a provincial prisoner’s application for medical treatment (pain medication) pending trial on the issue of his right to adequate medical care in prison: *Geary v. Alberta (Edmonton Remand Centre)*, 2004 ABQB 19, [2004] 5 W.W.R. 634.

<sup>85</sup> *Criminal Trial Lawyers’ Assn. v. Alberta (Solicitor General)*, 2004 ABQB 534, [2004] A.W.L.D. 526 (Q.B.) [*Criminal Trial Lawyers*].

<sup>86</sup> In *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, 88 D.L.R. (4th) 577 [*Irwin Toy* cited to S.C.R.], the Supreme Court of Canada held that the economic interests of a corporation were not protected by s. 7, but said that it would be “precipitous” to exclude from the *Charter* economic rights such as those guaranteed in international human rights documents (at para. 95). However, litigation brought by low-income Canadians challenging restrictive social assistance laws as violations of *Charter* rights have met with little success. See e.g. David Wiseman, “The Charter and Poverty: Beyond Injusticiability” (2001) 51 U.T.L.J. 425.

The effect of limits on a remand prisoner's ability to raise bail and locate potential witnesses may be much more direct and dramatic than that created by a requirement of collect telephone calls from serving prisoners. Those persons have already been convicted; raising bail is not an issue they face, nor is the need to contact witnesses for trial. In comparison, the effect on remand prisoners, to the extent it limits their right to apply for bail or secure defense evidence for trial, directly impacts upon their ability to obtain release pending trial, and to defend themselves at trial.<sup>87</sup>

This difference transforms the issue from an economic one into a question of liberty. Under the operation of the new telephone system it is not the prisoner's ability to pay the cost of a local collect telephone call which is at issue, but rather the prisoner's inability to fully pursue opportunities to obtain release from custody or mount a defence at trial. The fact that economic limitations on the part of the recipient of the calls may be the immediate cause of the problem does not transform the issue into an economic one.<sup>88</sup>

The Court clearly focused on the fact that this restriction affected remand prisoners in a way that had an impact on their right to a fair trial. It remains to be seen whether other cases involving the rights of remand prisoners will achieve similar success.<sup>89</sup>

### C. SECTION 8: RIGHT TO BE FREE FROM UNREASONABLE SEARCH AND SEIZURE

From strip searches to reading mail to taping telephone calls, courts have generally dismissed allegations that prison officials violated prisoners' section 8 right to be free from unreasonable

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<sup>87</sup> *Criminal Trial Lawyers*, *supra* note 85 at para. 75.

<sup>88</sup> *Irwin Toy*, *supra* note 86 at paras. 75-76.

<sup>89</sup> An omnibus *Charter* challenge to remand conditions at the Edmonton Remand Centre is ongoing in the Alberta Court of Queen's Bench, after surviving numerous motions, including one to dismiss the action as moot, which was rejected by the Court of Queen's Bench: *Trang v. Alberta (Edmonton Remand Centre)*, 2004 ABQB 497, [2004] A.J. No. 796 [*Trang* Alta. Q.B. cited to A.J.] and Alberta Court of Appeal: 363 A.R. 167, [2005] A.J. No. 157 [*Trang* C.A. cited to A.J.], leave to appeal to S.C.C. refused, 346 N.R. 194, [2005] S.C.C.A. No. 161.



search or seizure. Most of these cases do not proceed to the section 1 justification stage because the courts tend to find that the penitentiary context, by its very nature, leads to a diminished expectation of privacy, rendering virtually any search reasonable.<sup>90</sup> For example, in *Warriner v. Kingston Penitentiary*,<sup>91</sup> the Federal Court found no violation of section 8 where a prisoner was ordered to strip and “bend over” in order to allow a visual inspection of his anal cavity after a contact visit with his wife. The Court also rejected an argument that the humiliation and degradation caused by the “bend over” order amounted to a violation of prisoners’ security of the person contrary to section 7 of the *Charter*.

However, in a few cases, courts have found that certain searches and seizures within prisons violate section 8 rights, leading to a remedy under subsection 24(2) of the *Charter* where the prisoner is awaiting trial. In *R. v. Williamson*,<sup>92</sup> the Court found that a policy of universally taping prisoners’ telephone calls was an unreasonable search and seizure, and that evidence obtained from the taped phone calls was inadmissible against the accused. On the other hand, in *R. v. Lamirande*,<sup>93</sup> the Manitoba Court of Appeal distinguished and disagreed with *Williamson*, finding no violation of section 8 where correctional officials had seized personal notes from a prisoner and sought to use them in a prosecution against her. The prisoner was said to have no reasonable expectation of privacy in relation to the personal notes and diaries. Similarly, in *R. v. Sutherland*,<sup>94</sup> a prisoner’s diaries were seized by correctional officials and used in a dangerous offender hearing. Whether considered at the section 8, 1 or subsection 24(2) stage, the fact that prison officials have

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<sup>90</sup> In *Weatherall v. Canada (Attorney General)* (1993), 23 C.R. (4th) 1, [1993] 2 S.C.R. 872 [*Weatherall* cited to S.C.R.], the Supreme Court held that the reasonable expectation of privacy, which is the basis for the s. 8 right, is much lower in prison than in the outside community.

<sup>91</sup> *Warriner v. Kingston Penitentiary*, [1991] 2 F.C. 88, 39 F.T.R. 285, [1991] F.C.J. No. 1116 (T.D.).

<sup>92</sup> *R. v. Williamson* (1998), 2 C.R.R. (2d) 277, 123 C.C.C. (3d) 540 (Alta. Q.B.).

<sup>93</sup> *R. v. Lamirande*, 2002 MBCA 41, [2002] M.J. No. 133.

<sup>94</sup> *R. v. Sutherland*, 120 Man. R. (2d) 125, [1997] M.J. No. 390 (Q.B.).

legitimate security concerns related to contraband, potential escapes or the commission of other offences within prisons looms large in these cases and thus, the *Charter* right against unreasonable search and seizure has had relatively little impact on the lives of prisoners.

#### D. SECTION 2: FUNDAMENTAL FREEDOMS OF EXPRESSION AND RELIGION

Prisoners' claims based on freedom of expression have also been largely unsuccessful. Perhaps not surprisingly, Clifford Olson, a notorious prisoner serving a sentence for multiple first degree murders, lost a challenge to an administrative rule limiting his access to the media.<sup>95</sup> The policy of limiting Olson's media access constituted a violation of his freedom of expression (the Crown conceded this point), but the policy was saved by section 1 and was found to minimally impair Olson's expressive rights. According to the Court, Olson was permitted to express himself in a variety of ways; he was just not allowed to express himself to the media. At least two pressing and substantial objectives were found, namely facilitating Olson's rehabilitation through reducing his notoriety, as well as limiting the security risk Olson posed in the institution.

That is not to say that there have been no successful free speech cases. In a 1997 Federal Court decision,<sup>96</sup> one aspect of the CSC's telephone access policy (Commissioner's Directive 085) was found to unjustifiably infringe prisoners' freedom of expression. The contested elements of the policy included: a limit of 40 telephone numbers that each prisoner was permitted to call (plus common access numbers such as legal aid, politicians, and senior government officials), the recording and/or monitoring of telephone calls, and a "voice-over" message advising all telephone call recipients that "this call is from a correctional institution. This call may be monitored or recorded." The policy was upheld (as a

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<sup>95</sup> *Olson v. Canada* (1996), 34 C.R.R. (2d) 1, [1996] 2 F.C. 158 (T.D.).

