The Development of *Corrections and Conditional Release Act*

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Introduction

This paper outlines the process behind the development of the *Corrections and Conditional Release Act*, 1992.1

This Act was informed by recommendations from the Correctional Law Review, a multi-year project which conducted an in-depth examination of the purpose of corrections and determination of how the law should be cast to best reflect that purpose.

The Correctional Law Review endeavored to propose a framework for corrections that would provide continuity and consistency among pieces of legislation and parts of the system. The framework was to promote the dignity and fair treatment of offenders while facilitating the attainment of correctional goals and objectives. Above all, the framework was to reflect the *Charter* and was to promote fair and effective decision-making by balancing the interests of staff, offenders and all others affected by the correctional system.

The Context for Reform

For some five decades prior to the Criminal Law Review (of which the Correctional Law Review was a part), the *ad hoc* development of the *Criminal Code* and the corollary expansion of a system to administer it had been the subject of critical debate and evaluation. Throughout these

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1 This paper draws heavily on the nine consultation papers released as part of the Correctional Law Review from 1986 to 1988.

examinations, there was recognition that criminal legislation, law enforcement, judicial procedure and penal systems were inextricably inter-related. Just as each component cannot operate in isolation from the others, they must be reviewed comprehensively and within the context of a system of justice.

Significant examples of this approach to reform include the Archambault Report (1938), the Fauteux Report (1956), the Ouimet Report (1969), and the McGuigan Report (1977). While each investigation was commissioned to inquire into the operation of the penal system, the scope of the inquiries necessarily included and made recommendations for the system as a whole.

One of the unifying themes emerging from these investigations was the need for clarity and consensus regarding the purpose of the criminal law and the justice system. As the McGuigan Report (1977) concluded:

> "The criminal justice system lacks any clear or acceptable governing conception of what we as a society intend to accomplish under the rubric of 'criminality' […] and we can only achieve justice, in a rational sense of that very significant term, through a major commitment to fundamental reform […] a thorough, open and necessarily painful candid assessment of what the criminal justice system ought to do". (McGuigan: 1977, at p. 4)

The rapid social changes of the latter half of the 20th century also highlighted the need for reform. In particular, the late 1960s and early 1970s saw significant increases in the incidence, perceptions and fear of crime. The law and justice system expanded in nature and scope to address a plethora of social, economic and technological developments. At the same time, there was a perceived breakdown in the ability of traditional social structures (e.g., family, neighbourhoods, and churches) to effectively influence normative, acceptable behaviour. The law and justice system expanded to fill this vacuum, assuming an ever-greater role in social control. The growth in the criminal justice system was inevitably accompanied by increasing costs and public sector resources. There were conflicting pressures to further expand and ensure social safety accompanied by demands to cut costs as the system was seen as ineffective and inefficient.

In essence, the law and the system were facing a crisis of legitimacy. There was consensus that without a general criminal justice

policy and a uniform philosophy, the law would be met, at best, by public ambivalence and, at worst, by disrepute.

In this milieu, the Criminal Law Review was initiated in 1979 as a comprehensive examination of all federal criminal law and the criminal justice system. The underlying premise for the review was that Canada needed an integrated criminal justice policy relevant to the changing needs of Canadian society.

The achieve that objective, the Criminal Law Review sought to clarify the purposes of the criminal justice system and articulate what society wanted to achieve with criminal law and how justice should carry out its functions. To that end, the Criminal Law Review published a statement of philosophy of the criminal law that was intended to guide the review process and the approach taken to more particular issues in criminal law policy. In essence, the philosophy asserted that the criminal law has two major purposes:[2]

- Security goals—preservation of the peace, crime prevention, security of the public; and
- Justice goals—equality, fairness, guarantees for the rights and liberties of the individual against the powers of the state, and the provision of a fitting response by society to wrongdoing.

The purpose and philosophy articulated for the criminal law provided a context for a fundamental and systematic reappraisal addressing both the procedural and substantive aspects of Canadian criminal law.

