

## Con Game : The Truth about Canada's Prisons?

The subtitle of Michael Harris' new book *Con Game: The Truth about Canada's Prisons* holds out the promise that by carefully reading between the covers, the Canadian public will get the straight goods. What Michael Harris in fact delivers is a bill of goods calculated to inflame public fear. In the process Mr. Harris manages to misread the history of correctional policy, misinterpret the relevant law (including the impact of the *Canadian Charter of Rights and Freedoms*) and gets many of the facts wrong. As an exercise in populist journalism, designed to curry favour with those who advocate tougher prison regimes and longer sentences, *Con Game* plays well. As an exercise in providing public information to move the Canadian prison system in the direction that balances both public safety and human rights, Michael Harris' book is indeed, as its title states, a "con game".

In his first chapter Harris provides a factual and detailed account of the first weeks in the life of a newly admitted federal prisoner, as the prisoner goes through the intake assessment phase of the sentence which will determine his security rating, the institution in which he will be placed and his correctional plan. Harris' style is documentary as he presents the reader with the institutional regime faced by a new prisoner. However, on page 19 his focus abruptly changes:

The realities are a little different from the official version of how the assessment unit and the prison runs. Asked what a typical shift at Millhaven was like, one correctional officer agreed to take notes during his working day.

What follows is an account of prisoners verbally abusing the staff, refusing to lock up when ordered to do so and threatening to assault staff. All of this is reported with no indication that any disciplinary charges resulted from this action, clearly conveying the impression that the staff are expected to tolerate such abuse with impunity. Indeed this implication is made explicit when Harris reports that one officer wrote out an observation report after his life was threatened four times by an inmate at Millhaven; however the only result was that the "guard was moved to a different post after his shift ended, sending a clear message to inmates that they could make death threats without consequences, or so the guard in question believed." (p.22)

Now it is quite true that many staff do tolerate a level of verbal abuse as part of the give and take of life in prison. However, to suggest as Harris does, relying upon the statements of a single officer in one institution, that repeated death threats against a staff member are regularly condoned, flies in the face of my

own observations, over many years, based upon reviewing hundreds of disciplinary cases.

This example illustrates a disturbing problem I found in Harris's account of life inside prison; he paints with a broad brush, although the picture provided to him is from a narrow perspective of sources which are either not identified or which often turn out to be but one officer.

Another example of this is in Harris's chapter on Kingston penitentiary. Harris refers to case of Robert Gentles, a prisoner who in 1993 died of asphyxiation during a forcible cell extraction. Following both an internal inquiry and an extensive coroner's inquest, policy changes were implemented to place greater controls on the staff's use of force to ensure that they were in compliance with the law.

The result, according to Harris, is that institutions have become far more tolerant of violence, of drug use on the ranges, and inmates have lost respect for staff authority in the higher-security prisons. Harris gives no sources for this bald assertion. However, relying upon one guard he states, that in the wake of Gentles, "it's all intimidation and brute force, and who has the most drugs to sell." Harris continues, "As a result, front line staff have little doubt that it is the prisoners who really run the institutions: 'no doubt about it, we can do nothing to them now. Absolutely nothing. At one point, at least we had the threat of being able to lock them up and change them, or some type of control. Now you tell them you are going to charge them – they laugh at you.'" (p.48-49)

The proposition that prisons have become a free-fire zone in which prisoners can resort to violence against staff and their fellow prisoners with impunity, because of policy changes designed to ensure that the staff's use of force is exercised in compliance with the law is completely unsubstantiated by any of the evidence presented by Harris. That evidence appears in the form of accounts of several riots that have occurred at Kingston and Millhaven, the causes of which have absolutely nothing to do with policy changes designed to ensure that prisoners do not die in the course of cell extractions. The riots of Kingston and Millhaven, like most prison riots, have multiple causes and Harris's simplistic explanation does little to help public understanding. If you want to know the truth about why prisoners riot, you will not find the answer in *Con Game*.

Millhaven and Kingston have featured heavily in the history of prison riots over the past thirty years. Eruptions in Millhaven, along with riots in two other maximum security prisons, in Quebec and British Columbia, led to the establishment of the 1977 Parliamentary Sub-Committee on the Penitentiary System. The Sub-Committee's report in many ways laid the foundations for major changes in Canada's federal prison system. In their report members of parliament, after describing the riots, sought to provide the Canadian public with a greater understanding, not only on the immediate precipitating causes of the

riots, but the deep seated and systemic problems that plagued maximum security institutions in the 1970's. These were identified as a "a fundamental absence of purpose or direction [that] creates a corrosive ambivalence that subverts from the outset the efforts, policies, plans and operations of the administrators of the Canadian Penitentiary service, saps the confidence and seriously impairs the morale and sense of professional purpose of the correction, classificational and program officers, and ensures, from the inmates perspective, that imprisonment 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 a country" (Report to Parliament, p. 156).

As I point out in *Justice Behind the Walls*, much has changed since the 1977 parliamentary committee report and explanations for more recent riots in Kingston and Millhaven need to be analyzed and understood, not only in terms of their historical precursors, but also in light of contemporary realities. Michael Harris's book, while heavy on the graphic detail of what happened during the riots, tells us nothing about the contemporary causes of these riots, nor offers pathways to avoid their recurrence. As a one person royal commission, as one commentator described Michael Harris, his prescriptions for change are glaringly absent.

There are also serious problems with Harris' use of statistics. For a journalist who charges that CSC manipulates its official statistics on recidivism, Harris' reliance on statistical evidence to support his own arguments is hardly exemplary. As evidence of his assertion that pro- prisoner law and policies have made prisons more dangerous, he states, " According to the CSC performance report released in November 2001, major assaults by inmates jumped from thirty-one in 1998-1999 to fifty-four in 2000-2001."(p.62) Because the assertion that prisoner violence is increasing was not what my own research suggested, I reviewed the figures for the two years before the CCRA was introduced (1990-1992) and the ten years since (1992-2002 ). This is what they show.

