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Prisoners as Possessors
of Rights
in Canadian Law

by

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Chapter One: Introduction

Prisons are built with stones of law ...

William Blake

In 1974, Professor Michael Jackson remarked that "[t]he Canadian prison, an integral part of the criminal justice system, has so far not been seen as the concern of lawyers and the courts."[1] At that time, the occasions on which prisoners raised justiciable issues were rare. Prisoners were regarded as having few, if any, rights or remedies. When a question relating to the entitlements of a prisoner did arise, courts generally took a "hands-off"[2] approach, preferring to leave dealings with prisoners to those who were regarded as having a greater expertise in the area; i.e. prison administrators.

This was rather an anomolous position for the courts to have taken. It would have been analogous to have stated that the criminal law should be left to the police, or that tax matters be left to Revenue Canada. The judicial reluctance to intervene in the area of prison law may have been a manifestation of the marginal nature of this area of the law. While criminal law, for example, has been a mainstream subject of legal education and practice for centuries, the law governing the treatment of those convicted of crime has a comparatively short history.[3] Few lawyers practice in the area and instruction in Canadian law schools is minimal or non-existent.[4]

As a society, we have a collective discomfort with the notion and the reality of imprisonment. We have, in convicting people of crimes and sentencing them to imprisonment, determined them to be unfit for community life. We have chosen to be rid of them, at least temporarily. Perhaps we cannot truly be rid of them if we concern ourselves too greatly with their situation or their treatment. To the extent that our legal system and judiciary mirror social values, the marginal nature of prison law may simply reflect the general inclination in our society not to occupy ourselves with prisons and prisoners.

There may be another reason for the paucity of attention given to prison law. Our legal system is preoccupied with the fair and deliberate prosecution of those suspected of committing a crime. We demand exacting behaviour on the part of police in their investigations. We have strict rules of procedure and evidence which enshrine the presumption of innocence and ensure that only relevant and reliable proof is introduced to demonstrate guilt. Once someone has been convicted after this attenuated process, however, we are perhaps certain enough of the person's guilt that we have been content to leave his or her fate in the hands of prison personnel. Other legal systems have a different focus - less emphasis on due process and greater concern for fair and remedial treatment of prisoners.[5] But in our country, the domain of prison law has been no more than an apostrophe at the end of an elaborate system of criminal justice. It is as if our legal system exhausted itself in the scrupulous process of prosecution and had little energy left to concern itself with those whom it condemned to a term of incarceration.

The reasons for this lack of occupation with prison matters both in the law itself and by the courts can, of course, only be the subject of speculation. Neither legislators nor judges have spoken on this question directly. Yet the fact is that throughout the history of imprisonment in Canada, courts have generally recognized few legal entitlements of prisoners or means of challenging the incidents of their incarceration. When prison matters did come before the courts, judges defined their role narrowly. The reluctance to intervene was explicit.

This paper analyzes the extent to which Canadian courts have recognized prisoners as the possessors of concrete, enforceable rights. The status of prisoners at common law, in Canadian statutes and under the Canadian Charter of Rights and Freedoms[6] will be investigated with a view to demonstrating the Charter's impact on this area of the law. The Charter, of course, has not been the only source of change in the law of corrections. Many legal innovations, particularly in administrative law principles, occurred prior to, or have been coincident with, the proclamation of the Charter. But the Charter, it would seem, has accelerated this simultaneous process of change and has acted as a constitutional catalyst for it.

To examine completely the Charter's actual or potential impact on any area of law would be impossible. The aim here is a more modest but purposive one. The Canadian jurisprudence prior to the Charter will be examined. Against it, the proliferation of cases under the Charter will be compared. The differences in the judicial characterization of the status, rights and remedies of prisoners will be highlighted. Through this analysis of the pre- and post-*Charter* situations, the transformation in prison law that has been wrought through the introduction of a constitutionally-entrenched set of legal norms will become evident, as will the evolution of the notion of prisoners' rights in Canadian law.

In Chapter Two, the pre-*Charter* jurisprudence in the area of prison law will be canvassed. This will form the background for a discussion in Chapter Three of the general operation and requirements of the *Charter* with reference to the implications for the law of corrections, and an analysis of the *Charter* jurisprudence to date. Conclusions will be stated in Chapter Four.

A note should be made about the parameters of this study. The analysis begins after the conviction and sentencing of an accused person and ends with the termination of the sentence. As such, the incidents that follow sentencing will be dealt with, such as forms of conditional release, prison discipline, prison conditions, the transfer of prisoners, etc. By way of disclaimer, this paper is intended to trace the process of change in prison law with particular emphasis on the legally recognized rights and remedies of prisoners both before and after the Charter. While some reference will be made to the situation of prisoners in Canadian history, it is not by any means a complete treatment of that subject. Likewise, while the paper examines the role of courts in defining prisoners' rights, it is by no means an exhaustive treatise on judicial review.

Chapter Two: Before the Charter - Prisoners in the Courts

Before examining the magnitude of the *Charter*'s impact on prison law, a discussion of the pre-*Charter* situation is necessary for an appreciation of that impact.

A. Historical Background

At common law, those who had been convicted of a criminal offence were literally "outlaws." They were disentitled to the legal benefits and arrangements that were usually incidental to membership in society, such as proprietary and testamentary rights. In fact, a felon lost all civil rights. This status was referred to as "civil death."[7] For purposes of the law and the rights it proclaimed and provided the convicted person was "attaint" or deemed not to exist.[8] Related to civil death and attainder was the concept of "corruption of blood." According to this doctrine, not only did the convict forfeit his own proprietary rights, but his estate was extinguished and no heirs could succeed to it.[9] In the United States, a slightly different expression was given to the status of prisoners in the nineteenth century. There a convict, "as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State."[10]

Needless to say, whether regarded as dead or as a slave, the incarcerated person was entitled to very few, if any, rights or privileges at common law. The law, "in its humanity" did, however, confer some entitlements by statute. In Canada, the first post-Confederation penitentiary legislation,[11] while containing mostly details about the personnel and administration of federal penitentiaries, also set out some benefits that were to be enjoyed by those confined there. Most notably, the Act set out General Rules for the Treatment of Convicts:

1. Every convict shall, during the term of his confinement, be clothed at the expense of the penitentiary in suitable prison garments;

2. He shall be fed on a sufficient quantity of wholesome food;

3. He shall be provided with a bed and pillow with sufficient covering, varied according to the season;

4. Except during sickness or other incapacity, he shall be kept constantly at hard labor, the kind of which shall be determined by the Warden, every day not exceeding ten hours, exclusive of hours for meals, except Sundays, Good Friday and Christmas Day, and such other days as the Governor may set apart for days of fasting or Thanksgiving, and such days as many be designated in the rules made by the Directors in that behalf;

5. No Roman Catholic convict shall be compelled to labor on any of the obligatory holidays of his Church; that is to say, Circumcision, Epiphany, Annunciation, Corpus Christi, Saint Peter and Saint Paul, All Saints, Conception and Ascension;

6. The Warden may, if he sees fit, permit a convict of exemplary conduct to work over hours at such work as can be conveniently done in the institution, and at such rates as shall be defined by the Directors, the value of which overwork, at said rates, may be paid either to the convict's family during his imprisonment, should he so desire it, or be credited to him in the books of the Institution to be paid him on his discharge,

subject, however, to any general rules which the Directors may make upon the subject;

7. Every convict shall be kept in a cell by himself at night, and during the day when not employed, except in case of sickness.[12]

A prisoner was entitled to earn remission from the duration of the sentence through "industry, diligence and faithfulness in the performance of his work, and the strictness with which he observes the prison rules."[13] The Inspector of Penitentiaries was empowered to establish certain prison offences. The Act made it an offence in all cases for a prisoner "to speak to another convict upon any pretence whatever, not to any officer or guard, or other servant of the institution, except with respect to the work at which he is employed, and then only in the fewest words and in a respectful manner."[14] With respect to the other offences, the prisoners were given notice of them through the posting of a list.[15] Only certain privileged persons were entitled to visit penitentiaries: the Governor General, Members of Parliament, Judges and Queen's Counsel, etc. Others could attend only with the warden's permission.[16] Prisoners could be transferred from one institution to another on the orders of the Secretary of

State or another designated officer.[17] The only limitation on the discretion to transfer a prisoner was the requirement of a medical certificate declaring that the prisoner was "free from any putrid, infectious or cutaneous disease, and that he is fit to be removed."[18] Prisoners could not be forced to leave the penitentiary upon expiration of their sentence during the winter months of November through March, nor if they were unwell.[19] Upon discharge, prisoners were to be given a suit of clothing and enough money to permit them to travel to the place where they were convicted.[20]

Conditions in the penitentiaries were obviously intended to be harsh. Convicts were required to work at hard labour and were not permitted to speak. However, there are some traces in the Act of a humane and merciful disposition toward the prisoners. They were to be decently clothed and kept warm. They could earn remission of their sentences by applying themselves industriously. While the rules of behaviour were strict, they were at least given advance warning of the offences to which they might be liable on breach of the rules. There was an acknowledgement of religious holidays. Prisoners could be transferred only if they were in a fit condition. They were entitled to sanctuary in the cold winter months if they had nowhere else to go upon discharge. Presumably with a view to aiding prisoners in their successful reintegration into society, they were also given suitable clothing and conduct money.

The Penitentiaries Act, 1868 mirrored penal reforms taking place at the time in Britain, Europe and the United States.[21] Prior to the eighteenth century, prisons had been unregulated and little used places of punishment. Other forms of punishment were more common than incarceration - torture, death or transportation to penal colonies. These were all forms of punishment inflicted on the body of the offender. Imprisonment came to be regarded in the eighteenth century as a means of punishing the person, rather than the body, of a criminal. Through a strict regime of hard work, hygiene, silence and prayer, it was felt by reformers that criminals could be disciplined to become decent citizens. Both convicts and their keepers, by contrast to earlier times when prisons were unsupervised and run as their wardens saw fit, were to be governed by statutory rules and subject to assiduous inspection. The environment was to be strict, but fair.[22]

It is evident, however, that although the introduction of a statutory regime bound prison administrators to offer their inmates a certain quality of incarceration, much was still left to their ample discretionary powers. According to the Penitentiaries Act, 1868, the warden had the power to decide whether prisoners could receive visitors or earn remission. The warden acted as judge in cases involving the breach of prison rules and fixed the appropriate punishment - infliction of the lash or other corporal punishment, or remand to the "Penal Prison."[23] As the chief executive officer of the penitentiary and the person responsible for its "faithful and efficient administration,"[24] the warden also had to decide how best to carry out the general prison rules conferring benefits on the prisoners; i.e. what clothing was "suitable," whether the diet was "sufficient" and "wholesome," etc.

Thus, while the common law regarded prisoners as civilly dead, without rights or remedies, the Penitentiaries Act, 1868 appeared to establish some minimal entitlements that were to be made available during the course of their incarceration and upon their discharge. The Act also set out the powers and duties of penitentiary administrators, most notably the warden, but still left to them a very broad discretion to govern the institution as they saw fit. This was a significant, but not radical, improvement in the situation of prisoners. The Act manifested a certain benevolence toward prisoners, but the amplitude of the discretion left to the administration and the absence of any means of asserting the benefits set out in the Act itself mitigated any amelioration of the status of prisoners the Act otherwise might have accomplished.

Canada's first conditional release statute passed in 1899,[25] set out a legal regime establishing powers of the Governor General to release prisoners on certain terms and conditions on what was called a "ticket of leave" before expiration of their sentences. Release was clearly to be a privilege, not a right.[26] The Act did state, however, that those given a license to be released "shall be allowed to go and remain at large according to the terms of such license."[27] The Governor General was given an unfettered discretion to revoke or amend the conditions of release.[28]

The conditions of release were strict. Released prisoners were required to notify the police of their place of residence and of any change of address or travel to another town even if only temporary.[29] Release was automatically forfeited upon conviction of an indictable offence[30] and was liable to be revoked on conviction of a summary offence or upon the Governor General's orders.[31] In either case, the convict was returned to the penitentiary and required to serve whatever portion of the sentence remained unexpired at the time of release.[32] Thus, even though the sentence was deemed to be in force while the prisoner was at large,[33] revocation or forfeiture resulted in the re-serving in custody of the time spent on release. Breach of conditions[34] in itself was a crime punishable by three months' imprisonment with or without hard labour.[35]

Thus, like the Penitentiaries Act, 1868, the Ticket of Leave Act, 1899 had both a humanitarian and a harsh aspect. On passage of the Ticket of Leave Act, 1899, Sir Wilfred Laurier compared the power to release a prisoner before the expiration of a sentence of imprisonment to the exercise of the royal prerogative of mercy.[36] While the Act purported to give the licensed prisoner an entitlement to be at large, it also gave broad powers to terminate the release.

Neither Act offered the prisoner any means of recourse for asserting the entitlements the statutes appeared to grant. Neither was there a common law remedy available. The prerogative writs did not at the time permit judicial review of conditions of incarceration,[37] the exercise of discretion by administrative officials,[38] or the exercise of the royal prerogative.[39]

The interrelated concepts of outlawry, attainder, and corruption of blood which denied convicted persons of proprietary and other civil rights absolutely, were expressly abolished in Canada in 1892 with passage of the first Criminal Code.[40] However, it is arguable that vestiges of the notion that prisoners lacked the capacity to possess rights lingered on in Canadian law until quite recently. This will be discussed in the next section, which deals with the pre-Charter Canadian caselaw.

B. Challenging the Incidents of Incarceration

Legislation governing incarcerated persons remained largely unchanged until the late 1950s and early 1960s.[41] A statutory scheme governing parole was enacted in 1958[42] on the recommendations of a Royal Commission.[43] The <u>Penitentiary Act</u> received significant amendment in 1961.[44] In addition, the <u>Canadian Bill of Rights</u> was enacted in 1960.[45] It recognized certain rights and freedoms to be enjoyed by all Canadians and required that the laws of Canada be construed or applied in a manner so as not to abrogate, abridge or infringe the rights and freedoms it declared. Most notably, with respect to its potential influence on the rights of prisoners and parolees, the <u>Bill</u> provided:

- the rights to life, liberty, and security of the person, and the right not to be deprived thereof except by due process of law; (s. 1(a))

- the right to equality before the law and the protection of the law; (s. 1(b))

- protection against arbitrary detention or imprisonment; (s. 2(a))

- protection against cruel and unusual treatment or punishment; (s. 2(b))

- the right to be informed promptly of the reasons for arrest or detention; (s. 2(c)(i))

- the right to retain and instruct counsel upon arrest or detention without delay; (s. 2(c)(ii))

- the right to challenge the validity of detention by way of <u>habeas corpus</u>; (s. 1(c)(iii))

- the right to a fair hearing in accordance with principles of fundamental justice for the determination of rights and obligations. (s. 2(e))

Thus, there was a flurry of legislative activity with respect to the law applying to prisoners within a span of three years, while there had been almost no change in the previous sixty. As might be expected, these changes sparked litigation of a number of issues relating to prisons and prisoners. Curiously, however, it was as much the common law as statutes or regulations which was responsible for the most profound changes in the way courts regarded the rights and remedies of prisoners up until passage of the <u>Charter</u> in 1982. The next section analyzes the developments affecting the legal rights of prisoners which took place prior to the <u>Charter's</u> enactment.

(i) Parole

The Parole Act of 1958[46] created the National Parole Board[47] and vested it with sole responsibility for determining whom was to be granted conditional release according to statutory criteria.[48] It was obliged to consider the suitability of every penitentiary inmate for parole, whether or not the prisoner applied.[49] It was also given powers to suspend or revoke parole.[50] As such, the Act effected a transfer to a tribunal of a power that had been regarded, at least by some,[51] as a discretionary exercise of the royal prerogative of mercy.[52] The purpose of parole, in accordance with the views of the Fauteux Committee,[53] was clearly to be rehabilitative,[54] rather than beneficent. Whether, and to what extent, the new Act created any rights or remedies for those who were subject to it were questions that came before the courts in the 1960s and 1970s.

The first case to interpret the impact of the new legislation was In re McCaud.[55] There the prisoner was re-arrested while on parole and later had his parole revoked. He was not informed of the reasons for revocation nor was he given an opportunity to oppose it. The Parole Act contained a two-stage process by which the Parole Board could terminate parole. First, a member of the Board or a designated person could suspend the parole and authorize the prisoner's arrest.[56] Second, the Board was obliged to review the matter and determine whether to cancel the suspension or revoke the parole.[57] McCaud argued that upon his arrest he was entitled to be given reasons for the suspension of his parole and, further, that he should have had an opportunity to make submissions at the Board's review of his suspension. On his habeas corpus application to the Supreme Court of Canada,[58] he invoked s. 2(e) of the Canadian Bill of Rights in support of his claim to be present at the post-suspension hearing. It provides:

> 2. Every law of Canada shall ... be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights and freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to
>
> ...
>
> (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations ....

Spence J. dismissed the application. He held that since the Parole Act empowered the National Parole Board to revoke parole "in its discretion,"[59] its actions were not reviewable. Further, the Canadian Bill of Rights, in Spence J.'s opinion, did not apply. He referred to s. 11 of the Parole Act, which stated that the inmate's sentence continued in force while on parole, and concluded:

> [T]herefore when the applicant had his parole revoked he was under sentence which was continued in force. The question of whether that sentence must be served in a penal institution or may be served while released from the institution and subject to the conditions of parole is altogether a decision within the discretion of the Parole Board as an administrative matter and is not in any way a judicial determination.[60]

There were several significant ramifications of this decision. It is unclear why the Bill of Rights did not apply. Paragraph 2(e) of the Bill entitled McCaud to a fair hearing for the determination of his "rights and obligations." Implicit in Spence J.'s judgment, then, was the belief that no "rights" were at stake in the revocation of the inmate's parole. In stressing that the parolee's sentence continues in force while on release, Spence J.'s judgment was consistent with the treatment of prisoners at common law; that is, since the status of the parolee was identical to that of a prisoner and prisoners have no rights, neither, then, do parolees. While it is not clear from the decision, he may have reasoned that the Bill of Rights gave rise to no greater powers of review than were available at common law - since judicial review of this kind of administrative decision was at that time unknown at common law, the Bill of Rights could not create it.

Also argued in McCaud was the question whether subsections 11(1) and 16(1) of the Parole Act were in conflict. Subsection 11(1) stated that the parolee's sentence continued in force while on parole. Subsection 16(1) provided that upon revocation of parole, the prisoner was obliged "to serve the portion of his original term of imprisonment that remained unexpired at the time his parole was granted." In other words, the Act deemed the parolee to be serving his sentence while released, but required the period of time spent on release to be served again if the parole was subsequently revoked. Spence J. held, without giving reasons, that there was no contradiction between the provisions.

The requirement to double-serve "street time" upon revocation or forfeiture of release had been a feature of conditional release legislation since enactment of the Ticket of Leave Act, 1898.[61] It was unclear, however, what effect the revocation or forfeiture of parole had on remission standing to the parolee's credit; i.e. did the unexpired portion of the sentence include remission already credited?

The Penitentiary Act of 1961 provided two means by which a prisoner's sentence could be shortened by way of remission. First, every prisoner, upon entry into a penitentiary, was automatically given "statutory remission" equal to one-quarter of the sentence to be served.[62] Second, a prisoner could accumulate an additional period of "earned remission" of up to three days for each month "during which he ... applied himself industriously to his work."[63] Statutory remission could be forfeited under the Act as punishment for conviction of a disciplinary offence.[64] Three-quarters of the statutory remission was forfeited upon conviction of the offence of escape or attempted escape.[65] Earned remission could not be forfeited for any reason.[66] Clearly, then, forfeiture or revocation of parole could not erase a prisoner's earned remission, but neither the Parole Act nor the Penitentiary Act spoke directly to the effect on statutory remission. While the case law on this issue, because of subsequent statutory amendments, is largely of historical interest, it is of some significance for present purposes since it deals with the effect on parole of what appeared to be a new right conferred on prisoners by the _Penitentiary Act_ - the right to statutory remission.

Section 22(1) of the _Penitentiary Act_ provided:

> 22(1) Every person who is sentenced or committed to penitentiary for a fixed term shall, upon being received into a penitentiary, be credited with statutory remission amounting to one-quarter of the period for which he has been sentenced, or committed as time off subject to good conduct.

It appeared to bestow on all eligible prisoners an automatic reduction of sentence upon confinement. Other provisions of the Act detailed the conduct that could give rise to a subsequent loss of remission.[67] However, the Saskatchewan Court of Appeal in _Re Morin_[68] interpreted the Act otherwise. Culliton, C.J.S. for the Court held that subsection 22(1) did not provide "an immediate reduction of sentence."[69] Rather, the granting of remission was a "deferred credit"[70] that could only be enjoyed when the prisoner was entitled to be released.[71] Thus, his entitlement to statutory remission had not yet vested. He was given no credit for it in calculating the period of his incarceration upon revocation of parole. The Court professed to be giving the words in the Penitentiary Act "their obvious and plain meaning."[72]

The Supreme Court of Canada also found the words in issue to be without ambiguity, but to the opposite effect in Marcotte v. Deputy Attorney General for Canada.[73] Dickson, J., as he then was, for the majority,[74] characterized statutory remission as something to which a prisoner was entitled "as of right,"[75] "a real and immediate entitlement and not an elusive expectation."[76] Since the Penitentiary Act contained an "entire code"[77] for the awarding and forfeiture of remission, it could not be withdrawn by means other than those expressly provided. Dickson, J. held that "[i]t is not one of the purposes of the Parole Act to effect changes in sentences,"[78] notwithstanding that the Act also had the effect of lengthening sentences by requiring street time to be served twice upon revocation or forfeiture. While Dickson, J. found the legislation to be clear with respect to the prisoner's entitlement to remission, he would have decided the matter in the same way had there been any doubt:

It is unnecessary to emphasize the importance of clarity and certainty when freedom is at stake. No authority is needed for the proposition that if real ambiguities are found, or doubts of substance arise, in the construction and application of a statute affecting the liberty of a subject, then that statute should be applied in such a manner as to favour the person against whom it is sought to be enforced. If one is to be incarcerated, one should at least know that some Act of Parliament requires it in express terms, and not, at most, by implication.[79]

Marcotte was a significant decision. It was the first occasion on which the Supreme Court was faced with a determination of the character of an entitlement conferred on prisoners by Canadian legislation. The majority stated without hesitation that the prisoner's statutory remission was a "right" that could only be withdrawn expressly. It did so as a matter of statutory interpretation without resort to the Canadian Bill of Rights. Four members of the Court[80] went on to state that even if the statute had mandated the loss of statutory remission, that would have been an unnecessary, if not unwise, consequence of parole revocation. There already existed a significant penalty for parole revocation - the re-serving of street time. Dickson,

J. stated that "the loss of liberty and the necessity of re-serving parole time are sufficient incentives to the parolee without the added burden of loss of statutory remission."[81]

Much as the decision was significant for its forceful recognition of the prisoners' rights at stake, the result was somewhat ironic. The case was decided in 1974. In 1969, amendments had been made to the Parole Act[82] and the Penitentiary Act[83] which expressly provided that both statutory and earned remission were to be lost upon revocation or forfeiture of parole. Thus, while a majority of the Supreme Court had, for the first time in Canadian legal history, given recognition to a "right" of prisoners, that right had long since been extinguished by statute.

The decision was ironic in another respect. Nowhere did the Court state that the nature of the parole revocation process had any implications for the manner in which the respective statutes ought to be interpreted. Yet, its earlier decision in In re McCaud[84] had held that parole revocation was an administrative matter within the sole discretion of the Parole Board. Its decisions not being judicial or quasi-judicial in nature, they were not reviewable and the Bill of Rights did not apply to it. The result in Marcotte may, then, be attributable to the decision in McCaud. If statutory remission could be lost as the result of an unreviewable, administrative decision, the length of time a prisoner spent in custody could be increased significantly without any intervention by the courts. At the level of the Ontario Court of Appeal, Estey, J., had made the connection between the issues in Marcotte and McCaud in his dissenting judgment:

> When one considers the parole procedures as described in Ex p. McCaud, supra, one must be reluctant to prescribe as a consequence of the administrative action of suspension and revocation of parole the death of the right to statutory remission for all time served prior to the grant of parole. Such an interpretation indeed would tempt an inmate to decline parole because of the hazards of successfully serving out the unexpired portion of his sentence outside the prison on parole.[85]

Marcotte made it clear that for those who had their parole revoked or forfeited prior to the effective date of the 1969 amendments, no statutory remission would be lost.[86] A remaining issue was the effect of the amendments on those who had been credited with remission prior to passage of those provisions but whose parole terminated thereafter.

If, as Dickson, J. held in Marcotte, statutory remission was a "real and immediate entitlement"[87] granted to prisoners upon their reception into the penitentiary, it was questionable whether subsequent legislation could interfere with that vested right.

In R. v. Dwyer,[88] Anderson J. of the British Columbia Supreme Court held that the 1969 amendments could not apply to anyone sentenced prior to the legislation's proclamation. To hold otherwise would be to give the legislation a retroactive effect. It would also allow the imposition of a potentially lengthy period of incarceration by an administrative body, the National Parole Board:

> The new term of imprisonment is not imposed in accordance with "due process" by any court of competent jurisdiction but by the automatic result of administrative action.
>
> ... I cannot conceive that Parliament meant, in the light of the provisions in the Bill of Rights, that the amendment of the Parole Act should be construed retroactively so as to add a new term of imprisonment to the term already served or deemed ... to have been served.[89]

In Ex parte Dodge,[90] Keith, J. stated that as "a matter of elementary justice ... this applicant's remaining term of imprisonment should not be increased by nearly 300 days"[91] by invoking a piece of legislation that came into force well after he had been sentenced and paroled.

Other cases went the other way. In Ex parte Hilson,[92] Morand J. relied on the characterization of statutory remission as a "deferred credit"[93] and held that the 1969 amendments could extinguish what had been previously granted to the prisoner. Since the earlier case of In re McCaud had made it clear that the Parole Board could act on a discretionary basis without judicial reivew, and the Parole Act specifically authorized the Board to act other than in accordance with principles of fundamental justice, the prisoner had no complaint, even under the Bill of Rights. Even cases decided after Marcotte, which had rejected the "deferred credit" line of cases in favour of a "rights" doctrine, occasionally took this approach.[94]

The Supreme Court's solution arrived in Howley v. Deputy Attorney General of Canada.[95] Howley had been sentenced in 1965 to 10 years' imprisonment for attempted robbery. He was paroled in March 1971. At that time, he had 903 days of remission to his credit. His parole was forfeited in October, 1971, after conviction on a charge of theft, and his remission was extinguished. Dickson J., as he then was, for a unanimous Court, distinguished Marcotte on the basis that the "ambiguity which the majority of the Court found in the former s. 16(1) [of the Parole Act] in Marcotte is noticeably absent in the new legislation. The new language removes any doubt as to what is intended."[96] This result was rather peculiar given that Dickson J. had, in fact, found no ambiguity in Marcotte. He stated there that he was giving effect to "the plain and ordinary meaning of the words used in s. 16(1) of the Parole Act."[97] What he did say was that he would have decided the case the same way had there been any ambiguity. The Court in Howley also qualified the characterization of statutory remission that had been given by the Marcotte majority. Statutory remission was indeed a "real and immediate" entitlement, but "it would be overstating the case to refer to it as a vested right. It was always subject to divestment for bad conduct."[98]

Two remarks can be made about this aspect of the Howley judgment. First, it is unclear how statutory remission could be a "real and immediate" entitlement without being a vested right. The Penitentiary Act provided that remission was granted to a prisoner "upon being received into a penitentiary."[99] By calling it "real and immediate" and rejecting the concept of a "deferred credit," the majority in Marcotte inferred that remission was something that was granted immediately upon the prisoner's committal. The decision in Howley, notwithstanding protests to the contrary, suggested that remission was, rather, a real but not immediate entitlement, since it could be taken away by subsequent legislation. Normally, statutes affecting vested rights only apply prospectively, not retrospectively.[100] Second, it is unclear how one could be divested of something that had not yet vested. Dickson J. stated that it would be going too far to call statutory remission a vested right since it could be divested for bad conduct. If it can be divested, then the entitlement has obviously vested. In the result, the Court held that Howley's remission had been properly forfeited. It repeated the rule expressed in Marcotte that ambiguities should be resolved in favour of the prisoner,[101] but found that the statutory language was not "fairly capable of two constructions."[102]

Thus, Howley undid what had been momentous about Marcotte - an unequivocal declaration of a prisoner's right. While Howley did not, nor could it, take remission away from prisoners completely, it qualified it so greatly (i.e. a real but not immediate, non-vested entitlement) as to make it difficult, even after Marcotte, to continue to speak of prisoners' rights having been judicially recognized in Canadian jurisprudence.

The amendments made to the Parole Act and the Penitentiary Act in 1969 brought about other changes in the administration of the Canadian parole system. Two new concepts were introduced: day parole[103] and mandatory supervision.[104] Day parole allowed a prisoner to be released during certain hours of the day or for a fixed period of time. The Parole Board was given the jurisdiction to grant and terminate day parole in its discretion. The effect of terminating day parole was, however, not specified. Since there was a specific power given to the Board to terminate day parole,[105] it was arguable that the general provisions in the Act for "revocation" and "forfeiture" of parole[106] did not apply. While no consequences appeared to result from mere termination of day parole, revocation or forfeiture would result in the loss of all remission time and the re-serving of time spent on parole.

Some courts saw the general power to revoke parole as not applying to day parole and, as such, refused to sanction failure on day parole with loss of remission and credit for street time.[107] The Federal Court Trial Division held in Skitt v. Solicitor General of Canada[108] that any doubt about the application of the revocation procedures and consequences to day parole should be resolved in the parolee's favour. Other courts found no ambiguity in the forfeiture, as opposed to the revocation, provisions of the Parole Act. Revocation applied simply to "parole."[109] By contrast, forfeiture applied to "any parole."[110] In Ex parte Davidson,[111] Seaton J.A. felt compelled to conclude that day parole could be forfeited, notwithstanding arguments about the fairness of this result:

> It is suggested that it is unduly harsh to forfeit a day parole and then serve the time which has already been served. On the other side it is said that a person on day parole who commits an indictable offence ought to be dealt with harshly. I do not propose to weigh those arguments. The law is expressed with clarity in s. 21(1) and the plain words must be given effect to.[112]

In Zong v. Commissioner of Penitentiaries,[113] it was argued that the effect of forfeiture of day parole was even harsher than the consequences of forfeiting full parole. A person on day parole usually spends a certain period of the day at large, but returns to a prison or other facility for the remainder. Thus, while on day parole, the parolee may still be incarcerated for a significant portion of the duration of the parole. Yet, if the parole is forfeited, no credit would be given for the time spent on day parole, including the time actually spent in close custody. However, the Federal Court of Appeal held that the forfeiture provisions ought to apply to day parole absent an expression of a contrary intention by Parliament.[114]

Various provisions of the <u>Canadian Bill of Rights</u> were invoked by the plaintiff in <u>Zong</u>. Mr. Justice Le Dain for the Court held that the <u>Bill</u> added nothing to the usual rules of statutory interpretation. While he found the results of forfeiture to be "severe indeed,"[115] they were obviously felt necessary by Parliament "to assure compliance with the conditions of parole."[116] He held that the additional period of imprisonment required to be served was not arbitrary, since it was prescribed by law.[117] While the consequences of forfeiture were "drastic," they did not amount to punishment.[118] Thus, the proscriptions in the <u>Bill of Rights</u> against arbitrary detention and cruel and unusual punishment were not offended by the <u>Parole Act</u>.

Bill of Rights arguments were similarly dismissed in R. v. Connors.[119] Connors also challenged the imposition of an additional period of incarceration as a penalty for parole forfeiture on the grounds that it constituted double jeopardy as defined in section 11 of the Criminal Code.[120] He had already received a term of imprisonment as punishment for the indictable offence committed while on parole. The lost remission time and re-service of street time were added on top of that sentence. The Court held that there was no double jeopardy in the circumstances, since loss of remission and street time credit were not "punishment." Hart J. stated:

> The statutory revocation of a privilege is not, in my opinion, the type of "punishment" intended by s. 11 of the Criminal Code.[121]

Thus, while the severe consequences of parole revocation were regarded by courts as a necessary sanction to effect compliance with parole requirements, the fact that parole itself was a privilege prevented the extended periods of incarceration imposed by the Parole Act from being regarded as "punishment."

The concept of mandatory supervision introduced by the 1969 amendments to the Parole Act required prisoners who had been released on the basis of earned and statutory remission to be subject to supervision in the community as if they were on parole.[122] The forfeiture and revocation provisions of the Act were also applicable to those on mandatory supervision.[123] Thus, those who prior to these amendments would have been given unqualified early release on the basis of accumulated remission were now required to accept conditions of release, undergo supervision and risk forfeiture of their remission and re-service of time on release in the event of revocation or forfeiture of their mandatory supervision. Consistent with the decision in Howley that remission awarded prior to the introduction of the 1969 amendments would be lost upon revocation or forfeiture of parole thereafter, prisoners were required to submit to mandatory supervision even though their remission had been credited before mandatory supervision came into existence.[124]

While the effect of revocation of mandatory supervision was the same as if the inmate's parole had been revoked, it was arguably more harsh. The person was entitled to be released solely because of good conduct and industrious behaviour in the institution. Thus, in revoking mandatory supervision, the Parole Board was not merely withdrawing a privilege it had granted, it was extinguishing a credit the prisoner had earned. This distinction,[125] however, did not result in any difference in the manner in which mandatory supervision cases were dealt with in the courts. As Kennell J. stated in Ex parte Lambert:

> Whether wisdom or unwisdom resides in the scheme ... is not for me to say. The consequences of the construction ... may seem unduly harsh, but the interpretive process must give effect to the plain words of the drafting.[126]

All of these cases generated by the Criminal Law Amendment Act of 1969 point out one dominant characteristic of the Canadian penal system during this era - that is, the immense powers exercised by the National Parole board. Its decision to revoke an inmate's full parole or even day parole had grave consequences. The length of time the person could be required to spend in custody could be lengthened considerably beyond the duration of the sentence imposed by a court. In addition, the Board was given jurisdiction to supervise those who were entitled to be released other than on the basis of the Board's decision to grant parole - i.e. those who had accumulated remission time. Further, it could revoke the release of these inmates. All of these powers were supplementary to the broad powers given to the Board to grant or revoke parole under the 1958 Parole Act and recognized in In re McCaud. The era following the passage of the 1969 amendments therefore "was the period of greatest power for the National Parole Board and of the most harsh measures in terms of revocation and forfeiture."[127]

Notwithstanding the magnitude of the Board's powers, it was not answerable to the courts for the exercise of its discretion. The Board was, however, required to abide by certain mandatory requirements of its enabling statute. The Act[128] set out a series of procedures that were to be followed in the course of suspending and revoking parole. Section 16 empowered a Board member to cause a warrant to be issued suspending an inmate's parole "whenever he is satisfied that the arrest of the inmate is necessary or desirable in order to prevent a breach of any term or condition of the parole or for the rehabilitation of the inmate or the protection of society." The inmate was then remanded into custody pending a review of the matter by the Board within fourteen days.[129] These provisions were interpreted as imposing a positive duty on the Board to act within the specified period. If it did not do so, it was without jurisdiction to revoke an inmate's parole.[130] In other words, these provisions entitled parolees to certain procedural "rights". The Board could revoke parole only after it had reviewed the matter and "conducted all such inquiries ... as it considers necessary."[131] However, the parolee was not always entitled to these procedural rights. The Board could rely on its plenary discretion to revoke parole without abiding by the procedural code contained in the Act.[132] Thus, the right to a review and an inquiry under the Act obtained only if the Board chose to invoke the procedure.[133] Strictly speaking, the inmate cannot be said to have had any "rights" if the Board was obliged to afford them only if it so desired.

