

A New Act for Prisons and Parole

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As of November 1, 1992, the *Corrections and Conditional Release Act* governs federal prisons and parole in Canada. The Act is practical and progressive. It relies heavily on the concept of reintegration in directing the Correctional Service of Canada (CSC) and the National Parole Board (NPB). Having spent the past 16 years in Canada's federal penitentiaries, I see the Act as a welcome milestone in the evolution of prison management in this country. What follows is commentary on the Act and related matters.

At the outset, I qualify my assessment of the Act as practical and progressive. The Act is better described as having the potential to bring forth positive change, than as having done so already. This qualification is important, because Canadians in federal detention generally expend little energy in pursuing collective interests, and because this may remain so, despite the opportunities the Act creates for them. Further, current prison managers developed their work habits in a more authoritarian work environment than the one prescribed by the Act, and one expects they will be slow to change those habits. The same can be said about many of the CSC's front-line staff members. A pessimist might think the apathy of prisoners and the authoritarian approach of current managers will combine to rob the Act of its potential. Being an optimist, I think otherwise.

An appreciation of the Act's potential begins with understanding the concept of reintegration and its embodiment in the Act. With very few exceptions, all Canadians in federal detention will be released at some point. Given this inevitability, the most practical purpose the CSC can have is to assist the people in its charge to prepare for a crime-free life outside. And, in fact, section 3 of the Act states:

The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by

- (a) Carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and
- (b) assisting 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.

Before examining the key provision that relates reintegration specifically to the management of individuals under sentence, and in order to keep the progressive as well as the practical nature of the Act in mind, I point out that the Act directs both the CSC and the NPB to use the 'least restrictive' means available to them. In Part 1 of the Act, which deals with corrections, section 4 provides ten principles 'that shall guide the

Service [CSC] in achieving the purpose referred to in section 3 [above].'
Two of these are of interest here:

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

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

Part II of the Act, which deals with conditional release (i.e. parole), contains a guiding principle similar to (d) above.

Prisoners will have to rely on the courts, if they expect to benefit much from these provisions. I believe one ought to accept this as natural because one knows relations between keepers and those in their care and custody contains an inherent imbalance of power, and because one ought to know that this imbalance of power is improperly exploited, more often than not as a matter of convenience, sometimes out of malice. It follows that those who abuse their power as a matter of course will resist complying with provisions meant to curtail such abuse. If one accepts this idea at face value, one better understands why an apathetic prison population will realize only a portion of what the Act promises.

A look at Section 74 provides the opportunity to detail a recent exploration of the Act by the inmate committee of this prison. Section 74 reads:

The Service shall provide inmates with the opportunity to contribute to decisions of the Service affecting the inmate population as a whole, or affecting a group within the population, excepting decisions relating to security matters.

Since all CSC decisions relate, at least indirectly, to security matters, one assumes that, in complying with this section, the CSC should include only those decisions where doing otherwise would constitute a *breach* of security. To date the administration of the prison I am in has virtually ignored section 74. Our Inmate Committee recently asked for a copy of the 'Master Development Plan' for the prison, because the allocation of space within the prison had become a matter of concern to the population and because whenever the Committee broached the subject and made suggestions, it was told the allocation of space was being dictated by considerations arising from the Master Development Plan. When the Committee requested to see the Plan, the Warden responded by saying a copy would be provided when the plan was completed. The Committee rejoined that it would then be too late to contribute to decisions affecting the Plan, and since the Plan was already affecting the whole population, continuing to withhold the Plan from the Committee amounted to a violation of section 74. The Warden said he would have the Plan doctored so that providing it would not reveal ducts, tunnels, and security installations and would then give a copy of the doctored Plan to the Committee. It is clear the Warden would not have agreed to

produce a copy of the Plan upon request had the Committee not used section 74 to force the issue. It was also clear that the Warden was not pleased at being put in the position of having to choose between producing a copy of the Plan before he wanted to and possibly violating this section.

By itself, the matter of whether or not the Committee's request for a copy of the Plan is granted has little significance. In a greater sense, however, the matter represents a test of section 74 and thus in the context of these comments, a test of what I call the Act's progressive nature.

Assuming the Plan is shared with the Committee, what are the ramifications?

First, the possibility of better allocating space is created by giving interested prisoners the information they require to make useful suggestions. Second, awareness of the Act's potential is raised. On the downside, one would count the time and effort expended by the person who had to doctor the Plan. One might also have to include here the possibility that forcing the issue might have caused resentment and that this may yet have negative repercussions. The downside of this episode deserves additional comment, because it applies in similar situations.