<sup>96</sup> *Hunter v. Canada (Commissioner of Corrections)* (1997), 9 C.R. (5th) 120, [1997] F.C.J. No. 959 (T.D.).

violation of subsection 2(b) justified by section 1)<sup>97</sup> except for the voice-over part of the policy, which was not justified by section 1.<sup>98</sup>

The CSC's objectives were found to be pressing and substantial: (1) to enhance inmate telephone communication with family and other significant community members to promote rehabilitation and (2) to control inmate communications that might result in the commission of a crime. The voice-over ("forced speech") aspect of the policy failed the "minimal impairment" branch of the section 1 *Oakes* test.<sup>99</sup> The Court considered it "patently intrusive" and not necessary to achieve the rehabilitative or precautionary objectives of the policy. The Court extended an interlocutory injunction granted with respect to the voice-over policy, which prohibited the CSC from using the voice-over feature. However, it is important to note that subsection 2(b) of the *Charter* has been interpreted in a very expansive fashion, with all the doctrinal and analytical "work" being done at the section 1 justification stage.<sup>100</sup> A rigorous section 1 analysis in a freedom of expression case (whether the litigant is a prisoner or anyone else) will not necessarily translate into the analysis of other *Charter* rights.

The only reported freedom of religion cases relate to limited religious services provided to remand prisoners<sup>101</sup> and a claim that

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<sup>97</sup> The plaintiffs also unsuccessfully argued that the policy violated ss. 7 and 8 of the *Charter*.

<sup>98</sup> There are other cases involving prisoners' access to telephones. For example, in *Alcorn v. Canada (Commissioner of Corrections)*, 2002 FCA 154, [2002] F.C.J. No. 620, the Federal Court of Appeal found no violation of prisoners' rights under ss. 7, 10(b), and 15 of the *Charter* when the CSC instituted its Millennium Telephone System which increased the cost of local calls to two dollars (from twenty-five cents or free).

<sup>99</sup> *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103.

<sup>100</sup> Peter Hogg, *Constitutional Law of Canada, Student Edition 2005* (Toronto: Carswell, 2005) at 952.

<sup>101</sup> *Maltby v. Saskatchewan* (1982), 143 D.L.R. (3d) 649, [1982] S.J. No. 871 (Q.B.). This allegation was part of an omnibus *Charter* challenge to remand prison conditions, brought within the first year of the *Charter*. The Court found no violation of s. 2(a) of the *Charter*. But see *R. v. Chan*, 387 A.R. 123, [2005] A.J. No. 1118 (Q.B.) where a sentencing judge found that a remand prisoner's s. 2(a) freedom of religion was unjustifiably infringed by failing to meet his religious-based request for a vegetarian diet. The remedy was a judicial

a prison smoking ban infringed the rights of Aboriginal prisoners to practice their religion (tobacco being an important part of the religious practice of many Aboriginal groups).<sup>102</sup> However, relatively recently a freedom of conscience<sup>103</sup> case was successful in Federal Court. In *Maurice v. Canada (Attorney General)*,<sup>104</sup> a self-represented prisoner successfully argued that his freedom of conscience was unjustifiably infringed by a correctional policy to deny vegetarian meals unless the vegetarianism was linked to a religious belief.<sup>105</sup> Jack Maurice had a deeply-held belief that eating meat was morally wrong, but he did not adhere to any religion. The Federal Court found a breach of Maurice's freedom of conscience and ordered CSC to provide him with vegetarian meals. However, it seems that this decision has not had the expected impact at a systemic level. Notably, the decision did not lead to a service-wide change to vegetarian meal policy to protect this right for affected prisoners.<sup>106</sup>

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declaration that his rights had been violated, with no order for a change in policy, nor any individual redress for Mr. Chan.

<sup>102</sup> *Regina Correctional Centre v. Saskatchewan (Dept. of Justice)* (1995), 133 Sask. R. 61, [1995] S.J. No. 350 (Q.B.). The Court found pressing and substantial health reasons for banning smoking in prisons.

<sup>103</sup> This freedom has received little attention from courts or commentators. An exception is the consideration given to freedom of conscience by Justice Wilson in her minority opinion in *R. v. Morgentaler* (1988), 37 C.C.C. (3d) 449, [1988] 1 S.C.R. 30 at paras. 249-54.

<sup>104</sup> *Maurice v. Canada (Attorney General)*, 2002 FCT 69, 210 D.L.R. (4th) 186, [2002] F.C.J. No. 72 [*Maurice*].

<sup>105</sup> The Court did not conduct an *Oakes* analysis under s. 1 of the *Charter*, but concluded that the Crown had little difficulty accommodating the prisoner's conscientious belief since it already provided vegetarian meals to accommodate religious beliefs.

<sup>106</sup> Four years after the *Maurice* decision, the Correctional Service of Canada's Manual on Religious and Spiritual Accommodation (last updated on 3 March 2005) simply provides that "CSC is in the process of establishing Guidelines for Diets of Conscience which base the evaluation of a request on the criteria set out in [the Supreme Court of Canada's recent freedom of religion decision] *Syndicat Northcrest v. Amselem* (2004) ... using the same criteria (of demonstrating sincerity and consistency of practice)."

## E. SUBSECTION 10(B): RIGHT TO COUNSEL

In addition to the limited section 7 right to counsel in prison discipline hearings that has been recognized by the Supreme Court of Canada, some lower courts have upheld prisoners' claims on the basis that their subsection 10(b) right to counsel was violated in cases of a body cavity search<sup>107</sup> and the illegal use of excessive force.<sup>108</sup> In a recent Federal Court decision, Tracy Curry, a prisoner at Grand Valley Institution, was awarded \$10,000 in damages for negligence and breach of her subsection 10(b) right after she was subjected to a body cavity search. The Court found that her purported consent to the cavity search was obtained by inducement and was therefore invalid.

Norman MacPherson, a provincial prisoner in New Brunswick and an unrepresented litigant, brought a successful *habeas corpus* application after he was strapped face-down on a stretcher with a hockey helmet and wire mask over his head for two to three hours.<sup>109</sup> The Court found that he was treated in this manner as punishment for banging on his cell door repeatedly and requesting to call a lawyer. The treatment of MacPherson amounted to violations of his sections 12 and 9 rights, as well as showing "limited recognition of his right to retain and instruct counsel under subsection 10(b) of the Charter."<sup>110</sup> The Court found that MacPherson had been asking to call a lawyer for at least 40 days but had not been permitted to do so. Remedies ordered pursuant to subsection 24(1) of the *Charter* included, notably, a reduction of three months from MacPherson's sentence, as well as an exhortation that the provincial Attorney General "consider what steps can be taken to ensure that legal aid is readily available to inmates of jails in New Brunswick."<sup>111</sup>

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<sup>107</sup> *Curry v. Canada*, 2006 FC 63, [2006] F.C.J. no. 87 [*Curry*].

<sup>108</sup> *R. v. MacPherson* (1996), 48 C.R. (4th) 122, [1996] N.B.J. No. 182 [*MacPherson* cited to N.B.J.]. See Mary Campbell, *supra* note 26 at 310. Campbell notes that this case is the "closest that a litigated remedy has come to the Arbour Report recommendation" for a reduction in sentence as a remedy for prisoners' rights violations.