Inmates did, however, come to possess one concrete right under the Parole Act. The 1958 Act[134] introduced a requirement that the Board consider the parole eligibility of every penitentiary prisoner.[135] This duty was interpreted by the Federal Court in Ford v. National Parole Board[136] as entitling a prisoner to have his case considered by the Board at the point at which he had spent the minimum duration of his sentence necessary to be eligible for release. The Court made clear that it was not suggesting that the Board's decisions were reviewable; rather, that the Board was merely obliged to make a decision in relation to each prisoner:

> Defendant's principal argument was to the effect that the granting of parole is a privilege and not a

right. That is undoubtedly so as is the argument that the decision by the Parole Board to grant or refuse to grant parole to an inmate is an administrative act which should not be interfered with by the Courts unless the rules of natural justice have been infringed, which is not suggested here. I find no difficulty however in making a distinction between the granting of parole which is a privilege to be exercised at the sole discretion of the National Parole Board after a review of the inmate's record and the making of such a review at times required by the Act and Regulations made thereunder, which in my view is a right.[137]

Interestingly, the date at which Ford was to be eligible for parole had changed when he was in prison. Originally he would have been eligible for parole in 1975. According to amendments to the Parole Regulations passed in 1973,[138] he would have to wait until 1978. Walsh J. referred to the Interpretation Act[139] and cases dealing with the retrospective application of statutes that take away rights[140] and concluded that the 1973 regulations could not operate so as to deny the prisoner his previously granted right to a review in 1975. No reference was made by Walsh J. to the Howley[141] case in which an opposite conclusion had been reached as to the ability of legislation to extinguish previously accrued remission time.[142]

With passage of the <u>Federal Court Act</u>[143] in 1970 new possibilities arose for the review of decisions of the National Parole Board. The Act split the Court's supervisory jurisdiction between the Trial Division and the Court of Appeal. The Trial Division was given "exclusive original jurisdiction" to review by way of the prerogative writs the decisions of "any federal board, commission or other tribunal."[144] The Court of Appeal had jurisdiction to review and set aside a decision or order of a federal board, commission or other tribunal "other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis."[145] Thus, review of federal tribunals by way of the prerogative writs (other than <u>habeas corpus</u>) was transferred from the superior courts of the provinces to the Federal Court. If decisions of the Parole Board could be characterized as "judicial or quasi-judicial", the Federal Court of Appeal would have jurisdiction to review them. On the other hand, if the Board's proceedings were entirely administrative, the Trial Division could review them on such grounds as were recognized at common law. There was no certainty, of course, that either remedy was open to prisoners who challenged the Board's powers. For example, if the Board was found merely to exercise administrative functions for which there was no common law remedy, the Federal Court would have no supervisory role to play.

The first review possibility was explored in Howarth v. National Parole Board.[146] There the prisoner challenged the Board's decision to revoke his parole on the basis that it did not afford him reasons for the revocation nor an opportunity to be heard. He sought review in the Federal Court of Appeal on a section 28 application. The Supreme Court of Canada held that the Board's decisions were not required by law to be made on a judicial or quasi-judicial basis and, therefore, that they were explicitly excluded from review under section 28. The majority[147] relied on the statement of Spence J. in In re McCaud[148] that the Board's discretion to determine the place where a prisoner was required to serve his sentence was "not in any way a judicial determination"[149] in concluding that section 28 did not apply.[150]

The Parole Act had been amended[151] since In re McCaud. While the Act had previously required the Board merely to review the case of a suspended parolee, after 1969 the Board was obliged to "review the case and cause to be conducted all such inquiries in connection therewith as it considers necessary."[152] The majority in Howarth, however, did not regard this change as imposing any new obligation on the Board to proceed in a judicial or quasi-judicial fashion. While some common law remedy might have been available and, therefore, some cause of action before the Trial Division, there were no grounds for a section 28 review.

Dickson, J., as he than was, wrote a dissenting judgment.[153] He began by noting the importance, but long-standing neglect, of parole matters:

> The question is an important one for the law has erected manifold safeguards to protect the civil rights of a person accused of crime, and gives to a person released on probation a protective shield of due process, (Criminal Code, s. 664) but hitherto evinced small regard for the civil rights of a person to whom parole has been granted. It falls now to decide whether the enactment of the Federal Court Act ... has changed all of that.[154]

He went on to interpret the duty to act on a judicial or quasi-judicial basis broadly; that is, that it includes any duty to observe the principles of natural justice.[155] In his view, it was the magnitude of the interests affected by the tribunal which determined whether the rules of natural justice must be observed in arriving at its decisions or orders. Dickson J. recognized the interests dealt with by the Parole Board as substantial. It was perhaps the most forceful statement on the "rights" of parolees ever made by a member of the Court:

> Revocation of parole is not a part of the criminal prosecution and a parole prisoner can hardly be regarded as a "free" man. He stands charged and convicted by due process of law. While paroled he is still a convicted prisoner. But he has been given a large measure of freedom as part of the rehabilitative process and the imminent loss of that freedom does not find him entirely without rights. I fail to see how it can be contended that parole is a mere privilege or act of grace and favour, on the part of the Parole Board, conferring no rights on the parolee and subject to withdrawal at will. The parolee is given his liberty and an opportunity to be united with his family and friends, to further his education, to seek and obtain employment and subject to the terms of his parole and the statute to enjoy the privileges of a free man and the prospect of ultimate restoration of full civil status. <u>All of this is a precious right</u>. It cannot be argued successfully that the parolee remains in the custody of the warden of the prison or the Parole Board and that parole and revocation of parole are mere changes in the form of custody.

> Confinement in a cell and liberty under parole are simply not comparable. Though subject to the supervision of a parole officer, the liberty of a parolee is extensive and is extinguished by incarceration. By any test, incarceration upon revocation of probation (sic) is deprivation of freedom.[156]

This was obviously a marked departure from the decision in In re McCaud in which Spence J. had referred to the absolute discretion of the Board to determine whether a prisoner's sentence was to be served in or out of an institution. Yet Spence J. concurred with Dickson J.'s assessment of the board's powers and responsibilities in Howarth. Dickson J. distinguished McCaud on the basis that the Federal Court Act had introduced new review mechanisms, and amendments to the Parole Act had imposed a requirement that the Board act in a quasi-judicial fashion in revoking parole.[156]

While the majority in Howarth rejected the plaintiff's claim that the Parole Board's decisions were subject to judicial review, for two reasons this did not foreclose access to the courts by parolees altogether. First, it is clear that Howarth was based solely on the jurisdiction of the Federal Court of Appeal under section 28 of the Federal Court Act. It did not address the availability of review by the Trial Division on common law grounds under section 18. Second, no reference was made to the Canadian Bill of Rights in the decision. Thus, it was still possible that the Bill imposed upon the Parole Board duties to proceed in accordance with natural justice or in conformity with judicial or quasi-judicial standards of procedural regularity. Not even in Dickson J.'s dissent, in which "rights" of parolees were recognized, was there reliance on the provisions of the Bill. Clearly, the application of the Bill had not been argued.

Other courts, however, did not interpret Howarth this way. For example, in Ex parte Lambert,[158] Pennell J. ruled on a habeas corpus application that the Parole Board had no obligation to act in accordance with principles of natural justice. Thus, even though "it may be a fair incident of revocation proceedings to give the inmate a hearing ... the great weight of judicial authority has held that it was not the intention of the lawmakers that it be necessary."[159] Howarth was interpreted by the Court as an endorsement of In re McCaud. Decisions of the Parole Board, therefore, were still viewed as completely unreviewable notwithstanding that the majority in Howarth confined itself solely to the jurisdiction of the Federal Court of Appeal under its enabling statute and explicitly left aside the question of review by way of the prerogative writs, including habeas corpus. The result in Lambert was particularly curious given Pennell J.'s own decision in the earlier case of Ex parte Beauchamp.[160] There he held that the result in In re McCaud did not relieve the Parole Board from acting fairly "in accordance with the principles of proper justice."[161] As such, the Board should give the parolee an opportunity to be heard before it revokes parole. Apparently, Pennell J. regarded Howarth as reversing his holding in Beauchamp.

With respect to the application of the Bill of Rights, courts continued to follow In re McCaud, holding that the Bill simply did not apply to parole decisions. For example, it was argued in Ex parte Thompson[162] that the process of parole revocation operated so as to deny a parolee of liberty without due process of law.[163] The Nova Scotia Supreme Court concluded that since Thompson had been duly convicted of a crime, he had lost his liberty by due process of law. In other words, liberty on parole was not regarded as an interest protected by the Bill of Rights.

Similarly, in a decision of the Federal Court,[164] Howarth was interpreted as confirming the inapplicability of the Bill of Rights to the Parole Board. As such, the revocation of the privilege to be at large while serving a sentence of imprisonment "is not impeded by any of the safeguards that stand between the individual and the collective will of society to interfere with his rights."[165]

The Supreme Court of Canada was given an opportunity to rule on the two issues not addressed in Howarth in Mitchell v. The Queen.[166] There was no issue of jurisdiction to be dealt with as the case arose on a habeas corpus application. The effect of the Bill of Rights was argued fully. The facts of the case, which Laskin C.J.C. found "tend to shock from their mere narration,"[167] were as follows.

Michell had been released on parole on November 9, 1971. His sentence was to expire on January 1, 1974. On December 23, 1973, one week before the end of his sentence, he was arrested without any explanation, other than being told that his parole had been suspended. On February 8, 1974, the National Parole Board revoked Mitchell's parole. Since he received no credit for time spent on release, he was required to re-serve that period of time (about three years) in close custody.

A majority of the Court held that In re McCaud and Howarth were determinative of the issues before it. Ritchie J.[168] held that there was no basis on which to review the Board's decision to revoke parole on a habeas corpus application since there was no jurisdiction to go behind the warrant of committal authorizing the parolee's detention.

However, he went on to say obiter dicta that even if there was jurisdiction to review actions of the Board, no review would lie because the Board, according to In re McCaud and Howarth, has an absolute discretion to grant and revoke parole. It is not obliged to act in a judicial or quasi-judicial manner. Therefore, there is no legal basis on which to review its decisions.

With respect to the Bill of Rights, Ritchie J. concurred with the views expressed by Martland J.[169] Two provisions of the Bill were asserted by Mitchell. First, he argued that he had been denied the right in s. 2(c)(i) of the Bill to be informed promptly of the reasons for his arrest when his parole was suspended. Martland J. answered this argument by stating that the Bill of Rights could not restrict the broad powers of the Parole Board to revoke parole in its absolute discretion. Thus, the Bill could not impose an obligation on the Board to give reasons for its decisions. The parolee was simply entitled to be told that his parole had been suspended, and later, that it had been revoked. While Martland J. supported this conclusion by referring to the Court's decision in Howarth, nothing had been said in that case about the impact of the Bill of Rights on the Parole Act. Neither had anything been said in In re McCaud about s. 2(c)(i) of the Bill of Rights.[170]

Second, Mitchell invoked s. 2(e) of the Bill which entitles a person to a fair hearing in accordance with principles of fundamental justice in the determination of his or her rights and obligations. Martland J. followed In re McCaud holding that since parole is not a right, the parolee was not entitled to a hearing.

Chief Justice Laskin in dissent[171] characterized the Board's authority as follows:

> The plain fact is that the Board claims a tyrannical authority that I believe is without precedent among administrative agencies empowered to deal with a person's liberty. It claims an unfettered power to deal with an inmate, almost as if he were a mere puppet on a string. What standards the statute indicates are, on the Board's contentions, for it to apply according to its appreciation and without accountability to the Courts. Its word must be taken that it is acting fairly, without it being obliged to give the slightest indication of why it was moved to suspend or revoke parole.[172]

Laskin, C.J.C. dismissed the application of Howarth to the matter for the two reasons given above; i.e. that

Howarth dealt solely with a jurisdictional issue, not the general susceptibility of the Board to review, and that Howarth did not involve consideration of the Bill of Rights. He would have required the Board to act fairly, afford the parolee a hearing and give reasons for the suspension and revocation of Mitchell's parole.

Spence, J. felt bound in his separate dissent to distinguish his own judgment in In re McCaud. He stated that at the time McCaud was decided, revocation of parole did not give rise to the forfeiture of remission.[173] This was the consequence of amendments made to the Parole Act in 1969.[174] Since remission credits were "very important personal rights,"[175] the Board could not be acting purely in an administrative capacity when it deprived a prisoner of those rights.

When Mitchell was decided, the Parole Board was at the peak of its powers.[176] By way of the 1969 amendments to its statute, the Board was given jurisdiction to supervise those who had previously been permitted complete freedom. Its decision to revoke parole resulted in prisoners re-serving their street time and forfeiting their remission credits, including those earned before passage of the amendments. It had absolute discretion to grant or revoke parole. Courts could not interfere with the exercise of the Board's powers, even to the extent of ensuring that the Board observed minimum procedural safeguards. Those subject to the Act had no concrete entitlements whatsoever other than to be considered for parole on their parole eligibility date.

Legislative reform in 1977[177] curtailed somewhat the Board's powers by altering the consequences of revocation of parole. The notion of forfeiture of parole automatically upon commission of an indictable offence was abolished.[178] Parolees whose parole had been revoked were to be credited with street time.[179] While remission continued to be lost on revocation of parole, credit was given for earned remission accumulated prior to the amendment.[180] In addition, the Board was empowered to re-credit any remission forfeited on revocation.[181] Thus, the consequences of parole revocation were ameliorated by the 1977 amendments. In the process, however, the Board was given the additional discretion to revoke the parole of those who had committed serious crimes on parole. It was also given authority to determine what amount of remission time the parolee would be entitled to keep. The extent to which the Board's decisions were reviewable remained, therefore, a significant issue even after the 1977 amendments.

Just as with other changes in parole law,[181] an issue arose with respect to the treatment of prisoners whose sentences had been fixed according to the law existing prior to the 1977 modifications. In particular, while the Criminal Law Amendment Act of 1977 abolished the concept of parole forfeiture and gave credit for street time, many prisoners were at the time serving sentences whose length had been calculated according to the formula in the Parole Act prior to 1977; i.e. with double-service of street time and complete forfeiture of remission. Two prisoners challenged the duration of their sentences on the basis that they were entitled to the benefit of the new legislation even though their sentences had been computed before it took effect. Because of the apparent absence of any governing provision of the Canadian Bill of Rights and the Supreme Court's decision on a similar issue in Howley,[183] these prisoners sought recourse under the International Convenant on Civil and Political Rights and the Optional Protocol thereto, to which Canada had recently become a signatory.[184]

The two prisoners, Van Duzen and MacIsaac, brought separate applications asserting that Canada was in breach of its obligation under the Covenant to bring its domestic law into conformity with the rights contained in it.[185] In particular, they alleged that Canada had failed to afford them the rights contained in Article 15(1) of the Covenant:

> Article 15
>
> 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed that the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

It was argued on behalf of Van Duzen and MacIsaac that the Criminal Law Amendment Act of 1977 introduced a "lighter penalty" for breach of an indictable offence since it gave credit for time served while on parole and permitted the recrediting of remission. Canada responded by arguing that the consequences of commission of an indictable offence while on parole were administrative sanctions, not a "penalty" in the sense in which that word was used in Article 15 of the Covenant. With respect to Van Duzen, the United Nations Human Rights Committee determined, without deciding the substantive issue, that it ought not to grant the petition because he had already been released on parole. While Van Duzen had been seeking complete release on the basis of a re-calculation of his sentence, the Committee ruled that release on parole was an adequate result of his claim "since the risk of re-imprisonment depends upon his own behaviour."[186]

In MacIsaac's case, the Committee stated that it was impossible to know whether the law prior to 1977 had been more harsh in its treatment of those who committed offences while on parole than the later law. The judge who sentenced MacIsaac for the offence may well have taken into account the consequences of parole forfeiture in arriving at the appropriate sentence. As such, whether MacIsaac would have received a more favourable treatment after introduction of the 1977 amendments was purely a hypothetical question.[187]

While these cases were unsuccessful in terms of obtaining a declaration that Canada was in violation of its international human rights commitments, they were significant for two reasons. First, the Committee did not rule specifically that the prisoners were not entitled to the rights they asserted. If Van Duzen had not been released on parole or if MacIsaac had been able to demonstrate that his sentence was of a duration more appropriate for someone whose parole had not been forfeited, the result might well have been different. Second, they demonstrated that a new means for asserting putative rights had become available to prisoners and that Canadian law may, in the process, be opened to close scrutiny by an international body. The decisions of the Committee are not binding on the state parties the way decisions of domestic courts would be. Yet, as Zuijdwijk has pointed out, "the impact of a finding against the respondent state will be substantial."[188] The possibility of that outcome was manifested by the Van Duzen and MacIsaac cases and for that reason, their importance should not be underestimated.

Passage of the Criminal Law Amendment Act of 1977 did not result in any substantial alteration in the extent to which courts were willing to supervise decisions of the National Parole Board. It was clear that deference to the Board's expertise was to continue:

> The Parole Board has been given the duty and power to make their decisions without the expectations of court scrutiny thereafter. They are far better fitted to make the decision than a judge in court.

> It is sensible that this power should be granted. For every inmate who has a sincere desire to rehabilitate himself, they must face a dozen whose only sincere desire is to confuse the parole board into thinking they have a sincere desire to rehabilitate themselves. Much of the parole board's decision must be based on experience, psychology and knowledge of the prisoner. None of those can be communicated by the written records.189

Further, the status of the inmate as a convicted person continued to affect the extent to which courts required the Board to comply with the principles of natural justice:

> ... [C]ourts should exercise restraint expecially where prison authorities are under the pressure of making "on the spot decisions." I would apply such caution in cases where a designated officer of the Board has decided to suspend mandatory supervision, which is, after all, a conditional release reducing the time that a judge has or a judge and jury have sentenced a person to prison.190

Owing to developments in the Supreme Court's approach to administrative law in recent cases,[191] including cases involving prison officials,[192] courts did come to regard the procedures and decisons of the Parole Board as having an orbit, however loose, around the principles of natural justice. In addition, regulations passed in 1978 obliged the Board to hold hearings.[193] They also required it to give notice to a parolee of the information to be considered by the Board in determining whether to grant parole and give reasons for its decisions.[194]

In Dubeau v. National Parole Board,[195] Smith D.J. granted an application under Section 18 of the Federal Court Act to review a decision of the Parole Board revoking the applicant's parole.[196] Dubeau argued that he was entitled to have the assistance of counsel at his parole revocation hearing. Smith D.J. found that the Board had "sole power and absolute discretion in connection with revocation of parole" and was "largely free to use its own judgment"[197] in deciding how it should proceed. He also endorsed the characterization of parole as a "privilege," not a "right."[198] However, he regarded the liberty of the parolee to remain at large as an "interest" as well as a "privilege."[199] As such, the Board was obliged to act fairly in determining whether or not the parolee should be deprived of his interests or privileges. In the circumstances,[200] the Board had acted unfairly in denying Dubeau counsel at his revocation hearing. The entitlement to assistance at parole granting and post-suspension hearings was later provided by regulation.[201]

In a later case, Smith D.J. held that the entitlement to a hearing includes the right to attend at the entire hearing with counsel and to hear all of the evidence to be introduced by the Board, in order to have an opportunity to respond to it.[202]

The case did not deal, however, with the right to receive advance disclosure of the evidence to be introduced at a Board hearing. The right to notice had been held by some courts to be at best a moral rather than a legal obligation.[203] To be fair, the Board was simply required to inform the inmate of the substance of the allegations to be made, even though providing copies of its reports would have been preferred.[204] However, in Morgan v. National Parole Board,[205] the Federal Court of Appeal went further in ruling that the obligation on the Parole Board to act fairly prevented it from revoking a parolee's release at a post-suspension hearing without giving him full disclosure of the matters to be considered at the hearing. The Court held that where the Board intends to consider information of which the parolee has not received advance notice, the Board must grant him an adjournment in order to permit him an opportunity to prepare a response. In addition, while the Board did not have a specific legal obligation to inform the inmate of the right to counsel at the hearing, failure to do so was "a further aggravation of the unfairness."[206]

Thus, in summary, it was the application to the Parole Board of the common law duty to act fairly that eventually opened up possibilities for review of Parole Board decisions on procedural grounds. In the years immediately preceding passage of the Charter, courts were less reluctant to intervene in the parole decision-making process to ensure that the parolee's interest in being at liberty was not denied without due process than they had been even in the 1960s and 1970s. While regulatory change introduced several procedural safeguards, such as the right to notice, reasons, and a hearing, it was clear that courts would regard these as minima and would also require that the inmates be given other procedural rights, such as the right to counsel and the right to be informed thereof, the right to attend parole suspension hearings, the right to disclosure and, where appropriate, the right to an adjournment. The merits of the Board's decisons were still beyond the scrutiny of the courts.[207] In decisions such as Dubeau,[208] Couperthwaite[209] and Morgan,[210] however, courts recognized that the Parole Board could continue to exercise broad discretion and autonomy in its decision-making while the courts ensured that fair procedures were followed in the process. Implicit in these recent cases was the recognition that parolees, though still under a sentence of imprisonment, possessed interests that could be asserted in and protected by the courts. In other words, they possessed judicially enforceable rights.

(ii) Prison Discipline

The Penitentiary Act[211] of 1960-61 empowered the Governor-in-Council to make regulations for, among other things, the "custody, treatment, training, employment and discipline of inmates."[212] Regulations promulgated in 1962 set out a list of disciplinary offences.[213] Whereas the previous legislation gave the Commissioner of Penitentiaries an unfettered discretion to create prison offences,[214] the new Act and accompanying Regulations created a finite set of infractions. Arguably, the new regime actually offered inmates less certainty as to the domain of proper conduct in the institution since they were no longer entitled to have the list of offences posted in their cells.[215] Further, new offences prohibited prisoners from breaching prison rules set out in so-called Commissioner's Directives,[216] of which they were often given no notice.[217] The offences themselves also tended to have an "open-ended"[218] character, rendering the categories of proscribed behaviour somewhat imprecise.[219]

The institutional head of each penitentiary was responsible for conviction and punishment of prison offences. Upon conviction the punishment usually amounted to a loss of privileges (such as access to recreational facilities, preferred work assignments or temporary absence passes) unless, in the opinion of the institutional head, the offence was "flagrant or serious."[220] For the latter types of infractions, the prisoner could face loss of remission, dissociation (i.e. solitary confinement) or corporal punishment, not exceeding fifteen strokes of the strap.[221]

By contrast to the jurisprudence involving parolees discussed earlier, in which courts resisted the articulation of any theory of rights in addressing the legal entitlements of parolees and the powers of the Parole Board, an attempt to fashion a comprehensive theory of prisoners' rights was made in 1968 in the context of prison discipline in <u>R. v. Institutional Head of Beaver Creek Correctional Camp, Ex parte McCaud</u>.[222] There the prisoner[223] sought review of the decision of the institutional head to impose a punitive sanction for commission of an offence under the Penitentiary Service Regulations. The facts were not before the Court. However, the prisoner alleged that he had been denied a hearing, the opportunity to present evidence, disclosure of the charges against him, and that the punishment imposed on him was not legally authorized. Thus, the general issue before the Court was whether the institutional head's decision could be reviewed by way of certiorari for failure to adhere to the principles of natural justice, or where jurisdiction was otherwise absent. Certiorari would be available if the institutional head had an obligation to proceed on a judicial or quasi-judicial basis in disciplinary proceedings. Such an obligation would arise only where sufficiently significant interests were the subject of a tribunal's decision. Thus, in Beaver Creek the Ontario Court of Appeal was required to characterize the nature of the prisoner's interests that were affected by the imposition of punishment by an institutional head. Since the issue was dealt with in a general way, rather than in relation to a specific set of facts, the Court outlined a general theory of the status, rights and remedies of prisoners.

The Court began with the proposition that an institutional head generally acts purely in an administrative capacity, even when imposing punishment for breach of prison regulations. However, there was a certain domain of decision-making in which the institutional head was required to act judicially - where the civil rights of the inmate were affected. The Court proposed a test for determining whether a particular decision mandated adherence to judicial procedures:

> The proper test to be applied is to ask whether the proceedings sought to be reviewed have deprived the inmate wholly or in part of his civil rights in that they affect his status as a person as distinguished from his status as an inmate. If the application of this test provides an affirmative answer, in arriving at that decision the institutional head is performing a "judicial" act.224

The Court, in determining which rights an inmate continued to possess after conviction, stated another general proposition:

> It would be trite to say that an inmate of an institution continues to enjoy all the civil rights of a person save those that are taken away or interfered with by his having been lawfully sentenced to imprisonment.225

While the Court may have regarded this as a "trite" statement, it was really the first occasion on which any Canadian court had given expression to the legal status and rights of prisoners. It was clear, however, that notwithstanding this sweeping principle, the Court regarded prisoners as retaining few real rights. Notably, it did not say that prisoners retained all civil rights other than those expressly taken away. Rather, they merely retained those civil rights that were not inconsistent with incarceration. As such, the Court held that prisoners had no right whatsoever to liberty or to possession of property, unless such rights were expressly granted to them under the Penitentiary Act. Similarly, they had no right to enjoy any privileges that officials might permit them while in prison. Neither did they have the right to earn remission time.226 Thus, the decision of an institutional head to impose a punishment that affected a prisoner's liberty (e.g. solitary confinement, refusal of temporary absence passes), property (e.g. disposition of personal effects) or other privileges (e.g. visitation, recreation) did not have to be made on a judicial or quasi-judicial basis. Therefore, it would not be reviewable by way of *certiorari*.

On the other hand, since forfeiture of statutory remission would affect the duration of a prisoner's incarceration it would, therefore, limit his or her liberty not as a prisoner, but as a person.[227] Imposition of corporal punishment infringed an inmate's right to personal security, since it was "punishment inflicted upon the person," not simply "punishment of the person."[228] Thus, where an institutional head punished a flagrant or serious breach of prison regulations by a reduction in statutory remission credits or by physical means, judicial procedures would have to be followed.

In addition, the Court held that prisoners may come to be entitled to certain statutory rights contained in the Penitentiary Act and regulations.[229] While Canadian penitentiary legislation had always provided that prisoners were entitled to certain dignities,[230] this was the first occasion on which a court had actually referred to them as "rights." However, the Court also held that the contents of other legal instruments, such as Commissioner's Directives, did not apply to prisoners. In particular, a Directive[231] that set out a judicial process to be followed in disciplinary matters could not be invoked by a prisoner to assert procedural rights. Directives merely governed the employment relationship between the Commissioner and penitentiary officers. They did not in themselves create civil rights.

In those disciplinary matters in which institutional heads owed allegiance to the principles of fundamental justice, they must, according to Beaver Creek, afford certain basic procedural regularities. The inmate must be informed of the alleged offence and be given a fair opportunity to present evidence. The decision must be arrived at judicially; that is, solely upon the evidence properly tendered, not on irrelevant or capricious grounds. As in most of the parole cases discussed earlier, the Court dismissed the argument that the Bill of Rights enhanced the legal rights of prisoners. Since the common law, as interpreted by the Court, required a hearing and other due process protections whenever the inmate's personal rights were affected by an institutional head's decision, the Bill's guarantees added nothing.

While Beaver Creek was undoubtedly one of the most significant cases in the Canadian law of prisoners' rights for its articulation of an overall theory of rights, it can be criticized on two bases. First, the soundness of distinguishing[232] the inmate's rights as a prisoner from those rights enjoyed as a person may be questioned. It is reminiscent of the notion of civil death at common law since it ascribes a truncated legal status to prisoners, rather than simply prescribing which of their rights are diminished as a necessary consequence of incarceration. Thus, the Court states baldly that prisoners cannot enjoy <u>any</u> personal liberty or property rights while imprisoned, whereas, had it not bifurcated prisoners' rights from the rights of persons, it could have stated simply that prisoners' liberty and rights to property were necessarily circumscribed while in prison.

Second, having created two categories of rights, the Court's actual placement of certain interests in the respective groups is open to question. On the one hand, the prisoner had no right to physical liberty. Thus, a decision to subject an inmate to solitary confinement, which has severe emotional and psychological consequences,[233] would be purely administrative and immune from judicial review.[234] On the other hand, the infliction of a few strokes of the strap could only follow a determination of guilt according to a judicial process and the decision to impose such a punishment would be amenable to <u>certiorari</u>. Similarly, the decision not to grant earned remission is administrative, but the withdrawal of statutory remission had a judicial quality, even though the effect of one is "functionally identical"[235] to the other.

Still, notwithstanding these criticisms, it was clear after <u>Beaver Creek</u> that disciplinary proceedings would, in certain cases, be reviewed for alleged failure to comport with principles of natural justice. Thus, where an inmate was convicted of a disciplinary offence in a hearing consisting only of attempts to get an inmate to admit guilt, the proceedings were quashed.[236] Similarly, where no oral evidence was introduced against a prisoner and, therefore, no opportunity was given to him to question witnesses, the conviction was set aside.[237]

After passage of the Federal Court Act[238] in 1970 an analogous issue arose in the disciplinary context as had occupied courts in the area of parole; that is, whether the Trial Division or the Court of Appeal had jurisdiction, in this case, to review decisions of institutional heads. The Court of Appeal would have jurisdiction under section 28 of the Act only if the disciplinary tribunal was required by law to act on a judicial or *quasi*-judicial basis. The Trial Division would play a supervisory role under section 18 if a common law remedy, such as *certiorari*, was available.

The Supreme Court of Canada resolved the issue in a pair of cases launched simultaneously in the Federal Court, each seeking review of the decision of a disciplinary board imposing a penalty of punitive isolation, restrictive diet and loss of privileges for fifteen days for the "flagrant or serious" offences of being two to a cell and being in an indecent position. The plaintiffs argued that since they were excluded from the disciplinary hearing, the board had failed to proceed fairly. Commissioner's Directives required that inmates be given notice of the charges alleged, disclosure of a summary of evidence, and an opportunity to attend the hearing to make full answer and defence. In Martineau and Butters v. Matsqui Institution Inmate Disciplinary Board[239] the Supreme Court held that the requirement in the Commissioner's Directives to afford prisoners certain procedural protections did not amount to a legal requirement to proceed on a judicial or *quasi*-judicial basis, since the Directives, by contrast to statutes or regulations, were not "law." Thus, no review under section 28 was possible. This was in effect an endorsement of the Ontario Court of Appeal's judgment in Beaver Creek that Commissioner's Directives did not create rights. Later, in Martineau v. Matsqui Institution Disciplinary Board (No. 2),[240] the Court held that the Trial Division had jurisdiction to review disciplinary decisions on the basis that they were arrived at other than in accordance with a duty to act fairly toward those whose interests were affected by them. This duty to act fairly had a concrete procedural context. It was not simply an obligation to act in good faith. Decisions of federal boards and tribunals could, then, be reviewed in the Federal Court if the procedures followed in arriving at those decisions were insufficiently fair.

Importantly, the Supreme Court in Martineau (No. 2) did not adhere to the typology of rights set out in Beaver Creek. The Court did not attempt to divide the rights of prisoners into those which were personal and those that attached to incarcerated persons. Nor did it state in any absolute way the rights the interference with which would, or would not, give rise to judicial review. Rather, consistent with developments in the United Kingdom[241] and Canada[242] in administrative law, the Court held that judicial review was available across a large expanse of interests, not just where "rights" in the strict sense were being dealt with. It fell to the reviewing court to determine what degree of compliance with the rules of natural justice had to be met by the tribunal of first instance. But it was clear that prisoners had the right to expect fair treatment in the adjudication of their liability for disciplinary offences and that they had a means of securing a remedy in the Trial Division of the Federal Court.

The majority decision by Pigeon J.[243] manifested a certain caution in arriving at this result. After finding that the disciplinary board's decision was open to review, he stated:

> This is subject to the exercise of judicial discretion and in this respect it will be essential that the requirements of prison discipline be borne in mind, just as it is essential that the requirements of the effective administration of criminal justice be borne in mind when dealing with applications for certiorari before trial.... It is specially important that the remedy be granted only in cases of serious injustice and that proper care be taken to prevent such proceedings from being used to delay deserved punishment so long that it is made ineffective, if not altogether avoided.[244]

The minority decision245 by Dickson J., as he then was, exhibited no such hesitancy. He rejected the notion that judicial review was confined solely to those tribunals that dealt with "rights." The existence of judicial review should not depend on whether the issue at stake involved rights, privileges, legitimate expectations, or other entitlements. The nature of the interest should merely be a factor in determining the proper degree of intervention in a particular matter:

> In my opinion, certiorari avails as a remedy wherever a public body has power to decide any matter affecting

the rights, interests, property, privileges, or liberties of any person.[246]

Clearly this constituted a complete rejection of the result in Beaver Creek which disallowed judicial intervention in a decision involving the entitlements of a prisoner as a prisoner, permitting judicial review only of matters that affected the inmate in a personal capacity. The words "any person" employed by Dickson J. were obviously intended to include prisoners, especially given that the case involved a prison disciplinary decision. Further, the three things that the Ontario Court of Appeal had expressly stated did not give rise to review were specifically included: property, privileges and liberties. Finally, the following words of Dickson J. removed any doubt that Martineau was the most significant prisoners' rights case to date: "The rule of law must run within prison walls."[247] The full content of the rule of law as envisioned by Dickson J. was not specified, yet it was clear that it connoted as a minimum "elementary justice"[248] and the right to petition a court to compel a public body to act fairly in dealing with a person's (including a prisoner's) interests.

It is the minority judgment of Dickson J. which has been relied upon in subsequent prisoners' rights cases and followed by courts in resolving issues relating to the reviewability of decisions made by prison officials. For example, prisoners relied on Martineau (No. 2) in arguing that they were entitled to be represented by counsel at prison disciplinary hearings. While they were unsuccessful in obtaining recognition of an absolute right to counsel, the courts did not rule out the possibility of legal representation. In Re Davidson and Disciplinary Board of Prison for Women,[249] Cattanach J. held that a right to counsel was incompatible with the necessity to make swift disciplinary decisions in the prison setting. However, a Commissioner's Directive to the effect that requests for legal representation should always be denied was "reprehensible" and "invalid."[250] Other courts held that the presiding officer should have a discretion to allow counsel to be present where necessary to do justice[251] and that courts should only review that discretion where it is exercised in a manner which is "patently unfair."[252]

(iii) Prison Conditions

Prisoners are sent to prison as punishment, not for punishment.253 Thus, the conditions under which they are held and the treatment they receive while incarcerated should not amount to additional punishment. The punishment for commission of a crime lies in the requirement to reside in prison, with the concomitant separation from family and friends and loss of personal freedom and responsibility. This can be said to have been at least implicit in Canadian legislation governing prisoners as it has always required that prison officials provide certain minimal conditions to penitentiary residents.254 As mentioned, however, prisoners had no means of asserting whatever entitlements had been granted to them in statutes or regulations until the Ontario Court of Appeal in Beaver Creek recognized these as "rights."255 While in theory this declaration should have allowed prisoners to petition a court to review any failure of prison officials to afford these conditions, there is no reported case of a prisoner doing so. There are two possible reasons for this. One is that prisoners were entirely content with the conditions under they were incarcerated.256 The other is that there was no standard against which to evaluate the adequacy of prison conditions other than that contained in the Canadian Bill of Rights, which required that no law of Canada be construed or applied so as to impose or authorize the imposition of "cruel and unusual treatment or punishment."[257] Thus, the only meaningful way in which prisoners could challenge the conditions under which they were detained was to characterize them as cruel and unusual. This was obviously a very strict test, which required more than a mere demonstration that prison officials failed in their obligation to provide to prisoners that to which they were entitled under the applicable regulations.

Not surprisingly, subsection 2(b) of the Bill had its greatest application in sentencing matters. While sentencing is not, in itself, within the scope of this paper, the interpretation given to the protection against cruel and unusual punishment in those cases is relevant to the Bill's application to prison conditions.

The first sentencing case dealing with subsection 2(b) of the Bill of Rights was decided in 1964.[258] The Manitoba Court of Appeal ruled that a sentence of corporal punishment for commission of a particularly brutal gang rape was not "cruel and unusual." At the time, the Criminal Code[259] provided that a person who committed rape was "liable to imprisonment for life and to be whipped."[260] The accused had been sentenced by the trial judge to four years' imprisonment and to five strokes of the strap to be applied on two occasions in their first year of imprisonment. This particular punishment was administered by the prisoner being "beaten upon his bare buttocks with a leather strap", which was obviously a "painful and humiliating process."[261] The trial judge could have subjected the accused to the lash, but sentenced them instead to the "lesser punishment" of paddling.

In rejecting the suggestion that such a punishment was cruel and unusual, Schultz J.A. made three points. First, Parliament passed the Bill of Rights knowing full well that corporal punishment was provided in the Criminal Code and elsewhere. Therefore, it had no intention of abrogating those statutory provisions when it enacted the Bill of Rights. Second, the Criminal Code was specific legislation whereas the Bill of Rights was general. As such, generalia specialibus non derogant or "general words do not derogate from special."[262] Finally, the sentence did not, in any case, amount to cruel and unusual punishment. Imprisonment may in some cases be even more cruel than corporal punishment. Further, even if paddling was cruel, it was not unusual:

> [c]orporal punishment is not unusual in any sense of the word; in some form or other almost every one has received it. Discipline in prisons, in the home, in the school is, to some extent, enforced by corporal punishment. If not the most common, it is certainly one of the most common of all forms of punishment. With respect, I think that it is wholly unrealistic to contend that it is "unusual."[263]

Thus, if a prisoner sought to rely on the Bill of Rights to protest prison conditions, success would depend on a showing that the impugned conditions, no matter how cruel, were also unusual, in the sense that they were uncommon. According to this reasoning, if prison conditions across the country were uniformly deplorable, there could be no complaint.

