# Re-Framing Parole

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## Introduction

On this panel we have been asked to address perceptions as to the viability of conditional release or parole. Whether it is still an effective way to support the safe re-integration of offenders into society, or should we abolish it and have what some call "real time" sentences, which some perceive to more closely equate with what Judges and the public want. In addition, we have been asked to address the question of so-called "reliable statistical tools" for predicting and managing the risk of criminal recidivism. Whether or not we could simply use those tools to support the safe re-integration of offenders into society without the need for professional discretion being exercised by parole decision-makers.

We have been asked to do this in the overall context reflected by the conference title—Changing Punishment at the Turn of the Century: Finding a Common Ground, and more specifically in the context of today's general theme—"The ongoing struggle for justice".

Because this is the last day of the conference and we are the last panel, I am hopeful that by the time our turn arrives, all participants in the conference will have changed their understanding of punishment and will have become penal abolitionists. Hopefully we will have changed the role of the courts in sentencing from a retributive to a restorative one, and even more hopefully, there will be very little imprisonment left to re-frame, let alone the need for parole at all. Of course, all those persons processed under the old system and sentenced to imprisonment will still be there and we will still need one mechanism or another to get them out, or at least to

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greatly reduce their numbers at the earliest time. From my perspective, imprisonment in Canada, while undoubtedly better than most other countries remains, to quote the 1977 Sub-Committee on the Penitentiary System in Canada:

> " […] where it is not simply inhumane, is the most individually destructive, psychologically crippling and socially alienating experience that could conceivably exist within the borders of the country." (45:168 para752 )

Under my ideal system, sentences of imprisonment would be abolished to the greatest extent possible and with few exceptions. Society would, of course, still be entitled to defend itself from those who break the law. People would still be arrested and detained but their detention would only continue for as long as necessary and the onus would be on the government to regularly show cause why the detention was still necessary instead of some lesser restrictive alternative. In addition there would be a continuing positive duty on government, to not only try and determine the facts and circumstances of the case and its underlying causes, but to work with the victims and others impacted by the offending, and the offender, to effect some form of reconciliation that involves, at a minimum, putting things right for the victim to the extent that that is humanly possible. The ultimate objective would be to transform the situation for the victim, the offender and society as a whole so that it is unlikely to happen again. Essentially, we would return to a system where imprisonment is only used pre-trial or on the same legal basis as bail or judicial interim release and solutions that are alternatives to imprisonment will have been found in most cases before the need for any trial arrives. Given the current climate, I suspect that it will be a long time before those in whom the urge to punish remains strong, will come around to this way of thinking.

Again, hopefully, with the abolition of punishment or the infliction of pain as the dominant method of trying to deter crime, offenders, seeing more constructive means of correction being available, will be more willing to accept responsibility and to be accountable for their actions, instead of pleading not guilty and hoping for a miracle simply to delay or avoid altogether ones so called "just desserts". The alternative options, upon the acceptance of responsibility, would be so attractive under my system that those denying guilt would cause the government to have sufficient doubts about their case that it compels them to re-examine it thoroughly to make sure they are not making a mistake. I understand that

something similar to this operates informally in Japan, although in conjunction with continuing and significant sentences of imprisonment.

Restorative or Transformative Justice would take place in all circumstances where the facts are agreed or at least not significantly disputed so that the focus would be on trying "to put things right".

In those cases where there is a dispute as to the facts of the offence or any other related matter, I have been unable to come up with any better human solution than our adversarial system where witnesses are called, examined and cross-examined, and their veracity determined by an independent trier of fact, be it judge or jury. In my opinion it is impossible to fairly resolve factual disputes on paper or by reading one side on paper and accepting it without question and hearing only from the other in person by way of a form of inquisition.

Before moving on to look at "Reality", permit me to say a few things about my background and interests so that you will be able to easily identify where my biases lie.

**Some backgrounder**

My interest in imprisonment and parole came about as a result of my returning to Abbotsford, British Columbia, to practise law, followed by a five year stint running BC's first community law office—Abbotsford Community Legal Services. Before that, like most criminal defence counsel, when my client was sentenced to imprisonment, he went through a side door in the courtroom and that would usually be the last I heard of him—unless of course he re-offended and then only if he didn't blame me for his earlier conviction.

At the community law office, the demands on my time soon started coming from prisoners and their families because Abbotsford, like Kingston, is surrounded by prisons, both federal and provincial. Fairly early on in the job I remember being asked to represent a member of the Native Brotherhood at Matsqui Institution called Chico Martineau before what was then called "the disciplinary board". When I contacted the Warden to tell him that I had been asked to represent Mr. Martineau and to appear before the Board, I remember being told "we don't allow lawyers in here". Of course, this was the wrong thing to say to a young lawyer not long out of law school and particularly to one who had just acquired the

luxury of being able to do research and prepare test case litigation without having to worry about billing and meeting the overhead. Not only was I incensed by the Warden's response and how it did not accord with what I had learned in law school, but I was appalled at how arbitrary and unjust the prison administration and particularly the "disciplinary board" was. In those days, the Assistant Warden security (the Chief of Police in the prison) sat as the chairperson on the Board and the only evidence against the prisoners invariably came from his subordinate officers, whom he obviously could not afford to disbelieve. That was the beginning of my involvement with Matsqui Institution and the "Disciplinary Board" which culminated in the Martineau line of cases, which resulted in two trips to the Supreme Court of Canada. (see *Martineau and Butters* v. *Matsqui Institution Inmate Disciplinary Board* (No 1), [1978] 1SCR118 and *Martineau* v. *Matsqui Inmate Disciplinary Board* (No 2), [1980] 1SCR 602.)

The Wardens remarks have taken on several new meanings over the years. CSC staff like most of us, hate being held accountable or having to deal with lawyers or even intelligent prisoners who stand up for their rights. It's not that they prevent lawyers from coming in but they go to great lengths to dissuade prisoners from engaging Counsel in connection with their problems. Over the years clients have regularly told me that their caseworker tried to discourage them from hiring me by telling them, for example, how the Parole Board hates lawyers or how they will be wasting their money etc. The latest tool is the Millennium telephone system. We now have the privilege of having to pay collect call rates ($1.75 per call) for all prisoner calls even local calls.

Shortly after becoming involved on behalf of Mr. Martineau, I was asked to act as counsel for Dwight Lucas in the trial of Lucas, Bruce and Wilson, more popularly known as the "Steinhauser hostage taking incident" at the old BC Pen.(see *R* v. *Bruce, Wilson and Lucas* (1977), 36 CCC (2d)158 (BCSC). In that case, I was exposed, not only to the "cruel and unusual punishment" inflicted upon the prisoners in the solitary confinement unit at the British Columbia Penitentiary, (see *McCann* v. *The Queen* [1976] 1 FC 570(TD)), but I was also profoundly affected by the absence of peaceful legal remedies open to prisoners to resolve their real or imagined disputes. The Courts seemed to find all sorts of excuses to dismiss prisoners' claims and to defer to the so-called wisdom of correctional administrators using, from my perspective, the wholly inappropriate analogy of the armed services or the police. "Hands off" was the policy of the day, a policy that still continues to some extent

today. It was no wonder, to me, that riots, hostage takings and other violent incidents were occurring in our prisons. I was surprised that they were not occurring more often.

