

# Prisoners' Rights in Alberta: Challenges and Opportunities

## III CANADA'S HISTORICAL APPROACH TO THE PROTECTION OF PRISONERS' RIGHTS

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### A. Constitutional and Legislative Provisions

Historically, although Canadian government policy and public opinion have swung between a crime-control and due process approach to crime, the long-term trend has been to increasingly recognize prisoners as holders of human rights and civil liberties, both through the enactment of the *Canadian Charter of Rights and Freedoms*<sup>1</sup> and the codification of rights and safeguards in criminal justice legislation and the recognition of prisoners as rights-holders by the courts.

The *Charter* became part of Canada's Constitution in 1982 and protects the human rights and civil liberties of all Canadians. The Supreme Court of Canada has strongly affirmed that *Charter* rights extend to prisoners. In *Sauvé v Canada (Chief Electoral Officer)*,<sup>2</sup> where the Court ruled that a ban on prisoner voting was unconstitutional, the Court stated that prisoners retain their legal rights to the extent that they are not necessarily restricted.

The *Criminal Code*<sup>3</sup> contains a series of safeguards recognizing the rights of individuals accused and convicted of committing crimes. In the 1990s, the *Criminal Code* was amended to introduce conditional sentences allowing eligible prisoners in provincial/territorial prisons serving sentences of less than two years to serve their sentences under supervision in the community and also sentencing measures to encourage the use of community-based sanctions. During this

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

<sup>2</sup> *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68 (CanLII), online: <<http://canlii.ca/t/50cw>>.

<sup>3</sup> *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*].

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period the incarceration rates in some provinces and territories stalled and some older correctional institutions were closed.<sup>4</sup>

The federal *Corrections and Conditional Release Act*<sup>5</sup> was enacted in 1992 and introduced a human-rights-oriented legislative framework for federal corrections. The *CCRA* requires Correctional Services Canada (CSC), the body responsible for administering federal corrections, to administer corrections in accordance with a number of guiding principles including that the CSC: “use the least restrictive measures consistent with the protection of the public, staff members and offenders”; “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”; and that correctional decisions “be made in a forthright procedure”.<sup>6</sup> The *CCRA* requires the federal correctional system to be overseen by the Office of the Correctional Investigator (OCI or federal Correctional Investigator). The OCI acts as an independent ombudsman for federal prisoners, has open access to federal prisons and the power to investigate and report on prisoner complaints and prison conditions. The OCI publishes annual reports that include recommendations for improvements to the federal correctional system.

Most provincial/territorial corrections legislation, including the *Corrections Act*<sup>7</sup> of Alberta, does not make provision for the appointment of an ombudsman dedicated to the oversight of correctional systems and does not contain strong provisions protecting prisoners' rights similar to those found in the *CCRA*.

## B. Developments in Criminal and Corrections Law

In 2006, under the leadership of the former federal Conservative government, the federal government moved away from a due process approach and toward a crime-control approach to crime. During its term in office, the *Criminal Code*, *CCRA* and other federal criminal law statutes were extensively amended to impose more stringent sentences and harsher measures on those convicted of committing crimes.

In 2007, a panel under the leadership of the Federal Ministry of Public Safety charged with reviewing the operations of CSC published *A Roadmap to Strengthening Public Safety*.<sup>8</sup> The *Roadmap* made five findings and resulting recommendations: 1) that the *CCRA* requirement to use the “least restrictive measures” to control prisoner behaviour unduly restricts the CSC's ability to act and that “appropriate measures” be introduced to support correctional plan

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<sup>4</sup> Justin Piche, “A Contradictory and Finishing State: Explaining Recent Prison Capacity Expansion in Canada's Provinces and Territories” (2014) XI:26 *Penal Field*, at para 27 [Piche, *Contradictory and Finishing State*], online: <http://champpenal.revues.org/8797>.

<sup>5</sup> *Corrections and Conditional Release Act*, SC 1992, c 20 [CCRA].

<sup>6</sup> *CCRA*, s 4.

<sup>7</sup> *Corrections Act*, RSA 2000, c C-29 [Corrections Act].

<sup>8</sup> Canada, Public Safety Canada, *A Roadmap to Strengthening Public Safety: Report of the Correctional Service of Canada Review Panel* (Ottawa: Minister of Public Works and Government Services, 2007) at 75-76 [Roadmap].

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implementation and offender accountability; 2) that illicit drugs be eliminated from prison through a number of means; 3) that focus be shifted to employability and employment and away from other programs such as substance abuse and anger management programs; 4) that individual prisons be replaced by regional complexes holding four or five prisons within one perimeter (super-prisons) to take advantage of economies of scale, increase security and more effectively serve and manage diverse needs and security levels; and 5) that mandatory statutory release (*Criminal Code* provisions requiring prisoners to be released from custody after they have served a specified portion of their sentence) be eliminated and that prisoners be required to earn their release through parole.

