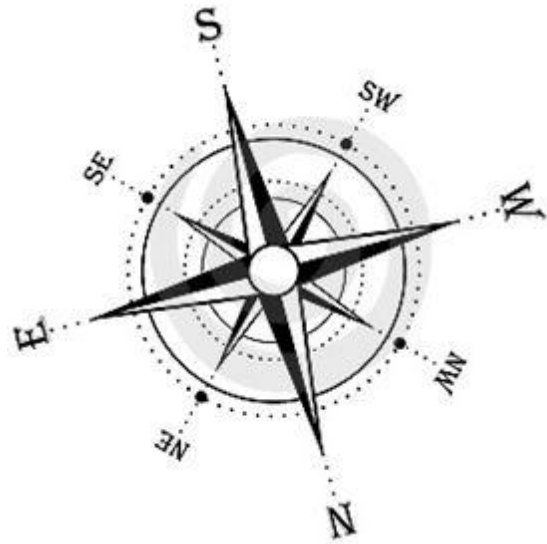


A Flawed Compass: A Human Rights Analysis of the Roadmap to Strengthening Public Safety



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Note to the on-line version

The on-line version of this report varies from the print version in that minor errors have been corrected.

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Preface: The Roadmap as Public Policy

This report is a critical review of the policy paper on the Correctional Service of Canada released publicly in December 2007 by a panel appointed by then Minister of Public Safety, the Honourable Stockwell Day. Headlined *A Roadmap to Strengthening Public Safety*, the report has been embraced by the Government and the Correctional Service of Canada as the script for a “transformation” agenda for Canadian federal corrections. Neither the report nor the transformation agenda has been subject to any serious public policy analysis or debate, yet corrections is now being made over in its image. Makeovers – of faces, bodies and houses - may provide acceptable scripts for popular reality television shows, but this makeover of federal corrections affects not just the external façade of prisons but would undermine the fundamental human rights of the men and women confined behind their walls and fences. Yet the *Roadmap* makes no reference to and indeed seems oblivious to the long struggle in the history of Canadian imprisonment to entrench a culture of respect for human rights. There are many recommendations of the *Roadmap* which reflect ideological and populist views that being “tough on crime” is a sufficient and defensible basis for public policy. Not only will implementation of many of the key recommendations undermine respect for human rights but they will also do nothing to enhance public safety. They are deeply flawed and we believe it is necessary that the Government and CSC be held accountable before the “transformation” makes a mockery of Canada’s commitment to the defence of human rights.

There would have been no need to prepare this response had the *Roadmap* been the result of an informed and objective panel whose credibility was not seriously undermined by obvious politically partisan influences and ideology. It might not have been necessary if the Panel had been aided by expert independent policy and research staff, or if its recommendations had enjoyed significant public review. It would not have been necessary had there been time for the Panel to prepare a carefully constructed analysis that clearly justified its recommendations in terms of effectiveness and cost. Neither would it have been necessary had the recommendations been built upon our well documented correctional history, human rights considerations and an understanding of the relevant law. But none of these essential components for responsible, principled and effective public policy making were present.

What is special about corrections?

The expectation for the responsible, principled and effective development of public policy applies to any area of government activity, but it has some particular significance in the area of federal corrections. There are three characteristics of the correctional environment that mark it out for special vigilance.

Power

No other system of government activity entails as much power over individual citizens’ freedom. At the federal level the correctional authorities control every element of the lives of those sentenced between 2 years and natural life from the basics of food and shelter, clothing, medi-

cal care, access to family and friends, recreation, education, and religious observance. Privacy is a rare commodity even for the most intimate moments and the fundamental values of individuality and autonomy are subordinated to the exigencies of power and control.

Accountability

We are accustomed and expect that responsibility and accountability of government increases proportionately with the power that the system is authorized to exercise. The sweeping power and, therefore, the responsibility of the correctional system are unparalleled in free society. The exercise of this power in the form of imprisonment occurs behind walls that are intended to keep prisoners inside but they also keep the community outside. The walls are a forbidding barrier that few Canadians have peered behind either directly or even through the media. The barriers are not just concrete and stone walls or razor-wire fences; they involve security practices that control both behaviour and information. The physical separation and security focus makes prison management largely invisible to the public – in contrast with other powerful systems like the courts that operate in a publicly accessible forum. The accuracy of the information that is disseminated is often difficult to confirm through sources other than the correctional system's own communications.

Indifference and fear

Finally, prisons hold people who have little claim over the attention or compassion of the general community. They have broken the legal code that society depends on for order and safety. Some have committed horrible crimes that generate strong feelings of revulsion and fear. Except in the aftermath of sensational events in prison, the issue of whether prisoners are treated properly is low on the citizenry's list of priorities. In our current recessionary times where the lives of those who live within the rules of society are increasingly challenged, the issue of prison conditions is not an obvious vote getter.

What we have then is a system of great power operating in a forum that is inaccessible by the public and media, with only as much public accountability as it takes on itself, characterized by a cycle of neglect and abuse leading to horrible events, followed by "reform" with new measures and standards put in place to redress the problem. Almost inevitably the measures prove inadequate or the commitment to them decays over time and a new round of abuse begins. Commissions of inquiry, royal commissions and explosive media stories have documented those failures beginning with the Brown Commission that castigated the cruel administration of Kingston Penitentiary in the 1840s and most recently – almost 150 years later - the Arbour Commission that condemned the strip searching of women prisoners by male guards at the Prison for Women. The "reforms" that the *Roadmap* advocates are likely to lead to another chapter in this history of abuse of human rights, a chapter another commission of inquiry will be called upon to document. Our response to the *Roadmap* is our best effort to raise public awareness to forestall that happening.

Why view correctional policy and through a human rights lens?

The necessary counterbalance to this cycle to ensure the continued improvement of the conditions of confinement and to guard against the failures and abuse is a complex web of laws, poli-

cies and practices underpinned by a culture that at its core is intended to address the fundamental need of us all, both individually and collectively, to have our human dignity respected. Our attempts to institutionalise respect for human dignity in society take many forms but together they are referred to as “human rights.” Human rights are those rights to human treatment that come solely from the fact that we are human beings. They are not privileges, not “earned” or “deserved” because of what we have or have not done; they are inherent in nature by reason of our common humanity and cannot be cast aside in the name of populist “tough on crime” ideology.

It is easier to implement respect for human dignity and respect of human rights with those we respect, love or feel safe with, but to be sure that they are predictably and consistently available, they must also be the birthright of those we fear and dislike. Prison is the acid test of our commitment to human rights. If we can maintain our commitment in our prisons we can do it anywhere. If not, then respect for our human dignity becomes conditional and, in the case of prisons, based on the decisions of faceless officials operating with the broadest authority in the darkest places of society. Ultimately the preservation of rights for all citizens depends on our preservation of the rights of those in our prisons. For this reason, important policy developments in corrections in the past almost inevitably have begun with the careful articulation of human rights as reflected in fundamental rules of law and humane practices.

But in the *Roadmap’s* latest rendition of public policy there is no reference to human rights. Nor do we find any reference to the *Charter of Rights and Freedoms* or to the common law and *Charter* jurisprudence of the Supreme Court of Canada which together give Canadian legal content to the international human rights standards set out in the Universal Declaration of Human Rights and other international covenants to which Canada is a signatory. The *Roadmap’s* only references to legal rights are presented in the context of diminishing them. That alone is a very serious development. In this case, what makes the policy proposals so alarming has been the fact that the Ministry responsible for overseeing the correctional system, rather than encouraging the broadest public consultation on recommendations that would undermine much of the human rights work of the last 30 years, has completely endorsed them after only a few weeks of closed internal review. Packaged as the “transformation agenda” CSC officials and employees (including those who privately have grave reservations about the agenda) along with many in the community sector have felt obliged to accept the proposed changes uncritically. With no public review or consultation, the plethora of recommendations – some good, some trivial but many with draconian implications for the protection of human rights, public safety and the public purse, are being presented as the future of federal corrections in Canada.

Legal and human rights principles have been fundamental to correctional policy in Canada for about three decades and while compliance with those principles is always a challenge, they are the keystone that holds corrections policy together in a coherent whole. The absence of such principles in the *Roadmap* requires that our response be sufficiently detailed so that the knowledge and evidence deficiencies in the *Roadmap* and their deviance from Canada’s long-standing principles for corrections can be documented and understood. It is through that lens that we have analysed the *Roadmap* report and assessed the potential success or failure of the correctional measures it proposes.

The title of our response and the design of the cover page is informed by the 1990 Green Paper published by the Minister of Justice and the Solicitor General of Canada “Directions for Reform: A Framework for Sentencing, Corrections and Conditional Release”, which laid the foundations for the 1992 *Corrections and Conditional Release Act*. It, too, had on its cover a symbolic compass pointing to a contemporary model of corrections that reflected the values and principles embodied in the *Charter of Rights and Freedoms*. In sharp contrast, the *Roadmap* is a flawed moral and legal compass. It points in the wrong direction without reference to the fundamental values and principles of human rights.

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Michael Jackson

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Executive Summary

Context for the Review

On April 20th, 2007, The Honourable Stockwell Day, Minister of Public Safety announced the appointment of a Panel charged with the task of reviewing the operations of the Correctional Service of Canada (CSC). The Correctional Service of Canada Review Panel (the Panel) was composed of Rob Sampson, the former Minister of Corrections for the Ontario Government, and four other individuals experienced in the fields of public policy and public safety. The mandate of the Review Panel was to provide the Minister of Public Safety with advice on a broad range of complex topics that have been problematic for CSC over many years.

Six months after its appointment the Review Panel presented its final report to the Honourable Stockwell Day on October 31, 2007. The 170 page report (excluding appendices) entitled “A Roadmap to Strengthening Public Safety”,¹ contains 109 recommendations organized around strengthening five key areas that the Panel considered would enable CSC “to offer greater public safety results to Canadians.” The five areas and the Panel’s major recommendations are:

1. *Offender Accountability*

Rehabilitation is a responsibility shared by CSC and the offender.

The principles of the Corrections and Conditional Release Act (CCRA) have to be strengthened to further emphasize offender responsibility and accountability.

2. *Eliminating Drugs from Prison*

The presence of drugs means that the institutions are not safe and secure environments where offenders can focus on rehabilitation. The Panel recommended that CSC strengthen its interdiction initiatives on all fronts.

3. *Employability/Employment*

There is a need to enhance both the quantity and quality of work opportunities available in penitentiaries leading to opportunities in the community.

The Panel recommended that CSC implement a more structured workday to allow for the proper balance among work, education and correctional programs.

4. *Physical Infrastructure*

The Panel recommended that CSC explore building regional “complexes”; complexes reinforce an overall correctional management model that stresses the accountabilities of offenders to follow their correctional plans and provide integrated opportunities to improve correctional results.

5. *Eliminating Statutory Release; Moving to Earned Parole*

1 Report of the Correctional Service of Canada Review Panel: A Roadmap to Strengthening Public Safety (Minister of Public Works and Government Services Canada 2007) iii (hereafter “Roadmap”) online at http://www.ps-sp.gc.ca/csc-scc/report-rapport/table_of_contents-eng.aspx

The Panel recommended that offenders be required to earn their way back to their home communities: they should demonstrate to the National Parole Board that they have changed and are capable of living as law-abiding citizens.

The Government officially responded to the Report in Budget 2008, investing \$478.8 million over five years to initiate the implementation of a new vision and set the foundation to strengthen the federal correctional system and enable CSC to respond comprehensively to the Panel's recommendations. The then CSC Commissioner Keith Coulter established a Transformation Team to lead CSC's response to the Report recommendations, led by Senior Deputy Commissioner Don Head. On June 27 2008, Mr. Head succeeded Mr. Coulter as the Commissioner. In his introduction to the June 2008 edition of *Let's Talk*, CSC's in-house publication, Don Head described the nature and trajectory of the envisioned transformation:

CSC is once again starting a new chapter — this time in response to the CSC Review Panel Report. The Panel's 109 recommendations touch on every aspect of our business, ranging from institutional services to community corrections. Responding to these recommendations will position us well for the future to help ensure we achieve excellent public safety results in an integrated and consistent manner.

With remarkable speed unprecedented in the history of Canadian Corrections - a little over a year - a blueprint for "transformation" of Canada's federal correctional system has been identified by the Panel and has been endorsed and adopted by CSC as the correctional equivalent of the holy grail for "how CSC delivers services and ...the manner in which we perform our business." Given that we are talking "transformation" rather than incremental change, there has been remarkably little discussion or critical commentary, either in the public domain or among the criminal justice NGO community, about the contours of the *Roadmap*, analysing its strengths, limitations and implications. Is it indeed the pathway to the correctional grail or another step in a long history of well intentioned but flawed attempts to pave over the fault lines in the correctional landscape? Is the proposed transformation really one that will strengthen public safety or an agenda that will threaten the vital balance between security and justice, and in the process derogate from the development of a culture of respect for human rights and undermine Canada's commitment to live up to its domestic and international human rights obligations.

Our purpose in writing this report is to subject the *Roadmap's* recommendations and CSC's transformation agenda to the kind of scrutiny that such far-reaching changes in the Canadian federal correctional system demands and the Canadian public deserves. Our report is intended to present a counterpoint to the *Roadmap*, one marked by a review of correctional and legal history, a consideration of the relevant reports of royal commissions, task forces and academic research and an analysis of the human rights standards and jurisprudence applicable to corrections, all of which is entirely absent from the *Roadmap*. On the basis of what we consider a stronger historical and legal foundation, one anchored in an unwavering commitment to human rights in prison, we will discuss the merits, limitations and the true costs for both public safety and human dignity of implementation of the Panel's recommendations for correctional programs and services. We will show that the Panel's analysis reveals such fundamental misunder-

standings and misinterpretation of the Canadian correctional context that both its observations and recommendations are indelibly flawed.

One of the hard lessons the authors have learned from our collective 75 years of being involved in Canadian corrections is that there is often a huge gap between the rhetoric and reality of change. We have both repeatedly experienced events in Canadian penitentiaries, often in contradiction to the law, policy and stated values of the prison system, that have been huge disappointments in our quest for the humane treatment of prisoners. While prison is one of the most difficult environments to respect human dignity, that means we must be ever more vigilant to ensure that the values that we depend on for our quality of life are extended to those in prison. We both continue to profess and advocate that a humane prison is a substantially realizable and necessary goal. The fact that many important steps have been taken during our working lives speaks to the fact that our goal is shared by many dedicated administrators and staff within the Correctional Service of Canada. But while the achievements are important and a matter for celebration, we must never lose sight of the gaps between the rhetoric and reality. The goal of living in a humane society cannot be surrendered - particularly in our prisons.

Faulty Premises

Any government-sponsored body charged with the task of making recommendations about the future of corrections in Canada should have the hallmark of credibility if it is to engender the necessary confidence of Canadians that the recommendations do form a blueprint that is in the public interest. Credibility turns on factors such as the reasons for the study, expertise of the review Panel in the field under study, objectivity of the chairperson, appropriate resources for research, adequacy of the time frame, and the opportunity for public consultation regarding the recommendations. In all of these respects the CSC Review Panel reveals serious shortcomings, creating the grave concern that the Panel's conception, mandate and recommendations were unduly influenced by a political and ideological agenda that undermined its correctional integrity.

We analyze how the Panel carefully selected crime statistics that give a distorted view of crime trends that are then bootstrapped to justify the "strengthening public safety" agenda. Similarly we examine in detail the innuendo and questionable conclusions that the Panel draws from the "changing offender profile". The crime and offender profile data the Panel draws upon to justify its agenda is for anyone with a basic knowledge of such matters transparently misused to create faulty premises.

The report paints a picture of crime that purports to show serious violent crime as being on the increase by focussing on the 2006 figures without any historical perspective of the cycle of crime statistics that show that overall violent crime has been on the decrease. To imply that a one-year change constitutes a trend that should influence, let alone justify, far-reaching changes to the framework of Canadian corrections is a fundamental error.

Notwithstanding the public misconception of rising and rampant violent crime, the rate of violent crime in Canada has not gone up over the past decade. The Panel's report, far from cor-

recting this misconception, contributes to its perpetuation. In July 2009 Statistics Canada reported the fifth consecutive annual decline in police-reported crime.

The Panel's uncritical acceptance of the "changing offender profile" and misinformed analysis of violent crime trends seems to set the stage for many of their most dubious recommendations. Buying in to the seductive rationale of a more difficult prisoner population sets the stage to adopt simplistic sanction-based responses to a whole range of complex problems. Human rights, in that context, become an expendable hindrance. The recommendations to change the *CCRA* –to separate "basic" from other rights, abandon the least restrictive measures standard, tighten up on "offender accountability", link rights and privileges to compliance with the correctional plan, reduce access to conditional release, use work as a discipline dressed up as treatment, and the placement of drug interdiction before anything else – including justice, flow naturally from their view of prisons and crime encapsulated in their attachment to these faulty premises.

While the *Roadmap* purports to chart a transformative pathway for Canadian corrections, it fails to acknowledge or give due consideration to the relevant historical context in which many of its recommendations must be situated. Remarkably, of the 170 years of available "historical perspective" since the opening of Kingston penitentiary in 1835, the Panel's analysis provides just two short paragraphs. The history is limited to post 1992. Did the Panel really believe that nothing before 1992 and the adoption of the *CCRA* - the legislative framework for federal corrections - was of relevance to its recommendations? Yet Canadian corrections has a deep history that is well documented through a succession of royal commissions, commissions of inquiry, government task forces and academic literature. It is also a history that includes discussion of many of the key areas and some of the same recommendation identified by the Panel.

The Panel patently misconceives the historical context of the *CCRA*. The Panel seems to believe that the legislative purpose of the *CCRA* was to serve the needs of CSC. The report treats the *CCRA* as if it were simply a piece of legislation designed to facilitate a narrow set of correctional goals that are subject to change depending upon changes in the prison population and operational requirements. As we document, one of the primary purposes of the *CCRA* was to bring correctional legislation into conformity with the *Charter of Rights and Freedoms* to ensure that Canadian correctional authority was exercised within a Charter culture of respect for rights and not according to the dictates of administrative convenience. The *CCRA* was not simply a response to the challenges of operational requirements and the offender profile of the federal prison population in the 1980s but a far-reaching legislative response to the requirements of Canada's Constitution that enshrine Canadian values. It was also intended to reflect in legislative language the values and principles of CSC's Mission Statement, a statement that every Solicitor General and Minister of Public Safety since 1989 has signed and held up to be the key principles on which CSC's operation is to be judged. We believe that the problematic and controversial nature of many of the Panel's recommendations flow from their lack of consideration of the historical and constitutional foundations of the *CCRA*.

Human Rights and Corrections

We are not the first to make the point that it takes vigilance and courage, both individual and collective, to ensure that human rights are protected at those points where they become most vulnerable. Within Canada, that vulnerability is nowhere more evident than inside penitentiaries. It is because we believe that respect for human rights is fundamental to any transformation of Canadian corrections that we begin our commentary with the international and domestic human rights framework.

In our response we argue that human rights is not something that needs to be “balanced” against prison discipline and control. Rather, it is something through which prison discipline and control is exercised in a professional manner. Discipline and control that is not consistent with inherent human dignity, and the rights that give legal meaning to that dignity, is simply the naked exercise of power and as such is inevitably abusive. Legitimate discipline and control is necessary but can only be effective in promoting positive change in the individual, and avoid being self-defeating, if it is inherently moral and justifiable. Promoting and respecting human rights is not about being soft, it is about being decent. Respect for human rights is a necessary condition for the exercise of correctional authority.² It is also the most effective way of doing corrections.

In the past several years the commitment to human rights at the upper levels of CSC has considerably wavered. There are those who now think that human rights talk is out of fashion, as if such discourse was a fad or fetish of liberal-minded people and had no place in a “get tough on crime and criminals” world. Little wonder then that a human rights strategy remains a hard sell to many staff and the general public.

In light of the unfinished business of entrenching a culture of respect for human rights within Canadian penitentiaries and the wavering commitment within CSC to such an agenda, any report on the future of corrections must include a clarion call to reinvigorate that commitment and identify measures and initiatives well calculated to implement it. No such call is to be found in the *Roadmap*. Instead of a clarion call for greater vigilance in protecting human rights we find a virtual open invitation to CSC to dismantle the existing legal and administrative framework and redefine the definition of rights by introducing an ill-conceived hierarchy of rights and conditions of confinement dependent upon how well prisoners participate in their correctional plan. The *Roadmap* undermines the fundamental nature of Canada's human rights commitments and puts Canada on a path out of step with the relevant international and domestic human rights norms.

In our Response we have repeatedly invoked the concept of human dignity and the principles that pour content into its implementation in Canadian corrections to provide the necessary framework for understanding the dangers and perils for both public safety and human rights

² Michael Ignatieff in *A Just Measure of Pain* has documented the deep historical links between justice and moral legitimacy. John Howard, whose 1777 seminal work *The State of the Prisons in England and Wales* inspired the idea of the modern penitentiary as a humane response to crime, in his proposals for reform of the prisons, was insistent that punishment, in order to be effective, must maintain its moral legitimacy in the eyes of both the public and the offender. For Howard the most painful punishments and those that aroused the greatest guilt were those that observed the strictest standards of justice and morality.

that lie along the Panel's *Roadmap* and CSC's transformation agenda. As we will demonstrate, the failure of the Panel to understand that the *CCRA* was designed to incorporate a *Charter* culture of rights into correctional operations undermines their principal recommendations for amending the Act. It is to these recommendations that we first turn.

The Panel's proposed Amendments to the *CCRA*

In justifying what is described as "refocusing the *CCRA*" the Panel accepts "the key rehabilitative principle and CSC's responsibility ...to provide the offender with ample opportunity to learn the skills required to correct behaviour". At the same time, the Panel "does not view the rehabilitation mandate of CSC as a one-way commitment." We are told that "the foundation of the Panel's philosophy is the belief that if rehabilitation is to occur and truly be sustained, it must be shared between CSC and the offender." Offenders "must seize those opportunities, pick up the tools of rehabilitation and use them." The Panel, therefore, recommends legislative change "to support an increased emphasis on offender accountability" and because the *CCRA* "is highly prescriptive in how CSC should operate, and what it can and cannot do" proposes changing the principle of 'least restrictive measures' with the principle of 'appropriate measures' to support correctional plan implementation".

The Panel's most significant and far reaching proposed amendments to the *CCRA* are to ss. 4(d) and 4(e). In furtherance of its goal to more firmly establish the principle of offender responsibility in the *Act*, the Panel suggested several changes to the wording of these sections. Instead of assuming that prisoners are to be imprisoned according to "the least restrictive measures" and that prisoners "retain all the rights and privileges that adhere to members of society except for those necessarily removed as a result of their imprisonment", prisoners would be expected to earn their rights and privileges. The only rights that prisoners would retain will be "basic rights".

Some indication of the Panel's correctional philosophy can be gained from the articulation of the same "basic rights" correctional philosophy that was advanced by members of the former Canadian Alliance Party in its dissenting report to the Parliamentary Sub-committee's Five Year review of the *CCRA*:

Putting the protection of a law-abiding society first means that it is necessary to accept to some degree that the rights and privileges of those who obey the laws of this country are fundamentally different from the rights of those who do not. The system does not do this.

Section 4 of the Corrections and Conditional Release Act (CCRA) states "that offenders retain the rights and privileges of all members of society, except those rights and privileges that are necessarily removed or restricted as a consequence of the sentence." The Canadian Alliance believes that any person who has been convicted in a Canadian court should temporarily lose some of their rights and privileges as a Canadian. Primary exceptions to this are basic Charter rights such as right to an attorney and the right to humane and healthful treatment. We define this as the right to be incarcerated in accommodations with reasonable environmental control, to be provided with basic personal care supplies, to be fed according to the Canadian nutrition guide, and to be provided with access to basic medical treatment. Beyond this, prisoners should have the ability to earn other rights and privileges such as more freedom within the prison, transfers to

*more desirable facilities, training programs, sports programs, visitor privileges, payment for work performance, canteen privileges, temporary absences and parole. Each of these rights and privileges must be earned by appropriate behaviour which in turn means that they can also be taken away for inappropriate behaviour.*³

So what is so wrong with requiring prisoners to earn the right to have anything more than their basic rights? The fundamental flaw in this and the Panel's vision of correctional principles is fivefold:

- (1) it is inconsistent with the evolving common law and *Charter* jurisprudence on the human rights of prisoners, specifically the judgments of the Supreme Court of Canada in *Solosky v. The Queen* [1980] and *Sauvé v. Canada* [2003];
- (2) it disregards the extensive legislative history and context of the *CCRA* (specifically the work of the Correctional Law Review);
- (3) it is out of step with international human rights standards;
- (4) it would compromise respect for the rule of law and human rights in Canadian prisons and
- (5) it would undermine rather than promote prisoner reintegration

This is the Panel's rationale for the change to the least restrictive measures principle:

*The Panel believes that this principle has been emphasized too much by the staff and management of CSC, and even by the courts in everyday decision-making about offenders. As a result an imbalance has been created that places the onus on CSC to justify why the least restrictive measures shouldn't be used, rather than on offenders to justify why they should have access to privileges based upon their performance under their correctional plans. The Panel believes that this imbalance is detrimental to offender responsibility and accountability.*⁴

The Panel clearly has no appreciation that the principle has been appropriately and necessarily emphasised by staff and management and applied 'even by the courts' because it is in keeping with a *Charter* derived constitutional test to justify reasonable limits on *Charter* rights and that under that test the only justifiable limitations are those that are necessary to achieve a legitimate correctional goal, and that are the least restrictive possible. The onus on the correctional authorities to justify that the exercise of their legal authority is in accordance with the least restrictive measure is consistent with and indeed mandated by the "retained rights" principle endorsed by the Supreme Court of Canada which means that it is not giving rights to inmates which requires justification, but rather, *restricting* them, which does.

The Panel's amendment would substitute "appropriate" for "least restrictive measures". This change would substitute for a **constitutionally derived** standard of restraint on the exercise of state power, a **policy and operationally derived** standard that leaves it entirely up to correc-

3 Canadian Alliance Official Opposition Minority Report on the Corrections and Conditional Release Act ,Jim Gouk M.P. included in A Work in Progress: The Corrections and Conditional Release Act [Ottawa: Public Works and Government Services, 2000]

4 *Roadmap*, p. 16.

tional authorities to determine what are the appropriate measures, so long as they are designed to ensure the protection of the public, staff members and offenders and that are consistent with the management of the offender's correctional plan.

The questions never posed and therefore never answered by the Panel are what legitimate correctional initiatives or interventions are presently precluded by requiring CSC to ensure that it respects the least restrictive measures consistent with the protection of the public, staff members and offenders and on what conceivable basis should the federal correctional system, the deep end of the criminal justice system, be excepted from the constitutional standards that govern all other exercises of state coercive power?

The Nature of Prisoners' Rights

The second major amendment proposed by the Panel is to s. 4(e). The current wording of 4(e) is a legislative codification of the Supreme Court of Canada's pre-*Charter* decision in *Solosky*. Subsequent decisions of the Court interpreting the *Charter* have greatly reinforced this concept of retained rights and a careful review of the most important of these cases - *Sauvé v. Canada* - the prisoners voting case - demonstrates that the Panel's proposed changes are not only inconsistent with the Supreme Court's approach to human rights but would undermine decades of important work in Canada and internationally to establish a culture of respect for human rights behind prison walls.

According to the Panel, apart from a basic level of rights, prisoners do not have the right to have rights. The assumption seems to be that human rights properly belong to those who are law-abiding members of society. For those who have crossed the threshold to become law-breakers and have been sentenced to prison the right to bear all but the most "basic" rights is forfeited. Any further rights must then be earned back by the law-breakers who must show they have taken responsibility for their criminal actions and are actively engaging in rehabilitating themselves.

In *Sauvé*, the Supreme Court of Canada takes a very different approach to how prisoners' rights are to be understood. First, and most importantly, Chief Justice McLachlin uses the evocative phrase "citizen-lawbreakers"⁵ to describe prisoners and their relationship to *Charter* rights. The crucial point is that even after conviction and imprisonment, an offender remains a rights-bearing individual: the connection between the individual and their common law and *Charter* rights is not severed by a finding of criminal guilt and a sentence of imprisonment. Consequently, prisoners' rights include the majority of the most robust rights listed in the Charter, including freedom of conscience and religion, freedom of thought, equality rights, the right to life, liberty and security of the person, language rights, and a considerable list of legal rights.

The Panel, in proposing that prisoners be allowed "basic rights" and that any additional rights must be earned, views rights as being contingent, in that they can be taken away for 'bad' behaviour and restored for 'good' behaviour. This view, however, misconceives at a fundamental level the very nature of human rights, as rights that are inherent in the human person, based

5 *Sauvé* at para. 40.

upon a sense of common humanity and dignity. The inherent nature of the rights contained within the *Charter* has been recognized and affirmed by the Supreme Court in *Sauvé* in their statement that “**Charter rights are not a matter of privilege or merit, but a function of membership in the Canadian polity that cannot lightly be cast aside**”.

The Panel’s view of human rights is rendered without reference to the constitutional framework established by Canadian courts. The role of *Charter* rights in a democracy is to protect the integrity of the individual from the coercive power of the state. This function is especially important in the criminal law context, not only because of the potential for unfair and arbitrary action on the part of the state, but also because it is in the criminal context where the individual has the most to lose – the right to liberty. Courts have taken their role as protectors of these rights seriously and there is a strong jurisprudential history of defending the rights of an accused in the criminal law context. However, it must never be forgotten that the correctional system is an extension of the criminal justice system. An individual, while incarcerated, is even more vulnerable to rights-infringing action by the state, as he or she is dependent on the state for access to all the necessities of life. It is the state that provides their shelter, their food, ensures their safety and allows them access to their families through visits, phone calls and mail. As Justice Louise Arbour has stated:

*A guilty verdict followed by a custodial sentence is not a grant of authority for the State to disregard the very values that the law, particularly criminal law, seeks to uphold and to vindicate, such as honesty, respect for the physical safety of others, respect for privacy and for human dignity. The administration of criminal justice does not end with the verdict and the imposition of a sentence. Corrections officials are held to the same standards of integrity and decency as their partners in the administration of criminal law.*⁶

There is another important dimension to understanding the implications of a roadmap that would direct Canadian corrections on a journey featuring regimes that limit rights. A consistent theme in the history of corrections, not just in Canada but throughout the world, has been the struggle to achieve a balance between potentially competing goals, whether expressed as justice and security/public safety, punishment and rehabilitation, or restraint and reintegration. A prominent feature of this history has been that the invocation of imprisonment and the practices that accompany its execution have been punctuated over the course of two centuries by a succession of crises. These crises have led to commissions of inquiry and reports cataloguing both the abuses of power taking place within prison walls and the prison's pervasive tendency to make prisoners more dangerous and more anti-social. In the last part of the twentieth century and into this century it has been increasingly recognized that an indispensable component in reconciling the goals of public safety and justice has been promoting a culture of respect for the rule of law and human rights and holding correctional authorities accountable for abuses of power.

The most recent of these inquiries in Canada to address this component is that of Justice Louise Arbour in 1996 arising from the strip searching and segregation of a group of women at the

⁶ Louise Arbour, Commission of Inquiry into Certain Events at the Prison for Women in Kingston, (Ottawa: Public Works and Government Services Canada, 1996) at xi

Prison for Women. The Arbour report is a seminal document in the history of Canadian corrections, yet the Panel's report gives no consideration to the recommendations of the Arbour report to entrench respect for the rule of law and human rights in Canada's penitentiaries. Justice Arbour went on to become Chief Prosecutor for the International Criminal Tribunals for the former Yugoslavia and Rwanda, a justice of the Supreme Court of Canada and the United Nations High Commissioner for Human Rights, yet the analysis by one of Canada's most distinguished jurists regarding the importance of and CSC's historical lack of respect for human rights is nowhere acknowledged by the *Roadmap*.

The Panel's recommendations reflect a profound lack of understanding of the constitutional and correctional basis for the recognition of and legitimate limitations on the human rights of offenders. Implementation of its recommendations, far from being "transformative", would be a deeply regressive development in Canada's human rights history.

Conditions of Confinement

The Panel's recommendations to CSC on how the Service should restructure the conditions of confinement in Canadian penitentiaries reveal the same fundamental flaws as its recommendations regarding amendments to the *CCRA*. The Panel places great weight on and indeed unquestioning belief in the prescriptive excellence of the correctional plan and regard an offender's willingness to engage with it as the pre-requisite to certain rights and privileges and conditions of confinement and propose that it be entrenched as an "accountability contract" on which parole release would be contingent. There is more than a little correctional hubris in the assumption that CSC assessors can, in the first few months of a long sentence, definitively diagnose and prescribe the exact programs that will address the prisoner's problems, now and in the future. Here, as with so much of corrections, the distance between the rhetoric and the reality is vast.

The correctional plan typically will identify which of the CSC "menu" of cognitive-based programs are necessary to address the prisoner's criminogenic needs, risk factors, and reintegration potential, and any educational upgrading or job training that may be appropriate and available. According to policy the development of an offender's correctional plan is handmade and carefully tailored to the offender's needs, risks and motivation. In practice it more resembles an assembly line mass produced product made from standardised parts.

While we do not dispute the necessity for a correctional plan, we also reject the notion that as presently structured it is all that is required to manage future risk and prepare the person for successful release. Effective corrections cannot consist of simply participating in a pre-ordered set of programs taken from a very limited menu. The road of personal development is rarely a straight one. The route and goals change as we discover new options or barriers. So long as choice is involved, the correctional plan must be flexible – to reflect changes in the person and his or her goals. Similarly, all the elements must tie together to make sense and build towards a process of change. The *Roadmap* recognizes the need for continuity, but seems to be overly and unrealistically confident that this can be accomplished by the professional staff under the current framework of the correctional plan.

The Panel recommendations are particularly addressed to the unmotivated prisoner who does not participate in their correctional plan. It is this offender who the Panel wishes to motivate to better cooperate with the correctional authorities by encouraging CSC to identify and prescribe conditions of confinement that are tougher for such offenders than those available to their more compliant peers. However, this “they get less” model of motivation is not likely to lead to reintegration of offenders, but rather to a harder, tougher cohort of individuals who, in large measure, are already quite used to privation. It is also clear from years of experience that if offenders ‘participate’ or attend programs for the sole purpose of avoiding a negative consequence, or to meet expectations of a decision-making authority, they are less likely to internalize the benefits and therefore, ultimately, defeats the purpose of the correctional plan in the end.

The Panel would have CSC undergo a re-examination of rights and privileges and develop regimes based on an offender’s performance under his or her correctional plan and differentiating access to ‘rights and privileges’ both by security level and such performance. Less than a decade ago when this regimes concept was first advanced, CSC, after consultation with the National Associations Active in Criminal Justice (NAACJ) and the Canadian Bar Association, correctly concluded that trying to develop correctional regimes with differing rights and privileges was not a productive discourse. Yet it is now proposed by the Panel as a new idea with no appreciation of its implications or of the road previously travelled by CSC.

Segregation

That the Panel’s recommendations would both compromise principles of human dignity and fair and just decision-making and undermine the already difficult task of developing within the federal correctional system a culture of respect for rights is manifested in the Panel’s observations and recommendations regarding administrative segregation. Because the time in administrative segregation can extend to months, even years, it represents the most powerful form of carceral authority. Because the conditions of confinement are the closest thing to solitary confinement, it is also the most intensive form of imprisonment. Segregation is perhaps the best documented example in Canada of the abuse of correctional power yet the Panel devoted little space to this issue. It did however make recommendations to tighten the conditions in voluntary segregation. The clear implication of the Panel’s analysis is that the conditions of confinement for those prisoners in “voluntary” segregation are too soft and need to be toughened up to discourage prisoners from checking into or remaining in voluntary segregation.

In 1977 the Supreme Court rightly characterized segregation as “a prison within a prison”. Administrative segregation was the subject of CSC’s 1975 Vantour report, the 1996 Arbour Commission of Inquiry and CSC’s 1997 Report of the Task Force on Segregation, a task force convened specifically in response to the damning criticism of Justice Arbour. It is also the subject of a large body of scholarly work. Yet the Panel makes no mention of any of this, even though the Task Force devoted considerable attention to the issue of voluntary segregation and the challenges it presented for CSC. Every other report that has looked at segregation has addressed the human rights implications of the conditions of confinement as central to its deliberations, as well as addressing the importance of due process in making decisions about placing

prisoners in segregation and reviewing these cases to minimize the duration of segregation. According to the Panel, the only pressing agenda facing CSC regarding administrative segregation worthy of inclusion in the transformation agenda is to make the conditions of such segregation less comfortable- presumably by taking away any aspect of confinement - such as a single cell - that seems to confer an advantage over those existing in general population. The Panel virtually invites CSC to reverse its policy, adopted in response to the recommendations of the Task Force on Segregation and after repeated criticism from the Correctional Investigator, that prisoners in segregation shall not be double bunked. Elsewhere in the Panel's report there is reference to the Parliamentary Committee's report on the five-year review of the CCRA, "A Work in Progress". That Committee specifically addressed the issue of administrative segregation and one of its recommendations was that CSC should appoint independent chairpersons for administrative segregation similar to the regime for the disciplinary process. The system of independent adjudication of disciplinary cases in which a prisoner can be sentenced to a maximum of 30 days in segregation (which can be increased to 45 days for multiple convictions) was introduced in 1980 following the recommendations of the 1977 report of the Parliamentary Subcommittee on the Penitentiary System in Canada. Since then there have been a succession of recommendations from other inquiries, committees and experts for the introduction of independent adjudication into the process of placement of prisoners in indefinite administrative segregation. It has been argued that independent adjudication of segregation decisions is necessary to ensure a fair and unbiased hearing, compliance with the statutory framework, protection of prisoners' rights and privileges while segregated, and the implementation of reintegration plans to ensure that the correctional authorities, in administering the sentence, use the least restrictive measures. The recommendation for independent adjudication has been advanced by Justice Arbour, CSC's Task Force on Segregation, the Yalden Working Group on Human Rights, the Parliamentary Sub-Committee on the CCRA, the Canadian Human Rights Commission and the Correctional Investigator. This consensus would seem to all but guarantee that CSC would recognize that it merited space in the correctional legal landscape yet CSC has steadfastly resisted implementation of these recommendations.⁷ The Panel makes no mention of this outstanding and pressing issue of independent adjudication despite its identification by an increasing chorus of commentators, academic, judicial and parliamentary, as an essential part of the roadmap for a fair and effective correctional regime.

Gangs

The Panel seems to be particularly concerned with those offenders who are doing relatively short sentences, who have gang affiliations and who continue to maintain criminal values. Yet here again, the research literature that the Panel seems not to have read strongly suggests that a strategy based on greater privation by toughening of the conditions of confinement is unlikely to make a positive impression on those who have already experienced a life of alienation and privation that led to their gang involvement. Ironically, as the Panel deliberated CSC received a report that provided a comprehensive analysis of the origins of Aboriginal gangs and the social

7 For a detailed history of the issue see Michael Jackson, *The Litmus Test of Legitimacy: Independent Adjudication and Administrative Segregation*, 48 *Canadian Journal of Criminology and Criminal Justice*, 157 (2006)

and economic conditions that lead to the formation and recruitment of members. Its major findings provide powerful evidence for rejecting the Panel's "they get less" strategy to motivate the non-compliant gang member. What the report demonstrates clearly is that the issue of responding in the correctional context to young, unmotivated gang members is complex, rooted as it is in larger societal conditions and that the avenues for advancing CSC's mission and mandate must be nuanced and must above all else be based on "treating inmates like human beings." Instead what we get from the Panel is a blunt recommendation to sanction the non-compliant by developing a hierarchy of rights and privileges with more privation and more onerous conditions of confinement for the unmotivated prisoner.

Drugs in Prison

The Panel makes far-reaching recommendations which it believes will enable the Correctional Service of Canada to better wage the war on drugs inside the walls. The Panel's approach to drug use is one dimensional focusing exclusively on greater enforcement with no sensitivity or consideration to the implications of the measures proposed on the human rights of prisoners and their families to visit and associate.

There can be no argument that the trafficking of illegal drugs within penitentiaries is a serious problem that contributes to violence, the spread of disease and undermines prisoner rehabilitation. There can be no argument that because of these reasons, "illicit drugs are unacceptable in a federal penitentiary". There is also no argument that the proliferation of drugs within Canadian society and the enormous profits to be made from the distribution of illegal drugs has led to the growth of international, national and local criminal networks to manufacture and distribute these commodities. That the drug trade would be a major problem in Canadian penitentiaries is neither a revelation nor surprising. A significant part of the federal prison population is made up of offenders who come to prison (1) because of illegal drug use - those who are addicted to illegal drugs and commit offenses such as robberies, to feed their habits or commit offences while under the influence of drugs and (2) because of their involvement in the networks of drug trafficking. Within the prison walls, therefore, are replicated and concentrated the market conditions for a profitable drug trade that exist outside the walls – a demand side of users eager to acquire drugs and a supply side of offenders connected to networks to fill that demand. In 1990 a British Columbia Court of Appeal judge commented during a sentencing appeal that "Drugs of all sorts are readily available in our prisons and penitentiaries. Only the price varies, in kind and amount, from that which is exacted on the street". This comment remains as true today as then.

It is clear from the list of the Panel recommendations that enhanced security measures, increased use of drug dogs and drug-sensing technology, greater limitations on contact visits, more intense surveillance and strengthening of intelligence information and more punitive sanctions are the exclusive focus of the Panel's approach to reform. Completely absent from the Panel's analysis is any recognition that under the existing law, correctional authorities already have and use significantly greater powers to conduct searches within federal penitentiaries than Canadian society would ever tolerate by the police on the street. Even with these greater powers, drugs continue to flow into prisons. While it might seem reasonable to believe

that implementing the Panel's recommendation of "more stringent control measures (i.e. elimination of contact visits)" and requiring that all visits be behind glass might have some impact on reducing the flow of drugs, there is no research evidence to support this. In fact CSC's own internal audit of drug interdiction reveals that over the period 2001-6 drug seizures in the visits areas accounted for less than 20% of drug seizures in penitentiaries. We also need to consider that even if the flow could be successfully reduced, this increased scarcity would significantly increase the value of drugs and competition for them with the result that the drug trade in prison could become more lucrative, desperate and, therefore, more violent.

Restricting visits beyond the current practice of selective restrictions for those who present security risks would also have a crippling effect on prisoners and their families. Permitting a humane visiting regime while ensuring a drug-free penitentiary is impossible if either the visits or the drug interdiction must be absolute. Both outcomes are desirable as they reflect recognition of the competing interests at stake, recognition entirely absent from the Panel's analysis. Without recognizing these competing interests, the Panel is unable to consider strategies other than simply allowing one to exclude the other.

The Panel makes the mistake of not recognizing that most prisoners and most visitors are not involved in the drug trade at all. Depriving them of the opportunity to maintain crucial relationships in the faint hope of seriously interfering with drug trafficking in prison is arbitrary and comes at a cost that is substantial while offering no evidence that drugs will not come in through other, potentially more problematic channels. The *CCRA* recognizes the *Charter* rights of prisoners and visitors, articulates in legislative form the correctional objectives that provide the substantial and compelling grounds for placing limitations on those rights and requires that any such limitation be the least restrictive measure. These criteria appropriately reflect principles articulated by the Supreme Court in its *Charter* jurisprudence and cannot be easily modified without raising serious questions of constitutionality. The significance of this carefully calibrated constitutional order in framing recommendations for reform is completely ignored by the Panel.

Two of the Panel's recommendations call for greater use of ionscan equipment and drug dogs without any cost-benefit analysis or review of CSC's experience with these anti-drug initiatives. In fact, CSC has never been able to produce evidence of studies conducted by them or anyone else that establish the reliability of the technology in the field. There is no doubt that the technology is highly sensitive to certain substances and can identify extremely small amounts. However, what is in dispute is the degree to which the technology can reliably differentiate between substances associated with illegal drugs and many other perfectly legal substances.

Despite its widespread use in a variety of settings there is a dearth of independent research on the reliability of the technology in drug testing in field situations, such as the front gate of a prison. In 1998, at the order of Her Majesty's Prison Service in the United Kingdom, the Police Scientific Development Branch conducted a study of six electronic trace drug detection devices, under both field and laboratory conditions. Included in these machines were machines utilized by CSC, the Barringer Ionscan and the Ion Track Itemiser. The detailed results of the experiments could not be released due to "commercial confidentiality", but a general conclusion re-

vealed that the only illegal drug that the machines detected reliably was cocaine, and that for other drugs, the machines were “not...currently reliable.”

In 2006, as a result of the concerns by offenders and their visitors about the proper use of Ion scan devices an audit was conducted by CSC’s Internal Audit Branch. This Audit found that the Ion scan policies and procedures were not being followed and provides powerful confirmatory evidence that the abuse of ionscanning described in the accounts of visitors are not aberrations but part of a systemic failure by CSC staff to comply with law and policy.

The Panel does not seem to have been aware of the existence of this Audit yet confidently recommends that CSC place more resources in the deployment of this technology without insisting on reliability studies conducted in the field and without requiring that CSC demonstrate its compliance with law and policy. It is hard to understand, therefore, the Panel’s unquestioning endorsement of this and other unnamed “new technologies” except in terms of an unremitting and unquestioning faith in intensifying the war on drugs, irrespective of the costs to justice and effective corrections.

We have seen no evidence to support the case that “a more rigorous approach to drug interdiction” would have any more success within prisons than the array of increased enforcement and tougher sentencing has had on stemming the flow of drugs coming into Canadian cities and communities. In prison, as on the street, prevention and treatment are more hopeful and productive strategies to address the intractable problems of drug use. Harm reduction strategies offer the best hope to modify the deadly transfer of HIV and Hep C within the prisons and, after release, in the community.

CSC’s current Drug Strategy rightly emphasises the elements of prevention and treatment along with enforcement. Shifting resources by addressing only “more stringent measures”, as advocated by the Panel, carries unconsidered heavy costs for both a crucial element necessary for a humane environment and for an effective drug strategy. Unfairly inhibiting the rights and ability of prisoners, their families and their support networks to maintain the bonds of family and community necessary for their reintegration into society, has no legitimate place in a roadmap to a just, peaceful and safe society.

Earned Parole

The Panel proposes that Statutory Release and Accelerated Day Parole be abolished and replaced with a system they call “earned parole” where an offender’s release prior to the warrant expiry date would only be possible through a parole decision by the National Parole Board. In our response we consider the historical record and the research evidence relevant to the Panel’s recommendations and discuss why we think they are ill-conceived and inimical to public safety.

In 1969 the Report of the Canadian Committee on Corrections (the Ouimet report) reviewed Canada’s experience after the first decade of the *Parole Act*. The Committee noted that while the lowest risk offenders were being released through parole under community based supervi-

sion, those who had not been granted parole were being released directly to the street with neither supervision nor assistance. In other words, those for whom the transition to the community was likely to be the most difficult were being ignored and left to their own devices. To address this shortcoming the Committee proposed that a system be developed “under which almost everyone would be released under some form of supervision.” Recognizing that “there will be many who will not qualify for parole” they proposed “making the period of statutory remission a period of supervision in the community subject to the same procedures that apply to parole.” By recommending that community supervision occur during the remitted portion of the sentence, the Committee ensured that the community supervision period would be *added, not subtracted*, to the time that would otherwise be served in prison. The Committee’s recommendations were implemented in 1970 through amendments to the *Parole Act*.

It is important to understand the consequences for corrections of the introduction of what from 1970 until 1992 was called “mandatory supervision”. Prior to 1970 a prisoner who was not granted parole and who had not lost remission through bad behaviour would be entitled to be released at the end of two-thirds of their sentence. At that point the prisoner became a free person, subject to no further restraint by the state. As a result of the implementation of the recommendations of the Ouimet Committee in 1970, those prisoners not granted parole remained entitled to be released at the two thirds point in their sentence, but instead of being free they were now subject to mandatory supervision by a parole officer- in effect a compulsory form of parole. During this period of supervision they could be returned to prison to serve the rest of their sentence for breach of the conditions of their supervision even though they committed no new crime. Quite clearly the changes in 1970 amounted to a substantial tightening of the correctional screws. The period of time under sentence was increased by fifty percent through the addition of the period under mandatory supervision. This change was justified by the correctional theory that it would help those who were considered too high risk for parole to safely reintegrate into the community. With the passage of the *CCRA* in 1992 this form of compulsory supervision was renamed “statutory release”.

The Panel views statutory release as being an unsuccessful program. That conclusion appears to be driven primarily by the Panel’s recitation of a few statistics.

“Of all statutory release supervision periods in 2005–06, 6 in 10 were completed without revocation; however, statutory release cases accounted for 79% of violent reoffending in the community, while representing 35% of the conditionally released population.

For another and fairer perspective on the risks of violent offences committed in the community by those on statutory release, consideration should be given to the overall contribution of this group to violent crime in Canada. In 2006-07 117 violent offences (all types and severity) committed by statutory release cases constituted 0.035% of the 306,559 (35 per 100,000) violent crimes reported by Statistics Canada for that year. No violent crime is acceptable, but before we abolish statutory release as an unsafe program it must be understood that with this measure only a tiny fraction of violent crime would be addressed. Further, given that release at warrant expiry would follow anyway in less than 7 months on average, the likelihood that the offences would only be delayed slightly would mean no noticeable or real difference in the violent crime we experience in the community.

In 2006-07, 58.1% of those on statutory release completed their supervision period successfully, while 30.7% who failed to live by the rules were returned to prison for “technical” violations and 9 % returned with a non-violent crime. That leaves just 2.2% who returned for committing a violent crime. In fact, the overall rates of both violent and non-violent reoffending by those on statutory release have been dropping steadily from an already low rate for many years.

The Panel presents data in such a way as to build a case for their proposition that a violent failure rate of just 2.2% amongst those identified as being both the highest need and highest risk offenders is a failed program that should be abolished. However the most concerning omission in the Panel’s analysis is that they make no attempt to address the single factor that would justify the abolition of statutory release: whether the same people, if released free and clear at the end of their sentence would, during a similar period, commit violent offences at a rate lower than the 2.2% rate of statutory release cases. Without this information the Panel is unable to provide any valid evidence that abolishing gradual supervised release for these higher-risk prisoners is not a reasonable balancing of risk against the competing risk of direct unsupervised release to the community.

The fact that the statutory release cases do relatively worse than the parole group is hardly a revelation. As noted already, this outcome was predicted by the Ouimet Committee in recognition of the fact that statutory release was *intended* to be used for those who had been refused or did not apply for parole.

The Panel would have us confidently believe that with the abolition of statutory release the goal of community reintegration and public safety will be furthered because, through the implementation by CSC of all the Panel’s other recommendations, offenders who would now leave prison on statutory release, will be better motivated and prepared to gain their release under the reformed “earned” parole model advanced by the Panel. In this way the National Parole Board’s grant rate would increase obviating the need for statutory release. It is our judgment that such confidence is not only misplaced but, based upon any objective analysis, demonstrably misconceived.

The Panel “believes” that many individuals who are either denied or who do not apply for parole would approach their correctional plan with new-found enthusiasm should statutory release be abolished. In fact, the circumstances of the offense, the inability to produce coherent release plans, addictions and mental illness, learning disabilities, illiteracy and many other disadvantages constitute weigh heavily against a successful parole application. They are not factors that most prisoners can easily compensate for or change. Others will have already failed on parole and, regardless of the effort they put into their correctional plan while in prison, have no reasonable chance of being released on parole again. Additionally, it needs to be recognized that family and community support, crucial factors for success, are not available for many prisoners and cannot be addressed through a correctional plan.

The continuous focus of the Panel on “motivation” as a primary factor that determines release on parole overlooks the enormous barriers to parole faced by so many prisoners and ignores or minimizes what would be required to overcome them. Clearly, it is difficult to be “motivated”

to address factors that are perceived to be beyond a person's capacity to control. No incentive or punishment can address this perception. The suggestion that large numbers of those currently being released on statutory release might be released under parole if they tried harder is insensitive to systemic and personal disadvantage.

In surely what is the ultimate case of correctional irony, the CSC Review Panel, 40 years after the Ouimet report was tabled, recommends the abolition of statutory release citing "public safety" as the reason: the very rationale used by Ouimet to recommend it in the first place and relied upon ever since by CSC and successive governments to justify its continuance. The Panel does so in apparent ignorance of the history of statutory release and the reasons for its implementation. The Panel's lack of historical context for its recommendation is a major public policy shortfall. Had the Panel reviewed that history and the underlying justification for the introduction of statutory release it might have recognized that its recommendation for its abolition conflicts with its own observation "that public safety is best served through a period of supervised and supported release for offenders prior to the end of the sentence".

Militating against the Panel's confidence that its transformation agenda will adequately compensate for abolition of statutory release are the Panel's own recommendations that would make it more difficult to "earn" parole. Two of these additional elements of earned parole that relate to adherence to the correctional plan and the prospect of community employment raise serious issues of implementation and accountability that undermine the Panel's confidence that earned parole is an effective substitute for statutory release. While everyone would agree that employment after release is often important, the proposal to make employment an important factor for granting parole could have serious and unintended consequences. It is very difficult to arrange employment for prisoners or for prisoners to find their own employment while incarcerated. Even amongst those few employers who might consider employing a person straight out of prison, even fewer would be willing to promise a job without the opportunity to interview the individual, being able to assess his qualifications or character and not knowing when or if the person would become available. While having a job is an important advantage, requiring that a person have a job "or strong likelihood of a job placement" would be an insurmountable barrier to parole for the great majority.