As in the example above, providing the opportunity to contribute to a decision will often require that managers first make the context in which a decision is being made clear to the prisoners who might contribute to the decision. This process will always take some time and effort, and one can foresee instances in which managers would feel that time and effort so expended was wasted, because the prisoners involved did not reciprocate by taking the time and expending the effort that would have been required to make a meaningful contribution to whatever decision had been made. Further, if, for example, prisoners entered into this process in bad faith, perhaps looking only to cost managers time and effort, it is likely that future possibilities of benefiting from a cooperative effort would diminish in number and scope and with just cause. One should recognize that a manager can influence a prisoner's personal situation a great deal with minimal effort. The rule here is simple: those who oppose their keepers pay, and those who help their keepers get paid – payment being measured in how much time a person serves and under what conditions. Given the position a manager enjoys relative to an individual prisoner, and given the demands that compliance with this section would make on managers, it is likely that managers and national CSC planners have purposely avoided setting any policy regarding section 74.

The CSC does comply with provisions relating to reintegration. It began developing this idea years before the Act took effect. Section 102 of the Act's Regulations deals with reintegration directly. Section 102, subsection (1) obliges the CSC to develop a correctional plan for each inmate and to maintain the plan

to insure that the inmate receives the most effective programs ... to prepare the inmate for reintegration into the community ... as a law-abiding citizen.

Prisoners who work toward release according to their correctional plan seem to be afforded insurance that their efforts will not be in vain by way of subsection 107(2) of the Regulations, which states:

When considering program selection for, or the transfer or conditional release of, an inmate, the Service shall take into account the inmate's progress towards meeting the objectives set out in the inmate's correctional plan.

Section 102, subsection (2) is of special importance to those targeted for detention until the end of their sentences, i.e., those who could be denied conditional release altogether. People serving definite sentences who have not been ordered detained until warrant expiry can be released before and, by law, must be released at the two-thirds mark of their sentences. Release at two-thirds of sentence is called statutory release. The Act expands the target group for detention beyond two-thirds of sentence from only those likely to commit further serious violent offenses to include those likely to commit further serious drug offenses. Each case for detention beyond two-thirds of sentence is decided by the NPB at a detention hearing. As with any other parole hearing, the prisoner has the right to have an assistant (legal or other) at a detention hearing. It is yet far from clear how many of those targeted for detention under the expanded provisions will actually be detained. Given the wording of Regulation 102 (2), one thing is clear: it will be harder to make a case for detention against those who follow their correctional plans, than against those who do not.

The programs that CSC offers prisoners in relation to correctional plans, rehabilitation, and reintegration vary between prisons and regions of the country, and range from a gem that qualifies prisoners as electronics technicians to intense, individualized treatment by psychiatrists and psychologists intended to modify violent criminal behaviour. However, the bulk of the programming offered falls into two broad categories: drug and alcohol rehabilitation, and living skills training. The rehab programs vary in quality and intensity, beginning with Narcotics Anonymous and Alcoholics Anonymous and ending with programs offered only at isolated facilities managed exclusively around the specific rehab program that the facility offers. Under the heading of 'living skills training' one finds programs like 'Street Readiness,' which prepares people for release by directing them to social assistance agencies, helping them to restore lost ID, and instructing them in how best to find and keep work; one also finds programs offering help in controlling anger. These programs are designed and delivered by professionals, i.e., teachers, social workers, and psychologists. Unfortunately, the CSC is moving from offering living skills training (l.c.) to offering Living Skills Training (u.c.). The latter consists of five short modules and seems to represent the barest minimum of what can be said to constitute a program under section 3. It was designed by the CSC

and is delivered exclusively by people who entered the CSC as guards and case workers. I see this move as unfortunate, because ex-guards and ex-case workers generally do not influence prisoners a great deal in a classroom type of setting. One reason the CSC relies on its own this way is that section 4 of the Act contains a guiding principle that obliges the CSC to provide 'appropriate career development opportunities' for staff members. Ironically, compliance with this provision reduces the effectiveness of some programs the CSC provides in compliance with section 3.

A thorough evaluation of programming within the CSC is beyond my purpose here, and given the CSC's reluctance to disclose specific information about its activities in this area, it is likely beyond my ability as well.

Section 81 is, perhaps, the most interesting and progressive section in the Act. It may also prove to be the most practical. Its subsection (1) reads:

[The Solicitor General of Canada] may enter into an agreement with an aboriginal community for the provision of correctional services to aboriginal offenders and for payment by the [Solicitor General] ... in respect of the provision of those services.

Subsection 81(2) reads:

Notwithstanding subsection (1), an agreement entered into under that subsection may provide for the provision of correctional services to a non aboriginal offender.

Subsection 81(3) reads;

In accordance with any agreement entered into under subsection (1), the Commissioner [of the CSC] may transfer an offender to the care and custody of an aboriginal community, with the consent of the offender and of the aboriginal community.