#### Federal Statistics – Major Assaults on Inmates

1990-91	45
1991-92	62
1992-93	52
1993-94	56
1994-95	58
1995-96	54
1996-97	45
1997-98	45
1998-99	31
1999-00	43
2000-01	54
2001-02	32

While Harris is correct in stating that the 2000-01 number of 54 is a “jump” from the 1998-99 number of 31, it does not take a Ph.D in statistics to see that the 1998-99 number is the lowest number of assaults in the twelve year cycle. Looking at the numbers as a whole it is clear that there has *not* been any increase in major assaults from 1990 to 2002; indeed comparing the six years from 1990-1996 with the six years from 1996-2002 there is a downward trend, to which 2000-01 is the exception. The numbers provide no support and indeed contradict Harris’ “ violence is rampant and escalating” thesis.

One of Mr. Harris’s favourite targets throughout *Con Game* is what he characterizes as a “prisoner-friendly” legal regime, created by the *CCRA* and the *Canadian Charter of Rights and Freedoms*. For example, in describing the problems authorities have at Fenbrook Medium Security Institution in Ontario in controlling the institution’s serious drug problem (a problem shared with almost every other federal institution) Harris writes:

“The CCRA and the Charter hamstring the way officers can conduct search and seizure operations at federal penitentiaries. Even if there is good information that a prisoner is going to bring drugs in, current laws stipulate that authorities have to prove it ‘beyond a reasonable doubt’ before the warden will authorize an intrusive search.”

If Mr. Harris had taken the trouble of reading the *CCRA*, he would find the following provision in section 60(3):

“Where a staff member believes on *reasonable grounds* that a visitor is carrying contraband or carrying other evidence relating to an offence under section 45 [section 45 makes it an offence to deliver contraband to an inmate] and that a strip search is necessary to find the contraband or evidence,

- (a) the staff member may detain the visitor in order to
  - (i) obtain the authorization of the institutional head to conduct a strip search, or
  - (ii) obtain the services of the police; and
- (b) where the staff member satisfies the institutional head that there are *reasonable grounds* to believe
  - (i) that the visitor is carrying contraband or carrying other evidence relating to an offence under section 45, and
  - (ii) that a strip search is necessary to find the contraband or evidence,the institutional head may authorize a staff member of the same sex as the visitor to conduct a strip search of the visitor.

.As is readily apparent, what is required for a search is “reasonable grounds” which is a quite different and far less onerous standard than “proof beyond a reasonable doubt”.

According to Harris’s sources, CSC is rendered impotent to control the influx of drugs through visitors. The existing legal powers of search, including the power to place a prisoner in a dry cell, the use of drug dogs and ION scan devices are all dismissed as insufficient weapons in the war against drugs. Completely absent from Harris’s analysis is any recognition that correctional authorities are given significantly greater powers to conduct searches within federal penitentiaries than the police have on the street. Harris is right in saying, that even with these greater powers, drugs continue to flow into prisons, and that this flow is facilitated by visiting policies which allow for contact visits. What Harris does not acknowledge is that this is one of those areas where the law and correctional policy seeks a balance between encouraging and facilitating contact between a prisoner and his family and community on the one hand, and maintaining a safe and secure institution. There is no doubt that cutting off contact visits and requiring that all visits be behind glass would have a major impact on reducing the flow of drugs; it would also have a crippling effect on prisoners and their families in the already difficult task of maintaining a semblance of family life and an equally chilling effect on prisoner’s ability to develop community support networks to help them on their return to society.

In *Justice Behind the Walls*, in the internet chapter on visit review boards, I have described how these boards, relying upon CSC’s National Drug strategy, use drug dog and ION scan hits as virtual proof of a visitor’s drug involvement in ways which would be clearly unacceptable outside of prison, resulting in visitors being unfairly stigmatized and visits unfairly restricted. Striking the right balance between a humane visiting regime and a safe penitentiary is an extraordinary difficult one that calls for a recognition of the competing interests at stake. In *Justice Behind the Walls* I have tried to both identify those interests and have suggested how the law and administrative practice should respond to achieve that balance. In *Con Game*, Michael Harris not only fails to recognize that there are competing interests, but misstates the law in suggesting that it renders the administration impotent to protect its and the public’s interests in running safe prisons.

In chapter 4, Harris grapples with the issue of “Native Justice. His agenda appears to be that of undermining the legitimacy of any legislative, judicial or administrative initiative designed to redress the over- representation of Aboriginal peoples in prison, an over- representation described by the Supreme Court of Canada as a “crisis in the Canadian Criminal Justice System”. This is also one of the chapters in which Mr. Harris amply demonstrates his shallow understanding of the very realities of which he professes to speak the truth and his inadequate understanding of the law. In describing CSC’s efforts to develop

rehabilitative and healing programs responsive to Aboriginal prisoner's needs and experience Harris writes:

"CSC management believes that Aboriginal offenders respond better to programs developed and delivered by the Aboriginal community, an apparently enlightened view that could equally be viewed as passing-the-buck."

This is faint praise indeed. The facts of the matter are that the CSC, albeit initially reluctantly, in establishing such programs, has responded to the recommendations of almost every royal commission and commission of enquiry that has looked into the issue of Aboriginal peoples and the criminal justice system in Canada, and has endeavoured to recognize that there are significant cultural differences between Aboriginal and non-Aboriginal peoples that must be taken into account if justice and correction are to be achieved. Harris himself, at the beginning of this chapter, refers to the report of the Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide*, and its conclusion that the Canadian criminal justice has failed the Aboriginal peoples of Canada, mainly because of the fundamentally different world view that Aboriginals hold about justice and how it is achieved (p.83). Why then does Harris on the next page characterize CSC's efforts in this regard, which have now been legislatively mandated in the CCRA, as "an apparently enlightened view that could equally be viewed as passing the buck? Apparently, for Harris, any efforts to involve Aboriginal peoples in resolving the systemic and individual problems that the legacy of colonialism and racism have brought to their communities is suspect.