These were some of the experiences that moved me to spend a considerable amount of my time as Director of the Community Law Office attempting to develop peaceful legal remedies through Martineau (No.1) and Martineau (No. 2) and later Cardinal and *Oswald* v. *Director of Kent Institution* [1986] 1 SCR 577(SCC), followed by the establishment of the Prisoners' Legal Services of the Legal Services Society of British Columbia.

My experiences with parole did not come until later. While I may have attended a few hearings and made written submissions, my litigation experiences with the Board commenced when the practice of "gating" started. This involved taking the prisoner that had become entitled to mandatory supervision out to the quarry at the back of Kent prison and letting him out of the vehicle on statutory release. The prisoner was then immediately re-arrested and suspended in the absence of any post-release conduct that might warrant such suspension. This practice was also held to be unlawful (see *R* v. *Moore*; *Oag* v. *The Queen* (1983), 4 CCC(3d) 216n (SCC) and *Truscott* v. *The Director of Mountain Prison* (1983), 4 CCC(3d) 199 (BCCA)). This led to a hue and cry about all the dangerous offenders who were about to be released on mandatory supervision and how the Board needed to have the power to keep people in until warrant expiry. Parliament was called back in the middle of the summer to pass the "detention" legislation.

I have since attended as an "assistant" (you can't call yourself "Counsel") before the National Parole Board (NPB) on many occasions. As an experienced Barrister appearing more frequently in the regular criminal courts, I find the procedures and processes of the NPB to be both incredibly frustrating and unfair. Obtaining full disclosure beforehand is most frustrating. Nine times out of ten the Board will blindly (partly due to the lack of cross-examination) accept the written reports of CSC staff, who know they can write almost anything they want and get away with it. Who is going to believe the prisoner? The same can be said of psychological reports that are relied upon without any consideration as to weight or expertise. The prisoner is grilled in the presence of several silent, but obviously hate filled victims or relatives. In high profile cases, the Board is more likely than not to be intimidated by the likely media and victim response to a decision favourable to the prisoner, so they turn him down. I

mean no disrespect to Board members here. The pressure that they are sometimes subjected to, actual organized campaigns, is quite incredible. They do not have the job security that members of the Bench enjoy and their discretion is now so controlled by policy that they lack independence in more ways than one.

The Canadian Bar Association (CBA) responded to the proposed Detention legislation by the creation of a "Taskforce on Imprisonment and Release" chaired by David Cole, as he then was. The following year, the CBA created the Special Committee on Imprisonment and Release, which I had the privilege of chairing, and this evolved into the current Standing Committee of the Canadian Bar Association Criminal Justice Section – the Committee on Imprisonment and Release. David Cole continued as a member of that Committee for many years, along with Michael Jackson, and various others. Alison MacPhail was our ex-officio member from the Correctional Law Review of the Solicitor General Secretariat. Later Allan Manson joined the Committee and more recently Hélène Dumont. Mary Campbell was also for a time our ex-officio member from the Solicitor General's Ministry.

I mention all of this for several reasons. Firstly so that you will see that this conference is, for me, a bit of reunion. Secondly, so that you will understand that my exposure and focus is from the prisoners' side. Consequently I undoubtedly see the worst blemishes of both the prison and parole system, although my clients and my 25 plus years of experiences tells me that they are common and not unusual or exceptional blemishes. Thirdly, so that you will see how biased I am and will appreciate how the writings of the Bar Committee became balanced—not by the influence of the Chair, but by the influence of its members on the Chair.

**Conditional Release—Is it still viable or should we abolish it and have real time sentences?**

In my opinion, so long as we have sentences of imprisonment, we will need some form conditional release mechanism. We will need some form of relief from incarceration, some way of gradually reintegrating the offender back into the community instead of releasing them directly to the street. I have not heard of any proposal that would completely abolish all forms of conditional release for all prisoners. While an argument might be

made regarding the elimination of full parole for fixed sentences, I find it difficult to imagine indeterminate or life sentences without some hope of supervised release. I would expect such sentences would run afoul of s.12 (Cruel and Unusual punishment) following *R* v. *Lyons* (1987), 37 CCC (3d) 1(SCC).

I am not forgetting the recent *Liberal Private Members Bill* that gives Judges a discretion to impose a legal absurdity, namely the consecutive life sentence. Presumably this type of sentence is really designed to ensure that the prisoner doesn't live long enough to reach his or her parole eligibility date. It troubles me that so many of our lawmakers, including senior Cabinet members and the Premier of Ontario, not to mention numerous citizens, continue to believe that "life imprisonment" means "25 years".

There continues to be widespread disparity in sentencing in Canada. The prospects of that changing in the near future seems bleak. While I always thought that the proposals of the Sentencing Commission in this regard, coupling guidelines with maximum discretion, provided a reasonable opportunity to do something about this, the fear of a US style mathematical grid model with little or no discretion seemed too much for us to bear. While the provisions of *C-41* still have scope to help bring sentences down, this is also unlikely to occur, given the current continuing level of public demand for greater not less punishment. We live in times where public perception fuelled by the media overrides both reality and rationality.

I do not accept the criticism from some judicial quarters that parole undermines the sentence or transfers the sentencing functions to the Board. It has been a matter of elementary law, that a "sentence according to law" meant in accordance with the *Criminal Code*, the *Prison and Reformatories Act*, the *Penitentiary Act*, and the *Parole Act*, the latter two having been replaced by the *Corrections and Conditional Release Act*. I am surprised to hear that some Judges either claimed not to understand this or more likely resented being unable to lock someone up for longer without imposing an unfit sentence. As long as we have had sentences of imprisonment, it has always made perfectly good sense to me that the first third of the sentence was considered the denunciatory period. This was to be followed by efforts to correct the offender's behaviour and to begin the process of reintegrating the offender as a law-abiding citizen. While eligibility dates were set by Parliament and provided the basic framework for the sentence, Judges now have the power to set eligibility dates in

certain circumstances. Unfortunately, this, it seems to me will only lead to greater disparity.

In my opinion it is wrong for Judges to give longer sentences simply because a person might get parole. This assumes the offender will be released at eligibility and if he isn't will result in a sentence that is more onerous than intended. On the other hand, if a prisoner reaches parole eligibility and is granted parole he continues to serve the sentence subject to supervision and suspension, even for an anticipatory breach, which can entail a return to custody.

It is similarly wrong for Parole Boards to focus on deterrence and other sentencing principles and to keep someone in just because the members sitting happen to think that the prisoner should do more time. It is not their function to sentence. In my experience the more senior and therefore trained the Member the less likely this will occur.