A similar approach was taken by the British Columbia Court of Appeal when it was asked to declare the death penalty to be cruel and unusual punishment in R. v. Miller and Cockriell.[264] The Criminal Code at the time punished murder with the death penalty only if the victims were police officers or prison guards, according to an amendment passed in 1973.[265] Miller and Cockriell had been convicted of murdering a police officer and sentenced to death. Robertson J.A.[266] was loath to interfere with a statutory provision that had so recently received parliamentary attention. He was particularly averse to finding that the provision was inoperative for conflict with the Bill of Rights for then the energy of Parliament would have been "utterly and completely ineffective." It "might as well have saved its breath." The provision would be reduced to "words written on the breeze" and the Criminal Code rendered "a sorry mess."[267]

Robertson J.A. gave three reasons for not finding any breach of subsection 2(b) of the Bill of Rights, which roughly corresponded to those given by Schultz J.A. in R. v. Dick, Penner and Finnigan.[268] First, Parliament would not have passed the 1973 amendment to the Criminal Code preserving the death penalty for murder of police officers and prison guards had it believed that hanging was an unusual punishment. Thus, even though Parliament had not specified that the death penalty should apply notwithstanding the Canadian Bill of Rights, as it could have done, its actions could be taken as an indication that it believed that it was unnecessary to do so, and the courts should not interfere with the will of Parliament. Second, since specific legislation dealing with imposition of the death penalty was passed after the general proscription against cruel and unusual punishment in the Bill of Rights, the specific should override the general as a matter of statutory construction. Finally, even were one to assume that hanging was cruel punishment, it was not unusual:

> In England from time immemorial murder was punishable by death. It was so in Canada before Confederation. Since Confederation it has been the prescribed penalty, though in 1961 certain classes of murder became punishable by imprisonment for life instead of by death. The fact that since 1962 the Cabinet in their wisdom have chosen to allow no sentences of death to be carried out proves nothing more than that the sentiment of the majority of the members of Cabinet has been against capital punishment. In my opinion punishment by death has not become an unusual punishment.[269]

A forceful dissent was written by McIntyre J.A. (as he then was). He began by rejecting two of the basic premises upon which Robertson J.A. had proceeded. First, while there were differences between the legal systems of Canada and the United States, Canadian courts may look to American jurisprudence for guidance in the interpretation of the Canadian Bill of Rights, particularly in this case since the protections against imposition of cruel and unusual punishments in Canadian and United States law[270] have a common origin in the English Bill of Rights of 1688.[271] Second, since passage of the Canadian Bill of Rights, courts have not been bound strictly to follow the will of Parliament. In fact, the courts have an obligation to declare laws that conflict with the Bill to be inoperative, as the Supreme Court of Canada had done in R. v. Dybones.[272] Robertson J.A. had rejected the relevance of U.S. cases and had expressed fidelity to the concept of Parliamentary supremacy. McIntyre J.A. then went on to consider the meaning of cruel and unusual punishment with resort to U.S. decisions.

Significantly, McIntyre J.A. regarded the expression "cruel and unusual" as containing disjunctive qualifiers. In other words, a punishment that was cruel but not unusual would be proscribed by the Canadian Bill of Rights, and vice versa[273]. Further, he was of the view that an unusual punishment was not merely one that was imposed with statistical infrequency but one that was "not clearly authorized by law, not known in penal practice or not acceptable by community standards."[274] Having taken this broad approach to what might constitute cruel and unusual punishment, he went on to articulate various tests that could be used to determine whether the death penalty was such a punishment. The death penalty would be cruel and unusual if it had no deterrent value or other social benefit which would outweigh its obvious shortcomings as a reformative or rehabilitative measure. Further, it would be cruel and unusual if it fell short of community standards of decency, was unnecessarily harsh given adequate alternatives, or could not be applied "upon a rational basis in accordance with ascertained or ascertainable standards, and if it is excessive and out of proportion to the crimes it seeks to restrain."[275]

McIntyre J.A. went on to find that statistics did not show that the death penalty had any deterrent value. Given that no death sentence had been carried out since 1962, it was also doubtful whether hanging continued to correspond with public standards of decency. Neither was death a necessary sanction given the alternative of life imprisonment. Further, since the death penalty was rarely carried out on those who had been sentenced to death, it was reasonable to conclude that it was being imposed and witheld in an arbitrary way. Finally, death was an excessive response to the commission of a violent crime. As such, he concluded that the death penalty was a cruel and unusual punishment and its prescription in the Criminal Code should be rendered inoperative for its conflict with the Bill of Rights.

Had MacIntyre J.A.'s interpretation of the Bill of Rights prevailed, new means of challenging conditions of imprisonment would have been made available, whereas they had been almost completely foreclosed by the Manitoba Court of Appeal's judgment in Dick, Penner and Finnigan and the majority decision in Miller and Cockriell. However, notwithstanding these two precedents to the contrary, the Federal Court preferred the views of MacIntyre J.A. as to the meaning to be given to sbusection 2(b) of the Bill of Rights in the first reported case[276] in which prisoners challenged the legality of the conditions under which they were held in a federal penitentiary. In McCann v. The Queen,[277] a group of prisoners who had been placed in solitary confinement argued that the regulation[278] authorizing an institutional head to order a prisoner placed into "dissociation" was inoperative as it offended the Bill of Rights protection against cruel and unusual punishment. Heald J., as he then was, made the following findings of fact regarding the conditions in solitary:

The cells are approximately 11' x 6' in size with a height of 11' -- they have three solid cement walls and a solid steel door. There are no windows in the cell excepting a six-inch window in the cell door. The light in the cell is on 24 hours a day. All of the plaintiffs complained about ventilation in the cells ... [T]he ventilation was poor and ... most of the time the cells were either too hot or too cold ... Concerning exercise, the evidence is clear that certainly most of the time, the SCU inmates were restricted to 30 or 40 minutes per day exercise. While there was some suggestion from the defendants that there was fresh air exercise in the domed area, the preponderance of evidence is to the effect that most of the inmate exercise was confined to the corridor of H tier some 75 ft. in length and that there was very little fresh air exercise .... Concerning "skin frisks," it was conceded that said procedure was a necessary security precaution but perhaps in some instances, more guards than were necessary participated and observed said procedure. I find that the allegation concerning the requirement to always sleep in the same position in close proximity to the toilet bowl has been established by the evidence.279

In addition, experts called by the plaintiffs variously described conditions at the British Columbia Penitentiary as "among the most severe ... seen anywhere", "gratuitous and shocking,"[280] "as severe as can possibly be made under law,"[281] "cruel, inhuman and a degradation of the human spirit,"[282] and "atrocious".[283] All gave evidence that the conditions caused severe emotional and psychological distress and often provoked self-mutilation and suicide.[284]

Heald J. found that the first two of Robertson J.A.'s reasons in Miller and Cockriell discussed above had no application in McCann since no action of Parliament was impugned. Rather, it was merely a regulation promulgated by the Governor General in Council which was challeged. The only issue that remained was whether the prison conditions were actually cruel and unusual. He had "no hesitation in concluding that the treatment afforded them in solitary at the B.C. Penitentiary has been cruel."[285] As to whether the conditions were unusual, Heald J. concluded that because the conditions of solitary confinement served no positive penal purpose, did not accord with public standards of decency and propriety and were unnecessary because of adequate alternatives, they were indeed unusual. Further, even if "unusual" meant "uncommon", or "infrequently imposed" as

Robertson J.A. had seemed to suggest, Heald J. would still have found the treatment the prisoners received to be unusual since it was worse than that found elsewhere and did not appear to be imposed as a regular practice in any other institutions.

Having found the conditions in solitary to be cruel and unusual, Heald J. went on to consider the possibilities for relief. He declined to declare the applicable regulation to be inoperative. In doing so, he relied on decisions of the Supreme Court of Canada which had stated that the Bill of Rights could not be used to render inoperative a law which furthered a valid federal objective within Parliament's sphere of legislative competence.[286] Penitentiaries were clearly a federal responsibility under the British North America Act[287] and the regulation empowering the institutional head to dissociate prisoners was intra vires the Penitentiary Act. The regulation manifested a valid federal objective since it sought to maintain "good order and discipline within Canadian penitentiaries."[288] Thus, it should not be rendered inoperative.

Heald J. considered alternative remedies urged by the plaintiffs. They argued that the institutional decision to order them confined in solitary should have been made only after affording them a hearing and that the decision was reviewable. They invoked in their support the guarantee in the Canadian Bill of Rights of a fair hearing in accordance with the principles of fundamental justice.[289] Heald J. referred to the Supreme Court's decisions[290] holding that decisions of the Parole Board were completely administrative and unreviewable and concluded that the decision to place a prisoner in solitary confinement was also administrative in nature and therefore not subject to review. The Bill of Rights simply did not apply. Heald J. also refused to compel the defendants to act in accordance with the declaration that the conditions in solitary confinement were cruel and unusual, on the basis that he had no jurisdiction to do so. The plaintiffs had also argued that they had been denied certain entitlements set out in the regulations and which had been classified in Beaver Creek[291] as being "rights."[292] Rather than being independent claims against the defendant institutional head, however, they appear to have been considered in the judgment only as part of the allegation that the overall conditions in solitary constituted cruel and unusual treatment. Thus, the recognition of these matters as rights in Beaver Creek did not appear to give rise to any corresponding remedy, aside from that which might avail if the failure to provide these dignities amounted to cruel and unusual treatment.

McCann exemplified the state of the Canadian Bill of Rights in the era following the Supreme Court of Canada's decision in Hogan v. The Queen.[293] There a majority of the Court held that although there had been a breach of the Bill of Rights in not permitting the accused to consult with counsel while in detention, evidence obtained subsequent to that breach (i.e. a breath sample) was properly introduced as evidence against him. In other words, breach of a protected right did not necessarily give rise to a remedy. There was no question of the the Criminal Code provision authorizing the seizure of a breath sample being inoperative in Hogan since the provision itself did not offend the Bill. Rather, it was the manner in which that Criminal Code authority was executed which was in issue. Since the Bill of Rights did not contain any specific remedies other than the nullification of statutory conflicts, it was for the courts to fashion them. In Hogan, the Supreme Court refused to endorse exclusion of evidence as a remedy for breach of the Bill. Similarly, in McCann, it was the manner in which the authority to dissociate prisoners was carried out, not the authority itself, that offended the Bill of Rights.

But, as in Hogan, there was apparently no remedy available for breaches of the Bill resulting from actions rather than laws. As Laskin C.J.C. stated in dissent in Hogan:

> The Canadian Bill of Rights is a half-way house between a purely common law regime and a constitutional one; it may aptly be described as a quasi-constitutional instrument. It does not embody any sanctions for the enforcement of its terms, but it must be the function of the Courts to provide them in light of the judicial view of the impact of that enactment. The Drybones case has established what that impact is, and I have no reason to depart from the position there taken .... There being no doubt as to such denial and violation [of the Bill of Rights], the Courts must apply a sanction. We would not be justified in simply ignoring the breach of a declared fundamental right or in letting it go merely with words of reprobation.[294]

This is precisely what had transpired in McCann. Yet, in a seeming contradiction to Hogan, the Supreme Court had itself earlier affirmed the acquittal of an accused whose right to counsel had been denied in Brownridge v. The indicated that a remedy other than rendering a law inoperative, i.e. acquittal where breach of the Bill of Rights could be asserted as a defence, was indeed available. While this was not a remedy that would have applied in McCann, since the prisoners were not charged with any offence, it was relevant to a related case which followed soon thereafter.

In R. v. Bruce, Wilson and Lucas[296] the accused raised the Bill of Rights protection against cruel and unusual treatment as a defence to charges of unlawful confinement and attempted extortion arising out of a hostage-taking incident. The accused had previously been in solitary confinement and had just been released into the general population. One of the accused, Bruce, had been one of the plaintiffs in McCann. Thus, the accused were aware of the conditions in solitary and the fact that the institutional head's decision to place them there could be carried out without notice, a hearing or reasons, and could not be reviewed by a court, according to McCann. When they heard rumours that they were about to be re-placed in solitary, knowing they had no lawful means of opposing that decision, they attempted to avoid it by taking hostages. At their trial, they raised defences of lawful excuse and necessity.

Mr. Justice Toy held that even if the Bill of Rights could be raised as a substantive defence to criminal charges, the accused were not entitled to such a defence on the facts since solitary confinement was not, notwithstanding the decision of Heald J. in McCann, cruel and unusual treatment. While conditions there were "unpleasant" and "undesirable,"[297] they were not cruel. Further, even accepting for purposes of argument that the test of McIntyre J.A. in Miller and Cockriell should apply, Toy J. found that the conditions were not unusual. Thus, where McCann had found a breach of the Bill of Rights and had at least left open the possibility of a defensive remedy, as the Supreme Court had recognized in Brownridge, the case of Bruce, Wilson and Lucas foreclosed any judicial consequences flowing from conditions in solitary confinement by refusing to endorse the finding of cruel and unusual treatment itself.

It appeared for a short time that the minority opinion of McIntyre J.A. in Miller and Cockriell would have a greater lasting impact on Bill of Rights cases than the majority decision. It was preferred by Heald J. in McCann. Even Toy J. in Bruce, Wilson and Lucas assumed it to be the correct construction of subsection 2(b) of the Bill at least for purposes of argument. It was also relied upon by Borins

Co. Ct. J. in R. v. Shand.[298] There the accused pleaded guilty to a charge of importing narcotics. The Narcotic Control Act[299] imposed a mandatory minimum sentence of seven years' imprisonment for the offence. The accused argued that this penalty constituted cruel and unusual punishment. Borins Co. Ct. J. rejected the majority decision in Miller and Cockriell as a "barren approach"[300] to the issue. He preferred the approach of McIntyre J.A. since it allowed him to consider whether the punishment fit the crime and to determine the overall purposes of the punishment. Further, given the purposes of the Bill of Rights, it was appropriate to consider whether the seven year minimum sentence offended "the dignity and worth of the human person"[301] or denied accused persons "equality before the law."[302] After reviewing the process of prosecutorial discretion, sentencing practices of courts, theories on the purposes of imprisonment, and Canadian and U.S. jurisprudence, Borins Co. Ct. J. found the minimum sentence to be cruel and unusual:

> In my view a compulsory sentence of seven years for a non-violent crime imposed without consideration for the individual history and background of the accused is so excessive that it "shocks the conscience" and

> because of its arbitrary nature fails to comport with human dignity .... I appreciate the need to deter potential offenders from increasing the supply of narcotic substances in Canada. However, I am of the opinion that this element of general deterrence is provided by the provision of a maximum penalty of life imprisonment .... Finally, even assuming some deterrent value, a compulsory sentence of seven years in this case is completely unnecessary because it serves no positive penal purpose more effectively then a less severe punishment.[303]

The decision of Borins Co. Ct. J. was overturned on appeal to the Ontario Court of Appeal.[304] Arnup J.A. for the Court[305] disagreed with the proposition that the <u>Bill of Rights</u> required courts to substitute their own assessment of the seriousness of various crimes in determining whether a punishment was cruel and unusual. Since Parliament had concluded over the course of recent decades that the importing of narcotics was a sufficiently serious problem to warrant such a severe minimum penalty, courts should not interfere with that judgment lightly. The Court did not decide conclusively between the conjunctive approach taken by Robertson J.A. and the disjunctive approach of McIntyre

J.A. in Miller and Cockriell. Arnup J.A. stated that the words "cruel and unusual" had a "core meaning" that had "yet to be distilled and enunciated in Canada."[306] Neither did the Court reject, however, the notion that a punishment could be cruel and unusual if it was wholly disproportionate to the offence. Implicit in this suggestion was the possibility that a punishment could be unusual even if it was imposed regularly. Thus, the Court appeared to reject the meaning given to the word "unusual" by the Manitoba Court of Appeal in Dick, Penner and Finnegan and the British Columbia Court of Appeal in Miller and Cockriell. Yet, the Court was certain that imprisonment for seven years did not reach the level of disproportionality required for it to be characterized as cruel and unusual.

The implications flowing from Shand for prisoners who wished to challenge the conditions of their imprisonment on Bill of Rights grounds were that courts could still conclude that conditions were cruel and unusual, even if the conditions obtained in many institutions. In other words, statistical infrequency was not equated with "unusual" in Shand. While the Ontario Court of Appeal gave considerable deference to the will of Parliament, this itself would have had little impact on prisoners' cases since it was not expressly the desire of Parliament to impose harsh conditions such as those found in McCann. The conditions resulted from the practices of prison officials in the institution.

Further discussion of the meaning of "cruel and unusual" arrived on the appeal of Miller and Cockriell to the Supreme Court of Canada.[307] A majority[308] of the Court dismissed the appeal on the following grounds. First, Ritchie J. interpreted paragraph 1(a) of the Canadian Bill of Rights, which declares the right of the individual to life and the right not to be deprived thereof except by due process of law, as contemplating the imposition of the death penalty. Since the Bill recognized that a person's life could be extinguished in accordance with due process, a sentence of death could presumably be imposed upon someone after a lawful conviction for commission of a crime. Further, since the Bill of Rights merely declared existing rights and did not create new ones,[309] it could not protect anyone against execution, as there was no pre-existing right not to be put to death upon conviction. Second, since Parliament had devoted itself to amending the Criminal Code provisions regarding the imposition of the death penalty on various occasions[310] since enactment of the Bill of Rights, it must have been of the view that there was no conflict between the death penalty and the protection against cruel and unusual punishment. Had it believed such a conflict existed it would have specified that the imposition of the death penalty should operate notwithstanding the Bill of Rights. Third, the words "cruel and unusual" must be read conjunctively. Since the death penalty was not uncommon as a sanction for commission of murder throughout our legal history, it could not be said to be "unusual". With respect to the latter two grounds, the reasoning of the majority was identical to that of the Manitoba Court of Appeal in Dick, Penner and Finnegan and of Robertson J.A. in the Court below.

Laskin C.J.C. wrote a minority opinion[311] which also concluded that the death penalty did not offend subsection 2(b) of the Bill of Rights. His approach, however, differed considerably from that of the majority. He rejected the argument that Parliamentary attention to the issue foreclosed the courts from measuring statutory enactments against the standards in the Bill of Rights, even if those enactments followed, rather than preceded, passage of the Bill. Neither should the provisions in section 2 of the Bill be limited by the general expressions in section 1, as Ritchie J. had contended, since it was section 2 which made the words in section 1 operative. With respect to the meaning of "cruel and unusual punishment," Laskin C.J.C. did not accept either of the disjunctive or conjunctive approaches. After consulting United States authorities, which Ritchie J. had discounted as irrelevant, he concluded that the words "cruel" and "unusual" were "interacting expressions colouring each other" and should be "considered together as a compendious expression of a norm".[312] This was similar to the opinion of the Ontario Court of Appeal in Shand that the words had a "core meaning"[313] which had yet to be settled in Canadian law. As to whether the death penalty contravened the norm set out in subsection 2(b), Laskin C.J.C. considered four factors presented by the appellants. He rejected completely any suggestion that the death penalty was arbitrarily imposed, since it was mandatory upon conviction of murder of a police officer or prison guard. The fact that the Cabinet had consistently commuted the death penalty since 1962 was irrelevant. He also regarded the approval or disapproval of the death penalty by the Canadian people as being an extraneous consideration. As to the remaining two factors, i.e. whether capital punishment was unduly severe or excessive and had no deterrent value, Laskin C.J.C. was of the view that the absence of proof of the death penalty's use as a deterrent did not necessarily mean that it was excessive, since there was no evidence that it did not have an impact on the murder rate. Further, it was justifiable for Parliament to impose the death penalty to demonstrate society's outrage at certain forms of conduct. While vengeance alone would not have been an acceptable basis for executing offenders, there was no reason why deterrence should be the only justification for it.

The Supreme Court of Canada's decision in Miller and Cockriell made it clear only that capital punishment was not cruel and unusual, at least as it applied to murderers of police officers and prison guards. But it left open the largest issue. It was uncertain what test of "cruel and unusual" should be adopted. The failure of the Court to clarify that issue left prisoners wondering whether or not recourse to subsection 2(b) of the Bill of Rights was a meaningful way of challenging conditions of incarceration. While a majority of the Court believed that "cruel and unusual" was a conjunctive standard, this was clearly obiter dicta since the decision was based primarily on the scope of the Bill of Rights and its application to subsequent legislation. The opinion of Laskin C.J.C. did offer the articulation of a standard for judging treatment and punishment, but this was a minority judgment. Thus, even after Miller and Cockriell there was considerable uncertainty as to the utility of subsection 2(b) of the Bill of Rights as a basis for judicial scrutiny of prison conditions. Further, given the result in Bruce, Wilson and Lucas it was doubtful whether even on the most generous interpretation of subsection 2(b) there was any possibility of a court recognizing prison conditions as cruel and unusual.[314] Nor was it clear that prisoners had any means of compelling prison officials to afford prisoners the basic entitlements set out in penitentiary regulations, even though these had been recognized in Beaver Creek as the only rights prisoners enjoyed as prisoners. It appears that no further attempts were made by prisoners to assert these "rights" either with or without reliance on the Canadian Bill of Rights.

(iv) Transfers

Prison legislation has always provided broad powers to transfer inmates from one institution to another. The 1868 Act, for example, empowered the Secretary of State or a designated officer to transfer prisoners subject only to their fitness to be moved.[315]

Given that the Supreme Court had decided in In re McCaud[316] that decisions as to where a prisoner was to serve out a term of imprisonment were completely administrative, and that the Ontario Court of Appeal ruled in Beaver Creek[317] that prisoners have no right whatsoever to liberty, it is perhaps not surprising that courts viewed the decision to transfer prisoners as administrative in nature. Thus, prisoners were given no right to a hearing nor an opportunity to make submissions prior to being transferred. Neither could the decision to transfer be reviewed in the courts.

It is clear, however, that a prisoner often had a substantial interest at stake in the decision whether to transfer him or her from one location in the country to another, or from one form of imprisonment to another. For example, in Kosobook v. Solicitor General for Canada,[318] the plaintiffs argued that the decision to transfer them from Millhaven Penitentiary to the solitary confinement facilities at Kingston Penitentiary was one that should have been attended by certain procedural safeguards, such as advance notice, a hearing, and an opportunity to respond to the grounds underlying the decision. The Federal Court ruled that since the prisoners had absolutely no right to liberty, the decision to transfer them was purely administrative, even though the conditions of confinement would have been more severe in the new institution. Further, citing Mitchell[319], the Court ruled that the Canadian Bill of Rights had no application.

In Re Anaskan and The Queen[320], the prisoner had been transferred from a provincial institution in Prince Albert, Saskatchewan to the federal Prison for Women in Kingston, Ontario. This displacement[321] took her away from her home and thereby precluded her from visiting family and friends. She had not been informed in advance of the decision, nor given any opportunity to object to it. Since the decision had been made by a Saskatchewan official, the Ontario Court of Appeal ruled that it had no jurisdiction to review it. The Court made it clear, however, that even if it had jurisdiction it would not have been moved to interfere in the matter:

> There is no "right" in a prisoner to be in a particular institution .... It is then a matter of policy and of administrative concern where an individual serves his or her sentence. There is no quasi judicial quality in this determination which

would call into play the audi alteram partem rule or require a hearing of any kind. If the submissions made on behalf of the appellant were accepted as being the law, then every transfer, within the federal penitentiary system itself, or otherwise, would call for a hearing.[322]

As in the parole situation,[323] prison officials did have to abide by the mandatory requirements of the governing statute even with regard to transferring prisoners. Thus, for example, no federal prisoner could be transferred out of Newfoundland prior to 1977, given the specific prohibition against it.[324] After 1977, transfers out of Newfoundland could be authorized, but only by officers designated specifically for that purpose by the Lieutenant Governor of Newfoundland.[325] Thus, prisoners sentenced to a penitentiary term in Newfoundland had a right to be imprisoned in St. John's unless the proper officials authorized imprisonment elsewhere.[326] Prisoners in other parts of Canada had less protection against transfers.

In accordance with developments in administrative law and judicial review under the Federal Court Act,[327] courts came to regard the prisoners' interests at stake in a transfer decision to require at least that officials act fairly in arriving at such a decision.[328] But little content was given to the duty to act fairly in this context. It did not entitle the prisoner to notice or a hearing.[329] Even where a prisoner appeared to have a substantial interest in not being transferred because of marriage plans and outstanding criminal charges to be faced in the jurisdiction in which he was incarcerated, the Federal Court refused to acknowledge that the prisoner was entitled to any procedural safeguards.[330] Since federal officials may have to act quickly in transferring prisoners in some exigent circumstances, such as where a riot or escape is thought to be imminent, no prisoners, according to the Court, should have procedural protections against transfers. Further, the guarantees in the Bill of Rights of equality before the law and a fair hearing were not infringed by summary transfers.[331]

Thus, while courts accepted in this context the principle that Dickson J. later articulated in Martineau (No. 2), that any interests affected by the decision of a public body must be dealt with fairly,[332] they obviously determined that those interests were always so insignificant in transfer situations as not to warrant any due process protections. Yet the interests of a particular prisoner in remaining in a certain location or institution may in fact be equivalent or superior in value to remission credits, statutory rights or even release on parole, all of which had been recognized as giving rise to procedural protections and, where appropriate, judicial remedies.

(v) Other Incidents

Outside the major areas of prison life dealt with in the preceding sections, there are other matters that have been asserted by prisoners as "rights".

In Re Bruce and Reynett,333 a prisoner argued that penitentiary officials had no authority to deny him permission to marry. Since there were outstanding charges against Bruce at the time, permission to marry had to be obtained first from the Attorney General of British Columbia. That permission was granted once it was clear that Bruce's fiancée would not be called as a witness. She was made to submit to assessments conducted by the Parole Board, the contents of which were undisclosed. The defendant institutional head refused to permit the marriage to take place on the basis that Bruce was in solitary confinement at the time. Penitentiary regulations permitted the institutional head to withdraw from dissociated prisoners such privileges as "cannot reasonably be granted having regard to the limitations of the dissociation area and the necessity for the effective operation thereof."[334] The institutional head was of the view that the marriage "would simply not be in the best interest of security for the Institution".[335] Walsh, J. began by asking a fundamental question regarding the legal status of prisoners:

> Incarceration must of necessity involve the loss of a substantial number of privileges and amenities but the question raised is whether all privileges and amenities are lost save those specifically permitted by virtue of the Penitentiaries Act and Regulations or whether conversely an inmate retains all privileges save for those specifically taken away from him by such Act and Regulations, as applicants contend.[336]

Walsh J. relied upon the theory of prisoners' rights set out in Beaver Creek[337] and concluded that it was "self-evident" that a prisoner had no rights to liberty or property, and "retains only those that may be permitted by the Regulations".[338] Since neither the Act nor the

Regulations provided a right to marry, the prisoner had no such right, even though it was recognized at common law. Further, the right to equality before the law in the Canadian Bill of Rights had not been infringed since this concept had been limited in the jurisprudence of the Supreme Court of Canada to no more than an expression of the rule of law in the Diceyan sense[339]; i.e. that it merely guaranteed "equality in the administration or application of the law by the law enforcement authorities in the ordinary courts of the land",[340] which had no application to the issue at hand.

Bruce also argued that he had been denied a fair hearing in the determination of his rights, as protected by subsection 2(e) of the Bill of Rights. Walsh J. found that the institutional head had a duty to act fairly in the circumstances. It was apparent that he had done so in Walsh J.'s view, since the institution head had taken so long to decide the question. Further, "he had the right and authority to make this administrative decision",[341] the Court could not intervene.

This was as narrow a view as had been taken of prisoners' rights in Canadian law. Even though there was a common law right to marry, no legal impediment either under the laws of the province or the Penitentiary Act to this particular marriage, no apparent reason why marriage would upset the security or operation of the institution (since the intended spouse would have the same visitation privileges after marriage as she enjoyed before), the prisoner could not marry simply because there was no explicit statutory right of prisoners to do so. As in the transfer situation, the interests of the prisoner, which were the subject of the institutional head's administrative decision, were obviously regarded as minimal, with the result that the duty to act fairly had no real content in the circumstances.

One of the clearest judicial statements on the rights of prisoners in Canadian law was made by the Supreme Court of Canada in a case involving a prisoner's ability to correspond with his counsel. In Solosky v. The Queen,[342] Dickson J. (as he then was) stated that "a person confined to prison retains all of his civil rights, other than those expressly or impliedly taken from him by law."[343] While this declaration had a similar ring to the words used by the Ontario Court of Appeal in Beaver Creek,[344] there were significant differences. The Ontario Court of Appeal stated that the rights to liberty and property were always denied prisoners, unless specifically granted. Dickson J. made no such qualification. Further, a prisoner's rights were always limited by a lawful sentence of imprisonment according to Beaver Creek. By contrast, the Supreme Court stated in Solosky that more than mere incarceration was needed as a basis for denying a prisoner rights. They could only be circumscribed "by law", i.e. by an express or implied statutory provision. While Dickson J. did not elaborate on how the civil rights of a prisoner could be curtailed by an implied legal limit, it is difficult to square this statement with his earlier declaration in Marcotte that "[i]f one is to be incarcerated, one should at least know that some Act of Parliament requires it in express terms, and not, at most, by implication."[345]

At issue in Solosky was the question whether prison authorities were permitted to open and censor correspondence between the prisoner Solosky and his solicitor. The Regulations gave prisoners certain visiting and correspondence privileges.[346] They also stated that censorship of correspondence was to be avoided, but could be carried out if necessary or desirable for an inmate's rehabilitation or the security of the institution.[347] Solosky's mail was routinely opened and read, including correspondence from his solicitor. The Court held that the common law concept of solicitor-client privilege was not breached by this practice, since the privilege was of an evidentiary nature; it was not an all-encompassing right of privacy between solicitors and their clients. Nor did the opening of the inmate's mail contravene the Bill of Rights since a valid federal objective,348 the security of a penal institution, was being furthered. However, since the "right" to communicate in confidence with one's solicitor was not explicitly taken away from prisoners under the governing statutes and regulations, Dickson J. felt it incumbent upon the Court to balance the public interest in security against this right. Thus, prison officials could interfere with the right to correspond with counsel in confidence, but "the interference must be no greater than is essential to the maintenance of security and the rehabilitation of the inmate."349 He fashioned detailed rules as to how this balancing ought to be carried out in practice.350

Thus, in Solosky, the Supreme recognized a new right of prisoners - the right to confidential correspondence with a solicitor. That right could only be limited in situations where just cause could be shown. Most importantly, the Court stated a comprehensive principle upon which to found a theory of prisoners' rights, the first occasion on which that had been attempted since Beaver Creek. Interestingly, Solosky was handed down in the same court session as

Martineau (No.2),[351] which offered a broadening of the grounds upon which prisoners could seek review of the decisions of prison officials. Together, the two cases brought a vast change at least in the theoretical foundation upon which prisoners could rely in order to assert rights and have those rights recognized and enforced by the courts.

In a subsequent case, also involving a prisoner's correspondence rights,[352] the Federal Court found that prison officials had improperly opened the prisoner's privileged mail.[353] However, it held that because the opening of mail had not been carried out intentionally, recklessly or ~~negligently,~~ the inmate was entitled to no remedy in the circumstances. There had been bona fide errors made in the interpretation and administration of the applicable rules, but these did not give rise to any cause of action. Collier J. relied on Martineau (No. 2)[354] for the proposition that Commissioner's Directives were not "law" and, therefore, did not vest prisoners with rights. Curiously, no reference was made to the Solosky case in which the Supreme Court held that prisoners' rights could be limited only "by law". While there appeared to be no law authorizing the authorities to open the prisoner's privileged mail in the circumstances, the Federal Court refused to acknowledge that an interference with the prisoner's rights had taken place. It appeared to regard the evidential burden on the plaintiff as amounting to proof of mens rea on the part of the prison officials.

Closely related to the question of prisoners' rights to correspond with others, is their ability to receive visitors. The only reported case on this matter[355] arose out of the decision of a provincial prison official to deny visiting privileges to a prisoners' rights activist. In other words, the decision was not to deny a prisoner access to visitors; rather, it was to deny a visitor access to prisoners. The British Columbia Court of Appeal[356] found that the official's decision was reviewable on grounds of procedural fairness. However, it declined to impose any procedural restrictions on the defendants' decision making powers. Even though the decision had been made without notice, an opportunity to respond, or reasons (other than stating that the plaintiff's visits "would not be in the best interests of the institutions"), Craig J.A. found that the defendant had not acted unfairly. It is questionable, however, whether the same result would have obtained in the federal domain. The provincial prison rules stated that visits were a privilege, not a right, and could be suspended at any time.[357] Under the federal Regulations, visiting privileges were to be permitted to prisoners in order to "assist in the reformation and rehabilitation of the inmate."[358] This statutory recognition of the prisoners' interests in visiting privileges may have required federal officials to abide by certain procedural regularities and perhaps give reasons before withdrawing them. There is, however, no jurisprudence on this particular issue.

On occasion prisoners have complained about searches of their person by prison officials, particularly searches which are considered an affront to their personal dignity, namely skin frisks. In Gunn v. Yeomans,[359] the Federal Court found that skin frisks carried out routinely were not authorized by the applicable regulation[360]:

> s. 41(2) Where the institutional head suspects, on reasonable grounds, that an officer, employee, inmate or visitor to the institution is in possession of contraband he may order that person to be searched, but no such person, who is female, shall be searched except by a female person.

The plaintiff Gunn was subjected to a skin search upon return to the institution after an absence for medical treatment. He refused to submit to the search and was charged with the offence of failure to obey a lawful order. He then challenged the lawfulness of the order in the Federal Court. Standing Orders issued by the institutional head compelled inmates to submit to skin searches after any absence from the institution. Walsh J. held that Standing Orders could not be inconsistent with the Regulations. The Regulations only allowed searches to be carried out where there were reasonable grounds to believe that a particular person was in possession of contraband:

> The Regulation, as drawn, would appear to require specific suspicion of a given individual ."on reasonable grounds" before he may be searched. The word "inmate" is used in the singular, the Regulation uses the word "is" in possession not "may be" in possession, and the order is that "that" person be searched. It would in my view require stronger wording to justify a general body search of the type indicated of all inmates on leaving or entering the institution, however desirable, useful, or even necessary such a search may be. If greater powers of

search are necessary, as they may well be, then the Regulation should be amended to provide for this.[361]

The invitation to amend the Regulations was accepted immediately by the Governor in Council. The applicable regulation was altered so as to allow inmates to be searched where "such action [is] reasonable to detect the presence of contraband or to maintain the good order of an institution."[362] In a challenge to a general policy of skin searches of inmates after open visitation periods, the Federal Court accepted the expert opinion of an institutional head that there was a continuing reasonable and probable basis for believing that contraband would enter the institution after these visits. Thus, such a policy did not offend the newly drafted (and much broader) governing regulation, as it protected against the entry of contraband and ensured the good order of the institution.[363] It must be pointed out that the grounds for challenging powers of search and seizure in this context were rather limited given that no right to be secure against unreasonable search and seizure was set out in the Canadian Bill of Rights.

While the cases dealing with the powers of penitentiary officials to conduct intrusive body searches would appear to reserve no domain of personal inviolability to prisoners, subject only to limits in the applicable regulations, it is clear that unauthorized trespasses upon the person were not permissible. In R. v. Berrie and Seven Others,464 the accused prison guards were charged with common assault after a prisoner had refused to shave off his beard. They had held him down and attempted to shave the beard forceably. In the process, the prisoner received "rather deep lacerations to his neck resulting in profuse bleeding."365 A standing order of the institution had required inmates to shave. Govan Prov. Ct. J. considered the words in the preamble to the Canadian Bill of Rights recognizing the "dignity and worth of the human person," and observed:

> What greater affront to the person of Brown could be contemplated than that related herein, outright torture aside. If the forceful shaving of beards is allowed then why not forceful shaving of the head or pubic hair or eyebrows or forceful bathing or removal of clothing or force feeding when called for by regulation or directive not under any need of health or hygiene but purely and simply to enforce the rule for the sake of the rule.366

Thus, while the prisoner may have been in breach of the prison rules, the guards were not entitled to use force in enforcing compliance. The prisoner should have been charged and convicted of the offence if the prison officials wanted to enforce the institution's rules. Thereafter, "[s]hould the withdrawal of privileges and forfeitures of remission not be effective to coerce Brown to shave, then so be it."[367] A trespass upon the person could not be committed to enforce a "mere regulation of this sort."[368]

C. Summary - The Evolving Doctrine of Fairness.

The cases dealing with prisoners' rights before the Charter clearly exhibit a "hands-off" approach. There were various justifications given for this. First, the state of administrative law principles prior to cases such as Nicholson[369] and Martineau (No. 2)[370] was such that courts appeared to have no jurisdiction to intervene in prisoners' issues. Yet, this is not a sufficient explanation of the results of such cases as In re McCaud[371] and Beaver Creek[372], and the cases relying on them, since they turned upon a particular characterization of prisoners' interests which rationalized the refusal of the courts to intervene. In other words, had prisoners' interests been regarded as sufficiently significant, administrative law principles would have permitted judicial review, not prevented it.