The Correctional Law Review

The Correctional Law Review was one of 50 projects carried out as part of the Criminal Law Review. The Correctional Law Review proceeded on the basis of extensive consultations which were designed not only to elicit views of the different groups consulted, but also to explain the decisions or recommendations that were being taken along the way.

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[2] See Appendix A for the complete statement of purpose and principles for the criminal law.

The project team was led by the Solicitor General Secretariat, with representatives from the Correctional Service of Canada, the National Parole Board, and the Department of Justice. This team was responsible for developing the consultation documents, carrying out the consultations, and ultimately making recommendations to government with respect to the proposed legislation.

The first consultation document was distributed in 1984. It was extremely general, without specific proposals for consideration, and was designed to garner people's views of the overall direction the system should take. In part, this was done in order to avoid criticism that decisions had already been taken, and that the consultations were unlikely to influence the direction of the review in any significant way. As a result, there was criticism that government was asking others to do its work, and that clearly developed options should have been provided. In any event, the responses to the first consultation paper were relatively vague, and did not provide much helpful direction for the remainder of the project.

As well, a separate round of consultations was conducted with provinces and territories, which focused on issues of particular interest to them. Generally speaking, there was no appetite to look at changes to the split in jurisdiction between the federal government and the provinces in relation to corrections. To the extent that there was any interest at all, provinces were divided, with the larger provinces wanting to move to more provincial control if any change was to be made, while the smaller provinces would have only considered reducing the point at which offenders become a provincial responsibility. Given the low likelihood of any consensus on change, this issue was not pursued during the review.

Probably the key issue for consultation with provinces and territories was reaching agreement on a statement of purpose and principles which would apply equally to federal corrections in the *Corrections and Conditional Release Act*, and also to provincial corrections through the *Prisons and Reformatories Act*. Although provinces generally were reluctant to see any greater interference on the part of the federal government in the management of provincial corrections, a common statement of philosophy was seen as key to achieving a necessary level of consistency among them.

The next stage involved the development of nine comprehensive consultation papers, released between June of 1986 and February of 1988. These set out both the approach of the Working Group and their substantive proposals. At this point, the project team held in-person rather than written consultations. To the extent possible, meetings were

convened with the broadest possible range of interested groups in each major centre across the country. Although there were separate meetings with inmates and staff in penitentiaries, staff also were invited to attend the public sessions. All levels of court participated in the consultation, in some cases attending the public consultations, in other situations through separate meetings.

The value of this approach was born out by the results. In particular, the situation was avoided where government meets with a single interest group, hears what it should do, and when the final proposal is not identical to the group's view, are told that it didn't listen and the consultation was a sham. In the broad-based forum, all groups understand better the range of views on any issue, and can at least appreciate that at the end of the day, government has to try and accommodate or respond to a range of positions.

Perhaps most importantly, the consultations allowed groups to see that there was frequently little disagreement on the overall objectives being proposed for the system. This tended to make the discussions less adversarial and, once common ground was established, it became easier to focus the discussion on the best way to achieve the purpose consistent with the principles that were proposed.

The Philosophy for Corrections

Accepting the direction from the many previous inquiries into the penal system, the first substantive task of the project was to develop a statement of correctional philosophy which would underpin the entire review, and be reflected in every aspect of the new legislation. The proposed statement was based on and consistent with the more general statement proposed by the Criminal Law Review. The statement which was ultimately endorsed by Parliament is reproduced in full in Appendix B. Essentially the purpose of corrections is seen as twofold: to carry out the sentence of the court through the provision of safe custody and control, and through assisting the offender to return to society as a law-abiding citizen.

The principles then set out how this purpose is to be achieved. Of particular significance to the judiciary is principle b), which provides that the sentence is to be carried out having regard to all relevant information, including the stated reasons and recommendations of the sentencing judge.

This supports the notion of corrections as part of an integrated justice system. If corrections is to comply, judges need to be open and explicit about the factors influencing their decision to incarcerate, and should have an understanding of both the purpose of corrections and the resources available to it to carry out its functions. Conversely, principle c) requires corrections to communicate with both judges and other components of the justice system as well as to offenders, victims and members of the public. This is crucial if judges are to be able to make informed decisions about sentences of community supervision or incarceration.