While I may be able to think of good arguments for abolishing the Parole Board, given its lack of independence from the Correctional Service of Canada (CSC) and its 90% or better congruence with CSC in its decision making, rendering it, perhaps, superfluous, this is a topic for another paper. Ideally I think that the Court that imposes the sentence should also assume the paroling function. This way the Judiciary would keep on top of and be much more in touch with the places and processes that they send people to and through. Until that happens the CSC may as well perform this function. They are responsible for dealing with the prisoners on a daily basis and to provide for programming so perhaps they should be responsible for all decisions as to release and take the heat directly for their mistakes. I do not expect CSC would do a better job than the Board. Prisoners would only have to go through the process once. Board members could all be made judges and learn something about a fairer process when credibility is in issue or alternatively they could all go and work for CSC as the releasing component. Little would probably change, money might be saved, and the façade of independence would be removed.

A proposal to abolish full parole was made by the Canadian Sentencing Commission in its report in February, 1987, entitled "Sentencing Reform: the Canadian Approach". More specifically, the Commission recommended the abolition of full parole except in those cases of sentences of life imprisonment as a minimum, bearing in mind that it also recommended the abolition of the sentence of life

imprisonment as a maximum, substituting therefor an enhanced sentence regime. It also recommended the retention of a form of earned remission and a form of day release. The Commission gave three reasons for its recommendations as follows:

1. Parole conflicts with the principle of proportionality which the Commission assigned the highest priority in the sentencing rationale.

2. Because discretionary release introduces a great deal of uncertainty into the sentencing process.

3. Because parole release transfers sentencing decisions from the judge to the parole board. The Commission asserted that such tendencies may result in unwarranted disparities in time served so that the effects of the transfer was quite dramatic when one compared the data on percentages of sentences actually served in prison.

The Commission lamented that current law and practice made it difficult for Judges to estimate how long offenders sentenced to prison would actually spend in custody, leading some judges to take parole and remission into account when sentencing. In the Commission's view, under its proposals this would no longer be necessary as the Judge would know that only the last ¼ would be served in the community as a result of earned remission and judges would have guideline ranges to determine fit sentences. In the Commission's view, judges need not and should not consider early release when determining the appropriate length of custody. However, the Commission recognised the continuing need for some method of reducing the time served in custody and so recommended the retention of a form of earned remission. The Commission also recognised the objective of releasing prisoners prior to the expiry of their sentences to allow for reintegration into the community hence recommended the retention of a form day release.

The Commission recognised that if implemented this recommendation would increase federal prison populations by an estimated 20% if no changes were made to the length of sentences imposed by the courts. Over two years, unless sentence lengths were modified, this abolition of full parole would result in a substantial increase in the federal prison population. The recommendation was therefore predicated upon a modification of sentence lengths. The Commission

recognised that the abolition of all forms of early release would result in at least a doubling of the prison population in a short period of time and that it would be unrealistic to expect that judges would drastically alter their sentencing practices over night. The publicity that would be attracted and the reaction by the public were also recognised.

Consequently, the Commission recommended a continued form of remission based release up to ¼ of the sentence with provision for withholding of this type of release. It also recommended a form of day release after serving 2/3 of the sentence that would not be available to those from whom remission release had been withheld. Escorted temporary absences would be called "special leave" and would still be administered by the Correctional Service of Canada and not the parole board. This is a very general review of the Commission's proposals and in fairness to the Commission they should be looked at in the context of the overall recommendations made and how these proposals would be integrated with others.

The CBA Committee on Imprisonment and Release responded to the Sentencing Commission's report in a paper entitled "Parole and Early Release", which was also our submission to the Parliamentary Committee, then known after its Chair as the Daubney Committee. In that paper, we took the position that the abolition of full parole could not be justified by the Commission's arguments, nor was it a required step in a process of reform predicated on restraint, proportionality and equity. While noting many problems with the existing parole regime in terms of unchecked discretion, disparity, unfairness and other functional defects, we still could not support its abolition.

We pointed to the late Chief Justice Laskin's well known quotation in the mid 1970's from *Mitchell* v. *The Queen*, [1976] 2 SCR 570 (SCC) describing the power of the board in terms of a "tyrannical authority" manipulating its subjects "like puppets on a string", and our own criticisms of the existing parole regime. We noted how the abolition of parole would at least remove one source of grievance, instability and unfairness from the prison environment. Nevertheless our thinking at that time was influenced by two factors. Firstly, the post-1980 era that substantially increased opportunities for judicial scrutiny and external exposure as a result of the acceptance of the "duty to act fairly" and the advent of the *Charter*, believing that many of the process complaints that permeated the system during the previous decade had been addressed. Secondly, we remained concerned about the rigors of the penitentiary

environment. In our opinion, in the absence of fundamental changes in the nature of imprisonment in Canada, there was an overriding need to restrict its grasp and limit its human impact. As we said back then, "mechanisms of early release may not be ideal, but they are essential".

While noting that criticism of the existing system of release was apt and necessary, we pointed to issues of disclosure, the right to counsel and the application of the doctrine of res judicata as needing to be addressed in order to avoid unfairness. In addition we noted as well such structural issues as the articulation of criteria, the publication of decisions and the basis for appointments to the board needing to be examined. However, at the end of the day, notwithstanding our recognition of these defects, we still did not feel that this state of affairs logically supported a cry for abolition.

Unfortunately, while judicial scrutiny continues to exist and remedies are available, my faith in the Courts as a means of improving the fairness of Parole hearings has been severely weakened if not destroyed completely. Following the Supreme Court of Canada's decision in *Mooring* v. *Canada* (National Parole Board), [1996] 1 S.C.R.75, the Federal Court of Appeal in *McInne*s v. *Canada* (Attorney General), [1996] F.C.J.1117 (FCA) made it clear that while s.7 of the *Charter* applies to the Board it does not have the effect of giving the prisoner a right to counsel nor a right to hear or call witnesses or to cross examine them at hearings. As far as the Court of Appeal is concerned, (leave to appeal to the Supreme Court of Canada was refused), compliance with the common law rules and the practices and procedures set out in the *Corrections and Conditional Release Act* (*CCRA*) constitutes full compliance with the principles of fundamental Justice and therefore s.7 of the *Charter*. This was said in the context of a review of a "Dangerous offender" at one of those reviews that according to Lyons (supra) prevented the entire sentence from becoming "Cruel and Unusual". It was also a case in which conflicting reports had been put before the Board yet the Court found that cross-examination was not necessary to ensure fairness.

The implications of this decision will hopefully become apparent when we come to consider the question of "statistical tools" in the second part of this paper. This "Struggle for Justice" appears to have been lost. It is now acceptable to have substandard justice and fairness when liberty is in issue. It is now part of the consequence of the sentence or punishment—notwithstanding Martineau (supra), *Solosky* v. *The Queen* (1979), CCC (2d) 495 (SCC), and the express words of s. 4(e) of the *CCRA*.

As I said at the outset, when facts are in dispute and credibility is in issue, there is simply no substitute for a full hearing with witnesses and cross-examination before an independent tribunal or adjudicator. One would have thought that this would be recognised as even more important in circumstances where one of the parties is under the direct control of the other and that other is the CSC. In this regard the words of Madame Justice Arbour in the Report of the Commission of Inquiry into certain events at the Prison for Women in Kingston, the recent Arbour Report, at pp. 180 – 181 are worth recalling:

> "In my view, if anything emerges from this inquiry, it is the realization that the Rule of Law will not find its place in corrections by 'swift and certain disciplinary action against staff and inmates. The absence of the Rule of Law is most noticeable at the management level, both within the prison and at the Regional and National levels. The Rule of Law has to be imported and integrated, at those levels, from the other partners in the criminal justice enterprise, as there is no evidence that it will emerge spontaneously."