We are left in no doubt that the abolition of statutory release will have a huge impact on the federal prison population. The release mechanism that is used in two-thirds of all releases will be abolished, leaving those so affected to serve 50% more time in prison than is the case now. To compensate for their statutory release recommendations every prisoner would need to be released on earned parole before the two-thirds point in their sentence, the Parole Board would need to have a grant rate of almost 100%. We challenge any experienced correctional or parole administrator/decision maker to seriously argue that this is a realistic scenario.

One very disturbing consequence of the Panel's proposal to abolish statutory release is the impact it will have on Aboriginal offenders. The overrepresentation of Aboriginal offenders in Canadian prisons has been condemned by the Supreme Court of Canada as a "national crisis" and "a staggering injustice". As the CSC Research Branch and the Correctional Investigator have documented, the grant rates at full parole for Aboriginal offenders fall below the rates for non-

Aboriginal offenders leading to Aboriginal offenders being released and supervised on statutory release at a significantly higher rate. The Panel's proposed abolition of statutory release would see a greater representation of Aboriginal offenders serving their complete sentences in prison, further increasing their over representation in federal custody, and thereby deepening the national crisis and intensifying the injustice. Yet nowhere in its *Roadmap* does the Panel give this implication any consideration. In light of our analysis a strong case can be made that the aggravating impact of the abolition of statutory release on the systemic discrimination facing Aboriginal offenders should in and of itself be sufficient reason to reject the Panel's proposal.

The Panel makes no effort to quantify the financial costs of its proposed abolition of statutory release. However, the Canadian Criminal Justice Association and the John Howard Society of Ontario reviewed the likely cost implications of abolition showing that the price for this change could approach one *billion* dollars. While costs should not outweigh community safety, proposing huge expenditures of this nature without any evidence of increased community safety is irresponsible public policy especially in the context of the lost opportunities that spending in this way represents. With just a fraction of this amount we could better address the issues of mental illness in prison and the community and make real progress in reversing the many impediments to Aboriginal reintegration.

Employment and Employability

The terms of reference for the Panel include the expectation that they would consider "The availability and effectiveness of work programs, including impact on recidivism." Although only one of a number of areas identified in the Terms of Reference, work readiness, training and placement both in prison and the community clearly became a substantial focus and priority of the *Roadmap*. If implemented as described by the Panel, the recommendations relating to work, training and placement are likely to have enormous cost implications – rivalled only by the proposal to abolish statutory release. The recommendations also have very substantial implications for prison administration, program management, community supervision and decisions to grant parole.

The history of corrections is filled with work or work-training initiatives that in their day were thought would reduce recidivism based on the common-sense idea that to be successful after release one needed a source of livelihood and a productive place in society. It is difficult to see how ex-prisoners can stay free of crime indefinitely without a way to sustain themselves and this view is reflected from the start of the report when the Panel states that "without the means to earn a living upon release, an offender's rehabilitation is jeopardized." However, as the Panel notes, "employment has been eclipsed as a priority over the past decade by programs that address other core needs (e.g., substance abuse and violence)."

The Panel makes no attempt to trace the reasons for the drift from an historically popular focus on employment skills to those relating to cognitive skills, mental health, addictions, anger management, literacy, education and other programs developed over the last few decades. Are we to understand from the Panel that these changes were not made on the basis of evidence of better results? It would appear that the Panel is simply not familiar with the reasons for this very clear and deliberate shift– reflected repeatedly in the "what works" literature that CSC has

embraced. Not only does the literature establish clear criteria for effective programming and the focus of that programming, it cautions that misdirected initiatives can actually make matters worse.

One might expect that the Panel would be aware of the problems that arose from simple assumptions in the past about effective programming and be sensitive to the fact that ideas that seem to make sense intuitively often do not work as expected in the unusual world of the prison. Further it would be reasonable to expect that the work of the Panel would be strongly influenced by the research in recent decades – much of it by the Department of Public Safety and CSC that builds an increasingly stronger case for effective program design that works to reduce recidivism. For that reason it is essential that the Panel, to the degree that it takes a different course, would marshal evidence that supports the notion that pre-release preparation for work, prison-based employment and job placement on release for the majority of prisoners is technically possible, financially and operationally feasible and effective in reducing recidivism. Unfortunately, here as with so many of their other recommendations, they do not make an evidence-based case and seem oblivious to the implications of the direction they set.

The Panel seems to think that the CSC Research Branch has placed relatively modest amounts of their resources into employment and training research simply as an oversight rather than a deliberate strategy to focus research in those areas that their existing research, and that of other jurisdictions, see as being most promising. So certain it is of its conclusions, the Panel actually proposes that the researchers go out and prove what the Panel is convinced must be there - somewhere.

It is remarkable that the Panel would propose far-reaching changes *first* and *then* ask the CSC Research Branch to find the evidence to justify those changes. Surely this completely distorts the very notion of evidence-based policy into something that could only be described as policy-based evidence. Further, CSC has already conducted some research on their employment initiatives as well as reviews of research in other jurisdictions that appears to have been ignored by the Panel. Being one of the most expensive programs, the potential for serious cost-benefit misjudgements in relation to employment initiatives is substantial.

Throughout the report the Panel emphasises the “changing offender profile” and in so doing paints the picture of a population with large numbers of violent persons with serious mental health, addiction, social deficits, and a plethora of other barriers – all needing to be treated by CSC under shorter and shorter time frames. They paint a picture of recalcitrant and unmotivated prisoners who often seek out segregation to avoid addressing their correctional plan that the Panel thinks is already undemanding. Having proffered this description of the prison population as a foundation for their review, the Panel then claim to have seen examples “that demonstrate that basic education and specific skills can guarantee immediate employment and can offer a solid base that an employer can use to build increasing expertise through on-the-job experience and training.”

Based on their discovery of these unidentified magical programs, the Panel then places great expectations on CSC to make employment during and after release a priority - apparently un-

fazed by the fact that their recommendations are breathtaking in their scope, complexity and cost.

While some or even most of the initiatives proposed by the Panel could be beneficial, together they would require a massive influx of new money to implement. Even with unlimited funds, some would be logistically near impossible to achieve. The Panel does not address the financial or logistical implications to any serious degree – a flaw that seems even more glaring when the current economic downturn and the new economic reality of continuing and increasing government deficit are considered. Nor is the employment of ex-prisoners likely to become a priority for government spending or the private sector in the face of increasing unemployment generally.

A significant increase in the size of prison populations would make it extremely difficult for CSC to retain the current programs as they exist, let alone engage in massive expansion. The lack of space in programs, already a barrier to achieving prisoners' correctional plans, can only become much worse. In fact, the Panel does not take into account the anticipated prison population increase to be created by new legislation that introduces long mandatory minimum sentences for a whole range of offences and barely considers its own recommendations to abolish statutory release and accelerated parole review. The proposals of the Panel reflect the complete opposite of what one might expect of an evidence-based approach to prison rehabilitation. We should expect that the evidence for effectiveness for their employment focus would be clearly identified first, followed by a feasible strategy for implementation. That strategy would include cost implications. Instead, the Panel first recommends "transformative" changes for CSC with employment as a keystone element, and then proposes that CSC develop hitherto unavailable "evidence" that will demonstrate the effectiveness of their proposals to reduce recidivism for large numbers of offenders. Only then do they suggest that CSC begin to estimate the costs and impact of their proposals as they proceed with the implementation of the recommendations.

Without any of the evidence, implementation strategy or costs addressed, and in the face of contrary considerations, CSC announced that it is fully committed to the implementation of the Panel's recommendations. We should all be concerned however that the new focus on employment will take resources from other areas that have greater potential to reduce recidivism and that the Panel's initiatives will mark another chapter in the history of costly if well intentioned correctional failures.

Education

The Panel views education as being a substantial component of their employment and employability focus when it states "Education has an undisputed role in the personal development and professional or vocational success of an individual in Canadian society". What is surprising is that given the importance of education to recidivism and its crucial relationship to the Panel's emphasis on employment, education is the subject of so few recommendations and those that are presented are so general.

On closer examination the *Roadmap's* support for education is qualified by other recommendations and statements that make it clear that the Panel is only supportive of **basic** education

where it is directly tied to employment. The concept of education being justifiable only as an avenue to work is contradicted by the evidence and speaks, again, to the ideological focus of the Panel. The solution to recidivism is not just about finding work, although that is obviously important, it is also about addressing the myriad of problems that stand in the way of finding work or other means to sustain oneself as a law-abiding citizen. These factors interact in iterative and complex ways. Addictions might preclude the positive opportunities of education or work if left uncontrolled. Education might improve the person's susceptibility to treatment and allow them to progress more quickly. Employment might well be the *outcome* of successful rehabilitation as much as a *contributor* to successful rehabilitation.

The lack of context and nuance in the *Roadmap's* consideration of education has the effect of forcing people into an ideologically-determined set of programs rather than create an environment of personal development through which prisoners are encouraged and supported to find their way to a law abiding life after prison.

As we document in our response, the Panel would have CSC embark on a set of work related initiatives that are costly, unresearched and likely unrealizable. Yet the Panel not only would subordinate existing education initiatives to its flawed work strategy but pays scant regard to an education strategy that is cost effective, reflects community standards, is realistic, well researched and consistent with the core values of human rights.

Aboriginal Offenders

Whereas in other parts of our response we have criticized the Panel for misunderstanding the issues and the nature of the problems facing CSC and for recommending far-reaching, ill-conceived and unprincipled changes, our critique of their discussion of Aboriginal offenders is different. Our issue is not with the Panel's recommendations but rather that they have not been given the necessary profile and priority. This illustrates one of the problems when a roadmap is developed with a one-dimensional focus on public safety without sufficient attention to the justice goals of the criminal justice system. A "transformation" agenda that does not address, as the first priority, the staggering injustice that has been and continues to be inflicted on Aboriginal peoples is not one that a just society should endorse.

The problem of Aboriginal overrepresentation in Canadian prisons is well documented and has received the attention of a large number of commissions and inquiries and more recently that of the Supreme Court of Canada. Yet one looks in vain for any reference to this in the *Roadmap*. It does not even rate a footnote in the changing offender profile section. This is especially troubling since the problem is getting worse. In 1999 the Supreme Court of Canada in the *Gladue* case, referring to the 1997 figures that showed that "Aboriginal peoples constituted close to 3 percent of the population of Canada and amounted to 12 percent of all federal inmates issued this call to action: **"These findings 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"**. Later in its judgment the Court referred to the "staggering injustice" these figures represented.

The Correctional Investigator, in his June 2007 presentation to the Panel, advised the Panel that the number of Aboriginal offenders was still increasing and now represents 19.6% of the federal incarcerated population and the gaps in correctional outcomes between Aboriginal and other offenders are still widening. He warned, "Should the current trends continue unchecked, experts project the Aboriginal population in Canada's correctional institutions could reach the 25% mark in less than 10 years". In his latest 2007-8 Annual Report he writes, "using the latest census data, we estimate the overall incarceration rate of Aboriginal Canadians to be 983 per 100,000, or almost nine times higher than the rate for non-Aboriginal people". Regrettably the Panel's summary of the nature of the problem demonstrates no appreciation of national urgency or the need for extraordinary efforts to redress the problems that are within the Service's mandate.

While CSC has developed a strategic plan regarding Aboriginal offenders, one endorsed by the Panel, there is the substantial disconnect between strategic planning and its implementation. It is this disconnect that gives rise to the realities described by the Correctional Investigator in his 2005-6 Annual Report and submission to the Panel; the over representation of Aboriginal offenders, particularly Aboriginal women, in maximum security, which means prisoners often serve their sentences far away from their family and the valuable support of other community members, friends and supports such as Elders; the absence of Aboriginal programming in maximum-security institutions limiting their ability to be transferred to lower security institutions; the underrepresentation of Aboriginal offenders in minimum-security institutions that contributes to their being released later in their sentences than other prisoners; longer periods of incarceration and more statutory releases for Aboriginal offenders contribute to less time in the community for programming and supportive intervention than for non-Aboriginal offenders; the proportion of Aboriginal offenders under community supervision is significantly smaller than the proportion of non-Aboriginal offenders serving their sentences on conditional release; Aboriginal offenders continue to be over-represented as a proportion of offenders referred for detention and ultimately detained compared to the other offender groups; parole is more likely to be revoked for Aboriginal offenders than non-Aboriginal offenders and Aboriginal offenders are re-admitted to federal custody more frequently than non-Aboriginal offenders, repeating the cycle of inequitable treatment.

It is here that the Panel's failure to properly review the evidence of overrepresentation becomes so important. Had the Panel done so how could it in all good conscience have concluded that "The Panel recommends that employment be the first priority in supporting Aboriginal offenders in returning to the community". That employment would be the Panel's first priority is explained not by a careful consideration of the evidence of injustice but by the Panel's faith that employment, coupled with restricting prisoners to basic rights and toughening up prison regimes, is the correctional wave of the future.

Nor could the Panel in good conscience have contented itself with simply recommending that "CSC make resources available to respond to the specific needs of Aboriginal offender populations, such as further investment in correctional programming tailored specifically to their needs." This is hardly the clarion call necessary to respond to a national crisis. In the absence of

anything more, the recommendation has to compete with the many other recommendations that also call for further resources that may and indeed been given much higher priority. Had the Panel taken seriously the importance of restorative justice principles to the reintegration of Aboriginal offenders, how could it give the green light to CSC to ramp up security measures and place further burdens and injustice on community visitors in ways quite antithetical to the healing journey. Had the Panel given the necessary restitutive attention to overrepresentation and that Aboriginal prisoners are released later in their sentences than other prisoners, how in good conscience could it recommend the elimination of statutory release without any concern that it would almost certainly mean that Aboriginal offenders will serve even more time? It is not too harsh a judgment to conclude that the Panel's recommendations in the context of the systemic causes of Aboriginal overrepresentation and in conjunction for the other criminal justice initiatives of the Government (including restricting the availability of conditional sentences and the expansion of mandatory minimum sentences) provide an unintended roadmap for incarcerating even more Aboriginal offenders for even longer periods of time.

Physical Infrastructure and Regional Complexes

The Panel appears to have been persuaded by the UCCO submissions that substantial redevelopment of the prison infrastructure is needed in order to impose the control and disciplinary regimes that the union wants to see implemented.

Neither author of this response to the *Roadmap* pretends to be qualified to address matters of infrastructure "rust-out" or prison design except in terms of some general principles where the location and design of prisons have a bearing on human rights. We have, therefore, focussed our response largely on the human rights considerations. That said, we recognize that no structure can last forever – or should. This is particularly true of prisons that have gone through important transformations from the days of the Cherry Hill and Auburn Penitentiaries. While change is inevitable, and buildings become obsolete, few structures have the lasting power of the prison. We need to realize that any prisons built today will be with us for a very long time and it is, therefore, essential that if we are to avoid costly and long-lasting mistakes our plans must be based on clear correctional objectives, respect for human rights principles and solid evidence as to how design supports those objectives and principles.

If human rights are to be relevant to corrections, then the design and location of prisons must give very careful consideration to them so as to avoid creating conditions where attempts to respect those rights are undermined by the environment. The constitutional standard reflected in the *CCRA* that CSC use and justify the least restrictive measures demands that the structures that give force to the restrictive nature of the prison be developed to ensure that very careful accounting of how "least restrictive measure" has been recognized. Nowhere in the Act does it say that administrative convenience, efficiencies or even costs trump rights.

Good management and good design must complement each other in order to achieve the desired outcome. Neither can be considered in isolation of the other and if the *Roadmap* is to set in motion a process that is intended to make major changes in the "philosophy" of prison design - to be embodied in concrete and steel - they should articulate the key elements of that philosophy and demonstrate how it accommodates the fundamental principles relating to hu-

man dignity and law of human rights. In fact, other than some tenuous claims to increased efficiencies, we are left to wonder what the plans they articulate tells us about their vision of corrections in the 21st century.

Before considering new construction or the repair of old prisons, the bigger question that needs to be answered is: what prison capacity is *needed* in Canada in the foreseeable future? The comparison between Canada and the US shows that while crime and general growth in the population has an impact on imprisonment levels, public policy choices have, by far, the greatest influence. The fact that over the last two years our current federal government has adopted what is generally described as “harsh US style sentencing policies” that rely heavily on mandatory sentences for many offences should be of considerable concern for those planning future prison accommodations. The Panel, however, makes no attempt to factor these changes in sentencing policies into their proposals. Not only did they ignore the likely impact of the shift towards greater reliance on longer terms of imprisonment through the sentencing process, they did not even assess the impact on levels of imprisonment arising from their own recommendations relation to parole, statutory release and accelerated parole review. The Panel’s recommendations cannot help but generate sharp increases in our federal prison population. The abolition of statutory release alone will remove the release mechanism that is used in two-thirds of all releases and the Panel’s suggestion that their other reforms will result in a dramatic increase in the number of prisoners who will earn parole is unrealistic.

It is quite likely that with both the sentencing and releasing policies changing, the federal government would be hard pressed to build enough prison capacity to keep up with the growing population. Plans to replace the existing prisons for new ones will become increasingly difficult to achieve. For these reasons, the discussion of addressing “rust-out” through new construction seems like a denial of reality. The Panel’s invitation to consider design justified by the need for replacement while ignoring expansion pressures presents both a limited and misleading picture.

The new prisons envisaged by the Panel would be distinguishable from existing prisons primarily by a number of characteristics. The size and capacity of the new complexes would be much larger than any existing federal penitentiaries. By building physically separate housing units within the complex while using common central services such as kitchens, case management, administration, and possibly work programs and visiting facilities, distinct populations would be housed, at least at nighttimes, in separate units.

The Panel identifies what they consider to be the problems of discrete facilities and sets out the presumed advantages of regional complexes including offering “a continuum of care that is not possible now when a transfer between prisons occurs” and economies of scale that “are lost by replicating identical management, administrative and operational structures” without any evidence that such advantages might actually be realized or any analysis of the assumptions upon which they are based. The Panel provides no discussion of possible disadvantages and fails to identify a whole range of other issues that are crucial in redesigning the physical organization of imprisonment.

Our response identifies a series of questions that relate directly to the ways in which prison design has a dramatic bearing on how prisoners are treated and the protection of their human rights. Administrative convenience has always been a major counterpoint to human rights and a massively large institution justified almost entirely on the bases of administrative convenience and efficiencies could well shift the pressure even more against the human rights perspective.

It is interesting to note that the only significant expenditure of the Panel to obtain objective third-party “evidence” occurred in relation to their proposal for regional complexes where the Panel contracted with Deloitte & Touche to independently estimate the costs of constructing and operating a new regional complex facility versus the status quo. While we applaud the Panel for seeking something more tangible than their beliefs to ground their recommendations in this case, there are two important observations that need to be made about the Deloitte & Touche report:

1. the mandate was extremely limited – with a singular focus on cost while ignoring virtually all other correctional and human rights considerations, and
2. the report’s conclusions about costs are cautious and equivocal.

Based on the lack of clarity or conviction reflected in the Deloitte & Touche report itself, we cannot understand either the unbridled enthusiasm of the Panel for this proposal or the apparently uncritical endorsement of their recommendations by the Minister and CSC. The Panel’s selective profiling of the regional complex model resembles more a sales pitch more than a serious and thoughtful planning document. It seems ill-advised, and the antithesis of responsible correctional governance, to build an infrastructure of prisons – buildings that typically last for over a hundred years - on such a weak foundation. Any plan, especially one as massive and permanent as regional complexes, must be seriously challenged in the planning stages if we are to avoid having many future generations saddled with expensive, obsolete structures. Sadly, once again, there is no recognition of the relevance, importance, or even the existence, of human rights and their implications for their proposed design

Rhetoric and Reality

At the very same time the Panel was minimising the conditions within segregation and proposing changes to toughen up the “accountability” of prisoners, Ashley Smith strangled herself to death after more than a year of continuous segregation in our federal prisons. Based on our review of the report of the Correctional Investigator we conclude that the agonizing death of this nineteen year old in federal custody illustrates powerfully the fatal flaw of the Panel’s vision for corrections, by pointing to larger issues that can only be redressed by a roadmap that places human rights protection at the centre, not the periphery, of institutional transformation.

The Panel is not responsible for Ashley Smith's death. But the Panel has adopted writ large the same policies adopted by the staff at Grand Valley who subjugated the rights of Ashley Smith to the perceived needs of security and control. In our view the Panel was too easily captured by those who promote deprivation as a means to achieve compliance in a system where compliance often trumps all other considerations such as the desperate circumstance or mental health of the individual. The importance of vigilant and principled leadership in maintaining

conditions that respect the rights of individuals confined by the power of the state was missed entirely.

Conclusion

All of this speaks to the dangers of creating major “transformative” policy virtually overnight by a largely unqualified group under a heavy cloud of political expediency. Surely these factors alone warrant that the report be set aside as a failed experiment in public policy. That it was accepted in its entirety without any apparent internal critical review or public consultation as the future for CSC is alarming. Surely in this case the emperor has no clothes.

The *Roadmap* seeks to move the Correctional Service of Canada away from an unequivocal commitment to respect and protect the human rights of prisoners as the centerpiece of its operations. It is a flawed moral and legal compass. It points in the wrong direction; a direction that, tragically and inevitably, will bring yet more chapters in an already overburdened history of abuse and mismanagement of correctional authority through disregard of human dignity.

The Roadmap and Bill C-43

In June 2009, in the final days of the session the Honourable Peter Van Loan, Minister of Public Safety, introduced in Parliament a package of legislative amendments to the *CCRA* identified as Bill C-43. The direct link between the *Roadmap* and the proposed amendments is made clear in the Minister’s statements “It sets the foundation to strengthen the federal correctional system as we are proposing with the tabling of this bill”.⁸

We carefully considered adding as a final chapter to this response our commentary on Bill C-43. We have decided however that it is better to distribute this commentary as a separate albeit companion document. The *Roadmap* is being held up by CSC as the foundation for correctional transformation displacing and eclipsing every other vision of corrections. The implications for the policies, practices and values contained in the *Roadmap* go far beyond that which requires legislative change and so we did not want readers to assume that Bill-43 is the complete response of the Government to the report. Indeed Bill C-43 it is likely to be only the first of several Bills, including one to abolish statutory release. As a matter of historical record we have an obligation to make it as clear as we can that this is a vision that offers a false promise of public safety obscuring its great detrimental impact on the protection of human rights and effective corrections. We also have an obligation to make it clear to those who will be deliberating upon the merits of Bill C. 43 that its amendments are not the “modernization” of the correctional system as the government would have but a deeply regressive move.

8 Backgrounder Bill C-43, June 16, 2009

1 Context for the Review: Problems and Pitfalls

1.1 Introduction

On April 20th, 2007, The Honourable Stockwell Day, Minister of Public Safety announced the appointment of a Panel charged with the task of reviewing the operations of the Correctional Service of Canada (CSC). The Correctional Service of Canada Review Panel (the Panel) was composed of Rob Sampson, the former Minister of Corrections for the Ontario Government, and four other individuals experienced in the fields of public policy and public safety. The mandate of the Review Panel was to provide the Minister of Public Safety with advice on:

- *The availability and effectiveness of rehabilitation programming and support mechanisms in institutions and in the community post release, including the impact on recidivism and any legal framework issues;*
- *The availability and effectiveness of programs and services for Aboriginal offenders;*
- *Review the recommendations made in the report *Moving Forward with Women’s Corrections*;*
- *The availability and effectiveness of mental health programs and services in institutions and in communities;*
- *The availability and effectiveness of work programs, including impact on recidivism;*
- *The initial placement of offenders convicted of first and second degree murder;*
- *CSC’s approach to the location of its Community Correctional Centres and Parole Offices in urban areas;*
- *CSC’s ability to deal with parole violations, and with frivolous and vexatious grievances by offenders;*
- *CSC’s plans to enhance services for and support to victims;*
- *CSC’s efficiency in delivering on its public safety mandate—identifying barriers and opportunities for savings including through physical plant re-alignment and infrastructure renewal;*
- *CSC’s operational priorities, strategies and plans as defined in its business plan;*
- *Current challenges with respect to safety and security in institutions, including those related to reducing illicit drugs and combating violence, and requirements for the future; and*

- *CSC's capacity to deliver, including its capacity to address infrastructure rust out, maintain basic safety and security in institutions and communities, meet its basic policy and legal obligations; and adapt to the changing offender profile.*⁹

In the months that followed the appointment of the Review Panel, the group visited penitentiaries, parole offices and halfway houses and met with CSC staff and managers, union representatives and CSC executives. They also met with non-governmental organizations involved in the correctional process in Canada, such as the St. Leonard's Society of Canada and the Elizabeth Fry Society. The Review Panel solicited and received written submissions from key stakeholders and interested Canadians and met with many in person to discuss the challenges and possible solutions facing corrections. Six months after its appointment the Review Panel presented its final report to the Honourable Stockwell Day on October 31, 2007.

The 170 page report (excluding appendices) entitled "*A Roadmap to Strengthening Public Safety*", contains 109 recommendations organized around strengthening five key areas that the Panel considered would enable CSC "to offer greater public safety results to Canadians." The five areas and the Panel's major recommendations are:

1. Offender Accountability

Rehabilitation is a responsibility shared by CSC and the offender.

The principles of the Corrections and Conditional Release Act (CCRA) have to be strengthened to further emphasize offender responsibility and accountability.

2. Eliminating Drugs from Prison

The presence of drugs means that the institutions are not safe and secure environments where offenders can focus on rehabilitation. The Panel recommended that CSC strengthen its interdiction initiatives on all fronts.

3. Employability/Employment

There is a need to enhance both the quantity and quality of work opportunities available in penitentiaries leading to opportunities in the community.

The Panel recommended that CSC implement a more structured workday to allow for the proper balance among work, education and correctional programs.

4. Physical Infrastructure

The Panel recommended that CSC explore building regional "complexes"; complexes reinforce an overall correctional management model that stresses the accountabilitys of offenders to follow their correctional plans and provide integrated opportunities to improve correctional results.

5. Eliminating Statutory Release; Moving to Earned Parole

*The Panel recommended that offenders be required to earn their way back to their home communities: they should demonstrate to the National Parole Board that they have changed and are capable of living as law-abiding citizens.*¹⁰

9 Report of the Correctional Service of Canada Review Panel: A Roadmap to Strengthening Public Safety (Minister of Public Works and Government Services Canada 2007) iii (hereafter "Roadmap") online at http://www.ps-sp.gc.ca/csc-scc/report-rapport/table_of_contents-eng.aspx

10 *Roadmap*, at vii

The Government officially responded to the Report in Budget 2008, investing \$478.8 million over five years to initiate the implementation of a new vision and set the foundation to strengthen the federal correctional system and enable CSC to respond comprehensively to the Panel's recommendations. The then CSC Commissioner Keith Coulter established a Transformation Team to lead CSC's response to the Report recommendations, led by Senior Deputy Commissioner Don Head. On June 27 2008, Mr. Head succeeded Mr. Coulter as the Commissioner. In his introduction to the June 2008 edition of *Let's Talk*, CSC's in-house publication, Don Head described the nature and trajectory of the envisioned transformation:

Over the last 30 years, CSC has undergone a number of significant changes that have directly re-shaped the way that correctional services have been delivered in Canada. For example, the McGuigan Report of 1977 contained recommendations for improving the correctional system following a series of violent incidents and hostage takings in 1975 and 1976. In the late 1980s, the unit management system introduced an integrated approach to the overall management of offenders in the federal system. Finally, the coming into force of the Corrections and Conditional Release Act in 1992 facilitated the modernization of federal corrections by replacing the Penitentiary Act and the Parole Act. Each of these milestones has re-oriented and advanced our approach to corrections and how we contribute to public safety for Canadians.

CSC is once again starting a new chapter — this time in response to the CSC Review Panel Report. The Panel's 109 recommendations touch on every aspect of our business, ranging from institutional services to community corrections. Responding to these recommendations will position us well for the future to help ensure we achieve excellent public safety results in an integrated and consistent manner.¹¹

With remarkable speed unprecedented in the history of Canadian Corrections - a little over a year - a blueprint for "transformation" of Canada's federal correctional system has been identified by the Panel and has been endorsed and adopted by CSC as the correctional equivalent of the holy grail for "how CSC delivers services and ...the manner in which we perform our business." Given that we are talking "transformation" rather than incremental change, there has been remarkably little discussion or critical commentary, either in the public domain or among the criminal justice NGO community, about the contours of the *Roadmap*, analysing its strengths, limitations and implications. Is it indeed the pathway to the correctional grail or another step in a long history of well intentioned but flawed attempts to pave over the fault lines in the correctional landscape? Is the proposed transformation really one that will strengthen public safety or, as some fear, an agenda that will threaten the vital balance between security and justice and in the process derogate from the development of a culture of respect for human rights and undermine Canada's commitment to live up to its domestic and international human rights obligations.

Our purpose in writing this report is to subject the *Roadmap's* recommendations and CSC's transformation agenda to the kind of scrutiny that such far-reaching changes in the Canadian federal correctional system demands and the Canadian public deserves. Our report is intended to present a counterpoint to the *Roadmap*, one marked by a review of correctional and legal history, a consideration of the relevant reports of royal commissions, task forces and academic

11 *Let's Talk* Vol 33 No 1 June 2008 online at <http://www.ps-sp.gc.ca/csc-scc/report-eng.aspx>

research and an analysis of the human rights standards and jurisprudence applicable to corrections, all of which is entirely absent from the *Roadmap*. On the basis of what we consider a stronger historical and legal foundation, one anchored in an unwavering commitment to human rights in prison, we will discuss the merits, limitations and the true costs for both public safety and human dignity of implementation of the Panel's recommendations for correctional programs and services. We will show that the Panel's analysis reveals such fundamental misunderstandings and misinterpretation of the Canadian correctional context that both its observations and recommendations are indelibly flawed.

1.2 A Question of Credibility

Any government-sponsored body charged with the task of making recommendations about the future of corrections in Canada should have the hallmark of credibility if it is to engender the necessary confidence of Canadians that the recommendations are in the public interest. Credibility turns on factors such as the reasons for the study, expertise of the review panel in the field under study, objectivity of the chairperson, appropriate resources for research, adequacy of the time frame, followed by an opportunity for public consultation on the recommendations. In all of these respects the CSC Review Panel reveals seriously shortcomings creating the grave concern that the Panel's conception, mandate and recommendations were unduly influenced by a political and ideological agenda that undermined its correctional integrity.

1.2.1 Reasons for the Review

Prior to the 2006 federal election the Conservative party, at the urging of police, victim and prison guard associations made promises to examine the operation of the Correctional Service of Canada. Much of the pressure came through the "Club Fed" campaign that presented to the public the distorted notion that life for those in our federal prison system was equivalent to a holiday resort.

In a speech to the Canadian Professional Police Association one year before the CSC Review was announced then Minister of Justice Vic Toews acknowledged and agreed with the "Club Fed" rhetoric when he said:

I believe that it is time to get tough when it comes to incarcerating violent offenders, and I applaud the efforts that have been made to put an end to what has been referred to as "Club Fed."¹²

In their 2006 election platform the Conservative party made three promises that were directly related to recommendations that were later contained in the *Roadmap* report. They were:

- *Review the operations of Correctional Service Canada with a view to enhancing public safety.*
- *Ensure federal corrections officers have the tools and training they require to do their job as peace officers.*

12 Speech for the Minister of Justice and Attorney General of Canada, Vic Toews, Q.C. Canadian Professional Police Association, 3 April 2006, Ottawa, Ontario http://www.justice.gc.ca/eng/news-nouv/spe-disc/2006/doc_31774.html

- *Replace statutory release (the law entitling a prisoner to parole after serving two-thirds of his sentence) with earned parole.*¹³

After the election the government made no effort to hide their intention to make the operation of our justice system much tougher. The Prime Minister also articulated his disdain of academics and others who use “statistics” and lawmakers who recognize that prisoners do not forfeit their human rights when he said:

Some try to pacify Canadians with statistics.

Your personal experiences and impressions are wrong, they say; crime is really not a problem. These apologists remind me of the scene from the Wizard of Oz when the wizard says, "Pay no attention to that man behind the curtain.

But Canadians can see behind the curtain. They know there's a problem.

*And they know it was caused by a generation of lawmakers who embraced the bizarre notion that the rights of criminals outweigh the rights of law-abiding citizens.*¹⁴

There is little in this statement to encourage Canadians to think that the Conservative’s approach to crime policy in Canada would be respectful of the rights of all Canadians or based on objective evidence. As we will show, it is the Panel that improperly utilizes crime statistics to inflame public fear and it is the Panel that demonstrates a cavalier disregard for the last half century of developments in human rights law and policy.

At the press conference announcing the establishment of the Review Panel in April 2007, Minister Stockwell Day was flanked only by victim and police advocates sending out the clear message that the review would address primarily their concerns. During the press conference he spoke of only correctional officers and their contribution to corrections.¹⁵ Despite the laudable efforts of CSC over the past decades to encourage partnerships with non- governmental sector organizations such as John Howard, Elizabeth Fry, St Leonards and the many other groups active in criminal justice and CSC’s recognition of their integral role in the reintegration of offenders, these organizations had no role in the conception or announcement of the review panel nor were they invited to shape its mandate.

1.2.2 Mandate

The mandate of the Panel was extensive, yet, to ensure the degree of public and expert consultation, participation and reflection on such major issues, the Panel was given what most observers believed to be an unreasonably short 50 day window (later extended to six months) within which to report to the Minister. Many of the areas of review such as the effectiveness of treatment and the role of statutory release are highly complex matters that have each been subject to years of detailed research. Yet, the Panel was expected to make recommendations

13 Conservative Party of Canada, Federal Election Platform 2006, <http://www.box.net/shared/g4ol2jo0tz>

14 National Post, An address by Stephen Harper, the Prime Minister of Canada. Delivered Friday, January 25, 2008

15 Remarks by Honourable Minister Stockwell Day on Correctional Service of Canada, April 20, 2007, Ottawa, <http://www.ps-sp.gc.ca/media/sp/2007/sp20070420-en.asp>

on these issues in some definitive way in a few months. Not unreasonably, informed observers raised serious concerns about the entire process and the degree to which the Panel was intended to give expert advice or just confirm the Government's already announced intentions.

Although extensive, the terms of reference had obvious gaps. Of particular significance they did not explicitly include CSC's performance in and accountability for maintaining respect for the rule of law and human rights as an integral part of its mandate. The terms of reference make no mention of the principles for corrections that are expressed in CSC's own Mission Statement or the relevance to correctional operations of the *Charter of Rights and Freedoms*.

The fundamental importance of justice behind the walls is a theme that animated the work of the 1977 Parliamentary Subcommittee on the Penitentiary System in Canada, and is one that has been addressed in every annual report of the Correctional Investigator. In one of the written submissions of the Panel, the hope was expressed that "the absence of specific reference to the maintenance of the rule of law and respect for human rights in your terms of reference will not mean that the issues of safety and security overshadow your recommendations".¹⁶ Unfortunately the report in its discussion under the key area of offender accountability and its recommendations for changes in the *CCRA* shows a lamentable and unacceptable ignorance and/or misunderstanding of the legal history of Canada's correctional legislation, the pivotal role of the *Charter of Rights* and the recommendations of these other commissions of inquiry and task forces that call for greater commitment from CSC to promoting a culture of respect for human rights within Canadian prisons. The *Roadmap* makes no mention of the *Charter of Rights and Freedoms*, CSC's Mission Statement, no reference to leading Supreme Court of Canada judgments dealing with prisoners' rights, nor the recommendations of the Arbour commission (the most recent major commission addressing human rights in Canadian prisons). Nowhere is there any mention of CSC's own 1997 report of the Working Group on Human Rights, chaired by Max Yalden, former Chief Commissioner of the Canadian Human Rights Commission, and that report's major recommendation that CSC must adopt a human rights strategy as the centrepiece of its strategic planning.

1.2.3 Panel Members

One might reasonably think that if principled and research-based new directions in corrections were to be expected on so many difficult subjects within a few months, the members of the Panel would bring to the task a broad base of expertise and experience in correctional law, policy and practice. In this case however none had academic training related to criminology, offender treatment or correctional law. Of course academic training is not the only qualification for membership on such a panel. Professional policy and field experience may also provide a sound basis for mature and balanced correctional judgment. In that light we reviewed the expertise of the panel members as presented by the Minister.

- Serge Gascon, retired as the Deputy Chief after a 30-year career with the Police Service of the City of Montreal. During his career with the Police Service, he created and introduced a systems evaluation program, a career planning model for the Service, and managed major operational

16 Submission of West Coast Prison Justice Society, June 4, 2007

initiatives dealing with high-risk events in the city. He has been President of the Regional Committee of the Criminal Information Service of Quebec, and has served on a variety of committees contributing to criminal justice (police, correctional services, justice and parole).

- Sharon Rosenfeldt began her career as an alcohol and drug abuse counsellor at the Poundmaker's Lodge Treatment Centre in Edmonton, Alberta. In 1981, following the abduction and murder of her 16-year-old son, she helped co-found *Victims of Violence*, a national organization dedicated to improving the situation of crime victims in Canada. She has also, as part of a career as a victims' advocate, served as the Vice President of the Canadian Police Association's Resource Centre for Victims of Crime.
- Ian Glen, Q.C. was the Chair of the National Parole Board of Canada from May 2001 to May 2006. Previously, from 1975 to 2001 he held several senior positions in the federal government, including those of assistant deputy and deputy minister.
- Chief Clarence Louie is a highly respected Aboriginal leader who has been Chief of the Osoyoos Indian Band since 1985. He has consistently emphasized economic development as a means to improve the standard of living for Aboriginal people. Chief Louie was appointed chairperson of the National Aboriginal Economic Development in April 2007 and has received numerous awards including the Aboriginal Business Leader Award from All Nations Trust and Development Corporation.

It cannot be disputed that these four panel members are distinguished Canadians and could bring to bear their professional experiences, in the areas of policing, the perspectives of crime victims, the practise of parole and the particular economic challenges facing Aboriginal offenders reintegrating into their communities. But even collectively one would be hard pressed to suggest that they had the range of expertise and experience of the law, policy and practice of imprisonment to address the range of subjects in their mandate. Under these circumstance the chairperson of the Panel has a heavy responsibility to provide the leadership and expertise that is necessary for an adequately broad and comprehensive perspective.

According to the Minister, the Chairperson of the Panel, Robert Sampson, was from 1995 to 2003 a member of the Legislative Assembly of Ontario and a member of the Government of Ontario Cabinet, holding a variety of positions including Minister of Correctional Services from June 1999 to April 2002. In 1996, as Parliamentary Assistant to the Ontario Minister of Finance, Sampson spearheaded the Ontario Government's review of legislation and regulations governing auto insurance coverage in the Province of Ontario. At the time of his appointment as panel chairperson he was President of White Label Mortgages Limited, specializing in commercial mortgage brokerage services to Canadian corporations and groups. He is also Vice President, Corpfinance International Limited, providing debt and equity placements and financial advisory assignments for small and medium-sized corporations and all levels of government. While this sort of expertise might be welcome in a review of the recent subprime mortgage and liquidity crises It would seem that Mr. Sampson's single obvious qualification for the review of corrections in Canada was the fact that for two years in the mid-ninety's he was the Minister of Correctional Service for the Province of Ontario under a Conservative government with strong ties to the current federal conservatives.

If serving as a minister of corrections for two years a decade before at the provincial level was sufficient expertise to address the correctional issues put to this Panel, one might then ask why

the federal minister, Stockwell Day, with more than two years of federal experience himself, needed the Panel at all. It is disturbing that the important role of being the chair was entrusted to Mr. Sampson when he had neither the credibility of an expert on the broad range of subject matters under neither review nor the political distance that one would expect for the chairman of an ostensibly objective and “independent” review.¹⁷

For the panel to have broad credibility, it would be essential that the chair be a person with record of objectivity and intellectual rigour that was broadly recognized. Often, for obvious reasons, retired or active judges are commissioned to lead such panels. They are trained in reasoning and inquiry, objective and not publically nor politically aligned. In fields with serious legal implications, they also have obvious strengths in jurisprudence. Finally, judges well understand the need to maintain respect for the Rule of Law in a democracy and the potential of powerful institutions to abuse those who are under their control. Justices Archambault, Fauteaux, and Arbour are all examples of such people having public credibility in addressing complex correctional problems. Similar appointments are used routinely in many other areas of public policy. The perspectives of the other Panel members needed to be complemented by members whose expertise included constitutional and correctional law; criminological research in prison administration, the treatment of offenders and the experience of imprisonment, including the distinct issues facing women and Aboriginal prisoners; an understanding of the mental health issues facing corrections; the challenges of prison management and operational needs at a senior level within CSC and the role of citizen based organizations committed to the assistance and reintegration of offenders. We are not suggesting that a double digit panel is a *sine qua non* of credibility. Some members could be expected to have expertise in more than one area. But given the breadth, complexity and time line of its mandate, a panel with a much greater range of expertise was necessary to ensure well-founded recommendations.

1.2.4 Research

The creation of a research team is an essential part of any important public policy review. Given the scope of the Panel’s mandate it was essential that the services of expert independent researchers were available to address the subjects adequately, including the need to compile and synthesize the mass of research studies and scholarly literature and review the reports of previous inquiries and commissions. This need was particularly great in this case given the limited range of expertise of the panel members. Putting in place an independent research team takes time and resources but neither were available to the Panel. Except for a few dedicated CSC managers and staff, the Panel members were left alone to address a mandate larger than that given many royal commissions.

17 Following the release of the Roadmap and the Government’s endorsement of its recommendations Mr. Sampson was appointed by the Minister of Public Safety as one of two “external advisors” to assist CSC in completing its Strategic Review. Not surprisingly Mr. Sampson, having chaired the Roadmap Panel, had little difficulty in July 2008, in his role as external advisor, to “attest to the probity” of CSC’s Strategic Review based on the key recommendations he had authored and in concluding that the strategic review was “extremely well planned, well led and well executed”.

1.2.5 Consultations

The time constraints under which the Panel laboured severely limited the ability of NGOs and others interested in the future of corrections to fully participate and contribute to the review Panel's work. Unlike previous major reviews into the penitentiary system, no consultation documentation containing questions or proposals was prepared that would guide those interested in making a submission. Hearings were quickly arranged, and those wishing to make written submissions were given short lead times and limits of 20 pages within which to make them.¹⁸ Most importantly, no opportunities were made available for consultation on the actual recommendations coming from the Panel - many of which are far reaching, unanticipated, and have major implications that appear not to have been considered by the Panel.

Instead of broad and deep consultation on the Panel's recommendations, almost immediately the Minister and the Correctional Service of Canada indicated that they had adopted a new "Transformation" agenda based on the Panel recommendations. Within months the Government announced that \$122M dollars had been allocated to fast track the changes. In fact, according to the most recent Government figures, the total investment over five years amounts to \$478.8.¹⁹

1.2.6 Managing Strengths and Weaknesses

When a panel is asked to assess a complex and important issue in a short period of time, the potential for problems becomes immediately obvious. That potential was magnified in the case of the CSC Review Panel because it was assigned multiple complex issues. Under these circumstances, there are a number of strategies that the Panel might take. One option is to defer to the staff of the system being investigated. They often have the technical and professional knowledge as well as a thorough understanding of the logistical problems and circumstances of their system and often have a background of research and policy development. These strengths can easily overwhelm a review panel. The problem with this deferential approach is that critical observations are likely to be missed, and little is learned. The confirmation of the status quo by the review panel creates a stone wall around the operations and policies rather than a window that allows others to see inside. Where serious problems exist, this type of response by a review panel simply makes things worse.

On the other hand, the review panel might strike out boldly on its own believing that they might be able to use this critical independence to identify important fresh perspectives that can serve to create a "roadmap" to a better future. The risk with this approach is that the review

18 While all other participants were instructed to limit their submissions to 20 pages the Panel accepted a submission of 53 pages from the Union of Correctional Officers (U.C.C.O.) contributing to a perception that in their consultations and in their report the Panel gave greater time and consideration to the opinions and perspectives of correctional officers yet virtually no time or consideration to the opinions of prisoners and their advocates.

19 Correctional Service of Canada, Transforming Corrections, <http://www.csc-scc.gc.ca/text/organi/trnsform-eng.shtml>; <http://www.publicsafety.gc.ca/media/nr/2009/nr20090616-eng.aspx?rss=true>

panel might simply not comprehend the complexity of the problems and will thrust onto an already overburdened or weak system a costly and unhealthy new agenda thereby further crippling the system and creating costs that might create new and long-lasting burdens.

The degree to which being absorbed by the system is a problem or not is dependent on two factors: 1) the capabilities of the reviewers as reflected in their experience, knowledge, objectivity, independence and their access to expert resources directly and through consultations, all within an adequate time frame and, 2) how well the system being reviewed has evaluated their problems already, consulted widely and generated over time principled and evidence-based policy proposals and strategies. Where both the Panel's capabilities *and* the existing policies are strong, the outcomes are most likely to be beneficial. If either is weak, the quality of the outcomes is likely to be compromised at best. If both factors are weak the review process is very unlikely to generate a sound foundation for transformative change.

Even a panel with limited expertise in particular areas should be able to assess the planning worthiness of the organization being examined by applying certain relevant criteria in their analysis. Are the existing policies coherent, evidence based, lawful, and with resources that are adequate and proportional to the resources allocated to other priorities? Can they all be tied to the purpose of corrections as set out in the *CCRA*? Are the policies reflective of the dignity of the individual and the need to protect their human rights? Has short-term political expediencies unduly influenced the policies that are currently in place? Our examination of the *Roadmap* has led us to conclude that too often the Panel made poor and unprincipled recommendations by amplifying already weak correctional policy. The Panel's uncritical acceptance of the "changing offender profile" and distorted analysis of violent crime trends seems to set the stage for many of their most dubious recommendations. Buying in to the seductive rationale of a more difficult prisoner population leads to simplistic sanction-based responses to a whole range of complex problems. Human rights, in that context, become an expendable hindrance. The recommendations to change the *CCRA* to separate "basic" from other rights, abandon the least restrictive measures standard, tighten up on "offender accountability", link rights and privileges to compliance with the correctional plan, reduce access to conditional release, use work as a discipline dressed up as treatment, and the placement of drug interdiction before anything else – including justice, flow naturally from their view of prisons and crime encapsulated in their attachment to these faulty premises.

The Panel charted its own course outside of any existing policy envelope in its proposals on employment and employability, prison complexes and the abolition of statutory release - proposals that have huge implications for the deprivation of liberty while generating equally serious new financial costs with no discernable gains to public safety.

Lest it be thought that we are naysayers, we readily acknowledge that there are important parts of the Panel's report that are built upon CSC's policy strengths and were able to amplify the direction of existing good policy as well as placing some urgency on implementation. The recommendations on mental health are the best example of this. The mental health strategy

developed by CSC in 2004²⁰ as well as the strategy developed prior to that specifically relating to the mental health issues of women prisoners,²¹ formed a solid, evidence-based and principled platform from which initiatives to address this complex and crucial problem could be addressed. This strategic work was strengthened with the development of plans to enhance services to the mentally ill after release into the community. Most commentators – professionals in the field of mental health, community groups, the Office of the Correctional Investigator²² and now the Panel²³ - have been supportive of these strategies. CSC has made the development of services for the mentally ill one of its top 5 priorities.²⁴ The government has even put some funding in place – albeit temporary and modest.²⁵

This broad degree of support occurred in large measure because the strategy was approached in an honest, at times almost brutal, assessment that did not protect sacred cows or avoid bruising egos. It was, therefore, able to embrace evidence in its design and human rights as its motivation. The strategy was probably emboldened by the fact that the Senate of Canada had conducted an exhaustive, evidence-based and principled review of the state of mental health and addictions in Canada²⁶ that set an environment where critical analysis was expected. Finally, unlike the correctional environment where deprivation and punishment are still seen by many as legitimate means of intervention, few today see any role for punishment and deprivation as helpful strategies to address mental illness. As a result there is greater alignment between political, public and professional voices leading to informed consensus.

It is hard to conceive of a less helpful environment for a person facing serious mental illness than a federal prison. At its best, it is a place that engenders fear, defensiveness, denial, stigmatization and isolation. At its worst it becomes a segregation cell that can put relatively healthy people into psychotic states. Compounding the problems are the additional factors that many seriously mentally ill are without family support while in prison and outside community resources are often not available.

Human rights are our legal formulation to address a basic notion of preserving our individual and collective human dignity. It preserves the individual's human dignity by protecting the person from unfairness and abuse, and it preserves our collective dignity by giving us one means of acting in a civilized and respectful manner together. Few areas reflect the need for a human rights-based analysis than the care of the mentally ill in our prisons. Unfortunately the Panel did

20 Correctional Service of Canada, Quick Facts: Mental Health Strategy for Corrections, at <http://www.csc-scc.gc.ca/text/pblct/qf/11-eng.shtml>

21 Laishes, Jane. The 2002 Mental Health Strategy For Women Offenders, Correctional Service of Canada at <http://www.csc-scc.gc.ca/text/prgrm/fsw/mhealth/toc-eng.shtml>

22 Office of the Correctional Investigator, Annual Report 2007-2008, p. 35 at <http://www.oci-bec.gc.ca/rpt/pdf/annrpt/annrpt20072008-eng.pdf>

23 *Roadmap*, p. 104

24 Correctional Service Canada, Our Priorities, at <http://www.csc-scc.gc.ca/text/organi/prio-eng.shtml>

25 Coulter, Keith. "Improving Capacities to Address Mental Health Needs of Offenders" 31st Canadian Congress on Criminal Justice, 2007 at <http://www.csc-scc.gc.ca/text/media/spchscommis/2007/07-11-01-eng.shtml>

26 Kirby, M. (Chair) and Keon, W.J. (Co-Chair), *Out of the Shadows at Last: Final Report of the Standing Senate Committee on Social Affairs, Science and Technology on Mental Health, Mental Illness and Addiction - Highlights and Recommendations*. Senate of Canada, 2006

not address this issue from a rights-based perspective and so their response lacks principled analysis or moral urgency. However, because the underlying mental health strategy was premised on such an analysis, the recommendations are strong and sensible. The Panel, perhaps in part influenced by the breadth of support and in part by the professionalism of the planning and strategic direction, also endorsed the strategy. Indeed most of the Panel's recommendations are already in the plan.

1.2.7 Historical Perspective

While the *Roadmap* purports to chart a transformative pathway for Canadian corrections, it fails to acknowledge or give due consideration to the relevant historical context in which many of its recommendations must be situated. Remarkably, of the 170 years of available "historical perspective" since the opening of Kingston penitentiary in 1835, the Panel's analysis on page 1 (shown in text box) provides just two short paragraphs. The history is limited to post 1992. Did the Panel really believe that nothing before 1992 and the adoption of the CCRA was of relevance to its recommendations? Canadian corrections has a deep history that is well documented through a succession of royal commissions, commissions of inquiry, government task forces and academic literature that deserves careful consideration. It is also a history that includes discussion of many of the key areas and some of the same recommendations identified by the Panel. What confidence can the public have that the transformation agenda will improve public safety when no consideration has been given to why some of the same recommendations made by the Panel that have been made by previous reports have not been successful in achieving their goals?

(a) Historical Perspective

All Canadians have the right to live in safe communities. Threats to that right should be addressed swiftly and effectively by the criminal justice system. The federal correctional system is a critical component of that response.

Much has changed in Canada's criminal justice system since 1992, when the Corrections and Conditional Release Act (CCRA), the statute that governs The Correctional Service of Canada (CSC), received Royal Assent. In the intervening 15 years, the nature and size of the federal offender population has steadily changed. The CCRA and CSC's mandate were designed to meet the challenges that the criminal justice system faced in the late 1980s. The Panel has concluded that the principles of the CCRA do not address the current and future challenges facing CSC.

Roadmap p. 1

The absence of any understanding of correctional history condemns the Panel to repeat the mistakes of the past. The Panel's *Roadmap* for the 21st century harkens back to the earliest and simplest concepts of the early 19th century penitentiaries.²⁷ Removal of rights, which increases

27 The first penitentiaries in North America, the Auburn Prison in New York and the "Cherry Hill" Eastern Pennsylvania Penitentiary in Philadelphia introduced the innovative idea that prisons could be used for both punishment (as an alternative to torture or death) and for reformation by making the prisoner change his way. Each adopted a distinct theory about how the reformation of the prisoner could be achieved. As described by the 1969 Ouimet Commission:

These two prisons were built between 1820 and 1830. They appear to have influenced, until about a decade ago [1955] the design and program for carceral institutions in the Western world.

isolation, is presented as the solution for “unmotivated” prisoners. Excessive reliance on work to bring about individual reform, combined with dramatic proposals to abandon reintegration strategies for the majority of prisoners through the abolition of Statutory Release, are presented as the new foundation for a modern correctional system, oblivious to the fact that we have already been there.

Even in their short two-paragraph historical review, the Panel patently misconceives the historical context of the *CCRA*. They seem to believe that the legislative purpose of the *CCRA* was to serve the needs of CSC. The report treats the *CCRA* as if it were simply a piece of legislation designed to facilitate a narrow set of correctional goals that are subject to change depending upon changes in the prison population and operational requirements. As we will detail later, the legislative context of the *CCRA* is previewed in the Correctional Law Review working papers and, as they make clear, one of the primary purposes of the *CCRA* was to bring correctional legislation into conformity with the *Charter of Rights and Freedoms* to ensure that Canadian correctional authority was exercised within a Charter culture of respect for rights and not according to the dictates of administrative convenience. The *CCRA* was not, therefore, simply a response to the challenges of operational requirements and the offender profile of the federal prison population in the 1980s but a far-reaching legislative response to the requirements of Canada's Constitution that enshrined Canadian values. It was also intended to reflect in legislative language the values and principles of CSC's Mission Statement, a statement that every Solicitor General and Minister of Public Safety since 1989 has signed and held up to be the key principles on which CSC's operation is to be judged. We believe that the problematic and controversial nature of many of the Panel's recommendations flow from their lack of consideration of the historical and constitutional foundations of the *CCRA*.