More generally, the principles stress that offenders retain all rights of ordinary citizens except those necessarily taken away by the fact of incarceration. They include the notion of the least restrictive measure necessary to achieve legitimate correctional objectives and stress the importance of openness and of lay participation in all aspects of prison life. These principles reflect the analysis required to ensure that Charter rights are respected in the correctional context, although they go beyond the Charter and apply to any rights or interests that citizens have.

Since the vast majority of incarcerated offenders are at some point released back into the community, ultimately the best protection for society is to release them as law-abiding citizens. The view enshrined in the statement is that this is best achieved by treating offenders fairly, and giving them the greatest degree of responsibility and freedom commensurate with their level of risk. As discussed below, this philosophical approach informed all of the specific provisions, but was particularly important for those which either bestow or restrict inmate rights, or grant or restrict staff powers.

The Framework for the Correctional Law Review

Until relatively shortly before the commencement of the Correctional Law Review, the courts had generally been reluctant to go behind prison walls to scrutinize correctional practices or the internal decision-making practices of prison officials.

In part, this reluctance was rooted in recognition of both the inherent difficulties of maintaining security in a prison and the enormity of trying to rectify the conditions of complaints. These challenges resulted in a “hands off” approach to corrections administration that immunized prisons and prison officials from public scrutiny. Judicial reserve was

perhaps also based on the persistent belief that, once sentenced, an inmate was stripped of all his or her rights. Although the concept of civil death was abolished in 1892, the view that prison administration lay beyond the jurisdiction of the judiciary lingered.

Administrative law principles also influenced the position of the courts in these matters. Prior to the 1980's, only judicial or quasi-judicial decisions were subject to judicial review. The administrative decisions of prison officials were thus viewed as being distinct and immune from examination. The result was that prisoners, who had few rights, also had few remedies against the far-reaching administrative decision-making powers of prison officials.

It is not entirely clear why the courts gradually began to assume a more active role in reviewing prison administration and upholding inmates' rights. It has been suggested that this movement paralleled other social movements of the late 1960s and early 1970s. Certainly, there was growing concern that prisons were operated as autonomous systems and were quite insulated from public scrutiny.

The acceptance of the rehabilitative model also influenced increasing judicial scrutiny for penitentiary operations. The reasoning was that, if inmates could be rehabilitated, part of that process would include learning to respect authority and becoming contributing citizens in a democratic society. The right to challenge arbitrary or unfair use of power within the prison was a step towards achieving those aims.

Lastly, this shift was influenced by significant and radical developments in the realm of administrative law. The recognition of a duty of procedural fairness in administrative matters enabled judicial review of decisions that could not be described as either judicial or quasi-judicial. In the landmark case of *Martineau (No.2)*[3] the Supreme Court of Canada found that there was a right of judicial review of administrative matters in penitentiaries. In imposing a general duty of fairness on decision-making in the administrative sphere, the Supreme Court imposed the rule of law within prison walls.

Even before the *Charter*, then, the Canadian courts, responding to a variety of factors, had moved towards a more hands-on approach in dealing with inmate rights. The *Charter* then firmly established the role of

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[3] *Martineau v. Matsqui Institutional Disciplinary Board (No. 2),* (1979) 106 D.L.R. (3rd) 385 (S.C.C.).

the courts in defining and assuring inmates' rights and providing judicial review and remedy to administrative decision-making within the prison system.

There was some concern, particularly on the part of correctional officials, that there might be even greater judicial willingness to intervene in correctional matters, possible even to the extreme seen in the US, where at that time, there were a number of state prison systems under the direct control and supervision of the court, as a direct result of their systemic constitutional violations.

However, it was the view of the Working Group that the likelihood of litigation would be reduced if the new legislation reflected a balanced and reasonable correctional philosophy which restricted *Charter* rights as little as possible, and only for valid correctional purposes. Since restrictions on *Charter* rights must both meet the test set out in s.1 and be found in law, it was necessary for any such restrictions to be included in the new legislation. A s.I analysis was used to assure the reasonableness of all legislative provisions which affected an inmate's *Charter* rights.