The Commissioner then quotes at length from a paper by Lucie Lemonde, including in particular this part:

> "Notwithstanding the proliferation of rules, analysts of penal systems are almost unanimous in concluding that they are lawless States. Thus Greenberg and Stender, in their 1972 article "The Prison as a Lawless Agency", assert that "the prison, supposedly designed to enforce the law, became a complete negation of the very principle of legality". In 1974, Professor Michael Jackson, after scrutinizing the disciplinary process in some penitentiaries, concluded that the Canadian Correctional Service was "a lawless state".

The Commissioner continued:

> "This dual characteristic of the role of legal norms in a penal institution was amply demonstrated throughout this inquiry. On the one hand, the multiplicity of regulatory sources largely contributed to the applicable law or policy being often unknown, or easily forgotten and ignored. On the other hand, despite this plethora of normative requirements, one sees little evidence of the will to yield

> pragmatic concerns to the dictates of a legal order. The Rule of Law is absent, although rule are everywhere."

It is my impression that the CSC will vigorously resist the opening up of the system to agents of the law such as lawyers and other independent adjudicators and therefore the most likely sources of the introduction of the Rule of Law into the prison culture will be effectively excluded from any meaningful participation. The results of the Task Force on Independent Adjudication in relation to Segregation tells the story. So does every other previous investigation in to the operations of the Correctional service.

Notwithstanding these problems from Prisoners' Counsels perspective, I still cannot, due to the rigors of life in prison, bring my self to support the abolition of some form or forms conditional release.

**The Role of the Media**

In our Bar paper, the Committee also addressed the controversial nature of parole as a result of media distortions and resulting public misunderstanding. As we said then:

> "There is a broadly held view, which is reinforced by media reporting of the parole system, that the policies and practices of the National Parole Board needlessly expose the public to harm, usurp legitimate authority of the courts and undermine the effectiveness of sentences. Indeed from some quarters one gets the impression that if the parole system were abolished, violent crime in Canada would dramatically decrease and we could all sleep safely in our beds at night".
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> The Sentencing Commission in its chapter 4 "Public Knowledge of Sentencing" pointed out that as a result of several nation-wide polls conducted by the Commission, the Canadian public overestimates the amount of violent crime and underestimates the severity of the courts and their sentencing practices. The Commission pointed out that most members of the public think that the courts are overly lenient of their treatment of criminals and that the reality, at that time, was that Canada with an imprisonment of 108 per 100,000 inhabitants had one of the highest rates among western nations. That rate has since increased to 135 per 100,000.

The Commission noted that when it came to parole, the surveys revealed the same dissonance between public perception and correctional reality. The public overestimates the percentage of offenders released on parole and perceives the parole board as more lenient when the reality was that release rates had remained relatively stable for the previous five years. The public overestimated recidivism by a significant margin and public objections to parole were based on their perception of inordinately high re-offence rates by parolees.

We found the Sentencing Commission's answer to why these public misconceptions had arisen to be compelling. Most people get their information about the criminal justice system from the news media. A systematic bias by the media when it deals with sentencing and parole news was demonstrated and is a major contributing factor to public misconception. In the result, the public builds its view of sentencing on a data base which does not reflect reality. The bias in the media is even more exaggerated when it comes to parole. "Newsworthiness" is determined by re-offence by a parolee, especially through a particularly violent crime. As the Bar Committee pointed out, this distortion and the media's responsibility for it is best illustrated by reports on what was then called "mandatory supervision".

Originally, prisoners serving either federal or provincial sentences could earn one-third off their sentences for good behaviour called 'earned remission'. If they served two-thirds of their sentence inside they would finish their sentences at two-thirds. But if they took a parole at one-third or later, they would remain on parole until complete warrant expiry. This remains the case in relation to provincial sentences in British Columbia. But federally, we said—if people on parole are under supervision for the last one-third of their sentences, surely those who were not a good risk for parole should also be under supervision for the last one-third. After all these people are, by definition, a greater risk to the public. So we created "mandatory supervision". As we said in the Bar Committee Report—this was not the creation of a prisoner's right but "a tightening of the correctional screws".

In the result, however, the Media started taking a greater interest in breaches and new offences by those on mandatory supervision. Before they were merely re-offences by people with previous

> records. Now they blamed the Board even though the Board did not grant them release and these individuals were under much greater supervision than before. Nevertheless the Media and victims' groups were successful in portraying "Mandatory supervision" as an "entitlement" and that it should be abolished. They succeeded to the point where it was renamed "Statutory Release" and the Board received their power to detain prisoners until warrant expiry.

This would of course entail taking those who by definition must be the very worst risks and keeping them in right until the end of the sentence. Then we would unlock them and release them, with no gradual release, back to the street. So what happened to these people? Did they re-offend soon after release because of the lack of supervision? Did they perform well because they weren't that big a risk anyway and CSC and the Board over-predicted their risk? The problem of false positives must not be ignored. Or is their ammunition here for flat or "real time" sentences indicating that we can consider abolishing parole because it doesn't make any difference anyway? My review of the NPB Performance Monitoring Report 1997-1998 does not appear to present these statistics. I have heard that they have been or are doing better than expected or perhaps than predicted. Again the problem of over-prediction of risk and false positives is a factor to consider.

There has not been a lot of Media attention focussed on these individuals. Is this because they have finished their sentences and there is no Board to try and blame for their failures? I suppose a re-offence after warrant expiry is no longer newsworthy, just like before the advent of mandatory supervision.

I would be very surprised to find that a gradual release makes little or no difference in terms of recidivism post warrant expiry. The success rates after a gradual release appear to be very good. It seems to me that the only way to answer the question is to compare those subjected to a gradual release with those that haven't but even then too many variables arise to enable an accurate or reliable prediction.

In the absence of any evidence indicating that parole makes no difference to post warrant expiry recidivism, I would not be inclined to abolish it.

**Replacing the discretion exercised by parole decision makers with so called "reliable statistical tools"**

This proposition would entail not only the abolition of the Board but also the elimination of any discretion on the part of CSC leaving the decision as to conditional release to the results obtained or score achieved on one of these tools, presumably administered by a qualified expert—if such exists.

Of course it must not be forgotten that the tool was created by a human being using a particular database or cohort that may or may not be valid for the particular individual subjected to it on account of race or other factors. Further, some human being has to score the individual and this introduces a subjective element into the process that can result in widespread disparities in scoring and therefore results. Some examples of the problems encountered in this regard are set out below.

It is my understanding that the development of various statistical tools that purport to predict and manage the risk of criminal recidivism came about as a result of the recognition that our human ability to predict the future was not very reliable, whether in the context of predicting "dangerousness" in the courtroom (seeking to declare one to be a dangerous offender) or predicting lack of risk to re-offend or risk to re-offend (in applications for parole or at post suspension or detention hearings before the parole board).