Second, it is clear that courts hesitated to second-guess the expertise of prison officials in cases where a prisoner sought to review an administrative decision. The Parole Board, for example, must make decisions "based on experience, psychology and knowledge of the prisoner,"[373] and is "under the pressure of making 'on the spot decisions.'"[374] As Ritchie J. pointed out in Mitchell[375] the Board's tasks involve "the assessment of the character and qualities of prisoners and the decision of the very difficult question as to whether or not a particular prisoner is likely to benefit from re-introduction into society."[376] It must, therefore, have a broad discretion with which courts should not lightly interfere. Similarly, although prison officials must abide the rules of natural justice in disciplining prisoners, the courts should be wary of providing remedies other than in cases of "serious injustice" so as to prevent proceedings from being used to delay or avoid "deserved punishment."[377] In other words, whatever role the courts are to play in safeguarding the procedural rights of prisoners, they should not undermine the decisions of the competent authorities. The reasoning expressed in Davidson[378] by Cattanach J. is perhaps representative of this perspective on the role of the courts:

> The very nature of a prison is such prison officers must make immediate decisions, the disobedience of which by inmates will necessarily result in charges laid and restrictions and penalties imposed. This is essential and must be made as part of the routine process. Disobedience to legitimate orders in this regard must be followed by swift and certain punishment. If the powers and authority of the prison officers are curbed and the deterrent of speedy and sure punishment removed the consequences will be chaotic.
>
> Thus it has been frequently said that interference with this routine activity by the Courts would be as unthinkable as with the actions of the sargeant-major on the parade ground and the actions of the commanding officer in exercising powers of summary discipline in his orderly room.[379]

Indeed, the Supreme Court has stated that the courts should not, as a general rule, "question the judgment of the institutional head as to what may, or may not, be necessary in order to maintain security within a penitentiary."[380]

Third, in some cases courts appeared to have been influenced in their decision not to intervene in prisoners' cases because they believed that, to some extent, convicted persons deserved whatever treatment they received, since they came to be incarcerated as a result of their own deliberate actions. In Beaver Creek, for example, the Ontario Court of Appeal stated:

> The commission of a crime, its discovery, the prosecution of the offender, his conviction and sentence, constitute a predictable succession dependent for its initiation on the voluntary act of the prisoner. Since imprisonment in a penitentiary is impossible without there having been such a voluntary act, it is strictly correct to say that the confinement of an inmate in a penitentiary is the result of a voluntary choice on his part.[381]

In the context of a prison official's decision to transfer a prisoner, the Ontario Court of Appeal again resorted to this reasoning when it stated that the "inmate forfeited his liberty by his voluntary act and he has no right to be heard in the determination of where he is to be incarcerated."[382]

A related notion is the characterization of forms of early release as an interference with the punishment duly imposed by a court. Since a court has properly determined that a prisoner should spend a certain period of time in custody as a result of his or her own actions, other courts should not lightly interfere with a decision to revoke a prisoner's early release, since it was the will of the sentencing court that the person remain incarcerated anyway.[383]

These diverse and sometimes contradictory[384] reasons for giving short shrift to assertions of prisoners' rights resulted in the recognition of few real legal entitlements. In their most favourable light, the pre-Charter cases recognized the following entitlements: (i) Ambiguities in legislation must be construed in a manner most consistent with the liberty of the subject.[385] (ii) The Parole Board must observe the mandatory procedures in its enabling statute, unless it relies on its plenary powers.[385] (iii) The Parole Board must review a prisoner's suitability for parole at the earliest point of eligibility;[387] (iv) the Parole Board must act fairly in determining whether to revoke parole. As such, prisoners have the right in some circumstances to have counsel present,[388] are entitled to attend the entire hearing,[389] and should receive disclosure of the matters to be dealt with there.[390] (v) Prisoners can seek review of disciplinary decisions if they were arrived at unfairly.[391] (vi) Prisoners can complain of prison conditions if they amount to cruel and unusual treatment, but there may be no remedy.[392] (vii) Prisoners possess all civil rights except those expressly or impliedly taken away by law.[393] As such, they have the right to correspond with their solicitors in confidence.[394] (viii) Prisoners have the right not to be assaulted, even when they may be in breach of prison rules.395

By far the most significant of these rights was the right to fair treatment at the hands of public officials responsible for prisoners. This gave prisoners a mechanism for bringing prison matters into the courts and, therefore, into the public domain. Of course, the reach of this right was occasionally rather short. It did not allow the merits of a particular decision to be questioned and, in such matters as prison transfers and the ability to marry, its content was completely empty. Yet, it was this evolving doctrine of fairness or, as Dickson J. put it in Martineau (No.2), the notion that "[t]he rule of law must run within prison walls,"396 which ushered in a real theory of prisoners' rights in Canada. It, along with the principle espoused in Solosky, constituted tangible evidence of the demise of the notion that prisoners' civil rights were necessarily stunted merely by virtue of their incarceration. Rather, the concept of fairness relied on a perception of prisoners as people with significant, concrete, justiciable interests, entitlements and even rights, not as "slaves of the state" or civil corpses.

Chapter Three: After the Charter - Constitutional Imprisonment

The enactment of the _Canadian Charter of Rights and Freedoms_ in 1982 wrought an enormous change in the area of prisoners' rights, as it did in other domains of civil liberties and human rights. However, its impact on prisoners' rights may have been exceptional in that it came into being at a point in time when a theory of the rights of prisoners in Canada was just beginning to unfold. Courts had just begun to apply the principles espoused by the Supreme Court of Canada in cases like _Martineau (No. 2)_ and _Solosky_. Prison officials had been made sensitive to the legal requirement to treat prisoners fairly in relation to a spectrum of matters previously regarded as purely administrative and subject to their absolute discretion. The _Charter_ then proclaimed that everyone in Canada had certain rights and freedoms which, because of their constitutional character, were paramount over statutory and regulatory provisions. Whereas _Solosky_ stood for the proposition that prisoners enjoyed all civil rights other than those taken away by law, the _Charter_ on its face accorded prisoners all the constitutional rights and freedoms enjoyed by other Canadians, notwithstanding that laws may purport to deny prisoners those rights. Thus, the Charter magnified the principle in Solosky to new proportions. Further, it gave concrete context to the notion expressed in Martineau (No. 2) that the rule of law must run within prison walls, by making it clear that the prescriptions of the constitution applied to everyone.

This is not to say that the Charter is in itself responsible for all of the developments in prisoners' rights since 1982. There have been important decisions affecting the legal entitlements and remedies of prisoners that have not turned on an interpretation of the Charter. There are others which are cast in Charter terms, but could equally have been launched on grounds recognized at common law, such as the duty to act fairly, and may well have been decided the same way if they had been.

Before examining the Charter jurisprudence in the area of prisoners' rights, some of the rudiments of the Charter's operation should be established.[397]

A. Dynamics of Charter Interpretation

~~As~~ the Charter is part of the Canadian Constitution, it forms part of the "supreme law of Canada."[398] Section 32 of the Charter states that the Charter applies to the "Parliament and government of Canada" and the "legislature and government of each province" in respect of matters within their constitutional authority. The Supreme Court has held in Dolphin Delivery[399] that section 32 means that the Charter only applies to "governmental action."[400] Thus, it does not apply to private disputes, nor to the common law in itself, unless there is some intervening governmental act. While this approach to section 32 has yet to be applied in the prison context, it seems to be clear for present purposes that correctional officials,[401] disciplinary tribunals[402] and parole boards[403] are obliged to observe the requirements of the Charter in their dealings with prisoners.

Governments may, however, exempt legislation from compliance with the fundamental freedoms, legal rights and equality rights in the Charter if they do so expressly.[404] It would be possible, then, for a province or the federal government to introduce prison legislation derogating completely from the fundamental freedoms, legal rights or equality rights through the mechanism provided in section 33.[405]

There are two means of giving effect to the Charter. As mentioned, section 52 of the Constitution Act, 1982 states that the Charter is part of the "supreme law of Canada." Any law that is inconsistent with the Charter is, to extent of the inconsistency, of no force or effect. It would be open to a prisoner, then, to invite a court to strike down a particular piece of prison legislation on Charter grounds.

In addition to this power, there is a specific remedy provision in section 24 of the Charter. A person whose rights or freedoms have been infringed or denied may make an application for a remedy to a court of "competent jurisdiction."[406] The court may grant any remedy it considers "appropriate and just in the circumstances." Where it appears that evidence has been obtained in a manner that infringed a Charter right, the court receiving the application for a remedy is directed to exclude the evidence if its admission "would bring the administration of justice into disrepute."[407] A prisoner could, then, seek a remedy for violation of a Charter right in damages,[408] for example, or through the exclusion of evidence from a disciplinary or parole board hearing.[409]

Courts have consistently stated that the Charter deserves to be interpreted in a large and liberal fashion.[410] It should receive a generous, not a legalistic construction,[411] since it was designed to give recognition to the rights and freedoms of the individual and the community over a long period of time.[412] However, the plain meaning of words used in the Charter to protect rights and freedoms should not be distorted. Courts should attempt to give some certainty to the meaning of the Charter's contents while considering the purpose of the right or freedom in issue and the overall purpose of the Charter itself.[413] The context in which the Charter was enacted should also figure in determining the bounds of its guarantees. However, although the Charter was preceded by the Canadian Bill of Rights, which contains some provisions similar to those in the Charter, courts are not bound by the interpretation given to the Bill of Rights.[414] The Charter, unlike the Bill of Rights, is a constitutional document whose language is capable of adaptation and development. Further, the Canadian Bill of Rights, like the U.S. Bill of Rights, contains no equivalent to the limitation clause in the Charter. Therefore, courts have interpreted the guarantees in the Canadian Bill of Rights in a manner which may be inappropriate for the Charter.[415] Similarly, it may be unwise to place too great a reliance on jurisprudence emanating from the United States.[416]

The rights and freedoms contained in the Charter are basically of six types: (1) fundamental freedoms (section

2); (2) democratic rights (sections 3-5); (3) mobility rights (section 6); (4) legal rights (sections 7-14); (5) equality rights (sections 15, 27, 28); and (6) language rights (sections 16-23). Those provisions with the greatest application to prisoners will be discussed in the next section. It should be mentioned here, however, that in *Charter* litigation the burden of proof falls on the party who asserts that there has been a breach of the *Charter*'s guarantees.[417] Then, once a *prima facie* case has been made out that a breach of the *Charter* has occurred, the burden shifts to the party seeking to justify the breach[418] according to the standards of section 1 of the *Charter* which provides:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The Supreme Court has articulated a rather strict test for determining whether a particular statutory provision meets the standards in section 1. In *R.* v. *Oakes*,[419] Dickson C.J.C. stated that those seeking to limit constitutional rights bear a heavy burden of proof. They must show "a very high degree of probability" of compliance with section 1 based on "cogent and persuasive" evidence. A limit would be justified under section 1 only if its object "relate[s] to concerns which are pressing and substantial in a free and democratic society" and the "means chosen are reasonable and demonstrably justified". Further, the limit must be "rationally connected to the objective," intrude "as little as possible" upon the affected right or freedom, and be proportional to its object.[420]

This is, of course, a test for the justifiability of a statutory limit on a Charter right or freedom. Where a guarantee of the Charter is limited or denied by actions, rather than the effect of a legal instrument, there can be no recourse to section 1 as it only recognizes limits which are "prescribed by law."[421] Further, it is only those legal limits that are "ascertainable and understandable" and "articulated with some precision" that will be considered by the courts to be "law" for section 1 purposes.[422]

Thus, where prisoners seek to challenge prison legislation or regulations on Charter grounds, they must show prima facie the impugned provision's inconsistency with the *Charter*. It is then for the government responsible to justify the provision in accordance with the terms of section 1. However, where prisoners complain that their *Charter* rights have been infringed by actions, rather than law, the government cannot justify the behaviour of its agents on section 1 grounds. In either case, remedies may be available under section 24.

B. *New Challenges*

The pre-*Charter* cases established that decisions affecting prisoners had to be arrived at fairly. If they were not, they could be reviewed by the courts. Prisoners clearly could possess rights, but there was little opportunity, prior to the *Charter*, for the courts to delineate what those rights were. Since passage of the *Charter*, prison litigation has been cast primarily in the language of the *Charter*. While the *Charter* establishes that prisoners, among others, possess certain rights set out in it, the amplitude of many of the *Charter* rights and the limits upon them that are constitutionally acceptable remain to be settled. The following is an analysis of the judicial interpretations given to the rights of prisoners in the post-*Charter* era.

The judiciary's approach to prisoners' rights under the Charter is, by necessity, considerably different from the approach developed just prior to its enactment. Those rights that had been recognized before the Charter came into force were defined largely by the interpretation given to such statutes as the Parole Act and the Penitentiaries Act and by the principles of judicial review in the common law. Few were explicit. By contrast, the Charter states explicitly that "everyone", or "every citizen", or "any person charged with an offence," as the case may be, has certain rights or freedoms. The Charter, then, sets out a basic framework for a theory of prisoners' rights which had previously been absent.[423]

Still, there is much room for judicial interpretation within the Charter. As in the pre-Charter era, it is now within the domain of judicial discretion that prisoners' rights will be delineated. It is clear that prisoners are capable of holding a variety of Charter rights. This overcomes the question faced in the pre-Charter jurisprudence as to whether prisoners could assert rights at all. However, it is for the courts to determine the amplitude of those rights and the limits that can justifiably be placed on them in accordance with section

1. This, in effect, obviates the need for a special theory of prisoners' rights. In each case, the courts will simply need to decide whether the particular right being asserted is caught by the Charter and, if so, whether a legislative limit on it is justifiable.[424] Pre-Charter statements of the rights of prisoners contained in such cases as Solosky and Martineau (No. 2) are no longer authoritative and, in any case, are really subsumed in the Charter itself in sections 7 (the right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with principles of fundamental justice) and 15 (the right to equality before the law).

Thus, in the Charter caselaw there are few discussions of the legal status of prisoners or of their capacity to hold rights as there were in pre-Charter cases. Rather, the cases to be discussed below address issues relating to the content of rights asserted by prisoners.

(i) Parole

Section 7 of the Charter states that everyone has "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." For a time, because of the words "and the right ..." in the middle of the section, it was unclear whether section 7 contained two sets of rights or just one.[425] The Supreme Court of Canada settled this issue in Reference re Section 94(2) of Motor Vehicle Act, R.S.B.C. 1979, c. 288.[426] It held that the "one right" interpretation of section 7 was the correct one. That is, that the requirement to observe the principles of fundamental justice qualifies the right not to be deprived of life, liberty and security of the person; it is not a free-standing right on its own. However, it also held that the words "principles of fundamental justice" do not limit section 7's ambit to just procedural protection through the common law concept of "natural justice" or "due process". Rather, the basic principles of our legal system including, but not limited to, notions of procedural justice, are crystallized in section 7. Therefore, where liberty is denied, for example, in a fashion that runs against the sense of justice that is inherent in our legal system, there will be a violation of section 7. Both the determination whether to grant parole and the decision to revoke it have implications for a prisoner's liberty. This was recognized even prior to enactment of the Charter in the Dubeau case.[427] As such, section 7 of the Charter has been asserted frequently as the source of the rights of prisoners who are either seeking or are on parole.

In an early parole case under the Charter a restrictive interpretation was given to "liberty" for section 7 purposes. In Re Conroy and The Queen[428] the prisoner had been granted parole without conditions. Subsequently, after he had been seen on several occasions in an intoxicated state, the Parole Board imposed a condition that he abstain from consuming alcohol. His parole was immediately suspended. He had not been given an opportunity to make representations to the Board prior to the imposition of the special condition, nor was he given any advance notice of it or reasons for his subsequent apprehension. He challenged the Board's actions on section 7 grounds, arguing that he had been deprived of his liberty other than in accordance with principles of fundamental justice. Craig J. held that the imposition of the abstinence condition did not affect the prisoner's liberty. He characterized the status of a parolee in a way reminiscent of the pre-Dubeau cases:

> When one examines the conditions imposed upon a parolee, and specifically the all-encompassing

condition that the parolee "remain until expiry of sentence under the authority of the ... National Parole Board," it is obvious that the parolee does not enjoy "liberty" in the sense that that word is commonly understood. The parolee enjoys instead a very real, but none the less conditional or qualified right or privilege to remain free of detention or custody. The imposition of a further condition of abstinence from alcohol does not detain a parolee or return him to custody, and the parolee remains free "to resume [his] activities as a citizen at large in the community under supervision." For these reasons it is my opinion that s. 7 of the <u>Canadian Charter of Rights and Freedoms</u> does not apply to the imposition of the condition 429

This was a curious result given that the imposition of any conditions of release limits a parolee's liberty while outside prison. Further, even if the condition itself could not be said to limit liberty, this was certainly the effect of imposing the condition as the prisoner was apprehended almost immediately thereafter. Indeed, the very purpose of the condition appeared to be to bring about an end to the parolee's release since officials were aware of his drinking habits but did not inform him of the new condition. Thus, he was given no chance to conform to the abstinence requirement. The interpretation given to section 7 in the case cast doubt as to whether its terms were indeed broad enough to encompass the liberty interests of prisoners and parolees. In other words, Conroy appeared to limit the words "everyone has the right to ... liberty" to those who already had complete liberty. This would have made the inclusion of those words in the Charter meaningless since no one with complete liberty would be in a position to claim a deprivation. The case appeared to confuse the granting of a right to liberty with the issue whether liberty had been properly denied in the circumstances. Section 7 says that "everyone has the right to liberty." Presumably, a person on parole comes within the word "everyone." The question should have been whether the suspension and revocation were carried out in accordance with principles of fundamental justice, not whether the parolee was entitled to assert a section 7 right.

In a later case it was made clear that the imposition of parole conditions must conform to section 7. In Re Litwack and National Parole Board[430] the prisoner had been convicted of fraud. He was later granted parole subject to a special condition that he refrain from being involved in any business enterprises. This condition had prevented him from pursuing certain employment possibilities and other professional opportunities. He petitioned the Parole Board on several occasions to have the condition removed but was unsuccessful. Walsh J. found that the imposition of the condition was reasonable at the time, but that it was no longer acceptable. He rejected as "specious" the reasoning of the Board that the conditions could not be said to limit the parolee's freedom since the prisoner's acceptance of them permitted him to obtain release from prison. Citing Reference re Section 94(2),[431] he stated that "it is now clear that there is a duty of an administrative tribunal not merely to act fairly but also to act reasonably. Furthermore it is not sufficient to comply merely with procedural fairness but also the substance of the decision must be reasonable."[432] The special condition was unreasonable in the circumstances since it actually prevented the parolee's reintegration back into society. Not only does Litwack represent a liberal interpretation of parolees' liberty interests, the case demonstrates that the substance of the Parole Board's actions can be reviewed on Charter grounds. Thus, even where the Board has proceeded fairly in exercising its powers under the Parole Act, courts may intervene to ensure that its decisions are reasonable in the circumstances.

Although Litwack is indicative of a whole new domain of judicial review of parole matters, one which has yet to be explored, it is the procedural guarantees in section 7 which have been invoked most often in post-Charter cases. It has been used, for example, to argue for greater disclosure of information in the hands of the Board. In Cadieux v. Director of Mountain Institution,[433] Reed J. held that section 7 of the Charter applied to the decision whether to grant a prisoner an unescorted temporary absence.[434] The temporary absence was clearly a privilege not a right. Still, Reed J. held that section 7 applied. The refusal of the ability to enjoy the freedom of a temporary leave from the institution was a deprivation of liberty that could only be accomplished in accordance with section 7. Thus, the Board had an obligation to disclose to the prisoner the basis upon which it decided to cancel the temporary absence it had previously granted him and give him an opportunity to respond. The Board claimed that the information in its possession was confidential. The Court ruled that the Board should at least provide the prisoner the "gist of the reasons against him."[435] It would be relieved of that obligation only where necessary to protect the identity of a confidential informer.[436] Several other Charter cases[437] have reinforced the duty of the Board to disclose information upon which it relies in making parole decisions, continuing a trend started by such pre-Charter cases as Couperthwaite[438] and Morgan.[439]

The ability of prisoners to obtain disclosure has been the subject of Charter litigation in other parole contexts. Recent amendments to the Parole Act[440] allow the Parole Board to prevent the release of prisoners on mandatory supervision. This legislation was enacted in response to a decision of the Supreme Court of Canada holding that the Parole Board had no power under the Parole Act to arrest prisoners on mandatory supervision immediately upon their release from prison.[441] The government passed legislation permitting the Board to refuse the release of a prisoner who has committed a violent crime and who is believed on reasonable grounds to be likely to commit another violent offence prior to the expiration of the sentence imposed by the court.[442] In other words, the Board now has the power to cancel the remission time that a prisoner earned through good behaviour.

In Ross v. Kent Institution,[443] the prisoner challenged the constitutionality of the new legislation on the ground that the Board had cancelled his release without disclosing the information upon which it relied in determining that he represented a danger to the public. Thus, he had been given no means of meeting the case against him. The British Columbia Court of Appeal began by making it clear that the prisoner's remission credits were "rights."[444] As such, the prisoner had at least a qualified right to release on mandatory supervision and the infringement of that right must accord with the standards of section 7. Again, as in Cadieux, even if remission credits were not regarded as "rights," but as "deferred credits",[445] it was clear that section 7 applied since the opportunity to obtain release from the institution had been denied the prisoner. That is, he had suffered a deprivation of liberty which could only be carried out on section 7's terms.

Regulations allowed the Board to withold information that, if disclosed, would endanger a person's safety, jeopardize prison security or lead to the commission of a crime.[446] At first instance, the B.C. Supreme Court had held that the portions of the Parole Act allowing the Board to cancel a prisoner's release and the Regulations limiting disclosure were contrary to the guarantees of section 7 in that they allowed the Board to proceed on the basis of secret information. In the Court's view, this was equivalent to a "denial of the right to be heard. Without the information the hearing ostensibly accorded the accused under the amendments to the Parole Act is illusory."[447] However, the Court of Appeal disagreed. It held that the Regulations would, in the circumstances, only allow the Board to withold the identity of informers, not the substance of the allegations. Thus, a prisoner had a general right to disclosure subject only to the need to protect informers:

> The principles of fundamental justice require that he know the substance of the information said to be against him and be afforded a fair opportunity of answering it.[448]

The Court of Appeal did not address the question whether the prisoner should still receive full disclosure when the substance of the allegations itself would reveal the informer's identity.[449]

An Ontario case[450] addressed the larger issue of whether the newly conferred power to cancel a prisoner's impending release on mandatory supervision was, in itself, contrary to section 7. In dismissing this argument, the Ontario Court of Appeal used language that was reminiscent of the early parole case of In re McCaud:[451]

> The sections of the Parole Act in issue simply give the Parole Board the power to change the degree of supervision required in the case of those inmates referred to it.... The sections do not change the sentence imposed on the inmate by the court that convicted him, and consequently do not impose an additional penalty. In our opinion, they do no more than change the manner or condition under which certain inmates must serve the balance of the sentence.[452]

While similar reasoning in In re McCaud was used to reject the argument that the Board was bound by procedural requirements and was subject to judicial review, it was clear in Evans that the Board's decision constituted a deprivation of liberty and section 7 applied. As such, the Board could not deny a prisoner release without a fair hearing. If it did, the courts would be bound to intervene. In the result, the Ontario Court of Appeal found that the procedures in the Act were fair. The Court did not specifically address whether the new legislation was substantively reasonable according to the meaning given to section 7 in Reference re s. 94(2).[453] However, it may have done so indirectly by considering the merits and objectives of the legislation as part of the determination whether the prisoner's rights had been interfered with:

> The scheme adopted by Parliament to achieve the objective of protecting the public against inmates likely to cause death or serious harm cannot, in our opinion, be said to violate the appellant's constitutional right not to be deprived of his liberty except in accordance with the principles of fundamental justice.[454]

The Court appeared to have balanced the objectives of the scheme against the prisoner's rights. This may have been an indirect assessment of the substantive reasonableness of the legislative provisions. In other words, the legislation did not contravene section 7 because it was reasonable for the Parole Board to attempt to prevent the release of potentially dangerous convicts. The Court also concluded that the resulting detention was not arbitrary because of the statutory procedures in place. Thus, there was no breach of section 9 of the Charter. If necessary, the Court would have had no difficulty in finding that the legislation met the standards of section 1 as the "means chosen by Parliament for the important societal purpose of protecting the public from dangerous inmates are reasonable and demonstrably justified."455

Some prisoners have challenged the entire mandatory supervision scheme as being contrary to the Charter. In Belliveau v. The Queen,456 the Federal Court held that a system of supervised release was reasonable in a democratic society. The Canadian system of mandatory supervision did not offend the principles of fundamental justice. Nor did re-incarceration after commission of additional offences while on release amount to arbitrary detention or cruel and unusual punishment. Interestingly, the Court began by considering whether mandatory supervision was a valid limitation on liberty in accordance with section 1, rather than determining first whether a Charter right had actually been breached. Dubé J. concluded:

> It is not unrealistic to assume that some form of control and rehabilitation is indicated to assist

prisoners in their gradual re-entry into the community and that some type of safeguard is warranted for the protection of that community. Mandatory supervision is one method for achieving those goals and the limitations it imposes are reasonable and justifiable in a democratic society.[457]

The procedural protections in the Parole Act ensured that the principles of fundamental justice were afforded to prisoners whose release on mandatory supervision was subsequently revoked. Thus, there was no conflict between the revocation procedures in the Act and section 7 of the Charter. The mandatory supervision scheme was both substantively reasonable and procedurally adequate.

Dubé J. was also of the view that there could be no conflict between revocation of mandatory supervision and section 9 of the Charter which gives everyone the right not to be arbitrarily detained or imprisoned. Since there was a statutory foundation for the revocation of mandatory supervision and release could only be terminated for good cause, detention for failure on release was not arbitrary.

With respect to the section 12 contention that revocation of mandatory supervision amounted to cruel and unusual treatment or punishment, Dubé applied a test not unlike that articulated by MacIntyre J.A. (as he then was) in Miller and Cockriell.458 He concluded that:

> A programme which includes [the possibility of re-incarceration] and the ensuing loss of remission, such as the one in place in this country, cannot, in my view, be described as outrageous, or excessive, or beyond the rational bounds of morality. The fact that the prisoner who has so breached the system loses his remission cannot be said to be excessive or disproportionate. The Canadian mandatory supervision programme would appear to me to be in accord with Canadian standards of decency and propriety. It can be applied upon a rational basis in accordance with ascertainable standards.459

Finally, the prisoner argued that the loss of remission consequent on revocation of mandatory supervision constituted "double punishment" in breach of s. 11(h) of the Charter since the prisoner was also punished for the criminal acts which precipitated the revocation. Section 11(h) states that a person who has been charged with, convicted, and punished for an offence, cannot be tried or punished for it again. Belliveau argued that since he had been tried, convicted, and punished for the crimes committed while on mandatory supervision, he could not be tried or punished for them again by the Parole Board as part of the post-revocation process. In rejecting this argument, Dubé relied on the case of R. v. Debaie[460] in which the Nova Scotia Court of Appeal had distinguished between the consequences of breaching conditions of mandatory supervision from punishment for commission of criminal offences. It concluded that there had been no infliction of double punishment in convicting a prisoner of criminal offences after revocation of mandatory supervision. Although it did not say as much, in order to reach this conclusion, the Court must have believed either that the loss of remission did not constitute "punishment" or that a person facing post-revocation proceedings was not entitled to the protection of s. 11(h) as such a person was not "charged with an offence."

Similar issues were dealt with by the Federal Court of Appeal in Re Maxie.[461] There, the Court did consider whether there was "punishment" involved in the revocation of mandatory supervision in determining whether any principles of fundamental justice were breached in the process of revoking the prisoner's release and convicting him of offences committed while at large.[462] Thurlow C.J. for the Court did not recognize loss of remission as "punishment":

> It is not primarily, if at all, a punishment for the new offence or breach of condition. Rather, it is the result of a decision by the Board as to what to do about a breach of a condition of mandatory supervision having regard to what it shows about the state of the inmate's rehabilitation and the risk to the public of his being left at large. The resulting incarceration is not a new sentence but the old one, the one awarded for his earlier offences that is now to be served in custody rather than at large on mandatory supervision.[463]

While this may be a disproportionately harsh consequence for those whose failure on mandatory supervision resulted from relatively minor misconduct, it could be mitigated by the Parole Board's discretion to recredit some or all of the lost remission.[464]

The Court also rejected arguments that re-incarceration upon revocation of mandatory supervision amounted to arbitrary imprisonment contrary to section 9 of the Charter. It found that there was "a sufficient basis" for the Board's actions given that the prisoner had committed three offences in as many days immediately upon his release. It was appropriate, therefore, for the Board to have concluded that protection of the public required that the prisoner's release be terminated.

The Court's approach in Re Maxie seems reasonable. Loss of remission on revocation of parole or mandatory supervision is difficult to conceive as punishment in itself. The prisoner has been given an opportunity to enjoy a certain degree of freedom while serving a prison sentence. If the Board subsequently has cause to believe that release is inappropriate because of criminal activity or a breach of conditions, it must have the power to bring the prisoner back into custody. In the era prior to enactment of the Criminal Law Amendment Act, 1977,[465] it would have been arguable that revocation of parole or mandatory supervision did amount to punishment since the prisoner was required then not only to serve the remainder of the sentence in prison, but also to re-serve the time spent on release. This additional incarceration beyond the sentence imposed by the courts had a punitive character[466] that is now absent from the Parole Act. It resulted in the imposition of an extended period of incarceration, not merely in a change in the place and manner of serving the original sentence. This is not to say, of course, that the Board is not dealing with significant interests, particularly where prisoners have been re-incarcerated after earning the right to be at large during their sentence. Courts have resorted to the Charter repeatedly to require the Board to follow fair procedures when it denies a prisoner freedom.

The duty to act fairly was clear in such pre-Charter cases as Dubeau,[467] Couperthwaite[468] and Morgan[469] and the trend continued under the Charter in Cadieux,[470] and other disclosure cases.[471] But the Charter, it would appear, has done more than simply allow the common law to unfold as it might otherwise have done. It has resulted in the application of stricter procedural safeguards than the common law would have imposed. For example, in R. v. Caddedu,[472] Potts J. stated explicitly that, but for the Charter, he would not have held that a provincial prisoner[473] was entitled to an in-person post-suspension hearing. The common law duty to act fairly did not require such a hearing in the circumstances[474] but section 7 of the Charter did.

The Charter has been used to require a hearing in other circumstances where one was not required by parole statutes or regulations. In Swan v. A.G. of B.C.[475] the British Columbia Supreme Court held that the Parole Board was obliged to afford a prisoner an in-person hearing after his parole had been revoked at an ex parte proceeding. In fact, the prisoner had been offered a hearing and declined it after being told, in effect, that it would serve him no purpose. The Court held that the Board must hold a hearing in all cases where parole has been revoked in the prisoner's absence, even though the reason for the absence was that the prisoner had absconded. Upon return, the prisoner should be provided an opportunity to give an explanation.

Similarly, where the Board is required to hold a hearing upon the prisoner's application, it must hold the hearing unless the prisoner makes an informed decision to waive it. Thus, the Board must hold a post-suspension hearing[476] unless it can establish that the inmate made an informed choice to decline the hearing.[477]

As well as requiring hearings in certain circumstances, the Charter has also brought about changes in the way parole hearings are conducted. Prior to the

Charter, the Board had been required to conduct hearings in the prisoner's presence.[478] *Charter* cases have come to the same conclusion,[479] even in situations where no hearing had been required by statute or regulation.[480] One of the main differences under the *Charter*, however, lies in the expanse of remedies available to the reviewing court. A court seized with a *habeas corpus* application with *certiorari* in aid can quash the impugned decision.[481] On the other hand, under the *Charter* the court could send the matter back to the Board for a proper hearing as an appropriate and just remedy under section 24.[482]

The opposite side of the "in-person" requirement has also come to be recognized; i.e. that the Board, as well as the prisoner, must be present in-person at the hearing. It cannot make its determinations merely by reviewing the prisoner's file. It must be present to hear the person's submissions. In *Re Mason and The Queen*,[483] Ewaschuk J. held that section 7 of the *Charter* required that those who were in a position to decide whether to revoke a person's mandatory supervision must hear the person's submissions. Thus, where an additional vote is needed to break a tie between Board members sitting at a post-suspension hearing, the member who casts the deciding vote cannot do so solely on a review of the file. Such a decision, affecting as it does a person's entitlement to liberty, cannot be made by a "faceless and absent bureaucrat who cast his critical vote in some distant unknown place."484

The same result was reached in O'Brien v. National Parole Board,485 but for different reasons. There, McNair J. held that the common law duty to act fairly obliged the Board to afford a prisoner seeking an unescorted temporary absence an in-person hearing before all those who cast a vote on the issue. In O'Brien, only three Board members were present at the hearing. Four others cast their votes based on an assessment of the prisoner's file. Those who heard the prisoner's submissions voted in favour of release -- those who only reviewed his file voted against. McNair J. regarded this as unfair and quashed the Board's decision.

Curiously, McNair J. did not find there to have been a breach of section 7. He believed that on the facts there was not a sufficient liberty interest at stake to attract the application of section 7's guarantees. O'Brien had requested permission to be released for a three-day period in order to visit his aged grandmother. It was not a case in which the Board had brought about the prisoner's re-incarceration after being liberated on parole or mandatory supervision. This, according to McNair J., was a significant distinction:

> The subject matter of the application was simply a request. There was no question of the deprivation of any constitutionally-enshrined right of liberty, conditional or otherwise, such as might occur with the revocation of parole and its consequences on earned remission or the suspension of mandatory supervision. The applicant made a request for the granting of a privilege, which was denied in accordance with the clearly mandated legislative provisions. To my mind, a distinction must be drawn between a denial affecting the expectation of enjoyment of some anticipated privilege of liberty and the deprivation of some right or liberty, presently existing and enjoyed, where such deprivation is contrary to fundamental justice.[486]

This analysis may be criticized on two grounds. First, section 7 affords the right not to deprived of liberty except in accordance with the principles of fundamental justice. It is difficult to conceive of a decision denying a person an opportunity to be released from prison as anything but a deprivation of some liberty.

Admittedly, the liberty interest may be of lesser magnitude in this situation than where a parolee is brought back to an institution and, accordingly, the applicable principles of fundamental justice may be more circumspect, but there is no basis for the assertion that section 7 simply does not apply. Second, in order to make the distinction, McNair J. was forced to elevate the legal status of those on parole and mandatory supervision to a level not generally recognized in Canadian law. He refers to parole (and mandatory supervision) as "constitutionally-enshrined" and as a "right of liberty, presently existing and enjoyed." More correctly, parole and mandatory supervision are not rights, they are privileges. Yet they represent significant personal interests whose termination or deprivation attracts a requirement to observe fair procedures and, according to section 7, the principles of fundamental justice. The situation where parole or mandatory supervision is suspended by the Parole Board may be different in degree from its decision not to grant release, but it is not different in kind. Both constitute deprivations of liberty and ought to accord with section 7, as was recognized in such cases as Cadieux,[487] Ross[488] and Evans.[489]

Thus, in parole cases under the Charter, much of the litigation has involved a determination of the prisoner's liberty interests in the given circumstances. Where courts have considered a person to have been deprived of a liberty interest that is protected by section 7 of the Charter, they have imposed a duty on the Parole Board to abide by the principles of fundamental justice. The imposition of parole conditions restrict a parolee's freedom and, therefore, must be reasonable.[490] The decision not to grant a prisoner a form of release may constitute a deprivation of liberty obliging the Board to disclose to the prisoner the information upon which it relies[491] and hold a fair hearing.[492] Even if section 7 does not apply to this decision, the Board must at least act fairly by giving the prisoner an opportunity to make submissions to the entire panel charged with deciding the matter.[493] It is clear that terminating parole or mandatory supervision deprives a prisoner of a protected liberty. Therefore, post-suspension procedures must be fundamentally just.[494]

While section 7 has been dominant in these parole cases, other sections of the Charter have been asserted, but without success. Prisoners have argued that post-suspension procedures result in arbitrary detention contrary to section 9,[495] inflict cruel and unusual treatment in breach of section 12[496] and impose double punishment contrary to section 11(h).[497] Courts have rejected each of these arguments.