<sup>109</sup> *MacPherson, ibid.*

<sup>110</sup> *Ibid.* at para. 56.

<sup>111</sup> *Ibid.* at para. 59.

The judges in these decisions did not analyze subsection 10(b) in any detail (or address the language in subsection 10(b) providing that the right arises “on arrest or detention”), apparently finding the breach of right to counsel plain and obvious on the facts. For example, Beaudry J. writes in *Curry*:

the defendant’s argument that Grand Valley staff were under no obligation to inform the plaintiff of her right to counsel is downright unreasonable. A cavity search is one of the most invasive and humiliating procedures a human being can be subjected to, and everyone should have the right to seek legal advice before consenting to it.<sup>112</sup>

It appears that *Curry* also could have been decided on the basis of sections 7 or 8, since the Court was clearly of the view that this “invasive and humiliating procedure” engaged Tracy Curry’s security of the person and reasonable expectation of privacy, while the lack of informed consent rendered such a search unreasonable and contrary to principles of fundamental justice.<sup>113</sup>

#### F. SUBSECTION 11(H): RIGHT NOT TO BE TRIED AND PUNISHED TWICE FOR THE SAME OFFENCE

The Supreme Court of Canada decided in *R. v. Shubley*<sup>114</sup> that prison discipline proceedings for an institutional offence (in Shubley’s case, assault) resulting in a punishment of five days in solitary confinement on a restricted diet did not attract the protection of the subsection 11(h) right not to be tried and punished twice for the same offence. When Shubley faced criminal charges arising out of the same alleged assault, the Court overturned the trial judge’s stay of those charges on subsection 11(h) grounds. The majority held that penalties such as solitary confinement (i.e. placement in a prison within a prison) and the loss of earned remission for institutional offences did not amount to “true penal consequences” in a manner necessary to attract the protection of the right against double jeopardy.<sup>115</sup>

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<sup>112</sup> *Curry*, *supra* note 107 at para. 22.

<sup>113</sup> *Ibid.* at para. 22.

<sup>114</sup> *R. v. Shubley* (1990), 74 C.R. (3d) 1, [1990] 1 S.C.R. 3 [*Shubley* cited to S.C.R.].

<sup>115</sup> *Ibid.* at para. 60.

*Shubley* has been characterized as “a sad commentary on how the judiciary, sitting in the quiet and removed forum of the courtroom, views the institution of imprisonment.”<sup>116</sup> In that decision, McLachlin J., as she then was, stated for the majority that “internal disciplinary proceedings involve neither fines nor imprisonment,”<sup>117</sup> yet even in pre-*Charter* decisions such as *Martineau v. Matsqui Institution Disciplinary Board*,<sup>118</sup> the Supreme Court of Canada had characterized solitary confinement as a punitive “prison within a prison” that deprives prisoners of their residual liberty interests.<sup>119</sup> The *Shubley* majority shows a substantial degree of deference to the Ontario government’s characterization of the internal discipline process as informal, summary, and therefore, non-criminal, and in the process, fails to appreciate the substance of the penal consequences meted out in provincial disciplinary hearings through loss of earned remission (and consequent lengthening of the sentence) or time spent in a “prison within a prison.”<sup>120</sup>

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<sup>116</sup> Allan Manson, “Solitary Confinement, Remission and Prison Discipline” (1990) 75 C.R. (3d) 356 at 356. Manson goes on to suggest, at 357:

Underlying the majority judgment in *Shubley* is an attitude toward prisons and prisoners that shows a misappreciation of the coercive nature of solitary confinement and remission and the roles which they play within the prison environment. The majority judges’ decision not to inquire more carefully into the factors of imprisonment does not do justice to the expanded function of the judiciary in the post-*Charter* era.

<sup>117</sup> *Shubley*, *supra* note 114 at para. 40.

<sup>118</sup> *Martineau v. Matsqui Institution Disciplinary Board* (1980), 13 C.R. (3d) 1, [1980] 1 S.C.R. 602.

<sup>119</sup> Even earlier, the Federal Court in *McCann v. Queen*, [1976] 1 F.C. 570, 29 C.C.C. (2d) 337, had declared that the regime of solitary confinement at the British Columbia Penitentiary amounted to cruel and unusual punishment. See Michael Jackson, *Prisoners of Isolation: Solitary Confinement in Canada* (Toronto: University of Toronto Press, 1983) at c. 4.

<sup>120</sup> *Shubley*, *supra* note 114. The dissenting opinion of Cory J. (with which Wilson J. concurred) demonstrates an appreciation of the true nature of penal consequences for people already in prison, at para. 8:

To say that [solitary confinement is not a violation of residual liberties] would mean that once convicted an inmate has forfeited all rights and could no longer question the validity of any supplementary form of punishment. If the inmate can never question the validity of

### G. SECTION 12: THE RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT

While one might have thought that the right not to be subjected to any cruel and unusual treatment or punishment would be one of the more significant *Charter* rights for prisoners, the section has had remarkably little impact in litigation concerning conditions of confinement.<sup>121</sup> For example, a number of challenges to the practice of double-bunking as cruel and unusual treatment or punishment have been dismissed.<sup>122</sup> The test applied for a violation of section 12 is whether the treatment or punishment is “so excessive as to outrage the standards of decency,”<sup>123</sup> a test that has proved very difficult for prisoners to meet. Most of the analytical “work” in *Charter* claims involving prison conditions is done under section 7. However, a notable successful section 12 case was the *MacPherson* decision from New Brunswick, discussed under subsection 10(b) above, in which a reduced sentence was ordered as a remedy for treatment found to be cruel and unusual.

### H. SECTION 15: EQUALITY RIGHTS

The guarantee of equality in section 15 of the *Charter*, described by the Supreme Court of Canada as “the *Charter*’s conceptually most difficult right,”<sup>124</sup> has been raised in a few prison cases,

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supplementary punishment, then any form of punishment could be justified on the basis that good treatment is only a privilege.

<sup>121</sup> In 1982, Michael Jackson argued that s. 12 should be interpreted in a manner that would subject prison conditions to careful scrutiny. See Michael Jackson, “Cruel and Unusual Treatment or Punishment?” (1982), U.B.C. L. Rev. *Charter* Edition 189 at 211 where Jackson stated:

The focusing of s. 12 of the *Charter* on prison conditions and practices would be particularly appropriate given that typically such practices and conditions are not specifically prescribed by Parliament but are rather applied through the interpretations of very broadly drafted legislative provisions which are made specific through administrative policy-making.

<sup>122</sup> See e.g. *Piche*, *supra* note 79.

<sup>123</sup> *Ibid.*

<sup>124</sup> *Law v. Canada* (1999), 170 D.L.R. (4th) 1, [1999] 1 S.C.R. 497 [*Law* cited to S.C.R.].



including two that reached that court.<sup>125</sup> Beginning with its decision in *Andrews v. Law Society of British Columbia*,<sup>126</sup> the Supreme Court of Canada has adopted a “substantive equality” approach to section 15 which has been described succinctly by Diana Majury:

Substantive equality recognizes that in order to further equality, policies and practices need to respond to historically and socially based differences. Substantive equality looks to the effects of a practice or policy to determine its equality impact, recognizing that in order to be treated equally, dominant and subordinated groups may need to be treated differently.<sup>127</sup>

As such, to prove a violation of equality rights, a claimant must demonstrate the following:<sup>128</sup> (1) that the law or government action treated the claimant different than others, by purpose or effect; (2) that the differential treatment was based on an enumerated<sup>129</sup> or analogous<sup>130</sup> ground of discrimination; and (3) that the differential treatment was discriminatory in a substantive sense, considering such factors as pre-existing group disadvantage and the nature of the interest affected.