Mr. Harris goes on to level a particular criticism of CSC's culturally appropriate substance abuse programs, native liaisons services and spiritual programs. "A glaring problem with the special-treatment approach is that there is no one Aboriginal culture. Cree, Sioux and Dene, for example, all have their own distinctive traditions. What if an inmate does not belong to the particular tribe offering a particular program? There appears to be a blending of different traditions that has, in effect, corrupted authentic tribal traditions rather than incorporated them into correctional programs" (p. 84).

Rather than trying to position himself as a defender of "authentic tribal traditions" Mr. Harris would have done better to continue his investigations into the truth about Canada's prisons by reading James Waldram's *The Way of the Pipe*: Aboriginal spirituality and symbolic healing in Canadian prisons, the leading academic work in this area. In commenting on Waldram's research the Royal Commission on Aboriginal Peoples provided this balanced opinion:

Some may criticize this development as a form of pan-Aboriginalism that fails to reflect the cultural diversity of Aboriginal peoples. There is no denying, however, that the form in which Aboriginal spirituality has

developed in the prison context has provided a powerful magnet for Aboriginal people who had hitherto remained outside any constructive circle in which they could share both their pain and their dreams. In his interviews with prisoners at a prairie institution, who came from very many different cultural backgrounds, Waldram found they were not troubled by the nature of the spirituality being offered, including those with the firmest roots in an Aboriginal culture. It would seem that both prisoners and elders understand that in the contemporary situation in which they find themselves, there must be a search for some common denominators linking their distinctive cultures and experiences so that they can address the critical issue of healing. That the specific ceremonies and forms of spirituality differ from those of any particular Aboriginal tradition does not negate their essential character ...

The experience of Aboriginal spirituality in the prisons may provide one of the models for the development of an urban Aboriginal justice system that would seek to build on the common denominators between different Aboriginal traditions to respond to the issues facing urban Aboriginal people on the brink of the 21<sup>st</sup> Century. It is a model that while celebrating the cultural diversity of Aboriginal Nations, looks to a common framework for their expression. The experience of Aboriginal prisoners and their work with elders demonstrates that the achievement of a common framework is not only an laudable but an achievable objective.” (*Bridging the Cultural Divide* p. 136)

What for a real royal commission is “not only a laudable but an achievable objective” is for Mr. Harris “a glaring problem”.

Following his faint praise of culturally appropriate Aboriginal programs, Mr. Harris turns his attention to the Supreme Court of Canada’s judgment in the *Gladue* case. In this case, the court considered s. 718(2) of the Criminal Code, which provides that

“A court that imposes a sentence shall also take into consideration the following principles:

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances to Aboriginal offenders.”

This is Mr. Harris’s ‘take’ on Gladue.

In the Gladue case, the Supreme Court of Canada clarified s. 718.2, suggesting that judges should sentence Aboriginals in a different way. Restorative justice programs would bring offenders and community

leaders together to address the crime. The Supreme Court called on judges to make a special effort to deal with the problem of Aboriginals in prison by considering alternatives to jail wherever possible. While everyone applauded the intent, few bothered to note that the landmark case would in effect give Canada a racially based, two-tiered justice system in which different races would receive different penalties for the same crime” (p. 88).

Mr. Harris’s potted version of the law and its effect hardly does justice to the judgment of the Supreme Court of Canada. The Court considered s. 718.2 in the context of the 1996 amendments to the Criminal Code which introduced into that Code, for the first time in Canadian history, a set of sentencing principles. In the words of the Court the “enactment was directed , in particular, at reducing the use of prison as sanction, at expanding the use of restorative justice principles in sentencing, and at engaging in both of these objectives with a sensitivity to Aboriginal community justice initiatives when sentencing Aboriginal offences.”(para 48).

As to Harris’s contention that the case gives Canada a racially-based, two-tiered justice system in which different races would receive different penalties for the same crime, consider this statement by the Court itself:

“It should be said that the words of s. 718.2(e) do not alter the fundamental duty of the sentencing judge to impose a sentence that is fit for the offense and the offender. For example, as we will discuss below, it will generally be the case as a practical matter that particularly violent and serious offences will result in imprisonment for Aboriginal offenders as often as for non-Aboriginal offenders. What s. 718.2(e) does alter is the method of analysis which each sentencing judge must use in determining the nature of a fit sentence for an Aboriginal offender.” (para 33)

The court goes on:

“The next question is the meaning to be attributed to the words “with particular attention to the circumstances of Aboriginal offenders”. The phrase cannot be an instruction for judges to pay “more attention when sentencing Aboriginal offenders.” It would be unreasonable to assume that Parliament intended sentencing judges to prefer certain categories of offenders over others. Neither can the phrase be merely an instruction to a sentencing judge to consider the circumstances of Aboriginal offenders just as she or he would consider the circumstances of any other offender. There would be not point in adding a special reference to Aboriginal offenders if this was the case. Rather, the logical meaning to be derived from the special reference to the circumstances of Aboriginal offenders, is that sentencing judges should pay particular attention to the



circumstances of Aboriginal offenders because those circumstances are unique, and different from those of non-Aboriginal offenders.

The wording of 718.2(e) on its face, then, requires both consideration of alternatives to the use of imprisonment as a penal sanction generally, which amounts to a restraint in the resort to imprisonment as a sentence, and recognition by the sentencing judge of the unique circumstances of Aboriginal offenders.” (paras. 37 & 38).

The Supreme Court then reviewed the evidence of the overrepresentation of Aboriginal Canadians in penal institutions, including a reference to my own study for the Canadian Bar Association “*Locking up Natives in Canada*, and concluded

‘These finding cry out for recognition of the magnitude and gravity of the problem, and for responses to alleviate it. The figures are stark and reflect what may fairly be termed a crisis in the Canadian criminal justice system. A drastic overrepresentation of Aboriginal peoples within both the Canadian prison population and the criminal justice system reveals a sad and pressing social problem. It is reasonable to assume the Parliament, in singling out Aboriginal offenders for distinct sense in treatment in s. 718.2(e), intended to attempt to redress this social problem to some degree. The provision may properly be seen as Parliament’s direction to members of the judiciary to enquire into causes of the problem and endeavour to remedy it, to the extent that a remedy is possible through the sentencing process.