The CBA Committee in a paper (February, 1997) addressing *Bill C-55*, the *Criminal Code* amendments regarding High Risk Offenders noted the following when commenting specifically on the new provision in Dangerous Offender hearings that eliminates the appointment of a psychiatrist for each side and substitutes a remand "to the custody of the person that the court directs and who can perform an assessment, or can have an assessment performed by experts":

> "But are expert and neutral resources available to warrant this degree of deference? Firstly, the clinical predictions of psychiatrists and psychologists about future dangerousness are wrong more often than they are right. The American Psychiatric Association (APA) filed an amicus curiae brief in the Supreme Court of the United States in *Barefoot* v. *Estelle* [(1983), 463 U.S. 880] arguing that such opinions should not be admitted in the punishment phase of capital cases because of inherent unreliability.

> Secondly, several controversies within the mental health field bear upon these issues. The DSM IV, the primary diagnostic text for North American psychiatrists, contains an important caution that the inclusion of peadophilia in the text "does not imply that the condition meets legal or other non medical criteria for what constitutes mental disease, mental disorder, or mental disability" and that the scientific consideration involved in categorizing this condition may be irrelevant to legal questions about "individual responsibility, disability determination and competency." Thirdly, while some practitioners within the corrections field applaud the use of actuarial prediction models, even the most ardent enthusiasts accept their limitations. The leading Canadian team of researchers in the field cautions that their model may work and injustice in an individual case:
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> "The present VPS (Violence Prediction Scheme) embodies within it a good deal of current knowledge and experience. No one claims that its use will guarantee "fairness", "accuracy" and "absence of bias" in each and every case." (Webster, Harris, Rice, Cormier, Quinsey, The Violence Prediction Scheme, Toronto: Centre of Criminology. 1994 at p. 65.)

Quinsey, one of the most prolific and well-known advocates of actuarial and multi-disciplinary prediction concludes that "clinical judgement has proven to be a rather poor predictor of future violence" (see V. Quinsey, "The Prediction and Explanation of Criminal Violence" (1995) 18 Int. J. of Psych and Law 117 at p.118).

Monahan, one of the leading American researchers involved in risk assessment over that past twenty years, has concluded that "psychiatrists and psychologists are accurate in no more than one in three predictions of violent behaviour" even when applied to an institutionalized sample who have already committed some violent act in that past (J. Monahan and H. Steadman, "Towards a Rejuvenation of Risk Assessment Research" in Monahan and Steadman (eds.), Violence and Mental Disorder: Developments in Risk Assessment (Chicago university Press. 1994 at p.5) While these authors have expressed limited optimism about the future of actuarial prediction they add that "an increase in predictive accuracy would not obviate the profound questions of social policy and professional ethics that attend any preventive use of the state's police power." (Supra at p.13).

The American Psychiatric Association brief, referred to above, expressly stated:

> "Although psychiatric assessments may permit short-term predictions of violent or assaultive behaviour, medical knowledge has simply not advanced to that point where long term predictions… may be made with even reasonable accuracy. The large body of research in this area indicates that, even under the best of conditions, psychiatric predictions of long-term future dangerousness are wrong in at least two out of every three cases." (APA brief at p.8-9)

In the case of "dangerous offender" hearings, the accused, having been convicted of a "serious personal injury offence", is entitled by Part XXIV of the *Criminal Code* to a further hearing before a Supreme Court Justice in a court of law, represented by Counsel, covered by legal aid if necessary, to determine if the statutory criteria have been met to warrant the imposition of the label which will now result in an automatic indefinite sentence of imprisonment, subject to a parole review at 7 years and then every 2 years thereafter. Apart from the circumstances of the offenders past offences, the primary evidence at such hearings comes from psychiatrists and psychologists who not only diagnose the individuals psychiatric or psychological condition but also predict whether or not the individual is a risk to re-offend. Some of them will rely on some of these statistical tools in arriving at their opinions and conclusions. At least Counsel has an opportunity to explore the nature of the tool used, to ensure its protocol has been complied with and to ensure that the offender and the decision maker are fully informed about its strengths and weaknesses when taking it in to account in the decision making process. Witnesses are called and full examination and cross examination is permitted to test the credibility of the evidence that the Court will potentially rely upon to determine whether there is a credibly based probability that the individual is indeed a "dangerous offender".

The concern in these types of proceedings is to ensure that only truly "dangerous" persons are locked up indefinitely and no others. Not only are we poor predictors of dangerousness but also we have a tendency to be over-inclusive when we do so. We also know that such sentences would run afoul of the Charters proscription against "cruel and unusual treatment or punishment" if it wasn't for the fact that parole reviews are mandated to enable the Correctional Services of Canada and the National Parole Board to tailor these sentences to fit the individual circumstances.

When the Supreme Court of Canada decided *R*. v. *Lyons (supra)* the initial review was at 3 years and then every 2 thereafter. That these reviews do not serve the function the Court had in mind is well illustrated by the Courts later decision in *R.* v. *Steele* (1990) 80 CR (3d) 257 (SCC).

I have not heard it being suggested that these hearings should be abolished or replaced by the application of "statistical tools" by social scientists. I wonder why that is so? After all the subject of the application is already an "offender" having been convicted of a serious offence. Perhaps it's because it's still part of the process that will determine the sentence and once that has been decided and fixed then we can relax and require much less exacting standards. After all these people are by then convicted criminals sentenced to imprisonment. They are being punished and don't deserve a full hearing with witnesses and counsel when their liberty interests are considered in the future. It is interesting how the flexibility in determining what Principles of fundamental Justice or fairness should be applied to the case vary not so much according to the nature of the decision, predicting risk to re-offend and affecting liberty, but according to ones status.

What follows are some examples of some specific problems that I have encountered or heard about in the course of my practice in relation to the use one of these tools—the Hare Psychopathy Checklist or PCL-R.

**(a) Harvey Andres**

In May, 1994, I was appointed by the Legal Services Society of British Columbia to act as counsel on behalf of one Harvey Andres on his application for judicial review, pursuant to s.745 of the *Criminal Code of Canada*, of his parole ineligibility period. This type of an application is presented to the Chief Justice of the Province who then designates a Judge who in turn presides over the empanelling of a Jury which ultimately will decide whether or not the parole ineligibility period should be reduced. The Rules governing this type of an application in British Columbia require the preparation of a Parole Eligibility Report by the Correctional Service of Canada.

When that report in relation to Mr. Andres was finalized in July, 1995, it included a psychological report by one James Seagers dated August 25, 1994. Mr. Seagers was the "acting" Chief of Psychology at the Saskatchewan Penitentiary. This report was summarized in the Parole

Eligibility Report and then the actual report itself was attached. There were six other psychological or psychiatric reports similarly summarized in the main body of the Parole Eligibility Report and attached as Appendices.