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<sup>125</sup> *Weatherall*, *supra* note 90 (upholding a policy of female correctional officers conducting frisk searches and cell surveillance of male prisoners) and *Sauvé*, *supra* note 2 (a majority of the Court decided the challenge to a prisoner voting ban on s. 3 and s. 1 grounds, leaving undecided the question of whether “prisoner status” is an analogous ground of discrimination protected by s. 15; the dissent would have found no violation of equality rights).

<sup>126</sup> *Andrews v. Law Society of British Columbia* (1989), 34 B.C.L.R. (2d) 273, [1989] 1 S.C.R. 143.

<sup>127</sup> Diana Majury, “The Charter, Equality Rights, and Women: Equivocation and Celebration” (2002) 40 Osgoode Hall L.J. 297 at para. 16.

<sup>128</sup> The test articulated here is the one applied by the unanimous Supreme Court of Canada in *Law* and in subsequent cases. The “Law Test” has been the subject of much criticism. See e.g. Fay Faraday, Margaret Denike & M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Toronto: Irwin, 2006).

<sup>129</sup> The grounds enumerated in s. 15 are race, national or ethnic origin, colour, religion, sex age, or mental or physical disability.

<sup>130</sup> Grounds recognized by the Supreme Court to be analogous to the listed grounds in s. 15 include citizenship status, marital status, sexual orientation, and Aboriginality-residence.

## 1. PRISONER STATUS

To date, a majority of the Supreme Court of Canada has not considered squarely the argument that “prisoner status” is a ground of discrimination analogous to those listed in section 15 and that, therefore, differential treatment of prisoners amounting to substantive discrimination violates the equality guarantee. In *Sauvé*, the majority struck down the prisoner voting ban as an unjustified infringement of the right to vote, noting that it was unnecessary to consider the alternative argument that the law violated subsection 15(1).<sup>131</sup> However, on behalf of four dissenting justices, Gonthier J. took the view that prisoner status is not an analogous ground, on the basis that prisoners have been convicted of an offence and, therefore, are appropriately treated differently. He stated, “[i]n my view, to find prisoner status to be an analogous ground would be a distortion of the purpose of subsection 15(1) and would come close to making a mockery of the *Criminal Code* and the values on which it is based and which it enshrines.”<sup>132</sup> The plaintiffs and intervenors in *Sauvé*, including Aboriginal Legal Services of Toronto, the Canadian Association of Elizabeth Fry Societies and the John Howard Society of Canada, had urged the court to view prisoners as a “quintessential discrete and insular minority... lacking in political power and vulnerable to having their interests overlooked,”<sup>133</sup> and noted the overrepresentation of Aboriginal, poor and otherwise socially disadvantaged people in the prison population.<sup>134</sup>

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<sup>131</sup> *Sauvé*, *supra* note 2 at para. 63. The trial and Court of Appeal decisions in *Sauvé* had rejected the s. 15 claim. See also *Jackson v. Joyceville Penitentiary*, [1990] 3 F.C. 55, 55 C.C.C. (3d) 50 (T.D.) similarly rejecting a s. 15 argument about prisoner status.

<sup>132</sup> *Sauvé*, *ibid.* at para. 201.

<sup>133</sup> *Ibid.* (Factum of the Intervenor at paras. 22-23), online: Aboriginal Legal Services of Toronto <<http://www.aboriginallegal.ca/docs/sauve.factum.final.htm>>.

<sup>134</sup> *Sauvé*, *supra* note 2 (Expert Evidence of Professor Michael Jackson at 35-53, on file with author).

## 2. ENUMERATED AND ANALOGOUS GROUNDS OF DISCRIMINATION

Women prisoners have long been considered “too few to count,”<sup>135</sup> representing just ten percent of those in provincial jail and six percent of those serving federal time.<sup>136</sup> As such, they have often been disadvantaged in a system designed for the vast majority of prisoners who are men, a reality chronicled in stark detail in numerous reports and commissions of inquiry.<sup>137</sup> It is therefore interesting that the only sex discrimination case in the prison context to reach the Supreme Court of Canada was one involving the treatment of male prisoners. In *Weatherall v. Canada*,<sup>138</sup> the Supreme Court of Canada upheld a CSC policy permitting female correctional officers to work on the front lines in men’s prisons, including conducting frisk searches and cell surveillance. La Forest J. noted that men were treated differently than women (the evidence indicated that, at the time, men were subjected to frisk searches by female guards while women prisoners were not subjected to frisk searches by male guards).<sup>139</sup> However, the “historical, biological and sociological differences between men and women,” including “that the historical trend of violence perpetrated by men against women is not matched by a comparable trend pursuant to which men are victims and women

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<sup>135</sup> Ellen Adelberg & Claudia Currie, eds., *Too Few to Count: Canadian Women in Conflict with the Law* (Vancouver: Press Gang, 1987).

<sup>136</sup> Beattie, *supra* note 35.

<sup>137</sup> See e.g. Task Force on Federally Sentenced Women, *Creating Choices: Report of the Task Force on Federally Sentenced Women* (Ottawa: Ministry of the Solicitor General, 1990); Arbour, *supra* note 9; Canadian Human Rights Commission, *supra* note 11.

<sup>138</sup> *Weatherall*, *supra* note 90.

<sup>139</sup> It should be noted that the CSC’s current “gender-neutral staffing policy” means that there are men employed in front-line positions in all the regional women’s prisons, despite a recommendation to the contrary made by the CSC contracted Cross Gender Monitor. See Thérèse LaJeunesse *et al.*, *The Cross Gender Monitoring Project Federally Sentenced Women’s Facilities: Third and Final Report* (Ottawa, Correction Service Canada, 2000), online: Thérèse LaJeunesse and Associates <[http://www.csc-scc.gc.ca/text/prgrm/fsw/gender3/toc\\_e.shtml#TopOfPage](http://www.csc-scc.gc.ca/text/prgrm/fsw/gender3/toc_e.shtml#TopOfPage)>. For a discussion of the human rights issues at stake in cross-gender staffing in women’s prisons, see Canadian Human Rights Commission, *supra* note 11 at 42-44.

the aggressors,” meant that this differential treatment was not necessarily discriminatory in a substantive sense.<sup>140</sup>

The few equality claims brought by women prisoners have met with mixed success in lower courts, although many issues have yet to be addressed in litigation.<sup>141</sup> Until the mid-1990s, all federally sentenced women in Canada served their time at the Prison for Women in Kingston (“P4W”),<sup>142</sup> which meant much greater geographic isolation from family and community supports relative to federally sentenced men, a reality compounded by the fact that more women than men are the primary caregivers of children.<sup>143</sup> A claim by Gayle Horii,<sup>144</sup> a federally sentenced woman from British

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<sup>140</sup> *Weatherall*, *supra* note 90 at 873. But see *Turner v. Burnaby Correctional Centre for Women*, [1994] B.C.J. No. 1430 (S.C.) (rejecting an equality-based claim by a federally sentenced woman that she should be permitted to have her newborn child with her in prison as part of the existing mother-child program. The Court noted that federally sentenced men did not have this opportunity, but did not consider the social reality of differences between men and women in relation to childbearing and primary responsibility for childrearing).