It is clear that sentencing innovation by itself cannot remove the causes of Aboriginal offending and the greater problem of Aboriginal alienation from the criminal justice system. The unbalanced ratio of imprisonment for Aboriginal offenders flows from a number of sources, including poverty, substance abuse, lack of education and the lack of employment opportunities for Aboriginal peoples. The rise is also from bias against Aboriginal people and from an unfortunate institutional approach that is more inclined to refuse bail and impose more and longer prison terms for Aboriginal offenders. There are many aspects of this sad situation which cannot be addressed in these reasons. What can and must be addressed, though, is the limited role that sentencing judges will play in remedying injustice against Aboriginal peoples in Canada. Sentencing judges are among those decision-makers who have the power to influence the treatment of Aboriginal offenders in the justice system. They determine most directly whether an Aboriginal offender will go to jail, or whether other sentencing options may be employed which will be played perhaps a stronger role in restoring a sense of balance to the offender, victim, and the community, and in preventing future crime.” (paras. 64 & 65)

The court then sets out to provide a framework of analysis for the sentencing judge. The judge must consider first “the unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts.” This would include a history, for example, of residential school placement, sexual abuse or a disability such as Fetal Alcohol Syndrome with which Aboriginal youths are inflicted in far greater numbers than the general population. Second, the judge must review the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection.” Here, the concept and principles of a restorative justice approach are particularly relevant because of their resonance within Aboriginal cultures and their likelihood of therefore responding to the problems that have brought the offender before the court and preventing re-offending. Here again the court makes clear that they are not creating a two-tier justice system.

“We do not mean to suggest that, as a general practice, Aboriginal offenders must always be sentenced in a manner which gives greatest weight to the principles of restorative justice, and less weight that goes such as deterrence, denunciation, and separation. It is unreasonable to assume that Aboriginal peoples themselves do not believe in the importance of these latter goals, and even if they do not, that such goals must not predominate in appropriate cases. Clearly there are some serious offences and some offenders for which and for whom separation, denunciation, and deterrence and fundamentally relevant ... *Generally, the more violent and serious the offence, the more likely it is as a practical reality that the terms of imprisonment for Aboriginals and non-Aboriginals will be close to into account their different concepts of sentencing.*”  
Emphasis added (paras 77 & 78)

From these extracts of the Supreme Court judgment in *Gladue*, it should be clear that Harris’s summary does not even come close to explaining what the court said. The extracts also reveal another significant difference. The Supreme Court, in interpreting section 718.2(e), did so in the context of a remedial framework to address a pressing social problem characterized as a crisis. The court articulated a framework which sought to redress that problem in a way which is consistent with a just and fit sentence for Aboriginal offenders. Harris’s approach to this problem is designed to raise a specter of race-based special treatment, with no constructive suggestions of his own as to how Canada should deal with a problem which is rightly seen as a blot on its international reputation as a just society.

Mr. Harris is not content to venture into his own incomplete legal interpretation of the *Gladue* case. He reaches back some twenty years to another decision of the Supreme Court of Canada in the *Solosky* case. Harris asserts that CSC senior management has, by claiming that the Court affirmed that prisoners retain all their rights other than those expressly or impliedly taken away by law,

consistently misinterpreted the ruling in this case so as to “fit perfectly with CSC’s consistent policy of extending prisoner’s rights under the guise of following the law”. The facts and law are that it is Harris who has misread and misunderstood the judgment in *Solosky*. Mr. Solosky sought a declaration that communications between him and his solicitor were covered by the solicitor-client privilege and that a penitentiary regulation authorizing the authorities to read his mail was therefore unlawful and that such correspondence should be forwarded unopened. The Supreme Court affirmed the lower court rulings that the solicitor-client privilege in the case of either a prisoner or a non-prisoner had never been interpreted to cover all communications between a client and a solicitor and because the opening of Mr. Solosky’s mail could not be characterized as being directed to obtaining evidence in any legal proceedings, the privilege could not be invoked. That however, was not the end of the matter. The court went on to consider the issue on an alternative basis. In a passage actually cited by Mr. Harris, Mr. Justice Dickson, stated

“One may depart from the current concept of privilege and approach the case on the broader basis that (i) the right to communicate in confidence with one’s legal advisor is a fundamental, civil and legal right, founded upon the unique relationship of solicitor and client, and (ii) a person confined to prison retains all of his civil rights, other than those expressly or impliedly taken from him by law ... The right to privacy in solicitor-correspondence has not been expressly taken away by the language of the [Penitentiary Service] Regulations and the[Commissioners] Directive.

Most prisons are sufficiently remote that the mail constitutes the prime means of communication to an inmate’s solicitor. Nothing is more likely than to have a “chilling” effect upon the frank and free exchange and disclosure of confidences, which should characterize the relationship between inmate and counsel, than the knowledge that what has been written will be read by some third person, and perhaps used against the inmate at a later date. I do not understand counsel for the Crown to dispute the importance of these considerations.

The result, as I see it, is that the court is placed in the position of having to balance the public interest in maintaining the safety and security of a penal institution, its staff and its inmates, with the interest represented by insulating the solicitor-client relationship. Even giving full recognition to the right of a inmate to correspond freely with his legal advisor, and the need for minimum derogation therefrom, the scale must ultimately come down in favour of the public interest. But the interference must be no greater than is essential to the maintenance of security and the rehabilitation of the inmate.”

Using this alternative legal framework, the Supreme Court interpreted the relevant penitentiary service regulation to authorize a warden to order that an

envelope that appears to have originated from a solicitor, or to be addressed to a solicitor, to be subject to opening, and an examination to the minimum extent necessary to establish whether it is properly the subject of solicitor-client privilege.