(ii) Prison Discipline

As in the parole setting, it is section 7 of the *Charter* which has been asserted most frequently in prison discipline cases. Since the result of a conviction of a disciplinary offence can result in deprivations of liberty through loss of remission, placement in dissociation, or otherwise, it is the liberty interest at stake in disciplinary hearings that attracts the application of section 7.

After the Supreme Court's decision in *Martineau (No. 2)*,[498] it was clear that disciplinary tribunals had an obligation to act fairly in hearing charges against prisoners. Pre-*Charter* cases recognized that prisoners may have counsel present at disciplinary hearings where the presiding officer considers it appropriate.[499] The right to counsel has also been litigated under section 7 of the *Charter* in *Re Howard and Presiding Officer of Inmate Disciplinary Court of Stony Mountain Institution*.[500] There, Thurlow C.J.[501] implicitly endorsed the pre-*Charter* cases by holding that there is no absolute right to counsel in the disciplinary setting. However, his judgment went further than the earlier cases in two respects. First, it was his view that in circumstances where representation by counsel is necessary in order for the prisoner to adequately defend disciplinary charges, the prisoner has a <u>right</u> to counsel. It is, at that point, no longer within the discretion of the presiding officer to deny the prisoner permission to appear with counsel:

> ... [W]hether or not the person has a right to representation by counsel will depend on the circumstances of the particular case, its nature, its gravity, its complexity, the capacity of the inmate himself to understand the case and present his defence. The list is not exhaustive. And from this, it seems to me, it follows that whether or not an inmate's request for representation by counsel can lawfully be refused is not properly referred to as a matter of discretion but is a matter of right where the circumstances are such that the opportunity to present the case adequately calls for representation by counsel. It may be that where the circumstances do not point to that conclusion a residual authority to permit counsel nevertheless is exercisable by the appropriate official but that area is not, I think, within the purview of s. 7.[502]

Second, as a necessary corollary to this position, Thurlow C.J. stated that the courts have the obligation to determine whether the decision to deny a prisoner counsel at a disciplinary hearing was correct. In other words, where certain criteria are present, the presiding officer no longer has an unfettered discretion to determine whether counsel should be present. Rather, the officer has a duty to afford the prisoner an opportunity to retain counsel. As such, the decision of the presiding officer was reviewable by the courts in order to determine whether a right to counsel existed in the circumstances.[503]

Thurlow C.J. relied on the factors set out in the English case of R. v. Secretary of State for Home Department, Ex p. Tarrant.[504] There, Webster J. listed the following as relevant criteria:

1. the seriousness of the charge and of the potential penalty;

2. whether any points of law are likely to arise;

3. the capacity of a particular person to present his own case;

4. procedural difficulties;

5. the need for reasonable speed in making the adjudication;

6. the need for fairness as between prisoners and as between prisoners and prison officers.[505]

In the result, Thurlow C.J. held that Howard was entitled to be represented by counsel at his disciplinary hearing. The seven charges against Howard were all "serious" or "flagrant."[506] The prisoner stood to lose his 267 days of accumulated earned remission as punishment for these charges. Further, he could be punished with dissociation and loss of privileges. The charges lacked particularity and some of them may have applied to the same act. One charge was "notoriously vague and difficult ... for anyone to defend."[507] The prisoner was in need of counsel to assist in sorting out the charges and in defending against the potential loss of liberty consequent upon conviction.

MacGuigan J.A. wrote a minority concurring judgment. He considered whether changes in the manner in which hearings were conducted since Martineau (No. 2) had transformed the process into a judicial or *quasi*-judicial proceeding which would require the presence of counsel. While he conceded that many procedural innovations had occurred,[508] disciplinary tribunals had not yet become courts:

> In the result, while a new legal system in prison disciplinary proceedings may be in the process of evolution, it has not yet emerged. Legally speaking, the only advance has been to a fairer version of the same basic model considered by the Supreme Court in the two Martineau cases.[509]

MacGuigan J.A. then considered whether section 7 of the Charter was the source of the right to counsel asserted by Howard. He compared Canadian law with the approach taken in the U.S.[510] and concluded that the liberty interest at stake in disciplinary proceedings was sufficient to attract the application of section 7 and that any proceedings from which an absolute deprivation of liberty could result (such as through the irretrievable loss of remission) should allow for the affected party to be represented by counsel. In doing so, MacGuigan J.A. made an eloquent and effective rejoinder to the argument that due process guarantees are incompatible with the disciplinary requirements of penitentiaries:

> Penitentiaries are not nice places for nice people. They are, rather, institutions of incarceration for the confinement of, for the most part, crime-hardened

and anti-social men and women, serving sentences of more than two years. Reformation fortunately remains an aspiration of the prison system, but the prevalent environment is sadly reminiscent of Hobbes' primitive state of nature before the advent of the leviathan, where human life was said to be solitary, poor, nasty, brutish and short. In such an atmosphere of discord and hatred, minor sparks can set off major conflagrations of the most incendiary sort. Order is both more necessary and more fragile than in even military and police contexts, and its restoration, when disturbed, becomes a matter of frightening immediacy.

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

But not every feature of present disciplinary practice is objectively necessary for immediate disciplinary purposes. The mere convenience of the authorities will serve as no justification; as Lord Atkin put it in General Medical Council v. Spackman, [1943] A.C.

627 at p. 638: "Convenience and justice are often not on speaking terms." Even what may be necessary but nevertheless delayable cannot be given priority. All that is not immediately necessary must certainly yield to the fullest exigencies of liberty.

On the basis of these criteria of necessity and immediacy, on-the-spot administrative dissociation may arguably be required to segregate inmates involved, e.g., in hostage-taking, but punitive dissociation as a consequence of a disciplinary court has much less immediate necessity, and revocation of earned remission seems not to be immediately necessary at all.511

MacGuigan J.A. could conceive of few situations where prisoners would not have the right to counsel, given the vague and open-ended nature of many disciplinary offences. Legal issues will often arise from these kinds of charges. Thus, other than "in fact situations of unique simplicity"512, MacGuigan J.A. supported a presumption in favour of allowing prisoners to engage counsel to represent them at disciplinary hearings. He disagreed specifically with Thurlow C.J.'s opinion that the capacity of the prisoner should be a consideration as to whether to permit counsel to appear, since the presiding officer would not be in a position to make that determination at the beginning of a disciplinary proceeding.

The implications of Howard remain to be explored. It was a case in which the prisoner's liberty interest was both manifest and significant since 267 days of remission time were at stake.[513] Where prisoners have a similarly large stake in the outcome of a disciplinary hearing, they will almost certainly be entitled to have counsel represent them. However, where less serious misconduct is alleged and the concomitant penalties are less severe, presiding officers (and reviewing courts) will have to consider the six variables deriving from the Tarrant case in order to determine whether the prisoner has a right to counsel. Several recent cases have applied Howard - some have recognized a right to counsel;[514] others have not.[515] All of them have applied the Tarrant criteria. The Correctional Service of Canada has interpreted Howard as requiring representation by counsel only in serious or flagrant cases. Indeed, the alteration in the categories of offences[516] after Howard may have been motivated by a desire to ensure that counsel would not be routinely present in the broad range of disciplinary hearings.[517]

Prisoners have attempted to invoke rights in the Charter contained in provisions other than section 7. Specifically, section 11, which sets out certain rights held by persons "charged with an offence", has been relied on by prisoners. In the disciplinary setting, the application of section 11 depends on the meaning to be given to the word "offence" in its opening words.

In R. v. Mingo,[518] Toy J. held that disciplinary offences were not the kind of offences foreseen by section 11 of the Charter. Toy J. stated that the determination of whether an offence was involved in a particular case and hence, whether the person charged was entitled to the protections of section 11, should be made with regard to the nature of the instrument creating the infraction and the tribunals charged with adjudicating them:

> In my respectful view, the authors of the new Charter, when they employed the unqualified word "offence" as opposed to "criminal offence", were doing nothing more than providing for the equal protection of Canadian citizens from breaches of their rights under provincial as well as federal laws in so far as public as opposed to private or domestic prohibitions were concerned. The test of what constitutes an offence falls to be determined by examining the enactment and

determining, in so far as federal legislation is concerned, if the allegation is dealt with by a court with jurisdiction to hear an indictable or summary conviction offence.[519]

As such, the prisoner was unable to argue that he had a right guaranteed in s. 11(h) of the Charter not to be punished twice for acts committed in prison. He had been convicted by a disciplinary court and punished with dissociation and loss of remission. This, however, did not prevent a court from hearing criminal charges against the prisoner arising from the same incident.

Some courts have regarded disciplinary infractions as "offences" for Charter purposes. In Russell v. Radley,[520] Muldoon J. disagreed with the approach taken in Mingo on the basis that the determination of whether a charge is an offence cannot depend on the nature of the body hearing the charge since section 11 makes no reference to particular kinds of courts -- only an "independent and impartial tribunal" (s. 11(d)) and a "military tribunal" (s. 11(f)). He held that the word "offence", for section 11 purposes, meant the following:

Surely it must mean conduct (truly, culpable misconduct) defined and prohibited by law, which, if found beyond a reasonable doubt to have been committed in fact, is punishable by fine, imprisonment or other penalty imposed according to law upon the culpable miscreant, the offender. By that standard, a disciplinary offence defined in the Penitentiary Service Regulations is surely an offence within the meaning of section 11 of the Charter.[521]

As such, Muldoon J. held that prisoners were entitled to the applicable rights set out in section 11 -- the right to be informed without delay of the specific offence (s. 11(a)); the right to be tried within a reasonable time (s. 11(b)); the right not to be compelled as a witness in the proceedings (s. 11(c)); the right to be presumed innocent until proven guilty in a fair hearing by an independent and impartial tribunal (s. 11(d));[522] the right not to be found guilty of an act unless it was an offence under Canadian, international, or customary law (s. 11(g));[523] the right not to be tried or punished for an offence twice (s. 11(h)); and, the right to receive the benefit of lesser punishment if reduced between the time of committing the offence and sentencing (s. 11(i)).[524] The prisoners had alleged breaches of sections 11(b) and 11(d). With respect to the latter, Muldoon J. rejected the prisoners' arguments. He found that the disciplinary court was both independent and impartial and that the Commissioner's Directives provide adequate guidelines for holding a fair hearing. However, he accepted the prisoners' arguments that their right to be tried within a reasonable time had been breached by the adjournment of proceedings sine die. In disciplinary matters, proceedings should normally be completed swiftly since, unlike cases outside prison, all of the parties are present within the institution: "So it is that in the case of an inmate charged with a disciplinary offence, 'to be tried within a reasonable time' must ordinarily mean to be tried much more swiftly than is reasonable or even possible in the case of a person who is charged with a criminal or penal offence under federal or provincial laws of general application".[525]

In the Peltari[526] case, involving a provincial prisoner, the Court adopted much of the reasoning of Muldoon J. in Russell, holding that because the prisoner had previously been acquitted on a charge of being unlawfully at large, he could not subsequently be punished by a disciplinary panel for the same conduct. Section 11(h) of the Charter applied. Gibbs J. differed from Muldoon J. in Russell in believing that the quantum of proof was not a relevant factor in determining whether a particular penal provision constituted an offence for section 11 purposes.[527] Rather, the sole issue was the character of the sanction which accompanied the alleged "offence". Thus, "an offence in s. 11(h) means conduct prohibited by law on pain of punishment."[528] In Peltari, since punishment in the form of lost remission had indeed been imposed in relation to conduct for which the prisoner had previously been acquitted, there had been a breach of section 11(h) of the Charter.[529]

Another scenario in which claims of double punishment have arisen is where a prisoner has been punished by a disciplinary tribunal and then fails to earn remission for the month in which the conviction occurs. In Knockaert v. Commissioner of Corrections,[530] the Federal Court of Appeal held that this sequence of events does not constitute a breach of section 11(h). Two members of the Court[531] accepted that section 11 applied to disciplinary offences, but refused to characterize the witholding of remission as "punishment". The third member, Marceau J.A., took a broad view of the meaning of punishment, stating that "'[p]unishment' means 'the imposition of a penalty' and a 'penalty' is, in a broad sense, a 'disadvantage of some kind' imposed as a consequence of a misbehaviour, which, it seems to me, may include a loss of reward."[532] However, in the result, Marceau J.A. agreed with the majority. He believed that while the prisoner had been punished twice, section 11 did not apply because the prisoner was not charged with an offence in the sense in which that word is used in section 11.

The general approach of the majority in Knockaert seems more reasonable. To be consistent with a large, liberal interpretation of the Charter, disciplinary charges ought to be characterized as offences for section 11 purposes.[533] It should then be determined whether the particular right has been infringed. In the Knockeart case, this step involves an assessment of the particular sanctions imposed; i.e. do they amount to double punishment for the same act? On this specific issue, the analysis of Marceau J.A. is more sound than that of the majority. The withholding or withdrawal of a reward can surely amount to punishment. What must be considered is the basis upon which the reward was withheld. A denial of liberty through the witholding of remission credits can be a punishment if it is carried out solely to sanction misconduct. On the other hand, if it is withheld because it has not been earned having regard to the overall behaviour of the prisoner over the relevant time period, then it cannot realistically be called punishment. Thus, when Hugessen J.A. refers to the denial of parole as an example of a reward withheld which could not be considered to be punishment for earlier disciplinary convictions, he misses this point. If parole were withheld simply to sanction earlier misbehaviour, then surely this could be nothing other than punishment. On the other hand, if parole were withheld because the prisoner's past conduct evinced a pattern of behaviour that would make for an unsuitable candidate for early release according to the applicable statutory criteria, then its denial would surely not amount to punishment.[534] The decision not to award earned remission in Knockaert was clearly punitive, since it was based solely on the result of the disciplinary proceedings, not on a conscientious assessment of the prisoner's overall behaviour.[535]

The Supreme Court of Canada has now developed a test for determining whether a statutory prohibition is an "offence" for section 11 purposes. In Wigglesworth v. The Queen,[536] Wilson J.[537] held that "[t]he rights guaranteed by s. 11 of the Charter are available to persons prosecuted by the State for public offences involving punitive sanctions, i.e., criminal, quasi-criminal and regulatory offences, either federally or provincially enacted."[538] A prohibition would be caught by section 11 if it was by its "very nature" a criminal or penal matter or if it authorized upon conviction a "true penal consequence."[539] While disciplinary matters are not by their very nature generally covered by section 11, they can be if they result in a true penal consequence. A "true penal consequence" is imprisonment or a fine "imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity."[540] In the result, Wilson J. found that police disciplinary proceedings under the Royal Canadian Mounted Police Act,[541] attract the application of section 11 since the Act authorizes punishment of one year of imprisonment. However, she went on to find that a prosecution for criminal charges after conviction in disciplinary proceedings would not breach the protection against double punishment in section 11(h). In a seeming contradiction, Wilson J. stated that the conduct in question had a "double aspect"[542] - it was partly related to an internal disciplinary matter and partly a criminal offence. One would have thought that having found that the proceedings under the Act were penal in nature (i.e. they did not relate solely to internal discipline) that the conclusion that the conduct (in this case an assault) had a "double aspect" (i.e. both disciplinary and criminal) and could be punished in both fora would have been foreclosed. The Court's own approach to the rule against multiple convictions was not followed in determining whether there was more than one punishable aspect to the conduct.[543] As Estey J. states in dissent:

> There is no question but that here the one accused committed the single offence of common assault and he has been convicted and sentenced for that offence in a court established by Parliament for that purpose and is now faced with the like prosecution under another act of Parliament, the <u>Criminal Code</u> and before another court.[544]

It seems clear that serious or flagrant prison disciplinary offences would be covered by Wilson J.'s definition of "offence" for section 11 purposes since there is a risk of losing remission time upon conviction. This would probably be a "truly penal consequence." Perhaps prison disciplinary offences as a whole would by their "very nature" be covered by section 11, but this is far from clear. However, even if these offences attracted the application of section 11, and the protection against double punishment in section 11(h) in particular, the approach of Wilson J. in <u>Wiggleworth</u> would almost certainly preclude any entitlement not to be prosecuted twice for misconduct in prison. Her new "double aspect" doctrine[545] would appear to allow for this wherever disciplinary proceedings are coupled with a criminal prosecution under the <u>Code</u>.

The post-*Charter* prison discipline cases discussed have involved the application of entitlements contained in sections 7 and 11 of the *Charter*. It must also be noted that several cases have involved purely common law issues relating to the duty of disciplinary tribunals to act fairly. Thus, where it is uncertain whether a prisoner can have recourse to the *Charter* to obtain procedural justice, it may be of some consolation that the common law is an alternative source of authority.[546]

(iii) Prison Conditions

The primary instrument for challenging conditions of imprisonment is section 12 of the *Charter*:

> Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Section 12 does not depart in any significant way from the wording of subsection 2(b) of the *Canadian Bill of Rights*. The question is whether the constitutional entrenchment of this right has resulted in the application of a different standard[547] of what is "cruel and unusual" than existed in jurisprudence under the *Bill of Rights*.

In an early case under the *Charter*, section 12 was invoked by prisoners challenging the practice of placing two prisoners in one cell -- so-called "double-bunking."[548] The Court relied on a U.S. decision[549] on this issue in holding that the prisoners were not entitled to an injunction on section 12 grounds to prevent the introduction of this practice. It did not resort to a consideration of the caselaw under the Bill of Rights. Rather, it referred to and adopted the definition of "cruel and unusual" given by the U.S. Supreme Court in Rhodes v. Chapman:

> The phrase goes beyond "barbaric physical punishments" and includes the "unnecessary and wanton infliction of pain ... totally without penological justification." These terms are to be defined in accordance with "standards of decency that mark the progress of a maturing society."[550]

Applying this standard, Dubé J. concluded that the temporary double-bunking practised at the Leclerc and Laval Institutions, while probably uncomfortable and certainly not to be recommended, was not shown to be cruel and unusual. He specifically left open the possibility of a further application being made after the programme had actually been instituted.[551]

Prisoners also challenged the policy of double-bunking which had been established at Stony Mountain Medium Security

Penitentiary in 1982. They alleged that the decision of the Solicitor General to impose double-bunking was made without, or in excess of, jurisdiction and in a manner that infringed section 7 of the Charter. They also argued that the practice offended section 12. After an exhaustive assessment of the prison conditions based on the evidence of both prisoners and experts, Nitikman D.J. found that the programme of double-bunking was neither ultra vires nor contrary to the Charter.[552] The prisoners had complained of "increased tension rising to extreme tension, lack of privacy, arguments, fears of assaults, sexual and otherwise, problems relating to sexual privacy (masterbation) (sic), defecation odours by reason of lack of ventilation and lack of space due to the small size of cells."[553]

Nitikman D.J. rejected summarily the arguments on the duty to act fairly. He relied on authorities both under the Bill of Rights[554] and the Charter[555] in concluding that the Charter "does not empower courts to substitute their views for those of the prison authorities to properly manage such institutions."[556] The decision of the Solicitor General was "necessary" and, as such, "not open to question."[557] It is difficult to conceive how this expression of the "hands-off" doctrine relates to the question of fairness, unless

Nitikman D.J. was implying that the Solicitor General's decision was not reviewable.[558]

On the meaning of "cruel and unusual," Nitikman D.J. adopted the conjunctive approach favoured by Ritchie J. in Miller and Cockriell.[559] He did not regard Ritchie J.'s judgment on this issue as obiter[560] but as binding on him. After referring to Collin[561] and U.S. authorities[562] on the question, he concluded simply that "while double-bunking is admittedly not an ideal situation,"[563] it was not "cruel and unusual." No discussion of the meaning to be given to those words was undertaken.[564]

The uncertainty as to the meaning of "cruel and unusual"[565] has now been settled by the Supreme Court of Canada in R. v. Smith.[566] At issue in Smith was the mandatory seven-year minimum sentence for importing narcotics that had arisen in the pre-Charter case of R. v. Shand.[567]

The Court[568] was unanimous in its conclusion that the meaning given to the words "cruel and unusual" by Laskin C.J. in his dissenting judgment in Miller and Cockriell[569] was the operative ~~standard~~ under the Charter. Laskin C.J.'s interpretation of those words was as follows:

> The various judgments in the Supreme Court of the United States, which I would not discount as being irrelevant here, do lend support to the view that "cruel and unusual" are not treated there as conjunctive in the sense of requiring a rigidly separate assessment of each word, each of whose meanings must be met before they become effective against challenged legislation, but rather as interacting expressions colouring each other, so to speak, and hence to be considered together as a compendious expression of a norm.570

Since "cruel" and "unusual" are "interacting expressions," a form of treatment or punishment could offend section 12 if "it was so unusual as to be cruel and so cruel as to be unusual."571 The general test adopted by the majority was "whether the punishment prescribed is so excessive as to outrage standards of decency."572 In the result, the Court found the seven-year minimum to be so grossly disproportionate as to offend the constitutional protection against cruel and unusual treatment or punishment.

It is a curiousity of the case that McIntyre J, dissented in the result. In fact, his approach to the expression "cruel and unusual" has obviously changed since the rendering of his dissenting judgment in Miller and Cockriell573 at the British Columbia Court of Appeal. There, he had regarded the terms "cruel" and "unusual" as being disjunctive modifiers:

> In my view, then, it is permissible and preferable to read the words "cruel" and unusual" disjunctively so that cruel punishments however unusual in the ordinary sense of the term could come within the proscription.[574]

However, in Smith, McIntyre J. seemed to be surprised by the characterization of his approach in Miller and Cockriell as disjunctive.575 Further, he stated that he was "not satisfied that on this question there is a truly significant difference between the views of the majority and the minority"576 in the Supreme Court's decision in Miller and Cockriell. This is rather an anomolous statement given that he had forcefully rejected the conjunctive approach adopted by the British Columbia Court of Appeal (and subsequently taken up by the majority at the Supreme Court of Canada) in Miller and Cockriell. That he now sees no difference between the conjunctive and the compendious interpretations is not explained.

While the majority judgment in Smith may not be the definitive Charter analysis on section 12,[577] the result is a significant one for prisoners' rights for two principal reasons. First, it is clear that the words "cruel and unusual" constitute a qualitative standard against which to measure prison conditions. Statistical frequency alone will not defeat a challenge on section 12 grounds.[578] Second, in situations where a court finds that a prisoner has received cruel and unusual treatment, the Charter makes it clear that a remedy will be available. Thus, if a case such as McCann[579] were to arise under the Charter and the conditions in solitary confinement found to be "cruel and unusual," the court would have the power to award an appropriate and just remedy within its competence.[580] In other words, the "'it may be a right, but there is no remedy' principle"[581] which prevailed under the Canadian Bill of Rights does not apply under the Charter.

It remains to be seen whether the Supreme Court's approach to section 12 will open up grounds for challenging prison conditions.[582] Yet the Court in Smith sent some signals that will no doubt have been noticed by both prisoners and prison lawyers. Lamer J. leaves no doubt that the effect of a particular punishment must be considered as well as its purpose in measuring it against the section 12 standard. Included in the factors to be analyzed are the nature of the punishment and the conditions under which it is served.[583] For example, service of a sentence in solitary confinement may offend section 12 even if the duration of the sentence is relatively short.[584] Further some punishments and some forms of treatment will always offend section 12 notwithstanding the circumstances in which they are imposed: "for example, the infliction of corporal punishment, such as the lash, irrespective of the number of lashes imposed, or, to give examples of treatment, the lobotomization of certain dangerous offenders or the castration of sexual offenders."[585] Thus, Smith explicitly contemplates challenges to the treatment and punishment of those who have already been incarcerated as a result of the commission of a crime. As such, a legal avenue that had effectively been blocked under Bill of Rights jurisprudence has been re-opened.

A similarly significant means of challenging conditions of incarceration which has been revitalized in the post-Charter era is the remedy of habeas corpus. At common law, habeas corpus had been held not to be available to challenge the legality of a particular form of confinement but, rather, was a remedy only against the confinement itself.[586] In other words, the remedy could not be used where the prisoner sought to alter the place or conditions of imprisonment. It could only be invoked when complete liberty was sought. In Miller v. The Queen,[587] the Supreme Court of Canada cast doubt upon the correctness of the common law limits on resort to habeas corpus and held that prisoners could have recourse to the remedy to challenge placement in any form of custody that was more strict than that in which the general prison population was held.

Interestingly, the Court[588] in Miller relied on a particular theoretical framework for prisoners' rights in reaching that result. After referring to Dickson J.'s (as he then was) declaration in Martineau (No. 2) that the "rule of law must run within penitentiary walls,"[589] Le Dain J. stated:

> This statement reflects the perception that a prisoner is not wholly without some rights or residual liberty [citing Solosky[590]] and that there may be significant degrees of deprivation of liberty within a penal institution.... In effect, a prisoner has the right not to be deprived unlawfully of the relative or

residual liberty permitted to the general inmate population of an institution.[591]

Thus, the placement of a prisoner in a special handling unit constitutes a deprivation of liberty sufficient to give rise to a habeas corpus application:

> Confinement in a special handling unit, or in administrative segregation ... is a form of detention that is distinct and separate from that imposed on the general inmate population. It involves a significant reduction in the residual liberty of the inmate. It is in fact a new detention of the inmate, purporting to rest on its own foundation of legal authority.[592]

In effect, Le Dain J. was articulating a new facet of the principle in Solosky. In Solosky, the Court held that a prisoner possesses all civil rights except those taken away by law. Here, it held that prisoners are entitled to as much liberty as is generally available in a prison. When greater restrictions are placed on a prisoner's liberty, the legality of placement in that form of custody can be challenged by way of habeas corpus. Not only does Miller offer prisoners new grounds for challenging prison conditions, it provides an effective remedy[593] for doing so. The importance of habeas corpus is underscored by its inclusion in the Charter as a constitutionally protected remedy for those under arrest or detention.[594] Perhaps it is this that explains the Court's departure from its narrow approach to habeas corpus in Mitchell.[595] It may have been moved by Laskin C.J.C.'s forceful dissent in Mitchell which had interpreted the reinforcement of the right to habeas corpus in s. 2(c)(iii) of the Canadian Bill of Rights as requiring the Court to "make the remedy an effective one and not simply an exhibit in a show-case."[596] While the Miller case is discussed here for its significance to prisoners' rights to challenge conditions of imprisonment, it must be emphasized that it also has great implications in the areas of prison discipline and prison transfers since it deals broadly with placement in restrictive forms of custody which can follow from prison disciplinary proceedings and transfers.

A further protection against the imposition of inhumane prison conditions is now provided in the Criminal Code.[597] Section 245.4 creates an offence of inflicting torture upon any person. "Torture" is defined as any act or omission causing severe mental or physical pain or suffering for the purpose of obtaining a statement, for punishment, to intimidate the person, or for any discriminatory reasons. Lawful sanctions are specifically excluded.

Thus, the ability of prisoners to challenge the conditions under which they are kept has improved substantially since passage of the <u>Charter</u>. The meaning of "cruel and unusual" treatment and punishment is now relatively settled given the Supreme Court's decision in <u>Smith</u>. The disjunctive approach has clearly been rejected. While this is, in itself, a significant development, the fact that the <u>Charter</u> provides to the courts a broad remedial power, there is a greater likelihood that future findings of cruel and unusual treatment or punishment will result in real improvements. The <u>Miller</u> case and its companions are also of import here, as well as in the prison discipline and transfer areas. Prisoners can now challenge the conditions of their detention through the expeditious, and now effective, remedy of <u>habeas corpus</u> on the grounds that there is no lawful basis for their placement there. Since the result in <u>Miller</u> is founded on a newly recognized right of prisoners to "residual liberty," the full ramifications of the decision remain to be seen. It is possible that <u>habeas corpus</u> will now be available to challenge all manner of infringements on prisoners' liberty.

(iv) Transfers

Prior to the <u>Charter</u>, cases had recognized the duty of prison administrators to act fairly in determining whether a prisoner should be transferred. But no courts were actually willing to impose procedural safeguards in the transfer situation. Courts have now accepted that certain procedural guarantees must be afforded to prisoners.

In virtually all of the recent transfer cases, the courts reiterate the need to allow prison authorities much deference and conclude that courts should not interfere lightly with transfer decisions.[598] However, notwithstanding that general inclination, some judges have quashed transfers on the basis that prison authorities had not dealt fairly with the prisoners involved.

For example, in R. v. Chester,[599] J. Holland held that the prisoner, while not entitled to a hearing before the transfer, had a right to receive fair notice of the matters to be considered by the National Special Handling Unit Review Committee before being transferred to a special handling unit. The prisoner should receive a complete list of materials to be relied on by the Committee and a summary of their contents. Where necessary to protect confidential sources, the documents should be edited.[600]

Prisoners should also be given an opportunity to make representations to the authorities. Further, prior to the transfer, the prisoner should be given reasons for the decision.[601] Even where prisoners are not transferred for reasons relating to their own conduct but for general policy reasons, they should be given procedural protections.[602] If not, their rights to "qualified liberty" will have been denied. Prisoners are "not to be moved about like cordwood."[603]

Procedural protections must be meaningful even in transfer situations. Where notice is given, it must adequately inform the prisoner of the reasons for the transfer, so that an adequate response can be prepared. Also, where the prisoner makes written submissions opposing the transfer, the authorities may take them into consideration before making the decision.[604]

Thus, while there has been no great transformation in the manner in which transfer cases have been dealt with under the Charter, courts are more interventionist than before. Notwithstanding expressions of fidelity to the "hands-off" doctrine, courts have imposed comparatively strict procedural requirements on those charged with making transfer decisions. No court has yet, however, recognized that transfer decisions must be substantively, as well as procedurally, reasonable.[605] The remedy in cases where courts have quashed transfers has generally been to order that the prisoner be returned to the original place of confinement.[606] In two cases, however, prisoners have also sought monetary damages for improper transfers.[607] Neither case was successful.

(v) Other Incidents

One effect that the enactment of the Charter has had on prisoners' rights has been the proliferation of novel rights claims made by those in prison or on parole. As in the pre-Charter era, courts have been required to determine the limits to be placed on prisoners' liberty. Prior to the Charter, this required an overall theory of prisoners' rights. Under the Charter, resort to a general theory is rarely necessary since the plain words of the Charter can be referred to in considering whether a prisoner can or cannot enjoy a particular right.

For example, in a pre-Charter case, Walsh J. had relied on the theory of rights contained in Beaver Creek[608] in deciding that prisoners had no right to marry.[609] When raised as a right included in the freedom of association (s. 2(d)) or the right to liberty (s. 7) under the Charter, Denault J. held simply that neither encompassed the right to marry.[610] Even if it were included, Denault J. believed that section 1 would justify a limitation on the right.

There has been considerable controversy as to the right of prisoners to vote in federal and provincial elections. Section 3 of the Charter states:

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

It is clear that statutory limits on the ability of prisoners to vote contravene the broad wording of section 3. The more difficult issue is whether these limits are reasonable and justifiable according to section 1. In Re Reynolds and A.-G. B.C.,[611] MacDonnell J. found that there was no public benefit shown to derive from limiting the right of the applicant, who was on probation, to vote, as the applicable B.C. legislation[612] purported to do. However, the applicant was on probation, not in custody, when the action was commenced. Thus, MacDonnell J. confined his ruling to probationers. Insofar as the B.C. Election Act limited the right of those on probation from voting, it was unconstitutional. After citing similar legislation in other provinces and at the federal level, he concluded that it was reasonable to limit the right of those in custody to vote.[613]

The question of the validity of restrictions on the voting rights of incarcerated offenders has arisen squarely in other cases. For example, in Re Jolivet and Barker and

The Queen,[614] Taylor J. found that there was no justification for limiting the right to vote in order to protect society or to punish offenders further. The only reasonable basis for limiting the right related to the practical difficulties in arranging for prisoners to vote. In considering the latter factor, Taylor J. gave an expansive interpretation to the right to vote in section 3. The right to vote "means the right to make an informed electoral choice reached through freedom of belief, conscience, opinion expression, association and assembly -- that is to say with complete freedom of access to the process of 'discussion and the interplay of ideas' by which public opinion is formed."[615] Since there are practical difficulties[616] in allowing prisoners the full expanse of the democratic rights protected by section 3, Taylor J. found that it was reasonable to deny prisoners the right to vote.

It is difficult to accept the line of reasoning in Jolivet. The Court interpreted the Charter as including rights not asserted by the prisoner as a means of demonstrating that the prisoner could not enjoy the right he was seeking. By analogy, if section 7 were interpreted as including the liberty to travel across provincial borders, or a general right to privacy, then prisoners could never resort to section 7 since they could never enjoy all of the liberties which the provision protects. Further, the Court takes a rather lofty view of the political process, one which probably does not apply even to the public at large. The majority of citizens participate in elections simply by casting a ballot in favour of a candidate about whom they have, presumably, formed a favourable opinion based on media reports, not by canvassing or campaigning actively. Surely Taylor J. would not deny the vote to those ordinary citizens whose participation in the electoral process was marginal. Yet he would do so for prisoners.

Reed J. commented on the Jolivet case in Gould v. A.-G. Canada,617 in which a prisoner sought to exercise his right to vote in a federal election. After referring to Taylor J.'s reasoning that section 3 contains more than the right to cast a ballot, Reed J. stated:

> While I accept that this is generally so, the right to vote and the right to freedom of association, belief, conscience and expression, etc. are found in separate sections of the Charter. It would appear that they were thought of as distinct rights. Consequently I do not think that because some of a prisoner's rights must necessarily be curtailed (e.g. the freedom of association, of expression, the right to be a

candidate for election) this justifies curtailing the whole spectrum. It seems to me there is a logical fallacy somewhere in that argument.[618]

Reed J. went on to allow the prisoner's application for an interlocutory injunction requiring federal officials to permit him to exercise his right to vote. The Federal Court of Appeal held subsequently that the case was not an appropriate one for the issuance of an interlocutory order.[619]

A similar approach to that of Reed J. was adopted by Rouleau J. in Levesque v. A.-G. Canada,[620] holding that prisoners in a federal institution were entitled to vote in a provincial election.[621] There was, however, no problem in Levesque as to the proper remedy. Rouleau J. held that the prisoner was entitled to a declaration[622] that his rights under section 3 had been breached and to an order in the nature of mandamus against representatives of the Crown to enforce it.[623]

None of the voting cases referred to above dealt explicitly with the underlying rationale for limiting prisoners' voting rights, other than by referring to minor practical difficulties. However, in Badger v. A.-G.