The need for historical context is vital for another reason that directly impacts public safety. The circumstances that gave rise to the recognition of the legal obligations of CSC to respect human rights were ones following violent events. Inquiries and court interventions disclosed abuses of power and inhumane conditions of imprisonment. To relax the vigilance of CSC from even its current fragile “commitment” to human rights simply invites a repetition of those tragic and costly events.

In the Eastern Pennsylvania Penitentiary, a man was put into a cell alone with his Bible and his thoughts (the theory being that he would repent and reform); whereas in the Auburn Prison inmates were let out of their cells by day to work together in shops while being forbidden to speak and required to march in lockstep with a downcast gaze. The latter system rested on the theory that hard work, not solitary penance, would both punish and reform. However, the efficacy of such methods has not been demonstrated.

2 Human Rights and Corrections

We are not the first to make the point that it takes vigilance and courage, both individual and collective, to ensure that human rights are protected at those points where they become most vulnerable. Within Canada, that vulnerability is nowhere more evident than inside penitentiaries. It is because we believe that respect for human rights is fundamental to any “transformation” of Canadian corrections that we begin our commentary with the international and domestic human rights framework.

In the material that follows we will try to demonstrate that human rights is not something that needs to be “balanced” against prison discipline and control. Rather, it is something through which prison discipline and control is exercised in a professional manner. Discipline and control that is not consistent with the inherent human dignity, and the rights that give legal meaning to that dignity, is simply the naked exercise of power and as such is inevitably abusive. Legitimate discipline and control is necessary but can only be effective in promoting positive change in the individual and avoid being self-defeating, if it is inherently moral and justifiable.²⁸ Promoting and respecting human rights is not about being soft, it is about being decent. Respect for human rights is a necessary condition for the exercise of correctional authority.

On December 10, 2008 Canada joined other nations in marking the 60th anniversary of the Universal Declaration of Human Rights. We did so with the knowledge that, as much as any country, we have endeavoured to live up to the ideals and standards set by this statement of fundamental human rights, and with added pride that a Canadian, John Humphrey, played a leading role in drafting and guiding the Declaration through the United Nations in 1948. Article 1 of the Universal Declaration affirms that “All human beings are born free and equal in dignity and rights.”²⁹ As Max Yalden, former Chief Commissioner of the Canadian Human Rights Commission and a commissioner with the United Nations Human Rights Commission, stated on the occasion of the 50th anniversary of the Declaration, this “fundamental statement of humanity’s goals and aspirations for a fairer and more humane future, is nowhere more applicable than in the world of corrections.”³⁰ Mr. Yalden went on to assert that “no moment in history could be more appropriate” for the Correctional Service of Canada to re-commit itself to respecting the provisions of the Declaration.

28 John Howard, whose 1777 seminal work *The State of the Prisons in England and Wales* inspired the idea of the modern penitentiary as a humane response to crime, in his proposals for reform of the prisons, was insistent that punishment, in order to be effective, must maintain its moral legitimacy in the eyes of both the public and the offender. For Howard the most painful punishments and those that aroused the greatest guilt were those that observed the strictest standards of justice and morality. See <http://justicebehindthewalls.net/book.asp?cid=765&pid=816>; Michael Ignatieff, *A Just Measure of Pain; The Penitentiary in the Industrial revolution 1705-1850* (1978) p.72

29 G.A. res.217A III, U.N. Doc A/810 at 71 (1948), reprinted in [1948] U.N.B. 465

30 Maxwell Yalden, “Canada, the CSC and Human Rights,” [November 1998] *Let's Talk* Vol. 23, no. 4, at 13

The significance of the Universal Declaration and the international instruments it has inspired is clearly set out in the 1997 Report of the Working Group on Human Rights, Human Rights and Corrections: A Strategic Model. The working group was commissioned by CSC and chaired by Mr. Yalden. The report explains the international sources of the human rights guarantees and protections of the Canadian *Charter* and the *CCRA*:

The Universal Declaration of Human Rights was adopted by the United Nations General Assembly on December 10, 1948. Although it does not have the status of a binding international covenant, it is widely regarded as determining conventional international law and as the primary instrument for protecting the "inalienable," "inherent" and "fundamental" dignity of the human person. It underlies the many subsequent UN covenants and conventions that have shaped international human rights law, to which Canada is a party, in particular the International Covenant on Civil and Political Rights and the Convention Against Torture. These, among other things, provide that:

"All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person" (art. 10, International Covenant on Civil and Political Rights [ICCPR]);

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment" (art. 7, ICCPR);

"The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation" (art. 10(3), ICCPR)³¹

The Universal Declaration and the International Covenant have been influential in shaping Canadian domestic law, and many of their provisions are the source of the constitutional protections entrenched in the Canadian Charter of Rights and Freedoms. As we will see, the *Corrections and Conditional Release Act* was drafted to ensure that the correctional legal regime was consistent with the *Charter*, and thus it is possible to trace a lineage through the four documents. As the Working Group concluded:

. . . One must acknowledge what the CCRA does do to lay out a correctional regime that will be respectful of Canada's obligations in human rights matters . . . Over and above the general right to safe and humane custody, sections 3 and 4 of the Act specifically identify: the right to be dealt with in the least restrictive way; the residual rights which are those of any member of society, except those necessarily restricted or removed by virtue of incarceration; the right to forthright and fair decision-making, and to an effective grievance procedure; the right to have sexual, cultural, linguistic and other differences and needs respected; and the right to participate in programs designed to promote rehabilitation and reintegration. These broad principles can be readily traced back to their international and constitutional roots.³²

Andrew Coyle, a former governor in the Scottish prison system and the Director of the International Center for Prison Studies at King's College, London, has summarized the implications for the treatment of prisoners of the international instruments that require States to respect the

31 Human Rights and Corrections: A Strategic Model December 1997 Online at <http://www.csc-scc.gc.ca/text/pblct/rights/human/im4630-02-eng.shtml> (hereafter "The Yalden Report")

32 Yalden Report, p.24

inherent dignity of the human person. In *A Human Rights Approach to Prison Management*”, he writes:

People who are detained or imprisoned do not cease to be human beings, no matter how serious the crime of which they have been accused or convicted. The court of law or other judicial agency that dealt with their case decreed that they should be deprived of their liberty, not that they should forfeit their humanity...

Their humanity extends far beyond the fact that they are prisoners. Equally, prison staff are human beings. The extent to which these two groups recognize and observe their common humanity is the most important measurement of a decent and humane prison. Where such recognition is lacking there will be a real danger that human rights will be abused.³³

In Canada we have taken much pride in committing this nation to the advancement of human rights. The 1982 *Charter of Rights and Freedoms* is the legal lodestar in the entrenchment of international human rights protection in our own Constitution.³⁴ The overarching human right to dignity does not stop at the prison door and, as the Supreme Court has made clear, the *Charter* applies with full force to the imprisoned. Entrenching human rights in the Constitution is one thing: translating the right to human dignity in the everyday life of a prison is quite another. The prison environment, more so than any other within the boundaries of the State, with its authoritarian structure, its surveillance and supervision of every aspect of a person's life, its daily rituals of count and search, is at constant odds with the attributes of dignity, individuality and liberty that most of us experience. The potential for abuse of human rights is ever present. This has been well expressed by Ivan Zinger, formerly a human rights officer for CSC and now Executive Director of the Office of the Correctional Investigator:

In a correctional context, every aspect of the prisoner's life is heavily regulated by correctional authorities. Correctional authorities make thousands of decisions every day that affect prisoners' fundamental rights (e.g., use of force, segregation, searches, transfers, visiting). Routine daily activities, such as whether prisoners can contact family and friends, whether and how they can practice their religion or access medical services, and when they can eat and sleep, are all regulated by correctional authorities. Without recognition that the business of corrections is all about

33 Andrew Coyle, *A Human Rights Approach for Prison Management: Handbook for Prison Staff* (London: King's College, International Center for Prison Studies, 2002), at p. 31-33. Dr. Andrew Coyle is one of the most respected international experts on prison management and has extensive international experience on prison matters, having visited prison systems in many countries as an expert consultant for bodies such as the United Nations and the Council of Europe.

34 See the statement of Chief Justice Brian Dickson In *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 : “Since the close of the Second World War, the protection of the fundamental rights and freedoms of groups and individuals has become a matter of international concern. A body of treaties (or conventions) and customary norms now constitutes an international law of human rights under which the nations of the world have undertaken to adhere to the standards and principles necessary for ensuring freedom, dignity and social justice for their citizens. The Charter conforms to the spirit of this contemporary international human rights movement, and it incorporates many of the policies and prescriptions of the various international documents pertaining to human rights.” (at p.348)

*promoting and monitoring respect for human rights, preventing human rights violations, and detecting and remedying human rights violations, systemic abuses of power are inevitable.*³⁵

In 1996 Justice Louise Arbour, in her report on abuses of human rights at the Prison for Women, concluded that the enactment of the CCRA, the existence of internal grievance mechanisms, and the existing forms of judicial review had not been successful in developing a culture of rights within the Correctional Service of Canada. Her report led to the new Commissioner of Corrections, Ole Ingstrup, setting up of the Working Group on Human Rights. In his 1997 Report Mr. Yalden alerted the Service to the importance and challenges of implementing a human rights agenda within Canadian penitentiaries:

*It is particularly important to recognize the fundamental nature of Canada's commitments in light of the fact that some members of Canadian society, including some CSC employees, do not necessarily share the values underlying the Service's human rights framework. In that context, it is essential to make it clear that the principles and provisions incorporated in the CCRA derive from universal human rights standards supported by all the advanced democracies with which Canada compares itself, that the Service holds itself accountable to those standards, and that it is actively committed to making them work in federal correctional institutions.*³⁶

In identifying a strategy for improving the CSC's communication of its mandate regarding human rights to the general public, the Yalden Report acknowledged that the Service was "caught in a cross-fire between those who perceive the correctional system as soft on criminals and those who worry that incarceration further degrades them, or fails to assist them in becoming more positive members of society".³⁷ Based on the results of a 1996 CSC staff survey, the Report also observed that a substantial proportion of staff either do not accept the rationale for their professional conduct or question its effectiveness. The Report concluded:

*If staff are to see themselves as part of a lawful and socially constructive enterprise, they not only need a firm grasp of clear and practical professional guidelines, they must also have some personal understanding of why such rules are lawful and the social purpose that they serve.*³⁸

The Report offered what it saw as the best argument for observing human rights in a correctional context:

*[It] is not merely that [these rules] are required by international convention or domestic law, or even that they are intrinsically more civilizing, but that they actually work better than any known alternatives -- for inmates, for staff and for society at large. By preserving such fundamental social rules within the institutional setting, so the argument goes, one improves the odds of eventually releasing a more responsible person.*³⁹

35 I. Zinger, "Human Rights Compliance and the Role of External Prison Oversight" (2006) 42, Can. J. Crim. & Crim. Jus. 127 at 128.

36 Yalden Report, p. 8

37 Yalden report, p.36

38 Yalden Report, p.37

39 Yalden Report, p.40

It cannot be overemphasised that respecting human rights is not a weak-kneed “soft on criminals” line but the most principled and most effective form of corrections. As expressed by Andrew Coyle in *A Human Rights Approach to Prison Management*:

*Staff behavior and the humane and dignified treatment of prisoners should underpin every operational activity in a prison. This is not merely a question of human rights principles. In operational terms is also the most effective and efficient way in which to manage a prison.*⁴⁰

The Yalden Report proposed a broad platform of reforms, all premised on a "rights-related strategy." These included improvements in the quantity, quality, and accessibility of rights-related training, particularly for front-line staff, and the establishment of a Human Rights Unit, headed by an individual with appropriate seniority, to monitor compliance with human rights standards.

The Yalden Report was well received by the then Commissioner of Corrections, Ole Ingstrup, (himself a former warden in the Danish prison system) and one of the first recommendations to be implemented was the establishment of a Human Rights Unit at National Headquarters. However, far from being given the profile and resources suggested by the Yalden Report, the CSC's Human Rights Unit has a smaller staff than any other at National Headquarters. In the past several years the commitment to human rights at the upper levels of the Service has considerably wavered. There are those who now think that human rights talk is out of fashion, as if such discourse was a fad or fetish of liberal-minded people and had no place in a “get tough on crime and criminals” world. Little wonder then that, as Mr. Yalden predicted, a human rights strategy remains a hard sell to many staff.

In light of the unfinished business of entrenching a culture of respect for human rights within Canadian penitentiaries and the wavering commitment within CSC to such an agenda, any report on the future of corrections must include a clarion call to reinvigorate that commitment and identify measures and initiatives well calculated to implement it. No such call is to be found in the Panel's report. To its great discredit the Panel makes no mention of Canada's international human rights obligations or of the application of the *Charter* to Canadian prisons, and has no regard for or apparent awareness of the well-documented record of how difficult it has been to entrench a culture of respect for rights within CSC. Instead of a clarion call for greater vigilance in protecting human rights we find a virtual open invitation to CSC to dismantle the existing legal and administrative framework and redefine the definition of rights by introducing an ill-conceived hierarchy of rights and conditions of confinement dependent upon how well prisoners participate in their correctional plan. The *Roadmap* undermines the fundamental nature of Canada's human rights commitments and puts Canada on a path out of step with the relevant international and domestic human rights norms.

2.1 Dignity's Child

One of the large gaps in the Panel's analysis is the lack of any consideration to the views and perspectives of the prisoners themselves who would be affected by the Panel's recommenda-

40 *A Human Rights Approach to Prison Management* p.33

tion. In preparing this response the authors did not have the financial resources available to the Panel but we determined that it was not only appropriate but necessary to provide a forum for some prisoners to voice their concerns. With the cooperation of the Warden of Matsqui Institution we held a “community hearing” at the institution on November 29, 2008. In advance of the meeting prisoners were invited to prepare and present either written or oral submissions addressing the recommendations contained in the *Roadmap*.⁴¹ The proceedings were recorded. The submissions covered many areas but not surprisingly the issues of human dignity and equality, the core concepts underpinning human rights law, emerged as a common theme.

Several prisoners addressed the Panel’s recommendation that the CCRA be amended to provide that prisoners only retain “basic rights”. Nathan Myles characterized the underlying theme in the terrible events in the last century where in different parts of the world certain classes of citizens were stripped of their rights:

*In general it's where a ruling group denigrates another group's dignity, pride and human rights. [The Roadmap] would be taking away our rights and making us lower class to no-class citizens. To treat us as social outcasts... This report is not a roadmap to public safety but plain and simply an attempt to destroy the rights of prisoners and to downgrade us in class to subhuman –sub-Canadians.*⁴²

Another prisoner, Greg Hanson, in critiquing the Panel’s recommendation that human rights can be attenuated because a prisoner has not shown ‘sufficient progress’ in addressing their correctional plan, invoked his own personal journey and offered this account of the importance of human dignity in anchoring any correctional system:

In the spring of 1982 I was 15 years old, living in a small city in B.C. Like many teenagers, I was preoccupied with motorcycles, girls, rock music, and dressing to impress my peers. Mostly I was unaware of something happening that spring that would have considerable influence on my future life. On April 17th Queen Elizabeth II and the Prime Minister of Canada signed a document that included the Canadian Charter of Rights and Freedoms, or “The Charter”. Though it meant little to me at the time, the Charter is a Canadian legal document that would have a greater effect on my life than any other. Two short years later, I would enter British Columbia’s infamous Oakalla prison. From then until today, I am ashamed to concede that I have spent over 22 years inside of prisons just like this one (Matsqui). In that time, I have learned more about human indignity than many would think possible for an educated person living in one of the most “civilized” nations on earth. Though I could not know it at the time, my entrance into Oakalla began a long search for human dignity.

My dictionary defines dignity as, ‘the quality or state of being worthy, honored, or esteemed.’ By that definition, human dignity involves the way I view myself, the way others deal with me, and the way I view and treat others. While it is true that many things can affect the way I feel about myself, it is equally true that the way others treat me plays a large role in my everyday sense of personal value. I have been thinking a lot about that lately. Especially have I been thinking about it in light of the Charter. More than any other Canadian legal document, the Charter gives voice

41 Invited observers included representatives from CSC’s NHQ Rights, Redress and Resolution Branch and the Director General, Corrections & Criminal Justice, Public Safety Canada.

42 Submission of Nathan Myles, November 29, 2008 Matsqui Institution

not only to how Canadians must treat each other, but more importantly, how we should view, or feel about each other.

It would be unrealistically biased of me to be so critical of the “Roadmap” report and not present an alternative. Yet, I freely admit that any alternative I could present would only be one more theory in a long line of theories presented by those seeking a utopian society. The truth is, crime is ugly. In every form, it is an assault on the human dignity of another. I know of which I speak.

In 1983, I began my all out assault on dignity. It began with a breach of financial trust, and ended 12 years later with the ultimate indignity - when I deprived another human being of his right to life. Yet, as implausible as it may sound, I now know that during that time I was desperately seeking “worth, honor, and esteem.” You will recall that this is how the dictionary defined “dignity”. How did a person searching so desperately for dignity become so undignified?

I have thought about that question for many years now. The conclusion I’ve reached is that even though we are born with dignity, the world we are born into is full of indignity. How else can we explain the global epidemic of sexual slavery, child molestation, family violence, drug addiction and alcoholism, war, violent crime, starvation and poverty, environmental destruction and gross economic injustice? We may be born innocent, but it doesn’t remain that way for long. If dignity is a human birthright, then the world we are born into is a thief relentlessly seeking to steal it away. When dignity is first taken from us, we feel “indignant”. Without correction, our base response is to take dignity from others in an attempt to retrieve our own. Logically, this “tit-for-tat” model of conflict resolution is the wrong response. It only creates a firestorm of people robbing dignity from others. Yet it is the model we continue to follow into adulthood – often without second thought. What it creates is a life cycle of indignity as the pendulum swings between losing and taking dignity.

Lawmakers know this well. In April of 1945, in an endorsement of the Charter of the newly formed United Nations Organization, U.S. President Harry Truman publicly stated: “We must build a new world—a far better world—one in which the eternal dignity of man is respected.” It is this attempt to validate “eternal dignity” for all that drives lawmakers to draft codes such as the Charter. ...

As stated earlier, I am in prison because of committing one of the greatest indignities known to man. I forcibly took away another person’s dignity. His right to “worth, honor, and esteem”. His right to life. In doing so, I likewise gave up my own human dignity. Notice, I did not say I gave up my right to dignity. .. Rather, in my case, I threw away my own dignity. At that time, Canadian society was forced to decide how to respond. Was revenge the right model? By killing me, they could enact upon me the same indignity I had enacted on my victim. Though I wouldn’t learn anything from the experience, perhaps it would teach the rest of society that taking away the dignity of another would be met with a forcible and severe removal of their dignity. Or, perhaps, as is the case in some societies, it would be better to publicly torture and maim me. That way revenge could be satisfied as my dignity is taken away on a repeated and daily basis. In the end, Canadian society chose the moral high road. Perhaps this course was chosen on the perception that a person born into a world with so much indignity is not solely responsible for treating others with indignity. So, it was decided that in my case – and the cases of thousands of other Canadian citizens – Canadian society would attempt to teach us how to treat others with dignity....But how could this best be accomplished on such a large scale? In 1986, it was decided to create a new body of law that would – amongst other things – “promote the dignity and fair treatment of inmates”.

This new body of law would take 6 years to create, span the mandate of two separate governments, and involve the labours of hundreds of lawmakers, social workers, International partners, university professors, CSC staff, lawyers, and community liaisons. The working papers alone for this project cover 2 years and 481 pages of summary reports. I know, I've read all of them. The final result was the CCRA – The Corrections and Conditional Release Act and the accompanying Regulations.

The rationale behind this legislation is easily understood. Stripping a person of dignity is often more brutal than inflicting physical blows. It is devastating to the human spirit. A devastated, dehumanized human spirit is a dangerous thing. When humans become dehumanized, they tend to act inhumanely. This was the lesson learned painfully through the events in B.C. Pen, Millhaven, Archambault, and Kingston Penitentiary in the 1970's and early 80's. Some in the CSC today choose to irresponsibly forget that those lessons were paid for with the blood of both prisoners and Correctional Officers. A more pleasant lesson CSC has both learned and preached since that time is that when accorded greater dignity, human inclination is to conduct oneself, and treat others more humanely. In the 20 years since the creation of CSC's Mission and the subsequent inception of the CCRA, incidents of prison violence in general, violent recidivism by parolees, and violent crime committed by successful beneficiaries of CSC correctional programming have reduced dramatically.⁴³

It is more than ironic that Canadian prisoners can demonstrate a far greater understanding and respect for the significance of human rights than an 'expert' panel purporting to chart a roadmap for the future of Canadian corrections. Perhaps we should expect that those who have felt the indignity of harsh justice – both given and taken – would be most sensitive to legal amendments that would deform the laws that were shaped to reflect our commitment as a society to human dignity. In our response we have repeatedly invoked the concept of human dignity and the principles that pour content into its implementation in Canadian corrections to provide the framework for understanding the dangers and perils for both public safety and human rights that lie along the *Roadmap* and CSC's transformation agenda.

43 "Dignity's Child", Submission of Greg Hanson, November 29, 2008 Matsqui Institution

3 Faulty Premises

The Panel gives considerable space at the beginning of the report setting that stage for their analysis and recommendations by providing some data on crime trends and changes to the profile of prison populations. Because of the seriousness of the conclusions they reach and the implications of their recommendations, it is essential that we examine the data presented. We were struck by the negative attitudes towards prisoners generally that this part of the report reflects which may explain why the Panel gave no consideration for human rights in the chapters that followed and felt no apparent compunction introducing proposals that would diminish those that currently exist.

3.1 Crime in Canada

The Panel provides a short overview of crime trends in Canada and their likely impact on federal corrections. Their analysis leads the reader to conclude that the major decreases in crime occurring over many years are driven by non-violent crime that has little impact on federal corrections while violent crime is on an alarming increase. The analysis contains a series of errors, and selective use of statistics that reveals a weak understanding of crime rates and trends. Given the importance that the report appears to place on these data for the future of federal corrections, the errors must be addressed in detail.

The report paints a picture of crime that purports to show serious violent crime as being on the increase by focussing on the 2006 figures without any historical perspective of the cycle of crime statistics that show that overall violent crime has been on the decrease. To imply that a one-year change constitute a trend that should influence, let alone justify, far-reaching changes to the framework of Canadian corrections is a fundamental error.

The Panel's use of carefully selected statistics using a single year as a reference – something any first year criminology student is warned about – and exposure of the misconceived impression created by the Panel of increased serious violent crime along with the implication of an increasingly violent federal prison population, becomes clear by looking at the Juristat 2007 figures and the trend over the decade from 1998 - 2007.

Crime rates for selected offences				
Type of offence	2007		2006 to 2007	1998 to 2007
	number	rate	% rate change	
Total Criminal Code (excluding traffic), crime rate	2,302,900	6,984	-7.4	-14.4
Violent crime	306,559	930	-2.5	-5.3
Homicide	594	2	-3.0	-2.6
Attempted murder	802	2	-5.1	-1.6
Robbery	29,600	90	-4.7	-6.5
Sexual assault (levels 1,2,3)	21,449	65	-4.5	-23.2
Other sexual offences	2,784	8	-0.1	-26.1
Assault level 1	179,586	545	-3.3	-10.7
Assault level 2, weapon/causing bodily harm	53,945	164	0.1	32.3
Assault level 3, aggravated	3,403	10	0.5	18.6
Other assaults	13,917	42	5.4	4.8
Abduction	479	1	-8.3	-47.2

<http://www.statcan.ca/Daily/English/080717/d080717b.htm>

To better understand the significance of the 2007 figures, Statistics Canada reports the percentage increase /decrease over the previous year (2006) and the comparison figure over the previous decade.

Using this table we can revisit the Panel's inference of a violent crime epidemic. Using their bullets of relevant information that "positions" their observations and recommendations, we then supplement that information with the 2007 figures and more importantly the 10- year period changes.

- *murders increased for the second consecutive year to 852, 30 more than the previous year;*

The Panel has misread the figures. The 852 figure refers to attempted murder, not murder. As to the figure for murder, the 2007 Juristat figures do not separately report murders but aggregate all homicides to include murders and manslaughter offences. The 2007 Juristat shows that police reported 605 homicides in 2006, 58 **fewer** than in 2005. This resulted in a rate of 1.85 homicides per 100,000 population, **10% lower** than in 2005. As noted by Juristat "The homicide rate has been generally declining since the mid-1970s."⁴⁴

For attempted murder the increase in 2006 was followed by a 2.5 decline in 2007. "Although the rate of attempted murder has remained consistently higher than that of homicide since 1978, it has generally paralleled the gradual decline seen in homicide."⁴⁵

The data show that the 10 year change for homicides declined by 2.6%; for attempted murder the ten year change shows a 1.6% decline.

- *aggravated assaults, the most serious form of assault, were up 5%, also the second consecutive increase;*

The data show that for 2007 these offences remained virtually unchanged with an increase of 0.5%. The 10 year change shows an 18.6% increase.

44 Juristat, (2007) p. 4

45 Juristat, (2007) p. 5

- *assault with a weapon or assault causing bodily harm increased for the seventh consecutive year, up 4%; this was the highest rate since the offence was introduced into the Criminal Code in 1983;*

Statistics Canada reports that "... aggravated assault, assault with a weapon and forcible confinement remained stable. The stable rate of assault with a weapon follows seven years of previous increases."⁴⁶ The data show 32.3% increase over the previous 10-year period;

- *robberies increased for the second year in a row, up 6%;*

The 2007 data for robberies show a decline of 4.7%. The 10 year period shows a 6.5% decline.

- *robberies involving firearms rose 4% and accounted for approximately 1 in 8 robberies;*

Statistics Canada reports that "Most robberies in 2007 were committed without the use of a weapon (60%). The rate of robberies involving firearms, which accounted for about 11% of all robbery incidents, fell in all provinces except Manitoba and British Columbia. As a result, the national firearm-related robbery rate was at its lowest point since this information became available in 1977."⁴⁷

- *kidnapping/forcible confinement continued to increase; over the past 20 years, the number of incidents reported to police has increased sevenfold, from about 500 in the mid-1980s to over 4,000 in 2006.*

For 2007 kidnapping/forcible confinement remained virtually unchanged with an increase of 0.9% but abduction declined 8.3%. The 10 year cycle shows a 121.5% increase in kidnapping/forcible confinement and a 47.2 decline in abduction.

- *youth crime increased by 3%, the first increase since 2003; the rate of youths accused of homicide was the highest since 1961;*

In fact, "The rate of youth accused (the youth crime rate) decreased by 2% in 2007, following a 3% increase in 2006. Following substantial declines after peaking in 1991, the youth crime rate has remained relatively stable over the past decade."⁴⁸ Further, according to Juristat,

*"Following a record high in the youth homicide rate in 2006, the number of youth accused of homicide in 2007 decreased from 85 to 74, representing a 13% drop in the rate. Despite this decrease the 2007 youth homicide rate was the second highest since 1961. The rates in Manitoba and Saskatchewan, reached record highs. It is important to note that youth homicide rates can vary considerably from year-to-year due to the relatively small number of youth who commit this offence."*⁴⁹

To illustrate the above mentioned volatility of youth homicide rates; "There were 40 youth (12 to 17 years) accused of homicide in 2004, 17 fewer than the previous year. The rate of youth accused was at its second lowest point in more than 30 years."⁵⁰

46 Juristat, (2007) p. 4

47 Juristat, (2007) p. 5

48 Juristat, (2007) p. 8

49 Juristat, (2007) p. 8

50 Juristat, Homicide in Canada 2004, Statistics Canada – Catalogue no. 85-002-XPE, Vol. 25, no. 6 p 13.

- *drug crimes increased 2%; cannabis offences, which continued to account for approximately 60% of all drug offences, were down 4%, but cocaine offences were up 13% and offences related to other drugs, including crystal methadone, rose 8%.*

In 2007 the rate of drug offences rose 4%, driven by an increase in cannabis possession offences, which accounted for about half of all drug offences.

The data also show that sexual assaults declined in 2007 by 4.5%. The 10 year period shows a 23.2% decline. Other sexual offences remained virtually unchanged in 2007 with a decline of 0.1%. The 10 year period shows a 26.1 decline.

The overall violent crime rate decreased 2.5% in 2007 and the 10 year period shows a 5.3% decline.

In April 2009 Statistics Canada introduced a new tool - the Crime Severity Index. The index was developed in response to a request by the police community to create a measure of crime that reflects the relative seriousness of different offences. Each type of offence is assigned a weight derived from actual sentences handed down by courts in all provinces and territories. More serious crimes are assigned higher weights, less serious offences lower weights. As a result, when all crimes are included, more serious offences have a greater impact on changes in the index. Using the new index Statistics Canada reported as follows:

Crime severity is expressed as an index for which 2006 is the base year at 100. In 2007, the index for overall crime was 94.6, down from 119.1 in 1998. This means that crime severity fell by about 20% during the decade. The 10-year decline was driven by a 40% drop in break-ins.

The seriousness of police-reported crime fell in every year during the decade, except for 2003. In that year, the index rose as a result of increases in robberies and break-ins.

*In contrast to the downward trend in the seriousness of police-reported crime as a whole, the index for just violent crime stayed relatively stable during the decade. **This suggests that the situation with respect to serious crimes against the person was about the same as 10 years ago.***

In 1998, the Violent Crime Severity Index value was 98.0 and in 2007, it was 96.5, a drop of about 2%. The traditional violent crime rate was also at about the same level in 2007 as in 1998.⁵¹

So what conclusions should be drawn from these figures? Notwithstanding the public misconception of rising and rampant violent crime, the rate of violent crime in Canada has not gone up over the past decade. The Panel's report, far from correcting this misconception, contributes to its perpetuation. There are, not surprisingly, a few offence categories that seem to be inconsistent with the overall trend and thus require further research to understand. In particular, we note the rise in the more serious types of assaults, but also the significant decline in sexual assaults. The huge increase in kidnapping /unlawful confinement offences is anomalous and in part likely reflects changes in police/crown charging practices because it is accompanied by a large decline in abduction charges. But clearly placed in their proper context these figures reveal no crisis in public safety that calls for a transformation of the correctional system.

It is interesting to contrast the Panel's analysis with that of the Ouimet Commission of 1969 which surely set the standard for prudence in cautioning against the dangers of being too easily per-

51 The Daily, Tuesday, April 21, 2009 <http://www.statcan.gc.ca/daily-quotidien/090421/dq090421b-eng.htm>

sueded that crime was escalating. They began their chapter entitled “The Incidence of Crime in Canada” with these words:

*Whether serious crime has been increasing in Canada in recent decades is a question that must be examined before changes in the administration of justice can be discussed dispassionately. The belief that violent crime is rampant tends to engender extreme reactions and thus interferes with the consideration of proposals on their merits.*⁵²

They conclude this chapter by cautioning of the danger of describing short term crime statistics changes as trends:

*These findings underline the danger of attaching much significance to reports of annual fluctuations in unfamiliar statistics...*⁵³

It is all too clear that the Panel fell head first into the trap that Ouimet warned of forty years ago. Their errors violate a fundamental expectation for any review or opinion purporting to be “expert” and seriously undermine a key premise for their recommendations.

3.2 The Changing Offender Profile

The Panel provides this description of developments that have led to changes in the offender profile of those admitted to federal institutions and the implications for CSC:

To understand crime in Canada, it is important to understand the series of developments in the last 15 years that have gradually transformed the federal offender population profile. These include:

- *the amendments to the Criminal Code that provide options to the courts for first-time, non-violent offenders;*
- *the introduction of conditional sentences for certain types of offences;*
- *the strengthening of laws to combat organized crime and gangs;*
- *the toughening of laws for child sex offenders;*
- *the closure of provincial mental health facilities;*
- *the Supreme Court decision (R v. Wust (2000) 1 S.C.R. 455) that reduced sentences for time served while on remand status*⁵⁴

52 Ouimet, R (Chairman) 1969) Report of the Canadian Committee on Corrections-Towards Unity: Criminal Justice and Corrections, p.21

53 Ouimet, p30

54 The Panel misunderstands the very limited impact of *Wust* on federal prison populations. Giving credit for time served on remand had been a common practice well before *Wust*. In *R v. Rezale* (1996) 31 O.R. (3d) 713 Justice Laskin of the Ontario Court of Appeal said:

While these factors have contributed to a 12% decrease in the men offender population since 1997, they have also created many new challenges for CSC in implementing its mandate.

In a speech to the International Corrections and Prisons Association (ICPA) on October 23, 2006, CSC Commissioner Keith Coulter articulated the nature and gravity of these new challenges:

Our offenders have more and more extensive histories of involvement with the court system—roughly 9 out of 10 now have previous criminal convictions.

Our offenders also have more extensive histories of violence and violent offences in their criminal history, and far more are assessed as violence prone, hostile, impulsive and aggressive.

There has been an increase of more than 100% in the proportion of offenders who are classified as maximum security on admission—13% are now classified at this level on admission.

An increase of 33% has occurred in the proportion of offenders with gang and/or organized crime affiliations—one in six male, and one in ten female offenders now have known affiliations.

The proportion of offenders serving sentences for homicide has increased by 14%—it now stands at more than one in four male offenders.

The percentage of male offenders has increased by 71%, with an increase of 67% in female offenders identified at admission as having very serious mental health problems—12% of the male and 26% of the female offender populations have this designation.

About four out of five offenders now arrive at a federal institution with a serious substance abuse problem, with one out of two having committed their crime under the influence of drugs, alcohol or other intoxicants.

There is a trend to shorter sentences here in Canada. This has meant an increase of 62% in the proportion of male offender admissions serving a sentence of less than three years. (“Canadian Corrections: Current Complexities”⁵⁵

This description and analysis is overly simplistic and again suffers from a lack of historical perspective. It is true that there have been changes in the federal offender profile but the Panel overstates both the nature of the changes and their implications. Here are just some examples.

- The Panel reports, citing the former Commissioner, that:

Although this section is discretionary, not mandatory, in my view a sentencing judge should ordinarily give credit for pre-trial custody. At least a judge should not deny credit without good reason. To do so offends one’s sense of fairness. Incarceration at any stage of the criminal process is a denial of an accused’s liberty. Moreover, in two respects, pre-trial custody is even more onerous than post-sentencing custody. First, other than for a sentence of life imprisonment, legislative provisions for parole eligibility and statutory release do not take into account time spent in custody before trial (or before sentencing). Second, local detention centres ordinarily do not provide educational, retraining or rehabilitation programs to an accused in custody waiting trial. For these reasons, pre-trial custody is commonly referred to as “dead time”, and trial judges, in deciding on an appropriate sentence, frequently give credit for double the time an accused has served. (at 721)

The Supreme Court in *Wust* held only that “the well-established practice of sentencing judges to give credit for time served when computing a sentence remains available [to offences that prescribe a mandatory minimum sentence], even if it appears to reduce a sentence below the minimum provided by law.”

55 CSC Commissioner Keith Coulter, International Corrections and Prisons Association Conference, October 23, 2006, Vancouver, BC, http://www.csc-scc.gc.ca/text/media/spchscommis/2006/icpa_2006-eng.shtml

Our offenders also have more extensive histories of violence and violent offences in their criminal history, and far more are assessed as violence prone, hostile, impulsive and aggressive”.

Yet according to the most recent Juristat report we read this quite different statement of the changes over the last decade:

Among adults admitted to federal custody, the mix of offences has changed since 1997/1998, the longest time period for which data are available. While offenders convicted of violent offences continue to represent the largest proportion of offenders admitted to federal custody, this proportion decreased from 58% in 1997/1998 to 49% in 2006/2007.

This change occurred because the number of adults admitted for property crimes and 'other Criminal Code' offences grew, while the number of adults admitted for violent crimes remained relatively unchanged⁵⁶

- The statement that “there has been an increase of more than 100% in the proportion of offenders who are classified as maximum security on admission—13% are now classified at this level on admission”, fails to acknowledge that this increase is partly attributable to a change in CSC’s own policy, introduced in 2001, that all prisoners sentenced to life imprisonment for first and second murder are to be classified during the first 2 years of their sentence as maximum security. Prior to 2001 many of these offenders were rated medium security on admission. This policy, which has been heavily criticized by the Correctional Investigator as both unjustified as sound correctional policy and contrary to the security classification criteria set out in the CCRA, has nothing to do with the escape risk, dangerousness or unmanageability of these prisoners but was introduced to placate victims and the police.⁵⁷
- The Panel states that “the percentage of male offenders has increased by 71%, with an increase of 67% in female offenders identified at admission as having very serious mental health problems—12% of the male and 26% of the female offender populations have this designation.” There is no doubt that the deinstitutionalization of the provincial mental health systems has led to many more mentally ill offenders being processed through the criminal justice system and that some of the most chronic of these offenders end up in federal institutions. While this population does, as the Panel correctly concluded, give rise to special challenges and a need for carefully tailored interventions, to imply, as the Panel does, that a larger proportion of mentally ill offenders contribute to a more violent offender profile, is not supported by the evidence. The assumed relationship between mental illness and violent crime, while a common popular misconception, and one seemingly shared by the Panel, has been the subject of much recent research. That research demonstrates that a causal interpretation of the statistical association between mental illness and violence is problematic because any relationship is influenced by

56 Avani Babooram, The Changing Profile of Adults in Custody, 2006/2007 Juristat, December 2008 Vol. 28, no. 10 <http://www.statcan.gc.ca/pub/85-002-x/2008010/article/10732-eng.htm#a3>

57 See *Justice Behind the Walls* p. 477-482 online at <http://justicebehindthewalls.net/book.asp?cid=196>

*other variables including substance abuse, victimization and community disorganization. Imprisonment far from alleviating may compound these problems.*⁵⁸

- While “the proportion of offenders serving sentences for homicide has increased by 14%—it now stands at more than one in four male offenders” the Panel fails to note that this part of the prison population historically has been the least disruptive and troublesome for prison management. The increase in the number of offenders serving life sentences certainly has important implications for correctional programming but it does not contribute to a prison population more likely to use violence within the prison. A common public fallacy, shared and reinforced by the Panel is that those serving life sentences are difficult to manage prisoners. Previous CSC Task Forces have addressed the special nature of and challenges facing this lifer population, reports that the Panel seems not to have considered in their recommendations.⁵⁹

The average time served before parole for someone convicted of capital murder before 1977, whose sentence was commuted, was 13.3 years. Since the abolition of capital punishment that year and the introduction of the mandatory minimum 25 year sentences for first degree murder, even taking into account those who successfully apply for a reduction of eligibility through the Judicial Review that can occur after 15 years, the average time served before parole for these offenders has significantly lengthened resulting in the pooling of “lifers” in the prisons. Estimates of median time that will be served before parole for those subject to the 25 year period of parole ineligibility has been estimated to be 28.4 years with more than half of the total group expected to serve more than 30.6 years.⁶⁰ This was an entirely intended outcome – one that reflects deliberate changes to justice policy in Canada. The drivers for this change were en-

58 Frank Sirotych, *Correlates of Crime and Violence among Persons with Mental Disorder: An Evidence- Based Review*, *Brief Treatment and Crisis Intervention* 8:171–194 (2008); Frank J. Porporino and Laurence L. Motiuk, *The Prison Careers of Mentally Disordered Offenders*:18 *International Journal of Law and Psychiatry*, pp. 29-44, 1995, a Canadian study reporting no significant differences in the mean number of prior convictions, either in total or specifically for prior violent convictions between non-disordered and the disordered federal prisoners, nor in involvement in significant prison incidents e.g., assaults, escape, possession of contraband or general behavioral disruption. Online on CSC’s website at <http://www.csc-scc.gc.ca/text/rsrch/reports/r33/r33e-eng.shtml#DISCUSSION>; N. Patrick Gosden, Peter Kramp, Gorm Gabrielsen, Tavs Folmer Andersen, Dorte Sestoft, *Mental Disorders and Charges of Violent Offences*, *Journal of Law and Psychiatry* 29 (2006) 186–194. This study of male adolescent remand prisoners in Denmark revealed no statistically significant association between the occurrence of a violent charge and mental disorders in general; Virginia Aldige Hiday, *Putting community risk in perspective: A look at Correlations, Causes and Controls*, *International Journal of Law and Psychiatry* 29 (2006) 316–331, which concluded “Future studies are likely to find statistical associations between severe mental illness and violence which will be spurious. Policy makers not recognizing the spuriousness of the studies’ correlations will be misled in efforts to reduce community risk. More broadly, such correlations will act to support the stereotype of the violent mentally ill person and to sustain the stigma of mental illness”. p.327

59 *Implementing The Life Line Concept: Report Of The Task Force On Long Term Offenders* February, 1998

60 Corrections Directorate, Ministry of the Solicitor General, “*Life Sentences for First Degree Murder (Canada) and International Equivalents: Eligibility for Release and Average Time Served*, 1999.

tirely political compromises made to gain acceptance for the abolition of the death penalty and did not reflect changes in the nature or profile of the average lifer.⁶¹

- “There is a trend to shorter sentences here in Canada. This has meant an increase of 62% in the proportion of male offender admissions serving a sentence of less than three years”. While this represents a distinct programming challenge from that of long term offenders it is hardly a “dramatic change” given that going back to the late 19th century the average penitentiary sentence in Canada has been less than 4 years and that under the pre-1970 remission schemes almost all federal prisoners, who had not already been paroled, were released from prison after serving two-thirds of the original sentence.⁶²
- The Panel does recognize that “since 1997 there has been a 12% decrease in the male offender population” but does not link this to the fact that there has been in that same period a 14.4% decline in the overall Criminal Code offence rate (excluding traffic offences) and a 5.3% decline in violent crime.

The Panel makes no mention in its summary of the changing offender profile of what the Supreme Court of Canada has described as “a crisis in the criminal justice system” and “a staggering injustice” – the overrepresentation of Aboriginal offenders. As we will describe in a later chapter this overrepresentation has almost doubled in the last 20 years and may be fairly regarded as the most disturbing trend in Canadian corrections.

The Panel offers this analysis of the implications of the changing offender profile:

This dramatic change in the profile of the average federal offender means that CSC now has an offender population that is more violent and requires either more interventions or different types of interventions, which must be provided in an even shorter timeframe.

Furthermore, many offenders need to learn how to live as law-abiding citizens for the first time, as they have failed to learn the skills required to be productive members of society. The reasons for this vary. Many have failed throughout their lives, beginning in elementary school, and have subsequently moved through the juvenile justice system, the provincial adult correctional system, and in many cases, the mental health system. The reality is that many offenders entering a federal penitentiary are addressing their behaviours for the first time ever. While core programs in the past could focus on criminogenic needs, today’s offender has to learn basic living and employability skills, and also address addiction and criminogenic needs.

As a foundation for transformative corrections this analysis is notable only for its banality. The nature and types of correctional interventions has been the perennial and ubiquitous subject of correctional history dating back to Canada’s first *Penitentiary Act* enacted in 1835. Borrowing from the

61 The Government’s most recent proposed amendments to the Criminal Code for abolishing 15 year reviews will further lengthen the median time spent in prison for those sentenced to first degree murder.

62 In 1888 41% of the prisoners at Kingston Penitentiary were serving sentences of four years or less and 63% five years or less. The figures for the B.C. Penitentiary for the same year were 55% and 64%. Annual Report of the Inspection of Penitentiaries 1887-8, tables 14 and 16. In 1900 46% of all federal prisoners were serving four years or less and 67% five years or less. Annual Report of the Inspection of Penitentiaries, 1899-1900, p.2

preamble of the English *Penitentiary Act* of 1779, it set out the intentions behind Kingston Penitentiary:

*If many offenders convicted of crimes were ordered to solitary imprisonment, accompanied by well-regulated labour and religious instruction, it might 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*⁶³

When Kingston Penitentiary opened, the prevailing theory, as described by historian J. M. Beattie, was that crime was a social disease characteristic of the poor, the origins of which lay in indolence and a lack of moral sense.

*Since crime was thought to be the product of a criminal class that lived in destitution and ignorance, that lived without the restraints of morality and religion, . . . crime could only be prevented and society protected if the habits and behaviour of the lower orders of the population were changed . . . Internal discipline and good work habits would succeed in protecting property from the envy of the low orders where the horrors of the gallows had failed.*⁶⁴

The expectation of those who designed the regime at Kingston Penitentiary was that with a basic diet of hard work and religious instruction, outlaws would become law-abiding. As the penitentiary's official historians have noted, "At least this was the hope at a time when criminal behaviour was equated with sinfulness. It later would be called a sickness, and still later a disorder of the social environment, but the penitentiary would prove equal to all the theories."⁶⁵

The latest reiteration of Canadian correctional interventions dates to the 1990s when, as part of its organizational renewal, CSC also adopted as the basis for its correctional programming a cognitive model of correctional intervention. As described by the then Commissioner, Ole Ingstrup:

Our overall strategy focuses on programs that not only change behaviour, but also ensure that beliefs and attitudes change so that the change is more durable. The strategy focuses on the personal development of offenders so that they may acquire the skills and abilities required for the pro-social adaptation necessary for successful reintegration as law abiding citizens. . .

The cognitive model attempts to teach offenders how to think logically, objectively and rationally without over-generalizing or externalizing blame. It is based on methods of changing the way offenders think because their thinking patterns seem to be instrumental in propelling them towards involvement in criminal activities. The model, a fairly recent innovation in correctional treatment, is founded on a substantial body of research indicating that many offenders lack a number of cognitive skills essential for social adaptation. For example, many lack self-control, tending to be action-oriented, non-reflective and impulsive. They often seem unable to look at the world from another person's perspective. They act without adequately considering the consequences of their actions. They are lacking in inter-personal problem-solving, critical reasoning and planning skills. The end re-

63 *Justice Behind the Walls*, p.19, online at <http://justicebehindthewalls.net/book.asp?cid=7&pid=273>

64 J. M. Beattie, *Attitudes towards Crime and Punishment in Upper Canada, 1830-1850: A Documentary Study* [Toronto: University of Toronto Centre of Criminology, 1977], p. 12-13

65 Dennis Curtis et al., *Kingston Penitentiary: The First 150 Years, 1835-1985* [Ottawa: Correctional Services of Canada, 1985] p. 4

*sult is that offenders become caught in a cycle of thinking errors -- the situation that programs based on the cognitive model attempt to change.*⁶⁶

As we will see, one of the Panel's observations was that "employment and employability programs appear to have been placed on the back burner by CSC and not given the attention that they require"⁶⁷ and they recommend that CSC should once again give more emphasis to providing employment programs to offenders. In doing so the Panel is hardly advocating for transformation but a return to a correctional theme that dates back to the birth of the penitentiary and one, like so many of its noble intentions, where the rhetoric has never lived up to the reality. We will be examining whether the Panel's latest version of employment and employability programs as a correctional intervention will prove any different.

As for the Panel's analysis of the recurring problem of offenders traversing the treadmill of correctional institutions, compare it with that of that of the 1977 *House of Commons Sub-Committee on the Penitentiary System in Canada (the MacGuigan Report)*:

The persistent recidivist statistic can be related to the fact that so many in prison have been irreversibly damaged by the system by the time they reach the final storehouse of the Criminal Justice System -- the penitentiary . . . It was compounded in schools, foster homes, group homes, orphanages, the juvenile justice system, the courts, the police stations, provincial jails, and finally in the university of the system, the penitentiary.

Most of those in prison are not dangerous. However, cruel lockups, isolation, the injustices and harassment deliberately inflicted on prisoners unable to fight back, make non-violent inmates violent, and those already dangerous more dangerous

*Society has spent millions of dollars over the years to create and maintain the proven failure of prisons. Incarceration has failed in its two essential purposes -- correcting the offender and providing permanent protection to society.*⁶⁸

As documented so vividly in the MacGuigan Report, the penitentiary system in Canada experienced violence and massive riots during the 1970 to 1976 period that was entirely unprecedented in Canadian history and has never been approached since. Before concluding that today's penitentiary population is a more violent one the Panel might have found it worth reading the MacGuigan Report's description of those times 30 years ago:

Seven years of comparative peace in the Canadian penitentiary system ended in 1970 with a series of upheavals (riots, strikes, murders and hostage-takings) that grew in numbers and size with each passing year. By 1976 the prison explosions were almost constant; hardly a week passed without another violent incident. The majority were in Canada's maximum security institutions. In the 42 years between 1932 and 1974, there was a total of 65 major incidents in federal penitentiaries. Yet in two

66 Jim Vantour, ed., *Our Story: Organizational Renewal in Federal Corrections*, [Ottawa: Correctional Service of Canada, 1991] p.70

67 *Roadmap*, p.38

68 *House of Commons Sub-Committee on the Penitentiary System in Canada* [Ottawa: Minister of Supply and Services, 1977] [Chairman: Mark MacGuigan], p.10

years -- 1975 and 1976 -- there was a total of 69 major incidents, including 35 hostage-takings involving 92 victims, one of whom (a prison officer) was killed.⁶⁹

One has to wonder what the implications for the MacGuigan report's conclusions would have been if the focus had been entirely on the "changing prisoner profile" during those years. In fact, it was the promise of fair treatment and respect for human rights that brought about the end to this violence even before the Parliamentary Sub-committee's report had been tabled. In the period that the Sub-Committee traveled and held hearings not one major incident occurred in a Canadian Penitentiary. It was the longest stretch since 1973 without a smashup or hostage incident.⁷⁰ In 1977 Parliamentarians from all political parties recognized, like so many other official reports, that the experience of imprisonment, as a response to crime, is itself criminogenic: it actually produces and reproduces the very behaviour it seeks to control. There is another theme that runs the historical course of 170 years between the early days of the penitentiary and the first decade of the twenty-first century. It is that the experience of imprisonment, intended to inculcate respect for the law by punishing those who breach its commands, actually creates disrespect for the very legal order in whose name it is invoked. This theme - the need for and the absence of respect for human rights behind the walls - has seen its most recent expression in the 1996 report of Madam Justice Arbour into events at the Prison for Women. The Panel's report, by totally disregarding this theme, is bereft of any recommendations to address it. It is however a theme to which we will be returning because it lies at the heart of any roadmap to transformation.

The relationship between a safe prison, for both staff and prisoners, and a regime that is respectful of human rights is well understood by experienced correctional staff, although apparently not by those the Panel consulted. Jim Mackie, a senior correctional supervisor at Kent institution, in comparing conditions he had experienced in the 1970s in the B.C. Penitentiary to those at Kent institution 20 years later, had this to say:

I know that the prisons when I first walked in the door at B.C. Pen were so damn dangerous that you were glad to be home any given day. I know now when I walk in the door I expect to be home . . . At the B.C. Pen there were excesses in force. There was no such thing as use-of-force documents, you didn't record anything. You were told to go deal with the person and drag him to the hole. If the guy went hard so be it, if he went easy so be it. We've learned to do things better and it is paying a dividend to us now. Possibly there are some people that are saying there are too many rights for inmates, but if they lose those rights then possibly we lose the same rights. Because when they take away their rights, they take away our rights⁷¹.

So much of the Panel's *Roadmap* is premised on the asserted increasingly violent population it is of great concern that the Panel failed to explore the validity of this premise, using CSC's own readily-available figures. Both of the authors, who have experienced the changes in the Canadian Penitentiary over the past 30 years, have the strong sense that prisons are less violent places, a perception supported by the description of the state of affairs in the 1970s described in the MacGuigan Report. Is this sense supported by the evidence on the ground or does that evidence validate the

69 *Sub-Committee on the Penitentiary System in Canada*, p.5

70 *Sub-Committee on the Penitentiary System in Canada*, p. 6

71 Interview with Jim Mackie, in *Justice behind the Walls: Human Rights in Canadian Prisons* (2002) p.83, online at <http://justicebehindthewalls.net/book.asp?cid=20&pid=314>

Panel's premise of increasing violence? To answer this question we asked the Correctional Service of Canada to provide us with their best evidence of the current situation and the trend. That evidence is contained in the Security Branch's Annual Report for 2006-7 of Institutional Security Incidents. As explained at the beginning of the report:

This report contains an overview of institutionally based security incidents which include data on Offenders sustaining 'MAJOR' injury, as well as information pertaining to Serious Offences committed by federal offenders while subject to conditional release in the Community. Furthermore, a comparative analysis of this past Fiscal Year's results with those reported during the preceding years is included.⁷²

These then are the facts of institutional violence according to CSC's best evidence:

INMATE MURDERS;

There was no change in the number of Inmate Murders, three (3), committed in Fiscal Years 2006-07, 2005-06 and 2004-05, respectively. This remains below the annual average of four (4) Inmate Murders recorded during the preceding nine year period,

MAJOR INMATE ASSAULTS: 2.5% INCREASE over Fiscal Year 2005-2006;

There has been a minor increase in the number of Major Inmate Assaults recorded during this past Fiscal Year, forty (40) compared to thirty nine (39) in FY 2005-2006. This remains below the average of forty-one (41) Major Inmate Assaults recorded during the preceding nine year period,

MAJOR STAFF ASSAULTS; 67% DECREASE over Fiscal Year 2005-2006;

There has been a significant decrease in the number of Major Staff Assaults recorded during this past Fiscal Year, two (2) compared to six (6) in FY 2005-2006. This is also slightly below the average of (2.2) Major Staff Assaults recorded in the preceding nine year period,

MAJOR DISTURBANCES (Institutions);

There were two (2) Major Disturbances reported in Fiscal Year 2006-2007, compared to none in Fiscal Year 2005-2006, which is also below the average of 6.4 Major Disturbances recorded during the preceding nine year period,

INMATE SUICIDE INCIDENTS;

Ten (10) inmates committed suicide during this past Fiscal Year, which represents the same number of suicide incidents that had occurred in the previous year. This is slightly below the annual average of eleven (11) for the period of 1997-98 to 2005-06.