When it came to settling disputes, the legislative scheme would rely on adequate means of redress through more informal procedures that would satisfy the need for impartial review and effective dispute resolution, as well as through appropriate judicial remedies. Providing effective internal redress through inmate grievance procedures would enable the development of just solutions without unnecessary resort to the courts. With non-judicial remedies, administrators would be left with a role to initiate solutions and exercise their expertise; and staff and inmates would have an opportunity to participate in creating and maintaining solutions.

The Working Group recognized, of course, that judicial intervention had played and continued to play an important role. It legitimized both the concept that inmates retain rights and the role of outside inspection and scrutiny. With the *Charter*, the courts assumed even greater power and importance. The view of the Working Group was, however, that the courts should be relied on as a last resort, rather than a first measure. The point was that, by developing new correctional legislation, there was an opportunity to shape correctional policy and practice for the future. This approach allowed the correctional system to take into account the views of all concerned, to meet its goals. The proposed legislation was fashioned to promote voluntary compliance and to ensure that inmates' rights, constitutional and otherwise, were protected. It is important to remember that the legislation would not only

articulate the meaning of the *Charter* rights in the correctional context, but would also set out in clear terms the scope of other rights and duties.

In short, the Correctional Law Review was undertaken with the view that legislation could be developed in a way that did justice to all participants, in an effort to improve their collective enterprise. Litigation, in contrast, results in a win or loss for one side or the other. The outcome is rarely viewed as an improvement for everyone, and in fact often maximizes polarity. In considering long-term solutions, the approach was to avoid the need for resort to the courts by developing rules that recognized yet controlled discretion in response to principles that were understandable to inmates, prison staff and administrators, and the public. The combination of effective grievance procedures and a reasonable, balanced system of legal rules would reduce resort to the courts while providing for "justice within the walls".

One of the most controversial issues for the Working Group was how best to further fair and effective correctional decision-making. The corrections system is enormously complex, and corrections officials must make decisions on a wide range of issues, many of them with substantial impact on inmates. While discretion is vital to ensure appropriate flexibility and due regard for individual circumstances, it can also be inequitable, arbitrary or biased. Consideration of how best to structure correctional discretion led to discussion about the level of detail to be placed in the legislation or regulations. Generally speaking, corrections officials preferred less detail in the legislation, to permit sufficient flexibility to deal with unforeseen types of situations, or in how matters are handled. On the other hand, inmates advocated greater specificity, and thus certainty, in the legislation, in large measure because of a lack of trust in the way discretion might be exercised.

This too was considered by many earlier reviews, including Ouimet. The view was commonly expressed that the problems associated with discretion were not due to the existence of discretionary power itself, nor the absence of rules and regulations, but rather lack of a clear purpose or mission to guide the exercise of that discretion. Without it, discretion tends to be exercised on the basis of personal values, public opinion and system-serving goals.

This approach was adopted in the review so that, rather than developing an exhaustive code of detailed legal rules to govern conduct in every situation, the Working Group determined that their goals would be better met by including in legislation the statement of correctional philosophy. The legal and policy rules would be derived from this

statement. The philosophy would also guide the application and interpretation of the legislation and contribute to the use of discretion according to legitimate and clearly established principles, rather than according to the unguided and potentially arbitrary feelings of an individual decision-maker.

This approach to codification meant being explicit in the legislation with regard to the philosophy of corrections, as well as parole, remission, classification and placement. It also meant that the rest of the legislation, including regulations, had to be framed to be consistent with the stated principles and objectives. Policy was then to be developed by the correctional agencies themselves to reflect the philosophy.

With this approach, staff training becomes crucial. Even more important than the elements of the statute, regulations and policy is an understanding of the principles informing the statutory and policy provisions. It is this understanding of the reasons behind any specific policy that will permit correctional decision-makers to exercise their judgment fairly, consistently, and in keeping not just with the letter of the law, but also its spirit.