The report by Mr. Seagers was substantially more negative towards Mr. Andres than other reports, including reports that were both earlier and subsequent in time. In addition, Mr. Seagers applied a number of psychological tests purporting to measure risk, including one called the PCL-R. (the Hare Psychopathy Checklist). Mr. Seagers said that he had scored Mr. Andres and placed him in the 87th percentile on that test. This, he said, made Mr. Andres a high risk for general recidivism, saying that approximately 75% of men with similar scores will re-offend within 3-5 years after release. A report from Dr. W.J. Arnold, Ph.D., a registered psychologist, also with the Saskatchewan Penitentiary, conducted a subsequent assessment of Mr. Andres and came to quite a different conclusion than Mr. Seagers and specifically cautioned about the use of the so-called "actuarial indicators of recidivism risk" such as the PCL-R, which tend to focus on characteristics of the offence and are relatively insensitive to or ignore post incarceration change.

Given these differences of opinion and following my normal practice on s.745 review applications, I determined that we should have assessments conducted independent of the Correctional Service of Canada by a qualified forensic psychologist and similarly a qualified forensic psychiatrist. Consequently I arranged for the retention of such persons through the Legal Services Society of British Columbia and provided them with all of the materials, including the Parole Eligibility Report and the attached psychological and psychiatric reports and had them conduct full complete assessments of Mr. Andres.

On completion of the independent psychiatric and psychological assessments, there continued to be substantial differences of opinion compared to that of Mr. Seagers, including a substantial difference in the PCL-R score calculated by the independent psychologist I retained in comparison to the score calculated by Mr. Seagers. Consequently, I asked the psychologist to do a critique of Mr. Seagers' report and to educate me with respect to that report and, among other things, to fully inform and educate me with respect to the PCL-R and its protocols and requirements in order that I might firstly expose any errors in Mr. Seagers' report and thereby limit its weight, and secondly so that I might be prepared to cross examine him in the event that he was called by the Crown.

On conducting this investigation with the assistance of experts, it was determined that Mr. Seagers did not, as yet, have his Ph.D. and was not registered to practice as a psychologist in the Province of Saskatchewan. Subsequently, when we obtained the actual scores arrived at by Mr. Seagers, some further questions were raised as to how he was scoring the PCL-R and whether or not he was doing so in accordance with the protocols.

After the case for the applicant Mr. Andres was completed before the jury, which included the testimony of the independent psychiatrist and psychologist, the Crown chose to call evidence in reply, including Mr. Seagers. Consequently, I cross-examined Mr. Seagers extensively pointing out that he was not in compliance with the protocols for the PCL-R in that he did not have his Ph.D. yet, and was not registered to practice in the Province of Saskatchewan. It also became apparent from his evidence in chief that he had been modifying the scoring protocol because of his perspective in terms of public safety and had not disclosed this change in his report, leaving the readers of his psychological report to assume that he had in fact complied with the protocol. Without funding to investigate this matter and without examination in chief and cross-examination these defects would not have been discovered. I pointed out that this would be particularly true in front of the NPB. Even though he had never attended a hearing he knew that the Board would simply accept and read the report without question or assessment of the weight to be given to it.

Ultimately, on September 22, 1995 the Supreme Court Jury returned and reduced Mr. Andres' parole ineligibility date to approximately 19 years from 25 years, namely a reduction of approximately six years.

That was not the end of the story.

Subsequently, Mr. Andres was returned to his parent institution, namely the Saskatchewan Penitentiary where Mr. Seagers was continuing as the Acting Institutional Psychologist. On September 26, 1995 I received a telephone call from Mr. Andres informing me that he was going to have to continue to deal with Mr. Seagers who was continuing as the Acting Institutional Psychologist and that he anticipated considerable difficulties because of what had happened at the 15 year review hearing. He asked me to provide him with copies of the various psychological reports and curriculum vitaes for the authors of them. He inquired as to whether we

could obtain the transcripts of, among others, the examination and cross-examination of Mr. Seagers. He also requested the data that Mr. Seagers relied upon as well as the Hare Psychopathy Checklist protocol manual so that he could show the Warden and others the document that I was reading from during the course of the cross-examination and to simply show them the requirements of the protocol.

Ultimately, Mr. Andres began to experience the difficulties anticipated so my office arranged to send him the materials requested including a copy of the actual Checklist, Exhibit 17 in the Supreme Court proceedings, as well as the scoring completed by Mr. Seagers and the scoring completed by the other professional who testified. I also sent a copy of the protocol manual and the transcript of the cross-examination. I told him that this information should be used only in conjunction with their actual testimony.

I found out later that when Mr. Andres went to use the protocol or manual to make his points, it was seized from him and he was told that for some reason prisoners were not permitted to have a copy of this document and that only qualified psychologists or assessors were allowed to have them. I disagreed with that position and expressed the opinion to him that he was entitled to know not only the score on his assessment, but also the basis for it and in particular any materials showing how it was calculated or how it was not calculated in accordance with the protocols so that he could show this to Correctional Service of Canada authorities and thereby limit the validity and therefore the weight to be attached to that assessment. I further expressed the opinion to him that he would be entitled to this material in order to process any complaint that he might have against Mr. Seagers so long as he was not using the materials for any other purpose, such as trying to do assessments.

**(b) John Pinkney**

Around the same time, I was contacted by another prisoner at Mission Medium Institution, regarding a number of legal problems. One of them that involved a complaint regarding the use of the Hare Psychopathy Checklist at Mission Medium Institution by the institutional authorities, including the institutional psychologist Terry Gardy. It was alleged that he and others were not qualified in accordance with the protocols. I understood from him that not only was he having problems,

but others at the institution were having similar problems and that there was a wide divergence in some of the scores on some of the assessments for different people. He specifically mentioned problems being experienced by a Mr. John Pinkney. I arranged to have a copy of the Psychopathy Checklist manual or protocols sent in to him so that he could see what the requirements were in terms of qualifications for the assessors and could then use it in his grievances or the grievances of others, to ensure that the protocol was being complied with and if not, to ensure that the weight given to the assessments would be accordingly limited to the extent of any non-compliance.

Mr. Pinkney was moved to William Head Institution and made his own written application to the Federal Court. He had been turned down by the Board for Day Parole and asserted that the Board had relied in so doing on a PCL-R test conducted by an unqualified person and without his consent as required by Commissioners Directives. The test results characterized him as being high on the Psychopathy rating. Apparently the test had been conducted on him without his knowledge or consent or involvement and was based entirely on the psychologist's review of his case management and psychology files and his "prior interview impressions" of Mr. Pinkney. There were no other assessments on file diagnosing him as a psychopath. One earlier report from a psychiatrist suggested that he had some traits or features in this regard. The Board treated these reports as two diagnoses to the effect that Mr. Pinkney was in fact a "Psychopath".

The court stated: "With respect for the opinion of the Board on matters within their special ken, there simply is no evidence in the records of the applicant or the respondent of even one proper diagnosis of the applicant as a psychopath". See *Pinkney* v. *Canada* (Attorney General) [1998] F.C.J. No.261 (FCTD). However the Court declined to give Mr. Pinkney a remedy and gave effect to a preliminary objection made by the Federal Crown that he had failed to exhaust his statutory right of appeal to the Appeal Division of the NPB. In this regard the Court relied upon two decisions of the Trial Division to the same effect, namely, *Fragoso* v. *Canada* (National Parole Board) (19950, 101 F.T.R. 131 (TD) and *Fehr* v. *National Parole Board* (1995). 93 F.T.R. 161 (TD). Obviously a much earlier decision in the Court of Appeal to the contrary, *Morgan* v. *The National Parole Board*, (1982)65 CCC (2d) 216 (FCA) was not brought to the Courts attention.