Notwithstanding the Prime Minister's disparaging comments about the use of statistics that we quoted earlier, there is only one way to read these figures. No amount of manipulation or spin can support the Panel's view that prisoner violence within the institutions is on the increase. Given that it is UCCO that continually beats the drum that their members are working in an increasingly dangerous environment, the most significant statistic is that in 2006-7 major assaults on staff decreased by 67%, falling from 6 to 2, and that the average of major staff assaults recorded in the

72 Annual Report for 2006-7 of Institutional Security Incidents and Community Offences Fiscal Year 2006-7, Security Branch, CSC

preceding nine year period was 2.2. The number of inmate assaults on other inmates, while much higher numerically in 2006-7, at 40, is still below the average of 41 recorded during the preceding nine year period.

To avoid the mistake made by the Panel of interpreting single year changes as a trend, it is important to note that there is also evidence of a decrease in institutional violence over a longer period than reported in the Security Branch's 2006 -7 report. In 2002, in responding to similar assertions of an increasingly violent prisoner population in Michael Harris' book *Con Game: The Truth about Canada's Prisons*, Professor Jackson reviewed CSC's figures on major assaults on inmates for the two years before the CCRA was introduced (1990-1992) and for the ten years after (1992-2002). Looking at the numbers as a whole it was clear that there had 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 was a downward trend, to which 2000-01 was the exception. (The 2000-1 figure was the only one used by Mr. Harris).⁷³ Professor Jackson concluded that CSC's own numbers provided no support and indeed contradicted Mr. Harris' thesis that "violence is rampant and escalating". Exactly the same conclusion must be drawn regarding UCCO's and the Panel's reiteration of this claim.

Many of the Panel's assertions regarding crime, criminals, and prisoners' rights bear a remarkable similarity to those that appeared in the Harris book, assertions that inflamed public fear. In responding to the Harris thesis that the Canadian prison system is too concerned about rights and not concerned enough about security, Professor Jackson wrote:

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 public safety and human rights, Michael Harris' book is indeed, as its title states, a "con game".⁷⁴

We will let the reader decide, based on the evidence and analysis we provide, whether the same criticism can be made of the Panel's *Roadmap*.

73 See <http://justicebehindthewalls.net/resources/news/congame.pdf> at 3

74 *ibid* p. 1

4 Constitutional and Legislative Framework of Corrections

The first recommendations made by the Panel centre around “Refocusing the CCRA”. Before setting out those recommendations the report provides the following one paragraph summary of the legislative framework of federal corrections:

*The Corrections and Conditional Release Act (CCRA) came into force in 1992, replacing the Penitentiary and Parole Act with a modern, comprehensive framework for corrections and conditional release that makes clear that public protection is the paramount consideration in all decisions relating to the incarceration and release of offenders. Also, for the first time, victims of crime were formally recognized in the federal corrections and parole process*⁷⁵

Anyone familiar with the enormous work that went into the development of the CCRA would recognize that this is an incomplete and inadequate characterization of the Act. The purpose of the Act is set out in section 3:

Purpose

3. 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.

Section 3 CCRA

The Panel further fails to appreciate that one, if not the primary, objective of the new legislation was to bring Canadian correctional legislation into compliance with the *Charter of Rights and Freedoms*. Indeed, in assessing developments in correctional law since 1982, a strong case can be made that the most significant impact of the *Charter* has been in the development of new correctional legislation, culminating in the *Corrections and Conditional Release Act* in 1992. The genesis of this legislation was the Federal Department of Justice's publication in 1982 of *The Criminal Law in Canadian Society* which set out a comprehensive vision of the federal government's policy on the purpose and principles of criminal and correctional law. Along with the publication, the Department of Justice launched the Criminal Law Review, which included as a component the Correctional Law Review (CLR) conducted by the Ministry of the Solicitor General. Over the course of several years, the CLR published a series of working papers which were widely circulated and the subject of public consultation. In its working papers, the CLR specifically addressed the need for new correctional legislation that would incorporate the values of the *Charter* and work out the appropriate

⁷⁵ *Roadmap*, p. 5.

balance between correctional authority and prisoners' rights as mandated by the *Charter*. In its fifth working paper, appropriately entitled "Correctional Authority and Inmate Rights," the Working Group of the CLR explained the rationale for a new legislative framework.

*There are a number of reasons why matters governing inmate rights should now be placed in law. One is that legislated provisions are particularly important where the Charter is concerned. Because the Charter is drafted in general, abstract terms, **legislative provisions play a crucial role in articulating and clarifying Charter rights and any restrictions on them that are necessary in the corrections context** . . . In addition, development of legislative provisions at this time appears vastly preferable to a future of incremental and potentially inconsistent change forced upon the correctional system by the courts. Although judicial intervention plays an important role in providing outside inspection and scrutiny, the courts should be relied on as a last resort, rather than a first measure. In short, there is a need for legislative provisions to be developed in a way which does justice to all participants, in an effort to improve their collective enterprise. Litigation, in contrast, results in a win or loss for one side or the other, and often results in maximizing polarity.*

*In considering long term solutions, the need for resort to the courts should be avoided **by developing legislative rules that recognize yet structure discretion consistent with principles that are understandable to inmates, prison staff and administrators, and the public. Legislative rules that are based on clearly stated principles and objectives would structure discretion to allow for the necessary degree of flexibility while ensuring the greatest possible degree of accountability. Development of legislative provisions to govern inmate rights and staff powers, with input from all those affected by the correction system, is necessary to strike the appropriate balance.** In addition, legislative rules which reflect the interests of staff, offenders and the public are critical if they are to be fair and voluntarily complied with. It should also be noted that **pro-active legislation that takes into account the administrative resource burdens on corrections would allow inmate rights to be protected in the most cost-efficient manner.***

*Legislative rules help to accomplish other goals: to clearly set out the individual rights of inmates in the corrections context, and to provide guidance to staff in how to carry out their functions. **Inmates should be aware of and understand the restrictions which may be lawfully imposed on them, as well as the rights and responsibilities they have, and staff must be aware of their legal responsibilities and duties and the extent of their powers.** Uncertainty in the law is not conducive to either a fair or effective correctional system. It is therefore in the interest of both staff and inmates that the law clearly define inmate rights and staff powers.⁷⁶*

It is clear from this statement, particularly the bolded passages, that legislatively articulating the nature and scope and restrictions on rights, was not inspired or premised on a "soft" approach to offenders, but on ensuring a fair, flexible, accountable and cost-effective correctional system consistent with *Charter* values.

The working papers of the CLR were designed to provide a comprehensive, coherent and principled legislative framework which would embody the modern philosophy of corrections and incorporate

⁷⁶ Correctional Law Review, Working Group, "Correctional Authority and Inmate Rights" [Working Paper No. 5] [Ottawa: Solicitor General, Canada, 1987] [hereafter referred to as CLR Working Paper No.5] p. 2-4.

the rights and guarantees of the *Charter*. They remain the clearest articulation of the need to work out the critical “balance between correctional authority and prisoners' rights as mandated by the *Charter*”, a balance ultimately reflected in the *CCRA*. The working papers were reissued in 2003 in PDF format and are posted on the Ministry of Public Safety’s website.⁷⁷ In his Preface to their re-publication the then Solicitor General, the Hon. Wayne Easter, stated:

This work provides a valuable record of the thinking that underlies Canada’s correctional law, including its relationship to the Charter of Rights and Freedoms.

Many features of the new Corrections and Conditional Release Act have their genesis in proposals set out in the working papers of the Correctional Law Review. Not the least of these is a statement of purpose and principles for corrections in the context of Canada’s criminal justice system.

A special Sub-Committee of the Standing Committee on Justice and Human Rights completed a review of the Corrections and Conditional Release Act in May 2000. Their findings endorse the enduring soundness of the purpose, values and principles of the Act.

*This outcome is a legacy of the members of the Correctional Law Review team and those who participated in related consultations. **Thanks to their efforts, Canadians have a correctional system that is held in high regard by jurisdictions throughout the world.***⁷⁸

The work of those involved in the Correctional Law Review was indeed transformative, yet this important window into the *CCRA* is not even deemed worthy of a footnote by the Panel.

As we will demonstrate, the failure of the Panel to understand that the *CCRA* was designed to incorporate a *Charter* culture of rights into correctional operations undermines their principal recommendations for amending the Act. It is to these recommendations that we will now turn.

4.1 Refocusing the *CCRA*

In justifying what is described as “refocusing the *CCRA*” the Panel accepts “the key rehabilitative principle and CSC’s responsibility ...to provide the offender with ample opportunity to learn the skills required to correct behaviour”. At the same time, the Panel “does not view the rehabilitation mandate of CSC as a one-way commitment.” We are told that “the foundation of the Panel’s philosophy is the belief that if rehabilitation is to occur and truly be sustained, it must be shared between CSC and the offender.” Offenders “must seize those opportunities, pick up the tools of rehabilitation and use them.” The Panel, therefore, recommends legislative change “to support an increased emphasis on offender accountability” and because the *CCRA* “is highly prescriptive in how CSC should operate, and what it can and cannot do” proposes changing the principle of ‘least restrictive measures’ with the principle of ‘appropriate measures’ to support correctional plan implementation”.⁷⁹

The increased emphasis on accountability of offenders to rehabilitate themselves is justified by the Panel’s view of fundamental principles of democracy.

77 http://www.ps-sp.gc.ca/publications/corrections/correctional-review_e.pdf

78 Preface to Correctional Law Working Papers, p. 3

79 *Roadmap*, p.15

A fundamental principle of democracy is that individuals are responsible and must be held accountable for their actions. This should be no different simply because an individual is incarcerated. In fact, the Panel believes that it becomes even more important for offenders to accept accountability for their criminal acts. They must learn that they are responsible for their actions and are obligated to respect the rights and freedoms of others in society.⁸⁰

4.2 Proposed Amendments to s. 4

Based on this “fundamental principle of democracy” rationale, the Panel set out its recommendations for amending s.4 of the CCRA⁸¹, the section that contains the principles that guide the interpretation and implementation of the Act. Some of the Panel’s recommended changes are welcome. For example the change to s.4 (h) that “correctional policies, programs and practices respect... the needs of offenders with special mental health requirements” will give legal force to the Panel’s recommendations, (ones that have been previously made to CSC by the Correctional Investigator) regarding the dire need for improved services to this vulnerable group. Other proposed amendments seem to be no more than authoritarian rhetoric adding nothing of substance to the existing legislation. The clearest examples are a proposed new section entitled “Offender Accountabilities” and changes to the existing section 4(j).

The existing s.4 (j) reads “that offenders are expected to obey penitentiary rules and conditions governing temporary absence, work release, parole and statutory release, and to actively participate in programs designed to promote their rehabilitation and reintegration”. The Panel’s amendment would have the section read “those offenders be obligated to obey penitentiary rules and to respect the authority and position of the staff, and any conditions governing their release to the community”. The underlined changes convert “expected” to “obligated” and enlarge the obligation of offenders to “to respect the authority and position of the staff”. The changes are unnecessary. Under other sections of the Act it is crystal clear that prisoners are already “obligated” to obey penitentiary rules and respect the authority and position of the staff. The *CCRA and CCR Regulations* set out a comprehensive prison disciplinary process which includes a code of offences for breach of which prisoners can be disciplined. Section 40 CCRA provides:

40. An inmate commits a disciplinary offence who

(a) *disobeys a justifiable order of a staff member;*

f) *is disrespectful or abusive toward a staff member in a manner that could undermine a staff member’s authority;*

(r) *wilfully disobeys a written rule governing the conduct of inmates.*

It is important to note that these disciplinary offences require that any order given be “justifiable”, that disrespect be of such a nature that “could undermine a staff member’s authority” and that in the case of disobedience of a rule it be wilful and and that the rule be a written one so a prisoner can have notice of its existence. The purpose of this carefully drafted language is to reinforce both

80 *Roadmap*, p.15

81 The full text of the recommendations are set out in *Roadmap*, p. 15-17

the legitimate exercises of staff authority and concepts of individual offender responsibility. The Panel's amendments seem informed by an authoritarian concept of compliance that characterized the penitentiaries of the nineteenth century.

As to the Panel's concern that offenders being obligated to "respect any conditions governing their release to the community, ss.133-4 CCRA already provide:

Conditions of release

133 (2) Subject to subsection (6), every offender released on parole, statutory release or unescorted temporary absence is subject to the conditions prescribed by the regulations.

134. (1) An offender who has been released on parole, statutory release or unescorted temporary absence shall comply with any instructions given by a member of the Board or a person designated, by name or by position, by the Chairperson of the Board or the Commissioner, or given by the institutional head or by the offender's parole supervisor, respecting any conditions of parole, statutory release or unescorted temporary absence in order to prevent a breach of any condition or to protect society.

Breach of these conditions and instructions can and does lead to suspension and revocation of conditional release and return to prison. In light of these existing statutory provisions there is no reason to amend the Act and the Panel's recommendation raises only the issue of redundancy.

The rationale that the report offered for the finding that offender accountability must be considered a key focus of the CSC is that the responsibilities associated with the rehabilitative mandate of the CSC are being unevenly shared between CSC staff and prisoners. The Panel, earlier in its executive summary, writes:

CSC is to be commended for its efforts to rehabilitate offenders but it continues to face resistance from a portion of offenders who have no interest in rehabilitation and are content to "wait out" the system until they reach statutory release... It is the belief of the Panel that life inside a penitentiary should promote a positive work ethic. Today, an offender working hard at rehabilitation is often treated no differently than an offender who is seeking only to continue his criminal lifestyle.⁸²

The Panel goes on to state that while "it is the responsibility of CSC to provide ...the offender with ample opportunity to learn the skills required to correct behaviour"⁸³, it is the offender's responsibility to then use those tools to rehabilitate themselves. Consequently, the Panel concluded that it was necessary to strengthen the language of the CCRA to include a more robust conception of offender responsibility and accountability. In furtherance of this conclusion, the Panel proposes that two changes be made to the CCRA. First, the Panel recommends that a substantive section entitled "Offender Accountabilities" be inserted into the Act and that the proposed section contain, at a minimum, the following language:

Offenders, as part of their commitment to society to change their behaviour and in order to help protect society, must:

a) obey penitentiary rules as established by CSC;

82 *Roadmap*, p. v

83 *Roadmap*, p. 15

b) *respect the authority of staff at all times; and*

c) *actively participate in programs identified by CSC in their correctional plans (e.g., education, work, correctional programs).*

As we have shown the CCRA already leaves no doubt as to offenders' accountability to obey penitentiary rules and respect staff authority so this recommendation, at least with regard to (a) and (b), is unnecessary. Similarly, with respect to (c) the CCRA already provides that offenders are "expected to participate in programs designed to promote their rehabilitation and safe reintegration" and since these programs will have been identified in their correctional plans the Panel's change adds nothing to offender accountability. The inclusion of the correctional plan in this proposed amendment does however raise other issues. As we will demonstrate later, this recommendation reflects the Panel's unjustifiable belief that the "correctional plan" contains such a powerful elixir of rehabilitative potential that an offender who refuses to participate in it can be legitimately deprived of rights and privileges.

We would also note a revealing omission in the Panel's recommended amendments. The Panel, in response to several submissions acknowledged the lengthy waiting periods for some programs that are identified on offenders' correctional plan, which often means that access to early release is denied to individuals who might otherwise be safely managed in the community. The Panel recommended, therefore, that "every effort should be made to review the modules of cognitive-based correctional programs to identify and lessen redundancies, thereby shortening program content and required time frames."⁸⁴ Consistent with its mantra of greater accountability, why then would the Panel not recommend a correlative amendment to the CCRA that CSC not just make "every effort" but be legally obligated to deliver programs on an offender's correctional plan in a timely manner?

4.3 Retained Rights and the Least Restrictive Principles

If some of the recommended amendments raise issues of authoritarian rhetoric without substantive change and an asymmetrical concept of accountability there are others that raise fundamental questions about the constitutional limits on correctional authority in a free and democratic society. The Panel's most significant and far reaching proposed amendments are to ss. 4(d) and 4(e). The sections currently read:

The principles that shall guide the Service in achieving the purpose referred to in section 3 are

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

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

In furtherance of its goal to more firmly establish the principle of offender responsibility in the Act, the Panel suggested several changes to the wording of these sections. In s. 4(d), the Panel sug-

84 Roadmap, p.39

gested that instead of reading “that the Service use **the least restrictive** measures consistent with the protection of the public, staff members and offenders, it read

*“that, in managing the offender populations in general and the individual offenders, in particular, the Service use **appropriate measures** that will ensure the protection of the public, staff members and offenders, **and that are consistent with the management of the offender’s correctional plan;***

Regarding s. 4(e), the Panel recommends that instead of reading “that offenders retain the **rights** and privileges of all members of society, except those rights and privileges that are necessarily removed or restricted as a consequence of the sentence”, the section should read that

*“offenders retain the **basic rights** and privileges of all members of society, except those rights and privileges that are necessarily removed or restricted as a consequence of the sentence, **or that are required in order to encourage the offender to begin to and continue to engage in his or her correctional plan**”*

According to the Panel, offenders must be encouraged to take responsibility for their actions. Therefore, the Panel is suggesting that corrections in Canada should take a new approach: instead of assuming that prisoners are to be imprisoned according to the least restrictive measures and that prisoners retain all the rights that adhere to members of society except for those necessarily removed as a result of their imprisonment, prisoners would be expected to earn their rights and privileges. The only rights that prisoners would retain will be “basic rights”.

The recommendation of reducing prisoners’ legal entitlements to “basic rights” has a certain ambiguity never clarified by the Panel. Perhaps the Panel would like to see Canada going back to the *Penitentiary Act* of 1886 which stated,

51. The following general rules shall be observed in the treatment of convicts in a penitentiary:

- (a) every convict shall, during the term of his confinement, be clothed, at the expense of the penitentiary, in suitable prison garments;*
- (b) he shall be fed on a sufficient quantity of wholesome food;*
- (c) he shall be provided with a bed and pillow and sufficient covering, varied according to the season; and*
- (d) he shall, except in case of sickness, be kept in a cell by himself at night, and during the day when not employed.⁸⁵*

Some indication of the Panel’s correctional philosophy can be gained from the articulation of the same “basic rights” correctional philosophy that was advanced by members of the former Canadian Alliance Party in its dissenting report to the Parliamentary Sub-committee’s Five Year review of the CCRA:

Putting the protection of a law-abiding society first means that it is necessary to accept to some degree that the rights and privileges of those who obey the laws of this country are fundamentally different from the rights of those who do not. The system does not do this.

85 *Penitentiary Act, R.S.C. 1886, c. 182*

Section 4 of the Corrections and Conditional Release Act (CCRA) states "that offenders retain the rights and privileges of all members of society, except those rights and privileges that are necessarily removed or restricted as a consequence of the sentence." The Canadian Alliance believes that any person who has been convicted in a Canadian court should temporarily lose some of their rights and privileges as a Canadian. Primary exceptions to this are basic Charter rights such as right to an attorney and the right to humane and healthful treatment. We define this as the right to be incarcerated in accommodations with reasonable environmental control, to be provided with basic personal care supplies, to be fed according to the Canadian nutrition guide, and to be provided with access to basic medical treatment. Beyond this, prisoners should have the ability to earn other rights and privileges such as more freedom within the prison, transfers to more desirable facilities, training programs, sports programs, visitor privileges, payment for work performance, canteen privileges, temporary absences and parole. Each of these rights and privileges must be earned by appropriate behaviour which in turn means that they can also be taken away for inappropriate behaviour.⁸⁶

There is a populist attraction to this vision of corrections, rehabilitation and offender responsibility that the Panel is promoting. It claims to place responsibility for the crimes committed squarely on the shoulders of offenders and uses the incentive of converting existing rights beyond "basic rights" to privileges that must be earned to encourage offenders to reform their character. So what is so wrong with requiring prisoners to earn the "right" to have anything more than their basic rights? Particularly when all we are asking them to do is to participate in their own rehabilitation and in complying with institutional rules? The fundamental flaw in this and the Panel's vision of correctional principles is fivefold:

- (1) it is inconsistent with the evolving common law and *Charter* jurisprudence on the human rights of prisoners, specifically the judgments of the Supreme Court of Canada in *Solosky v. The Queen* [1980] and *Sauvé v. Canada* [2003];
- (2) it disregards the extensive legislative history and context of the *CCRA* (specifically the work of the Correctional Law Review);
- (3) it is out of step with international human rights standards;
- (4) it would compromise respect for the rule of law and human rights in Canadian prisons and
- (5) it would undermine rather than promote prisoner reintegration.

4.4 The Legal and Constitutional Context of the CCRA

Fully understanding the negative human rights implications for Canadian corrections of the Panel's recommended amendments to the *CCRA* entails a review of the legal and constitutional origins of the original provisions. Both the retained rights and the least restrictive measures principles have their jurisprudential origins in the pre- charter Supreme Court of Canada decision of *Solosky v. The*

86 Canadian Alliance Official Opposition Minority Report on the Corrections and Conditional Release Act ,Jim Gouk M.P. included in A Work in Progress: The Corrections and Conditional Release Act [Ottawa: Public Works and Government Services, 2000] online at http://cmte.parl.gc.ca/Content/HOC/committee/362/just/reports/rp2537364/just01/362_JUST_Rpt03-e.pdf

Queen.⁸⁷ Those origins and the bases for the principles are described in the working papers of the Correctional Law Review. We have reproduced the relevant passages below and we encourage our readers to consider them carefully because they reveal the necessary kind of discussion of constitutional and correctional principles that is conspicuously lacking in the Panel's *Roadmap*:

The view that an individual in prison does not lose "the right to have rights" is recognized in Canadian law. Even before the Charter, in R. v. Solosky, the Supreme Court of Canada expressly endorsed the view that inmates retain rights, except for those necessarily limited by the nature of incarceration or expressly or impliedly taken away by law. Moreover, the Supreme Court endorsed the "least restrictive means" approach which recognizes that any interference with inmate rights by institutional authorities must be for a valid correctional goal and must be the least restrictive means available.

*In effect, the "retained rights" principle means that it is not giving rights to inmates which requires justification, but rather, it is **restricting** them which does. Undoubtedly, some individual rights of inmates, such as liberty, must be limited by the nature of incarceration, in the same way that the rights of non-inmates in open society must be limited in certain situations. The important point, however, is that it is limitations on inmate rights which must be justified, and that the only justifiable limitations are those that are necessary to achieve a legitimate correctional goal, and that are the least restrictive possible.*

There are also very significant policy reasons, flowing from our statement of purpose, for recognizing and protecting the rights of inmates. As practically all inmates eventually get out of prison, society's long term interests are best protected if the correctional system influences them to begin or resume law abiding lives. According rights and responsibilities to inmates supports and furthers this goal. On the other hand, lack of respect for individual rights in the corrections context can build up resentments and frustrations on the part of inmates and undermine the system's short term and long term security goals. Arbitrary treatment may lead not only to resentment on the part of inmates who are sent to prison for breaking the law, but the ensuing tension could create an atmosphere of mistrust, which could lead to violence, and which is contrary not only to the interests of inmates, but to staff, management and the larger community as well. Thus the Working Group is firmly of the view that humane treatment of inmates and the recognition of their rights while they are in prison aids in their successful reintegration into the community.⁸⁸

The enactment of the *Charter of Rights and Freedoms*, as with other components of the criminal justice system, has had major impacts on corrections. As described by the Correctional Law Review:

Although the Charter gives rights to all individuals (in some cases just to citizens) in Canada, and does not specify the precise nature of those rights in the correctional context, it is clear that the Charter does apply to prisoners, subject to restrictions on rights upheld pursuant to section 1. In the jurisprudence to date, the courts have been particularly concerned that any correctional decisions which affect a prisoner's liberty, that is to say, any decisions which could either extend the period of

87 [1980] 1 S.C.R. 821

88 Correctional Authority and Inmate Rights, Correctional Law Review Working Paper No. 5, October 1987 online at http://ww2.ps-sp.gc.ca/publications/corrections/correctional-review_e.pdf ibid pp. 171-2

his incarceration or place him in a more restrictive environment, must be made in accordance with fundamental justice.⁸⁹

Many of the specific rights referred to in the Charter would touch on correctional authority: freedom of association, the right to vote, mobility rights, the right to life, liberty and security of the person, security against unreasonable search and seizure, and freedom from cruel and unusual treatment or punishment.

Section 1 of the Charter will increasingly mean that the burden will fall on government to articulate and "demonstrably justify" the limits which it wishes to place on offenders' rights. These limits will, furthermore, have to be stated in law.

This apparent Charter trend is echoed by the CLICS [The Criminal Law in Canadian Society] principle (a) that the criminal law should be administered "in a manner which interferes with individual rights and freedoms only to the extent necessary for the attainment of its purpose". Indeed, fairness suggests that we should not arbitrarily limit the civil rights of offenders, although we must recognize that some restrictions are a necessary consequence of a sentence of imprisonment. One principle, therefore, which should govern punishment could be stated as follows:

Individuals under sentence retain all the rights and privileges of a member of society, except those that are necessarily removed or restricted by the fact of incarceration. These rights and privileges and any limitations on them should be clearly and accessibly set forth in law.⁹⁰

It was this principle that was embodied in s.4 (e) of the CCRA.

The Correctional Law Review further explained the constitutional lineage of the requirement that correctional authorities must use the least restrictive measure, now reflected in s.4 (d) of the CCRA:

Section 1 of the Charter enables Parliament or a Legislature to enact a law which has the effect of limiting one of the guaranteed rights or freedoms. However, the government must prove that any limitation is a "reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society".

In a series of cases dealing with such diverse areas as immigration and narcotic control, the Supreme Court of Canada has set the test for limits on Charter rights. This test is extremely important for corrections, as it is at this stage that such serious concerns as security and good order of the institution will be balanced against the guarantee of Charter rights. The Supreme Court stresses that in applying this test it is committed to upholding Charter rights, and that any limits on Charter rights must be proven by the government to be necessary, and not just preferable as a matter of administrative convenience.

[The Oakes test] sets out two central criteria which must be satisfied to establish that a limit is reasonable and justified under section 1. The first, the objective to be served by any measure limiting a Charter right (for example, security of the institution) must be sufficiently important to warrant overriding a constitutionally protected right of freedom. Second, the party invoking section 1 (in the corrections context, this would be the government or the correctional authorities) must show the means

89 Correctional Philosophy, Correctional Law Review Working Paper No. 1, June 1986 http://ww2.ps-sp.gc.ca/publications/corrections/correctional-review_e.pdf Working Paper No. 1, p.23

90 Working Paper No. 1, p. 28-9 (emphasis added).

to be reasonable and demonstrably justified. This involves a form of proportionality test that has three components:

- 1) the measures must be fair and not arbitrary, carefully designed to achieve the objective and rationally connected to it,
- 2) the means should impair the right in question as little as possible, and
- 3) there must be a proportionality between the effects of the limiting measure and the objective - the more severe the negative effects of a measure, the more important the objective must be.

This proportionality test shows that protection of inmate rights must be balanced against the important and legitimate institutional and security concerns of penitentiaries and the community; concerns that in several respects relate to human life and safety. Such factors play an important role when it comes to the question of the extent to which inmate rights may be restricted or limited by the nature of incarceration. The answer to this question is complex and depends not only on security concerns but also on the nature of the particular right or interest at stake, the limit in question and the impact on the inmate.

Of major significance in balancing the various factors involved is the recognition that prison practices and programs vary in degree of intrusiveness on inmate rights, and that as the level of intrusiveness increases, the objective must be increasingly important and protections and safeguards must correspondingly increase. Finding the proper balance necessary to protect inmate rights while maintaining a safe, secure institution through a sliding scale approach is one of the primary concerns of this paper.⁹¹

4.5 Least Restrictive vs. Appropriate Measures

It was to reflect *Charter* derived principles that the CLR recommended that new correctional legislation include in its statement of principles a provision that:

In administering the sentence, the least restrictive course of action should be adopted that meets the legal requirements of the disposition, and consistent with public protection and institutional safety and order.

The implication of this principle, taken together with others, is that corrections would have the burden of demonstrating why a given correctional environment should not, either in general or in respect of a particular offender, approximate the conditions and freedoms of society generally. If there are two ways of accomplishing the same end, but one impinges considerably less on the offender's rights and interests, it is the less drastic course which should be chosen unless there are defensible reasons to reject it. A good example is the need to have identifiable photos of all inmates in order to assist in finding an escaped convict. One way to ensure an inmate will not be able to use facial hair to thwart identification is to require all inmates to remain clean-shaven at all times; a less restrictive option is to take photos of an inmate with and without facial hair, if he wishes to grow a beard or moustache. The same principle of restraint can apply to much more significant questions of initial

91 Working Paper No. 5, p. 178-9

*placement in maximum, medium or minimum security, as well as transfers, choice of treatment program, and conditions of release.*⁹²

The principle of restraint found its legislative form in s.4 (d) of the CCRA:

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

We can now consider the nature of the change envisaged by the Panel's recommendation that 4(e) be amended to read:

that, in managing the offender populations in general and the individual offenders, in particular, the Service use appropriate measures that will ensure the protection of the public, staff members and offenders and that are consistent with the management of the offender's correctional plan.

This is the Panel's rationale for the change:

*The Panel believes that this principle has been emphasized too much by the staff and management of CSC, and even by the courts in everyday decision-making about offenders. As a result an imbalance has been created that places the onus on CSC to justify why the least restrictive measures shouldn't be used, rather than on offenders to justify why they should have access to privileges based upon their performance under their correctional plans. The Panel believes that this imbalance is detrimental to offender responsibility and accountability.*⁹³

The Panel clearly has no appreciation that the principle has been appropriately and necessarily emphasised by staff and management and "even by the courts" because it is in keeping with a *Charter* derived constitutional test to justify reasonable limits on *Charter* rights and that under that test the only justifiable limitations are those that are necessary to achieve a legitimate correctional goal, and that are the least restrictive possible. The onus on the correctional authorities to justify that the exercise of their legal authority is in accordance with the least restrictive measure is consistent with and indeed mandated by the "retained rights" principle endorsed by the Supreme Court of Canada which means that it is not giving rights to inmates which requires justification, but rather, **restricting** them, which does.

The Panel's amendment would substitute "appropriate" for "least restrictive measures". This change would substitute for a **constitutionally derived** standard of restraint on the exercise of state power, a **policy and operationally derived** standard that leaves it entirely up to correctional authorities to determine what are the "appropriate" measures, so long as they are designed to ensure the protection of the public, staff members and offenders and that are consistent with the management of the offender's correctional plan. The operational difference and legal dissonance between a "least restrictive" and "appropriate" measures standard can be best understood in the context of the common justification of many aspects of prison regimes, that of administrative convenience. Viewed through this lens, providing for disciplinary hearings with procedural safeguards such as advance written notice and the assistance of counsel, is administratively inconvenient in terms of delaying the process and therefore it can be argued that limiting these elements would be

92 Working Paper No. 1, p. 31

93 *Roadmap*, p. 16.

“appropriate”. The problem with such a standard was most eloquently revealed in the 1984 judgment of Justice Mark MacGuigan in the Federal Court of Appeal in *Howard*, a case dealing with the right to counsel in prison disciplinary hearings. Justice MacGuigan, who prior to his appointment to the Federal Court of Appeal, had, as a Member of Parliament, chaired the 1977 House of Commons Sub-Committee on the Penitentiary System in Canada and had served subsequently as Canada’s Minister of Justice. In response to arguments that allowing for counsel would hinder the swift disposition of cases and undermine the administrative efficiency of the process, Justice MacGuigan stated:

*It would be an ill-informed court that was not aware of the necessity for immediate response by prison authorities to breaches of prison order and it would be a rash one that would deny them the means to react effectively. But not every feature of present disciplinary practice is objectively necessary for immediate disciplinary purposes. The mere convenience of the authorities will serve as no justification; as Lord Atkin put it in General Medical Consulate Council v. Spackman, "Convenience and justice are often not on speaking terms . . ." All that is not immediately necessary must certainly yield to the fullest exigencies of liberty.*⁹⁴

CSC’s former Director General of Rights, Redress and Resolution, Shereen Benzvy Miller, in a communication to senior management regarding the Panel’s proposed amendments to s.4(d), succinctly expressed the relationship between the “least restrictive” and “appropriate” measures as standards to guide CSC decision-making:

*..the least intrusive, **least restrictive measures.. are the most and only appropriate** [limits] and no special Task Force can diminish the force and power of the enshrined rights and entitlements that have been reflected in the CCRA.*⁹⁵

The questions never posed and therefore never answered by the Panel are what legitimate correctional initiatives or interventions are presently precluded by requiring CSC to ensure that it respects the least restrictive measures consistent with the protection of the public, staff members and offenders and on what conceivable basis should the federal correctional system, the deep end of the criminal justice system, be excepted from the constitutional standards that govern all other exercises of state coercive power?

4.6 The Nature of Prisoners’ Rights – The Citizen Lawbreaker

The second major amendment proposed by the Panel is to s. 4(e). The amendment would change the current wording which reads:

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

so that it would read:

94 *Howard v. Presiding Officer of the Inmate Disciplinary Court of Stony Mountain Institution* [1984] 2 F.C. 642 at 681-2

95 A discussion of Offender Accountability in the context of the work of the Transformation Team by Shereen Benzvy Miller, Director General, Rights, Redress and Resolution.

*“that offenders retain the **basic rights** and privileges of all members of society, except those rights and privileges that are necessarily removed or restricted as a consequence of the sentence, **or that are required in order to encourage the offender to begin to and continue to engage in his or her correctional plan**”*

We have already cited the Working Papers of the Correctional Law Review to demonstrate that the current wording of 4(e) is a legislative codification of the Supreme Court of Canada’s pre-*Charter* decision in *Solosky*. Subsequent decisions of the Court interpreting the *Charter* have greatly reinforced this concept of retained rights and a careful review of the most important of these cases, *Sauvé v. Canada* - the prisoners voting case - will demonstrate that the Panel’s proposed changes are not only inconsistent with the Supreme Court’s approach to human rights but would undermine decades of important work in Canada and internationally to establish a culture of respect for human rights behind prison walls.

According to the Panel, apart from a basic level of rights, prisoners do not have the right to have rights. The assumption seems to be that human rights properly belong to those who are law-abiding members of society. For those who have crossed the threshold to become law-breakers and have been sentenced to prison the right to bear all but the most “basic” rights is forfeited. Any further rights must then be earned back by the law-breakers who must show they have taken responsibility for their criminal actions and are actively engaging in rehabilitating themselves.

In *Sauvé*,⁹⁶ the Supreme Court of Canada takes a very different approach to how prisoners’ rights are to be understood. First, and most importantly, Chief Justice McLachlin uses the evocative phrase “citizen-lawbreakers”⁹⁷ to describe prisoners and their relationship to *Charter* rights. The significance of this description is that it emphasizes that in any analysis concerning prisoners’ rights, prisoners are to be *primarily* understood as citizens and as members of society, and only secondarily as law breakers. Chief Justice McLachlin describes the importance of the “citizen-lawbreaker” description as follows:

*The social compact requires the citizen to obey the laws created by the democratic process. But it does not follow that failure to do so nullifies the citizen’s continued membership in the self-governing polity. Indeed, the remedy of imprisonment for a term rather than permanent exile implies our acceptance of continued membership in the social order. Certain rights are justifiably limited for penal reasons, including aspects of the rights to liberty, security of the person, mobility, and security against search and seizure. But whether a right is justifiably limited cannot be determined by observing that an offender has, by his or her actions, withdrawn from the social compact. **Indeed, the right of the state to punish and the obligation of the criminal to accept punishment are tied to society’s acceptance of the criminal as a person with rights and responsibilities.** Other *Charter* provisions make this clear. Thus s. 11 protects convicted offenders from unfair trials, and s. 12 from “cruel and unusual treatment or punishment”.⁹⁸ (emphasis added)*

The crucial point is that even after conviction and imprisonment, an offender remains a rights-bearing individual: the connection between the individual and their common law and *Charter* rights

96 *Sauvé v. Canada* [2002] 3.S.C.R. 519

97 *Sauvé* at para. 40.

98 *Sauvé* at para. 47.

is not severed by a finding of criminal guilt and a sentence of imprisonment. Consequently, prisoners' rights include the majority of the most robust rights listed in the Charter, including freedom of conscience and religion, freedom of thought, equality rights, the right to life, liberty and security of the person, language rights, and a considerable list of legal rights.

This approach is very much in keeping with the understanding of prisoners' rights that has emerged under the common law over the last century. Originally at common law, persons convicted of felony and sentenced to imprisonment underwent a "civil death", whereby they lost all rights they had previously held. A Virginia court declared in 1871 that a prisoner "has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State"⁹⁹ The warden of Kingston Penitentiary was properly reflecting the traditional status of the felon when in 1867 he wrote, "So long as a convict is confined here I regard him as dead to all transactions of the outer world."¹⁰⁰ As a result of this idea, prisoners, ceased to be rights bearing individuals, rendering them beyond the purview of the courts. However, this approach to prisoners' rights has changed substantially in the course of the last century.

The change in approach in Canada began in 1892 when the concept of civil death was abandoned. The movement towards an understanding of prisoners as rights-bearing individuals was fortified in the pre-Charter court rulings such as *Solosky* and developments in administrative law, particularly the Supreme Court rulings on the duty to act fairly, that emphasized the importance of procedural protections in contexts where state action has a serious impact on individual rights and interests, such as in a prison.¹⁰¹ These two developments served to encourage the courts to take a more active role in reviewing how prison administrators handled issues around prisoners' rights within the prison walls.

Viewed from this historical perspective therefore the recommendations advanced by the Panel are out of step with both the common law developments regarding prisoners' rights and the Supreme Court of Canada's findings with respect to prisoners' access to *Charter* rights. The Panel, in proposing that prisoners be allowed "basic rights" and that any additional rights must be earned, views rights as being contingent, in that they can be taken away for 'bad' behaviour and restored for 'good' behaviour. This view, however, misconceives at a fundamental level the very nature of human rights, as rights that are inherent in the human person, based upon a sense of common humanity and dignity. The inherent nature of the rights contained within the *Charter* has been recognized and affirmed by the Supreme Court in *Sauvé* in their statement that "**Charter rights are not a matter of privilege or merit, but a function of membership in the Canadian polity that cannot lightly be cast aside**".¹⁰²

99 *Ruffin v. Commonwealth*, 62 Va. 790 (1871)

100 Jackson, *Prisoners of Isolation* p. 82

101 See *Justice behind the Walls* at 54-58. Online at <http://justicebehindthewalls.net/book.asp?cid=12>

102 *Sauvé*, at para. 14.

4.7 Removing Prisoners' Rights – A Suspect Enterprise

The Panel's view of human rights is rendered without reference to the constitutional framework established by Canadian courts. *Charter* rights are to be defined using a broad and liberal approach.¹⁰³ *Charter* rights are constitutionally entrenched and, as such, can only be infringed upon for a valid reason and in accordance with the least restrictive means. More specific to the prison context, the Supreme Court in *Sauvé* makes two important points regarding the nature of *Charter* rights. First, *Charter* rights are based on the principles of respect for human dignity and equality of membership in a political community. Second, the rights in the *Charter* are fundamental to democracy. The role of *Charter* rights in a democracy is to protect the integrity of the individual from the coercive power of the state. This function is especially important in the criminal law context, not only because of the potential for unfair and arbitrary action on the part of the state, but also because it is in the criminal context where the individual has the most to lose – the right to liberty. Courts have taken their role as protectors of these rights seriously and there is a strong jurisprudential history of defending the rights of an accused in the criminal law context. However, it must never be forgotten that the correctional system is an extension of the criminal justice system. An individual, while incarcerated, is even more vulnerable to rights-infringing action by the state, as he or she is dependent on the state for access to all the necessities of life. It is the state that provides their shelter, their food, ensures their safety and allows them access to their families through visits, phone calls and mail. As Justice Louise Arbour has stated:

*A guilty verdict followed by a custodial sentence is not a grant of authority for the State to disregard the very values that the law, particularly criminal law, seeks to uphold and to vindicate, such as honesty, respect for the physical safety of others, respect for privacy and for human dignity. The administration of criminal justice does not end with the verdict and the imposition of a sentence. Corrections officials are held to the same standards of integrity and decency as their partners in the administration of criminal law. My objective in bringing forward recommendations on various aspects of corrections... is to assist the correctional system in coming into the fold of two basic Canadian constitutional ideals, towards which the rest of the administration of criminal justice strives: the protection of individual rights and the entitlement to equality.*¹⁰⁴

The Panel proposes that depriving prisoners of some rights should be part of prisoners' punishment/accountability for the crime committed and that to earn these rights back prisoners must demonstrate a commitment to rehabilitation. In the correctional context, it is undoubtedly true that some *Charter* rights must necessarily be restricted to accomplish the purpose of imprisonment, for example "aspects of the rights to liberty, security of the person, mobility, and security against search and seizure."¹⁰⁵ However, *Sauvé* also asserts that while there is no "doubt that Parliament may limit constitutional rights in the name of punishment provided that it can justify the

103 *Hunter v. Southam Inc.* [1984] 2 S.C.R. 145

104 Louise Arbour, Commission of Inquiry into Certain Events at the Prison for Women in Kingston, (Ottawa: Public Works and Government Services Canada, 1996) at xi [Arbour Report].online at http://justicebehindthewalls.net/resources/arbour_report/arbour_rpt.htm

105 *Sauvé*, at para. 47.

limitation”¹⁰⁶, depriving prisoners of rights over and above the rights deprivations inherent in imprisonment should be approached with caution.

Chief Justice McLachlin in *Sauvé* subscribes to a vision of prisoners’ rights that sees human rights as inherent to every individual, both those that abide by the laws and those that do not. Not only is denying prisoners their rights suspect because it effectively removes them from *Charter* protection, it is also suspect because such a blanket denial of rights “runs counter to our constitutional commitment to the inherent worth and dignity of every individual”.¹⁰⁷ Therefore, while a prisoner may be legitimately deprived of some *Charter* rights for the purposes of imprisonment

*it is another thing to say that a particular class of people for a particular time will completely lose a particular constitutional right. This is tantamount to saying that the affected class is outside the full protection of the Charter. It is doubtful that such an unmodulated deprivation,...is capable of justification...*¹⁰⁸

The second concern that the court in *Sauvé* raises with regard to depriving prisoners of their rights is that it is “bad pedagogy”. The Federal Government in seeking to justify denying federal prisoners the right to vote had argued that it sent an “educative message” about the importance of respect for the law to inmates and to the citizenry at large. In the case of the Panel’s suggestions, the rationale offered for depriving prisoners of all but their basic rights is that this approach will teach offenders to be “responsible for their actions and [that they] are obligated to respect the rights and freedoms of others in society.”¹⁰⁹ However, Chief Justice McLachlin in *Sauvé* held that denying prisoners rights

*is bad pedagogy. It misrepresents the nature of our rights and obligations under the law, and it communicates a message more likely to harm than to help respect for the law. .. [It]is more likely to become a self-fulfilling prophecy than a spur to reintegration. Depriving at-risk individuals of their sense of collective identity and membership in the community is unlikely to instill a sense of responsibility and community identity.*¹¹⁰

Furthermore, the Chief Justice McLachlin goes on to hold that “more profoundly, it sends the unacceptable message that democratic values are less important than punitive measures ostensibly designed to promote order.”¹¹¹ Through these statements, we once again see the Chief Justice returning to the idea that prisoners, regardless of what crimes they have committed, retain their membership in the citizen-community. *Charter* rights are meant to embody democratic values and recognize the importance of the dignity of every human being.

It should be clear from this analysis that the Panel’s suggestion that prisoners, rights be seen as contingent on good behaviour and that diminution of rights be determined by corrections officials and used as a form of punishment, is out of step with common law traditions and conflicts with the

106 *Sauvé*, at para. 46.

107 *Sauvé*, at para. 35.

108 *Sauvé*, at para. 46.

109 *Roadmap*, p. 15.

110 *Roadmap*, p. 30 and p. 38.

111 *Roadmap*, p. 40.

spirit of the decision in *Sauvé*. Not only are prisoners rights-bearing individuals, the rights they hold are of great importance and cannot be cavalierly or lightly set aside. When the Panel starts from the assumption that the relationship between prisoners and their human rights may be broken upon incarceration, they are proposing an approach that is not supported by Canadian legal traditions. While this may be reason enough to reject the recommendations of the Panel, there is a more profound issue at stake. When human rights are seen as contingent, when the value of punishment is prioritized over our constitutional commitment to the principle of the inherent dignity of every individual, we risk undermining the very value of that foundational principle. Our commitment to human dignity, as it is expressed through *Charter* rights, is a commitment to the idea embodied in the Universal Declaration of Human Rights that every individual is worthy of respect simply because they are human. When we begin deeming people 'worthy' and 'not worthy' of such respect, the value of human dignity is diminished. As such, to act upon the Panel's recommendations would not only result in undermining the human rights of prisoners, it would result in the devaluation of foundational constitutional principles.

There is another important dimension to understanding the implications of a roadmap that would direct Canadian corrections on a journey featuring regimes that limit rights. A consistent theme in the history of corrections, not just in Canada but throughout the world, has been the struggle to achieve a balance between potentially competing goals, whether expressed as justice vs. security/public safety, punishment vs. rehabilitation, or restraint vs. reintegration. A prominent feature of this history has been that the invocation of imprisonment and the practices that accompany its execution have been punctuated over the course of two centuries by a succession of crises. These crises have led to commissions of inquiry and reports cataloguing both the abuses of power taking place within prison walls and the prison's pervasive tendency to make prisoners more dangerous and more anti-social. In the last part of the twentieth century and into this century it has been increasingly recognized that an indispensable component in reconciling the goals of public safety and justice has been promoting a culture of respect for the rule of law and human rights and holding correctional authorities accountable for abuses of power.

The most recent of these inquiries in Canada to address this component is that of Justice Louise Arbour in 1996 arising from the strip searching and segregation of a group of women at the Prison for Women. The Arbour report is a seminal document in the history of Canadian corrections yet the Panel's report gives no consideration to the recommendations of the Arbour report to entrench respect for the rule of law and human rights in Canada's penitentiaries. It has been left to CSC's former human rights director general, Shereen Benzvy Miller, after CSC's endorsement of the *Roadmap*, to remind the Service of the lessons of Arbour and their relationship to the Panel's recommendations for limiting prisoners' rights in the name of accountability and rehabilitation:

*So how can we meet the objective of ensuring offenders are held accountable for their reintegration (bearing in mind that their incarceration is society's way of holding them accountable for their offences). The CCRA and the Charter provide the context of the discussion, but we at CSC have history that sets the stage for our deliberations as well. It is not lost on me that I started writing this on April 22, 2008- exactly 14 years after the infamous 'Certain Events at the Prison for Women in Kingston' that led to the Arbour Report. **So let us review a few highlights as we ask ourselves, should we be***

amending law to solve the accountability dilemma? Would more legislation, Commissioner's Directives or Standing Orders improve the situation? Did limiting the rights of those offenders in that incident serve us well?

In her report, commissioned by Solicitor General Herb Gray, Arbour attacked prison officials' "ongoing infringement of prisoners' legal rights" and their "cruel, inhumane and degrading" treatment of the women. Nor did [Justice Arbour] limit her criticism to the Prison for Women: she said the shortcomings were "systemic" and "part of a prison culture" in Canada. Specifically, she says:

The breakdown of the Rule of Law in corrections has been denounced in the past, often in the most forceful terms. In 1977, the Report of the Subcommittee on the Penitentiary System in Canada, chaired by The Honourable Mark MacGuigan stated that: "There is a great deal of irony in the fact that imprisonment...the ultimate product of our system of criminal justice itself epitomizes injustice."...

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.

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 rules are everywhere....

The Service would be well advised to resist the impulse to further regulate itself by the issuance of even more administrative directions. Rather, the effort must be made to bring home to all the participants in the correctional enterprise the need to yield to the external power of Parliament and of the courts, and to join in the legal order that binds the other branches of the criminal justice system.¹¹²

In [another] section of the Report, she says:

The denial of rights and privileges in the Segregation Unit between April 22nd and April 26th was in contravention of the applicable law and policy. This was clearly based on a managerial strategy for handling the situation in the unit. It was an ill advised strategy which, in my opinion, contributed to an escalation of the situation. Rather than assisting the authorities in controlling the unit, it forced them to abandon any hope, at least in their own minds, of ever doing so. It was apparent early on that this was not effective. The fact that the policy of "they get nothing" was never changed, even after the intervention of the IERT, raises serious questions as to whether it was indeed merely a managerial strategy to control the unit, or whether it was, in part, the

112 Arbour, para. 3.1.2

*manifestation of a punitive attitude which would be a more serious contravention, not only of the policies, but of the law.*¹¹³

Ms. Benzvy Miller pointedly brings the Arbour perspective to bear on the Panel's recommendations:

*Arbour's plea that the rule of law ought to be better captured and the spirit of such legislation better understood at all levels of the organization could have been written about the suggestion that we abandon 'least restrictive measures consistent with the protection of the public, staff members and offenders' **The road down which one would travel with this amendment leads eventually to the 'they get nothing' approach to management because we, as managers and staff, might actually believe that we have the constitutional authority, legislative power and moral entitlement to decide such a thing. The notion of least restriction does not bind us, it guides us to do the right thing in remembering that we are responsible for the custody and control of human beings who have rights.***¹¹⁴

The Panel's recommendations reflect a profound lack of understanding of the constitutional and correctional basis for the recognition of and legitimate limitations on the human rights of offenders. Implementation of its recommendations, far from being "transformative", would be a deeply regressive development in Canada's human rights history.

113 Arbour Report, para 2.3.4.5

114 A discussion of Offender Accountability in the context of the work of the Transformation Team by Shereen Benzvy Miller, Director General, Rights, Redress and Resolution.

5 Conditions of Confinement

5.1 Context

The Panel's recommendations to CSC on how the Service should restructure the conditions of confinement in Canadian penitentiaries reveal the same fundamental flaws as its recommendations regarding amendments to the *CCRA*. Like those recommendations the Panel's approach would be a step backwards in the history of Canadian corrections and compromise Canada's commitment nationally and internationally to a human rights framework for the treatment of prisoners.

The distance and dissonance between the Panel's framework and a principled human rights' framework is easily demonstrated. A human rights framework starts with the clear understanding that;

*Men, women and children who are in prison are still human beings. Their humanity extends far beyond the fact that they are prisoners. Equally, prison staff are human beings. The extent to which these two groups recognize and observe their common humanity is the most important measurement of a decent and humane prison. Where such recognition is lacking there will be a real danger that human rights will be abused.*¹¹⁵

The Panel's principal recommendations and their rationale on this subject are these:

The Panel believes that living conditions in penitentiaries should serve two purposes:

a) to provide a safe, secure environment, and

*b) promote positive, pro-social behaviour, and an active interest in participating in the offender's correctional plan.*¹¹⁶

*.. life inside a penitentiary should promote a positive work ethic. Today, an offender who is actively engaged in his/her correctional plan is often treated no differently than an offender who is still engaged in criminal behaviour. The Panel feels that this is detrimental to promoting offender accountability. In this context, the Panel supports an approach that links conditions of confinement to an offender's responsibilities and accountabilities. These conditions must be identified and managed under the rights and privileges stated in the Act. The following areas could be targeted: degree of association with other offenders; movement (escorted, unescorted, and supervised); private family visits (access to and degree of frequency); leisure activity; personal clothing and property; searching; pay levels and access to money; access to penitentiary and CORCAN employment; access to programs (school or cell-based).*¹¹⁷

Recommendations

115 Andrew Coyle, *A Human Rights Approach for Prison Management: Handbook for Prison Staff* (London: King's College, International Center for Prison Studies, 2002), p. 31

116 *Roadmap*, p. 24

117 *Roadmap*, p. 59

3. The Panel recommends that, at each security level (minimum, medium and maximum), a basic level of rights should be defined.

4. The Panel recommends that differing conditions of confinement should be dependent on an offender's engagement in his or her correctional plan and the offender's security level.¹¹⁸

5.2 The Correctional Plan

The Panel clearly places great weight on and indeed unquestioning belief in the prescriptive excellence of the correctional plan and regard an offender's willingness to engage with it as the prerequisite to certain rights and privileges and conditions of confinement and propose that it be entrenched as an "accountability contract" on which parole release would be contingent. But is the correctional plan such a silver bullet that justifies this linkage with rights, privileges, conditions of confinement and release to the community?¹¹⁹

We must first demystify exactly what a correctional plan is and its role in a prisoner's life. As described by the Panel:

Upon admission to the federal correctional system, all offenders undergo intake assessment which is designed to assess each offender's risks and needs. ...To thoroughly evaluate the offender, the intake assessment process includes a review of information on the impact of the offender's crime(s) on the victim(s), as well as information gathered from police reports, court transcripts, judges' comments on sentencing and other information. The assessment also establishes a multidisciplinary correctional plan for treatment and intervention to be carried out during the offender's sentence. Once this assessment process is complete, the offender is transferred to the appropriate penitentiary and the rehabilitative process begins.¹²⁰

From the perspective of case management the most important document prepared as a result of the intake assessment process is the Correctional Plan. Commissioner's Directives define the objectives and components of the Plan:

24. The Correctional Plan is the principal document that provides a comprehensive initial assessment of the offender and an identification of proposed interventions. It is the base document against which all progress is measured. The Correctional Plan provides a succinct description of the critical information that is required to understand how the offender's sentence is to be managed from beginning to end.¹²¹

29. Based on the results of the Intake Assessment, interviews with the offender, a review of all file information, including files from previous sentences, and consultations with institutional and community staff, the Parole Officer/Primary Worker will define the goals for change, determine the key interventions (programs and activities) required, and indicate the location (the institution or the community), depending on the critical dates during the sentence (transfers, eligibility dates for various types of release, etc.).