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

Harris treats the first paragraph that I have cited as “judicial ruminations” in which Mr. Justice Dickson “mused” about prisoners retaining their civil rights. Harris is simply wrong. Mr. Justice Dickson was neither ruminating nor musing but articulating an alternative legal frame of reference for determining the issue before the Court and the case has been correctly interpreted by the Correctional Service of Canada, and every legal scholar, as authority for the proposition that a prisoner retains all of his civil rights, other than those expressly or impliedly taken away from him by law, a proposition which had already been articulated in the 1969 judgment of the Ontario Court of Appeal in *R. v. Institutional Head of Beaver Creek Correctional Camp, ex parte MacCaud*. The principle of *Solosky* has now been entrenched in section 4 of the CCRA as one of the principles that guides the Correctional Service of Canada. The case is also authority for the principle that correctional authority in interfering with prisoner’s rights and privileges must use the least restrictive measure, another one of the principles now reflected in section 4 of the CCRA. Indeed *Solosky* presaged the Supreme Court’s later ruling in *Oakes* that government, in seeking to justify reasonable limits on a Charter right, must minimally impair that right in achieving its legitimate governmental objective. Once again compare the approach of the Supreme Court, which seeks to balance correctional authority with prisoners’ rights, with Harris’ position that sees any recognition of those rights as an affront to public safety.

Michael Harris proves himself as critical of women-centered corrections as he is of culturally sensitive programs for Aboriginal prisoners. In Chapter 5 of his book, the title chosen, “*Prisons in Pink*”, gives a fair idea of his dismissive view of *Creating Choices*, the Report of the Task Force on Federally Sentenced Women, which has been the philosophical basis upon which new regional institutions have been built to replace the Prison For Women (P4W). Harris’s claim to be the truth giver can be assessed in this chapter by the way in which he deals with the Arbour Report into the events at P4W in 1994, including a strip search of women conducted by a male emergency response team and the extended stay in

segregation of the women involved. Harris gives a summary of the events that led to the strip search and segregation which differs significantly from that set out in Madam Justice Arbour's report. Yet, while we are expected to see Harris' account as the truth, he characterizes the report of Madam Justice Arbour as a "highly subjective indictment of CSC policies" and as a "one sided view of the P4W riot." It takes a certain arrogance on the part of an investigative journalist to claim that his investigations, which are based exclusively upon talking with the staff, represent the truth but the findings of a justice of the Ontario Court of Appeal, and later Supreme Court of Canada, based upon 43 days of judicial hearings in which witnesses from both the staff and the prisoners were heard, is subjective and one-sided.

Michael Harris's approach to investigative journalism is perhaps best revealed in the chapter entitled "Old and New" in which he attempts to give some historical perspective to the changes in Canada's prison system. If it was submitted as an essay in any course in correctional history it would receive a failing grade. Harris's theme is struck in the very first sentence of this chapter: "Penal thinking in Canada has come a long way in the last 250 years, all of it in one direction: the expansion of prisoner's rights". Given that, until well into the twentieth century, prisoners were regarded as having no rights, this is not so surprising. If the term "human rights" is substituted for "prisoners' rights", the statement is also one which should be seen as the hallmark of a civil and just society. Yet for Harris the emergence of prisoners' rights as human rights appears to be the mark of a society that has lost its moral compass.

Harris begins this chapter with a review of the early history of Kingston Penitentiary. The barbarous and inhumane regime of Kingston's first warden, Henry Smith, is well documented but even here Harris manages to get the facts wrong. He attributes the exposure of the brutality to the 1849 "muck-raking revelations" of George Brown, the editor of the *Toronto Globe*. Perhaps Mr. Harris is trying to trace a journalistic lineage from Mr. Brown to this own muck-raking, but the historical facts of the matter are that the revelations of the barbaric regime of Warden Smith came about through an extensive five person royal commission into the Kingston Penitentiary that was chaired by Mr. Brown and which issued two reports in 1848 and 1849, in which Warden Smith's regime was characterized as "disgraceful to humanity".

Mr. Harris casual way with historical references is characteristic of much of his writing in *Con Game*. This is further illustrated in the way he characterizes the correctional system's goal of rehabilitation. Harris writes:

Canada's modern preoccupation with rehabilitation had begun with the Archambault commission, although it wasn't until 1971 that rehabilitation without punishment became official policy, under the Liberal solicitor general Jean-Pierre Goyer. Under Canadian Law, loss of freedom is

considered the punishment. The focus is on the inmate, not the harm he has done.” (p.152-53)

Let’s take each of these propositions in turn. According to Harris, rehabilitation as an official policy is a recent invention of the Liberal government. Evidently, Mr. Harris in his extensive historical research, failed to read the preamble to Canada’s first *Penitentiary Act* passed in 1834, yes 1834, not 1934, and not 1971. It reads: “If many offenders convicted of crimes were ordered to solitary confinement, accompanied by well regulated labour and religious instruction, it will be the means under providence, not only of deterring others from the commission of like crimes, but also of reforming the individuals, and inuring them to habits of industry.” Any first year criminology student could have told Mr. Harris that rehabilitation was one of the founding premises that gave rise to the birth of the penitentiary in the late 18<sup>th</sup> century and while correctional philosophy has ebbed and flowed over the course of the last two centuries, some version of rehabilitation has rarely been far from the official agenda. The reality of course is another thing, as the barbaric regime of Warden Smith shows. Time and time again, as I describe in *Justice behind the Walls*, professed intentions have often been subverted in the practice of imprisonment. However, Harris’ assertion that rehabilitation is a Liberal policy foisted on an unsuspected public is historical nonsense.

As for the second proposition that “under Canadian Law, loss of freedom is considered the punishment”, this is also a principle, that far from being a recent Liberal invention, is one contained in the Standard Minimum Laws for the Treatment of Prisoners, that were approved by the United Nations Economic and Social Council in 1957. Rule 57 reads, “Imprisonment and other measures which result in cutting off an offender from the outside world are afflictive by the very fact of taking away from the person the right of self-determination by depriving him of his liberties. Therefore, the prison system shall not, except as incidental to justifiable segregation or the maintenance of discipline, aggravate the suffering inherent in such a situation.

The Standard Minimum Rules, which were adopted by Canada in 1975, also reflect the importance of rehabilitation as the best means to protect society from future crime. Rule 58 provides, “the purpose and justification of a sentence of imprisonment or a similar measure deprivative of liberty is ultimately to protect society against crime. This end can only be achieved if the period of imprisonment is used to ensure, so far as possible, that upon his return to society the offender is not only willing but able to lead a law-abiding and self-supporting life.” In other words, Canada’s correctional policy in which the emphasis is on providing prisoners with the means to improve themselves and re-integrate into society is a reflection of a set of international standards which transcend partisan politics.