The Court held that it should not intervene unless there was clearly a grave injustice which may not be otherwise remedied. The Court felt that this was not the case, particularly if administrative action was now undertaken to ensure no further prejudice arose to Mr. Pinkney. Consequently the Court went on to review the matter including the definition of "psychopathy" and concluded as follows:

> "These definitions differ, but an essential element of each is the classification of a mental disorder. There can be no question but that diagnosis of an individual with such a condition requires skill, knowledge and training at a high level. It is not entirely clear that the assessment of PCL-R rating for the applicant completed on October 20, 1996 was intended to be a diagnosis of the applicant in medical terms, but it was too easily relied upon as though it was, apparently by the Correctional Service itself and certainly by the National Parole Board. This, despite efforts of the applicant through the internal grievance process to have the report discounted." (*Supra* para 20).

The Court further noted after reviewing the protocol manual provisions with respect to qualifications that:

> "Moreover, simply on its face the Psychology/Psychiatric Assessment Report of October 20, 1996 which, inter alia, rated the applicant by the PCL-R scheme, ought not to have been intended, nor should it have been relied upon, as a diagnosis of the applicant's mental condition. It would be surprising if any qualified therapist with advanced training in clinical psychology or psychiatry, an essential qualification stated by Dr. Hare, the developer of the test, and by professional training standards, would purport to conclude a diagnosis in the manner this assessment was made, and the assessment may not have been intended as a diagnosis."

Finally the Court directed that a copy of its reasons be sent to the Chairman of the NPB and the Commissioner of Corrections and that they be told to give consideration to avoiding use of questionable psychological testing or assessments in future situations involving the applicant or other persons detained.

At the time of writing in late July 1999, nothing seems to have changed in British Columbia as far as I have been able to determine.

**(c) Ross Goodyear and Prisoners' Legal Services**

I was also aware that this prisoner was dealing with Prisoners' Legal Services of the Legal Services Society of British Columbia in relation to this issue. I was in contact with Megan Arundel at Prisoners' Legal Services and discussed with her this issue with respect to the Hare Psychopathy Checklist. Ms. Arundel informed me, that there were a number of people experiencing problems in relation to these assessments and confirmed that there were some that were saying that there was as much as a 50% divergence in the scores between different assessors. I sent her a copy of the Checklist and Manual so that she could use it for reference and research purposes in assisting her various clients.

In my discussions with Megan Arundel, I was informed by her of the case of Mr. Ross Goodyear who apparently had a Hare Psychopathy Checklist rating conducted on him by one Diane Mawson who was described as a psychological associate working in 1994 at the Regional Psychiatric Centre (Pacific). Apparently Ms. Mawson has a Master of Arts degree, but no Ph.D. and is not a psychologist registered with the College of Psychologists in British Columbia. She rated Mr. Goodyear apparently in the 100th percentile on the Checklist. A further rating was conducted by Dr. Ken Lum, a registered psychologist, also at the Regional Psychiatric Centre, who scored Mr. Goodyear as low to moderate. In addition, a Dr. Jackson, also a psychologist working with the Correctional Service of Canada, but at Elbow Lake Institution, did a further PCL-R assessment on Mr. Goodyear and he arrived at a score that was lower than Dr. Lum's. Consequently, because of the wide diversity in scores and the impact that this was having on Mr. Goodyear's security classification and conditional release prospects, Prisoners' Legal Services had an assessment done by someone independent of the Correctional Service of Canada, namely Dr. R. Ley. Dr. Ley's scoring results were between those of Dr. Lum and Ms. Mawson, but substantially closer to the low/moderate rating of Dr. Lum than the 100th percentile rating of Dr. Mawson.

Which one was the reliable one?

**(d) Peter Metcalfe**

Another client of mine, Mr. Peter Metcalfe, was to be sentenced on November 26, 1997 for a manslaughter that occurred when he was unlawfully at large from Ferndale Institution. On November 25, 1996, I received a copy of a Pre-Sentence Report pertaining to him. The author of the Report had attached to it a copy of a Memorandum from Mr. Terry Gardy, Psychologist, at Mission Medium Institution to Mr. Don Macdonnell, a Case Manager at the Institution. When I brought this to Mr. Metcalfe's attention he advised me that Mr. Gardy had come to see him for approximately five minutes at his request to discuss a previous Memorandum dated June 26, 1995 which contained a Hare Psychopathy Checklist Rating on him and other information that he objected to. He asked to see Mr. Gardy because the June 26, 1995 assessment had been conducted without anybody ever seeing him. He felt it contained misleading and inaccurate information. Consequently, as a result of Mr. Metcalfe's request, Mr. Gardy apparently attended on him for approximately five minutes in the segregation unit at Mission Medium Institution and subsequently Mr. Metcalfe did receive a copy of the July 20, 1996 Memorandum.

In the June 26, 1995 Memorandum, it was indicated that the Checklist rating was arrived at by a "review of the case management and psychology files and staff impressions of the a/m inmate." The July 20, 1996 Memorandum indicates that this latter Memorandum replaces the former Memorandum of June 26, 1995 and it also notes that the review of the case management and psychology files and staff impressions of the a/m inmate was conducted with Don Macdonell on June 26, 1995 to complete the Hare Psychopathy Checklist rating. In other words it confirms that the rating was done on the basis of file material alone and in conjunction with a case manager who does not meet the qualifications pursuant to the Hare Checklist protocol manual.

Fortunately for Mr. Metcalfe I was able to prevent the Crown from relying on this memo given their inability to prove it as an aggravating factor at sentencing under s.724(3) of the *Criminal Code*.

**(e) The plan for the future**

I then decided that I should buy my own copy of the Protocol Manual instead of working from the photocopy that I had used during the Andres' case. I consequently ordered three copies. It was my intention

that I would keep one copy in my office and then be in a position to lend out up to two other original copies to others who might need to refer to it for reference purposes in ensuring compliance with the protocols. I intended to lend the additional copies to prisoners having these specific problems or to paralegals assisting them or to the Prisoners' Legal Services.

I completed the "Test User Qualification Statement" that was required and sent them a letter stating that I would only be using the manual for reference or research and not for administration or assessment purposes. In addition I telephoned the company and told them that I required these manuals because various client prisoners were experiencing problems with people not complying with the protocols and that we wanted to have these manuals to ensure compliance with the protocols. Ultimately it cost me $429.34, representing the cost of three manuals, plus shipping, handling and taxes.

I understood that there were others who were experiencing similar problems with these assessments as they were by then being conducted extensively throughout Canada and elsewhere. A high rating on the assessment has a very detrimental impact on the liberty interests of such prisoners in obtaining passes or any form of conditional release or even transfers to lesser security. To be labelled as having a very high rating on the Hare Psychopathy Checklist is analogous to being labelled a "Dangerous Offender" in terms of the effects and consequences of the label. However, as mentioned above the "Dangerous Offender" label can only be attached after a full judicial hearing with witnesses, examination and cross-examination. To be a Hare "Psychopath", however, one need only be a prisoner, interviewed by an untrained staff member under the supervision of the institutional psychologist or by other persons who do not have the qualifications required by the protocol manual and with no means of ensuring compliance.