30. The Correctional Plan is comprised of the following elements:

118 Roadmap, p. 60

119 Roadmap, p. 107

120 Roadmap, p. 33, 36

121 CD 705 Intake Assessment Process 2007-09-18

- a. static factor assessment;
- b. dynamic factor identification and analysis;
- c. level of motivation;
- d. reintegration potential;
- e. Aboriginal Healing Plan (as applicable)
- f. sentence planning; and,
- g. determination of contributing factors and the interventions required to address them.

31. Input from institutional and community staff, Elders and Aboriginal Liaison Officers will be obtained in applicable cases.

32. For offenders serving sentences of 10 years or more, the focus of the initial activities or programs should be related to assisting the offender in adjusting to the institution and to the sentence.

33. Correctional Plans are not changed unless there is a significant change in the factors contributing to the offender's criminal behaviour. In these cases, a change in the Correctional Plan is addressed by completing a Correctional Plan Progress Report.¹²²

There is more than a little correctional hubris in the assumption that CSC assessors can, in the first few months of a long sentence, definitively diagnose and prescribe the exact programs that will address the prisoner's problems, now and in the future. Here as with so much of corrections the distance between the rhetoric and the reality is vast.

The correctional plan typically will identify which of the CSC "menu" of cognitive-based programs are necessary to address the prisoner's criminogenic needs, risk factors, and reintegration potential, and any educational upgrading or job training that may be appropriate and available. According to policy the development of an offender's correctional plan is handmade and carefully tailored to the offender's needs, risks and motivation. In practice it more resembles an assembly line mass produced product made from standardised parts. A review of any fifty correctional plans will reveal that they broadly fit into a quite limited number of distinct models and that the same sets of programs are identified for many prisoners. For prisoners who are serving long sentences the policy acknowledges that the "focus of the initial activities or programs should be related to assisting the offender in adjusting to the institution and to the sentence." In other words the correctional plan is initially to help the prisoner do time. For other prisoners, particularly those who have chosen a criminal career path, no programs may be available. Consider for example this assessment of a prisoner believed to be a high-ranking gang member sentenced to nine years for offenses involving drug trafficking:

Mr. A's contributing factors have been identified as Personal/Emotional Orientation, Attitude and Associates/Social Interactions. Marital /Family and Community Functioning have been assessed as an asset. Mr. A. does not have any identifiable issues in the area of Employment. Mr. A's initial correctional plan did not recommend any programs for Mr. A as it was deemed that he did not require

122 CD 705-6 Correctional Planning and Criminal Profile 2007-09-18

*program involvement to address his contributing factors because his criminal behavior was due to personal choice.*¹²³

While we do not dispute the necessity for a correctional plan, we also reject the notion that as presently structured it is all that is required to manage future risk and prepare the person for successful release. It is not, as the Panel mistakenly thinks, the be-all and end-all of a prisoner's pathway to rehabilitation. The compilation of program credits: grade 10 English, anger management, CORCAN employment for 6 months, and so on – spread sometimes over years of a sentence, while helpful, are not sufficient to create a predictably rehabilitative environment.

Effective corrections cannot consist of simply participating in a pre-ordered set of programs taken from a very limited menu. It is difficult to imagine how a person could feel motivated under such circumstances. As we describe in more detail in the section on education, personal development must include choice as it is through making choices that the person matures and come to the point where they can understand their needs and problems and thereby commit to a different life. In that sense, development of the person in prison is the same as the development of all people. Few of us during the important years of our development had a clear goal in life and an understanding of what we needed to learn and do to get there. The road of personal development is rarely a straight one. The route and goals change as we discover new options or barriers. So long as choice is involved, the correctional plan must be flexible – to reflect changes in the person and his or her goals. Similarly, all the elements must tie together to make sense and build towards a process of change. The *Roadmap* recognizes the need for continuity but seems to be overly and unrealistically confident that this can be accomplished by the professional staff under the current framework of the correctional plan.

The Panel's recommendations not only suffer from the lack of appreciation of the limitations of the correctional plan in the rehabilitative/reintegration process but also a misunderstanding of actual practice under the current regime. The Panel asserts "Today, an offender who is actively engaged in his/her correctional plan is often treated no differently than an offender who is still engaged in criminal behaviour. The Panel feels that this is detrimental to promoting offender accountability."¹²⁴ It is unclear from where this misconception came but the reality is that it is not the way in which case management of offenders works. Even the most cursory review of case management policy and practice reveals how important participation in a correctional plan is to an offender's security rating and his or her progress through the correctional system. Two of the factors used in the security rating scale are the degree to which the offender has completed the programs on their correctional plan and an assessment of the offender's motivation towards such completion. An offender who has low motivation or who fails to participate in their plan is deemed to be a higher risk and this will be reflected in determining not just that offender's security rating but also any decisions regarding access to the community through passes or conditional release. An offender who thumbs his nose at the correctional authorities and does nothing to better his or her situation does so at their peril.

123 Document on file with Professor Jackson

124 *Roadmap*, p. 59

It is this offender who presumably the Panel wishes to motivate to better cooperate with the correctional authorities by encouraging CSC to identify and prescribe conditions of confinement that are tougher for such offenders than those available to their more compliant peers.¹²⁵ Shereen Benzvy Miller, CSC's former Director General of Human Rights has correctly identified the dangerous implications of this deprivation - "they get less" - model of motivation:

If the consequence of something is an improved feeling of self-worth or even hope for a better future then I agree that we ought to ensure consequences of participation in the Correctional plan. But if they involve deprivation then we are sliding down a slippery slope that does not lead to reintegration of offenders, but rather to a harder, tougher cohort of individuals who, in large measure are already quite used to privation. It is also clear from our years of experience that if offenders 'participate' or attend programs for the sole purpose of avoiding a negative consequence, or to meet expectations of a decision-making authority, they are less likely to internalize the benefits and therefore, ultimately, defeats the purpose of the correctional plan in the end.¹²⁶

The Panel would have CSC undergo a re-examination of rights and privileges and develop regimes based on an offender's performance under his or her correctional plan and differentiating access to 'rights and privileges' both by security level and such performance. Less than a decade ago when this "regimes" concept was first advanced, CSC, after consultation with the National Associations Active in Criminal Justice (NAACJ) and the Canadian Bar Association, correctly stepped back from this approach. Yet it is now proposed by the Panel as a new idea with no appreciation of its implications or of the road previously travelled by CSC.

In her memo to senior management CSC's former Director General of Human Rights reviewed some of these implications:

If we were to allow greater access to privileges when an offender is participating in his/her correctional plan, what would we do for lifers whose programs and correctional plan usually don't kick in for many years into sentence?

Can rights be limited based on security level (maximum) due to the risk engaging in it presents at different levels of security, for instance providing access to different levels of freedom of association and visiting at different levels or security?

Visits are also, to a certain extent, already different at different levels of security. Look at the SHU -- as an example of the way we have 'justified' limiting this entitlement. I would also draw your attention to the fact that in my 6 years as DGRRR I never once had a SHU inmate tell me that not being allowed visits was motivating him to work hard to cascade to a less secure facility! I would recommend strongly against using visits as any kind of reward or carrot to motivate participation in other programs for several reasons:

1. on the face of it is like using children as hostages- 'engage in your correctional plan or you may never see your child again';

125 The Panel's emphasis on encouraging compliance has its source in UCCO's enthusiastic support for operational regimes where prisoners would be classified "as non-compliant, semi compliant and compliant" and that "each of these classifications will enjoy escalating levels of freedom, comfort and privileges." See UCCO's written submission to the Panel, p. 11 at http://www.ucco-sacc.csn.gc.ca/pregenerate/cmsFrameMain_EN_National.html?ParentID=National&Lang=EN

126 Memo from Shereen Benzvy Miller

2. *maintaining family contacts is by far the most important key to successful reintegration, so CSC ought to encourage, facilitate and respect this right making every effort never to limit unnecessarily—even in the name of an anti-drug strategy;*

3. *if our most difficult offenders (presumably those whose rights you would want to limit because they are likely the ones at higher levels of security) are those that have the most anti-social tendencies, then we are really playing with fire to break the ties they have with their community support if we limit their access because they will be the least likely to be able to build these networks back up later since they are the least skilled anyway.*

You could perhaps put in place a system whereby, if you were deemed to be ‘participating’ you could order more canteen, for example, but experience has taught us through the inmate pay system that determining levels of participation and then downgrading levels is a bureaucratic nightmare and one that leads often to expensive, cumbersome, not always fair decisions.

One might be able to devise a system that provided access to greater ‘privileges’ in less secure environments but I cannot help to define what those privileges would be. I could suggest that one might need to be very careful that (1) those chosen do not actually constitute entitlements like visits, association, access to religious practice, free speech, access to information, or anything the touches upon life, liberty or security of the person; (2) the way the system is administered serves your overall reintegration purpose (based preferably on solid research) so that it can be demonstrated that it supports effective corrections; and (3) that it is administered in such a way as to respect the principles of the duty to act fairly and the rule of law.

Ms Benzvy Miller’s cautionary observations are insightful. Consider her caveat that any strategy must serve “overall reintegration purpose (based preferably on solid research)”. In an editorial article in the British Journal of Psychiatry Sheleigh Hodgins, in reviewing the problem of persistent violent offending, writes:

*[O]ne of the characteristics of boys with conduct disorder and callous– unemotional traits and offenders with psychopathy is their altered perception of reward and punishment. Both in neuropsychological tests and in real-life situations, **they focus on rewards and ignore punishments. Consequently, they persistently miss the signal – the punishment – that a behaviour is inappropriate.** As children, this may be one of the key mechanisms that promotes their antisocial behaviour and that limits their access to the usual socialising experiences such as sports and other community activities, and eventually even to school. The problem persists into adulthood and is present, for example, later in life when they are incarcerated and enrolled in an offender rehabilitation programme.¹²⁷*

Offenders with this history and diagnosis often find themselves labelled uncooperative and unmotivated and hence would be a prime target of the negative reinforcement regime being prescribed by the Panel: yet according to this research, such an offender is the least likely to get the message.

Nor would such offenders be the only ones who would not get the message. One of the prisoners who participated in our community hearing at Matsqui Institution had this to say regarding the Panel’s suggested approach of linking “meaningful incentives and consequences” to encourage offenders to participate in their correctional plans:

127 Sheleigh Hodgins, Persistent violent offending: what do we know? British Journal of Psychiatry 2007 190 (suppl. 49)

Years ago I went to boot camp and everything was structured. I spent a lot of time being punished by being sent to the woodpile seven days a week all day until 6 p.m. and I wasn't allowed time out or many visits or even to use weights in the gym. Guess what happened? I turned into a bigger ass, I cared less, I worried about nothing. They "consequenced" so much that I thought it was my free time. I could think on my own at those times and most importantly I grew so negatively towards coppers and screws and judges and law that when I walked out, I came out... evil. That is the reality of a structured environment. Rebellion is a major side effect and a dangerous one. When a person is forced into a corner for so long, as history has proven, the oppressed fight and die for their cause to get out of the corner.¹²⁸

Some years ago another prisoner, in an interview with Michael Jackson, eloquently described the inherent limitations of a correctional strategy based on restricting rights:

If you want to change a man, you must change his thoughts. And you don't change thoughts by appealing to a man's fear of reprisal. You have to appeal to his humanity no matter how far we fall. In order to appeal to a prisoner's humanity, you must first believe and accept that he has some. If you have an attitude, a perspective and a perception of prisoners as having humanity -- not necessarily being humane because by and large most of us aren't -- I believe there's very few of us that will not respond in time to humane, fair, and kind approaches. If you're going to have any chance at all of turning men like me around, you must treat us fairly, you must treat us kindly. And yes, you must treat us with discipline and continuity in all that you do, and all but those who suffer from dementia cannot help but respond to kindness and fairness. That is the most dangerous weapon you have against the criminal element. But you can't get me to buy into a system where you tell me no violence should ever be used when the first time I do not do what you say, you come down with gas masks and clubs and beat the living shit out of me.

To survive in prison the prisoner must come up with his own values that give him self-esteem, a sense of purpose, a sense of direction. You don't dole these out like they're privileges. The need to love and the need to be loved, a sense of direction, of self-worth, of purpose, those are indigenous to the human being. This is what raises us above the beasts. You don't tell us to act human and then you will give us back those things as privileges. Those things that you are willingly prepared to give us if we act human are the things we need to be human, free of the fear of reprisal.¹²⁹

Organising a prison/prisoner management system around principles of human dignity and fair and just decision-making rather than an appeal to prisoners' fear of reprisal and deprivation of rights and privileges is not only more consistent with human rights law but with the empirical evidence. A recent 2009 study conducted in a prison in Slovakia confirmed other research findings in North America that show that fair and just procedures are associated with compliance with rules and regulations. The authors conclude:

*the strong and consistent relationship between procedural justice judgements and inmate misconduct is evidence that the ways in which prison officers deal with inmates on a daily basis contribute to the maintenance of order. **Correctional policymakers who assume inmates solely pursue self-interests and can only be effectively managed by manipulating rewards and sanctions should take***

128 Submission of Nathan Myles, November 29, 2008 Matsqui Institution

129 *Justice Behind the Walls*, p. 504 online at <http://justicebehindthewalls.net/book.asp?cid=221&pid=667>

*notice and avoid casually dismissing the empirical evidence simply because they find deterrence-based offender management strategies intuitively appealing and politically acceptable”.*¹³⁰

5.3 Segregation: The Litmus Test of Legitimacy

That the Panel’s recommendations would both compromise principles of human dignity and fair and just decision-making and undermine the already difficult task of developing within the federal correctional system a culture of respect for rights is manifested in the Panel’s observations and recommendations regarding administrative segregation. Segregation is perhaps the best documented example in Canada of the abuse of correctional power yet the Panel devoted little space to this issue. It did however make recommendations to tighten the conditions in voluntary segregation. To understand the correctional poverty of the Panel’s recommendations it is necessary first to understand the legislative framework for segregation.

The *CCRA* provides for two forms of segregation.¹³¹ The first is entitled disciplinary segregation. This can be imposed as a sanction after a prisoner has been found guilty of a serious disciplinary offence in a hearing before an independent chairperson. Segregation is the most severe form of punishment that can be administered as a disciplinary sanction. However it is limited to a maximum of 30 days, which can be increased to a maximum of 45 days for multiple convictions.¹³²

The second form of segregation is administrative segregation. Its purpose is to keep a prisoner from associating with the general population. It can be used whenever the institutional head has reasonable grounds to believe that the continued presence of the prisoner in the general population jeopardizes the security of the penitentiary or the safety of any person, including the prisoner’s own safety or would interfere with a serious investigation. In all cases, the institutional head must be satisfied that there is no alternative but to segregate the prisoner, and must ensure that the prisoner is returned to the general population as soon as possible.¹³³ Unlike disciplinary segregation there are no legislative limits to the duration of administrative segregation although it is subject to periodic review. In practice the time in administrative segregation can extend to months, even years.¹³⁴

Although there are cases in which prisoners placed in segregation for their own protection argue there is no basis for this fear, most prisoners segregated on this ground acknowledge that the fear is well-founded, and in many cases the prisoners themselves have requested protection. Thus, within the population of administratively segregated prisoners, there has arisen a distinction between "involuntary" and "voluntary" cases.

130 Reisig, Michael D. and Mesko, Gorazd(2009)'Procedural Justice, Legitimacy, and Prisoner Misconduct', *Psychology, Crime & Law*,15:1,41-599 (emphasis added)

131 The pre-1992 legislation used the term “dissociation”; post-1992 the term used is “segregation”. Both before and after 1992 prisoners refer to segregation as “the hole”.

132 *CCRA* s.44

133 *CCRA* s.31

134 A detailed examination of the law and practice of administrative segregation can be found in Michael Jackson, *Justice behind the Walls: Human Rights in Canadian Prisons*, Sector 4 online at <http://justicebehindthewalls.net/book.asp?cid=112>

The Panel limited its comments to prisoners in voluntary segregation. It has this to say:

The composition of the voluntarily segregated population can generally be described as offenders who:

- *have significant ‘debts’ and seek voluntary segregation as a temporary way to escape their creditors;*
- *are at risk in any of the subpopulations (multiple number of incompatibles) and seek the protection of segregation;*
- *generally fear for their safety and seek the protection of segregation;*
- *threaten violence if released from segregation and refuse to accept any proposed alternative;*
- *are not disruptive but are not following their correctional plans; and*
- *want to be or should be fully engaged in their correctional plans but cannot be integrated into a population that will provide that opportunity.¹³⁵*

The panel has heard that another factor contributing to this rise has been the fact that, while in segregation, offenders maintain living conditions that are almost identical to those elsewhere in the penitentiary, without having to resolve the issues that brought them to segregation... Furthermore, CSC policy prohibits double-bunking in segregation. A single cell can be considered to be another advantage over the offender’s circumstances in the general population.

The Panel is concerned that if the living conditions in segregation continue to equal or exceed those found in other parts of the penitentiary and there are no viable alternatives to placement in the penitentiary, more offenders will seek voluntary segregation. The Panel believes that offenders may not see any benefit to engaging in their correctional plan, thereby allowing them to be isolated from the level of intervention necessary for their rehabilitation.

Without having any incentives to provide to offenders who are working to rehabilitate, the Panel believes that the current environment of voluntary segregation diminishes offender responsibility and accountability.¹³⁶

The use by CSC and the Panel of “voluntary” to describe this population is a cruel euphemism. These offenders are seeking protection from other offenders, a protectorate that is part of CSC’s statutory mandate. Their placement in segregation is not the offenders’ choice but CSC’s failure to provide adequate alternatives.

The clear implication of the Panel’s analysis is that the conditions of confinement for those prisoners in “voluntary” segregation are too soft and need to be toughened up to discourage prisoners from checking into or remaining in voluntary segregation. What is remarkable about this very limited focus is that the issue of the use of segregation is one of the most well documented and studied area of corrections. Because the time in administrative segregation can extend to months, even years, it represents the most powerful form of carceral authority. Further, because the conditions

135 *Roadmap*, p. 23

136 *Roadmap*, p. 21-2

of confinement are the closest thing to solitary confinement, it is also the most intensive form of imprisonment. Historically it has also been the most abused.

In 1977 the Supreme Court rightly characterized segregation as “a prison within a prison”.¹³⁷ Administrative segregation was the subject of CSC’s 1975 Vantour report, the 1996 Arbour Commission of Inquiry and CSC’s 1997 Report of the Task Force on Segregation, a task force convened specifically in response to the damning criticism of Justice Arbour.¹³⁸ It is also the subject of a large body of scholarly work.¹³⁹ Yet the Panel makes no mention of any of this, even though the Task Force devoted considerable attention to the issue of voluntary segregation and the challenges it presented for CSC. Every other report that has looked at segregation has addressed the human rights implications of the conditions of confinement as central to its deliberations as well as addressing the importance of due process in making decisions about placing prisoners in segregation and reviewing these cases to minimize the duration of segregation. Yet the *Roadmap* has nothing more to contribute to the continuing debate than the need to increase the rigour of conditions in voluntary segregation. Inexplicably, in the light of the analysis of every other report, particularly Arbour, regarding the existing rigours of segregation and the undermining of respect for human dignity, we are told, in the complete absence of any supporting research, that “the Panel believes that the current environment of voluntary segregation diminishes offender responsibility and accountability.”¹⁴⁰

According to the Panel, the only pressing agenda facing CSC regarding administrative segregation worthy of inclusion in the transformation agenda is to make the conditions of such segregation less comfortable- presumably by taking away any aspect of confinement - such as a single cell - that seems to confer an advantage over those existing in general population. The Panel virtually invites CSC to reverse its policy, adopted in response to the recommendations of the Task Force on Segregation and after repeated criticism from the Correctional Investigator, that prisoners in segregation shall not be double bunked. The Panel’s thinking seems to be that a return to double bunking would be an appropriate way to remove the supposed advantage that checking in to segregation now confers in institutions where those in general population are double-bunked. Consider carefully that thinking in light of this description by Michael Jackson of the nature of double bunking in segregation at Kent Maximum Security and the effects it has on the human spirit and human dignity of one man subjected to its rigours:

There were months in which segregated prisoners represented almost 30 per cent of the total population, the highest percentage in the country. Segregation therefore came close to being the normal condition of imprisonment for a significant part of the population. Normalcy in this context involved confinement in an often double-bunked cell for twenty-three hours a day, with an hour out for exercise and a few more minutes for a shower, where life was shared in all its intimacies with another person and privacy reduced to the thickness of a curtain around a toilet standing only a few feet from your bed. Although the presence of televisions and Walkman radios suggested a degree of pro-

137 *Martineau v. Matsqui Institution Inmate Disciplinary Board*, [1980] 1 S.C.R. 602

138 Task Force on Administrative Segregation: Commitment to Legal Compliance, Fair Decisions and Effective Results, Correctional Service of Canada, March 1997. Both of the authors were members of the Task Force.

139 see *Prisoners of Isolation; Justice behind the Walls: Human Rights in Canadian Prisons*, Sector 4

140 *Roadmap*, p. 21-2

gress from the sterility of the Penthouse in the B.C. Penitentiary, for many prisoners long-term segregation under double-bunked conditions was seen as a regression...

On May 25, 1994, I spent a deeply disturbing shift in the segregation unit at Kent interviewing prisoners, listening to their stories and to their screams, some issued aloud, others confined to prisoners' minds. These interviews bear testament to the ways in which long-term segregation undermines a person's psychological hold on reality and intensifies a sense of injustice and paranoia.

John Edwards set out his recent institutional history, which he claimed was filled with unfair treatment. This had generated within him a rage which, given that he was just three months away from statutory release, should have been -- but did not seem to be -- of great concern to the Segregation Review Board. Mr. Edwards was serving a 4-year sentence for robbery. He had been transferred from Alberta's Bowden Institution to Matsqui in November 1992, although he had requested Mission Institution as he had an incompatible at Matsqui. Within days of arriving at Matsqui, his incompatible left a note in his jacket to the effect, "Check in, goof, or you die." He passed this note on to staff, who told him to try to settle the issue on his own. The next day a prisoner wearing a hood came into the cell where Mr. Edwards was watching television and struck him on the head with a chair leg, opening a gash that required twenty-three stitches to close. After leaving hospital, Mr. Edwards was placed in segregation at Matsqui for his own protection. He was there for forty-seven days, until his transfer to Mission early in January 1993. He spent Christmas and New Year's Day in segregation.

In June of 1993, Mr. Edwards was transferred to Kent because of alleged negative and deteriorating behaviour, including a threat to set a fire by piling up a bunch of grievance papers and igniting them. He told me this was a protest against the inadequate responses he had received to the grievances and was not meant as a serious threat. He was in segregation at Kent for some two months before being transferred to the PC population. He remained there until April of 1994, when he was placed in segregation following being punched by another prisoner. The last several weeks had been particularly difficult for Mr. Edwards. He was double-bunked with Mr. Pope, who had slashed himself in frustration at his own situation. He was placed in the observation cell for a day and then brought back into Mr. Edwards' cell. Mr. Edwards was extremely frightened by the situation, because he did not know whether Mr. Pope would try to slash again or might attack him. In fact, Mr. Pope did slash himself again, and this time he was taken to the Regional Psychiatric Centre. Mr. Edwards was left to clean up the blood himself. He had not spoken to anyone about the incident, although he admitted it had had a traumatic impact on him.

As I have explained ... there are procedures in place for dealing with possible post-traumatic stress among staff who experience incidents involving threats or violence to themselves or their colleagues. Had a staff member witnessed a slashing, it would have been the subject of a debriefing with the institutional psychologist. Yet Mr. Edwards had experienced, close up, two slashings by his cellmate and had received no counselling.¹⁴¹

The perversity of the Panel's suggestion that segregation conditions need to be toughened up and that there be more restriction on the rights and privileges of those voluntarily segregated prisoners to encourage them to take "an active interest in participating in their correctional plan" can be best judged by contrasting it with the analysis of the CSC Task Force on Segregation. As the Panel notes, the CCRA provides that prisoners in administrative segregation shall be given the same rights, privileges and conditions of confinement as the general population, except for those rights, privileges

141 *Justice behind the Walls* p. 322, 328-9

and conditions that can only be enjoined in association with other prisoners or cannot reasonably be given owing to limitations specific to the administrative segregation area or security requirements. The Task Force found that "the operational reality has been that inmates, their advocates or program staff have had to demonstrate why they should be provided the same rights, privileges and programs. The legal reality is that the CSC has to demonstrate why they should not be provided".¹⁴² To get a more informed picture of the national situation, the Task Force distributed a questionnaire to all segregated prisoners in late 1996 and received responses from almost four hundred. The purpose of the questionnaire was to determine whether prisoners had the same, less, or more access to rights, privileges, and services while in segregation. The responses confirmed that, under current practice, administrative convenience and security considerations had all but eclipsed legal programming requirements.

At the time prisoner Glen Rosenthal responded to the questionnaire, he had served a year in segregation at Edmonton Max after being attacked by another prisoner. In addition to checking off the list of questions, he offered these reflections:

In the course of completing this survey I have found it extremely difficult to convey the reality of living in this segregation unit for nearly a year. I have spent fifteen years in many different prisons and have found myself in the segregation units of most of them at one time or another. Never have I experienced anything remotely comparable to what I am experiencing now. It is one thing to be locked in a cell for a year, and that of itself is bad enough. Add to that the fact that you have no idea how long it will continue . . . And add to that the fact that your health has deteriorated to the point where you doubt you will ever be healthy again . . . You can't sleep more than three or at best four hours at a time. You are constantly getting awoken by music blasting, barriers clanging open and shut. You are always tired. You have gone from a hundred and fifty pounds to a hundred and ninety pounds and every muscle in your body is either knotted or atrophied. The warden told you he would transfer you to B.C., so your wife moved there six months ago and you have watched your marriage fall apart one piece at a time since then. You have been wearing stinking rags for so long you don't notice it anymore. You look older, fatter, disgusting to yourself when you look in the mirror. Your self-esteem is sub-zero . . .

You want to complain about the rags you get for clothes but you know the cleaners will spit in your food or urinate in your coffee if you do. You want to complain about the guard who miscounted your phone calls for the month, only giving you one or two, but you know next month you won't get any if you do. You want to complain about not being transferred but you know that this will piss somebody off and you will never get out. You can't bear the thought of people you love seeing you in this condition so you don't take any visits. Your life is so static there is nothing, absolutely nothing left to write to anyone about. Your once passionate and hopeful phone conversations with your wife turn into a string of uncomfortable silences and misdirected frustrations. But she is the only one who will listen, and then one day there is no one. You spend twenty hours a day on your back, somewhere between waking and sleeping, trying to keep your mind out of the dark places but you can't. Your mind seems full of thoughts that don't belong there. You can't carry a conversation anymore because you are afraid one of them will slip out. You don't tell anyone because you are even more afraid of the medication they might think you need.

142 Task Force on Administrative Segregation p. 50

*I don't use words like "afraid" easily. I have always identified myself with being up to whatever challenge came my way, and so far I have. I have never faced a challenge that threatens who and what I am more than this last year in this segregation unit. It is no exaggeration to call this cruel and unusual punishment. Though the circumstances here are likely more the product of indifference than malice, it is no less insidious and destructive. My health is gone, my life has fallen apart, parts of me that words can't describe will not recover from this. And I did nothing wrong. All this is happening to me because the machine isn't working and no one seems obliged to fix it.*¹⁴³

The Panel's "fix" - limiting the rights of those prisoners in voluntary segregation - can only aggravate the already debilitating and destructive effects of segregation described by Mr. Rosenthal, and in the process undermine prisoners' potential for reintegration and ultimately weaken, not strengthen, public safety.

Elsewhere in the Panel's report there is reference to the Parliamentary Committee's report on the five-year review of the CCRA, "A Work in Progress". That Committee specifically addressed the issue of administrative segregation and one of its recommendations was that CSC should appoint independent chairpersons for administrative segregation similar to the regime for the disciplinary process. The system of independent adjudication of disciplinary cases in which a prisoner can be sentenced to a maximum of 30 days in segregation (which can be increased to 45 days for multiple convictions) was introduced in 1980 following the recommendations of the 1977 report of the Parliamentary Subcommittee on the Penitentiary System in Canada. Since then there have been a succession of recommendations from other inquiries, committees and experts for the introduction of independent adjudication into the process of placement of prisoners in indefinite administrative segregation. It has been argued that independent adjudication of segregation decisions is necessary to ensure a fair and unbiased hearing, compliance with the statutory framework, protection of prisoners' rights and privileges while segregated, and the implementation of re-integration plans to ensure that the correctional authorities, in administering the sentence, use the least restrictive measures. The recommendation for independent adjudication has been advanced by Justice Arbour, CSC's Task Force on Segregation, the Yalden Working Group on Human Rights, the Parliamentary Sub-Committee on the CCRA, the Canadian Human Rights Commission and the Correctional Investigator, and this consensus would seem to all but guarantee that CSC would recognize that it merited space in the correctional legal landscape. CSC has steadfastly resisted implementation of these recommendations.¹⁴⁴ Yet the Panel makes no mention of this outstanding issue of independent adjudication despite its identification by an increasing chorus of commentators, academic, judicial and parliamentary, as an essential part of the roadmap for a fair and effective correctional regime.

As a final note, neither author can drive from their minds the disturbing image that at the very same time the Panel was minimising the conditions within segregation, Ashley Smith, a nineteen year of girl, strangled herself to death after more than a year of continuous segregation in our federal prisons.¹⁴⁵ The omission of any discussion in the Panel report of the important issues associ-

143 *Justice behind the Walls*, pp.383-4 online at <http://justicebehindthewalls.net/book.asp?cid=160>

144 For a detailed history of the issue see Michael Jackson, *The Litmus Test of Legitimacy: Independent Adjudication and Administrative Segregation*, 48 *Canadian Journal of Criminology and Criminal Justice*, 157 (2006)

145 We address this particular case of correctional breakdown in detail later in Chapter12.

ated with segregation reveals the one-dimensional view the Panel has of their roadmap to public safety; a roadmap in which principles of fundamental justice, fairness and human rights are left by the wayside.

5.4 Gangs

The Panel seems to be particularly concerned with those offenders who are doing relatively short sentences, who have gang affiliations and who continue to maintain criminal values. Yet here again, the research literature that the Panel seems not to have read strongly suggests that a strategy based on greater privation by toughening of the conditions of confinement is unlikely to make a positive impression on those who have already experienced a life of alienation and privation that led to their gang involvement. Ironically, as the Panel deliberated CSC received a report that provided a comprehensive analysis of the origins of Aboriginal gangs and the social and economic conditions that lead to the formation and recruitment of members. The study provides insight into the underlying and systemic forces that produce and sustain gangs in the community and in prison and its major findings provide powerful evidence for rejecting the Panel's "they get less" strategy to motivate the non-compliant gang member:

Gangs serve a function both inside and outside institutional walls. Why individuals join gangs is a complex issue and it is one that has been the focus of research efforts since the early 1900s. The gang can be a source of both self-esteem and identity for "lost" youth. For these reasons, it is likely that the gang has an appeal to youth coming from broken homes, single parent families, and abusive situations. The gang becomes a surrogate family for these disenfranchised young people. In addition to this, the gang can also serve as an economic organization, providing money to its members. As a social organization, the gang unit is a source of pro-criminal entertainment, status, excitement, camaraderie, prestige, and protection. However, the gang can also be a source of punishment, pain, assignment of criminal tasks, and can plague individuals with the constant threat of lost membership.

Within prison, a gang can offer new inmates exactly what they require in their new, hostile environment: support and protection. From this perspective, joining a gang, or making the move to become a recruit, seems to make sense. Gangs are functional for individuals in this situation. If individuals are at risk for assault and victimization because they are members of a visible minority group, joining an ethnic or culturally-based gang may protect them from such assault. Predatory inmates exist and vulnerable inmates do what it takes to avoid and prevent becoming victims. However, we also know that membership in gangs open individuals up to increased assault rates through predation from rival gangs and from disciplinary tactics within one's own gang.

Gang membership is a double-edged sword and individuals join for a variety of reasons. Survival and protection in prison may be one reason. Joining may be a band-aid solution to a variety of deeper,

core issues and internal conflicts. Yet, despite the drawbacks, the risk of injury, criminal record, and death, youth and adults continue to turn to this alternative, criminal lifestyle.¹⁴⁶

Our respondents indicate that gang members are people who had "nothing going" for them and joined as a means of finding recognition and respect. Membership in a gang may be a means for increasing one's status in a particular community. Gangs offer members the opportunity to feel a sense of self-worth and a sense of identity. Belonging to something "bigger than themselves" can make people feel important. Group membership is a significant component to human interaction and feelings of self-worth. No one wants to feel like or be treated as an outsider. Being part of a "gang" fulfills a need for social interaction and a feeling of importance on the part of individuals who may lack such a response from conventional, law-abiding society. It provides a positive label, at least within the group itself, for individuals who may never have experienced the respect and feelings of self-worth that accompany that kind of identification. The lack of such feelings of self-worth is exacerbated by the prison experience. It is here where we see a good deal of recruitment into gangs, and into Aboriginal gangs in particular.¹⁴⁷

Based on their comprehensive research the authors offer pathways to addressing the multi faceted issues arising from their analysis:

One of the themes that emerged from the interviews with correctional personnel is the need to attack the core issues which have contributed to gang involvement among Aboriginal and other offenders. Addressing the vast array of suspected causes, many of which are rooted in childhood experiences, and others which are grounded in the nature of the prison structure itself, is a daunting task, one that requires addressing many aspects in an individual's personality, coping skills, childhood, and belief system.

Many respondents, officers and ex-gang members alike, point to spirituality and culture as possibly one of the most effective means of reaching Aboriginal gang members. Citing cases where culture has facilitated gang exit for former members, these individuals place much faith in reconnecting or, in many cases, connecting with cultural heritage. For many (but not all) Aboriginal inmates, getting in touch with Aboriginal culture and spirituality can be an integral part of the healing process. The traditional cultural theme is a recurring one in the answers of many respondents. These individuals point to the importance of educating Aboriginal inmates on culture and spirituality, utilizing traditional healing concepts and processes in working with gang involved offenders, and finally, turning to Elders in the community to achieve these goals... Cultural awareness and programming, perhaps more so in the case of Aboriginal offenders than any other group, has the added benefit of directly addressing some of the core issues or causes of gang behaviour. Connecting with culture and with respected Aboriginal leaders means that one of the main reasons for joining a gang – the feeling of belonging, is addressed in a more functional, positive way. The image we have of gang members is that they are individuals with problems, problems often stemming back to family and childhood. These are people who need to heal. Aboriginal culture and spirituality have the potential to directly address this need.

146 Jana Grekul and Patti LaBoucane-Benson, An Investigation into the Formation and Recruitment Processes of Aboriginal Gangs in Western Canada, 2007 p.28 (hereafter "Aboriginal Gangs") online at http://www.publicsafety.gc.ca/res/cor/apc/abor_gangs-eng.aspx. A revised version of this paper entitled Aboriginal Gangs and Their (Dis)placement: Contextualizing Recruitment, Membership, and Status, can be found at 2008 CJCJ (Canadian Journal of Criminology and Criminal Justice) 59

147 Aboriginal Gangs, p. 42-3

Along these lines one respondent indicated that when dealing with Aboriginal offenders, conflict resolution could be done traditionally. A restorative justice approach is desirable, he claims, because the process is not about saving face, or an imbalance of power (which is what much gang-related behaviour is about), rather it is about empowering everyone, giving everyone a share in the process and the peaceful outcome.¹⁴⁸

Of particular interest and a testament to the energy that some CSC administrators and staff, in conjunction with community groups, have invested in creative responses to these complex issues is this account of what the authors refer to as "Healing Through Dynamic Intervention":

One maximum security institution is currently using this innovative approach for working with gang-involved inmates. This approach deals directly with the core causes of prison gang involvement discussed above and confronts the myths surrounding prison populations head on. Faced with increasing tension and violence within the institution, it was imperative that "something be done" about the Aboriginal gang problem. There were several stages to the process, which eventually led to the establishment of a "truce" or "peace treaty" among Aboriginal gangs and the General Population of inmates in this institution.

Prior to the current state of affairs, the institution was plagued with the complexity and need for extensive coordination in order to manage seven different populations who were segregated. Many officers and inmates alike were ready for a change. It had become unrealistic and problematic for the institution to continue with its policy of segregation, separation and intensive movement control of the rival groups in the institution.

Currently, units contain a mix of inmates. Gangs can reside in separate units, mixed with other inmate groups (i.e. general population inmates). However, all inmates have the opportunity to interact. For example, all inmates work, eat, and participate in recreation together.

Officers involved in this process indicate that it appears to be working well. The truce has resulted in an atmosphere where correctional personnel can now focus on the types of programming that get to the root of the issues and problems that many inmates have. Communication skills development, interpersonal skills development, and employment skill development are the types of programs that inmates (who are interested and ready) and staff can realistically focus on in a less restricted prison environment. Currently at this particular institution, the focus is on working individually with inmates, in group settings through programming. An atmosphere conducive to real change in individuals has been created through the truce process. Therapeutic intervention programming targets the deficient skill base of individual inmates. In many cases program facilitators are imparting parenting values to individual inmates who may never have been "parented properly". As one facilitator states:

"It all comes down to three things and this is what we stress with individual inmates: respect other people; try not to hurt anyone; and do the right thing."

Ultimately by treating inmates like human beings, by embodying these three things in their own interactions with inmates, individual officers can teach through example. Dynamic Intervention has the potential to change people's lives in a positive way.

The officers directly involved in this peace process reveal that the challenge for them now on a daily basis is "population management" as opposed to gang management or control. They must con-

148 Aboriginal Gangs, p. 66-8

*stantly manage the issues that emerge. This requires diligence and vigilance by focusing on those "little things" that can quickly escalate into much bigger issues, issues that could realistically threaten the current peaceful state of affairs. These officers are fully aware of the precarious nature of the situation they have helped create. But the truce appears to be working and success stories, few and far between in corrections, are worth listening to.*¹⁴⁹

This important research report, commissioned by CSC, was available to the Panel had they been concerned with ensuring that their analysis and recommendations were based on research and the best evidence. What the report demonstrates clearly is that the issue of responding in the correctional context to young, unmotivated gang members is complex, rooted as it is in larger societal conditions and that the avenues for advancing CSC's mission and mandate must be nuanced and must above all else be based on "treating inmates like human beings." Instead what we get from the Panel is a blunt recommendation to sanction the non-compliant by developing a hierarchy of rights and privileges with more privation and more onerous conditions of confinement for the unmotivated prisoner. Instead of encouraging the courageous efforts of those correctional staff who have attempted to reach out to the most disaffected and alienated prisoners, the Panel would encourage senior managers to spend their time fractioning rights and privileges into ever smaller portions and figuring out how to dole these out to a population whose life experience has shown them little else except privation.

The limitations of the Panel's simplistic and hard line approach to the complexities of prison administration and its dangerous implications in fostering inhumane and unfair conditions of confinement are most clearly reflected in its approach to drug use.

149 Aboriginal Gangs, p. 60-2

6 Drugs in Prison

6.1 The Panel's Approach

The Panel makes far-reaching recommendations which it believes will enable the Correctional Service of Canada to better wage the war on drugs inside the walls. The Panel's approach to drug use is one dimensional focusing exclusively on greater enforcement with no sensitivity or consideration to the implications of the measures proposed on the human rights of prisoners and their families to visit and associate. In this section we review the Panel's proposals, profile the importance of the right to visit as an integral part of a humane prison and assess the dangers of proposals that would make its exercise more difficult and demeaning.

The Panel provides us with this analysis of the problem:

"The Panel is convinced that drugs have also propagated the increase in organized gangs within penitentiaries and the ensuing violence as these gangs attempt to continue their criminal activity. Gang members are not averse to using violence to advance their agenda and to maintain or enhance their positions within the offender hierarchy. As long as drugs are a major source of revenue and power, the introduction of drugs into penitentiaries will continue to be their primary focus. Whether it is through the direct use of their associates in the community or through threats and intimidation of other offenders and their families, gang members will continue to use as many possible conduits as possible to introduce drugs into CSC penitentiaries.

The Panel members believe that illicit drugs are unacceptable in a federal penitentiary and create a dangerous environment for staff and offenders that translates into assaults on offenders and staff, promotes transmittable diseases such as HIV/AIDS and Hepatitis, and destroys any hope of providing a safe and secure environment where offenders can focus on rehabilitation.¹⁵⁰

There can be no argument that the trafficking of illegal drugs within penitentiaries is a serious problem that contributes to violence, the spread of disease and undermines prisoner rehabilitation. There can be no argument that because of these reasons, "illicit drugs are unacceptable in a federal penitentiary". There is also no argument that the proliferation of drugs within Canadian society and the enormous profits to be made from the distribution of illegal drugs has led to the growth of international, national and local criminal networks to manufacture and distribute these commodities. That the drug trade would be a major problem in Canadian penitentiaries is neither a revelation nor surprising. A significant part of the federal prison population is made up of offenders who come to prison (1) because of illegal drug use - those who are addicted to illegal drugs and commit offenses such as robberies, to feed their habits or commit offences while under the influence of drugs and (2) because of their involvement in the networks of drug trafficking. Within the prison walls, therefore, are replicated and concentrated the market conditions for a profitable drug trade that exist outside the walls – a demand side of users eager to acquire drugs and a supply side of offenders connected to networks to fill that demand. In 1990 a British Columbia Court of Appeal judge commented during a sentencing appeal that "Drugs of all sorts are readily available in

150 Roadmap, p. 27

our prisons and penitentiaries. Only the price varies, in kind and amount, from that which is exacted on the street”.¹⁵¹ This comment remains as true today as then.

There is another dimension to “the drug problem” inside the walls that the Panel fails to identify or consider in formulating its recommendations. Its best exposition is by one of Canada’s most experienced correctional administrators, whose career spanned 30 years, beginning with the dark days of the BC penitentiary in the 1970’s. Ken Peterson, the then Warden of Mission Institution, laid bare the way in which the realities of confinement contribute to the use of drugs:

*In this institution, as in all institutions, there is a drug subculture. It carries on feeding those who have a habit and it brings new people in. It is responsible for an undercurrent of violence that exists in all institutions. It is something to which you have to pay a lot of attention if you are an offender, because there is no neutral ground in here. I can see why inmates use drugs . . . it is to sedate themselves from what is going on. I don't think they use it to get high, I think they use it to get normal, whatever normal may be. It is to relieve that undercurrent of fear, tension, angst, whatever it may be. It's mood-altering, and when you get down to the mood in here, the mood in any prison is not good.*¹⁵²

The pressing issue is what should be the appropriate set of responses of CSC to these correctional realities. The Panel identifies CSC current approach to this issue:

CSC's current drug interdiction strategy is based on prevention, treatment, and enforcement. This strategy is guided by Canada's National Drug Strategy, and is briefly outlined below.

Prevention

CSC's Drug Strategy includes awareness programs, immunization programs, infectious disease testing, methadone maintenance treatment and intensive support units. Harm reduction initiatives are also available.

Treatment

CSC provides a range of internationally accredited programs to offenders whose substance dependence is related to their criminal behaviour. The more difficult the offender's problem, the more intense the intervention.

Programs have also been designed especially for women and Aboriginal offenders. These substance abuse and maintenance programs teach offenders to manage their patterns of substance abuse, with the goal of decreasing recidivism.

Enforcement

To reduce violence and illicit drugs in penitentiaries, all offenders — including those belonging to organized criminal groups—are monitored to prevent incidents and thus enhance safety. Offenders involved in violent incidents or found possessing or using illicit drugs face disciplinary actions and criminal charges.

As to future directions, the Panel offers a prescription that is unilaterally focussed on greater enforcement. The *Roadmap* does not even acknowledge the fourth “pillar” in the fight against the harm of drug use in the community – harm reduction. Harm reduction strategies, arising from pub-

151 *R. v. Preston* (1990) 79 C.R. (3d) 61 per Wood J.A. at para. 29

152 <http://www.justicebehindthewalls.net/book.asp?cid=20&pid=318>

lic health considerations, attempts to minimize the significant risk to life and health that illegal drug use and, in particular injection drug use, carries. Strategies such as needle exchange, supervised use and maintenance programs for confirmed addicts and related measures related to safer sex, and tattoo services can at least address the deadly diseases that are side effects of injection drug use. While CSC has ventured tentatively into harm reduction through the distribution of condoms and bleach kits to sanitize injection needles, other initiatives such as the tattoo pilot program was dropped even before the evaluation of its health benefits could be established¹⁵³. In the context of the evidence of effectiveness and increasing prevalence of such harm reduction measures in the community, one should have expected that a serious review of the issue of drug use in prison would have at least considered the available research, particularly since Canada has one of the most respected centers of such research in the world.¹⁵⁴

The importance of this research to a roadmap that truly addresses issues of public safety is made clear in the most recent publication by Canadian researchers in *Lancet*, the world's leading general medical journal:

As in the community, where there has been evidence for over a decade that HIV epidemics among IDUs, [intravenous drug users] can be prevented, stabilised, and reversed, there is now also an increasing body of knowledge and practice on effective prevention of the spread of HIV through drug use in prison. For the past decade, prison systems and governments have argued that measures such as needle and syringe programmes or opioid substitution therapy cannot be introduced in prisons for safety reasons, and that making them available would mean condoning drug use in prisons. Many prisoners are in prison because of drug or drug-related offences. Preventing their drug use is seen as an important part of their rehabilitation. In the eyes of many, acknowledging that drug use is a reality in prisons would be to acknowledge that prison authorities have failed. Far from condoning drug use in prisons, however, making available to prisoners the means that are necessary to protect them from HIV (and HCV) transmission acknowledges that protection of prisoners' health needs to be the primary objective of drug policy in prisons. As the Scottish report on drug use and prisons pointed out, "the idea of a drug free prison does not seem to be any more realistic than the idea of a drug free society", and "stability may actually be better achieved by moving beyond this concept".¹⁵⁵

Far from acknowledging that "protection of prisoners' health needs to be the primary objective of drug policy" the Panel recommends that CSC concentrates its resources on drug interdiction.

While the Panel appreciates that CSC's approach to drug interdiction is headed in the right direction, we believe that much more can be done to prevent drugs from entering federal penitentiaries, and to reduce the negative impact they have on CSC's operations.¹⁵⁶

...The Panel recommends that CSC must become more rigorous in its approach to drug interdiction by enhancing its control and management of the introduction and use of illicit substances.

153 Evaluation Report: Correctional Service Canada's Safer Tattooing Practices Pilot Initiative, File # 394-2-39 Evaluation Branch, Performance Assurance Sector, January 2009 <http://www.csc-scc.gc.ca/text/pa/ev-tattooing-394-2-39/index-eng.shtml>

154 Canadian HIV/AIDS Legal Network. <http://www.aidslaw.ca/EN/index.htm>

155 Ralf Jürgens, Andrew Ball, Annette Verster Interventions to reduce HIV transmission related to injecting drug use in prison www.thelancet.com/infection . Vol. 9 January 2009

156 *Roadmap*, p. 27-8

8. *The Panel recommends that CSC's approach should:*

- a) *entail the submission of an integrated request for resources supported by detailed performance targets, monitoring and an evaluation plan that requires report on CSC's progress to the Minister, Public Safety, by no later than 2009-10;*
- b) *incorporate a commitment to more stringent control measures (i.e., elimination of contact visits), supported by changes in legislation, if the results of the evaluation (see rec. (i)) does not support the expected progress;*
- c) *increase the number of drug dog detection teams in each penitentiary to ensure that a drug dog is available for every shift;*
- d) *involve the introduction of 'scheduled visits' so that more effective use of drug dogs can be made;*
- e) *increase perimeter surveillance (vehicle patrol by Correctional Officers) and the re-introduction of tower surveillance, where appropriate, to counter the entry of drugs over perimeter fences;*
- f) *include a more thorough, non-intrusive search procedure at penitentiary entry points for all vehicles, individuals and their personal belongings;*
- g) *include the immediate limitation and/or elimination of the use of contact visits when there is reasonable proof that they pose a threat to the safety and security of the penitentiary;*
- h) *include the purchase of new technologies, to detect the presence of drugs; (resources should be available for the ongoing maintenance and staff training);*
- i) *enhance the policies and procedures related to the management of prescription drugs, urinalysis testing and the routine searches of offenders and their cells for illicit substances;*
- j) *work closely with local police forces and Crown Attorneys to develop a more proactive approach for criminal sanctions related to the seizure of drugs;*
- k) *include an amendment to the Controlled Drugs and Substances Act to create an aggravating factor (or a separate offence) for the introduction or trafficking within a penitentiary in Canada of any controlled or designated substance with a mandatory minimum penalty consecutively to any existing sentence(s);*
- l) *include the authority for CSC to prohibit individuals who are found guilty of such charges (highlighted in XI) from entering a federal penitentiary for a period of not less than 10 years; and*
- m) *include the development and implementation of a heightened public awareness campaign to communicate the repercussions of smuggling drugs into penitentiaries.*

9. *The Panel recommends that CSC, as a priority, continue to strengthen its security intelligence framework for the collection, analysis and dissemination of information within federal corrections, police services and other criminal justice partners.*

10. *The Panel recommends that a national database of all visitors should be created.*¹⁵⁷

It is clear from the list of the Panel recommendations that enhanced security measures, increased use of drug dogs and drug-sensing technology, greater limitations on contact visits, more intense

157 Roadmap, p. 61

surveillance and strengthening of intelligence information and more punitive sanctions are the exclusive focus of the Panel's approach to reform. Completely absent from the Panel's analysis is any recognition that under the existing law, correctional authorities already have and use significantly greater powers to conduct searches within federal penitentiaries than Canadian society would ever tolerate by the police on the street. Even with these greater powers, drugs continue to flow into prisons. While it might seem reasonable to believe that implementing the Panel's recommendation of "more stringent control measures (i.e. elimination of contact visits)" and requiring that all visits be behind glass might have some impact on reducing the flow of drugs, there is no research evidence to support this. In fact CSC's own internal audit of drug interdiction reveals that over the period 2001-6 drug seizures in the visits areas accounted for less than 20% of drug seizures in penitentiaries.¹⁵⁸ In any event greater curtailment of contact visits would not be sufficient to stop other sources of drugs or prevent the development of new sources.

It needs to be recognized that where there is a demand for drugs they can always be found. Canada's prisons are not unique in that respect. We also need to consider that even if the flow could be successfully reduced, this increased scarcity would significantly increase the value of drugs and competition for them with the result that the drug trade in prison could become more lucrative, desperate and, therefore, more violent.

Restricting visits beyond the current practice of selective restrictions for those who present security risks would also have a crippling effect on prisoners and their families. The already difficult task of maintaining a semblance of family life and the maintenance or development of community support networks to help prisoners on their return to society would be made even more difficult. Permitting a humane visiting regime while ensuring a drug-free penitentiary is impossible if either the visits or the drug interdiction must be absolute. Both outcomes are desirable as they reflect recognition of the competing interests at stake, recognition entirely absent from the Panel's analysis. Without recognizing these competing interests, the Panel is unable to consider strategies other than simply allowing one to exclude the other.

The Panel makes the mistake of not recognizing that most prisoners and most visitors are not involved in the drug trade at all. Depriving them of the opportunity to maintain crucial relationships in the faint hope of seriously interfering with drug trafficking in prison is naive, arbitrary and comes at a cost that is substantial while offering no evidence or reason to think that drugs will not come in through other, potentially more problematic channels. Interference with contact visits for specific individuals might well be justified where there is abuse of visiting rules provided that the restrictions are proportional to the violation. The current law adequately provides for this. The need to identify those who are engaged in trafficking might well justify demonstrably improved interdiction methods, but does not justify grand-scale damage to family access.

6.2 The Importance of a Humane Visiting Regime

One of the most important developments in the operation of modern prisons has been the liberalization of the regime governing visits between prisoners and their family and friends. The current

158 Audit of Drug interdiction Activities, CSC Internal Audit Branch 378-1-209 August 21, 2006, p.3

visiting regime in the Canadian federal prison system bears scant resemblance to the movie stereotype of the prisoner desperately touching hand to glass in a facsimile of physical contact. In contrast to the cramped and often dingy spaces of thirty years ago, the visiting areas of both new and renovated institutions are more spacious, have comfortable chairs, pop machines and toys for the kids; in medium and minimum security institutions, there are adjacent, open areas with swing sets and other apparatus upon which both kids and their parents can play. Canadian institutions, with the exception of the super maximum security Special Handling Unit, have private family visiting houses or trailers in which prisoners can occasionally spend up to three days (and, exceptionally, longer periods) with their families; during this time they can interact in a more normal, relaxed, manner. They can cook their own meals, interact as parents with their children, have long private conversations and pursue the physical and emotional intimacy that is not possible in the visiting areas. In addition, in most institutions there is access to socials, powwows and other functions in which members of the community can come into the prison, either in the gymnasium or one of the outside recreation areas, to share a meal, some music and companionship. The availability of these expanded opportunities for social interaction is muted, however, by the reality that there are many prisoners who have lost community and family contact - or even hope of release - and rarely if ever receive visits. In all maximum and medium security institutions there are still areas for "closed" visits where prisoners are separated from their visitors by glass partitions and where communication is through intercom phone. These facilities are used when security risks are suspected; however, most visits now are "open" and prisoners can talk to and touch their visitors, so long as certain standards of decency and modesty are maintained. None of this is a substitute for family life but it is a far cry from the old regimes.