Harris's last proposition, that under contemporary correctional philosophy, the focus is on the inmate, not the harm he has done, is a gross oversimplification. Indeed, it is inconsistent with Harris's own account of the assessment process for new prisoners that he describes earlier in his book that determines both the appropriate security classification of prisoners and the recommended programs they should complete as part of their correctional plans, where consideration is given both to the personal and psychological history of the prisoner *and* the harms he or she has committed. Indeed, in the case of violent and sexual offenders, the harm committed by offenders is the primary determinant of the kind of programs they will be required to complete if they are to be recommended for any form of conditional release.

Harris's account of Canadian penitentiary history also takes in the 1977 report of the Parliamentary Sub-Committee on the Penitentiary completed in the wake of a series of major riots in maximum security penitentiaries in 1976. This all-party report, regarded by correctional historians as a pivotal document in setting the stage for major reforms in the federal prison system, is highlighted by Harris, not for its principle recommendations, but for the ascription of a comment that the Sub-Committee believed sparked the riot at Millhaven, to an officer other than the one who had actually made the comment. Harris is right in pointing out the personal injustice done to this officer. However, in a chapter which purports to provide a broad historical understanding, the fact that he makes no mention of the recommendations of the Sub-Committee that "the rule of law must prevail inside Canadian penitentiaries" and that "justice for inmates is a personal right and also an essential condition of their socialization and personal reformation", shows the narrow and limited vision Harris brings to the task of investigative journalism.

In his gallop through the historical annals, Harris's breathless analysis suffers not only from a misreading of history and a jaundiced account of events but also reflects some confusion on his part. For example, at p. 155 the following paragraph appears:

"John Braithwaite, a legendary name in corrections, worked at headquarters at a variety of jobs. A thinker and a good speaker, he was plugged into a number of international correctional organizations. His book *Crime, Shame and Reintegration* published in 1989, had a major impact on correctional thinking. The book looked at alternative correctional methods, including 're-integrative shaming'.

The first sentence is accurate; however, the John Braithwaite who wrote *Crime, Shame and Reintegration* is another John Braithwaite altogether who teaches criminology in Australia. Had Mr. Harris spent any time reading the book or indeed talking to the Canadian John Braithwaite, he would have readily discovered this fact.

In the last part of Harris's historical chapter he trains his guns unwaveringly on Ole Ingstrup, Canada's former Commissioner of Corrections. He begins with a well aimed volley, recounting an ill-advised dinner party organized by the former commissioner on a coast guard vessel in St. Johns, Newfoundland (an event documented in contemporary news accounts when the story broke in December 1999). With this venue as the hook, Harris constructs a theory that the contemporary law and policy of federal corrections, with all its asserted flaws, can be squarely traced to Ole Ingstrup's rise to power and his importation of a European model of corrections based upon experience in his native Denmark. Given Harris's own reference to the so called "Danish prince" this theory deserves to be labeled the Harris-Hamlet theory of Canadian corrections. However, the only similarity between Shakespeare's Hamlet and Harris's version is that they are both fiction. But whereas Shakespeare's version is high tragedy, Harris's account that Ole Ingstrup single handedly changed the direction of Canadian corrections by "putting his European policies into practice in Canada" (p. 166) and spearheaded a "move toward a European-style prison system imposed on very different North American realities" (p. 170) is a low-grade parody of the changes that took place in the 1980s and 1990s. As I described in *Justice Behind the Walls*, there were very significant organizational and legal changes made to the correctional landscape during these years and Mr. Ingstrup did take a leadership role in spearheading one aspect of this change, the adoption of the mission statement. However, mission statements were hardly Mr. Ingstrup's invention and almost every government and corporate organization during this period became missionized. There was absolutely nothing Danish or European about CSC's mission.

Harris continues with his parody with this statement:

"Ingstrup's mission statement was rolled into the Corrections and Conditions Release Act (CCRA) the law the governs Canada's prison system."

In *Justice Behind the Walls* I describe, in somewhat more than a single sentence, the evolution of the CCRA and how it resulted from years of work under the auspices of the Correctional Law Review, established within the Secretariat of the Solicitor General, years before Mr. Ingstrup became Commissioner. The Correctional Law Review provided a model for new correctional legislation which incorporated the values of the *Charter* and worked out the appropriate balance between correctional authority and prisoners rights as mandated by the *Charter*. The work of the Correctional Law Review was widely distributed and commented on by many of the stake holders in the criminal justice system. The CCRA, in other words, was the product of a distinctly Canadian process, reflecting Canadian values. Harris's contention that it was Ole Ingstrup's brainchild and offspring is as far removed from the truth as Denmark is from Canada.



No less far fetched is Harris's assertion about the impact of prisoner's rights litigation in Canada. On page 173 he asserts,

"At the same time Ingstrup's European model was being imposed on North American offenders those criminal careers did not rest on bicycle theft, inmates and prisoners' rights groups were mounting a whole range of court challenges over various alleged rights ... It was a highly successful campaign, ending in legal decisions that inhibited or restricted the right of CSC to strip search for drugs or impose widespread urinalysis testing as a means of finding drug use."

Like almost all of Harris's statements about the law, this one also gets a failing grade. In the 1991 decision of *Warriner v. Kingston Penitentiary*, the federal court *rejected* a challenge from a prisoner that requiring him to submit to a strip-search following a contact visit for the purpose of determining whether he was in possession of drugs or other contraband, was an unreasonable search contrary to s. 8 of the *Charter*. In the *Fieldhouse* case, a 1995 decision of the B.C. Court of Appeal, a prisoner challenge to random urinalysis testing as a means of fighting drug use *was rejected* by the court. A prisoner challenge to Michael Harris's rendition of the truth about Canadian prisons would by contrast be much more likely to succeed.