<sup>141</sup> See generally Canadian Human Rights Commission, *supra* note 11 and Debra Parkes & Kim Pate, “Time for Accountability: Effective Oversight of Women’s Prisons” (2006) 48 *Canadian Journal of Criminology and Criminal Justice* 251.

<sup>142</sup> Due to the 1997 court action to prevent the opening of the 34-bed women’s unit at Kingston Penitentiary for men, discussed *infra*, text accompanying notes 146-47, a handful of women were still in P4W into the late 1990s. The last woman left in 2000.

<sup>143</sup> In her 1996 Report, Justice Arbour, *supra* note 9 at 200 noted:

Women [at P4W] also served their sentences in harsher conditions than men because of their smaller numbers. They have suffered greater family dislocation, because there are so few options for the imprisonment of women. They have been overclassified, or in any event, they have been detained in a facility that does not correspond to their classification. For the same reasons, they have been offered fewer programs than men. ... They have no significant vocational training opportunities.

<sup>144</sup> Gayle Horii has been a strong activist on behalf of prisoners’ rights and social justice, both during her incarceration and while on parole. Her activities include co-founding the advocacy group Strength in Sisterhood and writing various journal articles such as Gayle Horii, “The Art In/Of Survival” (1994) 5(2) *Journal of Prisoners on Prisons* 10 and Gayle Horii, “Processing Humans” in Kelly Hannah-Moffat & Margaret Shaw, eds., *An Ideal Prison? Critical Essays on Women’s Imprison in Canada* (Halifax: Fernwood, 2000) at 104.

Columbia, that being incarcerated at P4W amounted to discrimination on the basis of sex was never heard on the merits.<sup>145</sup> However, Horii did serve some of her time at a men's prison in B.C. on humanitarian grounds (her husband was seriously ill) and the case ultimately settled out-of-court. Similarly, the equality issues raised in a *habeas corpus* application<sup>146</sup> by a group of women prisoners who were scheduled for transfer from P4W to a segregated maximum security unit inside Kingston Penitentiary (a men's prison) were never addressed on their merits. Shortly after the Ontario Court of Appeal affirmed that the women's *habeas corpus* application could proceed (and after the Ontario Superior Court had ordered that the women not be transferred in the interim), the Correctional Service of Canada agreed in a consent order not to operate a maximum security unit for women at Kingston Penitentiary. The women who had been scheduled for the transfer were all reclassified to be medium security prisoners, either while the court case was pending or during the ensuing two and a half years (i.e. by the time P4W was closed). While this was a positive result in Ontario, the reality was that at that time, women classified as maximum security prisoners were being housed in segregated units in men's prisons in Saskatchewan, Quebec, and Nova Scotia.<sup>147</sup> Obtaining a systemic or broad-based remedy that cannot be circumvented remains a challenge in the correctional context.

Equality rights may involve intersecting grounds of discrimination such as, for example, sex and race, in the experience of Aboriginal women prisoners. In *R. v. Daniels*, a

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<sup>145</sup> See *Horii v. Canada (Commissioner of Corrections)* (1991), 7 Admin. L.R. (2d) 1, [1992] 1 F.C. 142 (C.A.) (granting Horii's application for an interlocutory injunction to prevent her transfer to P4W).

<sup>146</sup> See *Beaudry v. Canada (Commissioner of Corrections)*, [1997] O.J. No. 5082 (C.A.) (dismissing an appeal by the Commissioner of Corrections from a decision that the women were entitled to seek relief by way of *habeas corpus* although the transfer had not yet been effected).

<sup>147</sup> *Submission of the Canadian Association of Elizabeth Fry Societies to the Canadian Human Rights Commission for the Special Report on the Discrimination on the Basis of Sex, Race and Disability Faced by Federally Sentenced Women* (Ottawa: Canadian Association of Elizabeth Fry Societies, 2003) at 32, online: CAEFS <<http://www.elizabethfry.ca/submissn/specialr/1.htm>>.

1990 sentencing decision involving an Aboriginal woman from Saskatchewan, Carol Daniels, it was successfully argued that serving her sentence at P4W would amount to a violation of her sections 15, 28, 7, and 12 *Charter* rights.<sup>148</sup> The recent deaths of six Aboriginal women by suicide at P4W, combined with the geographic dislocation and dearth of programs at the prison led Wedge J. to conclude that discrimination against Aboriginal women such as Carol Daniels was inevitable. While *Daniels* was overturned on appeal on jurisdictional grounds, and while P4W has since been closed and replaced with five regional prisons for women and the Okimaw Ohci Healing Lodge (the latter being available to less than one third of federally sentenced Aboriginal women), a number of the issues faced by Aboriginal women prisoners may be ripe for an equality rights challenge.<sup>149</sup> In addition, advocates for women prisoners and for Aboriginal women have demonstrated an intention to take these issues outside Canada to the international human rights arena,<sup>150</sup> a strategy that has worked to raise awareness in other cases of discrimination experienced by Aboriginal women.<sup>151</sup>

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<sup>148</sup> *R. v. Daniels*, [1990] 4 C.N.L.R. 51 (Sask. Q.B.), rev'd on procedural grounds: (1991) 65 C.C.C. (3d) 366 (Sask. C.A.).

<sup>149</sup> See Patricia Monture-Angus, *The Lived Experience of Aboriginal Women Who Are Federally Sentenced, Submission of the Canadian Association of Elizabeth Fry Societies to the Canadian Human Rights Commission* (Ottawa: Canadian Association of Elizabeth Fry Societies, 2002), online: CAEFS <<http://www.elizabethfry.ca/submissn/aborigin/aborigin.pdf>>. See also, Cheryl Webster and Anthony Doob, "Classification without Validity or Equity: An Empirical Examination of the Custody Rating Scale for Federally Sentenced Women Offenders in Canada" (2004) 46 *Canadian Journal of Criminology and Criminal Justice* 395.

<sup>150</sup> Gayle Horii, Debra Parkes & Kim Pate, "Are Women's Rights Worth the Paper They're Written On? Collaborating to Enforce the Human Rights of Criminalized Women" in Elizabeth Comack & Gillian Balfour, eds., *Criminalizing Women: Gender and (In)justice in Neo-Liberal Times* (Halifax: Fernwood, 2006) at 318-19.

<sup>151</sup> For example, Sandra Lovelace, a Maliseet woman, successfully argued before the United Nations Human Rights Commission that the discriminatory treatment of Aboriginal women under the *Indian Act* breached Canada's obligations under the *International Covenant on Civil and Political Rights*, eventually leading the Canadian government to amend the *Indian Act* to remove some, but not all, of the discriminatory treatment. See Anne Bayefsky, "The Human Rights Committee and the Case of Sandra Lovelace" (1982) 20 *Can. Y.B.*

Equality claims have also been brought by gay prisoners. In 1989, six years before the Supreme Court of Canada's holding in *Egan v. Canada*<sup>152</sup> that sexual orientation is an analogous ground of discrimination protected by section 15, Timothy Veysey successfully argued at trial that the CSC's private family visiting policy discriminated against him on the basis of his sexual orientation by being limited to married or common law spouses.<sup>153</sup> The Federal Court of Appeal ultimately decided the case in Veysey's favour, but on the basis that the existing policy actually did not exclude same-sex partners. The Court held that since they could be included within an expansive definition of "common law partners," the issue was not whether the existing policy was under inclusive, but in the Commissioner of Corrections' application of that policy in refusing to exercise his discretion. On the other hand, an equality rights claim by another federally sentenced gay man based on the denial of his request for a private family visit with his cellmate was dismissed.<sup>154</sup> The case was not substantively considered as a section 15 case; rather, it was dismissed on the basis that the definition of "visitor" simply excluded other prisoners.<sup>155</sup> Unfortunately for prisoners, the CSC interpreted this decision in an expansive way to mean that no prisoner could be eligible for any visit with another prisoner, including those in other institutions, which has meant that sisters, brothers, parents, and partners (same-sex or opposite sex) are barred from visiting one another.