Manitoba,624 the Court explained the Attorney-General of Manitoba's position as follows:

> The Attorney-General advanced a number of arguments for society limiting the franchise of citizens who are in prison because they have misconducted themselves. A person who commits a crime puts his vote at risk. He knowingly risks imprisonment and the resulting inability to participate fully in the democratic process. Society may properly take his conduct into account and decline, even if only temporarily, to give any weight to his political views or choice. The State is entitled to prevent the franchise being devalued and is therefore entitled to exclude those "passive citizens" who have, by misconduct, abandoned an independent and active role in society. Indeed, many convicts are in prison as a result of significant depredations on society and serious infringements of the basic rights of their fellow citizens. Their share in society is pledged until the debt is paid. In principle, then, the limitation of the right to vote may have the several ligitimate objectives of preserving the currency of the franchise and both symbolically and practically stigmatizing those who deliberately breach their duty to society. These

concerns are sufficiently pressing and substantial in a free and democratic society that the legislators are entitled to act upon them.[625]

In the result, Scollin J. found that while the restrictions had these reasonable aims, they did not satisfy the rational connection, minimum impairment and proportionality criteria established by the Supreme Court of Canada in Oakes,[626] since they applied to those convicted of absolute liability or regulatory offences. However, he refused to do more than merely declare the legislation unconstitutional; i.e. he declined to order that the prisoner's name be placed on the voters list or that polling stations be set up at the penitentiary.[627]

It is possible that the rationale underlying the statutory restrictions on prisoners' right to vote is that expressed by Scollin J. in Badger; that is, that society deliberately condemns those sent to prison so completely that it also rejects their political opinions and refuses them the opportunity to participate in civic affairs. However, it is also possible that "[i]t may be no more than a vestige of that period in our history when a convicted person lost all legal status -- it may be no more than a remnant of that historical situation,"[628] one which must be re-examined in the light of the innovations in this area of the law in the last decade.[629]

Another domain in which there has been a number of Charter challenges relates to the power of prison officials to conduct searches and seizures. In the pre-Charter caselaw, searches could be conducted without reasonable cause under the Regulations as amended after the Gunn v. Yeomans case.[630] Perhaps not surprisingly, the applicable Regulation[631] has been challenged as being inconsistent with various provisions of the Charter. In Weatherall v. Canada,[632] prisoners challenged the validity of the Regulation to the extent that it permitted strip searches and frisk searches to be carried out without probable cause and conducted by female guards on male prisoners. Strayer J. held that there was no general warrant requirement[633] or probable cause criterion for searches of inmates since they are often conducted as a matter of urgency to detect the presence of contraband in an institution. The degree of privacy that inmates can reasonably expect in a prison is, by necessity, less than that enjoyed by the general public. However, Strayer J. found that some controls on strip searches were necessary in order to protect against unreasonable searches and seizures as guaranteed by section 8 of the Charter.[634] Random strip searches should only be conducted in emergency situations. Individual strip searches should only be conducted where officials have reasonable and probable grounds to believe that the inmate has contraband in his possession. Further, conducting strip searches of male prisoners within view of female guards "offends normal standards of public decency and is not justified, even in the prison context."[635] Female prisoners are protected under the Regulations -- no female inmate can be searched except by a female guard.[636] Strayer J. held that this provision offends section 15 of the Charter by discriminating against male prisoners. In the result, then, to the extent that the Regulations allow strip searches to be conducted without grounds, by female guards upon male inmates, in non-emergency situations, they offend the Charter and are invalid.[637]

Restrictions on prisoners' correspondence rights have also been challenged on section 8 grounds. In Henry v. Canada,[638] the prisoner sought an injunction prohibiting prison officials from opening his mail. In the pre-Charter case of Solosky,[639] the Supreme Court of Canada had laid down rules to govern the practice of opening privileged correspondence. The Henry case questioned the adequacy of those rules since they resulted, in his case, in the opening of correspondence addressed to him from barristers and solicitors. Strayer J. held that there was no breach of section 8 in the circumstances since there was no evidence of unreasonable conduct, it not being sufficiently clear that the correspondence originated from lawyers. Further, he expressed reluctance in interfering with practices adopted by prison authorities for the purpose of maintaining security in a maximum security institution. He characterized the allegations of the prisoner as "minor inconsistencies in the way mail has been handled."[640]

In a related action, Henry sought to challenge Commissioner's Directives and Standing Orders that prevented him from gaining access to his savings account in order to prepare for litigation. Strayer J. held that the applicable rules "are cast so broadly as to prevent access by inmates to their financial resources which they may need in seeking to protect through litigation their 'liberty and security of the person' as referred to in s. 7."[641] As such, they offended section 7 and were not saved by section 1 since Directives and Standing Orders are not "prescribed by law."

A situation analogous to a search and seizure occurs when a demand is made by a government official for the production of evidence. Under prison regulations,[642] a prisoner is obliged to provide a urine sample upon the demand[643] of a guard in order to detect the presence of any intoxicants in the prisoner's body. In Re Dion and The Queen,[644] Galipeau J. found that both the disciplinary offence prohibiting the consumption of intoxicants and the means of investigating breaches of the prohibition through urinalysis offended the right to liberty protected in section 7 of the Charter. He took a broad view of what is meant by "liberty" in section 7:

> There is no doubt in the mind of the court that the wide and general meaning attributed ... to the word "liberty" encompasses the right of a citizen to consume, if only on occasion, certain intoxicants and the right not to be subject to an obligation to provide a urine sample to whomever it is that wants to detect the presence of the intoxicant in his body.[645]

While the impugned provisions served an important purpose in the prison context, where the consumption of alcohol and drugs has "disastrous" consequences,[646] they are overly broad, can be invoked arbitrarily, and can be used as a basis for the harassment of prisoners according to Galipeau J.. Samples should only be demanded where officials have reasonable grounds to believe that the person has an intoxicant in his body.[647] Similarly, Galipeau J. held that a total prohibition on the consumption of all intoxicants is unjustifiable. The offence should be limited in terms of the time, place and quantity of consumption.[648]

C. Summary -- Prisoners as Possessors of Charter Rights

There are two discernible, though not completely distinct, trends in the Charter cases dealing with prisoners' rights. Both of them appear to give prisoners more rights than had existed prior to the Charter.

First, issues that had arisen prior to the Charter have been given a fresh and generally more generous treatment. For example, the Supreme Court departed from its earlier judgment in Miller and Cockriell[649] to interpret the words "cruel and unusual" in a more meaningful fashion.[650] It also rendered the remedy of habeas corpus more effective than it had been at common law.[651] Common law principles of natural justice and fairness have generally been given a more expansive treatment in the post-Charter setting. Greater disclosure has been given to prisoners prior to parole hearings[652] and transfers.[653] The Parole Board has been required to hold hearings in situations where they had not been required to prior to the Charter[654] and to hold them in-person.[655] Prisoners have a right to be represented by counsel in serious disciplinary matters.[656] They also have some procedural protections in transfer decisions.[657]

Not all of these cases turned on an interpretation of the Charter. Some dealt only with common law principles. Thus, it is difficult to measure with any certainty the actual impact of the Charter . However, it is possible to make two tentative observations. The Charter has propelled more prisoners' rights cases into the courts. Thus, even where courts ~~have~~ chosen not to rely on Charter guarantees in rendering judgments in specific cases, it is likely that the Charter was directly or indirectly responsible for bringing the matter to trial. As such, what the Charter may have brought about is an acceleration in the development of common law principles simply by serving as a foundation for prison litigation. Further, it is likely that the entrenchment in the Charter of matters that were previously in the domain of the common law (e.g. procedural due process guaranteed by s. 7; habeas corpus protected by s. 10(c)) or in the Canadian Bill of Rights (e.g. the protection against cruel and unusual treatment or punishment) has resulted in judges giving more serious treatment to those protections.

The second major trend in these post-Charter cases is the articulation of some completely new rights. There are many examples of this -- the right to vote;[658] the right to be secure against unreasonable search or seizure;[659] the right of access to savings;[660] the right to consume intoxicants and to refuse to give urine samples;[661] and, perhaps most important of all, the right to be treated reasonably in all matters relating to life, liberty and security of the person.[662] Of course, layered on top of all these new rights are expansive remedial powers in s. 24(1) of the <u>Charter</u>. In addition, there are other rights in the <u>Charter</u> that will surely be resorted to by prisoners in the future.[663]

Chapter Four: Conclusions -- The Need for Reform

There has been an acceleration in the last decade toward recognition of prisoners' rights in Canadian law. Prior to that point in time, it would have been a contradiction in terms to speak of "prisoners' rights." It is appropriate now to reflect upon this phenomenon and ask whether the momentum in this area of the law has been desirable.

Two fundamental questions must be asked, having witnessed the rapid changes in the way courts have come to deal with prison cases. First, has the situation of prisoners really improved now that they can assert certain rights? Second, even if the recognition of prisoners' rights is believed to be a valuable mechanism for bringing about changes in the legal relationship between the state and prisoners, are other means more effective?

It is impossible to answer the first question in any absolute way. Prisoners are probably treated in a somewhat more humane and dignified fashion than was the case prior to the recognition of certain rights, such as the right to fair treatment or the right to counsel. Perhaps even the right to possess rights[664] in itself has influenced the way prisoners are regarded by prison staff, officials and the public. If prisoners can possess rights, they are more likely to be regarded as being situated similarly to the rest of society. In other words, through rights, prisoners gain personhood. Also, by asserting rights in the courts, prison matters come into the public domain. The treatment of prisoners becomes a matter of public record and discussion.

But these are indirect answers to the question put. One can say with certainty that decisions involving prisoners are now made more fairly than they were prior to the recognition of certain procedural rights. Fairness is important in the prison context. If inmates believe that they are treated fairly by prison officials, they will be less likely to rebel against the constraints on their freedom inherent in imprisonment and, more importantly, they will, "when they once again become free citizens, have a greater respect for authority in the larger society."[665] Thus, fairness will improve relations within prisons and make prisoners more likely to succeed without.

Some rights, by their very nature, will result in the improvement of conditions in which prisoners are placed, assuming that an effective remedy exists. Specifically, the right not to be subjected to cruel and unusual treatment or punishment can prevent the imposition of inhumane conditions upon prisoners. Similarly, the right to be secure against unreasonable searches and seizures can result in prisoners' being able to assert a domain of privacy and dignity in institutions where those commodities are exceedingly rare.

It is fair to say, then, in the absence of empirical data, that the recognition of prisoners' rights has resulted in improvements in the general quality of prison life. The next question is, would it not be more effective to bring about desired changes in other ways, for example, through legislation?

This question has a hidden proposition in it: that the recognition of prisoners' rights by the courts over recent years is at least partly due to the failure of the legislature to introduce changes. It is true that courts continue even now to mouth the words of the "hands-off doctrine." Yet, in reality, they have been increasingly willing to intervene in matters relating to the administration of prisons (e.g. disciplinary hearings, transfers, searches, etc.). This judicial activism, then, may be symptomatic of a system that is in need of wholesale reform.

While achieving recognition of prisoners' rights has improved prison conditions, it has its shortfalls. First, the results achieved through litigation are usually of benefit only to the parties before the court, unless recognition of the right involves invalidation of a statutory instrument or rule. Second, litigation is extremely costly and prisoners are often the least able to afford it. Third, successful litigation results in piecemeal improvements and half-measures when often what is really desired and needed is comprehensive law reform. Fourth, courts are loathe to fashion remedies in a manner that resembles the legislative function.[666] Fifth, litigation can give disproportionate weight to individual rights when there are broader social values at stake.

Thus, while the trend toward recognizing new rights has been, on the whole, a desirable one from the prisoner's point of view, it should not be relied upon as the sole means of bringing about change in this area of the law. Some ambitions attempts at wide-spread prison reform have been made in the past.[667] Scholars have made suggestions for reforming discrete areas of prison law.[668] The Solicitor General has commenced a reform effort beginning from first principles as part of a comprehensive review of correctional law.[669] These reform initiatives are, along with the proliferation of prisoners' rights litigation, other symptoms of the need for a modernization of our penal system and the failure to introduce remedial legislation. The beginnings of such an enterprise are already in place. The Law Reform Commission of Canada has undertaken a complete review of the purposes of the criminal law based on the notion that the criminal sanction should be used with restraint as a means of deterring and denouncing conduct that offends our most fundamental values.[670] The Canadian Sentencing Commission has recommended that incarceration should be used sparingly as punishment for criminal misconduct.[671] The logical next step is for reform to take place in prisons themselves.

Prison reform should have two major components. First, it should focus on determining the appropriate incidents of incarceration; that is, the conditions, privileges, and treatment of offenders that are consistent with the purposes for which carceral punishment is imposed. Second, it should seek to establish the basic entitlements that prisoners should enjoy in relation to those incidents. Only by this kind of two-pronged approach can a prison system be realized that actually reflects the underlying rationale for our criminal justice system and accords with the rights and freedoms guaranteed by the Charter.

Notes

1. Michael Jackson, "Justice Behind the Walls - A Study of the Disciplinary Process in a Canadian Penitentiary" (1974), 12 Osgoode Hall Law Journal 1.

2. This characterization of the role of the judiciary in prison law matters was originally coined in the U.S. See: Ira P. Robbins, "The Cry of Wolfish in the Federal Courts: The Future of Federal Judicial Intervention in Prison Administration" (1980), 71 Journal of Criminal Law and Criminology 211, at 211 n. 10. It has been applied to Canadian courts as well: Jackson, supra, note 1, at 56; Gordon Kaiser, "The Inmate as Citizen: Imprisonment and the Loss of Civil Rights in Canada" (1971-72), 1 Queen's Law Journal 208, at 243.

3. See Michael Jackson, Prisoners of Isolation - Solitary Confinement in Canada (Toronto: University of Toronto Press, 1983) at 6-24 for a discussion of the 18th century origins of imprisonment as a penal sanction. For a more complete treatise on the rise of the prison in Western society, see Michel Foucault, Discipline and Punish: The Birth of the Prison (New York: Pantheon, 1977).

4. A notable exception is, of course, the Faculty of Law at Queen's University which has a clinical program in correctional law.

5. See the comparison of the English common law with continental criminal justice systems by Stefan Trechsel, "The Right to Liberty and Security of the Person - Article 5 of the European Convention on Human Rights in the Strasbourg Case-Law" (1982), 1 Human Rights Law Journal 88.

6. Part I, Constitution Act, 1982, Schedule B, Canada Act, 1982 (U.K.), 1982, c. 11.

7. See Jackson, supra, note 3, at 82.

8. See Kaiser, supra, note 2, at 209.

9. Ibid.

10. Ruffin v. Commonwealth (1871), 62 Va. (21 Gratt.) 790, at 796.

11. An Act Respecting Penitentiaries, and the Directors thereof, and for other purposes, 1868, 31 Vict., c. 75.

12. _Ibid._, s. 31.

13. _Ibid._, s. 62.

14. _Ibid._, s. 32.

15. _Ibid._

16. _Ibid._, s. 42.

17. _Ibid._, s. 17.

18. _Ibid._

19. _Ibid._, s. 40.

20. _Ibid._, s. 40(4).

21. See Jackson, _supra_, note 3 at 25-41.

22. See Foucault, _supra_, note 3 for a discussion of the penal reforms of the 18th and 19th centuries.

23. _Penitentiaries Act, 1868_, _supra_, note 11, s. 33. The Penal Prison was a set of isolation cells in which prisoners were routinely held for a certain length of time upon reception into the penitentiary. Prisoners were also sent there as punishment for breach of prison rules. The importance of isolation as a penal device in the 19th century is well-documented in Jackson, _supra_, note 3 at 6-24. The 1868 Act itself contained an expression of the central role of isolation as a corrective procedure:

> 61. Whereas no system of discipline in a Penitentiary can be effectual for punishment, or for reformation of the criminal, unless it be combined with strict separate confinement during some period of the time for which the Court has sentenced him to be imprisoned, and it is therefore expedient that provision should be made in all the Penitentiaries named in this _Act_, and in all others hereafter to be established by virtue of this _Act_, for the separate confinement of every convict for a certain period of the time mentioned in the sentence of the Court by which he has been tried; therefore:
>
> It shall be lawful for the Governor, whenever he shall deem it expedient, to order

that such and so many Penal Cells shall be constructed from time to time at any Penitentiary, as he may see fit.

24. Penitentiaries Act, 1868, supra, note 11, s. 39.

25. An Act to Provide for the Conditional Liberation of Penitentiary Convicts, 1898, 62-63 Vict., c. 49, given the short title of Ticket of Leave Act, 1899 by the Ticket of Leave Amendment Act, 1900, 63-64 Vict., c. 48, s. 2. While this was the first comprehensive conditional release statute, a previous Act had provided conditional release for first offenders: An Act to Permit the Conditional Release of First Offenders in Certain Cases, 1889, 52 Vict., c. 44.

26. See House of Commons Debates, 1899, Vol. 50 (August 5th, 1899), at 9600, where Sir Wilfrid Laurier stated "But in practice, it is to be assumed, the privilege would not be allowed to those guilty of heinous offences."

27. Supra, note 25, s. 2.

28. Ibid., s. 1.

29. Ibid., s. 6.

30. Ibid., s. 5.

31. Ibid., ss. 9, 1.

32. Ibid., s. 11.

33. Ibid., s. 10.

34. Although the Governor General could impose any conditions thought appropriate, there were standard conditions set out in the Act:

> 1. The holder shall preserve his license and produce it when called upon to do so by a magistrate or a peace officer.
>
> 2. He shall abstain from any violation of the law.
>
> 3. He shall not habitually associate with notoriously bad characters, such as reputed thieves and prostitutes.

4. He shall not lead an idle and dissolute life without visible means of obtaining an honest livelihood.

35. Supra, note 25, s. 7(b).

36. House of Commons Debates, 1899, Vol. 50. (Aug. 5th, 1899), at 9603: "There is a precedent for [the Act]. It is in a modified sense the exercise of the pardoning power which is vested in the Governor in Council ...."

37. While habeas corpus could be invoked to question the legality of detention itself, it apparently could not remedy the conditions under which detention was imposed: Ex parte Rogers (1843), 7 Jur. 992 (Q.B.); R. v. Governor of Wandsworth Prison, Ex parte Silverman (1952), 96 Sol. J. 853 (Q.B.). See also Thomas Cromwell, "Habeas Corpus and Correctional Law - An Introduction" (1976-77), 3 Queen's Law Journal 295, at 329-31; Robert Sharpe, The Law of Habeas Corpus (Oxford: Clarendon Press, 1976), at 149; Miller v. The Queen (1985), 23 C.C.C. (3d) 97 (S.C.C.), at 112-18. More will be said about the Miller case in Chapter Three.

38. The writs of certiorari and prohibition were available only to review judicial or quasi-judicial acts: Gilles Létourneau, The Prerogative Writs in Canadian Criminal Law and Procedure (Toronto: Butterworths, 1976), at 110-13. Neither was habeas corpus available to review administrative acts: In re McCaud (1964), 43 C.R. 252 (S.C.C., in Chambers), affirmed (1964), 43 C.R. 256 (S.C.C.). The McCaud case is discussed more fully in the next section.

39. In Ex parte Brouillette [1926] 3 D.L.R. 688 (Qué. S.C.), Bruneau, J. held that the decision of the Governor General to revoke a prisoner's ticket of leave could not be reviewed: "[T]he Courts have no power to intervene in the exercise of a Royal prerogative specially granted by statute." Ibid., at 689.

40. The Criminal Code, 1892, 55 & 56 Vict., c. 29, ss. 962, 965.

41. See: Penitentiaries Act, 1883, 46 Vict., c. 37; Penitentiary Act, 1906, 6 Edw. VII, c. 38; Penitentiary Act, 1939, 3 Geo. VI, c. 6; Ticket of Leave Act, R.S.C. 1906, c. 150; Ticket of Leave Act,

R.S.C. 1927, c. 197; Ticket of Leave Act, R.S.C. 1952, c. 264.

42. Parole Act, S.C. 1958, c. 38.

43. Report of a Committee Appointed to Inquire into the Principles and Procedures followed in the Remission Service of the Department of Justice of Canada (Chairman: Gérald Fauteux) (Ottawa: Queen's Printer, 1956).

44. Penitentiary Act, S.C. 1960-61, c. 53.

45. 8-9 Elizabeth II, c. 44, R.S.C. 1970, Appendix III.

46. Supra, note 42.

47. Ibid., s. 3.

48. Ibid., s. 8:

> 8. The Board may
>
> (a) grant parole to an inmate if the Board considers that the inmate has derived the maximum benefit from imprisonment and that the reform and rehabilitation of the inmate will be aided by the grant of parole;
>
> (b) grant parole subject to any terms or conditions it considers desirable;
>
> (c) provide for the guidance and supervision of paroled inmates for such period as the Board considers desirable;
>
> ...

49. Ibid., s. 6(1)(a).

50. Ibid., s. 12, s. 8(d).

51. See Ex parte Brouillette, supra, note 39. The Fauteux Committee clearly saw the function of tickets of leave as being completely different from the function of the royal prerogative: supra, note 43, at 51. Thus, while parole by the 1950s was regarded as a correctional device rather than an act of clemency, this does not appear to have been the intent of the original legislation. See Fergus O'Connor, "The

Impact of the Canadian Charter of Rights and Freedoms on Parole in Canada" (1985), 10 Queen's Law Journal 336, at 336-42 for a discussion of the correctional/merciful dichotomy in early Canadian parole legislation. See also, Keith Jobson, "Fair Procedure in Parole" (1972), 22 University of Toronto Law Journal 267, at 269.

52. The Board was also obliged to make investigations and inquiries directed by the Minister of Justice in respect of the exercise of the royal prerogative. Supra, note 42, s. 18(2).

53. Supra, note 43, at 28, 51-4.

54. See criteria set out, supra, note 48.

55. (1964), 43 C.R. 252 (S.C.C., in Chambers), affirmed (1964), 43 C.R. 256 (S.C.C.).

56. Supra, note 42, s. 12(1).

57. Ibid., s. 12(3).

58. At that time the Supreme Court of Canada, as well as the superior courts of the provinces, had original jurisdiction over habeas corpus. This jurisdiction was later repealed by statute: An Act to Amend the Supreme Court Act, R.S.C. 1970, 1st Supp., c. 44, s. 4; See Gilles Létourneau, The Prerogative Writs in Canadian Criminal Law and Procedure (Toronto: Butterworths, 1976), at 314.

59. Supra, note 42, s. 8(d).

60. Supra, note 55, at 254.

61. Supra, note 25, ss. 10, 11.

62. Penitentiary Act, S.C. 1960-61, c. 53, s. 22.

63. Ibid., s. 24.

64. Ibid., s. 22(3).

65. Ibid., s. 22(4).

66. Ibid., s. 24.

67. Ibid., ss. 22(3), (4).

68. [1969] 2 C.C.C. 171 (Sask. C.A.).

69. Ibid., at 172.

70. Ibid., at 173.

71. I.e., at the point in time when statutory remission plus earned remission plus time served equalled the total length of sentence imposed.

72. Supra, note 68, at 172.

73. [1976] 1 S.C.R. 108.

74. Laskin, C.J., Spence, Dickson and Pigeon, JJ. concurring; Martland, Judson, Ritchie and de Grandpré, JJ. dissenting.

75. Supra, note 73, at 111.

76. Ibid.

77. Ibid.

78. Ibid., at 113.

79. Ibid., at 115.

80. Pigeon J., in his concurrence with Dickson, J., confined his agreement to the findings regarding the state of the law in force when Marcotte's parole was revoked.

81. Marcotte, supra, note 73, at 113.

82. Criminal Law Amendment Act, S.C. 1968-69, c. 38, s. 102.

83. Ibid., s. 108.

84. Supra, note 55.

85. Ex parte Marcotte (1973), 13 C.C.C. (2d) 114 (Ont. C.A.), at 123-4.

86. See Ronald R. Price, "Doing Justice to Corrections? Prisoners, Parolees and the Canadian Courts" (1976-77), 3 Queen's Law Journal 214, in which the issues and effects of Marcotte are discussed. See especially at 221-8 where the impact of the Criminal

Law Amendment Act of 1968-69 on the calculation of sentences is demonstrated.

87. Supra, note 73 at 111.

88. [1975] 4 W.W.R. 54 (B.C.S.C.).

89. Ibid., at 66. Anderson J. had made his views clear in the earlier case of R. v. Kolot [1973] 6 W.W.R. 527 (B.C.S.C.) in which he stated bluntly: In my view, s. 16(1) of the Parole Act is badly drafted and should be amended as soon as possible." Ibid., at 537-8.

90. [1972] 1 O.R. 753 (H.C.J.). See also Re Spice (1975), 23 C.C.C. (2d) 141 (Ont. H.C.J.); Ex parte Krachan (1975), 24 C.C.C. (2d) 114 (Ont. H.C.J.).

91. Ibid., at 755-6.

92. (1973), 12 C.C.C. (2d) 343 (Ont. H.C.J.)

93. See Re Morin, supra, note 68; Re Abbott (1970), 1 C.C.C. (2d) 147 (Ont. H.C.).

94. Ex parte Fraser (1975), 27 C.C.C. (2d) 479 (Man. C.A.); Re Zong and Commissioner of Penitentiaries [1976] 1 F.C.R. 657 (C.A.).

95. [1977] 2 S.C.R. 45.

96. Ibid., at 51.

97. Supra, note 73, at 114-5.

98. Supra, note 95, at 52.

99. Penitentiary Act, R.S.C. 1970, c. P-6, s. 22.

100. See R. v. Dwyer, [1975] 4 W.W.R. 54 (B.C.S.C.). However, the Supreme Court in Howley, in justifying its decision, reproduced the following statement that had appeared in the Federal Court of Appeal's judgment in Zong v. Commissioner of Penitentiaries, supra, note 94, at 672:

> A statute is not retrospective in operation merely because it affects an existing right. As Buckley L.J. said in West v. Gwynne [1911] 2 Ch. 2, at page 12: "Most Acts of Parliament, in fact, do interfere with existing rights."

Supra, note 95, at 51.

101. Supra, note 95, at 53.

102. Ibid.

103. Criminal Law Amendment Act, S.C. 1968-69, c. 38, s. 94.

104. Ibid., s. 101.

105. Parole Act, R.S.C. 1970, c. P-2, s. 10(2).

106. Ibid., ss. 20(1), 21(1) respectively.

107. See e.g. R. v. Hales (1974), 18 C.C.C. (2d) 240 (Man. C.A.); Ex parte Carlson (1975), 26 C.C.C. (2d) 65 (Ont. C.A.).

108. [1976] 1 F.C.R. 556 (T.D.).

109. Subsection 20(1) stated: "Where the parole granted to an inmate has been revoked ...."

110. Subsection 21(1) stated: "When any parole is forfeited by conviction for an indictable offence ...." In Ex parte Kerr (1975), 24 C.C.C. (2d) 395 (Ont. C.A.), it was held that the revocation provisions also applied to day parole. No reference was made to the difference in wording between ss. 20(1) and 21(1).

111. Ex parte Davidson (1974), 22 C.C.C. (2d) 122 (B.C.C.A.).

112. Ibid., at 125-6.

113. Supra, note 94.

114. Ibid., at 666-7. Procedures for terminating day parole were clarified by the Criminal Law Amendment Act, S.C. 1976-77, c. 53. See Jackson v. The Queen (1978), 44 C.C.C. (2d) 65 (S.C.C.).

115. Ibid., at 678.

116. Ibid. No reference was made to the opinion expressed by Dickson, J. in Marcotte that forfeiture of remission was not a necessary disincentive to the breach of parole conditions. See supra, note 81.

117. Ibid., at 679.

118. Ibid.

119. (1975), 20 N.S.R. (2d) 513 (S.C.).

120. R.S.C. 1970, c. C-34, s. 11.

121. _Supra_, note 119 at 519.

122. _Criminal Law Amendment Act_, S.C. 1968-69, c. 38, s. 101, enacting s. 11B of the _Parole Act_.

123. _Ibid._, enacting s. 11B(2) of the _Parole Act_.

124. See, e.g., _Hinks_ v. _National Parole Board_, [1972] F.C.R. 925 (T.D.); _Re Beaucage_ (1976), 34 C.R.N.S. 127 (Ont. C.A.).

125. See Ronald R. Price, "Doing Justice to Corrections? Prisoners, Parolees and the Canadian Courts" (1976-77), 3 _Queen's Law Journal_ 214, at 246.

126. (1975), 27 C.C.C. (2d) 568 (Ont. H.C.J.), at 572.

127. Fergus (Chip) O'Connor, "The Impact of the Canadian Charter of Rights and Freedoms on Parole in Canada" (1985), 10 _Queen's Law Journal_ 336, at 345-6.

128. _Parole Act_, R.S.C. 1970, c. P-2.

129. _Ibid._, s. 16(3).

130. _R._ v. _Elliott_, [1976] 3 W.W.R. 264 (B.C.S.C.); _Re Rowling and The Queen_ (1978), 45 C.C.C. (2d) 478 (Ont. H.C.J.); _R._ v. _Gorog_, [1975] 4 W.W.R. 191 (Man. C.A.), _per_ Matas J.A. in dissent, appeal to S.C.C. allowed on consent without reasons, Mar. 15, 1976, (1977), 33 C.C.C. (2d) 207_n_ (S.C.C.); _Re Munday and The Queen_ (1982), 69 C.C.C. (2d) 436 (B.C.C.A.). See Price, _supra_, note 125, at 251. It was clear in _Elliott_ that the Court did not wish its decision to be interpreted as giving rise to a new jurisdiction to review the Board's decisions:

> It is clear beyond all doubt that the suspension and revocation of parole are administrative in nature and the review procedures followed by the Parole Board or its officers are not subject to review by the Court. The Parole Board and its officers must, however, carry out the mandatory duties prescribed by Parliament and if they do not ... they are acting outside the law and any purported determination made by them is null and void. _Ibid._, at 270.

This view was consistent with the strict construction given to earlier conditional release legislation. See e.g. Re Munavish (1958), 29 C.R. 63 (B.C.S.C.).

131. Parole Act, supra, note 127, s. 16(4).

132. Ex parte Collins (1976), 30 C.C.C. (2d) 460 (Ont. H.C.J.); Re Grabina and The Queen (1977), 34 C.C.C. (2d) 52 (Ont. H.C.J.); Roach v. Director of Kent Institution, [1983] 3 W.W.R. 711 (B.C.C.A.). Paragraph 10(1)(e) of the Act stated:

> 10(1) The Board may
>
> ...
>
> (e) in its discretion, revoke the parole of any paroled inmate ....

133. See Ziatas v. National Parole Board (1982), 70 C.C.C. (2d) 381 (F.C.T.D.) where it was held that the Board had a choice with respect to day parole - it may either terminate it under s. 10(2) or revoke it under s. 16. If the latter provision is relied on, the Board must follow the procedures set out therein. The Court had earlier held that the Board may terminate day parole without a hearing even before the parole has commenced by relying on its general discretionary powers under s. 10: Beaumier v. National Parole Board, [1981] 1 F.C.R. 454 (T.D.).

134. S.C. 1958, c. 38.

135. Ibid., s. 6(1)(a) provided:

> 6(1) The Board shall at the times prescribed by the regulations
>
> (a) review the case of every inmate serving a sentence of imprisonment of two years or more ...

136. [1977] 1 F.C.R. 359 (T.D.).

137. Ibid., at 363 per Walsh J.

138. SOR/73-298.

139. R.S.C. 1970, c. I-23, ss. 35(b), (c), 36(e).

140. See, e.g. Upper Canada College v. Smith (1921), 61 S.C.R. 413; Boyer v. The King, [1949] S.C.R. 89;

Colonial Sugar Refining Co. v. Irving, [1905] A.C. 369.

141. Supra, note 95.

142. No reference was made in Howley to the Interpretation Act, R.S.C. 1970, c. I-23 or the authorities cited by Walsh J. in Ford. See supra, notes 115, 116.

143. R.S.C. 1970 (2nd Supp.), c. 10.

144. Ibid., s. 18(a).

145. Ibid., s. 28(1).

146. [1976] 1 S.C.R. 453.

147. Per Pigeon, J. (Martland, Judson and de Grandpré, JJ. concurring, Beetz, J. concurring in the result).

148. Supra, note 55.

149. Ibid., at 254.

150. Supra, note 146, at 473.

151. Criminal Law Amendment Act, S.C. 1968-69, c. 38.

152. Ibid., s. 101(1), enacting s. 16(4) of the Act.

153. Laskin C.J.C. and Spence J. concurring.

154. Supra, note 146, at 456.

155. Dickson, J. referred to recent U.K. and U.S. authorities in arriving at this broad view of the duty to act judicially: E.g. Ridge v. Baldwin, [1963] 2 All E.R. 66 (H.L.); Durayappah v. Fernando, [1967] 2 A.C. 337 (P.C.); Morrissey v. Brewer (1972), 92 S. Ct. 2593.

156. Supra, note 146, at 461. Emphasis added.

157. See supra, text accompanying notes 151, 152.

158. (1975), 27 C.C.C. (2d) 568 (Ont. H.C.J.).

159. Ibid., at 570-1.

160. (1970), 1 C.C.C. (2d) 101 (Ont. H.C.J.).

161. _Ibid._, at 105.

162. (1975), 25 C.C.C. (2d) 228 (N.S.S.C.).

163. As guaranteed by s. 1(a) of the _Canadian Bill of Rights_.

164. _In re Nicholson and the National Parole Board_, [1975] F.C.R. 478 (T.D.).

165. _Ibid._, at 481.

166. [1976] 2 S.C.R. 570.

167. _Ibid._, at 575, in dissent.

168. Judson, Pigeon and Beetz JJ. concurring.

169. de Grandpré J. concurring.

170. While it appears that the applicant complained of the failure to receive reasons for his detention in _In re McCaud_, Spence J. did not respond to the argument in his reasons. See _supra_, note 55 at 254.

171. Dickson J. concurring.

172. _Supra_, note 166 at 577.

173. As the Supreme Court recognized itself in _Marcotte_, _supra_, note 73.

174. _Criminal Law Amendment Act_, S.C. 1968-69, c. 38, s. 102.

175. _Supra_, note 166, at 598.

176. See Jean-Guy Marchesseault, "Le contrôle judiciaire des décisions de la Commission Nationale des Libérations Conditionnelles" (1982), 12 _Revue de droit de l'Université de Sherbrooke_ 273, for an analysis of judicial review of parole matters.

177. _Criminal Law Amendment Act_, S.C. 1976-77, c. 53.

178. _Ibid._, ss. 30, 32, repealing ss. 17, 21 of the _Parole Act_, R.S.C. 1970, c. P-2.

179. _Ibid._, s. 31, amending s. 20(2) of the _Parole Act_.

180. Ibid.

181. Ibid., enacting s. 20(3) of the Parole Act.

182. E.g. the 1969 amendments to the Parole Act; see text accompanying notes 82-98; see also Ford, supra, note 136.

183. Supra, note 95.

184. The Covenant and the Protocol were adopted by the United Nations General Assembly, Resolutions 2200 and 2200A, Dec. 16, 1966, U.N. Doc. A/6316 (1966). Canada acceded to them on May 19, 1976 shortly after their coming into force. See Ton J.M. Zuijdwijk, "The Right to Petition the United Nations Because of Alleged Violations of Human Rights" (1981), 59 Canadian Bar Review 103, for a discussion of the procedure for bringing a case under the Covenant to the United Nations Human Rights Committee.

185. Covenant, Article 2(1), (2), (3).

186. Van Duzen v. Canada, United Nations Human Rights Committee, 7 April 1982. (Views under article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights concerning Communication No. R. 12/50), reproduced in (1983), Canadian Human Rights Yearbook 329, at 336.

187. MacIsaac v. Canada, United Nations Human Rights Committee, 3 November 1982 (Views under article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights concerning Communication No. R. 13/55), reproduced in (1983), Canadian Human Rights Yearbook 337, at 342-3. See also A.R.S. v. Canada, United Nations Human Rights Committee, 28 October 1981 (Decision on admissibility under article 5(4) of the Optional Protocal to the International covenant on Civil and Political Rights concerning Communication No. 91/1981, dealing with similar issues in relation to mandatory supervision (held to be inadmissible). Reproduced in (1986), Canadian Human Rights Yearbook 179.

188. Supra, note 184, at 117.

189. Re Eaton (1979), 27 N.B.R. (2d) 666 (Q.B.).

190. Hunchak v. National Parole Board, unreported, (June 28, 1982, (B.C.C.A.), per Nemetz, C.J.B.C., quoted in Re Henderson and The Queen (1982), 69 C.C.C. (2d) 561 (B.C.S.C.) (denying the inmate reasons for parole

suspension before reference of the matter to the Board). Note the unarticulated contradiction between the remarks in Hunchak and the line of cases from In re McCaud to Howarth and Mitchell. In the latter cases the actions of the Parole Board were characterized as merely administrative decisions as to where a prisoner was to serve his sentence. Yet, in Hunchak, it is suggested that release on parole constitutes an interference with the decision of a court to confine a convict to prison.

191. See, e.g. Nicholson v. Haldimand-Norfolk Regional Police Commissioners, [1979] 1 S.C.R. 311.

192. Martineau v. Matsqui Institution Disciplinary Board, [1980] 1 S.C.R. 602, to be discussed below in the section on prison discipline.

193. SOR/78-428, s. 20(2).

194. Ibid., s. 17, 19.

195. [1981] 2 F.C.R. 37 (T.D.).

196. In Martineau, decisions of the disciplinary board had been found to be reviewable under section 18. Thus, the lingering question after Howarth, supra, note 146 and Mitchell, supra, note 166 as to whether a remedy existed other than in the Federal Court of Appeal under section 28 or a habeas corpus application to a superior court of a province had been resolved.

197. Supra, note 195, at 44.

198. Ibid., at 51.

199. Ibid.

200. Dubeau had alleged that the Board questioned him about outstanding criminal charges in the course of the proceeding. It was this questioning that had occasioned Dubeau's request to have counsel present. It was unclear whether the Board had considered these outstanding charges or simply parole violations in deciding to revoke. However, in a later case, Smith D.J. held that a parolee was not entitled to counsel when questioned by a parole officer, even if the questions were directed to outstanding charges: Re Rain and National Parole Board (1981), 58 C.C.C. (2d) 495 (F.C.T.D.).

201. SOR/81-318, enacting s. 20.1 of the Parole Regulations, supra, note 193.

202. Re Couperthwaite and National Parole Board (1982), 70 C.C.C. (2d) 172 (F.C.T.D.).

203. Rossi v. The Queen, [1974] F.C.R. 531 (T.D.).

204. Poirier v. Commission Nationale des Libérations Conditionnelles, [1982] C.S. 175.

205. (1982), 65 C.C.C. (2d) 216 (F.C.A.).