In several chapters Harris address the prevalence of drugs and the climate of violence that pervades the federal maximum security institutions. The public have every right to be concerned about the very high rate of HIV/AIDS infection rates and the almost epidemic incidence of Hepatitis C amongst the federal prison population. This is an issue which organizations such as the Canadian HIV/AIDS Legal Network have been bringing to the attention of policy makers for many years. To provide greater public education the Network has published a series of excellent fact sheets both documenting the crisis and providing constructive ways in which to address it. Their analysis and recommendations stand in stark contrast to Harris's simplistic approach. Harris identifies the prevalence of drugs and the high incidence of drug related disease and suggests that it demonstrates that CSC's official zero tolerance policy for drugs, as identified in its National Drug Strategy, is "a lie." Harris refers to the number of drug seizures in federal prisons, the provision of condoms and safe-sex guides, and the availability of bleach to clean needles as the evidence of an official policy of condonation of drug use and high risk sexual activities. As usual, Harris' analysis offers little in the way of constructive recommendations. Such as they are, Harris's prescription seems to be that zero tolerance should mean zero tolerance and that CSC should ratchet up the intensity and intrusiveness of its searches and increase the deterrent impact of penalties for those found to be in possession of drugs. What Harris never addresses is the relationship between drug use in prison and drug use on the street and the fact that zero tolerance war on drug policies on the street have not been successful in reducing the incidence

of drugs and that increasing sentences for drug users has no observable impact on the reduction of drug addiction.

Harris makes no reference at all in *Con Game* to the 1994 *Final Report of the Expert Committee on AIDS and Prisons*, produced by the McGill Center for Medicine, Ethics and Law, which is the most comprehensive analysis to date of this issue. Contrast Harris's simplistic model of more enforcement and greater punishment with the Final Reports recommendations for adopting a more pragmatic approach to drug use and acknowledging the idea that a drug-free prison is no more realistic than the idea of a drug free society. Because of HIV/AIDS, correctional authorities cannot afford to continue focusing on the reduction of drug use as the primary objective of drug policy. While reduction of drug use is an important goal, reduction of the spread of HIV and other infections is a more important public policy objective. Making bleach, sterile needles, and methadone programs available to prisoners does not mean condoning drug use, but is a necessary and pragmatic public health measure; The Final Report also emphasized the need for educating the Canadian public and decision makers about the importance of implementing harm-reduction measures in prisons. Harris would have performed a valuable public service in his role as investigative journalist had he addressed and critiqued these alternatives in the spirit of contributing to an informed public debate. Lamentably, Harris opted to do little more than ferment public fear.

An example of the failure of Michael Harris to seriously address the complexity of the issues around drug use and the need for a spectrum of strategies to redress the problems is his dismissive approach to the provision of bleach for prisoners to clean needles. His only comment is this:

“When a group of officers try to invoke their right to refuse work under the health and safety provisions of sub section 128(1) of the Canada Labour Code, protesting that the bleach could be thrown at them, used as poison, or combined with other ingredients to make a bomb, their grievance was turned down.” (p.203)

In the prisons in which I have done my research, bleach has now been made available for many years. I am not aware of a single instance of bleach being used in a way posing any of these dangers. To suggest, as Harris, does that these dangers are a sufficient answer to an important harm reduction strategy should convince no one.

Harris also suggests that restrictions on the authorities powers to search also inhibits an effective drug enforcement strategy. He writes:

“Prison regulations also work to the inmates' benefits. Before a “special” search of a cell, a correctional officer must first convince the officer in

charge that he has reasonable and probable grounds to believe that there is brew or drugs on the premises.”(p.207)

Besides the fact that there is no category of “special” search in the CCRA, Harris’s criticism is completely unfounded. S. 51(1) of the CCR regulations provides as follows:

“A staff member may, **without individualized suspicion**, conduct searches of cells and their contents on a periodic basis where the searches are designed to detect, through a systemic examination of areas of the penitentiary that are accessible to the inmates, contraband and other items that may jeopardize the security of the penitentiary or the safety of persons.”(emphasis added)

In other words, the routine searching of cells which takes place every day in every federal prison, does not require individualized suspicion based on reasonable and probable grounds. In addition to the powers conferred under s. 51(1), s. 52(1) allows a staff member to search a particular prisoner’s cell where a staff member believes on reasonable grounds that contraband or evidence of an offence is located in an inmate’s cell and he has the prior authorization of his supervisor. The requirement that the officer have reasonable grounds to search a particular cell, with the prior authorization of his supervisor, reflects the constitutional standards established by the Supreme Court of Canada for investigative searches and seeks to provide the appropriate balance between the needs of correctional authority in maintaining a safe institution and the interests of prisoners to be free from unreasonable invasions of their privacy. Harris’ suggestion that these requirements work only for the prisoners’ benefit is misconceived. To create a regime in which prisoners’ privacy is completely disregarded and in which individual guards may decide to search particular prisoners cells, with no reasonable grounds, would create a lawless environment which would endanger both the staff and the security of the institution. The CCRA in this regard was not drafted as a genuflection to prisoners; it is an effort to balance competing interests in a way which contributes to a safe environment for *both* prisoners and staff and which ensures that the law which governs relationships between law enforcement and citizens is not abandoned when the keeper and the kept encounter each other inside. Mr. Harris would learn a thing or two about balancing rights and interests by paying closer attention to the law.