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Int'l L. 244 and Native Women's Association of Canada, *Guide to Bill C-31* (Ohsweken, Ontario: Native Women's Association of Canada, 1986), online: Native Women's Association of Canada <<http://www.nwac-hq.org/documents/GuidetoBillC31.pdf>>.

<sup>152</sup> *Egan v. Canada* (1995), 12 R.F.L. (4th) 201, [1995] 2 S.C.R. 513.

<sup>153</sup> *Veysey v. Canada (Commissioner of the Correctional Service)*, [1990] 1 F.C. 321, [1989] F.C.J. No. 1013 (T.D.), varied by (1990), 43 Admin. L.R. 316 (Fed. C.A.).

<sup>154</sup> *Laliberté v. Canada (Correctional Service)* (2000), 181 F.T.R. 276, [2000] F.C.J. No. 548 (T.D.).

<sup>155</sup> *Ibid.*

#### IV. BARRIERS AND BREAKTHROUGHS IN PRISONER LITIGATION

There have been a number challenges brought under section 15 and other *Charter* rights that have failed at least in part due to the difficulties of marshalling the evidence necessary to prove a claim. These unsuccessful challenges have included, for example, claims of discrimination on the basis of race due to a lack of sufficient evidence<sup>156</sup> or claims that had been poorly framed<sup>157</sup> (often by unrepresented litigants or counsel inexperienced with prison or *Charter* law). Occasionally, self-represented prisoners are successful,<sup>158</sup> which is remarkable given the challenges they face. There are few lawyers who represent prisoners at all, a reality that is not surprising given the lack of legal aid funding for prison cases in most provinces. Fewer still have developed expertise in the area.

Furthermore, the kind of evidence that would be required to prove systemic discrimination against, for example, Aboriginal prisoners (e.g. on the basis that they are over-classified as maximum security prisoners) is substantial and would be expensive to gather. It is for this reason that the Canadian Association of Elizabeth Fry Societies has advocated a "Prisoner Court Challenges Fund" to fill this access to justice gap.<sup>159</sup> An additional barrier to mounting a successful legal proceeding in the prison context, whether based on the *Charter* or not, is the reality

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<sup>156</sup> See e.g. *Crowe v. Canada* (1993), 63 F.T.R. 177, [1993] F.C.J. No. 424 (T.D.) (dismissing, for lack of evidence, a claim by an Aboriginal man alleging that systemic discrimination against Aboriginal prisoners meant that they were less likely than non-Aboriginal prisoners to be granted escorted temporary absences).

<sup>157</sup> See e.g. *Schemmann v. Canada (Correctional Service)* (1995), 96 F.T.R. 154, [1995] F.C.J. No. 786 (T.D.) (where an unrepresented prisoner challenged a rule making him ineligible for accelerated parole review on the basis that he was discriminated against due to the nature of his offence, being incest).

<sup>158</sup> See e.g. *Maurice*, *supra* note 104, concerning freedom of conscience, wherein Jack Maurice won the right to a vegetarian meal for non-religious moral reasons.

<sup>159</sup> Parkes & Pate, *supra* note 141 at 276. This proposal for a Prisoner Court Challenges Fund was modelled on the former Court Challenges Program, which was abolished in 2006, but had provided limited funding for equality and language rights *Charter* challenges to federal laws.



that much of the research on prisons is commissioned by the CSC<sup>160</sup> or provincial corrections departments, which makes it difficult to find experts who might be willing and able to testify on behalf of prisoners in such cases.<sup>161</sup>

A further challenge is mootness. Often the circumstances facing a prisoner litigant, such as reclassification to maximum security or placement in segregation, have ended before a trial or other court proceeding can be heard. The prisoner may even have been released from incarceration, as is often the case with provincial prisoners, whether sentenced or in remand custody. For example, in *Allard v. Nanaimo Correctional Centre*,<sup>162</sup> decisions of the provincial jail's disciplinary board were quashed due to breaches of natural justice that the B.C. Supreme Court labeled "egregious."<sup>163</sup> However, the underlying issue concerning the constitutionality of the provincial disciplinary process (primarily that it lacked independent adjudication and procedural protections) was considered moot. The facts in this case point to the relative ease with which a prisoners' case can be rendered moot. The Court noted that after the judicial review petition was filed, and after the prison respondents had received legal advice, they reinstated the twenty days loss of remission, meaning that Allard's

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<sup>160</sup> See the substantial body of reports and other publications commissioned or produced by the Research Branch of the Correctional Service of Canada, online: Correctional Service Canada <[http://www.csc-scc.gc.ca/text/research\\_e.shtml](http://www.csc-scc.gc.ca/text/research_e.shtml)>.

<sup>161</sup> See e.g. Canadian Association of Elizabeth Fry Societies, *Executive Director's Annual Report 2004-2005* (Ottawa: Canadian Association of Elizabeth Fry Societies, 2005) at 11, online: CAEFS <<http://www.elizabethfry.ca/areport/2004-05/english/ed.pdf>> where Kim Pate relates a situation in which CAEFS felt compelled to withdraw as an intervenor in an inquest into a death in custody of a woman prisoner in Ontario. The scheduled expert witness indicated within one working day of the commencement of the inquest that she could not speak to many of the issues outlined in her witness statement after CAEFS' lawyer was contacted by counsel for the CSC. Similarly, other psychologists and psychiatrists had refused to testify against CSC for fear that they would jeopardize service delivery contracts and/or access to the prison(s) for women to conduct their research.

<sup>162</sup> *Allard*, *supra* note 61.

<sup>163</sup> See facts discussed *supra*, text accompanying notes 61-62.

release date was recalculated to just two days before the judicial review hearing date.<sup>164</sup> The Court further noted:

Counsel for the Petitioner had tried since January 2000 to have the Respondents file material so this matter could be set for hearing. There was some delay by the Respondents in complying. The Respondents however through counsel, indicated by early April a willingness to discuss "resolution of the issues". In early May counsel met and discussed resolution and the Respondent's counsel was to "seek instructions from her clients" in regard to matters discussed. On June 9, 2000 the Petitioner advised his counsel that his Release date was July 1, 2000 and he wished to have the matter set down before his release date so the matter could be determined before that time to benefit him and all others who might be similarly affected.<sup>165</sup>

It was only after the matter was set down for 23 June 2000 that Allard was advised that his release date had been recalculated to 21 June 2000. Despite the argument by counsel for Allard that given the short-term nature of provincial incarceration, this issue was likely to evade review indefinitely, the Court was reluctant to "impinge on a legislative function" when, in its view, there was no continuing live controversy.<sup>166</sup>

Nevertheless, some courts have taken a broader view and chosen to find an ongoing live controversy in prison cases, even where the prisoners have been released. For example, when faced with a motion to dismiss a *Charter* challenge to conditions at the Edmonton Remand Centre because the prisoner plaintiffs had been released (the charges against them having been stayed), both the Alberta Court of Queen's Bench and Court of Appeal refused to grant the motion to dismiss.<sup>167</sup> The Court at first instance had considered the matter moot, but exercised its discretion to allow the case to proceed in any event, demonstrating insight into the problems faced by prisoner litigants:

An application for release from disciplinary segregation may be evasive of judicial review because the question is moot as soon as the inmate is released. Similarly, an application to quash the order of a

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<sup>164</sup> *Allard, supra* note 61 at paras. 17-18.