Throughout, my use of the Hare Psychopathy Checklist protocol manual and a copy of it, was to try to assist my clients and ensure that they were not only assessed in accordance with the proper protocols as set out in the manual, but also that they were treated fairly in a procedural sense and in accordance with the principles of fundamental justice as set out in the *Canadian Charter of Rights and Freedoms*. Also to ensure that, at a minimum, they were fully advised of the case against them or the case relied upon against them and the basis for it in order that they might have a fair opportunity to respond to anything adverse to them. At no time did

I use the protocol manual for the purpose of conducting assessments or allowing others to do so and I only used the manual and its information for reference and research purposes to ensure compliance with it and the Constitution.

**(f) The aftermath**

It was a friend and colleague of Dr. Hare that seized the Protocol Manual from Harvey Andres. Communication took place between the Saskatchewan Penitentiary and Mission Medium. They discovered that the copy they each had, had identical written markings. Someone contacted Megan Arundel at Prisoners' Legal Services and determined that the copy she possessed had the same markings. They put two and two together and figured out that they were none other than my markings in preparing my cross exam in Andres. Dr. Hare was notified. Something had to be done. That I was trying to ensure that the protocol was complied with by the CSC did not seem to matter. Without realizing that I had in fact bought three copies of his manual at significant expense, he sued me. He is claiming damages for breach of confidentiality and unlawful interference with economic relations. He wants a permanent injunction to restrain me from further breaching his copyright and from unlawfully interfering with his economic relations by improperly copying and distributing the Hare materials. Essentially he wanted to stop me from distributing the materials to prisoners who are affected by them and cannot afford to pay for them. My sources tell me there are literally dozens of copies floating around that are used by staff. We secured the return of the photocopies I sent out—all 3 of them. This was in November 1996. Since then we have been hard pressed to get him to continue with his action. We would like to establish that the principles of fundamental justice and the duty to act fairly supersede his economic interests.

I was about to start lending out my purchased copies when I was informed that the CSC had declared possession of such materials to be "contraband". S.2(e) of the *CCRA* defines such to be—any item not described in paragraphs (a) to (d) that could jeopardize the security of a penitentiary or the safety of persons, when that item is possessed without authorization. In the opinion of Mr. W. Black, Legal services to CSC, possession of this type of material by an inmate is contraband because inmates could use it to distort test results, which in turn could affect the safety of persons or the security of a penitentiary if they were released or

transferred to lower security based in whole or in part on the strength of such distorted results. In Mr. Blacks opinion such materials if found in the possession of an inmate may be seized under s.65 of the *CCRA* and forfeited under subsection 59(4) of the Regulations, after giving the inmate a reasonable opportunity to arrange for its disposal or safekeeping outside the penitentiary or after charging the inmate with a disciplinary offence under s.40 (I) or (j) of the *CCRA*. Another possibility suggested by him is that institutional heads could prohibit the entry of such materials into or the circulation of them within the prison because there are reasonable grounds to believe it would jeopardize the security of the prison or the safety of any persons. A memorandum from Senior Deputy Commissioner Lucie McClung to the same effect was circulated to all Deputy Commissioners in March 1997.

Interestingly enough Dr. Hare has also deposed that the dissemination of these materials to inmates could damage the credibility and potentially the reliability of the test because they could "prepare" for the interview. The only problem I have with all of this is that it has been confirmed to me by original researchers and by observation that the test is primarily scored on the inmates file materials, frequently without an interview or on occasion a brief one to see if the inmate acts like his file depicts him or is trying to impress the interviewer differently. Certainly a 1 1/2 hour interview, as called for in the protocol, rarely if ever takes place within the CSC.

I am also wondering if this means that Dr. Hare's book, and the many articles he has written and published about the workings of this tool are also banned reading material by CSC inmates.

**Conclusion**

In my opinion, the problem with these types of tools was succinctly identified by Professor Ron Price Q.C. in his editorial for the Journal of Forensic Psychiatry (Vol. 3 No 1May 1997) entitled "On the risks of risk prediction" as follows:

> "Those appointed to tribunals called upon to hear such cases are not qualified to assess the validity of the instruments relied upon, or even the possible sources of error. Nor are the case management staff whose reliance upon such data in management and release recommendations has become their assurance of security."

At first he quotes from an article by Nikolas Rose in the History of the Human Sciences which points out the recent shift in the "psy-disciplines" from dangerousness, which is a property of the concrete individual, to risk, which is a combination of factors which are not necessarily dangerous in themselves and how this has caused these professionals to re-code problems previously understood and their obligations in the language of risk. He points out how the logic of prediction has come to replace the logic of diagnosis and that this is a logic at which the psychiatrist can claim no special competence. Prof. Price says that persons speaking to issues of ethics, law or systemic implications are notably absent by design from conferences held by those practitioners of the "craft of risk assessment".

Addressing his concerns to the current practices of the National Parole Board Prof. Price most accurately points out that the small group of lawyers who represent the detained in Canada are well aware of this 'paradigm shift' in the approach of the agencies of the state to our clients. He notes:

> "In proceedings before the National Parole Board, the bottom line in the decision process, more often than not, is a document—a risk assessment—accepted by the tribunal without any of the customary means of testing the reliability of the evidence (restyled 'information') being relied upon. In any practical sense, challenges will not even be entertained. Where there are positive recommendations, even by experienced treating professionals, these are routinely trumped by a negative risk assessment."

He goes on to point out, that the authors of these assessments are rarely present to explain or answer for their opinions. They are considered to be specially trained technicians to which the conventional rules of 'expert' testimony do not apply. Most importantly he points out:

> "Clinical records and correctional files, in common and demonstrable experience, contain numerous errors. Much of this has to do with how record keeping obligations are performed in institutional settings. Incorrect 'facts', and interpretations of facts, follow detainees through the years, as report parrots report. Where clinicians are called to testify, errors can often be shown through questioning. How is this to be done of the absent witnesses who compile risk assessments? The interpretation of 'facts' reflected in risk assessment coding sometimes strains credibility."

He then notes that reports are prepared by psychiatrists and psychologists that commonly incorporate risk assessment scores into their conclusions even though their expertise is not in the methodology of risk assessment. In this way the "psy-disciplines" give their imprimatur to what would otherwise not pass the test for accepting opinion evidence as expert. It also causes these clinicians to collude with a non clinical social agenda of preventative confinement.

After raising the numerous questions that arise about every one of such risk assessment tools he concludes with a quotation from Grisso and Appelbaum (1991-'Is it Unethical to Offer Predictions of Future Violence?' Law and Human Behaviour 16:621-33) calling on the psy-practitioners to question the ethical basis of their involvement in this process:

> "Independent of that which is accepted by society or the law, professionals have an obligation to consider the potential effects of their testimony about risk statements with high false positive rates, and to question whether the law's use of their testimony violates their professional ethical standards".
>
> To this I say—Amen.