Paying such attention would also yield dividends to Mr. Harris’s self-appointed mission to tell the truth about Canadian prisons. At the end of the chapter on drugs, in reporting on an order from Headquarters to crack down on drug and alcohol offenses, Harris writes:

“The Commissioner said that drug and alcohol abuses must be considered “serious offences”. Under the CCRA, a serious offence can merit a thirty-day stretch in segregation (After September 15, 1999, prison authorities

lost the power to impose such penalties on their own, regardless of what inmates had done. On that day, the Supreme Court of Canada ruled unanimously that prisoners facing solitary confinement because of disciplinary charges were entitled to legal aid).”(p.208)

Contrast Harris’s analysis with the actual facts and law regarding the *Winters* case, (a case in which I was co-counsel). Under the CCRA, offences designated as serious by the institutional authorities are heard in disciplinary court before an independent chair person who is appointed outside of CSC. That chairperson determines the issues of guilt or innocence and also determines the appropriate penalty, after hearing recommendations from the CSC advisor to the court. Independent chairpersons have been in place for over twenty years. That means that for over twenty years CSC has not had “the power to impose such penalties on their own” and the 1999 judgment of the Supreme Court in *Winters* did not change this one iota. The issue in *Winters* was whether a prisoner in British Columbia who faced serious disciplinary charges for which he could be sentenced to segregation if convicted, was entitled to legal services under the *BC Legal Services Society Act*. The Supreme Court held that he was, but that this did not mean that in every case prisoners were entitled to a lawyer; the Court held that legal services would include a preliminary investigation of the facts giving rise to the disciplinary charge, advice on the range of potential outcomes and the chance of success. This function could be performed by the Legal Services Society staff counsel or by a non-lawyer staff person well versed in prison matters working under the supervision of a lawyer. In actual fact, as a result of *Winters*, in most federal institutions in British Columbia, legal services are provided by a para-legal worker, although this is now in jeopardy as a result of massive cutbacks to legal aid by the provincial Liberal government – (see the news article on this site, dated April 11, 2002) Harris’s suggestion that the *Winters* case has somehow undermined the effectiveness of disciplinary sanctions against drug offences is without any factual or legal foundation.

Harris follows up his erroneous statement on the impact of the *Winters* case with a paragraph of one Kingston guard’s view of the relative ineffectiveness of a twenty dollar fine for possession of alcohol . Harris writes:

“As Rolland saw it, the reverse onus provision of the proposal grossly favoured the inmate offender. The officer who finds the brew must show up at the inmates hearing, sometimes on his day off or after his shift. Unlike the inmate, he is without legal assistance, but he is cross-examined by the taxpayer-supplied lawyer for the inmate accused.”(p.208)

This is a remarkable misuse of the concept of reverse onus. It is also deeply factually flawed. The officer “must indeed” show up at the offender’s hearings, because he is the person who has evidence of the charge in the same way as a police officer must show up at a criminal court hearing when

he or she has evidence relating to the charge. How else would Mr. Harris have it? Perhaps he would approve of the process I observed at one minor court hearing (which are presided over by correctional staff, not the independent chairperson) where the hearing officer phoned up the charging officer to get his evidence and without giving the prisoner any opportunity to know the case against him, found the prisoner guilty because he knew the charging officer and accepted his evidence as credible. Harris' statement that the officer must show up sometimes on his day off or after his shift is correct, but usually the hearing date is scheduled to accommodate staff work rotations; where officers are is required to come in other than on their regular shift they are usually paid overtime. Once again, this is no different than what is expected of police officers. It is hardly a basis for criticizing the effectiveness of the disciplinary process or for characterizing it as a reverse onus provision. The point raised by the officer that he has to appear without legal assistance while the lawyer has legal representation reflects the fact that it is the *prisoner*, and not the officer, who is facing the charge, and it is the *prisoner* who will be disciplined if found guilty; furthermore, the reality for the great majority of federal prisoners in this country is that they do not receive any form of legal representation. Ontario, Quebec and British Columbia are the only ones that make any provision for legal representation for prisoners facing disciplinary offences. Prisoners in all other provinces, even when facing charges for which they can and are sent to segregation, face their accusers un-represented. Mr. Harris of course, has no problem with that nor with the issues it raises of unequal treatment under the law. In *Justice Behind the Walls*, I devote a whole chapter to the ways in which the disciplinary process in prison should be reformed to take into account the legitimate concerns of *both* correctional staff and prisoners. Unlike Mr. Harris, it takes me more than a couple of sentences, based upon one guard's view, to chart a fairer course to bring justice to the disciplinary process.

It also takes me a whole sector, spanning 150 pages, to describe the historical and contemporary conditions in the segregation units of Canada's federal Institutions. In that sector, I rely upon my own personal observations over thirty years of study, the Arbour Report on conditions at the Prison for Women in Kingston, and the 1997 Task Force on Administrative Segregation (of which I was a member) which reviewed the conditions in the segregation unit of every federal institution in the country. Michael Harris, in a single page in which he refers only to the segregation unit at Kingston Penitentiary, suggests that segregation is akin to a stay in a hotel room with room service. Harris writes:

"At Kingston Penitentiary, Lower H Range became a segregation unit after the warden ordered the doors of the former "hole" welded shut in May 1999 to celebrate the commissioner's New Age approach to corrections. During stays in the new segregation unit, prisoners had their meals delivered to them by food stewards, not guards, and enjoyed cable television and stereos.... If the

inmate can do without his effects for a day, room service will deliver his personal effects in the person of a guard.” (p.209)

In May 1998, I visited the old “hole” at Kingston, and in *Justice behind the Walls* I provide this description: “it consists of a single range of cells facing each other, into which little natural light enters. The cells have double doors; an inner door of bars and an other door of 4” solid oak with a food slot. As recently as the 1980’s, the oak doors would be closed after suppertime, completely isolating the prisoners from human contact. These door are now left open, but even so, the doors are like dark caverns. High in the back wall of each cell are a light and an observation window through which the staff, patrolling on an elevated catwalk behind the cells, can observe the prisoners. The flicker of a television set in one of the cells depicting cartoon characters, only intensified the hideous nature of this most modern of Kingston’s chambers of punishment.” *Justice Behind the Walls* (p.390-91)

Visiting the hole with me was Chief Justice Bayda of the Saskatchewan Court of Appeal;

Like me, he was horrified at what he saw. The next day, referring to Charles Dickens’ indictment of solitary confinement in 1842, I appealed to Commissioner Ingstrup “on behalf of slumbering humanity” to take immediate measure to close the dungeon at Kingston. To suggest, as Michael Harris does, that the closure of this unit was done “to celebrate the commissioner’s New Age approach to corrections”, reveals far more about Michael Harris’s view of punishment than *Con Game* reveals about the commissioner’s approach to corrections or the realities of Canadian prisons.