In the modern penitentiary, the correctional theory underlying prisoner's access to their loved ones and friends is to maintain the bonds of community to facilitate prisoners' re-integration into the community when they leave the prison gates. Providing for a humane visitation regime is directly linked to what the Panel claims to be its primary agenda -greater public safety. Researchers from Florida State University in 2008 reported the results of the most comprehensive study to date on the relationship between visiting and recidivism. No comparable research has been conducted in Canada and as the US's fourth largest state prison system the Florida study is the best empirical evidence we have. These are the findings:

*Using Florida prisoner data that overcome many of the limitations of prior studies—which typically have focused only on men, inmates from a single facility, a single and often indirect measure of visitation, bivariate analyses with no statistical controls, and limited (e.g., one year or less) postrelease follow-up—we tested a series of hypotheses concerning the relationship between visitation and recidivism. Briefly, we found that only 42 percent of inmates received any visitation in the year prior to release, reinforcing the notion that incarceration indeed severs individuals' ties to society. **Our central overarching hypothesis was that visitation reduces recidivism, and save for a few exceptions, the analyses largely supported this expectation. Specifically, and consonant with the few extant empirical studies of the topic... any visitation and more frequent visitation were both associated with a lower likelihood of recidivism.** Additional, more nuanced analyses conveyed similar findings such as the notion that visitation over many different months exerts a greater effect than visits over fewer months. Visitation was also associated with delaying the onset or timing, of recidivism. **In addition, visitation of many types, including both family and friends, was associated with reduced***

and delayed onset of recidivism, with spousal visitation producing a more pronounced reduction in recidivism.¹⁵⁹

The 1992 *Corrections and Conditional Release Act and Regulations* provides the legal architecture for a humane visiting regime that facilitates reintegration. The legislation marks a legally significant shift from the pre-1992 *Penitentiary Act*, in which receiving visits was a privilege, to a regime in which prisoners have a right to maintain contact with the community. The legislation recognises that under the *Charter* everyone, including prisoners, have the right to association, subject to reasonable limits. In the context of the penitentiary reasonable limitations on the degree and manner of association may be justified by legitimate security and safety concerns consistent with the least restrictive measures test. Thus section 71(1) of the *CCRA* provides:

In order to promote relationships between inmates and the community, an inmate is entitled to have reasonable contact, including visits and correspondence, with family, friends and other person from outside the penitentiary, subject to such reasonable limits as are prescribed for protecting the security of the penitentiary or the safety of persons.

The *CCR Regulations* make it clear that prisoners have a presumptive entitlement to a contact (open) visit. Section 90(1) provides:

Every inmate shall have a reasonable opportunity to meet with their visitor without a physical barrier to physical contact unless

(a) the institutional head or a staff member designated by the institutional head believes on reasonable grounds that the barrier is necessary for the security of the penitentiary or the safety of any person; and

(b) no less restrictive measure is available.

The *Regulations* also specify the conditions under which a prisoner's right to visit can be denied or suspended. Section 91(1) provides:

(1) The institutional head or a staff member designated by the institutional head may authorize the refusal or suspension of a visit to an inmate where the institutional head or staff member believes on reasonable grounds

(a) that during the course of the visit, the inmate or visitor would

(i) jeopardize the security of the penitentiary or the safety of any person, or

(ii) plan or commit a criminal offence; and

(b) that restrictions on the manner in which the visit takes place would not be adequate to control the risk.

(2) Where a refusal or suspension is authorized under subsection (1),

(a) the refusal or suspension may continue for as long as the risk referred to in that subsection continues; and

159 William D. Bales and Daniel P. Mears, *Inmate Social Ties and the Transition to Society: Does Visitation Reduce Recidivism?* (2008) 45 *J of Research in Crime and Delinquency*, 287, p.311-12. The authors found that “among inmates who were visited, the odds of recidivism were 30.7% lower than for those who were not visited.” p. 304

(b) the institutional head or staff member shall promptly inform the inmate and the visitor of the reasons for the refusal or suspension and shall give the inmate and the visitor an opportunity to make representations with respect thereto.

The drafting of these provisions recognizes the *Charter* rights of prisoners and visitors, articulates in legislative form the correctional objectives that provide the substantial and compelling grounds for placing limitations on those rights and requires that any such limitation be the least restrictive measure. These criteria appropriately reflect principles articulated by the Supreme Court in its *Charter* jurisprudence and cannot be easily modified without raising serious questions of constitutionality. The significance of this carefully calibrated constitutional order in framing recommendations for reform is completely ignored by the Panel.

6.3 Reconciling Humane Visiting with Safe Penitentiaries

From the perspective of a correctional administrator, the liberalization of visiting regimes and the recognition of the principle that maintaining contacts with the community is an essential element of a prisoner's eventual reintegration carry a cost. Every step in opening up the prison to the outside results in potential holes in the security perimeter through which drugs can flow. Through diverse routes, hidden within the folds of clothing and underwear, "suit-cased" in condoms inserted into body orifices, implanted in tennis balls and other projectiles that are hurled over fences, or the intimidation or bribery of staff, the couriering business flourishes within federal penitentiaries.

Over a decade ago, in 1996, the Correctional Service of Canada joined in the War on Drugs and under the rubric of a National Drug Strategy implemented "administrative" sanctions to buttress the deterrent effect of the disciplinary code that prohibits the use or possession of drugs. Part of the artillery in the war were increased use of drug dogs and the introduction of devices that use "ion mobility spectrometry" to detect minute particles of substances associated with the production of illegal drugs on items submitted for analysis by the scanner. Initially introduced under the name "plasma chromatography" in the 1970s as a means of detecting selective trace amounts of organic compounds, IMS and its various forms has since been utilized in the detection of explosives, narcotics, and pesticides.¹⁶⁰ CSC operates two mass-manufactured portable ion scanners: the Ion Tracks Inc. "Itemizer" and the Smiths Detection "Ionscan".

The units, collectively referred to as the "ionscan" are installed at the front gate of the penitentiary, and like a metal detector, are classified as a non-intrusive search method. As ion scanners detect trace amounts of substance residue found on objects, the search procedure is carried out by asking the visitor for personal possessions (e.g. keys, watch, wallet or piece of jewellery) and either wiping the objects with specially treated swabs or by use of a specialized vacuum which traps particles on a Teflon filter. The first swab method is used more often because it can be done quickly. Following collection, the sample is placed in the machine where it is heated to vaporization, after which the

160 C. Collins and M Lee, "Developments in ion mobility spectrometry—mass spectrometry", in *Analytical and Bioanalytical Chemistry* 2002, 362:66-73, at 66.; F. Dussy et al., "Validation of an ion mobility spectrometry (IMS) method for the detection of heroin and cocaine on incriminated material", in *Forensic Science International* 177 (2008) 105-111, p.105

neutral molecules of vapour are carried in a stream of filtered air into the reaction region of the device to be ionized. After the vapour has been ionized and split into positive and negative particles, these particles move into an electric field from which they travel to a collector electrode. The amount of time required for the particles to reach the collector electrode (the “flight time”) is compiled by the device, recorded, and used to produce a spectrum which is specific to the nature of that particular substance. If the spectrum produced by the ion scanner upon analyzing the sample being tested matches a spectrum of an illicit substance a positive hit for that substance is registered.¹⁶¹

One significant aspect of the ionscan units is their sensitivity and ability to detect minute amounts of a substance. While methods of drug detection such as chemical reagent sprays are capable of detecting 10 micrograms of a substance, the Barringer Mobility-Ion machine is able to detect 1000 of a millionth of a gram of a drug (ie: a nanogram). As a result of their hyper-sensitivity to microscopic trace amounts of drug residue, ionscan units can be calibrated to a specific threshold level at which a positive hit is registered. What this adjustable threshold is set at will be dependent on the particular purpose and situations in which the ionscan is being used; what might be an acceptable level of a substance in one environment may be inappropriate in another. Currently, CSC guidelines provide threshold levels of 750 nanograms for cocaine and 500 nanograms for heroin in relation to the Itemiser ion scanner, and thresholds of 500 nanograms for cocaine and 100 nanograms for heroin in relation to the IonScan scanner.¹⁶²

Two of the Panel’s recommendations call for greater use of ionscan equipment and drug dogs without any cost-benefit analysis or review of CSC’s experience with these anti-drug initiatives. In fact, CSC has never been able to produce evidence of studies conducted by them or anyone else that establish the reliability of the technology **in the field**. There is no doubt that the technology is highly sensitive to certain substances and can identify extremely small amounts. What is in dispute, however, is the degree to which the technology can reliably differentiate between substances associated with illegal drugs and many other perfectly legal substances. Requests of CSC to produce a list of known substances such as, cosmetics, cleansers and other items that can produce false-positive readings have been refused on the grounds that their agreement with the manufacturer explicitly forbids such disclosure. As a result visitors to prisons cannot take informed measures to avoid unintentional contamination by everyday items. Many go to extreme, but often ineffective and even hazardous methods such as washing in strong chlorine solutions, to clean themselves of any materials that might generate a false test.

Despite its widespread use in a variety of settings there is a dearth of independent research on the reliability of the technology in drug testing in field situations, such as the front gate of a prison. In 1998, at the order of Her Majesty’s Prison Service in the United Kingdom, the Police Scientific Development Branch conducted a study of six electronic trace drug detection devices, under both

161 T. Keller *et al.*, “Application of ion mobility spectrometry in cases of forensic interest”, in *Forensic Science International* 161 (2006) 130-140 p. 130-131

162 Correctional Service Canada, Guideline 566-8-2 “Technical Requirements for Ion Mobility Spectrometry Devices”, para. 7

field and laboratory conditions. Included in these machines were those utilized by CSC, the Barringer Ionscan and the Ion Track Itemiser. The detailed results of the experiments could not be released due to “commercial confidentiality”, but a general conclusion revealed that the only illegal drug that the machines detected reliably was cocaine, and that for other drugs, the machines were “not...currently reliable.”¹⁶³

A private conversation between one of the authors with a senior researcher with one of the most prominent independent research facility in the United States provided further information that seriously challenges the reliability of using ionscan technology in field situations such as prisons. He advised that while the US government had frequently commissioned research of ionscan technology with explosives, to his knowledge, it had not commissioned such research for drugs. He advised that because of the more limited number of substances used to make explosives, detecting them is much more reliable than detecting drugs. Given the problem still faced with false positives for explosives, we should expect a far greater rate of false positive for drugs – particularly in environments that are likely to be contaminated such as the front entrances of prisons.

In research conducted as part of the *Justice behind the Walls* project at two federal penitentiaries in the years following the launch of the National Drug Strategy, one of the authors reviewed the way internal Visits Review Boards make decisions authorizing or restricting visits based on safety or security concerns, and whether these decisions were consistent with the governing legislation or reflected a pattern of pre-1992 customary law in which visits were seen as privileges rather than legal entitlements. The research findings were that visit review boards used drug dog and ionscan hits as virtual proof of a visitor’s drug involvement resulting in visitors being unfairly stigmatized and visits unfairly restricted. The implications for the prisoner whose visitor was identified as having contact with drugs can have an adverse impact on his security status and ultimately, release on parole. The use of the results of a ‘hit’ on the ionscan, or a ‘sit’ by a drug dog demonstrated that inside the walls in the War Against Drugs, armed with the new drug detection technology, one of the casualties was fairness¹⁶⁴

163 Sheldon, T.; Smith, G.; Doherty, S.; Waddell, R.; Donnelly, T.; Parker, A. Detection of Concealed Drugs on Prison Visitors: Realistic Laboratory and Field Trials of Six Drugs Trace Detectors and Passive Dogs, Sheldon, T.; Smith, G.; Doherty, S.; Waddell, R.; Donnelly, T.; Parker, A. Security Technology, 1998. Proceedings., 32nd Annual 1998 International Carnahan Conference on Volume , Issue , 12-14 Oct 1998 234 - 237. A second study of the Barringer Ionscan 350, published in *Spectroscopy* in 2000 determined that nicotine interferes with the machine’s ability to detect methamphetamine and that the Ionscan “may confirm the existence of methamphetamine when [a] sample is contaminated with nicotine.”¹⁶³ L.A. Shaw and P. de B. Harrington “Seeing through the Smoke with Dynamic Data Analysis: Detection of Methamphetamine in Forensic Samples Contaminated with Nicotine” (2000) *Spectroscopy*, Vol. 15, No. 11, pp. 40-45. A third study about ion scan technology published in *Forensic Science International* in 2008 included a number of widely available detergents in its test and found that, in certain concentrations, several detergents gave a false positive for heroin. The study also notes that other substances, such as atropine and papaverine, interfered with detection of cocaine and heroin. Dussy, F. *et al.* “Validation of an ion mobility spectrometry (IMS) method for the detection of heroin and cocaine on incriminated material”. *Forensic Science International* 177 (2008): 105-111.

164 *Justice behind the Walls*, internet version Sector 5 Ch.3 <http://justicebehindthewalls.net/book.asp?cid=213>

In response to CSC's confident assurances that the ionscan devices are reliable and the thresholds set for the various drugs being measured are indicative of more than incidental contact with the drugs, we need to consider additional facts. The manufacturers of the devices have made it clear that hitting above a threshold does not mean that the person **knowingly** came in contact with drug traces.¹⁶⁵

False positives are commonplace. One type of common false positive is where a hit is read as positive for a prohibited drug when in fact the traces detected are of a perfectly legal substance present in a commercially available product. For example, testing at Matsqui revealed that Clorox wipes, which visitors had been advised to use to decontaminate items of jewellery, registered positive above the threshold set for cocaine. At Kent certain brands of perfume, available at Sears, registered positive for methamphetamines.

Perhaps the most glaring and high-profile example of the inherent risk of false positives took place in 2005 at Matsqui institution in the course of a mediation of a grievance rising from a positive hit on the ionscan. Participating in the mediation were officials from CSC's national and regional headquarters and the Office of the Correctional Investigator. As part of a demonstration of the ionscan procedures, tests were performed by the senior officer in charge of ionscan staff training in the Pacific region on the watches of two the national headquarters officials, counsel for the Correctional Investigator and Professor Jackson, who was participating in the mediation as counsel for the prisoner. One CSC official hit above the threshold for cocaine, the other above the threshold for methamphetamines; counsel for the Correctional Investigator hit above the threshold for heroin and only Professor Jackson's test gave a negative result. On this occasion it was readily accepted that the positive hits were false-positives, an acceptance that is entirely absent in the day-to-day front gate operations for ordinary visitors.

On the same day that these false positives occurred there was a tragic event at Matsqui that further underscored the fallibility of the ionscan. During regular visiting hours a visitor came through the front gate, was subjected to the ionscan with negative results and proceeded to the open visiting area. At some point during the visit, the visitor orally passed to the prisoner being visited a balloon that had been secreted in the visitor's body containing a mix of heroin and cocaine. The prisoner asphyxiated and died. Thus, on the very same day as the ionscan produced false positives on CSC officials for cocaine, methamphetamines and heroin, it failed to identify a visitor actually carrying heroin and cocaine on their person. While this incident demonstrates the very real dangers of drug trafficking, it just as clearly demonstrates that the ionscan is not a technological panacea to its eradication.

CSC's own instructions to staff on the setup and calibration of ionscan equipment conclude by telling staff to test themselves. If a positive hit is registered, they are to wash their hands in alcohol and repeat the test. This is an implicit admission that false positives occur either through equip-

165 Written responses filed in facilitated discussion of third level grievance, October 2005. On file with Professor Jackson

ment failure or accidental contamination. It certainly gives the benefit of the doubt to staff that visitors never enjoy.¹⁶⁶

Because the Panel seems to be unaware of or is indifferent to the impact of the use of this “non-intrusive technology” on the lives of prisoners and their loved ones, we have set out one of many case studies taken from the *Justice behind the Walls* research project against which to judge the implications of the Panel’s recommendations for extending their use without providing better protections against their abuse.

A case that arose at Mission Institution in 1998 is illustrative. On August 29, 1998, while Mrs. M was visiting her husband, the drug dog handler reported to the IPSO (the Institutional Preventive Security officer, since changed to Security Intelligence Officer) that the dog indicated that Mrs. M had the odour of narcotics on her person. Mrs. M agreed to submit to a strip search or any other procedures the institution wished to conduct to demonstrate that she was not in possession of any drugs but her requests were rebuffed. Subsequently, she explained to the institutional authorities that she had allowed her son to use her car shortly before her visit to Mission Institution and that he had now admitted to her that he had smoked a joint in the car. That explanation made no difference to a three month ban on open visits. As I have described earlier in the book, it was Mr. M's case in the 1970s that resulted in the judgement of the Supreme Court of Canada that correctional decisions must be made in conformity with the duty to act fairly. In her letter to the Visits Review Board Mrs. M ably described the manner in which the suspension of her open visits with her husband contradicted what she had come to understand as fundamental principles of justice.

The Board is making decisions based on a belief that I was carrying narcotics. During my detainment and interrogation I requested many times that [the IPSO] or the RCMP do whatever procedures they felt necessary to prove that I was not in possession of narcotics. They refused. This now leaves me in the position of being treated as though I were guilty, yet I was given no chance to prove my innocence. In the outside world where I hold a responsible professional position, own my own home, and do everything else an ordinary Canadian citizen does, a person is innocent until proven guilty. I was disgusted to find that within the world of Corrections Canada, a person is guilty on suspicion, with no opportunity to prove his/her innocence. If your mandate is as you stated and [the IPSO] had suspicions that I was carrying contraband, then why wasn't everything possible done to find out the truth? I signed a document when I first started visiting which stated that I would submit to any procedures necessary to a contraband investigation, and I asked repeatedly and emphatically on August 29 that these procedures be carried out. Why weren't they? Is it easier for the Visitor Review Board to make decisions based only on suspicion? What about the truth? I know longer feel safe as a citizen visiting the Institution because my right to be innocent until proven guilty has been violated, and I am perceived as something very different than what I am.¹⁶⁷

Since the publication of *Justice behind the Walls* there has accumulated a great deal of evidence that the unfairness and violations of the CCRA associated with the use of the ionscan and drug dogs now constitutes some of the most disturbing examples of correctional arbitrariness. As opposed to other examples of arbitrariness, this latest one is dramatically affecting innocent citizens whose

166 Correctional Service of Canada, Itemizer Operating Procedures, Annex C GL 566-8-2 Procedure 4. 1. 2004 http://www.csc-ccc.gc.ca/text/plcy/doc/566-8-2gl-annex-C_e.pdf

167 *Justice behind the Walls*, internet version <http://justicebehindthewalls.net/book.asp?cid=213&pid=653>

only crime is offering support to the imprisoned. Here are some of the anguished letters that have been sent to the website of JusticebehindtheWalls.net that highlights the human costs of ill-conceived and arbitrary correctional policies:

I visit William Head prison and participate as a volunteer in Creative Writing Workshops, Writing to the Light, in the hope that telling the stories may be healing to prisoners, many of whom have been disadvantaged by our social priorities, by unaddressed learning disabilities, poverty and abuse. Many of these men are from the First Nations.

Last week-end, there was a pow wow at William Head. Elders from the Saanich Nation were invited to lead healing circles. Healing is critical at this time as the prison is downsizing and many inmates live in fear of being moved away from family and friends, their only connection to emotional support. Last week, there was a suicide that followed the rejection of one inmate's elderly mother, a very straight middle class lady, because she failed the ion test for drugs at the gate. This lady lost her pride when her son went to jail. The test took away her dignity. The aftermath took her son.

The ejection of the two elderly First Nations ladies who had come to help was an insult to their culture and another demoralizing experience for the inmates. In all, I believe, eleven people were rejected yesterday by a machine that, I have heard, is notoriously inaccurate. Mothers, wives, children and sisters, many of whom had travelled long distances to be with their loved ones in a positive setting, were humiliated. The healing day was a shambles. I saw men women and children in tears, and I wouldn't be surprised to see more suicides.

It is not the mandate of Corrections Canada to destroy families. This is a prescription for cultivating another generation of rage and despair.

I have decided to act because I perceive this system to be an attack on the family. I have no family in prison, by the grace of God, but I do belong to the human family and we are all responsible. Society prepares the crime, and the criminal commits it.¹⁶⁸

...

I have had many false positives when visiting my fiance who is in Kingston Penitentiary. I don't use any drugs, and no one else has used my driver's license for that purpose. But almost every single time I go in there, the stupid machine goes off. We were on closed visits, and were finally getting our designated seating back and then this happens. We are trying to get married, but will not be able to until we are on open visits. This is extremely frustrating and humiliating. These machines are NOT reliable. I even clean my ID with windex, then without touching it, put it in a ziploc bag. When I get to the prison, I hand it to the guard to swipe. And every time it goes off, it makes me look like I am a serious drug addict. Do you know of anything else that may be setting this thing off on me all the time?¹⁶⁹

I visited my brother at Matsqui Institution on October 26, 2008. After I checked in with the front desk and locked my things away, the guard asked if he could swipe my jacket for drugs. I consented and when he swiped my jacket it tested positive for crack cocaine. He asked if he could perform a second swipe test. I consented and the second test (on my pant leg) was negative.

168 Email to Michael Jackson September, 2002 Online at

http://justicebehindthewalls.net/resources/news/ion_scan.pdf

169 Email to Michael Jackson, Online at http://justicebehindthewalls.net/resources/news/ion_scan.pdf

At that point, he told me to sit to the side and wait. He did not tell me who I was waiting for or what was happening. I was sitting in the foyer of the building and other people were coming and going at the same time and looking at me curiously. I waited on the chair for about 15-20 minutes before a more senior guard came to speak to me.

He told me that I had tested positive for crack cocaine in an amount that was 2-3 times in excess of the "trace amount". He asked me to explain why I had tested positive. I was dumbfounded. I had never even seen crack cocaine before, let alone used it or touched it. He told me that I must have had crack cocaine "on my person" in order for it to show up in that quantity on the drug test machine. I said perhaps my jacket had touched it on the bus, or in a restaurant or bar, I said I lived downtown where many homeless and drug-addicted people roam the streets and that perhaps I could have come in contact with it by walking around, opening doors or even giving money to pan-handlers. He did not accept any of those explanations. Again, he pressed me to explain why I had tested positive; it was very uncomfortable because I had offered all of the plausible reasons for testing positive on the machine. He kept asking me the same question over and over and I was simply unable to offer an acceptable explanation to him. I was frustrated with his aggressive line of questioning and refusal to believe me and I started to get upset and emotional, he was interrogating me in the foyer of the prison in front of three other prison staff who were listening to our conversation. I was embarrassed and humiliated. I felt like a criminal. I was being accused of using or possessing crack cocaine and the guard would not believe a word that came out of my mouth. At one point I said to him "I am a lawyer, I would be risking my career to smuggle drugs into prison, why would I do that?" He said that he didn't think I was bringing drugs into prison, but that I was a "high risk" visitor as a drug user or seller. I told him I didn't use drugs and I never had used drugs and that I could not explain why drugs were showing up on my jacket.

After about 15-20 minutes, he said he would let me visit my brother but that I was not allowed to touch him and that I had to stay "up front" in front of the glass where I could be watched at all times. He told me I was on a list of people to watch and gave me a number to call to complain. The whole ordeal from the first drug swipe to the time I finally visited my brother lasted about an hour. My 2.5 hr visit turned into an hour and a half and I only go to visit him every few months.

Although I was embarrassed, humiliated and upset by the whole experience my biggest concern is for my brother and how this will reflect on him and his ability to get parole or be moved to a prison closer to his fiancée and daughter on Vancouver Island. I have never used or touched crack cocaine before and I have no criminal record, nor have I ever been charged with a crime. I am an upstanding member of the B.C. Bar and have no connections to anyone in the drug trade.¹⁷⁰

...

I have been visiting my partner every weekend since he was sent to Matsqui in January of this year. I travel with our daughter who is now one year old from Duncan on Vancouver Island via the ferries and stay overnight in a hotel so that we can visit for two days every week. We have had numerous times where either my daughter or I have tested positive on the swipes that have been taken from our clothing. At first I was suspicious that it was because of the fact that we were staying in a hotel and riding on the ferry. You can imagine that traveling with a small child means that we come into close contact with every kind of surface imaginable. Ella crawls and touches everything and then I pick her up. I attempted to rectify our difficulties by coming up with an elaborate routine where we

170 Email to Michael Jackson November 10, 2008

wipe ourselves down and change into clothing that has been washed and bagged before hand so as to have thoroughly cleaned any possibility of contamination prior to our entering the prison. This has not changed the fact that we still set the machine off on a fairly regular basis. I am, to say the least, thoroughly distressed at this point and time. I am full of fear and anxiety every time I make the trip as there does not seem to be anything I can do to stop the machine from going off. Every time we have tested positive we have been detained and interrogated. It is upsetting and I find the whole thing to be extremely traumatic. At this point my status for visiting at the prison is listed as open but they have made it clear that any further hits will result in visits being suspended. I am really frustrated as I have not done anything at all wrong and feel I am being unjustly "punished". I keep going around in circles in my head about how best to go about this so that we no longer set the machine off but I can't seem to see where the solution lies in all of this. I have nothing to do with drugs so why the machine goes off remains one of life's great mysteries. I have serious suspicions that the machine itself is faulty and it is not picking up on anything at all. I also wonder if there is the possibility of something like the baby wipes I use on Ella giving off false readings. I am wondering if you have any knowledge as to whether something like baby wipes could be tested by their machine to find out if this could be setting it off. I have looked online and have read of similar cases to mine where they did in fact link positive drug hits to be actually related to some other substance. There have been references made to certain lotions and the like but I have been unable to find any concrete information.¹⁷¹

The questions and issues raised in these emails are serious ones and should give rise to extreme caution in continuing the use of the ionscan under the present procedures, rather than the Panel's blanket endorsement and enthusiastic call for their greater deployment.

After years adamantly denying that the ionscan technology ever produced false positive results, CSC's national policy directives setting out the procedures for the use of the ionscan now make it clear that a positive hit is not a sufficient stand-alone basis upon which to restrict an open visit.¹⁷² Where a visitor registers a positive hit, a second test must be performed on a different item, followed by an interview with a supervisor or manager in which the individual is given the opportunity to provide an explanation for the positive search result (including mention of any products or medications)¹⁷³. That manager is to then conduct a Risk/Threat Assessment (TRA) that considers the results of the first and second swipe, the interview in combination with other applicable information that may be available (e.g. intelligence information, past inmate and/or visitor history and observed behaviour). Based on an assessment of these factors, the manager is required to make a decision, whether to allow an unrestricted open visit, a visit with designated seating (at the front of the visiting area close to staff) or a closed visit or deny any visit. The criteria for the decision are whether there are reasonable grounds to believe that permitting an unrestricted open visit would jeopardize the security of the penitentiary or the safety of any person. The manager is further required to provide a brief summary of the assessment and the rationale for the decision.¹⁷⁴

171 Email to Michael Jackson November 12,2008

172 "A positive indication by any non-intrusive search tool does not automatically result in the refusal of entry or a visit. It is treated as one piece of information that provides reasonable grounds to suspect that a person may have contraband in his or her possession." CD 566-8 Searching of Staff and Visitors (2008-07-25) Guidelines 566-8-1 - Use of Non-Intrusive Search Tools (2008-07-25) para. 19

173 CD 566-8, para. 17(c)

174 CD 566-8, para. 17(d-g)

The results of the TRA are provided to the Visits Review Board for their consideration and further action regarding future visits.

There is mounting evidence, however, that notwithstanding these national guidelines, there is great variation in their application not only from institution to institution but from manager to manager. In far too many cases the result of a positive hit, even when followed by a second negative hit, and in the absence of any further evidence of risk, results in some restriction on the visit. The restriction might take the form of an embarrassing and demeaning “up front” visit where everyone in the visiting room is aware of the fact that the visitor is under a drug related suspicion. Accumulating a series of positive hits may result in further restrictions on visiting.

The practice of visit review boards is characterized by a spectrum of responses. In some institutions where the visiting had previously been on an open visit basis, the practice is to impose screened visits until such time as the visitor on three consecutive visits makes 3 clean passes through the ionscan. If during one of those passes a positive hit is registered, the screened status would be maintained until the visitor made six consecutive clean passes. If during that period a further hit was registered, then the visitor's right to enter the institution would be suspended for a period of at least 30 days. At other institutions the practice is far less flexible. In some cases after a second hit on the ionscan, a visitor will be barred from entering the prison for any kind of visit for periods of up to 3 months.¹⁷⁵ In this way the presence of the ionscan device at the front gate of an institution has become a new site for the development of customary practices that vary from institution to institution.

In 2006, as a result of the concerns by offenders and their visitors about the proper use of ionscan devices, an audit was conducted by CSC's Internal Audit Branch of thirteen Canadian prisons to determine if the institutions were in compliance with the National Drug Strategy and if they had “implemented drug interdiction activities that balance detection and deterrence, and are in compliance with law and policy”¹⁷⁶ Although parts of the audit is redacted, what is available for public review shows a litany of noncompliance with policy that provides powerful confirmation of much of the arbitrary use of the ionscan that is reflected in the accounts of visitors that we have cited.

Regarding the use of ion scan machines, the Audit found that while ionscan operators in twelve of thirteen prisons had received training on how to use the devices, “IMS devices' policy and procedures are not being followed.”¹⁷⁷ Among the problems noted were the following: a failure to verify non-contamination of officers' hands, the unavailability of approved cleaning supplies, the failure to clean the sample area before conducting a swipe, and tests being conducted by officers without gloves. The Audit team concluded that “the verification of these [drug interdiction] tools requires stronger management oversight.”¹⁷⁸

175 See <http://justicebehindthewalls.net/book.asp?cid=213&pid=649>

176 Audit of Drug interdiction Activities, CSC Internal Audit Branch 378-1-209 August 21, 2006, p.1(hereafter “Audit”)

177 Audit, p.17

178 Audit, p.18

The Audit also examined the overall compliance with drug strategies, including procedures for searches and “Threat-Risk Assessments” (TRAs). The Audit reported that while all thirteen of the prisons studied had drug strategies in place, only nine of them had these strategies in writing, and at all thirteen prisons there were staff members who were “generally unaware of the strategy and it was unclear how the strategies were being communicated to institutional staff.”¹⁷⁹ Indeed, they discovered that CSC’s Guideline 566-8-1, “Use of Non-Intrusive Search Tools” is not part of the training programs for Correctional Supervisors or Security Intelligence Officers. The Audit team noted that training on this guideline is “imperative to ensure compliance” with the *National Drug Strategy*.¹⁸⁰

Perhaps the greatest deficiency seen at the prisons was in the use of the very mechanism designed to prevent arbitrariness in restricting visitors’ access, the Threat Risk Assessment. The Audit noted particular problems with the performance of the TRA and found that, partly due to this noted lack of instruction on drug interdiction policies and guidelines, the TRA is not being conducted in accordance with CSC policy. In ten of the thirteen institutions studied, the TRA forms were not properly completed. Problems reported by the Audit team included:

- *no indication that the Visits and Correspondence Department and the Security Intelligence Departments were consulted during the decision making process;*
- *no indication that a review of Offender Management System (OMS) and Reports of Automated Data Applied to Reintegration (RADAR) system was conducted;*
- *no evidence to indicate the visitor was interviewed;*
- *some TRAs were conducted by non-designated managers; and*
- *forms did not consistently indicate the decision rendered.*
- *Positive alerts resulting from the use of the IMSD and/or the drug dog could not be consistently linked to the completion of the TRA process;*
- *The required Designation Letters for the conduct of TRAs were not completed in 6 of 13 sites visited;*
- *The corresponding OMS Incident Report was not always completed in accordance with policy;*
- *Letters to offenders and visitors following the completion of TRAs were not filed in accordance with policy and decisions rendered were not consistently recorded in OMS.*

The Audit team found that one of the thirteen institutions was not even doing TRAs:

*The institution indicated that due to a construction issue, they are unable to conduct interviews in a private area (as required) and therefore do not complete any part of the process. Following a positive alert from either the detector dog team or the IMS Device, this institution turns away those who have hit positive.*¹⁸¹

179 Audit,p.6

180 Audit,p.9

181 Audit,p.13-14

Due to the lack of training and evidence and incorrect completion of the TRA, it becomes clear from the 2006 Audit that the process for determining the admission of visitors following a positive ion scan hit is not being conducted correctly (if at all). This means that in some situations, visitors and inmates may be denied visits based solely on false positives from the ion scan machines. The Audit team's made their concerns about this lack of compliance evident:

The TRA process has the potential to affect visitor status. By not completing the TRA forms in accordance with the policy, there is no evidence that decisions have been rendered based on all information available when determining whether visitors may introduce drugs into the institution. This poses the risk that a visitor will gain access to or be restricted from the facility without due consideration of all the facts.¹⁸²

CSC's own audit demonstrates that the abuse of ionscanning is not an aberration but part of a systemic failure by CSC staff to comply with law and policy. The Panel does not seem to have been aware of the existence of this Audit. Still, they confidently recommend that CSC place more resources in the deployment of this technology without insisting on reliability studies conducted in the field and without requiring that CSC demonstrate its compliance with law and policy. It is hard to understand therefore, the Panel's unquestioning endorsement of this and other unnamed "new technologies" except in terms of an unremitting and unquestioning faith in intensifying the war on drugs, irrespective of the costs to justice or its impact on effective corrections.

The Panel also calls for the greater use of drug dogs in the penitentiary again without any consideration to the potential for greater incidence of false positives. The Panel's assumption, mirroring that of CSC's, is that drug dog "hits" are sufficiently reliable to base restricting visiting rights on them. This is a misplaced assumption. Of particular relevance in considering the Panel's uncritical recommendation for greater use of drug dogs are the recent Supreme Court of Canada decisions in *The Queen v. A.M. and Gurmakh Kang-Brown v The Queen*.¹⁸³ These cases raised the *Charter* implications of the use of sniffer dogs, in the one case in a Toronto high school and the other at the Calgary bus station. The Court was evenly split on whether the appropriate *Charter* standard for a reasonable search within section 8 involving a sniffer dog was "reasonable grounds to believe" or a lower threshold of "reasonable suspicion" that drugs were present. However even those judges who were of the opinion that the lower threshold was justified, clearly expressed the view that the *Charter* had an important role in to ensure that law enforcement authorities not deploy sniffer dogs on the basis of speculative hunches in pursuit of a zero-tolerance drug policy. Justice Binnie wrote:

*I accept the youth court judge's finding of fact that this was a random speculative search. What was done here may have been seen by the police as an efficient use of their resources, and by the principal of the school as an efficient way to advance a zero tolerance policy. But these objectives were achieved at the expense of the privacy interest (and constitutional rights) of every student in the school, as the youth court judge and the Court of Appeal pointed out. **The Charter weighs other val-***

182 Audit, p.14

183 *R. v. A.M.*, [2008] SCC 19 *R. v. Kang-Brown*, [2008] SCC 18.

ues, including privacy, against an appetite for police efficiency. A hunch is not enough to warrant a search of citizens or their belongings by police dogs.¹⁸⁴

The Supreme Court also addressed police claims of the accuracy of sniffer dog “hits” and the issue of false positives:

Thirdly, the evidence in this case is that the sniffer dog Chief has an enviable record of accuracy. Of course dogs, being living creatures, exhibit individual capacities that vary from animal to animal. While a false positive may be rare for Chief, it is not thus with all dogs. The importance of proper tests and records of particular dogs will be an important element in establishing the reasonableness of a particular sniffer -dog search.

The Crown attaches considerable importance to what it says are statistics relevant to the detection rate, that is to say the successful location of drugs in a search conducted pursuant to a dog sniff (true positives), but an important concern for the Court is the number of false positives. From the police perspective, a dog that fails to detect half of the narcotics present is still better than no detection at all. From the perspective of the general population, a dog that falsely alerts half of the time raises serious concerns about the invasion of the privacy of innocent people.

Robert Bird, in his article “An Examination of the Training and Reliability of the Narcotics Detection Dog” (1996-97), 85 Ky. L.J. 405, claims that many dogs maintain “a near perfect record of narcotics detection” (p. 406). However, Justice Souter’s dissent in Caballes provides a useful compilation of some of the decided cases in the United States where, on the facts, the result was otherwise:

The infallible dog, however, is a creature of legal fiction. Although the Supreme Court of Illinois did not get into the sniffing averages of drug dogs, their supposed infallibility is belied by judicial opinions describing well-trained animals sniffing and alerting with less than perfect accuracy, whether owing to errors by their handlers, the limitations of the dogs themselves, or even the pervasive contamination of currency by cocaine. [pp.411-12]

Broadly based studies demonstrate an enormous variation in sniffer-dog performances, with some dogs giving false positives more than 50 percent of the time. Canadian police data seem not to be available, but in 2006, the New South Wales Ombudsman issued a report containing extensive empirical data on the use of sniffer dogs by police since the introduction of the Police Powers Act. During the review period, 17 different drug detection dogs made 10,211 indications during general drug detection operations. The Ombudsman reported:

*Almost all persons indicated by a drug detection dog were subsequently searched by police. This is in accordance with police policy which states that an indication by a drug detection dog gives police reasonable suspicion to search a person. **Prohibited drugs were only located in 26% of the searches following an indication. That is, almost three-quarters of all indications did not result in the location of prohibited drugs. The rate of finding drugs varied from dog to dog, ranging from 7% (of all indications) to 56%.***

(NSW Ombudsman, Review of the Police Powers (Drug Detections Dogs) Act 2001 (2006), at p. ii (emphasis added).)

I mention these conflicting reports because it is important not to treat the capacity and accuracy of sniffer dogs as interchangeable from one dog to the next. Dogs are not mechanical or chemical devices. The police claim that they have available dogs like Chief who have a high accuracy rate and a

184 *The Queen v. A.M* para. 15

low percentage of false positives. If the lawfulness of a search is challenged, the outcome may depend on evidence before the court in each case about the individual dog and its established reliability. **Neither the police nor other government authorities are justified in relying on the “myth of the infallible dog”.** Proper police manuals require a handler to record a dog’s (or the team’s) performance. This is (or should be) accepted as an essential part of a handler’s work to be adduced as part of the evidentiary basis laid before the trial court at which sniffer dog evidence is sought to be introduced.¹⁸⁵

Let us consider the implications of the Supreme Court’s comments for CSC’s use of sniffer dogs. First we must note that there are important differences in how the police use sniffer dogs compared with CSC’s deployment of them at the front gate of penitentiaries. In a case where a police sniffer dog indicates a positive hit the normal practice is that the person is subjected to a physical search to confirm the presence of drugs. If no drugs are found, in most cases in the absence of any other implicating evidence, there is no further consequence. If illegal drugs are found and charges are laid the accused may challenge the search and the courts will have to assess its reasonableness under the *Charter*.¹⁸⁶

In the case of a CSC drug dog deployed at the front gate of the penitentiary randomly sniffing visitors, the usual practice after a positive hit is not to conduct a physical search to confirm the presence (or absence) of drugs but to use the hit to trigger a Threat-Risk Assessment which may and often does result in a restriction on visits, as illustrated by the previous case study of Ms. M. There is no opportunity for an after-the-fact judicial review at which the reasonableness of the search can be challenged, including an inquiry into the accuracy record of the particular drug dog. The only review conducted will be by the institution’s own visit review board. At that institutional review the positive hit will be taken at face value. The drug dog handler will not be called upon to demonstrate the individual dog’s performance record and any argument made by a prisoner or their visitor that the hit is a false positive and that “neither the police nor other government authorities are justified in relying on the “myth of the infallible dog”” will be summarily rejected. Yet this is the process that the Panel implicitly accepts and recommends that CSC expand. It is an expansion that compounds further the unfairness and arbitrariness of existing practices and moves correctional decision-making along a path further away from *Charter* values and the rule of law.

6.4 Conclusion

CSC’s uncritical endorsement of the Panel’s recommendations on stepping up the war against drugs coupled with the allocation of new money to introduce more ionscan equipment, more drug dogs and more security intelligence officers, has had the effect of encouraging correctional managers and visit review boards to be more aggressive in this ongoing war, minimizing the mounting evi-

185 *R. v. A.M.*, paras.84-88.

186 The process is set out by Justice Binnie:

If the sniff is conducted on the basis of reasonable suspicion and discloses the presence of illegal drugs on the person or other place of concealment, the police may, in my view, confirm the accuracy of that information with a physical search, again without prior judicial authorization... But, of course, all such searches by the dogs or the police are subject to after -the-fact judicial review if it is alleged that no grounds of reasonable suspicion existed, or that the search was otherwise carried out in an unreasonable manner. *R. v. A.M.*, para. 14

dence of the fallibility of the technology and giving short shrift to visitors who plaintively protest their innocence of any involvement or association with drugs. We have been told of visitors who with great reluctance have decided to limit or even terminate their visiting of loved ones, for fear both of the embarrassment and demeaning consequences of false positive hits and also that this will build a record which will inhibit their loved ones' transfers to lower security or grant of parole.

We have seen no evidence to support the case that "a more rigorous approach to drug interdiction" would have any more success within prisons than the array of increased enforcement and tougher sentencing has had on stemming the flow of drugs coming into Canadian cities and communities. In prison, as on the street, prevention and treatment are more hopeful and productive strategies to address the intractable problems of drug use. Harm reduction strategies offer the best hope to modify the deadly transfer of HIV and Hep C within the prisons and, after release, in the community.

CSC's current Drug Strategy rightly emphasises the elements of prevention and treatment along with enforcement. Shifting resources by addressing only "more stringent measures", as advocated by the Panel, carries unconsidered heavy costs for both a crucial element necessary for a humane environment and for an effective drug strategy. Unfairly inhibiting the rights and ability of prisoners, their families and their support networks to maintain the bonds of family and community necessary for their reintegration into society, has no legitimate place in a roadmap to a just, peaceful and safe society.

7 Adequacy of the Inmate Disciplinary Process

No other section of the *Roadmap* raises suspicion about the Panel's bias towards pleasing a political constituency so much as the section on prison discipline. When one recognizes that the review was the fulfilment of the political promises made by the current government to prison guards¹⁸⁷, one might expect that their long-standing criticism of the disciplinary process would be taken seriously. In fact, the uncorroborated claims contained in a brief from the Union of Canadian Correctional Officers (UCCO) drove the entire content of this section of the report - to the exclusion of all other sources both within and outside of CSC. As a result, this is another area where the *Roadmap* reveals its one dimensional approach, one in which primacy is given to security concerns with no consideration to the justice goals of the process.

The Panel summarised what it learnt from UCCO's submission:

*The Panel heard from UCCO-SACC-CSN representatives that they believe that the disciplinary process is not working as it should. They specifically commented on the situation where "a non-compliant offender sentenced to segregation serves the penalty in a regular cell, with all the property and privileges enjoyed before conviction in Disciplinary Court."*¹⁸⁸

UCCO-SAAC-CSN also provided the Panel with an analysis of what they termed "the Discipline Regime" and as an example, gave an analysis of offence reports at Donnacona Penitentiary between January 1 and October 19, 2006....

The union noted issues around the timelines of the application of the disciplinary process. Section 36 of Commissioner's Directive 580 stipulates that the initial hearing of major and minor charges of a disciplinary offence shall normally take place within two weeks after the charge is laid. However, the statistics reveal that only 20.5% of the hearings are held within these time limits. Out of all offence reports filed, only 41.2%, led to sanctions of some sort. Hence, 58.8% of the major reports were rejected for various reasons, including administrative reasons such as timeliness.

The union also noted that many rejected offence reports are not passed on to the offender's future parole officers and thus are not considered during National Parole Board hearings. In addition, two out of five reports are not recorded in the Offender Management System (OMS). The union's study revealed that 135 reports with guilty verdicts were not officially recorded in OMS, which had a significant impact on case management, given that parole officers depend heavily on the OMS when evaluating cases to be presented to the Parole Board.

*The Panel was not able to confirm the accuracy of the union's allegations with CSC management but, the essence of the union's submission has led the Panel to conclude that in order to reduce levels of violence by offenders within the walls of the penitentiary system, **there must be significant and meaningful consequences for abusive or assaultive behaviour.** While the Panel heard from frontline correctional officers that some verbal abuse is to be expected from offenders given their profile, staff*

187 Minister Day fulfils pledge to review correctional system <http://www.ps-sp.gc.ca/media/nr/2007/nr20070420-eng.aspx>

188 "Rewards and Consequences: A Correctional Service for the 21st Century—A brief to the Independent Review Panel studying the future of Correctional Service Canada," UCCO-SACC-CSN, June 2007, page 11

*should not be feel they have to accept this behaviour. There should be appropriate and meaningful consequences for offenders' behaviour that is not deemed acceptable. Staff has repeatedly told the Panel that current sanctions are inadequate, and are handed down too late to have any deterrent effect on the offender.*¹⁸⁹

Remarkably in its comments on the disciplinary process the Panel makes no reference to the CCRA and the CCRA regulations or CSC's own Commissioners Directives. CD 580, which was revised in 2004, recognizes that the disciplinary process must be both fair and effective by providing the policy objective and principles provided in the text box.¹⁹⁰

Without any reference to either this policy objective and principles, or the law on which it is based, the Panel focuses solely on the issues of administrative efficiency and, to make matters worse, only from the perspective of the guards. This is made clear from the fact that the only submission that the Panel mentions in this part of its report is that from UCCO.

The time is long past when correctional officials were able to impose disciplinary sanctions without concern for complying with the legal obligation to act fairly. The presumption of innocence, the right to know the charge and evidence, and the right to be heard before an impartial judge are fundamental to our democracy and system of justice. For decades now it has been accepted, at least in principle if not always in practice, that the rule of law must apply within the prison in the same way that it must apply in the community if the justice system is to command respect. The Commissioners Directives reflect those principles and legal obligation. Only by ignoring the law and policy objectives and principles

POLICY OBJECTIVE

To contribute to public safety and an orderly and safe correctional environment through a fair and transparent disciplinary process by:

- a. promoting compliance and discouraging non-compliance with institutional rules; and*
- b. contributing to offender rehabilitation and successful community reintegration.*

PRINCIPLES

8. Inmate discipline shall:

- a. be fair;*
- b. use the least restrictive measures within the context of a particular decision, consistent with the protection of the public, staff and offenders;*
- c. be corrective by design;*
- d. reinforce the inmate's responsibility and accountability;*
- e. give due consideration to culturally appropriate restorative approaches to discipline and informal resolution to encourage positive interaction between inmates and staff;*
- f. be timely;*
- g. be impartially determined and administered;*
- h. take into consideration the inmate's mental health and, where applicable, consult with the patient's attending psychiatrist, before proceeding; and*
- i. apply only those sanctions imposed by the person conducting the hearing*

189 Roadmap, p. 24-5

190 See <http://www.csc-scc.gc.ca/text/plcy/cdshtm/580-cde-eng.shtml#1>

of the Commissioner's Directives is the Panel able to rely in a singularly uncritical manner on the UCCO perspective alone.

To make matters worse, we have reviewed the UCCO submission and found that the study it cites is woefully inadequate as a basis for any conclusions regarding the disciplinary system. Yet, the Panel cites the study uncritically while either disregarding or being unaware of the extensive scholarly literature that would provide a more balanced assessment of the adequacy of the disciplinary process and reform measures that strive to maintain the balance between the justice and security goals of the process. A few examples will illustrate this point.

The Panel report states that "UCCO provided the Panel with an analysis of what they termed "the Discipline Regime" and as an example, gave an analysis of offence reports at Donnacona Penitentiary between January 1 and October 19, 2006". The UCCO brief in presenting the Panel with its analysis stated "we believe that the results of an in-depth study recently undertaken by the Union into the discipline regime at maximum security Donnacona Institution are reasonably representative of how discipline is handled within CSC institutions across Canada. An analysis of 3648 major offense reports between January 1 2006 and October 19, 2006 provides a statistical portrait of how the discipline system in this institution is managed"¹⁹¹.

The Union provides no support for its statement that Donnacona is "reasonably representative" of how discipline is handled in other CSC institutions. In fact there are several compelling reasons to believe Donnacona is not representative. The **3648** serious offense reports in a 9 1/2 month period, on a per capita basis, are the highest of any institution in the country. Donnacona has a rated population of around 355 and in 2006 an average population of 289.¹⁹² The 3468 figure therefore represents a **charge rate of over one serious (major) charge for every prisoner every month**. We are not aware of any other institution that matches this. To give a comparative reference, in the fiscal year 2006-7 (a 12 month period) there were only **1,161** serious charges (a third of Donnacona) laid for the entire Pacific region, comprising 10 institutions with a prisoner population of 2,020, a population 7 times that of Donnacona!¹⁹³ Donnacona therefore had a serious charge rate

191 Although the UCCO brief refers to "major" offenses, the legal term used in the legislation and CDs is "serious" (or "infraction grave"). Serious disciplinary offences are adjudicated by independent chairpersons appointed from outside of the Correctional Service of Canada. Minor offenses are adjudicated by CSC correctional supervisors or managers. The task of designating an offence as serious or minor is made by a CSC correctional manager. More severe sanctions, including segregation, can be imposed following conviction of a serious offense. CD 580 provides this definition of serious and minor offences

Serious offence:

Commits, attempts, or incites acts that are:

- serious breaches of security;
- violent;
- harmful to others;
- repetitive violations of rules.

Minor offence: Other negative or non-productive inmate behaviour that is contrary to institutional rules. CD 580 2004/01/19 <http://www.csc-scc.gc.ca/text/plcy/cdshtm/580-cde-eng.shtm>

192 These population figures were supplied by National Headquarters of CSC.

193 The figures for the total number of charges for all regions of CSC were provided to the authors by National Headquarters of CSC.

in 2006 that, per prisoner, was 21 times (2,100%) higher than the Pacific region.¹⁹⁴ Further, and distancing Donnacona even more from other institutions, the UCCO brief tells us that “in a context of budget cutbacks local management decided to close the institution’s segregation unit. This decision had a major impact on how disciplinary actions are handled.”¹⁹⁵

The Panel, citing the Donnacona study, states “41.2% of the offence reports resulted in sanctions after being filed, while 58.8% of the reports were dismissed for various reasons (not guilty, untimely, stay of proceedings, and so on).” The inference is that an outcome in which less than half of the charges result in a guilty plea or verdict demonstrates that something is seriously wrong with the system. Indeed it is clear from the UCCO brief itself that in the Union’s view their concern is not just that less than half of the offense reports resulted in a guilty plea or verdict but that, even worse, only 30% of the offence reports gave rise to a sanction of segregation and that 9 out of 10 sanctions involved a suspended sentence or a fine. In other words, in UCCO’s view any result less than a sentence of segregation demonstrates a flaw in the disciplinary process. It is not the disciplinary process but UCCO’s line of thinking that is flawed here. The CCRA Regulations set out legally binding considerations to be taken into account by the independent chairperson in imposing a sanction following conviction of a serious disciplinary offence. They are

- a) the seriousness of the offence and the degree of responsibility the inmate bears for its commission;*
- (b) the least restrictive measure that would be appropriate in the circumstances;*
- (c) all relevant aggravating and mitigating circumstances, including the inmate's behaviour in the penitentiary;*
- (d) the sanctions that have been imposed on other inmates for similar disciplinary offences committed in similar circumstances;*
- (e) the nature and duration of any other sanction described in section 44 of the Act that has been imposed on the inmate, to ensure that the combination of the sanctions is not excessive;*
- (f) any measures taken by the Service in connection with the offence before the disposition of the disciplinary charge; and*
- (g) any recommendations respecting the appropriate sanctions made during the hearing.*¹⁹⁶

A sanction of segregation is the most serious punishment in the penitentiary, the equivalent of being sent to “a prison within the prison” as the Supreme Court of Canada has characterized it.¹⁹⁷ Consistent with the sentencing principle of proportionality, it is therefore the appropriate punishment for only the most serious offenses or those offenders who have repeatedly committed offenses. To view segregation as the preferred punishment for all or even a majority of serious disciplinary offenses, and see any lesser outcome such as suspended sentences or fines as a failure of

194 Quebec had the highest number of charges in the five regions, but even in Quebec the 3848 serious charges at Donnacona represents over ¾ of the total charges for the whole of Quebec.

195 UCCO submission p. 22

196 CCRA Regulations s.34

197 *Martineau v Matsqui Institution* [1980] 1 S.C.R. 602

the system, as UCCO apparently does, represents a serious misunderstanding and misinterpretation of correctional law and policy.

Not only does UCCO's argument misinterpret correctional law and policy but it would also amount to an administrative and resource nightmare. In most maximum and medium security institutions the disciplinary court for serious charges sits either once a week or every other week. If every one of the 3648 offence report that was designated serious at Donnacona in the first 9 1/2 months of 2006 had been heard in disciplinary court it would make for a weekly court docket of 91 cases. The Panel also cites uncritically UCCO's complaints about the timeliness of disciplinary hearings:

"Section 36 of Commissioner's Directive 580 stipulates that the initial hearing of major and minor charges of a disciplinary offence shall normally take place within two weeks after the charge is laid. However, the statistics reveal that only 20.5% of the hearings are held within these time limits."