Section 81 is particularly interesting in light of the national referendum held in October, 1992 on whether to accept the Charlottetown Accord (a proposed package of constitutional amendments) because the accord had included making Native self-government a constitutional right. The Charlottetown Accord was not accepted by Canadians, though polls concerning the referendum showed a substantial majority of Canadians favoured granting Canada's First Nations the right to govern themselves. Since the parties who would negotiate Agreements under 81(1) spent energy considering self-government leading up to the referendum, they are now in a favourable position with regard to this section.

The progressive aspect of section 81 is self-evident. An understanding of the practical aspects of the section may benefit from further comment. The first thing to consider is that Native communities will not likely build jails and prisons that resemble those of the federal

government, and one cannot well imagine the Solicitor General expecting otherwise. Section 81 is obviously meant to make allowances for the cultural differences between Native societies and Canadian society at large. One therefore assumes that an agreement under 81(1) would see a prisoner in a Native community 'held' there by her or his honour. This would eliminate the cost of custody, leaving only the cost of care by the community. At present, it costs the federal government approximately \$50,000 per year to keep one person in federal detention. One assumes communities can care for a person for considerably less. If this proves to be the case, agreements may be reached quickly; if they are, and if they prove beneficial to all concerned, the door to innovation throughout the system could be thrown wide open.

The Act is not without an odious aspect: urinalysis has been reinstated. The previous provisions for testing federal prisoners for drug use by urinalysis had been ruled unconstitutional in *Jackson* 1990. This Federal Court decision left everyone expecting that the CSC would simply revise its provisions, because the Court ruled mandatory urinalysis for prisoners *per se* was not unconstitutional, only that the provisions in use at the time failed to provide sufficient safeguards against violations of a prisoner's right not to be deprived of the fundamental principles of justice and the right against unreasonable search and seizure. It is certain that the new provisions will be examined judicially as well. In the meantime, the CSC and the NPB are making full use of the Act's provisions in this area.

At the time of this writing, the Solicitor General is sponsoring two bills dealing with 'preventive detention' *beyond* the end of a person's sentence. As with detention until end of sentence, any laws that might allow detention beyond that point would have to be judged on their application. Public pressure to keep violent people in prison is real, influential, and understandable. It makes no sense to release someone from detention, being certain the person will commit serious harm to others. But who has to be certain? What makes the person certain, and how exactly will that and should that affect the person who is consequently detained?

There is no mention of preventive detention in the *Corrections and Conditional Release Act*. The possibility of preventive detention being legislated, however, relates to the Act here in as much as it serves to show that laws affecting prisons and parole are subject to relatively quick and substantial change. It is because of this quality that I see the Act, which by law will undergo a comprehensive review five years from the date it took effect, as a window of opportunity. This Act has a distinctly holistic spirit, as evidenced by its reliance on reintegration, in defining its purpose, and in directing its resources. This is good. It should be exploited.

In closing I say to my fellow prisoners, let us make good use of the practical and progressive nature of the Act. To the community at large I say, wish us luck, because you will benefit if we succeed.

Post Script

This Monday, October 4, two letters were posted for the population of this prison to read. One came from the Inmate Committee, William Head Institution (WHI), a minimum security prison on Vancouver Island in British Columbia. It is dated August 31, is addressed to our committee, and includes the Federal Court ruling of August 13 that quashed the CSC decision to terminate the university program at WHI.

The ruling concludes:

Because the respondent [Her Majesty the Queen (CSC)] did not comply with section 74 [above], the decision to terminate the Simon Fraser University program at William Head Institution is quashed. Any new decision with respect to the program shall be taken only in accordance with section 74 of the Act.

The decision to quash is based on the CSC's failure to consult with prisoners *before* terminating the program at WHI. As quoted from the ruling, the CSC argued that:

section 74 does not require consultation with inmates prior to decisions being made, but that discussion with inmates after such decisions are made is sufficient compliance with that section.

J. Rothstein disagreed, writing:

The necessary implication of the words in section 74 and the accompanying heading [Inmate Input into Decisions] is that the opportunity to contribute must be afforded to inmates before and not after a decision affecting them is made.

Based on this ruling, the CSC has initiated a consultation process concerning the fate of university programs in all federal prisons. This brings me to the second letter posted on Monday. It is from our warden to our inmate committee. It includes what university students here say is a fictional account of consultations with them about this year's termination of the Queen's University program in this prison. Also included in this letter is a deadline for submissions on the fate of university programs in all federal prisons: '*no later than noon on 8 October 1993*' (emphasis in the original). Given that those prisoners affected by the termination of university programs, at WHI, and here were not consulted before decisions to terminate those programs were made. And given that prisoners here have, according to our warden, but four days to prepare submissions on the fate of all such programs, one cannot help thinking the CSC will not willingly act in accordance with the spirit of section 74.

The court action of the Inmate Committee of WHI and the subsequent ruling hint at the Act's potential.