Academics, the non-governmental criminal justice community and others argued, among other things, that the *Roadmap's* observations and recommendations were flawed, both because they were contrary to the historical move of Canadian correctional philosophy away from a punitive approach and toward a human rights approach, and because they lacked and were contrary to constitutional analysis and research-based evidence.

In 2012, the federal government enacted the *Safe Streets and Communities Act*,<sup>9</sup> also known as Bill C-10, which made substantial amendments to every key criminal justice statute including the *Criminal Code*, *CCRA*, *Controlled Drugs and Substances Act*,<sup>10</sup> *Criminal Records Act*,<sup>11</sup> and the *Youth Criminal Justice Act*.<sup>12</sup> The amendments included provisions reducing the availability of pardons; eliminating almost all opportunities for conditional sentences of imprisonment which could be served in the community; abolishing accelerated early parole for first-time, non-violent offenders; making changes to the legal regime for people found not criminally responsible on the basis of a mental disorder (NCRMD), including the creation of a new category of "high risk" offender who faces harsher punishments,<sup>13</sup> and increasing the number and duration of mandatory minimum sentences. The amendments also added section 3.1 to the *CCRC*, which states that "[t]he protection of society is the paramount consideration for the CSC in the corrections process." These amendments also replaced the guiding principle to "use the least restrictive measures" with a new principle to use "measures that are consistent with the protection of society, staff members and offenders and that are limited to only what is necessary and proportionate to attain the purposes of this Act".

### C. Some Effects of the Approach in Bill C-10

There was widespread opposition to Bill C-10 from a number of sectors, including the legal community, prisoners' rights organizations, the Assembly of First Nations and provincial and

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<sup>9</sup> *Safe Streets and Communities Act*, SC 2012, c 1. A detailed list of the amending legislation and provisions amended can be found in Raji Mangat, *More Than We Can Afford: The Costs of Mandatory Minimum Sentencing* (Vancouver: British Columbia Civil Liberties Association: 2014) at p 7 [*Costs of MMS*]: online <<https://bccla.org/wp-content/uploads/2014/09/Mandatory-Minimum-Sentencing.pdf>>.

<sup>10</sup> *Controlled Drugs and Substances Act*, SC 1996, c 19.

<sup>11</sup> *Criminal Records Act*, RSC 1985, c C-47.

<sup>12</sup> *Youth Criminal Justice Act*, SC 2002, c 1.

<sup>13</sup> *Not Criminally Responsible Reform Act*, SC 2014, c 6.

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municipal governments.<sup>14</sup> Academics, legal groups and advocacy groups working in the criminal justice system criticized this new “punitive approach” to crime as being out of step with the evidence about what works to reduce crime and increase public safety.<sup>15</sup> Others warned that this fear-driven policy would have “draconian implications for the protection of human rights, public safety and the public purse.”<sup>16</sup> Critics have linked these legislative changes as causal factors contributing to increased prison and remand populations, over-representation of Aboriginal and racialized prisoners, long-term solitary confinement, deaths in custody, and “a culture of impunity among correctional staff and prison administration.”<sup>17</sup>

Clearly, the number of prisoners in remand began rising steeply in the early 2000s, and since that time, prisoners in remand have outnumbered prisoners in sentenced custody.<sup>18</sup> Since remanded prisoners are exclusively under the supervision of provincial/territorial corrections, the increasing remand population has had a disproportionately negative effect on provincial and territorial correctional systems and the prisoners under the supervision of these systems.

#### D. Summary of Key Research Findings on Prisoners in Canada

The findings of the 2009 Task Force Report, *Changing Face of Corrections*, submitted to the federal, provincial, and territorial ministers responsible for justice and public safety in Canada discussed the practical problems caused by the increasing number of prisoners in remand in provincial/territorial correctional institutions, including: (1) rising costs of transporting individuals to and from court; (2) crowding in facilities close to court; (3) increasing security concerns associated with managing anxious prisoners still facing possible convictions and sentences; (4) increasing fiscal pressures associated with new facilities with each additional bed costing as much as \$300,000; and (5) limited programming for remanded prisoners. The Report also points to the moral implications for the administration of justice and civil society of having more remanded than sentenced prisoners.<sup>19</sup>

Numerous provincial and federal inquests, inquiries, reports, commissions, and investigations into the treatment of prisoners by Canadian correctional authorities, referred to throughout this report, have recommended the need for more oversight, accountability, and transparency in the correctional system. Most examine the federal corrections system. However, there is little doubt

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<sup>14</sup> *Costs of MMS* at 7-8.

<sup>15</sup> Debra Parkes, “The Punishment Agenda in the Courts” (2014) 67 Sup Ct L Rev (2d) 589 at p 590 and p 594 [*Parks, Punishment Agenda*].

<sup>16</sup> Michael Jackson and Graham Steward, “Fear Driven Policy”, *Literary Review of Canada*, 18:4 (2010), online: <<http://reviewcanada.ca/magazine/2010/05/fear-driven-policy/>>; see also Debra Parkes, “Women in Prison: Liberty, Equality and Thinking Outside the Bars” (2016) 12 JL & Equality 127, online: [https://commons.allard.ubc.ca/fac\\_pubs/438/](https://commons.allard.ubc.ca/fac_pubs/438/) which identifies changes in criminal and penal law that have caused prison populations to grow and how the culture of imprisonment has changed in Canada from one of rehabilitation to one of punishment.