The correctional reality underlying this statistic requires much more elaboration than this simplistic recitation. As other research has demonstrated, given the procedural protections that are built into the disciplinary regime to ensure a fair hearing, it is virtually impossible to have a hearing within two weeks unless the prisoner is prepared to plead guilty at their first appearance.¹⁹⁸ If a plea of not guilty is entered, a hearing date has to be scheduled to ensure that any correctional officers who are required to attend as witnesses are available. In many cases the hearing date is set to a date that fits with the officers' schedules, in order to avoid unnecessary overtime. In other cases, adjournments are granted to enable the prisoner to exercise his legal right to consult with counsel and in some cases be represented at the hearing by counsel. Such adjournments are essential for the conduct of a fair hearing and ensure compliance with the common law duty to act fairly and section 7 of the *Charter of Rights and Freedoms*. In all such cases where the expectation of the CD - that hearings normally take place within two weeks after the charge is laid - conflicts with the legal requirements for a fair hearing, those requirements rightfully take precedence.

The Panel also uncritically cites this statement from UCCO's brief:

"The union also noted that many rejected offence reports are not passed on to the offender's future parole officers and thus are not considered during National Parole Board hearings."

UCCO's statement seems to reject the application of the principle of presumed innocence. Even when a charge fails and the offence report is rejected UCCO suggests that the Parole Board, which wields the greatest power over the liberty of prisoners, should be routinely and negatively influenced by unsubstantiated accusations. Does UCCO really assume that the facts and allegations in every offense report written by one of its members are so reliable and unchallengeable that its contents should be considered by the National Parole Board? Does this include offense reports where an offender has been found not guilty by the independent chairperson? In independent research of the discipline process over many years and at different institutions, it has been shown that the allegations in correctional officers' offense reports, no more than what is alleged in police officers' reports, cannot be taken as demonstrating the presumptive guilt of an offender. If an offender has been found not guilty by an independent chairperson of allegations contained in a cor-

198 See *Justice Behind the Walls*, Sector 3, Chs. 2 and 3

rectional officer's offense report, on what fair correctional basis does UCCO or the Panel suggest the National Parole Board should consider those same allegations in assessing that offender's risk to the community?¹⁹⁹

The Panel makes only one recommendation relating to the disciplinary process:

*The Panel recommends that current disciplinary sanctions be reviewed and become more aligned with the severity of assaults and threatening behaviour, including the verbal abuse of correctional staff.*²⁰⁰

The sole source of this recommendation is the voiced concerns of UCCO members. Yet there was available to the Panel a body of independent scholarly research of the disciplinary process in Canadian penitentiaries that extends over the last 30 years.²⁰¹ This research traces the evolution from the old warden's court regime of the 1970s through to the introduction in the 1980s of independent chairpersons to adjudicate serious offenses. Using a methodology based upon observation of actual cases, interviews with correctional staff, correctional managers, independent chairpersons and prisoners, this provides a balanced and measured assessment of the strengths and weaknesses of the process and a series of recommendations to improve the process to make it both fairer and more efficient.²⁰² This research is readily available both in hard copy and online and indeed there is a link to the research on CSC's own website. That the Panel either did not discover this research or chose to disregard it severely compromises the validity of its one recommendation in terms of a comprehensive roadmap to reform.

On the merits of the Panel's specific recommendation the scholarly research provides no evidence that independent chairpersons do not already "align sanctions with the severity of assaults and threatening behaviour" in accordance with the *CCRA* regulations that requires sanctions to reflect "the seriousness of the offence and the degree of responsibility the inmate bears for its commission".²⁰³ But as the Regulations also require, other considerations come into play, including "all relevant aggravating and mitigating circumstances, including the inmate's behaviour in the penitentiary,"²⁰⁴ and "the nature and duration of any other sanction described in section 44 of the Act that has been imposed on the inmate, to ensure that the combination of the sanctions is not excessive".²⁰⁵

While UCCO is perfectly entitled to make their case and to have it considered, we think the Panel had an obligation to test the claims made by UCCO before reaching any conclusions or making any recommendations. The admission that they were "not able to confirm the accuracy of the Union's allegations with CSC management" demands further explanation. Was CSC management unable to confirm the accuracy because its own data contradicted the UCCO claims or are we to understand that management was unable to provide any data on disciplinary hearings – at Donnacona or else-

199 See *Justice Behind the Walls*, p. 203-211

200 *Roadmap*, p. 60

201 *Justice Behind the Walls* p. 187- 283 online at <http://justicebehindthewalls.net/book.asp?cid=101&pid=422>

202 Reform proposals for addressing staff concerns are dealt with at p. 268-275.

203 *CCRA* Regs s.34(a)

204 s.34(c)

205 s.34(e)

where? This would seem highly unlikely given the ease with which we were able to obtain such data from the Pacific regional headquarters. Was CSC unable to comment on the degree to which Donnacona is “representative” of other prisons across Canada? Again this is difficult to fathom given our analysis, which based on CSC’s own data, easily demonstrates how unrepresentative it is.

If CSC had not conducted any reviews or assessments of the disciplinary process then the Panel might have rightfully been very critical of CSC’s record keeping - but no such claim was made. In fact CSC has conducted periodic evaluations of the disciplinary process and had available to it the carefully researched work of independent reviewers.

It is a disturbing reflection of the Panel’s limited and myopic understanding of existing correctional law and policy, and the goal of achieving the necessary balance involved in contributing “to public safety and an orderly and safe correctional environment through a fair and transparent disciplinary process,” that its commentary and recommendation would jeopardize that balance.

8 Earned Parole

The Panel proposes that Statutory Release and Accelerated Day Parole be abolished and replaced with a system they call “earned parole” where an offender’s release prior to the warrant expiry date (WED) would only be possible through a parole decision by the National Parole Board.²⁰⁶ In the following section we will consider the historical record and the research evidence relevant to the Panel’s recommendations and discuss why we think they are ill-conceived and inimical to public safety.

We have identified what appears to be several crucial assumptions on which the Panel has based its recommendations:

- the abolition of statutory release would encourage individuals to pursue their correctional plan to avoid extending their time in prison,
- having pursued their correctional plan more vigorously, the National Parole Board will be willing to release these individuals on parole,
- the increase in newly motivated prisoners “earning” their parole will compensate for the abolition of statutory release and
- the paramount consideration of public safety would be achieved better in a situation where the remaining “unmotivated” offenders were in jail longer and spent less, if any, time under gradual release in community-based supervision.

If any of these assumptions are incorrect, the changes that the Panel proposes will be costly financially while undermining, not advancing, public safety. It is a far-reaching change that the Panel proposes to the reintegration process and we would therefore expect that it would be based on careful analysis of the nature and purpose of statutory release and accelerated parole review and the record of their success in relation to those purposes. We should also expect that the recommendations would be based on documented experience and research that identifies inadequacies with the existing system that would make the abolition of such reintegration programs necessary. As we will show, the Panel here as elsewhere in their report, is oblivious to the history and disregards the available research generated by CSC’s own Research Branch. In fact, little is offered to justify this radical change other than the opinion of the Panel supported by a few carefully selected and spun statistics.

Our analysis raises serious doubts about the assumptions on which the Panel’s recommendations are based and demonstrate the potential for a sharp increase in the period of incarceration for most offenders while reducing post release supervision and support. We argue that an objective review demonstrates that the radical change proposed by the Panel is neither necessary nor likely to contribute to greater public safety.

²⁰⁶ *Roadmap*, p. 115

8.1 The Promise and Purpose of Statutory Release

The Panel provides virtually no historical context to explain the purpose of statutory release or why it was included in our federal correctional law. In our view it is essential to understand this context to determine whether those purposes are still valid and to assess the degree to which they have been met. We will then turn our minds to the implications of the Panel's recommendations for the federal prison population.

Beginning in 1868 a system of remission was introduced into federal corrections through which prisoners could shorten their time in custody as a reward for good behaviour. Prisoners could obtain early release by up to one-third of a determinate sentence. (Those serving life or indeterminate sentences did not earn remission.) Once the prisoner reached his remission date he was released without condition. The practice of earning remission continues to this day in all provincial prisons where prisoners serve sentences of less than two years.

The Canadian parole system has its roots in reforms introduced at the very end of the nineteenth century.²⁰⁷ Initially and appropriately called "ticket-of-leave", this form of release was subject to the discretion of officials in the Department of Justice.²⁰⁸ This evolved into our modern concept of parole with the passage of the *Parole Act* in 1958 that transferred authority for release to the newly created National Parole Board and for the first time set out in legislative form the criteria for release. Later the *Parole Act* was integrated into Part II of the *CCRA* in 1992. The modern concept of an independent paroling authority therefore has been with us for the last 50 years.

In 1969 the Report of the Canadian Committee on Corrections reviewed Canada's experience after the first decade of the *Parole Act*.²⁰⁹ The Committee noted that while the lowest risk offenders were being released through parole under community based supervision, those who had not been granted parole were being released directly to the street with neither supervision nor assistance. In other words, those for whom the transition to the community was likely to be the most difficult were being ignored and left to their own devices.

In considering the purpose and value of parole, the Committee recognized that any form of gradual release implied some risk:

*"... there are risks in any form of treatment of the offender. The short-term risks of parole are calculated risks and in the opinion of the Committee are less than the risks in the alternative of sudden and dramatic contrast between incarceration and total freedom"*²¹⁰

207 An excellent history of the Canadian parole system can be found on the National Parole Board's site at http://www.npb-cnrc.gc.ca/about/part1_e.htm

208 The 1899 Act to Provide for the Conditional Liberation of Convicts- the Ticket of Leave Act provided: It shall be lawful for the Governor General by an order in writing under the hand and seal of the Secretary of State to grant to any convict under sentence of imprisonment in a penitentiary a license to be at large in Canada, or in such part thereof as in such license shall be mentioned, during such portion of his term of imprisonment, and upon such conditions in all respects as to the Governor General may seem fit; and the Governor General may from time to time revoke or alter such license by a like order in writing.

209 Ouimet, R (Chairman) 1969) Report of the Canadian Committee on Corrections-Towards Unity: Criminal Justice and Corrections.

210 *Ouimet*, p.331

They went on to elaborate:

“One cannot learn to live in freedom without experiencing freedom and even the most open institution provides a restricted, protective environment. The offender who is to succeed in becoming a law-abiding and, hopefully, contributing citizen, must do so in the outside community. It is here that he has previously failed, and he returns to the community usually feeling more isolated from whatever possible personal and social relationships he previously had when he went into prison.”

The Ouimet Committee took pains to note that while ticket-of-leave was originally developed as a form of clemency, this was no longer the case. The Committee had little difficulty recognizing the ability of parole to achieve public safety through successful reintegration of offenders into the community. The apparent success of parole only served to raise the question as to whether gradual supervised release would also reduce the rate of re-offending by those who had not been selected for parole.

“increasingly, however, it has been pointed out that the practice of paroling only the better risks means that those inmates who are potentially the most dangerous to society are still, as a rule, being released directly into full freedom in the community without the intermediate step represented by parole.”²¹¹

To address this shortcoming the Committee proposed that a system be developed “under which almost everyone would be released under some form of supervision.” Recognizing that “there will be many who will not qualify for parole” they proposed “making the period of statutory remission a period of supervision in the community subject to the same procedures that apply to parole.”²¹² By recommending that community supervision occur during the remitted portion of the sentence, the Committee ensured that the community supervision period would be *added, not subtracted*, to the time that would otherwise be served in prison. The Committee’s recommendations were implemented in 1970 through amendments to the *Parole Act*.

It is important to understand the consequences for corrections of the introduction of what from 1970 until 1992 was called “mandatory supervision”.²¹³ Prior to 1970 a prisoner who was not granted parole and who had not lost remission through bad behaviour would be entitled to be released at the end of two-thirds of their sentence. At that point the prisoner became a free person, subject to no further restraint by the state. As a result of the implementation of the recommendations of the Ouimet Committee in 1970, those prisoners not granted parole remained entitled to be released at the two thirds point in their sentence, but instead of being free they were now subject to mandatory supervision by a parole officer- in effect a compulsory form of parole. During this period of supervision they could be returned to prison to serve the rest of their sentence for breach of the conditions of their supervision even though they committed no new crime. Quite clearly the changes in 1970 amounted to a substantial tightening of the correctional screws. The period of time under sentence was increased by fifty percent²¹⁴ through the addition of the period under

211 Ouimet, (1969) p.348

212 Ouimet, (1969) p.350

213 After 1992 mandatory supervision was renamed by the CCRA to “statutory release”.

214 While statutory release is calculated as being one-third of the sentence, the impact on prisoners of being required to serve that portion of the sentence either in prison or under community supervision means that total time served before the person was free and clear had increased by fifty percent.

mandatory supervision. This change was justified by the correctional theory that it would help those who were considered too high risk for parole to safely reintegrate into the community.

The introduction of mandatory supervision was controversial from its inception as it meant that time spent under sentence was being significantly increased. Given that those subject to mandatory supervision were considered those most likely to reoffend, the potential impact on incarceration levels was substantial, particularly when one considers the power of the National Parole Board to revoke the community supervision and return the offender to prison at any time for “technical” breaches of the conditions of release such as, drinking alcohol, returning late to a halfway house, traveling beyond a designated radius or anything parole authorities think might reflect an adverse change in risk such as a deteriorating attitude. Obviously, mandatory supervision was not popular with prisoners. Equally obvious, popularity with prisoners was not an important consideration of the Ouimet Committee. Mandatory supervision was introduced because it was considered the most effective form of re-integration while avoiding any short term risk associated with “early release” from prison.

One of the other reasons why the Ouimet Committee made their recommendation was in recognition of the fact that “only 60%” of prisoners were applying for parole. The Committee believed that the rate of parole application was so low because for some prisoners release with complete freedom after two-thirds of the sentence was more attractive. To be released on parole meant that prisoners, while often saving only a few months of incarceration if granted parole, had to remain under supervision until the completion of their full sentence, including their remission period. Furthermore, until 1977 if returned to prison on a revocation they received no credit for time served while on parole and would have to serve the entire period already served on parole in prison - a form of doing double time. In order to maximize the potential benefits of parole, the Ouimet Committee wanted to encourage more people to apply, and failing this result, subject prisoners who still did not apply or who were rejected as bad risks to mandatory supervision.

Over the following years after its implementation, mandatory supervision – renamed “statutory release” - became associated with early release rather than extended supervision in the minds of the public and many politicians. It became increasingly difficult for either to reconcile the concept of early release with high risk. In an attempt to address fears associated with the release on statutory release of very high-risk prisoners, changes to the legislation were enacted in 1987 that gave authority to the National Parole Board to refuse release on statutory release of particularly high risk prisoners. With these changes CSC began reviewing every offender prior to their statutory release date and makes recommendations to the National Parole Board regarding release of detention during the statutory release period. The Board can impose a residency requirement at a halfway house as a condition of the release, and where it believes the offender is likely, before warrant expiry, to commit an offence involving death or serious harm, a sexual offence involving a child or a serious drug offence, may detain the offender in prison until warrant expiry.

In 1992 The *CCRA* was amended to abolish the concept of earned remission largely because it had become a nightmare to administer and because the failure to earn remission would conflict with the goal of ensuring that all but the highest risk prisoners would be released through community

supervision. Henceforth most prisoners who had not previously been paroled became entitled to release on “statutory release” at the two third point in their sentence.

In surely what is the ultimate case of correctional irony, the Panel, 40 years after the Ouimet report was tabled, recommends the abolition of statutory release citing “public safety” as the reason: the very rationale used by Ouimet to recommend it in the first place and relied upon ever since by CSC and successive governments to justify its continuance. The Panel does so in apparent ignorance of the history of statutory release and the reasons for its implementation. The Panel’s lack of historical context for its recommendation is a major public policy shortfall. Had the Panel reviewed that history and the underlying justification for the introduction of statutory release it might have recognized that abolition would conflict with its own observation “that public safety is best served through a period of supervised and supported release for offenders prior to the end of the sentence”.²¹⁵

8.2 Discrediting Statutory Release

The Panel views statutory release as being an unsuccessful program. That conclusion appears to be driven primarily by the following recitation of a few statistics.

“Of all statutory release supervision periods in 2005–06, 6 in 10 were completed without revocation; however, statutory release cases accounted for 79% of violent reoffending in the community, while representing 35% of the conditionally released population.”²¹⁶

By using the phrase “79% of violent reoffending in the community”, the Panel magnifies the public’s already exaggerated perception of violent reoffending by those under federal community supervision. Adding to the alarm, the Panel goes on to state:

“The Panel is concerned about the statistics on statutory releases: approximately 40% of statutory releases are revoked, 30% for breach of conditions and 10% for new offences, and violent reoffending rates are three times higher for statutory releases than for discretionary releases. The risk posed by these offenders and the potential for even greater risk as a result of the changing profile of the federal population points to the need for change.”²¹⁷

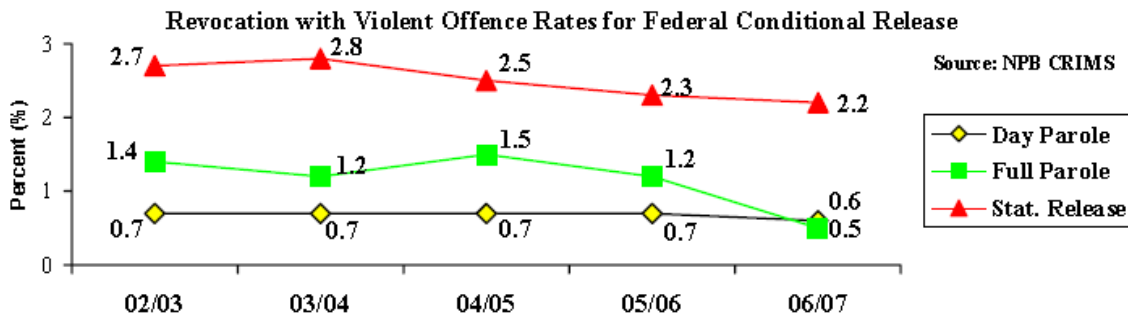
After using the actual rates of success for every other category the Panel suddenly switched to the *relative* rates when describing the rates of violent offences. The relative difference in the rate of violence is expressed as “three times higher” for statutory release then parole. The following chart (*Revocations with Violent Offence Rates for Federal Conditional Release*²¹⁸) showing comparable rates of offending as provided by the National Parole Board.

²¹⁵ Roadmap, p.113

²¹⁶ Roadmap, p.109

²¹⁷ Roadmap, p.113

²¹⁸ NPB Performance Monitoring Report 2006-07 p.xiv



Over the five years of data shown in the chart, the average rate of violent offending by those on parole is 1.16% while the average for statutory release is 2.5% - a difference of only 1.34%. To generate the alarming relative rate of 300% only the data in the last year was used. By using this form of statistical comparison the Panel was able to turn a small difference in violent offending of 1.7% into an alarming statistic of 300%.

For another perspective on the risks of violent offences committed in the community by those on statutory release, consideration should be given to the overall contribution of this group to violent crime in Canada. In 2006-07 117²¹⁹ violent offences (all types and severity) committed by statutory release cases constituted 0.035 % of the 306,559 (35 per 100,000) violent crimes reported by Statistics Canada for that year.²²⁰ No violent crime is acceptable, but before we abolish statutory release as an unsafe program it must be understood that only a tiny fraction of violent crime would be addressed. Further, given that release at warrant expiry would follow anyway in less than 7 months on average, the likelihood that the offences would only be delayed slightly would mean no noticeable or real difference in the violent crime we experience in the community.

As the following table shows, in 2006-07, 58.1% of those on statutory release completed their supervision period successfully, while 30.7% who failed to live by the rules were returned to prison for “technical” violations and 9 % were returned with a non-violent crime. That leaves 2.2% who returned for committing a violent crime. In fact, the overall rates of both violent and non-violent reoffending by those on statutory release have been dropping steadily from an already low rate for many years.

219 NPB, Performance Monitoring Report 2006-07 p.177
 220 Juristat, Crime Statistics in Canada, 2007 p.11

Table 149

Source: NPB CRIMS

OUTCOME RATES for STATUTORY RELEASE										
Outcome	2002/03		2003/04		2004/05		2005/06		2006/07	
	#	%	#	%	#	%	#	%	#	%
Successful Completions	3141	57.7	3121	57.9	3140	58.0	3243	58.6	3149	58.1
Revoked for breach of condition	1609	29.6	1598	29.7	1612	29.8	1645	29.7	1663	30.7
Revocations with Offence										
Non-violent offences	543	10.0	521	9.7	529	9.8	516	9.3	489	9.0
Violent Offences	147	2.7	147	2.7	136	2.5	128	2.3	117	2.2
Total Revocations with Offence	690	12.7	668	12.4	665	12.3	644	11.6	606	11.2
Total Completions	5440	100	5387	100	5417	100	5532	100	5418	100

The Panel presents data in such a way as to build a case for their proposition that a violent failure rate of just 2.2% amongst those identified as being both the highest need and highest risk offenders is a failed program that should be abolished. However the most concerning omission in the Panel's analysis is that they make no attempt to address the single factor that would justify the abolition of statutory release: whether the same people, if released free and clear at the end of their sentence would, during a similar period, commit violent offences at a rate lower than the 2.2% rate of statutory release cases. Without this information the Panel is unable to provide any valid evidence that abolishing gradual supervised release for these higher-risk prisoners is not a reasonable balancing of risk against the competing risk of direct unsupervised release to the community.

The fact that the statutory release cases do relatively worse than the parole group is hardly a revelation. As noted already, this outcome was predicted by the Ouimet Committee in recognition of the fact that statutory release was *intended* to be used for those who had been refused or did not apply for parole.

The Panel provides a graph and relative rates that shows that "offenders that completed their sentence of statutory release are between 2 and 2 ½ times more likely to be re-admitted on a federal sentence than offenders that complete their sentences on full parole."²²¹ The fact that those released on statutory release tend to have higher rates of offending after their period of community supervision does not make the case for its abolition as implied by the Panel. If anything, the data shows that supervision actually *suppresses* offending during the period under supervision. Considering that statutory release periods last on average 6.6 months compared with 25.3 months for parole²²², one could just as easily make the case that the substantially higher rate of offending of statutory release cases after supervision ends is, in part, because the period of supervised reinte-

221 *Roadmap*, p.114

222 NPB, Performance Monitoring Report 2006-07 p.133

gration is substantially shorter than with parole. This difference suggests that if we are considering modifying statutory release we should be thinking of longer periods of community supervision before warrant expiry - not its elimination. We have no way of knowing whether the reoffending rates for parole cases after expiry of the sentence would be greater if the period of supervision was limited to 6.6 months, but the prospect of greater rates of offending is quite plausible.

Surely the true test of statutory release is not whether those released by this method commit more crimes than those released on parole, but whether they commit more crimes than would be the case if they had been released directly to the street with no access to community programming designed to meet their needs nor direction and support that is part of the supervision process. The Panel makes no effort to address that question. Instead the Panel strung together and presented largely irrelevant statistics to bolster their case while ignoring years of work by the Research Branch of the Correctional Service of Canada on effective reintegration. The most recent summary of that research stated boldly:

*“Of all the factors that influence public safety, the Correctional Service of Canada, in collaboration with the National Parole Board, can only influence the safe release of offenders into the community. **There is solid evidence to support the premise that the gradual and structured release of offenders is the safest strategy for the protection of society against new offences by released offenders.**”*

For example, recidivism studies have found that the percentage of safe returns to the community is higher for supervised offenders than for those released with no supervision.”²²³ [Emphasis in original text]

It is difficult not to conclude that the case presented by the Panel for the abolition of statutory release was a superficial justification of the position already taken by the government rather than an objective review of the facts.

8.3 Parole as an Alternative to Statutory Release

The Panel confidently asserts that even with the abolition of statutory release, the goal of community reintegration and public safety will be furthered through the implementation of the Panel’s other recommendations. Prisoners who currently leave prison on statutory release, would, in future, become motivated and able to gain their release under the reformed “earned parole” model advanced by the Panel. The National Parole Board’s grant rate would increase obviating the need for statutory release. It is our judgment that such confidence is not only misplaced, but based upon any objective analysis, demonstrably misconceived.

Consider the description offered by the Panel of those presently being released on statutory release and who are, therefore, the particular targets for the new earned parole regime. The Panel acknowledges that the statutory release group includes many people with systemic disadvantages:

“According to CSC, the average profile of an offender who reoffends while on statutory release is an Aboriginal male under 35 years of age, with low educational attainment (no high school diploma), unemployed at arrest, with gang affiliation, serving a sentence of less than three years usually for

223 Research Branch, Correctional Service of Canada, The Safe Return of Offenders to the Community: Statistical Overview, 2005 p.3

*robbery. In addition, the typical offender tends to have a history of substance abuse, a previous criminal history, a previous negative correctional history (escape, segregation, revocation of parole), low program completion rates and higher levels of imposed residency conditions at release.*²²⁴

The Panel “believes” that should statutory release be abolished many individuals who are either denied or who do not apply for parole would approach their correctional plan with new-found enthusiasm. In fact, the circumstances of the offense, the inability to produce coherent release plans, addictions and mental illness, learning disabilities, illiteracy and many other disadvantages weigh heavily against a successful parole application. These are not factors that most prisoners can easily compensate for or change. Other prisoners will have already failed on parole and regardless of the effort they put into their correctional plan, have no reasonable chance of being released on parole again. Additionally, it needs to be recognized that family and community support, crucial factors for success, are not available for many prisoners and cannot be addressed through a correctional plan.

The continuous focus of the Panel on “motivation” as a primary factor that determines release on parole overlooks the enormous barriers to parole faced by so many prisoners and ignores or minimizes what would be required to overcome them. Clearly, it is difficult to be “motivated” to address factors that are perceived to be beyond a person’s capacity to control. No incentive or punishment can address this perception. The suggestion that large numbers of those currently being released on statutory release might be released under parole if they tried harder is simplistic and insensitive to the onerous systemic barriers and personal disadvantages so many of these people face.

Consider further that the Panel in recommending the abolition of statutory release makes a series of recommendations that would make it more difficult to “earn” parole. Currently, the CCRA sets out the criteria for release on parole as follows:

102. The Board or a provincial parole board may grant parole to an offender if, in its opinion,

(a) the offender will not, by reoffending, present an undue risk to society before the expiration according to law of the sentence the offender is serving; and

*(b) the release of the offender will contribute to the protection of society by facilitating the reintegration of the offender into society as a law-abiding citizen.*²²⁵

²²⁴ Roadmap, p. 109

²²⁵ CCRA Part II s.102 Criteria for granting parole. Section 101 sets out the principles for parole decision-making as follows:

101. The principles that shall guide the Board and the provincial parole boards in achieving the purpose of conditional release are

- (a) that the protection of society be the paramount consideration in the determination of any case;
- (b) that parole boards take into consideration all available information that is relevant to a case, including the stated reasons and recommendations of the sentencing judge, any other information from the trial or the sentencing hearing, information and assessments provided by correctional authorities, and information obtained from victims and the offender;
- (c) that parole boards enhance their effectiveness and openness through the timely exchange of relevant information with other components of the criminal justice system and through communication of their policies and programs to offenders, victims and the general public;
- (d) that parole boards make the least restrictive determination consistent with the protection of society;

The first criterium relates to the risk of harm should the person reoffend. The clause does not talk about the risk “of” reoffending but rather the risk “by” reoffending. In this way the Board must consider both the risk that an offence might occur and the seriousness of any such offence.

We should ask why it is that the first criterium does not set a zero tolerance policy for offending. The answer is given in the second criterium where it says that the Board must conclude that release under supervision will *contribute* to the protection of society by *facilitating* reintegration. The operative words here are “contribute” and “facilitate” – neither of which implies certainty. In short, the question that must be answered by the Parole Board in each case it hears is not just whether an offence might occur but whether it is less likely to occur while under supervision than on full release. It is the task of the Board to choose the least risky strategy because the “no-risk strategy” does not exist.

There is nothing in the legislative criteria that suggest that applicants must do something to “earn” release. Parole is not intended as a reward for compliance with institutional rules, participation in treatment, or positive attitude although the Board should and does consider all of these factors relevant to assessing risk. In the end, however, consistent with the human rights principle of least restrictive measure, the statutory mandate of the Parole Board is to assess only the relative risk to public safety should the applicant be released under supervision now or released at a later date without supervision.

Adding criteria that are intended to meet other purposes, such as prison management or to reward “good” behaviour, introduces objectives that are not related to public safety. Indeed, if parole is denied even though it is assessed as the best way to “facilitate” reintegration, public safety is actually reduced. The legislative rationale for parole is the long-term safety of the community, not to advance any particular agenda of the correctional system. It is, therefore, quite concerning that the Panel would make recommendations for parole granting that appear to introduce a whole additional set of criteria related to “earning” parole that are not necessarily related to risk that would not only make obtaining parole even more difficult but raise serious issues of implementation. Two of these additional problematic elements of earned parole relate to adherence to the correctional plan and the prospect of community employment.

The Panel recommends that:

additional criteria for granting parole would reflect the requirement for the offender to earn release ***through adherence to the correctional plan.***²²⁶

*Offenders must fully understand the consequences of not meeting correctional plan requirements with respect to access to penitentiary privileges **and conditional release**, and the consequences of reoffending while in the community on conditional release.*²²⁷ [Emphasis added]

(e) that parole boards adopt and be guided by appropriate policies and that their members be provided with the training necessary to implement those policies; and

(f) that offenders be provided with relevant information, reasons for decisions and access to the review of decisions in order to ensure a fair and understandable conditional release process.

226 Roadmap, p. 116

227 Roadmap, p. 117

*Case management strategies would include intensive and ongoing risk assessment and prediction; the development of **a comprehensive correctional plan that sets out a blueprint for the offender to move to gradual release to the community with a job or the strong likelihood of a job placement**; clear statements of the offender’s responsibilities and accountabilities for **following that blueprint to earn parole**; engagement of offenders in the parole process as early as possible and on a continuing basis; and preparation of offenders for release through more comprehensive community release planning.*²²⁸ [Emphasis added]

These additional elements of earned parole raise serious issues of implementation and accountability that undermine the Panel’s confidence that earned parole is an effective substitute for statutory release.

8.4 Employment as a Condition for Conditional Release

Throughout the section on earned parole, the Panel refers frequently to the necessity of employment after release suggesting that the likelihood of immediate employment would become a much more important criterion than it is now for release on parole.

*“... parole eligibility would be considered after assessing risk, assessing progress in addressing criminogenic, behavioural and skills deficits described in the offender’s comprehensive correctional plan, and assessing the community reintegration requirements, **including employment options when released** as outlined in the community release plan;*

*“... any release plan submitted to the NPB should include CSC’s consideration of **either the placement of the offender directly into a job or with a high likelihood of a job placement**”*²²⁹

*“The two key components of conditional release, day parole and full parole, must be reviewed to ensure they are aligned with the earned parole **and community employment approaches** and are fully supported by a community infrastructure that offers supervision, programming interventions, and service delivery. This will mean closer liaison with police services, provinces and municipalities, new and innovative supervision strategies, and comprehensive release planning that **continues the employment training and job-readiness programs started in the penitentiary.**”*²³⁰

While everyone would agree that employment after release is often important, the proposal to make employment an important factor for granting parole could have serious and unintended consequences. It is very difficult to arrange employment for prisoners or for prisoners to find their own employment while incarcerated. Even amongst those few employers who might consider employing a person straight out of prison, even fewer would be willing to promise a job without the opportunity to interview the individual, being able to assess his qualifications or character and not knowing when or if the person would become available. While having a job is an important advantage, requiring that a person have a job “or strong likelihood of a job placement” would be an insurmountable barrier to parole for the great majority. No feasible prison training or placement service would ever be able to meet the requirement for locating employment for more than a tiny

228 Roadmap, p.117

229 Roadmap, p. 116

230 Roadmap, p. 117

fraction of prisoners. Indeed the approach of the Panel to employment and employability is fraught with so many issues we have dedicated a chapter to this topic alone.

8.5 The Promise and Implications of an “Accountability Contract”

The Panel not only proposes that additional criteria be added for release under parole, they also propose what they call an “accountability contract”.

The Panel suggests that the comprehensive release plan be developed as an accountability contract between the offender and CSC with clearly defined expectations associated with well-developed milestones for the duration of the conditional release period.²³¹

At first this contract idea appears to relate only to expectations of individuals while under community supervision. If by “contract” the Panel means that those on release should have an explicit understanding of the expectations of them to remain on parole, then this is neither new nor problematic. However, taken in the context of the other statements and recommendations, the proposal is neither clear in its application nor are the implications adequately considered.

What is troubling about this concept is that the “contract” appears to have applicability to far more than simply “clear statements of offender accountability with respect to expected behaviour in the community.”²³² Indeed, the contract appears to apply throughout the entire sentence and be based largely on the correctional plan - a plan developed not by the Parole Board in the context of the legal criteria of the CCRA, but by institutional staff at the very beginning of the sentence.

Consider, for instance, the following statements:

*The Panel believes that particular emphasis will have to be given to the following key transition factors to ensure a comprehensive release plan is put in place, ensuring the **seamless blending of the offender’s institutional and community correctional plans**: [Emphasis added]...*

b) focus on the need for the extension of correctional interventions that link penitentiary program results with the identification of behavioural, educational and employment programs in the community,²³³

The implications of viewing parole as a contractual obligation which extends to decisions of the National Parole Board based on the successful completion of the correctional plan is inconsistent with the legislative criteria and principles for granting parole as set out in the CCRA. The Panel, with its proposed “accountability contract” fails to recognize that the National Parole Board is an independent body completely distinct from the Correctional Service of Canada. This is not an accident. Separation of release decisions from the operations of corrections helps to avoid the potential conflict of parole being used as a carrot by CSC for objectives that are unrelated to the criteria for release.

As noted earlier, the criteria for parole as set out in the CCRA relate to the risk to society by reoffending and the potential contribution of parole for successful reintegration into society.²³⁴ Award-

231 Roadmap, p.107

232 Roadmap, p. 106

233 Roadmap, p. 106

234 CCRA s.102

ing parole as a response to the completion of the correctional plan, while considered by the Parole Board as relevant to both risk assessment and reintegration potential, is not a sufficient or necessary independent criterium that can either justify the grant or denial of parole.

In the normal meaning of a “contract”, obligations flow in both directions. If one party meets the terms of the contract the other party is obligated to deliver on their reciprocal obligations. If completion of the correctional plan becomes an “accountability contract” that leads to a person “earning” parole, then clearly conflicts would develop with legislated principles that the Panel also appears to support. For instance, if a person was released on the basis of completion of the correctional plan but was not otherwise an acceptable risk, the principle of public safety would be violated. On the other hand if a person is denied release because they failed to complete the plan but were otherwise considered an acceptable risk, the denial of release conflicts with the principle of using the “least restrictive measure”. The National Parole Board cannot be obligated to make decisions on the basis of an “accountability contract” and certainly not one developed by a case management officer during the first few weeks of the sentence.

Even if we ignore the serious problem of the “accountability contract” conflicting with the criteria of the *CCRA*, it would put a substantial responsibility on CSC to provide the required programs with sufficient timeliness and quality to make it possible for prisoners to complete their obligations prior to their parole eligibility date. It would be both unfair and also a violation of CSC’s end of the contract if an offender was ultimately detained in prison solely because the programs were not available. Yet as we have noted earlier the Panel refrained from recommending in its menu of legislative changes a provision that would obligate CSC to deliver programs in a timely manner, likely because CSC would be either unable or unwilling to meet that responsibility, given that they have been chronically unable to meet parole eligibility dates for most short term and many other prisoners.

Clearly, the promise of a “contract” for parole in response to completion of the correctional plan is one that prisoners will immediately perceive as completely one-sided and empty rhetoric. They would understandably see it as a barrier to release rather than as an incentive. Hollow rhetoric about “contracts” and “earned” parole provide neither motivation nor reward and only contribute to prisoner cynicism that the proposals are intended to sound good to the public, who do not understand the implications, rather than be a means to help prisoners succeed.²³⁵

In the final analysis, it is very difficult to reconcile the notion of a contract with either “the protection of society [as] the paramount consideration in the determination of conditional release”²³⁶ or with the human rights principle of employing the least restrictive measure. Once again we see how human rights considerations, which limit the potential for the misuse of authority, and good corrections are complimentary concepts that the ideology and recommendations and of the Panel seriously threaten.

We are left in no doubt that the abolition of statutory release will have a huge impact on the federal prison population. The release mechanism that is used in two-thirds of all releases will be abol-

235 Our concern about an accountability contract being the basis of granting parole applies equally, and for the same reasons, to decisions to suspend or revoke parole.

236 *Roadmap*, p.118 Recommendation 61

ished, leaving those so affected to serve 50% more time in prison than is the case now. The Panel's minimises this impact by suggesting that their proposals for work and employment and the motivational effect of accountability contacts based on the correctional plan will result in a sharp increase in parole being granted and that will compensate for the restrictions on gradual release. This is little more than "pie in the sky" corrections. To compensate for their statutory release recommendations every prisoner would need to be released on earned parole before the two-thirds point in their sentence. The Parole Board would need to have a grant rate of almost 100%. We challenge any experienced correctional or parole administrator/decision maker to seriously argue that is a realistic scenario.

8.6 Implications for the Overrepresentation of Aboriginal Prisoners

While we have addressed the issue of overrepresentation of Aboriginal people in federal prisons in chapter 10 of this response, one very disturbing consequence of the Panel's proposal to abolish statutory release is the impact it will have on Aboriginal offenders. The overrepresentation of Aboriginal offenders in Canadian prisons has been condemned by the Supreme Court of Canada as a "national crisis" and "a staggering injustice"²³⁷. As the CSC Research Branch and the Correctional Investigator have documented, the grant rates at full parole for Aboriginal offenders fall below the rates for non-Aboriginal offenders, leading to Aboriginal offenders being released and supervised on statutory release at a significantly higher rate.²³⁸ The Panel's proposed abolition of statutory release would see a greater representation of Aboriginal offenders serving their complete sentences in prison, further increasing their over representation in federal custody, and thereby deepening the national crisis and intensifying the injustice. Yet nowhere in its *Roadmap* does the Panel give this implication any consideration. In light of our analysis in Chapter 10 a strong case can be made that the aggravating impact of the abolition of statutory release on the systemic discrimination facing Aboriginal offenders should in and of itself be sufficient reason to reject the Panel's proposal.

8.7 The Unspecified Cost of Abolishing Statutory Release

The Panel makes no effort to quantify the financial costs of its proposed abolition of statutory release. However, the Canadian Criminal Justice Association and the John Howard Society of Ontario reviewed the likely cost implications of abolition and provided the following calculation showing that the price for this change could approach one **billion** dollars²³⁹:

1. *In 2006-7, there were a total of 8,027 releases from federal institutions - 2,245 (28%) Day Parole, 168 (2%) Full Parole, 5,250 (65%) Statutory Release, 264 (3%) Warrant Expiry and 100 (1%) "Other" (death, transfer to other countries, etc)*
2. *The average length of supervision on statutory release was 6.6 months.*
3. *Assuming the worst case scenario, that is all current SR cases will only be released upon Warrant Expiry, we would be looking at an average increase of 2888 incarcerated inmates at any point in time*

237 *R v Gladue* [1999] 1 S.C.R. 688

238 See the Correctional Investigator's 2005-6 Annual Report and backgrounder at http://www.ocibec.gc.ca/newsroom/bk-AR0506_e.asp . see also <http://justicebehindthewalls.net/news.asp?id=74>

239 John Howard Society of Canada and Canadian Criminal Justice Association, unpublished, August 2008 .

(5,250 X 6.6 months/12 months). However, in an average year, about 40% are already revoked at some point during their statutory release. Assuming that on average, this happens after the half way point of their release period, some 20% would already be accounted for within the current cell occupation and would not require new cell capacity, leaving a net requirement for 2310 additional cells (2888 less 20 %).

4. It is not possible to predict how successful the new motivational, program, and educational initiatives may be at this time, so looking only at the worst case at this time for planning purposes, translates into dramatic cost increases for CSC.

5. Assuming that cell space is currently at, or close to, capacity an additional 2,310 cells will have to be brought on stream. The average construction period for an institution is 5 years so there could be a massive increase in current cell occupation norms in the interim.

6. An additional 2310 cells require 5 major institutions (using the UN standard of 500 per institution). Based upon the CSC estimates quoted in the Deloitte & Touche report of \$400,000 per medium security cell all-in cost, this would require an expenditure of approximately \$924 million.

7. The 2004-05 cost of keeping an inmate in a penitentiary was \$87,919. With this number, the annual costs of maintaining an additional 2,310 inmates would be \$203 million. With the average cost of community supervision at \$20,320 per offender, abolishing statutory release would lead to a reduction of \$47 million in the community, leaving the net cost to be approximately \$156 million per year.

8. We do not suggest that every offender currently released via SR would be detained until Warrant Expiry, however, for discussion purposes this does illustrate the potential, worst case costs. A more conservative assumption would be that approximately one-third of this group would be granted parole, given that the grant rate for Full Parole was 43% in 2006-07 and a significant portion of those released on SR were not granted parole. Even under this scenario, there would be an additional 1,525 inmates on average, requiring capital cost of \$610 million and additional operating costs of \$103 million.

While costs should not outweigh community safety, proposing huge expenditures of this nature without any evidence of increased community safety is irresponsible public policy, especially in the context of the lost opportunities that spending in this way represents. With just a fraction of this amount we could better address the issues of mental illness in prison and the community and make real progress in reversing the many impediments to Aboriginal reintegration.

8.8 Abolition of Accelerated Parole Review

Non-violent first time penitentiary prisoners are eligible for release under what is called “accelerated parole review”. Under the CCRA it is presumed that when certain eligibility criteria are met, the person will be granted parole unless the National Parole Board has reasons to believe that the person is likely to commit a violent offence before warrant expiry.

Accelerated Parole Review is a way to address the problem, identified by the Panel and many others including the Auditor General, where those serving short terms are effectively excluded from parole consideration because the time available before a parole hearing is not sufficient to complete the correctional plan. By pre-screening prisoners on the basis of being first-time penitentiary inmates convicted of a non-violent offence, the application process is expedited by having the re-

view take place without a hearing, and presuming release unless the National Parole Board has grounds, documented by CSC case managers, to override the presumption.

Ironically, those who are least likely to be released on parole are those who are serving short federal sentences simply because there is insufficient time to be assessed, placed in an appropriate institution and complete the required programs prior to their parole eligibility date. The Panel's proposal to abolish accelerated parole review removes the means that was developed specifically to address this problem. The Panel's expectation that people complete their "correctional plan" prior to being considered for earned parole only serves to ensure that those serving short sentences will remain in prison longer simply because it is not possible to be assigned and complete the correctional plan in the time available.

The Panel makes other recommendations that it thinks might speed up the initial assessment and programming of short-term offenders, but those proposals are neither new nor adequate to address the problem. The inability of CSC to process prisoners and have them complete their correctional plan before their parole eligibility date was the focus of Auditor General reports as far back as 1996²⁴⁰ and has already been the subject of considerable scrutiny and effort by CSC. The fact remains that the time available for those serving shorter sentences to complete their plan, especially with the additional components like work readiness proposed by the Panel, will be impossible to achieve.

The Panel, in an apparent major contradiction acknowledges that it "will require a longer period of time for the preparation of the plan and should be the result of a collaborative approach between institutional and community parole officers."²⁴¹ Clearly these new expectations will undermine the prospect of parole for those serving short prison terms.

The net result is that these non-violent offenders will serve their full sentence and be released without support of supervision into the community. There is no logic or evidence provided by the Panel to support its contention that the elimination of accelerated parole review does not address a real and substantial problem or that its loss could be compensated for in other ways.

8.9 An Implied Alternative

The Panel suggests that the abolition of statutory release could in some way be achieved without sacrificing the availability post-release supervision.

There was common agreement that if statutory release was eliminated, conditional release options would have to continue to support the benefits of gradual release to the community. Particular concern was expressed about the impact of releases directly from penitentiaries of offenders who had reached their warrant expiry dates, meaning they would not be under the supervision of CSC in the community.

240 Auditor General of Canada, Correctional Service of Canada – Reintegration of Offenders, Chapter 30, November 1996

241 *Roadmap* p.107

The Panel follows this declaration with a quote from one of the authors, Graham Stewart, which was presented as a reason to retain statutory release but used in the *Roadmap* to imply endorsement of post-warrant supervision – a complete distortion of his position.

The Panel goes on to conclude that:

As a consequence, the Panel believes that a review is required of how community-based interventions would be retooled to meet changing requirements for supervision and service delivery, while appropriate measures are taken to prepare the offender for the warrant expiry.

We are left to wonder what “retooling” would mean in the context of forcing a person to submit to supervision and possibly imprisonment – after the sentence had completely expired. Further we are mystified as to why the Panel would presume to impose on free people a measure that it had just proposed abolishing on the basis that it was not effective.

8.10 Conclusion

In 1969 the Ouimet Committee acknowledged that conditional release was no longer based on clemency. It was not something that was given on the basis of *desert*, but rather on the basis of *risk*. We introduced statutory release – not because prisoners *deserve* it but because the community *needs* it to maximize the potential for successful reintegration without subsequent new offenses.

The *CCRA* stipulates that the grant of parole is determined, independently of *CSC*, by the National Parole Board on the basis of the risk the individual presents to the community – not on whether they think he *deserves* to be released because of completion of the correctional plan. Many people are low risk whether they complete their correctional plan or not. Conversely, others continue to be viewed as high risk even after completion of all aspects of their correctional plan. The principle of “least restrictive measures”, when considered in combination with the first principle of public safety, requires that the Board focus entirely on risk – not desert.

Risk is not a one-sided calculation. The risk of release under supervision is balanced against the risk associated with release to the street without supervision or support. This balance cannot be addressed thoughtfully by relying on notions of “earned” parole. Misusing statistics to create exaggerated fears while ignoring the mass of contrary evidence mocks serious public policy development.

To abolish statutory release and accelerated parole review would have profound but unexplored implications for the terms and costs of imprisonment. The Panel’s recommended approach contradicts the Panel’s own support for conditional release and undermines, rather than strengthens, public safety.

9 Education, Employment and Human Rights

9.1 Introduction

Before addressing the Panel's proposals for prison work and education, it is worthwhile stating why we think these subjects have relevance to our human rights analysis of the Panel's recommendations. After all, surely useful prison work and education programs are positive initiatives that require no further justification.

If human rights are premised on respect for human dignity, the provision of opportunities for people to advance their capacity to live constructively in free society is not only consistent with but essential to that respect. Respect for such needs is reflected in the United Nations Standards for the Treatment of prisoners (see inserts).²⁴²

We may put a person in prison as punishment, but when we do so we also bring them into our care. Imprisonment by its nature makes people vulnerable. Prisoners have no substantial control over their most basic needs such as the quality or sufficiency of their shelter, food or medical care and there is little that they can do to protect themselves from the threat of harm from others. A prison system that ignores such fundamental needs is disrespectful of the human dignity of the individual and in doing so violates the person's human rights.

While basic needs relating to food, shelter and safety are necessary to survive, they are not sufficient for a meaningful life. Human beings cannot live for long in isolation even when their basic survival needs are met. Elsewhere in this paper we discuss the impact of segregation on individuals and its ability to drive a person to death or insanity or both. Segregation deprives prisoners of two necessities of life – social interaction and self actualization. Our humanity is only experienced in relation to others. Relationships define who we are and our place in this world. Without interaction with others, friendship, love, self esteem, respect and generosity

57. Imprisonment and other measures which result in cutting off an offender from the outside world are afflictive by the very fact of taking from the person the right of self-determination by depriving him of his liberty. 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.

58. 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.

²⁴² Standard Minimum Rules for the Treatment of Prisoners Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977 at

http://www.unhcr.ch/html/menu3/b/h_comp34.htm

cannot be received or given.

Self actualization relates to being able to grow and develop through learning, creating and producing. It involves opportunities to make choices about one's future. Removing these opportunities is an assault to one's humanity. Having a person in our care means that we must take steps to ensure that their human needs are met beyond those that relate only to physical survival.

If the punishment is intended only to limit one's freedom – not to allow the person to starve or be killed, to go insane or lose their family ties, then prisons must ensure that the potential for these unintended consequences are minimized. Hence the law provides that decisions affecting prisoners use the least restrictive means. The law also obligates prison officials to make available those aspects of social life that we consider necessary for human development.

59. To this end, the institution should utilize all the remedial, educational, moral, spiritual and other forces and forms of assistance which are appropriate and available, and should seek to apply them according to the individual treatment needs of the prisoners.

Education in the community is both free and mandatory for children up to age 16. Medical care is provided to all. Welfare meets basic needs for food and shelter and police services are intended to protect us all from harm. We consider those and other related services to be fundamental to a society in which we can thrive. Providing such services to us all reflects our collective respect for our human dignity as individuals. Those same standards of service must, logically, also apply in our care for prisoners. To do less degrades their humanity, their human dignity and their human rights. It also jeopardizes the successful reintegration of the individual into the community.

Consistently applying community service standards to prisoners is both difficult and costly. The costs alone challenge us to use imprisonment only to the degree that is absolutely necessary. We try to achieve this minimal use of imprisonment through sentencing principles and through release mechanisms that allow people to complete their prison sentence in the community.

Most would agree that prison work programs, education and gradual release are central to good corrections. However, the three initiatives do not operate in isolation: education improves the person's prospects for meaningful work and both education and work skills improve the person's prospect for gradual release. Work and education are more than just pastimes intended to keep prisoners occupied. As such the quality and feasibility of the work and education programs is crucial if prisons are to do more than simply detain. Recognizing that work and education programs can vary substantially in quality and impact, we must consider the following questions when examining current and proposed approaches to work and education programs:

60. (1) The regime of the institution should seek to minimize any differences between prison life and life at liberty which tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings.

- Do the work and education programs change for the better the person's ability to reintegrate into society?
- Do the programs improve the person's prospects for being released on parole?
- Are resources used to their greatest effect with these programs?

The importance of the relationship between work, education and successful reintegration are not lost on the Panel. They acknowledge that their proposals to abolish accelerated parole review and statutory release would have very substantial implications for expansion of prison populations unless the education and work outcomes are substantially enhanced from their current levels and prove to be effective both in terms of recidivism and in terms of the Parole Board being to release the person under community supervision.

A sharp increase in the prison population threatens the correctional abilities of the entire system. When populations increase suddenly, overcrowding is the inevitable result as it takes years to build and prepare a new prison. Overcrowding is more than double bunking cells – problematic as this is, Overcrowding makes access to programs, counselling and visits more difficult. Staff and prisoners know each other less well and become more suspicious of the other. Simple solutions for brewing conflicts such as moving a prisoner from one range to another are unavailable. Prisoners are seen as more threatening and increased pressure is created to assess them as dangerous thereby requiring higher levels of control and security. This apprehension, along with the inability to access programs, makes it more difficult for prisoners to obtain parole – thereby adding further to their frustration and the population size. Overcrowding begets more overcrowding. In this context work and education become more difficult to provide as staff, space and prison movement become increasingly restricted. The system can quickly grow out of control and will increasingly be forced to rely on static control measure to maintain security. Development programs intended to attain successful integration into both the prison and community go by the wayside.

Good and effective work and education programs are essential but will the programs proposed by the Panel be sufficient to compensate for the problems being created by their other proposals for statutory release and parole? If not, the conditions of prisons will degrade quickly, costs will rise sharply and those being released will be less likely to be successful - all at the expense of the community in both dollars and victimization and to the prisoner in lost years of freedom.

Wasting lives through ineffective corrections is inhumane when other ways of achieving effective corrections are known. Policy that would presume to set a transformation agenda for corrections would be expected to draw on that knowledge through extensive reference to research and best practices. The human rights of prisoners cannot be respected if they are used as guinea pigs in an ideological experiment. Anything less than a plan well grounded in evidence risks a major step backwards in the care of those dependent on us for their rehabilitation and an unacceptable disservice to the public that rightfully expects that their safety will be enhanced through effective corrections.

As we will document, the Panel would have CSC embark on a set of work related initiatives that are costly, unresearched and likely unrealizable. Yet the Panel not only would subordinate existing education initiatives to its flawed work strategy but pays scant regard to an education strategy that is cost effective, reflects community standards, is realistic, well researched and consistent with the core values of human rights.

9.2 Employment and Employability

The terms of reference for the Panel include the expectation that they would consider “The availability and effectiveness of work programs, including impact on recidivism;”²⁴³ Although only one of a number of areas identified in the Terms of Reference, work readiness, training and placement both in prison and the community clearly became a substantial focus and priority of the *Roadmap*. If implemented as described by the Panel, the recommendations relating to work, training and placement are likely to have enormous cost implications – rivalled only by the proposal to abolish statutory release. The recommendations also have very substantial implications for prison administration, program management, community supervision and decisions to grant parole.

The history of corrections is filled with work or work-training initiatives that in their day were thought would reduce recidivism based on the common-sense idea that to be successful after release one needed a source of livelihood and a productive place in society. It is difficult to see how ex-prisoners can stay free of crime indefinitely without a way to sustain themselves and this view is reflected from the start of the report when the Panel states that “without the means to earn a living upon release, an offender’s rehabilitation is jeopardized.” However, as the Panel notes “employment has been eclipsed as a priority over the past decade by programs that address other core needs (e.g., substance abuse and violence).”²⁴⁴

The Panel makes no attempt to trace the reasons for the drift from historically popular focus on employment skills to those relating to cognitive skills, mental health, addictions, anger management, literacy, education and other programs developed over the last few decades. Are we to understand from the Panel that these changes were not made on the basis of evidence of better results? It would appear that the Panel is simply not familiar with the reasons for this very clear and deliberate shift– reflected repeatedly in the “what works” literature that CSC has embraced.²⁴⁵ Not only does the literature establish clear criteria for effective programming and the focus of that programming, it cautions that misdirected initiatives can actually make matters worse.