Another key aspect of the Correctional Law Review was the realization that while disparate groups involved in the corrections system had distinct concerns—and despite the inherent conflict between staff and inmates—there were many areas where interests overlapped and converged.

Indeed, both staff and inmates need and desire personal safety, a decent environment in which to live and work, reasonable and respectful treatment by others, and a less tension-filled atmosphere. These practical and personal concerns are thoroughly consistent with public protection, safety, security and control, as well as with rehabilitation, openness and public participation.

In practice, prisons run on a consensual basis most of the time. A major goal of the review was to find ways to enhance this type of collaboration and to devise rules that facilitated and encouraged voluntary compliance. To that end, the review focussed on developing rules for governing institutions that fostered compliance and emphasized participation and cooperation rather than confrontation. Compliance was of concern not only from the perspective of inmates, but also from that of staff. While inmates may be less likely to comply with rules that they feel infringe unnecessarily on their basic human rights or dignity as

individuals, correctional staff may be less likely to comply with rules that they perceive to be unreasonable, or put their safety at risk.

A vital component in facilitating compliance is to ensure that rules and decision-making are perceived as being fair, since people are then more likely to accept constraints or restrictions. The review sought to enhance the perception of fairness in a number of ways.

First was to involve the people affected by the rules in their development. The premise was that the more directly involved people were, the more committed they would be to a rule. By extension, they would perceive the rule to be fair and be more willing to comply with it.

Second was to ensure that the rules clearly related to a valid correctional purpose, and were the least intrusive means possible to achieve that legitimate goal. This was an area where consultation was particularly important, to ensure that correctional staff had all the powers necessary to carry out their jobs, but that no unnecessary powers were bestowed.

As well, it was critical that the rules be framed clearly. A large degree of non-compliance with rules stems from an incomplete or misunderstanding of the rule, or even complete ignorance of the rule. More fundamentally, it is important that the purpose of the rules be clear, since this will guide the application of the rule in complex or borderline situations (as was noted above in the discussion of correctional discretion).

Finally, rules must be applied fairly and consistently. This requires appropriate staff training, as well as clear communication to inmates about the rules with which they are expected to comply.

A further objective was that the legislative scheme should support the ongoing active involvement of staff and inmates in various day-to-day matters that affect them. The involvement of correctional staff and inmates in the development of new correctional legislation was viewed as an important first step if that legislation was to receive their general support. However, their on-going participation was viewed as equally significant. A system that depends on participation and cooperation is not only more just, but more effective as well. The principles include a statement that staff should have opportunities to participate in the development of correctional policies and programs. There is no similar provision for inmates, which in retrospect was an oversight.

Conclusion

The Correctional Law Review, which resulted in the *Corrections and Conditional Release Act, 1992*, was a principled and systematic attempt to enshrine a clear statement of purpose and principles for corrections into legislation and to establish a vision for corrections as part of the broader justice system. It sought to give meaning to *Charter* rights in the correctional context, and to stress collaboration, openness and public participation in the operation of correctional systems.

APPENDIX A

Statement of Purpose and Principles for the Criminal Law

Recognizing that:

In the *Charter of Rights and Freedoms*, Canada has guaranteed certain rights and freedoms consonant with the rule of law and with the principles of justice fundamental to a free and democratic society;

Canada has, in addition, undertaken international obligations to maintain certain standards with respect to its criminal justice system;

The criminal law is necessary for the protection of the public and the establishment and maintenance of social order;

The criminal law potentially involves many of the most serious forms of interference by the state with individual rights and freedoms; and

Criminal law policy should be based on a clear appreciation of the fundamental purpose and principles of criminal law;

It is appropriate to set forth a statement of purpose and principles for the criminal law in Canada.

Purpose of the Criminal Law

The purpose of the criminal law is to contribute to the maintenance of a just, peaceful and safe society through the establishment of a system of prohibitions, sanctions and procedures to deal fairly and appropriately with culpable conduct that causes or threatens serious harm to individuals or society.