<sup>165</sup> *Ibid.* at paras. 22-23.

<sup>166</sup> *Ibid.* at para. 40.

<sup>167</sup> *Trang Alta. Q.B., supra* note 89; *Trang C.A. supra* note 89.

disciplinary hearing may be moot, if the decision is voluntarily set aside. In practice, if every application for Charter relief from conditions at the ERC is dismissed because the applicant has been released, the question as to whether or not his or her incarceration was in breach of the Charter will remain forever evasive of review.<sup>168</sup>

However, the Court of Appeal went one step further and said that the issue was simply not moot, stating “[t]here is clearly a live controversy between the parties as to whether or not the respondents’ Charter rights were breached while they were incarcerated.”<sup>169</sup> This case may serve as a useful precedent in other prisoner court challenges, given the Court’s apparent finding that release from custody does not mean the end of a “live controversy” about Charter breaches during incarceration.<sup>170</sup>

Of the prisoners’ Charter claims that do make it to court, many continue to be met with a deferential, “hands off” approach at various stages of the Charter analysis. Courts tend to characterize prison rules and decisions as “administrative” decisions subject to a deferential standard of review under the Charter. Instead of understanding these decisions as analogous to classic criminal ones that require more cogent justification for state limits on rights due to the imbalance of power between individual citizens and the state, prison officials are often accorded deference by courts, particularly when it is alleged that “safety” or “security” is at stake.<sup>171</sup> The cases reveal a tendency to consider issues of government justification for limiting rights at the stage of deciding whether there has been an infringement of the right itself, rather than at the subsequent section 1 stage. A notable example is *Fieldhouse v. Canada* where both the trial and appeal decisions held that a random urinalysis policy breached neither section 7 nor section 8 rights of federal prisoners.<sup>172</sup> Since no violation was found, neither court proceeded to consider section 1 of the Charter

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<sup>168</sup> *Trang Alta. Q.B.*, *ibid.* at para. 73.

<sup>169</sup> *Trang C.A.*, *supra* note 89 at para. 5.

<sup>170</sup> *Ibid.* at para. 51.

<sup>171</sup> It was predicted in the early days of the Charter that s. 1 would play a significant role in limiting the effect of the Charter to expand and protect prisoners’ rights. See e.g. MacKay, *supra* note 57 at 699.

<sup>172</sup> *Fieldhouse v. Canada* (1994), 33 C.R. (4th) 346, [1994] B.C.J. 1807 (S.C.), *aff’d* by (1995), 40 C.R. (4th) 263, [1995] B.C.J. No. 975 (C.A.).

to assess whether the government had adequate justification for instituting this policy. Instead, both levels of court considered the government's objectives and justifications for instituting random urinalysis as part of a truncated section 7 analysis and the "reasonableness" analysis in section 8.<sup>173</sup>

There is little doubt that the Court in *Fieldhouse* would have concluded that combating the problems associated with drug use in prisons (including the potential for drug-related assaults, intimidation, overdoses, and pressure on visiting family members to import drugs) is a pressing and substantial objective. However, section 1 justification requires more than a good objective; it requires, among other things, that the measure chosen to achieve the objective only minimally impair *Charter* rights. The decision in *Sauvé* is, therefore, instructive for the stringent approach taken by the majority to each stage of the government's attempted *Charter* justification of prisoner disenfranchisement. For example, in rejecting the argument that a ban on federal prisoners voting is even rationally connected to the objective of "enhancing the criminal sanction," the Chief Justice strongly supported the notion of prisoners as rights-bearing citizens:

Indeed, the remedy of imprisonment for a term rather than permanent exile implies our acceptance of continued membership in the social order. Certain rights are justifiably limited for penal reasons, including aspects of the rights to liberty, security of the person, mobility, and security against search and seizure. But whether a right is justifiably limited cannot be determined by observing that an offender has, by his or her actions, withdrawn from the social compact. Indeed, the right of the state to punish and the obligation of the criminal to accept punishment are tied to society's acceptance of the criminal as a person with rights and responsibilities.<sup>174</sup>

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<sup>173</sup>Allan Manson has criticized this approach, saying that the balancing of rights and societal interests is properly conducted at the s. 1 stage (when the burden is on the government) and that such an analysis is inconsistent with other criminal law cases (e.g. the "random stop" cases based on s. 9 of the *Charter*, such as *R. v. Hufsky* (1988), 63 C.R. (3d) 14, [1988] 1 S.C.R. 621). See Allan Manson, "Fieldhouse and the Diminution of *Charter* Scrutiny" (1994) 33 C.R. (4th) 358.

<sup>174</sup>*Sauvé*, *supra* note 2 at para. 47.

This approach arguably sets a new tone for prisoner litigation under the *Charter*, yet it cannot be ignored that the case concerned the quintessential civil and political right, the right to vote, rather than a right that would have implicated the prison's quest for "good order" and institutional security, as do many other *Charter* cases.

It is for this and other reasons that the subsequent decision of the Supreme Court of Canada in *May v. Ferndale Institution*<sup>175</sup> is so remarkable. When read in light of *Sauvé*, the *May* decision may signal a further step away from the deferential approach to prison decision-making and a muted view of prisoners' rights. *May* was not a *Charter* case; rather, it was a decision about the availability and scope of *habeas corpus* review in provincial superior court to challenge correctional decisions that deprive prisoners of their residual liberty interests.

*May* is significant for at least three reasons. First, the Supreme Court unanimously and unequivocally affirmed the right of prisoners to go to superior court on *habeas corpus*, thereby overturning a line of authority in provincial appellate courts which had held that *habeas corpus* review is not available to federal prisoners except in limited circumstances.<sup>176</sup> Second, in the course of its decision that *habeas corpus* must be available to federal prisoners, the Court bolstered the case for enhanced judicial oversight of prisoners by describing the internal grievance procedure to be woefully inadequate to protect their fundamental rights and interests. LeBel and Fish JJ. noted the following "structural weaknesses" in the federal grievance procedure:

the internal grievance process set out in the *CCRA* prescribes the review of decisions made by *prison authorities by other prison authorities*. Thus, in a case where the legality of a Commissioner's policy is contested, it cannot be reasonably expected that the decision-maker, who is subordinate to the Commissioner, could fairly and impartially decide the issue. It is also noteworthy that there are no remedies set out in the *CCRA* and its regulations and no articulated

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<sup>175</sup> *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809, 261 D.L.R. (4th) 541 [*May* S.C.C. cited to S.C.R.].