206. Ibid., at 223.

207. A re-examination of a Board decision by a differently constituted panel was, however, provided by regulation: SOR/78-428, s. 22.

208. Supra, note 195.

209. Supra, note 202.

210. Supra, note 205.

211. S.C. 1960-61, c. 53.

212. Ibid., s. 29(1)(b).

213. Penitentiary Service Regulations, SOR/62-90, s. 2.29.

214. See Penitentiary Act, R.S.C. 1952, c. 206, s. 70.

215. Ibid.

216. SOR/62-90, s. 2.29(h),(n). Directives were issued pursuant to s. 29(3) of the Act for the "organization, training, discipline, efficiency, administration and good government of the [Penitentiary] Service, and for the custody, treatment, training, employment and discipline of inmates ...." In addition, Standing Orders could be issued by an Institutional Head pursuant to s. 1.15 of the Regulations.

217. See Jackson, "Justice Behind the Walls - A Study of the Disciplinary Process in a Canadian Penitentiary" (1974), 12 Osgoode Hall Law Journal 1, at 5. In fact, as Jackson points out, prisoners could not gain access to Standing Orders at all and, while Directives were open to inspection, they were often unavailable to prisoners. See also R. v. Institutional Head of Beaver Creek Correctional Camp, Ex parte McCaud (1968), 2 D.L.R. (3d) 545 (Ont. C.A.), at 548 where the Court stated:

This directive which was made known and circulated amongst the members of the Service affected by it was not published or communicated to the inmates. It appears, however, that the appellant has become aware of the contents of the directive otherwise than through authorized channels.

This passage suggests that directives were not generally made available to prisoners.

218. See Jackson, _supra_, note 217, at 6.

219. E.g., Section 2.29 of the Regulations, _supra_, note 213 made it an offence to refuse to work or fail to work to the best of his ability (s. 2.29(c)); to wilfully waste food (s. 2.29(f)); to be indecent, disrespectful or threatening in his actions, language or writing towards any other person (s. 2.29(g)); to do any act that is calculated to prejudice the discipline or good order of the institution (s. 2.29(l)). As Jackson points out, the vagueness of these offences may offend the principle of legality; that is, that "offences be defined with precision in advance of punishment." _Supra_, note 217, at 6.

220. S. 2.28(3) of the Regulations, _supra_, note 213.

221. S. 2.28(3) of the Regulations, _supra_, note 213. The power to impose corporal punishment was revoked in 1972: SOR/72-207.

222. (1968), 2 D.L.R. 545 (Ont. C.A.) [hereinafter _Beaver Creek_].

223. The same person who had sought to have a decision of the Parole Board reviewed in _In re McCaud_, _supra_, note 55.

224. _Supra_, note 222, at 550.

225. _Ibid._, at 550-1.

226. Thus, a decision regarding earned remission was purely discretionary. This was consistent with a B.C. judgment holding that a decision to award or not to award earned remission may be made without a hearing or representations, and is unreviewable: _Ex parte Pearson_, [1967] 1 C.C.C. 286 (B.C.S.C.).

227. This is clearly based on a characterization of remission as a "real and immediate" entitlement, rather than as a "deferred credit" since the Court

states that "forfeiture of statutory remission as a penalty would entail the prolongation of the period of confinement beyond the time for which the inmate has been sentenced, less the statutory remission with which he is entitled to be credited ...." Supra, note 222, at 551. See supra, text accompanying notes 75 to 95. Since the revocation of parole involved loss of remission, it would have been consistent with Beaver Creek to permit review of Parole Board decisions on the basis that it was dealing with an inmate's rights as a person, not as a prisoner. However, the Supreme Court decided otherwise in Mitchell, supra, note 166. Spence J., without referring to Beaver Creek, dissented in Mitchell notwithstanding his earlier judgment in In re McCaud, supra, note 55, which was relied on by the Mitchell majority, on the basis that loss of remission was not a consequence of parole revocation at the time he decided In re McCaud. His view of remission as "very important personal rights" is, therefore, consistent with the typology of rights proposed in Beaver Creek. See supra, text accompanying notes 173 to 175.

228. Supra, note 222, at 551.

229. E.g. the Regulations entitled prisoners to adequate food, clothing, medical and dental care, etc., supra, note 213, ss. 2.05, 2.06, much as early penitentiary legislation had provided. See supra, text accompanying notes 11 to 20.

230. Supra, notes 11 to 20.

231. Commissioner's Directives No. 300, Sept. 20, 1963, set out as Schedule B to Beaver Creek, supra, note 222 at 556-7.

232. A distinction Jackson calls "strange and dehumanizing". Supra, note 217, at 63.

233. See McCann v. The Queen (1976), 29 C.C.C. (2d) 337 (F.C.T.D.). See also Jackson, Prisoners of Isolation - Solitary Confinement in Canada (Toronto: University of Toronto Press, 1983), at 96-101.

234. As would, presumably, a decision of the Parole Board to discontinue parole. Curiously, however, Beaver Creek was not cited in support of this conclusion in either Howarth or Mitchell.

235. Jackson, supra, note 217, at 59.

236. Re McLeod and Maksymovich (1973), 38 D.L.R. (3d) 251 (N.W.T.T.C.).

237. Magrath v. The Queen (1977), 38 C.C.C. (2d) 67 (F.C.T.D.).

238. R.S.C. 1970 (2nd) Supp., c. 10.

239. [1978] 1 S.C.R. 118.

240. (1979), 50 C.C.C. (2d) 353 (S.C.C.).

241. See e.g., Ridge v. Baldwin et al., [1964] A.C. 40 (H.L.); R. v. London Borough of Hillington, Ex p. Rayco Homes Ltd., [1974] 2 All E.R. 643 (Q.B.). An expansive approach to review of prison matters was apparent in R. v. Hull Prison Board of Visitors, Ex p. St. Germain et al., [1979] 1 All E.R. 701 (C.A.) and Fraser v. Mudge et al., [1975] 3 All E.R. 78 (C.A.).

242. Re Nicholson and Haldimand-Norfolk Regional Board of Commissioners of Police, [1979] 1 S.C.R. 311.

243. Martland, Ritchie, Beetz, Estey and Pratte, JJ. concurring.

244. Supra, note 239, at 353.

245. Laskin C.J.C. and McIntyre J. concurring.

246. Supra, note 239 at 373.

247. Ibid.

248. Ibid.

249. (1981), 61 C.C.C. (2d) 520 (F.C.T.D).

250. Ibid., at 536.

251. This approach was also adapted by Nitikman D.J. in Minott v. Presiding Officer of the Inmate Disciplinary Court of Stony Mountain, [1981] 1 F.C.R. 322 (T.D.).

252. Re Blanchard and Disciplinary Board of Millhaven (1982), 69 C.C.C. (2d) 171 (F.C.T.D.), at 174.

253. This principle has been espoused by the British Section of the International Commission of Jurists, Justice in Prison (London: Justice, 1983), at 2:

> The denial of [prisoners'] rights could be justified only if the loss of liberty were an insufficient punishment. But no law says that prisoners may be subjected to any additional

> punishment and those who hold, as we do, that they are sent to prison <u>as</u> a punishment, and not <u>for</u> punishment, would deny the right to inflict it.

It also appears to be penal policy in Canada. See Stan Berger, "The Application of the Cruel and Unusual Punishment Clause under the Canadian Bill of Rights" (1978), 24 McGill Law Journal 162, at 195 where representatives of the B.C. Attorney General's Department are said to have claimed "that the act of sending a person to prison was the punishment and it was beyond the prison's role to create further punishment while he was there." This is also a guiding principle in the present Solicitor-General's Correctional Law Review in the area of prisoners' rights. See Solicitor General, Correctional Law Review, Working Paper No. 1, Correctional Philosophy (1986), at 40 where the following principle is stated:

> The punishment consists only of the loss of liberty, restriction of mobility, or any other legal disposition of the Court. No other punishment should be imposed by the correctional authorities with regard to an individual's crime.

254. See *supra* text accompanying notes 11 to 20. Similar requirements are now set out in Regulations: Penitentiary Service Regulations, C.R.C. 1978, c. 1251, ss. 15-21:

> Food and Clothing
>
> 15. (1) Every inmate shall be
>
> (a) adequately fed and clothed, according to the requirements of the season and the nature of his employment, and
>
> (b) provided with adequate bedding.
>
> Medical and Dental Care
>
> 16. Every inmate shall be provided, in accordance with directives, with the essential medical and dental care that he requires.
>
> Personal Hygiene
>
> 17. Toilet articles and other articles necessary for personal health and cleanliness shall be issued to every inmate.

Inmate Effects

18. The institutional head shall take reasonable care to ensure that the effects of an inmate which, in accordance with the directives, he is permitted to bring into and keep in the institution, are protected from loss or damage.

Exercise

19. Every inmate is entitled, where weather permits, to a daily period of exercise in the open air in accordance with directives.

Correctional Training Program

20. (1) There shall be, at each institution, an appropriate program of inmate activities designed, as far as practicable, to prepare inmates, upon discharge, to assume their responsibilities as citizens and to conform to the requirements of the law.

(2) For the purpose of giving effect to subsection (1) the Commissioner shall, so far as practicable, make available to each inmate who is capable of benefitting therefrom, academic or vocational training, instructive and productive work, religious and recreational activities and psychiatric, psychological and social counselling.

(3) No inmate shall be compelled, against his wishes, to participate in religious or recreational activities.

Discharge

21. Where an inmate is discharged he shall be given, in accordance with directives,

(a) at public expense, an issue of civilian clothing suitable to the season and other necessities,

(b) travelling and living expenses, at public expense, to

(i) the place where he was convicted,

(ii) another place not further distant, if he so elects, or

(iii) any place in Canada, with the special approval of the Commissioner, and

(c) the moneys standing to his credit in the accounts of the institution.

255. *Supra*, note 222, at 551.

256. This is, however, unlikely given that prison riots in the 1970s were at least partly motivated by dissatisfaction with prison conditions. See Berger, *supra*, note 253, at 195.

257. S. 2(b).

258. *R.* v. *Dick, Penner and Finnigan*, [1965] 1 C.C.C. 171 (Man. C.A.).

259. S.C. 1953-54, c. 51.

260. *Ibid.*, s. 136.

261. *Supra*, note 257, at 179, quoting *R.* v. *Dupont* (1962), 133 C.C.C. 33 (B.C.C.A.) at 39.

262. *Black's Law Dictionary* (5th ed.), at 616.

263. *Supra*, note 257, at 177.

264. (1975), 24 C.C.C. (2d) 401 (B.C.C.A.).

265. S.C. 1973-74, c. 38, s. 2, amending s. 214 of the *Code*. Earlier the *Code* had prescribed the death penalty for all murders: S.C. 1953-54, c. 51, s. 206.

266. Farris, C.J.B.C. MacLean and Carrothers, JJ.A. concurring.

267. *Supra*, note 264, at 453.

268. *Supra*, note 258. This case was, however not cited by Robertson J.A.

269. *Supra*, note 264, at 453-4.

270. The Eighth Amendment to the U.S. Constitution states:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

271. Section 10 declared:

> That excessive bail ought not to be required nor excessive fines imposed; nor cruel and unusual punishments inflicted.

272. [1970] S.C.R. 282 (declaring s. 94(b) of the Indian Act, R.S.C. 1952, c. 149, which made it an offence for an Indian to be intoxicated off a reserve, to be inoperative owing to its conflict with the guarantee of equality before the law in s. 1(b) of the Bill).

273. Supra, note 264, at 465.

274. Ibid.

275. Ibid., at 468.

276. An earlier attempt to challenge conditions of imprisonment was launched in Quebec, but there is no report of its outcome: Filion and Poirier v. The Queen [1972] 2 F.C.R. 1202 (T.D.). In Kosobook et al. v. Solicitor General of Canada (1975), 30 C.C.C. (2d) 49 (F.C.T.D.), the plaintiffs argued that solitary confinement in itself offended the Bill of Rights since it could be imposed without a hearing or reasons. The Court rejected the claim relying on Beaver Creek, supra, note 222.

277. (1975), 68 D.L.R. (3d) 661 (F.C.T.D.).

278. Penitentiary Service Regulations, SOR 62/90, s. 2.30. This provision authorized the institutional head to dissociate a prisoner "for the maintenance of good order and discipline in the institution" or "in the best interests of an inmate." Thus, placement in solitary under s. 2.30 was not a means of punishing prisoners for breach of prison offences. Dissociation as punishment was authorized by s. 2.28(4)(b), but was limited to period of 30 days. The plaintiff McCann had been kept in solitary for a total of 1,471 days, with the longest continuous period of isolation being 754 days. Supra, note 277 at 690.

279. Supra, note 277, at 689-90.

280. Per Dr. Richard R. Korn, ibid., at 680-1.

281. Per Dr. Steven Fox, ibid., at 682.

282. Per Dr. Anthony Marcus, ibid., at 685.

283. Per Dr. K.C. Muthanna, ibid., at 686.

284. For a fuller account of the evidence in this case, see Jackson, supra, note 233, at 42-80.

285. Supra, note 277, at 692.

286. See e.g. Curr v. The Queen, [1972] S.C.R. 889; R. v. Burnshine (1974), 44 D.L.R. (3d) 581 (S.C.C.); A.G. Canada et al. v. Canard et al., [1976] 1 S.C.R. 170; In Prata v. Minister of Manpower and Immigration, [1976] 1 S.C.R. 376, Martland J. stated for the Court: "legislation dealing with a particular class of people is valid if it is enacted for the purpose of achieving a valid federal objective." Ibid, at 382.

287. 30-31 Vict., c. 3, s. 91(28). Now the Constitution Act, 1867.

288. Supra, note 277, at 696.

289. S. 2(e).

290. In re McCaud, supra, note 55; Howarth, supra, note 146; Mitchell, supra, note 166. While Heald J. would have been supported by the Ontario Court of Appeal's decision in Beaver Creek, supra, note 222, he did not cite it. See Kosobook, supra, note 276, at 53-5.

291. Supra, note 222.

292. They alleged that they were denied privileges to which they were entitled under s. 2.30 of the Regulations even in solitary confinement:

> **2.30** (2) An inmate who has been dissociated is not considered under punishment unless he has been sentenced as such and he shall not be deprived of any of his privileges and amenities by reason thereof, except those privileges and amenities that
>
> (a) can only be enjoyed in association with other inmates, or
>
> (b) cannot reasonably be granted having regard to the limitations of the dissociation area and the necessity for the effective operation thereof.

In addition, they alleged breach of s. 2.07 and 2.06 of the Regulations which entitled prisoners to toilet articles and other personal health items, and medical and dental care respectively.

293. (1974), 48 D.L.R. (3d) 427 (S.C.C.).

294. Ibid., at 443.

295. [1972] S.C.R. 926.

296. (1977), 36 C.C.C. (2d) 158 (B.C.S.C.).

297. Ibid., at 166-7.

298. (1976), 33 C.R.N.S. 82 (Ont. Co. Ct.).

299. R.S.C. 1970, c. N-1, s. 5.

300. Supra, note 298, at 93.

301. Preamble to the Canadian Bill of Rights, R.S.C. 1970, App. III.

302. Canadian Bill of Rights, s. 1(b).

303. Supra, note 298, at 120.

304. (1976), 35 C.R.N.S. 202 (Ont. C.A.).

305. Brooke, Dubin, Martin and Blair JJ.A. concurring.

306. Supra, note 304, at 221.

307. Miller and Cockriell v. The Queen, [1977] 2 S.C.R. 680.

308. Per Ritchie J., Martland, Judson, Pigeon, and de Grandpré JJ. concurring. Beetz J. concurring in part.

309. Citing The Queen v. Burnshine, [1975] 1 S.C.R. 693. This interpretation of the Canadian Bill of Rights has been referred to by Professor W.S. Tarnopolsky (as he then was) as the "frozen concepts" theory: "A New Bill of Rights in the Light of the Interpretation of the Present One by the Supreme Court of Canada" (1978), Special Lectures of the Law Society of Upper Canada 161, at 181-91; See also Tarnopolsky, "Just Deserts or Cruel and Unusual Treatment or Punishment? Where do we look for Guidance?" (1978), 10 Ottawa Law Review 1, at 24-6.

310. An Act to amend the Criminal Code, S.C. 1960-61, c. 44; S.C. 1967-68, c. 15; S.C. 1973-74, c. 38.

311. Spence and Dickson JJ. concurring.

312. Supra, note 307, at 690.

313. Supra, note 304, at 221.

314. See, however, Re Faid and The Queen (1978), 62 C.C.C. (2d) 62 (Alta. S.C.), where Steer J. made an order requiring prison officials to offer the applicant, an

accused awaiting trial, suitable conditions for meeting with counsel in the preparation of his defence based on the right to counsel in s. 2(c)(ii) of the Bill of Rights.

315. Penitentiaries Act, 1968 31 Vict., c. 75, s. 17. See also Penitentiary Act R.S.C. 1970, c. P-6, s. 13(3).

316. Supra, note 55.

317. Supra, note 222.

318. (1975), 30 C.C.C. (2d) 49 (F.C.T.D.).

319. Supra, note 166.

320. (1977), 34 C.C.C. (2d) 361 (Ont. C.A.).

321. Carried out pursuant to an agreement between the Saskatchewan and federal governments regarding the place of custody of persons who would normally be placed in provincial institutions according to s. 659(3) of the Criminal Code. The agreement allowed the transfer of some of these prisoners to federal facilities.

322. Supra, note 320, at 370.

323. See supra, text accompanying notes 128 to 133.

324. Penitentiary Act R.S.C. 1970, c. P-6, s. 13(5).

325. Criminal Law Amendment Act S.C. 1976-77, c. 53, s. 38, enacting s. 13(5.1) of the Penitentiary Act, supra note 324.

326. R. v. Fleming (1978), 24 N.B.R. (2d) 266 (N.B.S.C.).

327. See supra, text accompanying notes 191 to 194, and Martineau, supra note 240.

328. See e.g. Magrath v. The Queen (1977), 38 C.C.C. (2d) 67 (F.C.T.D.); Re Rowling and The Queen (1980), 57 C.C.C. (2d) 169 (Ont. H.C.J.). See also O'Connor and Wright, "Mirror, Mirror, on the Prison Wall!" (1983-4), 26 Criminal Law Quarterly 318, at 335-44.

329. See Magrath, ibid., at 86.

330. Re Bruce et al. and Yeomans et al. (1979), 102 D.L.R. (3d) 267 (F.C.T.D.).

331. Ibid., at 272-3.

332. See supra note 240, at 373.

333. (1979), 104 D.L.R. (3d) 11 (F.C.T.D.). This case and Re Bruce and Yeomans, supra, note 330, involved the same prisoner as had participated in R. v. Bruce, Wilson and Lucas, supra, note 296 and McCann v. The Queen, supra, note 277. The history of his involvement in these cases is set out in Re Bruce and Reynett, ibid., at 15-7.

334. Supra, note 292.

335. Supra, note 333, at 14.

336. Ibid., at 25.

337. Supra, note 222.

338. Supra, note 333, at 26.

339. Ibid., at 27. See e.g. Attorney General of Canada v. Lavell (1973), 38 D.L.R. (3d) 481 (S.C.C.); Walter S. Tarnopolsky The Canadian Bill of Rights (2nd ed.), (Toronto: McClelland and Stewart, 1975), at 297-8.

340. Lavell, ibid., at 495.

341. Supra, note 333, at 30.

342. [1980] 1 S.C.R. 821.

343. Ibid., at 839.

344. Where the Court stated:

> It would be trite to say that an inmate of an institution continues to enjoy all the civil rights of a person save those that are taken away or interfered with by his having been lawfully sentenced to imprisonment.

Supra, note 222, at 550-1.

335. Supra, note 72, at 115.

346. SOR/62-90, s. 2.17.

347. Ibid., s. 2.18.

348. See _supra_, note 286.

349. _Supra_, note 342, at 840.

350. I.e., "(i) the contents of an envelope may be inspected for contraband; (ii) in limited circumstances, the communication may be read to ensure that it, in fact, contains a confidential communication between solicitor and client written for the purpose of seeking or giving legal advice; (iii) the letter should only be read if there are reasonable and probable grounds for believing the contrary, and then only to the extent necessary to determine the _bona fides_ of the communication; (iv) the authorized penitentiary official who examines the envelope, upon ascertaining that the envelope contains nothing in breach of security, is under a duty at law to maintain the confidentiality of the communication." _Ibid._, at 841-2.

351. _Supra_, note 240.

352. _Belliveau_ v. _The Queen_, [1982] 1 F.C.R. 439 (T.D.).

353. Privileged correspondence was defined in Commissioner's Directive No. 219 as "correspondence between an inmate and an official holding a position of public office" named therein; i.e. the Solicitor General, Commissioner of Corrections, Correctional Investigator, Chairman of the National Parole Board, Members of the House of Commons, Judges etc.

354. _Supra_, note 240.

355. _Culhane_ v. _A.-G. B.C. and Harrison_ (1980), 51 C.C.C. (2d) 213 (B.C.C.A.).

356. _Per_ Craig, Taggart JJ.A. concurring, Lambert J.A. dissenting.

357. _Gaol Rules and Regulations_, B.C. 73/61, s. 2.41(3), promulgated under the _Corrections Act_, S.B.C. 1970, c. 10.

358. _Penitentiary Service Regulations_ C.R.C. 1978, c. 1251, s. 27.

359. (1979), 48 C.C.C. (2d) 544 (F.C.T.D.).

360. _Penitentiary Service Regulations_ C.R.C. 1978, c. 1251, s. 41(2).

361. _Supra_, note 359, at 549. Walsh J. issued an interlocutory injunction against such searches pending a fuller hearing on the matter. The injunction was continued by Cattanach J. in _Gunn_ v. _Yeomans (No. 2)_ (1980), 55 C.C.C. (2d) 452 (F.C.T.D.).

362. SOR/80-462, amending s. 41(2).

363. _Robertson_ v. _Yeomans_ (1981), 58 C.C.C. (2d) 1 (F.C.T.D.).

364. (1975), 24 C.C.C. (2d) 66 (B.C. Prov. Ct.).

365. _Ibid._, at 68.

366. _Ibid._, at 70.

367. _Ibid._, at 72.

368. _Ibid_.

369. _Supra_, note 191.

370. _Supra_, note 240.

371. _Supra_, note 55.

372. _Supra_, note 222.

373. _Re Eaton_, _supra_, note 189.

374. _Hunchak_, _supra_, note 190.

375. _Supra_, note 166.

376. _Ibid._, at 593.

377. _Martineau (No. 2)_, _supra_, note 239, at 637.

378. _Supra_, note 249.

379. _Ibid._, at 534.

380. _Solosky_, _supra_, note 342, at 839-40.

381. <u>Supra</u>, note 222, at 550.

382. <u>Re Anaskan</u>, <u>supra</u>, note 320, at 371. Professor Michael Mandel calls this form of non-intervention "blaming the punishment on the prisoner." Mandel, "The Legalization of Prison Discipline in Canada" (1986), 26 <u>Crime and Social Justice</u> 79, at 90.

383. See e.g., <u>Hunchak</u>, <u>supra</u>, note 190.

384. See <u>supra</u>, note 190.

385. <u>Marcotte</u>, <u>supra</u>, note 73.

386. See <u>Collins</u>; <u>Grabina</u>; <u>Roach</u>; <u>supra</u>, note 132; see also <u>Ziatas</u>; <u>Beaumier</u>; <u>supra</u>, note 133.

387. <u>Ford</u>, <u>supra</u>, note 136.

388. <u>Dubeau</u>, <u>supra</u>, note 195.

389. <u>Couperthwaite</u>, <u>supra</u>, note 202.

390. <u>Morgan</u>, <u>supra</u>, note 205.

391. <u>Martineau (No. 2)</u>, <u>supra</u>, note 240.

392. <u>McCann</u>, <u>supra</u>, note 277.

393. <u>Solosky</u>, <u>supra</u>, note 364.

394. <u>Ibid.</u>

395. <u>Berrie</u>, <u>supra</u>, note 364.

396. <u>Supra</u>, note 240, at 373.

397. For a fuller discussion of the dynamics of the <u>Charter</u>, see Dale Gibson, <u>The Law of the Charter: General Principles</u> (Toronto: Carswell, 1986); Gibson, "Interpretation of the Canadian Charter of Rights and Freedoms: Some General Considerations," Katherine Swinton, "Application of the Canadian Charter of Rights and Freedoms," Herbert Marx, "Entrenchment, Limitations and Non-Obstante," all in W.S. Tarnopolsky and G.-A. Beaudoin, <u>The Canadian Charter of Rights and Freedoms -- Commentary</u> (Toronto: Carswell, 1982); Gérard V. LaForest, "The Canadian Charter of Rights

and Freedoms: An Overview" (1983), 61 Canadian Bar Review 19.

398. The Charter is Part I of the Constitution Act, 1982 (Canada Act, 1982 (U.K.) 1982, c. 11, Sched. B.). Subsection 52(1) of Constitution Act, 1982 states that the "Constitution of Canada is the supreme law of Canada ...."

399. Retail, Wholesale and Department Store Union, Local 580 et al. v. Dolphin Delivery Ltd. et al., [1986] 2 S.C.R. 573.

400. Ibid., at 579.

401. See e.g. Re Soenen and Thomas et al. (1983), 8 C.C.C. (3d) 224 (Alta. Q.B.);

402. See e.g. Re Howard and Presiding Officer of Inmate Disciplinary Court of Stony Mountain Institution (1985), 19 C.C.C. (3d) 195 (F.C.A.), leave to appeal granted June 13, 1985.

403. See e.g. Re Caddedu and The Queen (1982), 4 C.C.C. (3d) 97 (Ont. H.C.J.), appeal abated 4 C.C.C. (3d) 112 (Ont. C.A.).

404. Section 33 of the Charter states in its material part:

> 33(1) Parliament or the legislature of a province may expressly declare ... that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

The province of Québec has attempted to exempt itself completely from these provisions in a single Act: An Act respecting the Constitution Act 1982 S.Q. 1982, c. 21 (Bill 62). The Québec Court of Appeal has ruled, however, that legislative derogations from the Charter can only be affected by specific provisions in each respective statute: Alliance des Professeurs de Montréal et al. v. A.G. of Québec (1985), 21 C.C.C. (3d) 273 (Qué. C.A.). Saskatchewan is the only other jurisdiction to have invoked section 33: The SGEV Dispute Settlement Act S.S. 1984-85-86, c. 111, s. 9(1).

405. It is arguable that derogations are themselves governed by the wording of section 1 of the Charter which states that the guaranteed rights and freedoms are subject only to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." To the extent that a notwithstanding clause constitutes a limit on the enjoyment of Charter rights, its enactment may itself have to be "reasonable" and "demonstrably justified" to be constitutional. There is as yet no judicial support for this interpretation of section 1 but the Alliance des Professeurs case, supra, note 404, is perhaps an indication that courts will not hesitate to review the decision of a legislature to invoke section 33. See Philip Anisman, "Application of the Charter: A Structural Approach" in Anisman and Linden, The Media, The Courts and the Charter (Toronto: Carswell, 1986) 1, at 5-6 for a presentation of this argument.

406. A court of competent jurisdiction is a court which, notwithstanding the Charter, is competent to award the remedy sought. In other words, the Charter did not create new judicial powers: Mills v. The Queen, [1986] 1 S.C.R. 863.

407. Subsection 24(2). In Collins v. The Queen, [1987] 1 S.C.R. 265 the Supreme Court held that evidence should be excluded if its admission "could" (rather than "would") bring the administration of justice into disrepute, relying on the broader wording in the French version of s. 24(2).

408. See e.g. Collin v. Lussier (1983), 6 C.R.R. 89 (F.C.T.D.). The Federal Court of Appeal ruled, however, that the claim had not been substantiated and, even if it had, that the requisite procedures had not been followed. It did not dispute that damages could be awarded in appropriate cases: Collin v. Lussier (1984), 22 C.C.C. (3d) 124 (F.C.A.).

409. This would be dependent upon the board being considered a court of competent jurisdiction for purposes of the exclusionary remedy. While it may appear anomolous for an administrative tribunal to be a "court" of competent jurisdiction, it is important to note that the French version of section 24 refers to "un tribunal compétent." Since the French and English versions of the Constitution Act, 1982 are

equally authoritative (_per_ s. 57 thereof), it is possible that tribunals may have remedial jurisdiction under the _Charter_.

410. Often cited in this connection are cases such as _Edwards_ v. _A.G. of Canada_ [1930] A.C. 124 (P.C.) in which Lord Sankey referred to the Canadian Constitution as "a living tree capable of growth and expansion within its natural limits." _Ibid._, at 136. See also _Minister of Home Affairs_ v. _Fisher_, [1980] A.C. 319 (P.C.) in which the Privy Council held that a generous interpretation should be given to parts of the Bermuda Constitution dealing with fundamental rights and freedoms, rejecting what it called "the austerity of tabulated legalism" in the interpretation of a constitutional instrument. _Ibid._, at 328. This sentiment was endorsed by the Supreme Court of Canada in _Hunter_ v. _Southam_, [1984] 2 S.C.R. 145, at 156.

411. See e.g. _Québec Association of Protestant School Boards et al._ v. _A.G. of Québec et al._, [1984] 2 S.C.R. 66; _R._ v. _Big M Drug Mart_ (1985), 18 D.L.R. (4th) 321 (S.C.C.).

412. See e.g. _Law Society of Upper Canada_ v. _Skapinker_ (1984), 9 D.L.R. (4th) 161 (S.C.C.).

413. See e.g. _R._ v. _Big M Drug Mart_, _supra_, note 411.

414. See e.g. _R._ v. _Therens_ (1985), 18 D.L.R. (4th) 655 (S.C.C.).

415. _Ibid._

416. See e.g. _R._ v. _Rao_ (1984), 12 C.C.C. (3d) 97 (Ont. C.A.).

417. See e.g. _R._ v. _Roach_ (1985), 23 C.C.C. (3d) 262 (Alta. C.A.).

418. See e.g. _R._ v. _Oakes_, [1986] 1 S.C.R. 103.

419. _Ibid._

420. _Ibid._, at 138-9. See the summary of the _Oakes_ test _per_ Tarnopolsky J.A. in _R._ v. _Ladouceur_ (1987), 57 C.R. (3d) 45 (Ont. C.A.), at 67.

421. See e.g. R. v. Therens, supra, note 414.

422. Re Ontario Film and Video Appreciation Society and Ontario Board of Censors (1983), 41 O.R. (2d) 583 (Div. Ct.), at 592, affirmed (1984), 45 O.R. (2d) 80 (C.A.).

423. See H.R.S. Ryan, "The Impact of the Canadian Charter of Rights and Freedoms on the Canadian Correctional System" (1983), Canadian Human Rights Yearbook 99 for an early discussion of the Charter's potential impact on prison law.

424. See e.g. the statement by McNair J. in Re O'Brien and National Parole Board (1984), 43 C.R. (3d) 10 (F.C.T.D.) in response to arguments as to the impact of section 7 on parole decision-making: "I have reviewed the authorities submitted by counsel. It is unnecessary to elaborate because, in my view, each case falls to be determined by its particular facts. What may be viewed in one case as the contravention of a guaranteed Charter right or the roughshod violation of 'fair play in action' may in another game situation with different players be seen to be fair and legal." Ibid., at 20.

425. See Patrice Garant, "L'article 7 de la Charte -- Toujours énigmatique après 18 mois de jurisprudence" (1983), 13 Manitoba Law Journal 477, at 485-6.

426. (1985), 48 C.R. (3d) 289 (S.C.C.).

427. Supra, note 195.

428. (1983), 5 C.C.C. (3d) 501 (Ont. H.C.J.).

429. Ibid., at 509-10. See the discussion of the Conroy case in Fergus (Chip) O'Connor, "The Impact of the Canadian Charter of Rights and Freedoms on Parole in Canada" (1985), 10 Queen's Law Journal 336, at 355-8.

430. (1986), 26 C.C.C. (3d) 65 (F.C.T.D.). See also Re Bryntwick and National Parole Board (1986), 32 C.C.C. (3d) 321 (F.C.T.D.), where a parole condition limiting contact with persons who had a criminal record was held not to be in breach of section 7 and a reasonable limit on freedom of association in s. 2(d).

431. Supra, note 426.

432. Supra, note 430, at 71.

433. [1985] 1 F.C.R. 378 (T.D.).

434. Granted pursuant to Penitentiary Act R.S.C. 1970, c. P-6, s. 26.1, enacted by S.C. 1976-77, c. 53, s. 42.

435. Supra, note 419, at 397.

436. Questions of disclosure and protection of confidential informers have arisen in other contexts under the Charter viz. access to search warrant informations and affidavits tendered in wiretap applications. Generally, courts have followed an approach similar to the decision in Cadieux. See James W. O'Reilly "Hunter: Access to Sealed Documents and Informer Privilege" (1987), 57 C.R. (3d) 16 for a discussion of the legal issues and the Charter cases to date.

437. See e.g., Re Latham and Solicitor General of Canada (1984), 12 C.C.C. (3d) 9 (F.C.T.D.); Re Staples and National Parole Board (1985), 21 C.C.C. (3d) 260 (F.C.T.D.); Wilson v. National Parole Board, [1985] 3 W.W.R. 333 (F.C.T.D.); see also Re Stewart and The Queen (1984), 13 C.C.C. (3d) 278 (B.C.S.C.) regarding the applicability of the Crown privilege protections in the Canada Evidence Act, R.S.C. 1970, c. E-10, s. 36.1 to the National Parole Board.

438. Supra, note 202.

439. Supra, note 205.

440. An Act to Amend the Parole Act and the Penitentiary Act, S.C. 1986, c. 42, s. 5, enacting ss. 15.1 to 15.6 of the Parole Act. See also An Act to Amend the Parole Act, the Penitentiary Act, the Prisons and Reformatories Act and the Criminal Code, S.C. 1986, c. 43.

441. R. v. Moore; Oag v. The Queen et al., [1983] 1 S.C.R. 658. See also Noonan v. National Parole Board (1983), 47 N.R. 221 (F.C.A.); Smith v. R. and Gilles (1983), 26 Sask. R. 73 (Q.B.); Truscott v. Director of Mountain Institution et al. (1983), 4 C.C.C. (3d) 199 (B.C.C.A.), all to the same effect. Oag later brought

a civil action for false arrest, false imprisonment and assault. The Federal Court struck out the statement of claim on jurisdictional grounds: Oag v. The Queen (1985), 23 C.C.C. (3d) 20 (F.C.T.D.). The Federal Court of Appeal reversed in relation to certain of the defendants in Oag v. Outerbridge and Howland (1987), 73 N.R. 149 (F.C.A.).

442. S. 15.3(2).

443. (1987), 57 C.R. (3d) 79 (B.C.C.A.).

444. This had been stated in Truscott, supra, note 441, at 202, endorsed by the Supreme Court in Moore, ibid. No reference was made to earlier cases dealing with the status of remission credits, such as Marcotte, supra, note 73, in which remission was labelled "a real and immediate entitlement", and Howley, supra, note 95, in which remission did not achieve to status of a vested right.

445. See supra, text accompanying notes 73 to 102.

446. Parole Regulations 78-428, s. 17(1), (5) (re-enacted 86-817, s. 4).

447. Quoted by the B.C. Court of Appeal, supra, note 443, at 87.

448. Supra, note 443, at 87.

449. In comparable situations, courts have given primacy to disclosure over informer privilege. See e.g. the cases referred to in O'Reilly, supra, note 436.

450. Evans v. Kingston Penitentiary (1986), 55 C.R. (3d) 285 (Ont. C.A.).

451. Supra, note 55. There, Spence J. had stated that the question whether a "sentence must be served in a penal institution or may be served while released from the institution" was an administrative matter within the Board's discretion. Ibid. at 254.

452. Supra, note 450, at 287-8.

453. Supra, note 426.

454. Supra, note 450 at 288.

455. Ibid.

356. (1984), 13 C.C.C. (3d) 138 (F.C.T.D.).

457. Ibid., at 145.

458. Supra, note 264. Dubé J. cited the post-Charter case of Re Mitchell and The Queen (1983), 6 C.C.C. (3d) 193 (Ont. H.C.J.) which involved an interpretation of section 12.

459. Supra, note 456, at 147.

460. (1983), 60 N.S.R. (2d) 78 (N.S.C.A.). Issues of double punishment will be addressed more fully below in the Prison Discipline section.