<sup>17</sup> *Parks, Punishment Agenda* at pp 593-594.

<sup>18</sup> *Piche, Contradictory & Finishing State* at para 28.

<sup>19</sup> *Piche, Contradictory & Finishing State* discusses this report at length and these specific findings at para 42.

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and substantial evidence that prisoners in provincial/territorial correctional systems suffer from the same or similar violations of their rights as do prisoners in the federal correctional system. This is understandable when one considers that the federal *CCRA*, unlike the Alberta *Corrections Act* and most other provincial/territorial corrections legislation, was enacted to bring federal corrections law in line with the *Charter* and that the federal system is generally considered to have better programs and services than those provided in the provincial/territorial corrections systems.

Michael Jackson, a Professor of Law at the University of British Columbia's Faculty of Law and a prisoners' rights advocate for over 40 years, chronicles the evolution of the Canadian prison system in his book, *Prisoners of Isolation: Solitary Confinement in Canada*, published in 1983.<sup>20</sup> The book was a ground-breaking study documenting the Canadian federal government's lack of regard for human rights in the correctional system, and in particular, the lack of any accountability or oversight of the use of solitary confinement (referred to as "segregation" in Canada). In 2015, Professor Jackson published *Reflections on 40 Years of Advocacy*<sup>21</sup> documenting his disappointment in the lack of meaningful change and the strong resistance by the federal government to seeing prisoners as rights holders, particularly given the many independent reports recommending the need for change and oversight of correctional authorities.

A riot at the Prison for Women in Kingston in 1994 led to an inquiry and the subsequent report by former Justice Louise Arbour in which she stated that "[t]he Rule of Law is absent, although rules are everywhere."<sup>22</sup>

In August 2015, the United Nations Human Rights Committee, in its sixth periodic report on Canada's compliance with the *United Nations International Covenant on Civil and Political Rights*<sup>23</sup> called on Canada to improve its prison conditions. The Committee's Concluding Observations called for a number of changes, including reductions in prison overcrowding, limitations on the use of solitary confinement generally, the elimination of solitary confinement in respect of prisoners with serious mental illnesses, and better treatment for all prisoners with mental health conditions.

In October 2015, the Federal Liberal government came into power. It has promised that reforms will be made to the criminal justice system to eliminate a number of the "tough-on-crime" amendments that were made by the former Conservative government. There has been some movement in that direction. On June 19, 2017, the federal government tabled Bill C-56, *An Act to*

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<sup>20</sup> Michael Jackson, *Prisoners of Isolation: Solitary Confinement in Canada* (Toronto: University of Toronto Press, 1983) [*Jackson, Prisoners of Isolation*].

<sup>21</sup> Michael Jackson, "Reflections on 40 Years of Advocacy" (2015) 4:1 Can J Hum Rts 57, online: <http://cjhr.ca/articles/vol-4-no-1-2015/reflections-on-40-years-of-advocacy/>.

<sup>22</sup> Canada, Solicitor General, *Report of the Commission of Inquiry into Certain Events at the Prison for Women in Kingston*, The Hon. Louise Arbour (Canada: Public Works and Government Services, 1996) at 181.

<sup>23</sup> Human Rights Committee, *International Covenant on Civil and Political Rights: Concluding Observations on the Sixth Periodic Report of Canada*, CCPR/C/CAN/CO/6, UNICCR, UN Doc CCPR/C/CAN/CO/6 (2015).

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*amend the Corrections and Conditional Release Act (CCRA) and the Abolition of Early Parole Act (AEPA).*<sup>24</sup> Among other things, Bill C-56 introduces a framework to limit the time a federal prisoner can be held in solitary confinement to 15 days. However, at this time, little else has been done to undo the harsher criminal laws enacted by the former federal government.

Concern with the violation of prisoners' human rights continues. In 2017, the Canadian Senate Committee on Human Rights launched a new study into the human rights of prisoners in the correctional system. The study will include an examination of the situation of vulnerable or disadvantaged groups in federal prisons including, Aboriginal people, visible minorities, women and those with mental health concerns. The Senate Committee's investigations are ongoing.<sup>25</sup>

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<sup>24</sup> Canada, House of Commons, BILL C-56:

*An Act to amend the Corrections and Conditional Release Act and the Abolition of Early Parole Act*, First Session, 64-65-66 Elizabeth II, Parliament of Canada (2017) online:  
<http://www.parl.ca/DocumentViewer/en/42-1/bill/C-56/first-reading>.

<sup>25</sup> Canada, Senate, "Studies and Bills" 42nd Parliament, 1st Session (2015) online:  
<<https://sencanada.ca/en/committees/ridr/studiesandbills/42-1>>.