<sup>176</sup> See e.g. *Spindler v. Millhaven Institution* (2003), 175 O.A.C. 251, [2003] O.J. No. 3449 (C.A.) and the B.C. Court of Appeal decision in *May v. Ferndale* (2003), 308 W.A.C. 23, [2003] B.C.J. No. 2294.

grounds upon which grievances may be reviewed. Lastly, the decisions with respect to grievances are not legally enforceable.<sup>177</sup>

The court went on to say,

[affirming the availability of *habeas corpus* for federal prisoners] properly recognizes the importance of affording prisoners a meaningful and significant access to justice in order to protect their liberty rights, a *Charter* value. Timely judicial oversight, in which provincial superior courts must play a concurrent if not predominant role, is still necessary to safeguard the human rights and civil liberties of prisoners, and to ensure that the rule of law applies within penitentiary walls.<sup>178</sup>

Finally, a majority of the Court found the instant decision—reclassifying Terry May and others from minimum to medium security—to be arbitrary and therefore illegal.<sup>179</sup> Classification decisions are about institutional security writ large and courts have tended to defer to correctional officials in such cases. This was not so in *May* where LeBel and Fish JJ., on behalf of the majority, found the correctional authorities' refusal to disclose the “scoring matrix” for reclassification and transfer decision to the applicants and to the Court at first instance to be misleading and “highly objectionable.”<sup>180</sup> Recognizing the inappropriateness of reflexive deference to correctional decision-making,<sup>181</sup> the majority seemed to grasp the difficulties faced by prisoner litigants in challenging the actions of authorities who hold all the power and much of the relevant evidence.

## V. LOOKING AHEAD: PRISONERS' RIGHTS IN LAW AND ORDER TIMES

In 1996, Justice Arbour made a compelling case in her *Report into Certain Events at the Prison for Women in Kingston* that without

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<sup>177</sup> *May* S.C.C., *supra* note 175 at para. 63 [emphasis in original].

<sup>178</sup> *Ibid.* at para. 72.

<sup>179</sup> *Ibid.*

<sup>180</sup> *Ibid.* at paras. 109-110.

<sup>181</sup> On the flip side, the dissenting judges show a significant degree of deference to the CSC in deciding the scope of disclosure to prisoners facing reclassification and involuntary transfer, as well as in making the “individual assessment” to transfer each prisoner.

an effective sanction for breaches of the law, the Rule of Law will never fully take hold within prisons.<sup>182</sup> She urged the empowerment of judges to reduce a prisoner's sentence when it has been proven that the sentence was rendered more punitive than the one intended due to "illegalities, gross mismanagement or unfairness in the administration of a sentence."<sup>183</sup> The possibilities and some limitations associated with this proposed remedy have been explored elsewhere,<sup>184</sup> but the key strength of the recommendation is that it provides a meaningful sanction and remedy for rights abuses, one that may provide an incentive for compliance with the law along the lines of the *Charter* subsection 24(2) remedy for the exclusion of illegally obtained evidence from a criminal trial.

In a media interview in May 2006, a month after the ten year anniversary of the release of her report, Louise Arbour, now United Nations High Commissioner for Human Rights, expressed disappointment that the recommendation for judicial oversight had been shelved.<sup>185</sup> The current Conservative government in Ottawa is even less likely than its predecessor to implement any legislative change to provide a remedy for prisoners' rights claims.<sup>186</sup> Meanwhile, with the exception of the *MacPherson* case discussed above, courts to date have not been keen to reduce prison sentences as a remedy for rights violations. However, in the sentencing context, some courts are willing to order that time spent in pre-trial custody be credited as triple or even quadruple

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<sup>182</sup> Arbour, *supra* note 9.

<sup>183</sup> *Ibid.* at 183.

<sup>184</sup> See Parkes & Pate, *supra* note 141; Mary Campbell, *supra* note 26; Allan Manson, "Scrutiny from the Outside: The Arbour Commission, the Prison for Women and the Correctional Service of Canada" (1996) 1 Can. Crim. L. Rev. 321.

<sup>185</sup> Kirk Makin, "Decade after inquiry, prisons still failing women, Arbour says" *The Globe and Mail* (13 May 2006) A9.

<sup>186</sup> The Conservative government's first Minister of Justice, Vic Toews, was a most vocal opponent of prisoners' rights while in opposition. For example, in expressing his disgust with the Supreme Court's ruling in *Sauvé*, that affirmed prisoners' voting rights, Toews went so far as to advocate a constitutional amendment to s. 3 of the *Charter* which provides that "every citizen has the right to vote... ." See Janice Tibbetts, "Conservatives pledge to take away prisoners' right to vote" *Canwest News Service* (20 June 2004).

time to redress the harshness of overcrowded and inhumane conditions,<sup>187</sup> and periods of arbitrary detention,<sup>188</sup> as well as time spent in pre-trial protective custody<sup>189</sup> or effective segregation for women prisoners.<sup>190</sup> The federal Correctional Investigator, as well as various other bodies at the provincial and federal level, continue to chronicle a range of events in this country's prisons and jails that cry out for independent review within a human rights framework. These realities include unauthorized uses of force, a lack of available process for reviewing administrative segregation, and woefully inadequate complaints procedures, all areas where the *Charter* has not meaningfully penetrated the walls of Canadian prisons.<sup>191</sup> Subsection 24(1) of the *Charter* empowers a judge who has found a breach of a prisoner's *Charter* rights to order a remedy that she or he "considers just and appropriate in the circumstances." With the lack of legislative attention to calls for independent oversight and effective remedies for violating prisoners' rights, the second quarter century of *Charter* litigation may see courts emboldened to take a greater role at the remedial stage, including using the "Arbour remedy" to reduce a sentence of imprisonment in appropriate cases.

To be sure, the courts alone cannot ensure that a "*Charter* culture" prevails in Canadian prisons. In fact, experience has taught us that effective oversight and accountability of prisons is extremely difficult to put in place, perhaps due to the nature of imprisonment itself which arguably represents the very antithesis of fundamental values such as liberty and human dignity. The difficulty of making prisons humane and effectively overseen should encourage us to seriously consider the need to reduce our society's reliance on imprisonment and to think creatively about

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<sup>187</sup> *R. v. Permesar*, [2003] O.J. 5420 (Prov. Ct.).

<sup>188</sup> *R. v. Ichikawa*, [2004] O.J. 5537 (Prov. Ct.).

<sup>189</sup> *R. v. Coombs*, 2003 ABQB 818, [2003] A.J. 1209.

<sup>190</sup> *R. v. Bennett*, [1993] O.J. 892 (Gen. Div.).

<sup>191</sup> I have argued elsewhere that independent adjudication of prisoners' complaints by a specialized tribunal is not an effective substitute for a more accessible and enhanced form of judicial oversight of prisons (including the availability of the remedy proposed by Justice Arbour of a reduction in the prisoners' sentence for illegalities and rights violations). See Parkes & Pate, *supra* note 141.



more productive responses to crime and its myriad causes.<sup>192</sup> That is the bigger picture that we would do well to keep in focus. That larger vision, including a healthy scepticism about the ability of prisons to deliver on the promise of a safer and more secure society, is consistent with a plea for greater oversight and accountability of our existing prisons. Prisoners must have meaningful access to courts as a last resort and effective sanction, not for peanut butter litigation, but to ensure that the rights enshrined in the *Charter* are applied to “everyone” and not just “everyone except prisoners.”

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<sup>192</sup> See generally Ruth Morris, *Penal Abolition: The Practical Choice* (Toronto: Canadian Scholars' Press Inc., 1995).