461. Re Maxie and National Parole Board et al. (1986), 32 C.C.C. (3d) 231 (F.C.A.).

462. There was no question of the application of s. 11(h) of the Charter which protect "persons charged with an offence" against infliction of double punishment as the prisoner raised the issue in relation to the revocation of his release, not conviction for the offences committed. By contrast, the Nova Scotia Court of Appeal dealt with s. 11(h) since the prisoner there raised the issue of double punishment as it applied to the offences with which he was charged while on release.

463. Supra, note 461 at 238-9.

464. Under s. 20(3) of the Parole Act, enacted by S.C. 1977-78, c. 53, s. 31. See Gregson v. National Parole Board (1982), 1 C.C.C. (3d) 13 (F.C.T.D.) which discusses the use of guidelines by the Board in recrediting remission.

465. S.C. 1977-78, c. 53.

466. See, however, R. v. Connors, supra, note 119 in which a double jeopardy argument was rejected.

467. Supra, note 195.

468. _Supra_, note 202.

469. _Supra_, note 205.

470. _Supra_, note 433.

471. See _supra_ note 437.

472. (1982), 32 C.R. (3d) 355 (Ont. H.C.J.), appeal abated (1983), 4 C.C.C. (3d) 112 (Ont. C.A.). See also _R. v. Nunnery_ (1983), 5 C.R.R. 69 (Ont. H.C.J.); _Re Dumoulin and The Queen_ (1983), 6 C.C.C. (3d) 190 (Ont. H.C.J.), both deciding the same issue on section 7 grounds. See also _Re Lowe and The Queen_ (1983), 5 C.C.C. (3d) 535 (B.C.S.C.) with respect to the application of section 7 to the B.C. Parole Board.

473. Regulations required an in-person hearing for federal prisoners (SOR/81-318, enacting s. 20.1 of the _Parole Regulations_ SOR/78-428) but not for provincial prisoners: see _Parole Regulations_ SOR/78-428, s. 34; _Ministry of Correctional Services Act Regulations_, Ont. REg. 649, s. 49(2).

474. This conclusion is, however, open to question. See O'Connor, _supra_, note 429, at 351-3.

475. (1983), 35 C.R. (3d) 135 (B.C.S.C.).

476. _Parole Regulations_ SOR/78-428, s. 20(2) obliges the Board to hold a post-suspension hearing after the "inmate has applied for a hearing."

477. _Re Conroy and The Queen_, _supra_, note 428, at 511-2.

478. _Couperthwaite_, _supra_, note 202.

479. _Hewitt v. National Parole Board_ (1984), 5 Admin. L.R. 100 (F.C.T.D.).

480. _Re Lowe and The Queen_ (1983), 5 C.C.C. (3d) 535 (B.C.S.C.); _Martens_ v. _A.G. of B.C._ (1983), 35 C.R. (3d) 149 (B.C.S.C.).

481. _Hewitt_, _supra_, note 479; _Lowe_, _supra_, note 480.

482. _Martens_, _supra_, note 480. See Allan Manson, "Annotation" (to _Martens_) (1983), 35 C.R. (3d) 149, at 150.

483. (1983), 7 C.C.C. (3d) 426 (Ont. H.C.J.).

484. Ibid., at 429.

485. (1984), 43 C.R. (3d) 10 (F.C.T.D.). See also Ford v. National Parole Board (1984), 43 C.R. (3d) 26 (F.C.T.D.); Browning v. National Parole Board (1984), 43 C.R. (3d) 31 (F.C.T.D.), both decided by McNair J. on this same issue.

486. Ibid., at 22.

487. Supra, note 433.

488. Supra, note 443.

489. Supra, note 450.

490. See e.g. Litwack, supra, note 430.

491. See e.g. Cadieux, supra, note 433; Ross, supra, note 443.

492. See e.g. Evans, supra, note 450.

493. See e.g. O'Brien, supra, note 485.

494. See e.g. Belliveau, supra, note 456; supra, note 472; Swan, supra, note 475; Mason, supra, note 483.

495. See e.g. Belliveau, supra, note 456.

496. Ibid.

497. Ibid. See also Debaie, supra, note 460; Maxie, supra, note 461.

498. Supra, note 240.

499. See Davidson, supra, note 249; Minott, supra, note 251; Blanchard, supra, note 252.

500. (1985), 19 C.C.C. (3d) 195 (F.C.A.), leave to appeal to S.C.C. granted June 13, 1985.

501. Pratte J. concurring.

502. Ibid., at 210-1.

503. Ibid., at 212.

504. [1984] 2 W.L.R. 613 (Q.B.).

505. Cited by Thurlow C.J., supra, note 500, at 206.

506. Penitentiary Service Regulations, C.R.C. 1978, c. 1251, s. 38(4). At the time, the Regulations contained only two categories of offences -- "minor" and "flagrant or serious." There are now three categories -- "minor," "intermediate" and "flagrant or serious": SOR/85-640.

507. Supra, note 500, at 212, referring to the charge of doing an act "that is calculated to prejudice the discipline or good order of the institution" contrary to s. 39(k) of the Regulations, supra, note 506.

508. Such as:

> "... a formal charge similar in form to a criminal information; 24 hours' written notice of the charge; a formal plea; an opportunity for the inmate to make full answer and defence to the charge, including the introduction of relevant documents, the questioning and cross-examination of witnesses through the presiding officer and the calling of witnesses; a right on the inmate's part not to incriminate himself; a decision based solely on the evidence addressed at the hearing; the criminal law standard of guilt beyond a reasonable doubt; the recording of proceedings, and upon a finding or admission of guilt, the imposition of a sentence."

Ibid., at 216-7. Some of these changes resulted from a recommendation made in a Report of the Sub-Committee on the Penitentiary System in Canada (Ottawa: Supply and Services, 1977) that disciplinary proceedings be presided over by independent chairpersons. The Sub-Committee was of the view that independent chairpersons would proceed in a manner that would be, and would appear to be, fairer and more impartial. As such, they were "required immediately as a basic demand of justice at all penitentiary institutions in Canada." Ibid., at 91. See Recommendation 30, ibid. MacGuigan J.A. was the Chairman of the Sub-Committee while a Member of Parliament.

509. Ibid., at 218.

510. See e.g. Wolff v. McDonnell (1974), 418 U.S. 539; Gagnon, Warden v. Scarpelli (1973), 411 U.S. 778.

511. Supra, note 500, at 223-4. Compare with the statements of Cattanach J. in Davidson, supra, accompanying note 379.

512. Supra, note 500, at 230.

513. Howard was actually sentenced to 70 days' loss of remission. While the Federal Court of Appeal in Howard held that the prisoner had been convicted other than in accordance with the principles of fundamental justice, in actual fact the issue was moot since Howard had already served his entire sentence by the time the Court was seized with the case. MacGuigan J.A. explains:

> A peculiarity of this case is that because the appellant was due to be released from prison on mandatory supervision two days later and in the absence of any statutory authorization to try him for disciplinary offences committed in prison after his release, the presiding officer presumed to proceed immediately to hearing, conviction and sentence, despite having notice of appeal to this court.

Supra, note 500, at 214.

514. Bailey v. Dinsley (1986), 6 F.T.R. 69 (T.D.); Thériault v. Comité de Discipline de l'Institution du Centre Fédéral de Formation, unreported, Feb. 18, 1987 (F.C.T.D.); Tremblay v. Président du Tribunal Disciplinaire de l'Établissement Laval (1987), 11 F.T.R. 1 (T.D.).

515. See e.g. Savard v. Morrison and Edmonton Institution Disciplinary Court (1986), 3 F.T.R. 1 (T.D.); Walker v. Kingston Penitentiary Disciplinary Board (1986), 3 F.T.R. 109 (T.D.); Kelly v. Disciplinary Board of Joyceville Institution (1987), 11 F.T.R. 197 (T.D.); Engen v. Disciplinary Board of Kingston Penitentiary and Troughton, unreported, July 24, 1987 (F.C.T.D.).

516. See supra, note 506.

517. See Michael Jackson, "The Right to Counsel in Prison Disciplinary Hearings" (1986) 20 University of British Columbia Law Review 221, at 278-9. Jackson also highlights the importance of the right to counsel in disciplinary proceedings with reference to empirical research.

518. (1982), 2 C.C.C. (3d) 23 (B.C.S.C.).

519. Ibid., at 36.

520. [1984] 1 F.C.R. 543 (T.D.).

521. Ibid., at 565.

522. Muldoon J. expressly held the requirement in s. 11(d) that the accused be tried in public not to apply in the disciplinary setting as hearings normally take place within the prison. Further, since the tribunal is not a court, it is not bound by the usual common law presumption in favour of openness. Ibid., at 567-8. For an analysis of the common law of openness of judicial proceedings, see Law Reform Commission of Canada, Working Paper 56, Public and Media Access to the Criminal Process (Ottawa: LRCC, 1987), at 21-4.

523. The protections in s. 11(e), (f) relating to bail and jury trials obviously do not apply.

524. On this issue, see the discussion of the pre-Charter cases of Van Duzen and MacIsaac, supra, accompanying notes 184-8.

525. Supra, note 520, at 573.

526. Re Peltari and Director of the Lower Mainland Regional Correctional Centre (1984), 15 C.C.C. (3d) 223 (B.C.S.C.).

527. Muldoon J. had stated that an "offence" had to be proved beyond a reasonable doubt. See supra, at note 521.

528. Supra, note 526, at 230.

529. On appeal, the B.C.C.A. found that the issue had become academic since the prisoner had already been released: (1985), 18 C.C.C. (3d) 571 (B.C.C.A.).

530. (1986), 55 C.R. (3d) 171 (F.C.A.), leave to appeal denied Mar. 24, 1987.

531. Per Hugessen J.A., Lacombe J.A. concurring.

532. Supra, note 530, at 175-6.

533. This approach to Charter interpretation is urged in Philip Anisman, "Application of the Charter: A Structural Approach" in Anisman and Linden, The Media, the Courts and the Charter (Toronto: Carswell, 1986) 1.

534. See other criticisms of Knockaert in John L. Hill, "Knockaert: Double Jeopardy and the Prison Disciplinary System" (1987), 55 C.R. (3d) 189. This analysis is supported by analogous reasoning in the civil context according to which a defendant cannot have punitive damages imposed by a court if the defendant had previously been convicted of a criminal offence for the same conduct. See Amos v. Vawter (1969), 6 D.L.R. (3d) 234 (B.C. S.C.); Loomis v. Rohan (1974), 46 D.L.R. (3d) 423 (B.C. S.C.); see also Linden, Canadian Tort Law (Toronto: Butterworths, 1977), at 49-51. An analysis of the meaning of "punishment" is set out in the U.S. case of Bell v. Wolfish (1979) 441 U.S. 520. See the discussion of this issue in the parole context, supra accompanying notes 460-5.

535. Supra, note 530, at 176.

536. Unreported, Nov. 17, 1987 (S.C.C.).

537. Dickson, C.J.C., Beetz, McIntyre, Lamer, and LaForest JJ. concurring; Estey J. dissenting.

538. Supra, note 536, at 11.

539. Ibid. at 16.

540. Ibid. at 18.

541. R.S.C. 1970, c. R-9.

542. Supra, note 536, at 24.

543. See R. v. Prince, [1986] 2 S.C.R. 480.

544. Supra, note 536, at 2-3.

545. "Double aspect" is a term well-known in constitutional law. See Peter Hogg, Constitutional Law of Canada (Toronto: Carswell, 1985), at 316-8.

546. See e.g. Re Desroches and The Queen (1983), 6 C.C.C. (3d) 406 (Ont. Div. Ct.) (prisoner must be given opportunity to make submissions and question witnesses); Re Blaquiere and Director of Matsqui Institution (1983), 6 C.C.C. (3d) 293 (F.C.T.D.) (prisoner must be given opportunity to make submissions on punishment); Lasalle v. The Disciplinary Tribunals of the Leclerc Institute (1983), 5 Admin. L.R. 23 (F.C.T.D.) (prisoner should have been allowed to appear with counsel or submit written arguments prepared by counsel); Belmont v. Disciplinary Court at Millhaven Institution (1984), 9 Admin. L.R. 181 (F.C.T.D.) (prisoner cannot be convicted of disciplinary offence in the absence of proof beyond reasonable doubt); See the discussion of fairness cases in Allan Manson, "Administrative Law Developments in the Prison and Parole Contexts" (1983), 5 Admin. L.R. 150; O'Connor and Wright," Mirror, Mirror, on the Prison Wall!" (1983-84) 26 Criminal Law Quarterly 318.

547. Prof. Jackson in "Cruel and Unusual Treatment or Punishment?" (1982) U.B.C. Law Review Charter Edition 189 predicted that section 12 would receive a broader interpretation than did s. 2(b) of the Canadian Bill of Rights. Ibid., at 210-2.

548. Collin v. Kaplan (1982), 1 C.C.C. (3d) 309 (F.C.T.D.).

549. Rhodes v. Chapman (1981), 101 S.Ct. 2392.

550. Supra, note 535, at 312-3, citing Rhodes, ibid., at 2398.

551. Ibid., at 314.

552. Piche v. Solicitor General of Canada (1984), 17 C.C.C. (3d) 1 (F.C.T.D.).

553. Ibid., at 96.

554. E.g. Solosky v. The Queen, supra, note 342.

555. E.g. Re Maltby and A.-G. Sask. (1982), 2 C.C.C. (3d) 153 (Sask. Q.B.) (conditions in remand centre not

cruel or unusual); Re Soenen and Thomas (1983), 8 C.C.C. (3d) 224 (Alta. Q.B.) (treatment of remand inmates not cruel or unusual).

556. Supra, note 552, at 102.

557. Ibid.

558. This, however, is unlikely given that the Federal Court of Appeal had recently ruled that Cabinet decisions were reviewable under the Charter: The Queen v. Operation Dismantle Inc. (1983), 3 D.L.R. (4th) 193 (F.C.A.), affirmed (1985), 18 D.L.R. (4th) 481 (S.C.C.).

559. Supra, note 307. Ritchie J.'s judgment in that case is discussed supra at note 308.

560. As suggested supra at note 308. See also Re Gittens and The Queen (1982), 68 C.C.C. (2d) 438 (F.C.T.D.) in which Mahoney J. interpreted Ritchie J.'s pronouncements on the meaning of cruel and unusual as obiter dicta. Ibid., at 445. Curiously, however, he also regarded the majority judgment in Miller and Cockriell as foreclosing the disjunctive approach advocated by McIntyre J.A., as he then was, at the B.C. Court of Appeal and by Heald J. in McCann v. The Queen, supra, note 277.

561. Supra, note 548.

562. Rhodes v. Chapman, supra, note 549; Bell v. Wolfish, supra, note 534.

563. Supra, note 552, at 114.

564. See Paul Russell, "Cruel and Unusual Treatment or Punishment: The Use of Section 12 in Prison Litigation" (1985), 43 U. of T. Faculty of Law Review 185 for a discussion of Piche.

565. See supra, Chapter Two, section B(iii).

566. (1987), 58 C.R. (3d) 193 (S.C.C.).

567. Supra, notes 298, 304.

568. _Per_ Lamer J., Dickson C.J. concurring, Wilson J., Le Dain J. and LaForest J. McIntyre J. dissented as to result but accepted that the Laskin test applied.

569. _Supra_, note 307.

570. _Ibid._, at 689-90.

571. _Per_ Wilson J., _supra_, note 566, at 243.

572. This is Laskin C.J.'s test in _Miller and Cockriell_, _supra_, note 307, at 688, cited by Lamer J., _supra_, note 566, at 231.

573. _Supra_, note 264.

574. _Ibid._, at 465.

575. He stated, referring to the commentary in the articles by Tarnopolsky, _supra_, note 309 and Berger, _supra_, note 253: "I am said to have adopted a disjunctive meaning in my dissent in _Miller_ v. _R._ ...." _Supra_, note 566, at 204.

576. _Ibid._, at 205.

577. As Manson points out in "Answering Some Questions About Cruel and Unusual Punishment" (1987), 58 C.R. (3d) 247, the Court was divided over the role of arbitrariness in the calculation of "cruel and unusual." Further, we have yet to hear from three current members of the Court on their approach to section 12 (Beetz, Estey, and L'Heureux - Dubé JJ.) _Ibid._, at 247.

578. See _supra_, test accompanying notes 262-3, notes 264-9, and notes 307-10.

579. _Supra_, note 277.

580. See _Mills_ v. _The Queen_, [1986] 1 S.C.R. 863 for a discussion of the competence to award _Charter_ remedies.

581. Tarnopolsky, "A New Bill of Rights in the Light of the Interpretation of the Present One by the Supreme Court of Canada" (1978), _Special Lectures of the Law Society of Upper Canada_ 161, at 172.

582. Conditions experienced by remand inmates have already been challenged under the _Charter_ without success: See _Re Soenen and Thomas_ (1983), 8 C.C.C. (3d) 224 (Alta. Q.B.); _Re Maltby and A.-G. Saskatchewan_ (1982), 143 D.L.R. (3d) 649 (Sask. Q.B.), appeal dismissed on grounds of nootness: (1984), 13 C.C.C. (3d) 308 (Sask. C.A.).

583. See supra, note 566, at 236.

584. Ibid.

585. Ibid. Note that the allusion to corporal punishment is an implicit reference to the Bill of Rights case which rejected an attempt to characterize corporal punishment as cruel and unusual: R. v. Dick, Penner and Finnegan, supra, note 258.

With respect to the treatment of dangerous offenders, see Re Moore and The Queen (1984), 10 C.C.C. (3d) 306 (Ont. H.C.J.); R. v. Langevin (1984), 11 C.C.C. (3d) 336 (Ont. C.A.) holding, respectively, that the dangerous offender provisions of the Criminal Code and imposition of indeterminate sentences are not unconstitutional. The Supreme Court of Canada has now found the dangerous offender provisions of the Code not to offend the Charter: Lyons v. The Queen, unreported, Oct. 15, 1987. See also Re Mitchell and The Queen (1983), 6 C.C.C. (3d) 193 (Ont. H.C.J.) (indeterminate sentencing of habitual criminal under repealed legislation unconstitutional in the absence of a finding that he was a dangerous offender according to current Code definition).

586. See supra, note 37.

587. (1985), 23 C.C.C. (3d) 97 (S.C.C.).

588. Per Le Dain J.

589. Supra, note 240, at 373.

590. Supra, note 342.

591. Supra, note 587, at 115.

592. Ibid., at 118. See also Cardinal and Oswald v. Director of Kent Institution (1985), 23 C.C.C. (3d) 118 (S.C.C.) handed down the same day as Miller, dealing with placement in administrative dissociation. The Court held there that habeas corpus with certiorari in aid would lie to release prisoners into the general population where the decision to transfer them to dissociation was made unfairly. See also Morin v. National SHU Review Committee (1985), 23 C.C.C. (3d) 132 (S.C.C.).

593. In the Miller, Cardinal and Oswald, and Morin, supra, note 592 trilogy the Supreme Court emphasizes the fundamental importance of habeas corpus as a means of

challenging incarceration. It recognizes that certiorari in aid is an important adjunct to habeas corpus (in order to bring up the record to the reviewing court), that absolute jurisdiction over habeas corpus lies with provincial superior courts (and hence is more accessible than remedies in the Federal Court) and that affidavit evidence is admissible in support of habeas corpus whether or not it is accompanied by certiorari in aid.

594. S. 10(c) of the Charter states:

> Everyone has the right on arrest or detention
> ...
> (c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

595. Supra, note 166. Ritchie J. held there that provincial superior courts had no jurisdiction to hear habeas corpus applications with certiorari in aid since the Federal Court Act gave the Federal Court exclusive jurisdiction over certiorari.

596. Ibid., at 578.

597. As amended by An Act to amend the Criminal Code (torture), S.C. 1987, c. 13, s. 2. This Act is intended to give effect in Canada to the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the U.N. General Assembly, Dec. 9, 1975 (Resolution 3452 (XXX)).

598. See especially Butler v. The Queen (1983), 5 C.C.C. (3d) 356 (F.C.T.D.) where Walsh J. relied on the following words of Addy J. in the pre-Charter case of Re Cline, unreported, Mar. 18, 1981, 5 W.C.B. 505:

> I would like to add that, except in clear and unequivocal cases of serious injustice coupled with mala fides or unfairness, judges, as a general rule, should avoid the temptation of using their ex officio wisdom in the solemn, dignified and calm atmosphere of the court-room and substituting their own judgment for that of experienced prison administrators. The latter are truly in the firing-line and are charged by

society with the extra ordinarily (sic) difficult and uneviable task of maintaining order and discipline among hundreds of convicted criminals who, as a class, are not generally reputed to be the most disciplined or emotionally stable members of society and who, by the mere fact of incarceration, are being forcibly deprived of many of their most fundamental freedoms. Similarly, courts should avoid laying down any detailed rules of conduct for these administrators since courts have very little practical knowledge of the problems involved in maintaining prison security generally or of the specific tensions, pressures and dangers existing in any particular prison or in any given situation. Such detailed rules of conduct, if any, should be left to the legislators or better still, to those possessing the required expertise who might be charged by the legislators with the issuing of regulations pertaining to these matters. Ibid., at 362.

599. (1984), 5 Admin. L.R. 111 (Ont. H.C.J.).

600. The Court did not believe there to be any difference between the common law duty of fairness and the guarantees in section 7 of the Charter.

601. Lasalle v. The Disciplinary Tribunals of the Leclerc Institute, supra, note 546, relying on the duty to act fairly.

602. Re Hay and National Parole Board (1985), 21 C.C.C. (3d) 408 (F.C.T.D.), relying on section 7.

603. Ibid., at 415.

604. Jamieson v. Commissioner of Corrections and Warden of Frontenac Institution (1986), 51 C.R. (3d) 155 (F.C.T.D.). The Court believed section 7 to contain no more than the common law duty to act fairly.

605. In Butler, supra, note 598, Walsh J., in circumstances not unlike those in Bruce and Yeomans, supra, note 330, held that the prisoner's transfer was neither unfair nor contrary to the Charter. Had the case been decided after Ref. re s. 94(2), supra, note 426, it would have been appropriate for the Court to have

considered whether it was substantively reasonable to transfer a prisoner away from his family. In Jamieson, Strayer J. appeared to reject a substantive interpretation of s.7 when he stated that "the 'principles of fundamental justice' do not require more than the common law duty of fairness". Supra, note 604, at 160-1. Note that prior to Strayer J.'s appointment to the bench, he was Assistant Deputy Minister of Public Law in the Department of Justice. In his testimony before the Special Joint Committee of the Senate and of the House of Commons on the Constitution he said of the words "principles of fundamental justice" that they "cover the same thing as what is called procedural due process, that is the meaning of due process in relation to requiring fair procedure. However, it in our view does not cover the concept of what is called substantive due process." Cited in Ref. re s. 94(2), ibid., at 310. The Supreme Court had rejected that interpretation of s.7 prior to Jamieson.

606. See e.g. Lasalle, supra, note 546, at 37; Hay, supra, note 602, at 416; Chester, supra, note 599, at 149.

607. See Chester, supra, note 599, at 149; Collin v. Lussier (1984), 22 C.C.C. (3d) 124 (F.C.A.).

608. Supra, note 222.

609. Re Bruce and Reynett, supra, note 333.

610. Re Gray et al. and Minister of Manpower and Immigration, unreported, May 6, 1985 (F.C.T.D.).

611. (1982), 143 D.L.R. (3d) 365 (B.C.S.C.). With respect to limits on remand inmates' right to vote see Re Maltby and A.G. Sask. (1982), 143 D.L.R. (3d) 649 (Sask. Q.B.), appeal dismissed on grounds of mootness: (1984), 13 C.C.C. (3d) 308 (Sask. C.A.).

612. Election Act, R.S.B.C. 1979, c. 103, s. 3(1)(b) stated:

> 3. (1) A person is disqualified from voting at any election, and shall not make application to have his name inserted in a list of voters, who ...

(b) has been convicted of treason or an indictable offence, unless he has secured a free or conditional pardon for the offence or has undergone the sentence imposed for the offence ....

613. Without explaining the basis of this conclusion, MacDonnell J. stated simply that "[i]t requires little imagination to see the practical reasons why a prisoner in custody should not be entitled to vote ...." Supra, note 611, at 369.

614. (1983), 7 C.C.C. (3d) 431 (B.C.S.C.).

615. Ibid., at 434.

616. E.g. publication of voters' lists (which would reveal the identities of certain inmates and place them in danger), conflict among prisoners if electioneering were allowed, and problems with canvassers in the prison.

617. [1984] 1 F.C.R. 1119 (T.D.).

618. Ibid., at 1126.

619. [1984] 1 F.C.R. 1133 (C.A.).

620. (1985), 25 D.L.R. (4th) 184 (F.C.T.D.).

621. Provincial prisoners were already entitled to vote in provincial elections according to Québec law: Election Act, S.Q. 1979, c. 56, ss. 204, 217.

622. The prisoner had previously sought a remedy under international law. However, his communication had been ruled inadmissible on the ground that he had not exhausted available domestic remedies. He had argued that a declaration was not a viable remedy under Canadian law given the result in McCann, supra, note 277. The U.N. Human Rights Committee considered Canadian law to have been altered by the Charter, namely s. 24(1), which empowers courts to fashion appropriate and just remedies. See C.F. v. Canada, United Nations Human Rights Committee, 12 April 1985 (Decision on admissibility under article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights concerning Communication No. 113/1981, reproduced in (1986), Canadian Human Rights Yearbook 185.

623. At common law, <u>mandamus</u> did not lie against the Crown or its agents. See e.g. <u>Re Central Canada Potash Co. Ltd. and Minister of Mineral Resources of Saskatchewan</u> (1972), 32 D.L.R. (3d) 107 (Sask. C.A.).

624. (1986), 27 C.C.C. (3d) 158 (Man. Q.B.).

625. <u>Ibid.</u>, at 162-3.

626. <u>Supra</u>, note 418.

627. Affirmed (1986), 29 C.C.C. (3d) 92 (Man. C.A.).

628. <u>Per</u> Reed J. in <u>Gould</u>, <u>supra</u>, note 617, at 1127.

629. As Kaiser states:

> It is uncertain what purpose is served by disenfranchisement. At best it appears as a historical anachronism with punitive overtones common to the early history of corrections .... [T]o the degree that disenfranchisement reinforces the status of the inmate as a "nonperson", it is contradictory to rehabilitative goals. On this ground alone, serious consideration should be given to the abolition of the provisions.

"The Inmate as Citizen: Imprisonment and the Loss of Civil Rights in Canada" (1971-72), 1 <u>Queen's Law Journal</u> 208, at 214-5. Kaiser cites an early English case in which the prisoner brought a <u>habeas corpus</u> application in order to vote. It was unsuccessful. <u>Ibid.</u>, at 214, citing <u>In re Jones</u> (1835), 111 E.R. 169.

630. <u>Supra</u>, note 359. See <u>supra</u>, text accompanying notes 359-63.

631. SOR/80-462, amending s. 41(2) of the <u>Penitentiary Service Regulations</u> C.R.C. 1978, c. 1251.

632. (1987), 11 F.T.R. 279 (T.D.).

633. The Supreme Court of Canada held in <u>Hunter</u> v. <u>Southam</u>, [1984] 2 S.C.R. 145 that a warrant was normally a prerequisite for a reasonable search.

634. Strayer J. held that s. 7 did not apply in the circumstances. <u>Supra</u>, note 632, at 288-92.

635. _Ibid._, at 297. Neither should female guards make random visual examinations of cells occupied by male inmates. _Ibid._, at 299.

636. _Supra_, note 631, s. 41(3).

637. Strip searches of remand inmates have been found not to violate the _Charter_: _Re Maltby and A.G. Sask._, _supra_, note 611; _Re Soenen and Thomas_ (1983), 3 D.L.R. (4th) 658 (Alta. Q.B.).

638. (1987), 10 F.T.R. 176 (T.D.).

639. _Supra_, note 342.

640. _Supra_, note 638, at 188.

641. _Henry_ v. _Commissioner of Penitentiaries_ (1987), 10 F.T.R. 166 (T.D.). Note that prisoners do not, at least in B.C., have a right to legal aid for purposes of defending themselves against disciplinary charges: _Landry_ v. _Legal Services Society_ (1986), 28 C.C.C. (3d) 138 (B.C.C.A.) (disciplinary proceedings are not criminal or civil in nature, nor do they affect a prisoner's livelihood).

642. _Penitentiary Service Regulations_, C.R.C. 1978, c. 1251, as amended by SOR/85-412, s. 3. It is a disciplinary offence under the Regulations to consume intoxicants. _Ibid._, s. 39, as amended by SOR/85-640, s. 4.

643. The forced production of evidence upon demand has been dealt with in some _Charter_ cases as a search and seizure: See e.g. _Re Belgoma Transportation Ltd. and Director of Employment Standards_ (1985), 51 O.R. (2d) 509 (C.A.); _Bishop_ v. _College of Physicians and Surgeons of B.C._ (1985), 22 D.L.R. (4th) 185 (B.C.S.C.), affirmed on other grounds: (1986), 26 D.L.R. (4th) 15 (B.C.C.A.). But see _Re Ziegler and Hunter_ (1983), 8 D.L.R. (4th) 648 (F.C.A.).

644. (1986), 30 C.C.C. (3d) 108 (Qué. S.C.).

645. _Ibid._, at 115.

646. _Ibid._, at 118.

647. For example, if the regulations were drafted so as to adopt the standard in analogous provisions of the Criminal Code, R.S.C. 1970, c. C-34, which empower peace officers to demand breath and blood samples of those reasonably suspected of driving while impaired or with a concentration of more than .08 mg. of alcohol in their blood (s. 238).

648. It is clear from Dion that prison officials have no general power to require prisoners to produce bodily fluids for analysis. Neither does the government have a duty to force a prisoner to receive life sustaining intravenous fluids into her body where the prisoner has made a conscious choice to refuse food: Re A.G. B.C. and Astaforoff (1983), 6 C.C.C. (3d) 498 (B.C.C.A.). See also R. v. Berrie and Seven Others, supra, note 364 where the possibility of force feeding prisoners was criticized. Ibid., at 70. In other contexts, issues of forced medical treatment of detained persons have arisen. See Margaret A. Somerville, "Refusal of Medical Treatment in 'Captive' Circumstances" (1985), 63 Canadian Bar Review 59.

649. Supra, note 307.

650. In Smith, supra, note 566.

651. In Miller, supra, note 587.

652. See e.g. Cadieux, supra, note 433; Ross, supra, note 443; and the cases cited supra, note 437.

653. See, e.g. Chester, supra, note 599; and Jamieson, supra, note 604.

654. See e.g. Caddedu, supra, note 472; Swan supra, note 475; and Conroy, supra, note 428.

655. See e.g. Hewitt, supra, note 479; Lowe, supra, note 480; Martens, supra, note 480; Mason, supra, note 483; and O'Brien, supra, note 485.

656. See e.g. Howard, supra, note 500; and the cases cited supra, note 514.

657. See e.g. Chester, supra, note 599; Lasalle, supra, note 546; Hay, supra, note 602; and Jamieson, supra, note 604.

658. See e.g. Gould, supra, note 617; Levesque, supra, note 620; and Badger, supra, note 624.

659. See e.g. Weatherall, supra, note 632; and Henry, supra, note 638.

660. Henry, supra, note 641.

661. Dion, supra, note 644.

662. Ref. re s. 94(2), supra, note 426.

663. E.g. freedom of expression and the right to equality. As to the former, see Manson, "Freedom of the Press and Juries, Prisons and Prisoners", in Anisman and Linden, The Media, the Courts and the Charter (Toronto: Carswell, 1986) 355.

664. See Furman v. Georgia (1972), 408 U.S. 238 in which Brennan J. stated: "An individual in prison does not lose 'the right to have rights.'" Ibid., at 290.

665. Jackson, "Justice Behin the Walls - A Study of the Disciplinary Process in a Canadian Penitentiary" (1974), 12 Osgoode Hall Law Journal 1, at 9.

666. See e.g. Hunter v. Southam, supra, note 633.

667. See the discussion of prison reform in Jackson, Prisoners of Isolation - Solitary Confinement in Canada (Toronto: University of Toronto Press, 1983), at 25-41. See also Report of the Fauteux Committee, supra, note 43; Report of the Canadian Committee on Corrections - Toward Unity: Criminal Justice and Corrections (Chairman: Roger Ouimet) (Ottawa; Information Canada, 1969); Report of the Sub-Committee on the Penitentiary System in Canada, supra, note 491; Law Reform Commission of Canada, Working Paper 11, Imprisonment and Release (Ottawa: Information Canada, 1975); Law Reform Commission of Canada, Report 3, Our Criminal Law (Ottawa: Information Canada, 1976); Report of the Canadian Sentencing Commission - Sentencing Reform: A Canadian Approach (Chairman: Omer Archambault). (Ottawa: Supply and Services, 1986).

668. See Mandel, "Rethinking Parole" (1975), 13 Osgoode Hall Law Journal 501; Jackson, Prisoners of Isolation - Solitary Confinement in Canada (Toronto: University of Toronto Press, 1983), at 245-250 (proposed Model

Segregation Code); Peter MacNaughton-Smith, Permission to be Slightly Free - A Study of the Granting, Refusing and Withdrawing of Parole in Canadian Penitentiaries (Ottawa: Supply and Services, 1976); Pierre Carrière, Sam Silverstone, The Parole Process - A Study of the National Parole Board (prepared for the Law Reform Commission of Canada), (Ottawa: Supply and Services, 1976); see also, Law Reform Commission of Canada, Studies on Imprisonment (Ottawa: Supply and Services).

669. Solicitor General, Correctional Law Review, Working Paper No. 1, Correctional Philosophy (1986); Solicitor General, Correctional Law Review, Working Paper No. 2, A Framework for the Correctional Law Review (1986).

670. See Report 3, supra, note 667; Law Reform Commission of Canada, Report 30, Vol. 1, Recodifying Criminal Law (Ottawa: LRCC, 1986).

671. Supra, note 667, at 164-6.

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ABSTRACT

This paper analyzes the evolution in Canadian law toward recognition of the rights of prisoners. At common law, prisoners had no rights. A conviction for criminal conduct resulted in the convict's "civil death". Prisoners were disentitled to the legal benefits that were usually incidental to membership in society, such as proprietary and testamentary rights.

However, even in the nineteenth century in Canada, prison statutes contained certain basic guarantees that prisoners would be treated with some dignity. The Penitentiaries Act, 1868, and statutes which followed it, set out certain minimum entitlements - the right to be decently clothed and kept warm; the right to observe religious holidays; the right to sanctuary during the winter months (even after sentences expired); the right upon discharge to suitable clothing and conduct money. Under early conditional release statutes, some prisoners were entitled to remain at large during their sentences. While these Acts gave prisoners some basic entitlements, much discretion was left to prison officials to determine the standard of treatment prisoners would receive. Further, there was no common law or statutory remedy available to assert them.

Canadian law in this area remained essentially unchanged until the late 1950s and early 1960s. A new Parole Act and a new Penitentiary Act sparked litigation of prison law matters throughout the 1960s and 1970s. However, courts generally took a non-interventionist, "hands-off" approach to prison matters. The decisions of prison and parole officials were regarded as being completely administrative and, therefore, not subject to judicial review. Further, prisoners continued to be regarded as incapable of possessing rights, other than those specifically granted by statute or regulation. Where these latter entitlements were asserted, courts defined them narrowly and were reluctant to call them "rights".

In the late 1970s and early 1980s, however, courts began to intervene more readily in matters involving prisoners. Curiously, this development was not due to any statutory or regulatory change. Rather, it sprang from innovations in the common law of judicial review. In particular, courts imposed upon prison and parole officials a duty to act fairly toward prisoners, even in the domain of administrative, as opposed to judicial or quasi-judicial decisions. Further, prisoners came to be regarded as capable of possessing rights. Indeed, they were entitled to all civil rights other than those expressly or impliedly taken away by law - a reversal of their status at common law.

In 1982, the _Canadian Charter of Rights and Freedoms_ was passed and its impact on prisoners rights was immediately felt. Since it guarantees basic freedoms and rights to everyone, there is no question whether prisoners are entitled to assert _Charter_ rights. However, courts have been left to articulate the breadth of, and the reasonable limits on, _Charter_ rights asserted by prisoners.

The result has been that the _Charter_ has accelerated the trend toward recognition of prisoners' rights by acting as a constitutional catalyst for rights recognized prior to its enactment and by serving as a source of inspiration for novel claims.

This trend in Canadian law has, on the whole, been a desirable one. It has resulted in some improvements in the way prisoners are treated. Yet, reform on a broader scale is needed in order to ensure that prisoners receive punishment that is compatible with the aims of our criminal justice system and consistent with the _Charter_.