Principles to be Applied in Achieving this Purpose

The purpose of the criminal law should be achieved through means consonant with the rights set forth in the *Canadian Charter of Rights and Freedoms*, and in accordance with the following principles:

a) the criminal law should be employed to deal only with that conduct for which other means of social control are inadequate or inappropriate and in a manner which interferes with the individual rights and freedoms only to the extent necessary for the attainment of its purpose;

b) the criminal law should clearly and accessibly set forth:

   i. the nature of conduct declared criminal;

   ii. the responsibility required to be proven for a finding of criminal liability;

c) the criminal law should also clearly and accessibly set forth the rights of persons whose liberty is put directly at risk through the criminal law process;

d) unless otherwise provided by Parliament, the burden of proving every material element of a crime should be on the prosecution, which burden should not be discharged by anything less than proof beyond a reasonable doubt;

e) the criminal law should provide and clearly define powers necessary to facilitate the conduct of criminal investigations and the arrest and detention of offenders, without unreasonably or arbitrarily interfering with individual rights and freedoms;

f) the criminal law should provide sanctions for criminal conduct that are related to the gravity of the offence and the degree of responsibility of the offender, and that reflect the need for protection of the public against further offences by the offender and for adequate deterrence against similar offences by others;

g) wherever possible and appropriate, the criminal law and the criminal justice system should also promote and provide for:

   i. opportunities for the reconciliation of the victim, community and the offender;

   ii. redress or recompense for the harm done to the victim of the offence;

iii. opportunities aimed at the personal reformation of the offender and his reintegration into the community.

h) persons found guilty of similar offences should receive similar sentences where the relevant circumstances are similar;

i) in awarding sentences, preference should be given to the least restrictive alternative adequate and appropriate in the circumstances;

j) in order to ensure equality of treatment and accountability, discretion at critical points of the criminal justice process should be governed by appropriate controls;

k) any person alleging illegal or improper treatment by an official of the criminal justice system should have ready access to a fair investigative and remedial procedure;

l) wherever possible and appropriate, opportunities should be provided for lay participation in the criminal justice process and the determination of community interests.

The Criminal Law in Canadian Society, (1982).

Ottawa: Government of Canada, pp. 52-54.

APPENDIX B

A Statement of Purpose and Principles for Corrections

The Purpose of Corrections is:

1) to contribute to the maintenance of a just, peaceful and safe society by carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and

2) to assist in the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community.

The purpose is to be achieved in the manner consistent with the following principles:

a) that the protection of society be the paramount consideration in the corrections process;

b) that the sentence be carried out having regard to all relevant available information, including the stated reasons and recommendations of the sentencing judge, other information from the trial or sentencing process, the release policies of, and any comments from, the National Parole Board, and information obtained from victims and offenders;

c) that the Service enhance its effectiveness and openness through the timely exchange of relevant information with other components of the criminal justice system, and through communication about its correctional policies and programs to offenders, victims and the public;

d) that the Service use the least restrictive measures consistent with the protection of the public, staff members and offenders;

e) that offenders retain the rights and privileges of all members of society, except those rights and privileges that are necessarily removed or restricted as a consequence of the sentence;

f) that the Service facilitate the involvement of members of the public in matters relating to the operations of the Service;

g) that correctional decisions be made in a forthright and fair manner, with access by the offender to an effective grievance procedure;

h) that correctional policies, programs and practices respect gender, ethnic, cultural and linguistic differences and be responsive to the special needs of women and aboriginal peoples, as well as to the needs of other groups of offenders with special requirements;

i) that offenders are expected to obey penitentiary rules and conditions governing temporary absence, work release, parole and statutory release, and to actively participate in programs designed to promote their rehabilitation and reintegration; and

j) that staff members be properly selected and trained, and be given—

   i. appropriate career development opportunities,

   ii. good working conditions, including a workplace environment that is free of practices that undermine a person's sense of personal dignity, and

   iii. opportunities to participate in the development of correctional policies and programs.

Corrections and Conditional Release Act, 1997