*Treatment interventions that do not adhere to any of the three principles (that is, they target the non-criminogenic needs of low risk offenders using non-cognitive-behavioural techniques) are actually criminogenic! This situation is particularly exacerbated when the treatment is given in residential/custodial settings (we presume because the offender cannot escape from the well-intentioned but poorly designed treatment).*²⁴⁶

One might expect that the Panel would be aware of the problems that arose from simple assumptions in the past about effective programming and be sensitive to the fact that often ideas that seem to make sense intuitively often do not work as expected in the unusual world of the prison. Further it would be reasonable to expect that the work of the Panel would be strongly influenced by the research in recent decades – much of it by the Department of Public Safety and CSC that

243 *Roadmap*, p. iii

244 *Roadmap*, p. 47

245 For an overview of the development of effective treatment that has been a continuing theme within CSC over recent decades see Bonta, J., Andrews, D. Risk-Need-Responsivity Model for Offender Assessment and Rehabilitation 2007-06, Public Safety Canada, http://www.publicsafety.gc.ca/res/cor/rep/fl/Risk_Need_2007-06_e.pdf

246 Risk-Need-Responsivity Model for Offender Assessment 2006 -2007 p.12

builds an increasingly stronger case for effective program design that works to reduce recidivism. For that reason it is essential that the Panel, to the degree that it takes a different course, would marshal evidence that supports the notion that pre-release preparation for work, prison-based employment and job placement on release for the majority of prisoners is technically possible, financially and operationally feasible and effective in reducing recidivism. Unfortunately, here as with so many of their other recommendations, they do not make an evidence-based case and seem oblivious to the implications of the direction they set.

In the words of the Panel:

*The Panel has been presented with evidence that programs based on sound research and theory do work and ultimately reduce reoffending. However, the Panel did not witness any extensive CSC work on integrating these programs with job readiness programs. In fact, employment and employability programs appear to have been placed on the back burner by CSC and not given the attention that they require.*²⁴⁷

Later in their report:

*The Panel notes the lack of current CSC research on what works and doesn't work with respect to the contribution of work to positive reintegration outcomes. However, the available research did confirm what other correctional jurisdictions have found: that offenders need knowledge and skills that make an offender job ready in the eyes of employers. Furthermore, the Panel notes a lack of current CSC evaluation and performance information that it could turn to for assistance in determining the success of current employment interventions on reoffending.*²⁴⁸

The Panel seems to think that the CSC Research Branch has placed relatively modest amounts of their resources into employment and training research simply as an oversight rather than a deliberate strategy to focus research in those areas that their existing research and that of other jurisdictions see as being most promising. So certain it is of its conclusions, the Panel actually proposes that the researchers go out and prove what the Panel is convinced must be there - somewhere.

*Consequently, the Panel suggests that CSC review and rebuild its research and evaluation frameworks to demonstrate the effectiveness of its employment initiatives in meeting labour market requirements and targeted employer requirements, and its contribution to reducing reoffending.*²⁴⁹

It is remarkable that the Panel would propose far-reaching changes *first* and *then* ask the CSC Research Branch to find the evidence to justify those changes. Surely this completely distorts the very notion of evidence-based policy into something that could only be described as policy-based evidence. Further, CSC has already conducted some research on their employment initiatives as well as reviews of research in other jurisdictions that appears to have been ignored by the Panel.²⁵⁰ What is proposed by the Panel seems to simply underscore their ignorance of both effective programming in accordance with the literature on “what works” and the difficulty involved in conduct-

247 Roadmap, p.37

248 Roadmap, p.77

249 Roadmap, p.77

250 Gillis, Christa A., Offender Employment Programming in Compendium 2000 on Effective Correctional Programming, Chapter 10, Eds. Motiuk, Laurence L and Serin, Ralph C. Research Branch, Correctional Service of Canada, p 16 <http://www.csc-scc.gc.ca/text/rsrch/compendium/2000/index-eng.shtml>

ing meaningful research on large complex programs being applied to individuals without clear and precise needs and outcomes being identified. The effectiveness of programming depends on whether the programming actually targets the criminogenic needs of the prisoner.²⁵¹ Large scale employment programs may include many individuals for whom employment is not the most important or even relevant factor that influences their criminal activity. Being one of the most expensive programs,²⁵² the potential for serious cost-benefit misjudgements in relation to employment initiatives is substantial.

The focus and criteria for research on employment initiatives was articulated by Dr. Christa Gillis and published by the Correctional Service of Canada. In her article she conducted an extensive review of the CSC and international research literature relating to employment and while positive about the potential benefits of employment initiatives she clearly was a long way from suggesting that CSC was ready for massive changes to its approach to offender employability initiatives.

It can safely be asserted that there is a resurgence of interest in employment as an important factor in the safe reintegration of offenders. However, the systematic study of employment as a risk and need factor is still in its infancy. Although we know employment is important in contributing to outcomes for offenders, we are in the preliminary stage of understanding the processes and factors that are important to employment success and community reintegration.

This parallels the status of risk and needs assessment in corrections. Our knowledge of risk is good, but our understanding and ability to effectively intervene to decrease criminogenic needs is constantly evolving as our knowledge base increases. Employment, as a subset of offender needs, constitutes an important area of study. Once an enhanced understanding of the mechanisms and processes associated with employment stability is attained, this information may be used to guide the development of intervention strategies, both at the institutional and community level. Moreover, once this level of understanding has been achieved, subsequent intervention efforts should focus on responsivity issues (including gender, ethnicity, motivation, and different learning styles), which have received relatively little exploration to date in the correctional literature.²⁵³

Knowing the difference between correlation and causality is crucial to creating sound policy proposals. Although few would dispute that there is a relationship between success after release from prison and attaining employment, there is considerable uncertainty about whether the relationship is one of correlation, causality or perhaps both. While the Panel assumes that employment is a major, if not *the* major contribution to success after release, the case can also be made for the converse – that those who address the other barriers to community reintegration are better able to find and keep work. Understanding which comes first is crucial. The Panel assumes a causal relationship based on what appears to be an ideological leap of faith:

251 Bonta, 2007 *op.cit.*

252 See Auditor General Chapter 10—Correctional Service Canada—Rehabilitation Programs for Offenders 1996 “Taking these operating losses into consideration, the cost of a CORCAN job was approximately \$13,000 in 1994-95. (CORCAN forecasts a cost per job of approximately \$11,000 for 1995-96.) By comparison, vocational training and basic education cost about \$7,500 in 1994-95”.para. 10. 59 http://www.oag-bvg.gc.ca/internet/English/parl_oag_199605_10_e_5041.html#0.2.Q3Q5J2.Q25UY6.JXSLQE.DA

253 *Offender Employment Programming in Compendium 2000* p. 16 <http://www.csc-scc.gc.ca/text/rsrch/compendium/2000/index-eng.shtml>

*the Panel believes that life inside a penitentiary should promote a positive work ethic.*²⁵⁴

Most thoughtful observers of the correctional milieu would likely support the development of carefully evaluated projects intended to answer the difficult questions identified by Gillis. Most would also recognize that work is a regular part of necessary prison activity. Few would oppose efforts to improve the quality and relevance of that work to improve the experience of the prisoner. As we heard at our forum at Matsqui Institution, prisoners would welcome the opportunity for meaningful work, particularly if it helped in their job search after release, in preference to the numbing boredom of doing time. But what the Panel proposes goes far beyond what can be substantiated by the research or supported by a cost-benefit analysis. The proposals are enormous in scope, would involve huge expenditures that might well drain resource from other necessary and proven initiatives, and conflict with, rather than enhance gradual release.

9.2.1 Scope

Throughout the report the Panel emphasises the “changing offender profile” and in so doing paints the picture of a population with large numbers of violent persons with serious mental health, addiction, social deficits, and a plethora of other barriers – all needing to be treated by CSC under shorter and shorter time frames. They paint a picture of recalcitrant and unmotivated prisoners who often seek out segregation to avoid addressing their correctional plan that the Panel thinks is already undemanding. Having proffered this description of the prison population as a foundation for their review, the Panel then claim to have seen examples

*that demonstrate that **basic** education and specific skills **can guarantee immediate employment** and can offer a solid base that an employer can use to build increasing expertise through on-the-job experience and training.”²⁵⁵ [Emphasis added]*

Based on their discovery of these unidentified magical programs, the Panel then places enormous expectations on CSC to make employment during and after release a priority - apparently unfazed by the fact that their recommendations are breathtaking in their scope, complexity and cost. The scope of their proposals is, perhaps, best illustrated and made self-evident by simply bringing them together in one place. The Panel proposes that every aspect of prison life from initial assessment to parole would involve a major focus on employment.

The Panel sees the refocusing of CSC to an employability–employment model that prepares offenders to be ‘skills-ready’ for the labour market as a key priority in a new integrated approach to work. Work-oriented programs must play a key role in CSC’s rehabilitative approach. CSC must move ahead to reorient its program base to include pre-apprenticeship and apprenticeship accreditation programs that are developed and sanctioned by recognized outside organizations.

The new approach should ensure:

- *employability becomes an integral part of the offender’s correctional plan at intake assessment;*

254 Roadmap, p. 20

255 Roadmap, p. 47

- *the implementation of the plan includes penitentiary program integration (linking co-educational, vocational and/or apprenticeship and employability programs, and work assignments);*
- *pre-release planning is linked to opportunities for community employment; and*
- *community employment is directly linked to employer-generated job opportunities.*²⁵⁶

To achieve the “refocusing” of CSC the Panel proposes that CSC should substantially expand the resources and mandate of CORCAN as well as its dependence on CSC for financial support:

CORCAN’s capacity to respond to market opportunities for products and services varies significantly by region and penitentiary. The Panel notes that without investment in new capacity and increased markets, CORCAN faces a significant challenge in generating sufficient revenues to support investment strategies that would create employment opportunities for offenders and offset the costs of employability and employment training.

*The Panel questions whether CORCAN can continue to balance revenues and expenditures to provide future employment and training requirements under its current operating model. The Panel questions whether CORCAN’s prime objective is sufficiently focused on its core responsibility to produce fully trained and job-ready offenders ready for release to positions in the community.*²⁵⁷

Education programs should be tied almost exclusively to employability:

The Panel has indicated its belief that education and employment are key cornerstones of the successful reintegration of offenders to the community. The ‘stove-piped’ environment currently associated with the delivery of these programs must be changed. Offenders must be provided with the best portfolio of knowledge and skills that prepare them to find and keep jobs after release into the community. At the same time, offenders must be motivated to participate in these programs by introducing an increased sense of purpose—the ability to be employed.

The Panel also recommends that these educational programs be reviewed and integrated with initiatives that are being undertaken to provide employability and employment skills for offenders.

*In this section, we focus on ensuring employment becomes an integral part of the correctional plan, is linked to other programs (particularly education and skills development), is an integral part of pre-release planning and is linked to employer-generated job opportunities in the community.*²⁵⁸

The Panel would require CSC to make employment available to large numbers of prisoners prior to release and after release:

*This will mean closer liaison with police services, provinces and municipalities, new and innovative supervision strategies, and comprehensive release planning that continues the employment training and job-readiness programs started in the penitentiary.*²⁵⁹

The Panel would like to see CSC review and refocus Aboriginal community support initiatives towards employment for ex-offenders re-entering Aboriginal communities already suffering with enormous problems of unemployment:

256 Roadmap, p. 70

257 Roadmap, p. 49

258 Roadmap, p.68

259 Roadmap, p.117

*Successful Aboriginal employment initiatives can only be realized if CSC works in close cooperation with federal government departments and is an integral part of the government's initiatives to identify Aboriginal solutions by Aboriginal communities.*²⁶⁰

*A primary objective for Aboriginal communities must be the employment of offenders returning to their communities.*²⁶¹

*In order to develop a longer-term strategy on community release, CSC should re-examine the interrelationships among the use of CCRA Section 81 (Healing Lodges) and Section 84 Agreements (supervision by an Aboriginal community) and the use of community correctional facilities. This review should include the role of these release alternatives in supporting the Aboriginal offender in seeking, finding and keeping a job.*²⁶²

*The Panel suggests that CSC work closely with the National Aboriginal Board in pursuing economic measures that help the reintegration of Aboriginal offenders to their communities by creating employment opportunities.*²⁶³

The Panel recommends that CSC/CORCAN focus on building formal relationships with employers to expand the employment opportunities for offenders. The Panel recommends the following specific priorities in this area:

- a) CSC redevelop its Aboriginal Employment Strategy focusing on building economic opportunities for Aboriginal community-based enterprises that support concrete employment opportunities for Aboriginal people;*
- b) CSC and CORCAN work with a Provincial Building and Construction Trades Council or another similar entity to create a pilot project that creates a pre-apprenticeship and/or apprenticeship program for offenders that leads directly to employment on release;*
- c) the Panel recommends that CSC and CORCAN work with the Saskatchewan Construction Association in establishing apprenticeship opportunities for young Aboriginals and opportunities that could be provided specifically to Aboriginal offender;*
- d) after evaluation of the above noted pilot and building on best practices, forge other such partnerships in other regions; and*
- e) CSC re-positions the recommendations identified above with respect to reassessing the National Employment Strategy for Women Offenders.*²⁶⁴

The Panel proposes that CSC develop transitional employment through the private sector for offenders on release – in particular with building trades that, at the time the report was written, were in a boom cycle:

As part of the community supervision and support process, CSC should ensure that opportunities for transitional employment for offenders have been identified and are in place. CSC will have to strengthen its labour market ties by ensuring employers are engaged prior to release and ready to accept pre-screened offenders for immediate employment.

260 Roadmap, p.74

261 Roadmap, p.85

262 Roadmap, p. 88

263 Roadmap, p.75

264 Roadmap, p.78

CSC should strengthen its partnerships with various employers, associations, unions, universities and colleges, and private sector firms, to provide transitional support for offenders on conditional release leading to full-time employment.

The Panel believes that these strategic partnerships can start by identifying opportunities related to the building and construction sector.²⁶⁵

CSC would be required to anticipate and plan for employment needs in the community:

In light of the fact that 50% of employable women on conditional release in the community are not working, particular attention must be paid to and integrate transitional employment requirements with CSC's enhanced community supervision and intervention infrastructure for women.²⁶⁶

The Panel recommends CORCAN must pay particular attention to:

- a) integrating employability/employment initiatives and correctional and educational programs within a re-structured work day, and*
- b) focusing on preparing offenders to be skills-ready (vocational/ apprenticeship) for national and local labour market opportunities.²⁶⁷*

As discussed in more detail in the section of this response entitled “Earned Parole”, the expectation of the Panel appears to be that the National Parole Board would, contrary to their own legislated criteria, make the likelihood of employment a crucial criterion for release on parole

The institutional and community case management processes should be more closely linked to develop a comprehensive community release plan that considers employment as a key priority.²⁶⁸

Finally, there is a requirement to work in conjunction with the National Parole Board to determine how employment will be factored into decisions for and conditions of release.²⁶⁹

The implementation of the enhanced strategy should respect the positive benefits that can be demonstrated with gradual, job-focused release. The principle should guide CSC in ensuring that every effort is made to support offenders in actively and successfully engaging in their correctional plan to reduce their risk to reoffend and consequently improve their eligibility for release. The two key components of conditional release, day parole and full parole, must be reviewed to ensure they are aligned with the earned parole and community employment approaches and are fully supported by a community infrastructure that offers supervision, programming interventions, and service delivery.²⁷⁰

CSC, and presumably the NPB, would redirect those being released from their home destinations to those areas where employment opportunities appear to be better –apparently assuming that employment possibilities are more important than family or community support in reducing recidivism. They also seem to ignore the fact that prisoners on release are entitled to go to their home or other community provided that destination does not present serious risks of reoffending.

²⁶⁵ Roadmap, p.72

²⁶⁶ Roadmap, p.76

²⁶⁷ Roadmap, p.77

²⁶⁸ Roadmap, p.71

²⁶⁹ Roadmap, p.72

²⁷⁰ Roadmap, p.117

Particular attention will have to be given to the availability of employment as a key determinant of location of release. It is important to recognize the disparity between the home residences of returning offenders and the location and availability of skill-appropriate jobs, often defined as a 'spatial mismatch.' The consideration of this disparity is fundamental in building both a short-term and longer-term community transition plan for the offender and requires attention in identifying job opportunities for offenders in general.²⁷¹

CSC would be expected to focus on the readiness of short term offenders for employment:

The needs of other groups of offenders should also be considered. For example, CSC staff indicated that offenders with short-term sentences and younger offenders need significantly more support to make them employment-oriented and job-ready.²⁷²

The Panel expects that CSC would require that community agencies like halfway houses "retool" for employment support:

CSC should re-evaluate the support structures in the community, including CORCAN community employment offices and community residential facilities, to ensure they can meet the challenges posed by an offender's reorientation of resources toward employment.²⁷³

The Panel also recommends that CORCAN support the job and skill needs of offenders on conditional release in the community and that CSC/CORCAN:

- a) identify approaches to strengthen release planning, by 'bridging' the offender to an available job in the community by ensuring the offender's job-readiness status is effectively matched to community support initiatives;*
- b) ensure that opportunities for transitional employment for offenders have been identified and linked with the responsibilities of community correctional centres and halfway houses, and*
- c) ensure that CSC has developed relationships with employers, to provide a seamless transition of pre-screened offenders from the penitentiary to immediate employment.²⁷⁴*

The institutional and community case management processes should be more closely linked to develop a comprehensive community release plan that considers employment as a key priority. There are benefits associated with extending the time available for this process to facilitate improved communications between institution and community parole officers and ensure the offender's job-readiness status is effectively matched to community support initiatives and employment prior to release.²⁷⁵

CSC should expand the prison work day from 8 to 12 hours in order to permit sufficient time for both program activity and work:

...the availability of offenders for employment is often limited by penitentiary routines, competing requirements for program participation and related resourcing constraints.²⁷⁶

271 Roadmap, p.72

272 Roadmap, p.70

273 Roadmap, p.71

274 Roadmap, p.78

275 Roadmap, p.72

276 Roadmap, p.48

We support the benefits of increasing the number of available productive hours and note that this change has resource implications with respect to operating systems and related resource allocations.²⁷⁷

9.2.2 Feasibility

While some or even most of the initiatives proposed by the Panel could be beneficial, together they would require a massive influx of new money to implement. Even with unlimited funds, some would be logistically near impossible to achieve. The Panel does not address the financial or logistical implications to any serious degree – a flaw that seems even more glaring when the current economic downturn and the new economic reality of continuing and increasing government deficit are considered. Nor is the employment of ex-prisoners likely to become a priority for government spending or the private sector in the face of increasing unemployment generally.

A significant increase in the size of prison populations would make it extremely difficult for CSC to retain the current programs as they exist, let alone engage in massive expansion. The lack of space in programs, already a barrier to achieving prisoners' correctional plans, can only become much worse. In fact, the Panel does not take into account the anticipated prison population increase to be created by new legislation that introduces long mandatory minimum sentences for a whole range of offences and barely considers its own recommendations to abolish statutory release and accelerated parole review. This is truly a troubling omission for a report that purports to be creating a roadmap for the future.

The Panel's only attempt to address the overwhelming logistical and cost problems likely to be faced by substantially increased prison populations falls woefully short of being a basis for serious public policy decision-making.

The introduction of a new parole or release system could affect the size of the incarcerated population because of potential increases in time served. However, a new focus on employability and employment could have an opposite effect—the effectiveness of programming both inside and outside the walls would likely lead to a reduction in reoffending and a consequent reduction in the return rate of offenders to a federal penitentiary. While the Panel believes that the overall impact will be a reduction in reoffending, CSC, in conjunction with NPB, should develop impact statements that define a time frame for management—preparing for and changing legislation and then applying the legislative change—and should establish cost estimates for a phased implementation of the Panel's recommendations. These estimates should be fully integrated with the Panel's recommendations on the introduction of regional complexes.²⁷⁸

No evidence or experience in other jurisdictions is presented that would give any reason to support the Panel's "beliefs".

9.2.3 Logistics

Prisons are a difficult place to create meaningful work let alone the development of specific work skills for a substantial portion of the population. Real work requires the production of products or

²⁷⁷ Roadmap, p.63

²⁷⁸ Roadmap, p.118

services that are valued. They must be relevant to market needs and professionally made and/or delivered. Prison work tends, therefore, to focus primarily on either its training value, its commercial value, or simply its value in keeping prisoners occupied. If the focus is on training the program will employ unskilled workers or those with employment issues. It is very difficult to produce a commercially viable product with unskilled workers. If the focus is on the production of a commercially viable product, then the work force needs to be made up of primarily competent staff – people who already have skills and, therefore, might not actually reduce their risk of recidivism because of the work experience - although they might prefer this work to help pass time. If the focus is on keeping people occupied, then the efficiencies of automation and scale of production are counterproductive to the primary goal of creating work, the antithesis of what one expects to find in the private sector.

Creating meaningful work for unskilled individuals is difficult and expensive. Doing so in prison where there are competing demands for space and time is particularly difficult. Developing a variety of work placements that train individuals in skills that are appropriate to their abilities requires a great diversity of programs. If the skill development is to continue throughout the sentence, then similar opportunities need to be available in all institutions to accommodate frequent inter-institutional transfers. There are huge capital costs for equipment. There is a need to hire staff with the expertise to teach particular skills. If the employment and training is to be consistent with demand of employers in the community, the programs and staff will need to be constantly adapting and changing.

In short, there are a plethora of factors relating to the needs and abilities of the prisoners, the physical space and capacity of institutions, staff abilities and the workforce needs in general that conspire to defeat major work and training initiatives that are intended to affect a substantial portion of the prison population. The Panel acknowledges that CORCAN, the primary initiative to provide more meaningful work experience in prison, today can employ only about 15% of the population²⁷⁹. While it is beyond the scope of this review to elaborate on all of these factors and their applicability to the *Roadmap* recommendations, the identification of these formidable problems should at least give some cause for reflection and consultation on the Panel's recommendations. Instead of mature reflection or deep consultation with the NGO communities who have spent lifetimes on reintegration strategies we find CSC's immediate endorsement of all of the *Roadmap's* recommendations.

9.2.4 Conclusion

The proposals of the Panel reflect the complete opposite of what one might expect of an evidence-based approach to prison rehabilitation. We should expect that the evidence for effectiveness for their employment focus would be clearly identified first, followed by a feasible strategy for implementation. That strategy would include cost implications. Instead, the Panel first recommends "transformative" changes for CSC with employment as a keystone element, and then proposes that CSC develop hitherto unavailable "evidence" that will demonstrate the effectiveness of their proposals to reduce recidivism for a large proportion of offenders. Only then do suggest that CSC begin

²⁷⁹ *Roadmap*, p.45

to estimate the costs and impact of their proposals as they proceed with the implementation of the recommendations.

In fact, without any of the evidence, implementation strategy or costs addressed, and in the face of contrary considerations, CSC announced that it is fully committed to the implementation of the Panel's recommendations. Yet it is difficult not to conclude that the prospect of success, as the Panel seems to envisage it, is remote while the costs are likely to be enormous. It all looks remarkably like another example of what has been termed 'faith based' criminal justice policy.

Minister Stockwell Day, the same minister who appointed the Panel and determined its terms of reference, announced upon unveiling the Government's legislation to expand the list of gun-related crimes subject to mandatory minimum penalties, and dramatically lengthen sentences for such offences: "We believe there will be a deterring effect from getting serious about serious crime." Journalist Dan Gardner, in critiquing the legislation in light of the available research that showed little if any support for a deterrent impact of similar legislation in other jurisdictions, responded:

The government "believes." And as every man of faith knows, belief can conquer even the mightiest army of facts. But for those of us in the reality-based community -- the famously dismissive phrase of a Bush official -- belief isn't good enough. We expect policy to be supported by facts and research. Perhaps that makes us lesser men and women, but we can't accept something as true simply because it's been given Stephen Harper's benediction. So where's the evidence that the government's radical, U.S.-style approach to criminal justice will make us safer? You won't find it on its website. There are lots of bold claims, of course. But in the press release and background information, there isn't a word about evidence.

Not that any of this will bother Mr. Harper or his ministers. They've got faith. And they've made it clear they have no intention of changing their minds, no matter what the research says. It's the rest of us -- those who still value evidence and reason --who should be concerned.²⁸⁰

Much the same critique can be made of the Panel's belief, unsupported by the evidence, that the massive investment in prison-related employment initiatives will produce dividends in public safety. We should all be concerned, however, that the new focus on employment will take resources from other areas that have greater potential to reduce recidivism and that the Panel's initiatives will mark another chapter in the history of costly if well intentioned correctional failures.

9.3 Education

For many years in Canada the education of prisoners has been viewed as a legitimate and worthwhile correctional endeavour. The Panel agrees with this view and clearly supports education as one of four crucial areas— along with employment/employability, programs, and structured leisure time as key components of a structured work day.²⁸¹ Throughout the report the Panel endorses education as an effective way to reduce recidivism and as a key component of improving employability.

280 The Ottawa Citizen Thursday, May 11, 2006, A1 online at <http://justicebehindthewalls.net/news.asp?nid=73>

281 *Roadmap*, p. 63

The Panel views education as being a substantial component of their employment and employability focus when it states: "Education has an undisputed role in the personal development and professional or vocational success of an individual in Canadian society".²⁸² While we agree that this relationship is firmly entrenched in our social experience, and does not need to be the subject of further analysis here, what is surprising is that given the importance of education to recidivism and its crucial relationship to the Panel's emphasis on employment, education is the subject of so few recommendations and those that are presented are so general. These are the Panel's recommendations:

15. *The Panel recommends that CSC pay more attention to the attainment of higher educational levels and development of work skills and training to provide the offender with increased opportunities for employment in the community.*²⁸³

18. *The Panel recommends that CSC review the reasons for the low offender participation rates in its adult basic education programs and identify new methodologies to motivate and support offenders in attaining education certificates by the end of their conditional release periods.*

19. *The Panel also recommends that these educational programs be reviewed and integrated with initiatives that are being undertaken to provide employability and employment skills for offenders.*²⁸⁴

59. *The Panel recommends that community reintegration planning, for offenders serving a fixed sentence, start at admission to ensure that focus is placed on programming, education, employment, and mental health treatment.*²⁸⁵

Only recommendations 18 and 19 appear in the section entitled "Education". Recommendation 15 appears in the section entitled "Structured Workday" while recommendation 59 appears in the section entitled "Comprehensive Community Reintegration Planning". On closer examination the *Roadmap's* support for education is qualified by other recommendations and statements that make it clear that the Panel is only supportive of *basic* education where it is directly tied to employment.

*We note that CSC has focused on the development and delivery of core programs at the expense of the development and delivery of basic adult education and employment programs.*²⁸⁶

...

*The Panel has indicated its belief that education and employment are key cornerstones of the successful reintegration of offenders to the community. The 'stove-piped' environment currently associated with the delivery of these programs must be changed. Offenders must be provided with the best portfolio of knowledge and skills that prepare them to find and keep jobs after release into the community. At the same time, offenders must be motivated to participate in these programs by introducing an increased sense of purpose—the ability to be employed.*²⁸⁷

282 *Roadmap*, p. 41

283 *Roadmap*, p.65

284 *Roadmap*, p. 68

285 *Roadmap*, p. 105

286 *Roadmap*, p.36

287 *Roadmap*, p.68

As noted in our response to the employment and employability proposals, the Panel has made many employment-related recommendations that, together, have massive cost implications and logistical problems. These limitations along with minimal evidence presented for effectiveness in reducing recidivism, raises serious doubts in our minds regarding the cost-benefits of their proposals. It is interesting therefore to compare their proposals for employment with that of education and the relative cost-benefit implications of each.

We suggest that in considering the relative importance of education in prison, particularly in comparison to other programs that might compete for the same resources, there are three important criteria that should be considered: (1) its efficacy- its impact on reintegration and recidivism; (2) its viability in the correctional context - the ability of CSC to make the program available to the right people at the right time, and (3) its costs. We will address each criterion.

9.3.1 Education and Recidivism

The Panel cites a CSC publication in which extensive evidence is identified showing that education appears to reduce recidivism.

*The importance placed on education has been supported by research. A review of 97 articles that examined the relationship between correctional education and recidivism levels revealed "solid support for a positive relationship between correctional education 15 and (lower) recidivism."*²⁸⁸

The article cited, commissioned and published by CSC was written by Dennis Stevens of the University of Massachusetts, College of Public and Community Services, and is a comprehensive review of research relating to the effectiveness of prison education programs. The article cited the work of J. E. McCormick who reviewed the 97 research articles. He concluded that "In the 97 articles, 83 (85%) reported documented evidence of recidivism control through correctional education, while only 14 (15%) reported a negative relationship between correctional education and reduced recidivism."²⁸⁹ Stevens shows through his article that some educational programs may not show a positive effect because the program standards and accessibility to those programs may be very limited in some areas. Additionally, Stephens cites many other studies that show a positive relationship concluding that "Offering individuals under correctional supervision a student-centred advanced educational program provides an avenue for those offenders who want change, an opportunity to advance themselves and ultimately the community".²⁹⁰

Other academics such as Gerald Gaes have documented the success of prison education in the reduction of recidivism. In a recent publication Gaes found through his exhaustive and rigorous review of meta-analyses that:

288 Stephens, D. J. Education Programming for Offenders in Motiuk, L, Serin, R eds. Compendium 2000 on Effective Correctional Programming, Chapter 9, page 59, CSC 2001.

289 Personal communication cited in Stephens (2001)

290 Stephens, (2001)

“correctional education does promote successful prisoner reentry. However, we only have an approximation of the true impact – the actual effect size. Even small effect sizes can produce substantial net cost-benefits especially for criminal justice costs that include adult corrections.”²⁹¹

In Canada we have the results of studies by CSC of their ABE (Adult Basic Education) program. The ABE review concluded that:

The results of this study (n = 6074) indicate that the ABE-8 program provides a modest but significant reintegration benefit for federal offenders who complete the program, as well as a literacy improvement of almost 3 school grades .

In brief, the three areas measured by this study (positive inmate attitudes and experiences with the ABE program, literacy gain and release outcome) all support a similar conclusion — ABE participation provides significant benefits for offenders and contributes to their safe reintegration to the community.²⁹²

At the other end of the education continuum is university level course work. The Final Report of the British Columbia Prison Education Project, (the Duguid Report) describes the theory, practice and efficacy of what many, including prisoners, regard as the most successful educational initiatives in the history of the Canadian penitentiary. Given that this evaluation is the most sophisticated and detailed study of the value of prison education ever undertaken in Canada one might have thought it would have been given some particular attention by the Panel. Because the evaluation addresses the role of education in the context of humanistic values, and not just as an avenue to employment, it has special significance in any correctional roadmap that gives primacy to the development of a culture that respects human rights. It is for this reason that we intend to quote at some length from the Duguid Report.

The University Program: Theory and Practice

What is the link between knowledge and behaviour? Can a more developed moral understanding persuade a law-breaker to adopt a more law-abiding stance toward society and the other? Can virtue be taught? Do more highly developed critical thinking skills lead to better decision-making in the “real world”? Are thinking skills more important than employment skills in the preparation of offenders for returning to the community? Are thinking skills and values best taught directly or through Liberal Arts academic courses? Why should criminals be educated? These questions and others like them provided the basis for on-going intellectual debate within the prison education program in British Columbia and an on-going discussion of policy issues between that program and the Correctional Service of Canada (CSC). Indeed, it would appear after reviewing the twenty-year history of the endeavour that the dynamism of these debates and discussions played a large part in the program’s longevity.

Between 1974 and 1993 university liberal arts courses were offered to prisoners in several federal correctional institutions in British Columbia, Canada. Delivered first by the University of Victoria (1973-1984) and then by Simon Fraser University (1984-1993), well over a thousand individual pris-

291 Gaes, R. The Impact of Prison Education Programs on Post-Release Outcomes, Reentry Roundtable on Education, March 31 and April 1, 2008 - retrieved December 5, 2008 from:

<http://www.ijay.cuny.edu/centersinstitutes/pri/pdfs/GaesTheEffectivenessofPrisonEducationPrograms.pdf>

292 Boe, R. (1998). A two-year release follow-up of federal offenders who participated in the Adult Basic Education (ABE) Program. (R-60, 1998). See: <http://www.csc-scc.gc.ca/text/pblct/forum/e132/e132e-eng.shtml>

oners were enrolled in courses taught by university faculty in traditional seminar settings within the prisons. Ranging from maximum to medium security, each of the correctional institutions contained a school or academic centre, a library and a sufficient level of support services to make possible the creation of relatively self-contained "learning centres" or "academic communities" behind the walls and fences. While distinct from the more formally "medicalized" or treatment approaches to prisoner rehabilitation that had characterized correctional interventions in the previous post-war decades, the university program in British Columbia nonetheless was based on the premise that education could result in rehabilitative outcomes. This premise stemmed from the conviction that education in the liberal arts, if carried out properly, could trigger processes of individual reclamation, reformation, and in some cases transformation. This conviction was in turn built on a diverse set of theoretical foundations in adult education and psychology, focusing in particular on the role of humanistic study in encouraging cognitive and moral development and the subsequent impact of that development on behaviour. The university program thus made certain claims as to its efficacy in inhibiting future criminal behaviour on the part of its prisoner-students, and unlike many other such programs, operationalized the claim by insisting that it would be demonstrated by lower rates of recidivism (return to imprisonment for a new offence following release) on the part of its students. A small research study carried out in 1979 seemed to bear out this claim, reporting very low rates of recidivism for program participants. (Ayers, et al., 1980; Duguid, 1981; Ross, 1980)

In 1993, co-determinus but not linked with the cancellation of the university program by the Correctional Service of Canada as a cost-cutting measure, a major follow-up study was undertaken of the prisoner-students who had been participants in that program from 1973 to 1993. The study was funded by the Social Sciences and Humanities Research Council of Canada and was completed in 1997. The objective was, put simply, to test the claim made by the program staff over its twenty-year life span that it had been effective in reducing the rate of recidivism of its students. Finding early on in the research that recidivism was in fact lower for this group than the average rate in Canada, the more ambitious objectives became to: (a) establish the degree to which the education program could be shown to be the significant factor in this success; (b) identify specific groups of prisoner-students who seemed to benefit the most from participation in the program, and; (c) identify the specific mechanisms and circumstances intrinsic to the education program that were linked with the success of these groups.²⁹³

One of the important findings of the Duguid Report related to the nature of the varying effects of higher education on recidivism.

Our task was to discover 'what worked for whom under what circumstances' - what mechanisms associated with the education program proved to be effective with what types of students in what particular circumstances? As the analyses of the Working Groups showed, the outcome - improving on one's predicted success of remaining free of prison - varied considerably with mechanisms having differential impacts. Thus what we called "hard slogging" in the academic core of the program, the actual university courses, proved to be associated with post-release success for certain groups of younger prisoners, especially those who we hypothesized might perceive education giving them a 'second chance' in society. Likewise academic success in the form of improving grades may have had an impact on the self-esteem of some men which in turn may have contributed to success. For other students the mechanisms associated with extra-curricular activities such as theatre or tutoring were

293 Duguid, S. (5-1-1998). British Columbia Prison Education Research Project: Final Report. Institute for the Humanities Simon Fraser University. <http://www.sfu.ca/humanities/ifeps/report.htm> p. 3

more strongly linked with success than was academic performance. In a surprising development which did not stem from a research hypothesis, completion of even minimal post-release education and training courses or programs was highly correlated to post-release success in virtually every Working Group studied.²⁹⁴

The Duguid Report's findings regarding high risk offenders are of particular interest:

Thus in our "Worst Cases", a high priority group to be sure, both from the perspective of Corrections and from the perspective of the public, we were able to conclude that for a significant number of individuals in that group the education program made a decisive difference. The SIR predicted that only 43 men from that group of 119 would be successful after release, but instead 54 were successful...While 11 additional successful individuals may not seem a lot, given their age and records the social savings implicit in their abandoning a criminal career are no doubt substantial. Each high risk criminal deterred from further criminal activity, then, represents a 'value-added' component of effectiveness.²⁹⁵

Given the cautionary approach throughout this research report in linking cause and effect, we would be more than hypocritical to suggest that the results point to university liberal arts education being the panacea or 'magic bullet' so long sought after by corrections and by society. Still, the results are impressive and certainly indicate that for a perhaps surprisingly wide range of prisoners this intervention in their lives played a decisive role in shifting them away from further involvement with crime - at least for three years! It did not achieve this impact on only an 'enlightened elite' within the prisons, but was at its most impressive with the worst of the 'Worst Cases', the most disadvantaged of the 'Young Robbers' and the most fragile of the 'Second Chancers' - in other words, this program was particularly effective with a great many high risk offenders.²⁹⁶

Both the basic education and university programs clearly identify important correlations between education and recidivism. While all education programs appear to have an important impact on recidivism, the greatest impact appears to be with the more advanced courses. This implies that the further a student-prisoner progresses with education the greater the likely benefit on recidivism. Clearly the implications of a relatively arbitrary cut off at grade 12 needs to be carefully considered. Does ending education for a student-prisoner at grade 12, sometimes years prior to his or her release, diminish the value of that education? Would forcing the student into work activity at that point be more likely to generate motivation or frustration? The *Roadmap* does not consider these questions. It relies, without analysis, on the view that only basic education leading to job entry is worth considering. While that might be appropriate for some or even most prisoners, we are not convinced that it is appropriate for many others. Everyone needs some place to advance to if they are to continue their personal development. For some the next step is literacy and for others it is a university math course. Individualized planning requires that each next step be available for each individual. Given the benefits of advanced education and the feasibility of providing such education, the Panel should have considered whether CSC should terminate educational advances by focussing exclusively on "basic" education.

294 Duguid, p.42

295 Duguid, p. 43

296 Duguid, p. 45

One of the reasons Duguid suggests that post-secondary education appears to have a greater impact on recidivism than education limited to lower grades may be that the nature of the advanced course involves immersion into an academic community where the prisoner becomes a student who is involved much more than simply attaining credits. The students were faced with a broad range of choices that they were free to make in accordance with their interests.

It is the sum total of a myriad such decisions which add up to the big choice - should I quit crime? Here lies a vital and uncomfortable message for policy-maker and evaluator alike - it is not programs which work, but their capacity to offer resources which allow subjects the choice of making them work.²⁹⁷

It is ironic, to say the least, that the university education program was cancelled in 1993, ostensibly as a cost-cutting initiative, shortly before the research evaluation of it was initiated. The extremely positive results identified in the Duguid report beg the question whether the decision to cut the program was justifiable in terms of either the correctional mandate of CSC or on the basis of cost effectiveness. This obvious and important question is one of many that were ignored by the Panel.

The only indication that post secondary education was given any consideration by the Panel is found in a single paragraph which stated:

Post-secondary education gives offenders the opportunity to acquire a trade or profession, and to update trade qualifications. Less than 10% of participants in education programs opt for post-secondary education. Offenders generally pay for their own post-secondary studies, unless it can be demonstrated that the education addresses a very specific need.²⁹⁸

The cancellation of the post-secondary education programs in penitentiaries across the country was very controversial at the time and, as the research that followed showed, unwise whether viewed in terms of individual reintegration or public safety. The Panel missed a golden opportunity to rectify this mistake. The quote immediately above from the *Roadmap* is distressing in the way it so easily dismisses the importance and potential of higher level education. The reference to post-secondary education involving “less than 10% of participants in education programs” implies that either there is general disinterest or capacity for such education. However, the Panel seems either unaware or unconcerned about the strong interest in such educational opportunities when CSC made them available or the enormous disincentives that currently exist for post-secondary education in penitentiaries. Had they considered such barriers, the level of activity would have been suggestive of an area where there is strong motivation for personal development – something the Panel decries the absence of but has no clear explanation for.

It is of concern to the Panel that the completion rate for all educational programs is currently 31% (see Appendix C). If education is a critical component of an offender’s successful return to society as a productive, law-abiding citizen, the completion rate must be improved. The Panel did not receive any findings from CSC to explain why these results are so low. Anecdotally, we have heard of several reasons, including systemic (i.e., offender transfers or competing correctional program demands) and issues of motivation.

297 Duguid, p. 44

298 *Roadmap*, p. 43

Interestingly, the completion rate for vocational programs is twice as high as that for educational programs. Again, whether this is due to systemic or motivational issues is not clear to the Panel.²⁹⁹

The Panel should have acknowledged that participating in post secondary education is extremely difficult while in a Canadian penitentiary today. The cost of the courses is prohibitive for a person earning only a few dollars a day. Since the cancellation of the university program all post secondary education is distance education without direct instruction or class participation. Most distance education programs and virtually all post-secondary education depends heavily, and often exclusively, on the use of computers, email and internet access to course materials, lectures, course materials, student–professor communication, and for submission of assignments – none of which is available to prisoners. Prison library materials are not sufficient or relevant to post-secondary courses. Books are prohibitively expensive. It is often impossible to meet timelines for courses when the student must rely on the prison and community mail system. There is often no place to study or keep course material and books. In short, it is a testament to the motivation and commitment of prisoners that any post-secondary education exists at all.

Apparently the Panel was either unaware of or unconcerned about these virtually impenetrable barriers to what is now recognized as a very important means to reduce recidivism. Nor were they apparently aware that the potential impact on recidivism relies on much more than simply credit achievement.

The concept of education being justifiable only as an avenue to work is contradicted by the evidence and speaks, again, to the ideological focus of the Panel. The solution to recidivism is not just about finding work, although that is obviously important, it is also about addressing the myriad of problems that stand in the way of finding work or other means to sustain oneself as a law-abiding citizen. These factors interact in iterative and complex ways. Addictions might preclude the positive opportunities of education or work if left uncontrolled. Education might improve the person’s susceptibility to treatment and allow them to progress more quickly. Employment might well be the *outcome* of successful rehabilitation as much as a *contributor* to successful rehabilitation. Gaes expresses this point well:

If there are limitations to the potential impact of correctional education on reentry success, it may be because other offender needs may have to be addressed such as their drug dependence or lack of work skills. Education effects may be muted by these other unmet needs. However, education may be fundamental to other correctional goals. It may be a prerequisite to the success of many of the other kinds of prison rehabilitation programs. The more literate the inmate, the more he or she may benefit from all other forms of training. Thus, the link between correctional education and successful post-release outcomes may have many paths which analysts do not consider when they evaluate education programs independent of its other influences.³⁰⁰

The lack of context and nuance in the Roadmap’s consideration of education has the effect of forcing people into an ideologically-determined set of programs rather than create an environment of

299 *Roadmap* p. 44

300 Gaes, 2008 p. 13

personal development through which prisoners are encouraged and supported to find their way to a law abiding life after prison.

In earlier parts of this review we have discussed the unquestioning belief of the Panel in the prescriptive excellence of the correctional plan. The Panel buys completely into the notion that the professional assessor can, in the first few months of a long sentence, diagnose and prescribe the exact programs that will address the prisoner's problems, now and in the future. So comfortable is the Panel with the correctional plan, they propose that it be entrenched as an "accountability contract" on which parole release would be contingent.³⁰¹ As we have stated, while we do not discount the necessity for a correctional plan, we also reject the notion that it is all that is required to manage future risk and prepare the person for successful release.

One lesson to be learned from Stephen Duguid's work is that it is insufficient to rely only on a professional assessor and diagnostician to know what is best. The apparent lack of motivation and low completion rates that the Panel is at a loss to understand and therefore believes must be addressed almost entirely through coercion and control, look suspiciously like possible outcomes for an already overly professionalized, coercive approach to personal development. Engaging a prisoner in his personal development means creating an environment that is not *of the prison*. Engagement of the prisoner in his development will more likely occur in an environment that is *of the community* in that those things that drive decisions are not dominated by the external rigidity and coercion of prison routine and control so much as it is dominated by values that support achievement and growth – as in the community.

An understanding of the larger concept of personal development based on humanistic values, including individual choice, is captured in the words of a Canadian prisoner, David Turner, in a valedictorian address given at Mountain Institution in 1985. One of three graduates of the Simon Fraser University Program that year, Mr. Turner told the assembled guests, including the Warden, CSC staff and family members:

*This program exists, survives, on the premise that it brings change to the individuals who participate within it. If this were not true I sincerely doubt we would be here today. Those of you who know me from before will recognize that my changes speak for themselves. The more difficult task is to illustrate how I became who I am... The fact that we are educated within a prison, separated from the community by time and space, has served to enhance our concept of humanity elsewhere and yet always in relation to ourselves. In his book *Language and Silence*, George Steiner notes that he was perplexed to consider how the torture and murders committed at Treblinka could be occurring at precisely the same time that people in New York were making love or going to the theatre. Were there two kinds of time in the world, Steiner wondered, good times and inhuman times?*

It is a question such as this which lends itself to the lessons found in our study of the humanities. To become more human is to discover the relations between inside and outside, between those dying and those alive when death occurs and the relation of all three to ourselves . . .

Humanities has taught me that if I do not feel deeply the suffering I am powerless to prevent, how could I be alert to the suffering I might put an end to . . .

301 *Roadmap*, p. 107

A very dear friend gave to me a remarkable definition of nobility .. . "True nobility is never found in being superior to someone else, but rather, it is found in being superior to one's former self." In this regard we three graduates can now claim nobility, true nobility.

In closing, I would like to share a short, but meaningful prayer. These words were first spoken by a newly emancipated slave, over a hundred and twenty years ago, but the spirit is especially appropriate today. It is not a prayer for a bowed head, but rather for a raised head. It goes:

Dear Lord, I ain't what I should be, And I ain't what I'm going to be,

But thank you Lord, I ain't what I used to be³⁰²

A key component of supporting achievement through a culture of development is that of individual choice. Individual choice is largely suppressed in prisons but is central to education. A well-developed school within a prison is a refuge from the structure and the humiliation that the prison structure asserts. The relationship with a teacher has only one purpose – the development of the student – not control of the prisoner. Education is about making better informed choices and so those choices cannot be suppressed in an educational environment. In the school, the “prisoner” becomes the “student” and that provides a taste of normalcy – along with the challenges that go with it, bringing the person to what Duguid refers to as “the big choice - should I quit crime”?

Of course some of these elements are also possible in other areas such as treatment programs and work. Indeed the Panel noted the power of the different supportive relationship that often occurs between CORCAN instructors and prisoners.

The Panel has concluded that CORCAN supervisors, working at the front line, have an important personal relationship with offenders. As such, they are in a position to have a significant positive impact on them. They are seen as providing offenders with a sense of purpose, and are a key contributor to increasing offender motivation for employment and in promoting self awareness among offenders in being able to handle a job effectively.³⁰³

To the extent this different atmosphere is possible it should be encouraged. In our view the school is one place where the potential for this different environment is greatest. This not to say that any prison “school” necessarily has all of these positive qualities in place as some school programs can begin to look more like sweat shops than places of learning, but where the school is led by qualified educators with a range of options that allow for appropriate choice and growth, the potential is substantial.

9.3.2 Logistics

Education has some distinct advantages over programs like work from a management and engagement perspective. Work almost always involves teams working to produce something. Education is personal. The benefits are therefore entirely personal as well. For those reasons education is delivered as a set of interrelated building blocks selected and assembled by the student in order to get from here to there.

302 P.J. Murphy and Jennifer Murphy, *Sentences and Paroles: A Prison Reader*, (New Style Books, Vancouver, 1998) p.214-16. P. J. Murphy taught in the SFU Prison Education Program for nine years till 1990.

303 *Roadmap* p. 70

Education is individualized, incremental and self-rewarding. Individualized programs are much easier to manage in a prison setting than large group productivity activities like manufacturing. Because it is individualized, education is transferable between institutions. One can take an English course in one prison and a math course in another prison – or in the community after release. The frequent movement of prisoners between prisons can be accommodated fairly easily in education programs while with many work and trades programs a move terminates the program or work activity as trades programs and manufacturing work is almost always unique to a particular institution. As a result, often very few credits that might lead to apprenticeship can be earned.

Educational programs can be set up just about anywhere with no significant infrastructure needed other than space. Manufacturing needs expensive equipment and/or service contracts and the continuing maintenance of external demands for the product – not a simple set of arrangements to develop and maintain. While education programs do not have significant capital requirements, industry and trades can be extremely expensive and often the value of equipment is short lived as it becomes obsolete.

Because of the ubiquitous nature of education in our society, qualified teachers for most subjects are available virtually everywhere. Indeed, in the past whole institutions for education have been employed through contracts with CSC to provide education by supplying both the staff and curriculum. Trades and work production often depend on tradesmen or industrial specialists that are unique to particular manufacturing activities. Recruitment of qualified people can be difficult and the loss of key people can seriously interrupt the work activity. Manufacturing activity requires expert people for such activities as marketing, design, engineering, market trend analysis, industrial relations etc. that is rarely needed in general education programs.

While CSC has relied heavily on private contractors to deliver educational programs, it has, on occasion, made extensive use of existing community based educational institutions such as boards of education, community colleges and universities. There are a broad range of alternative educational service providers. On the other hand, outside contracts to operate industrial operations are often not available and hence CSC has had to develop its own capacity through CORCAN to develop and operate such operations.

Education goes on regardless of the changes in the economy. Manufacturing and trades are highly dependent on the economy, changing market, demographic trends, other suppliers and a multitude of factors that can interrupt or negate production or training.

9.3.3 Costs and Benefits

For all of the logistical advantages identified above, education costs per student are low compared with most work and trades training activity. It costs far more to “employ” a prisoner in most prison work programs or production activity or skill-training than have that person engaged in educational activity. As noted in the section on Employment and Employability, the Auditor General noted in 1995 (the last relevant audit by the Auditor General) that the cost of CORCAN work was double that of education.³⁰⁴ This data needs to be updated by an independent agency like the Auditor

304 Auditor General Chapter 10—Correctional Service Canada—Rehabilitation Programs for Offenders 1996

General to verify current true net costs for both education and work activity. Even with the lack of independent data available and claims by CORCAN of substantial revenue through its work activity, the Panel raises serious doubts about the capacity of CORCAN to operate within its income generating mandate.

*The Panel questions whether CORCAN can continue to balance revenues and expenditures to provide future employment and training requirements under its current operating model. The Panel questions whether CORCAN's prime objective is sufficiently focused on its core responsibility to produce fully trained and job-ready offenders ready for release to positions in the community.*³⁰⁵

9.3.4 Computers

It is quite strange to us that a report that purports to provide a roadmap for the transformation of prisons never once mentions the matter of either computer or internet access. We are of the view that this serious omission in the *Roadmap* requires comment on our part.

For most prisoners, the many hours of cell time is dead time. There is virtually nothing to do but read or watch television – if you have a television. If you can't read, the options are very limited. Computers were understandably embraced by many prisoners as a means to use their time productively while developing knowledge and skills that would be of potential value in future education and /or work activity. Computers made correspondence courses easier to undertake and also give some recreational outlet.

With the growth of information technology in the late 1980's, federal prisoners were given permission, with substantial limitations, to purchase and keep personal computers in their cells. They had to use their own funds to purchase the hardware and software and maintain their system. For all but the most committed, or those with funds from outside the prison, the costs were almost prohibitive. Prisoners were dependant on the prison administration to arrange any necessary maintenance - often a slow and tedious process. No computers had internet access and there were many restrictions on the software that was permitted. Nevertheless, the ownership and use of computers had grown steadily over the years reaching the point where about 10% of prisoners had a computer in their cell.

In the fall of 1994, a working group was tasked with studying the feasibility of continuing this practice. During the working group's examination of this issue, a moratorium on the purchase of prisoner owned computers was put in place. By May 1996 EXCOM released General Principles on the uses of prisoner owned computers and the moratorium on the purchase of prisoner owned computers was lifted. The policy governing personal computers, CD 090, was subsequently amended in February 1997 to allow prisoners to own personal computers as long as they did not allow for communications with or access to computer networks. It is important to note that the policy was amended "to provide inmates with increased opportunities for personal development, including education and entertainment. These opportunities are comparable to those widely available to the

305 *Roadmap* p. 49

community and support the preparation of inmates for their eventual release as law-abiding citizens.”³⁰⁶

The 1997 decision included a requirement to review the issue three years after implementation. What was seen as a significant change in information technology coupled with continuing IT-related security incidents prompted CSC to commission an independent Threat Risk Assessment in early 2002 to re-evaluate the situation. The assessment concluded that there was a significant threat to CSC’s infrastructure and ability to deliver its mandate. It was also noted that computer inspections were difficult and complex and that IT resources and capabilities were limited while operational staff were not qualified to carry out computer inspections. CSC Security Branch and the IT Security Division reported that over 700 incidents occurred between 1998 and 2003 involving inmates and computers. As a result of this information, and with little consideration for the benefits of computers, CSC decided in April 2003 to prohibit the purchase or upgrade of inmate owned computers and to provide access to computers through closely monitored and controlled common access areas. Those owning personal computers at the time were allowed to keep them but were not allowed to upgrade, or purchase new computers, consigning existing computers to gradual obsolescence.

While there were difficulties ensuring that computers contained only approved materials, the initial claims of serious security risks turned out to be greatly exaggerated. The majority of the “security incidents” in fact involved no more than embarrassment when prisoners computers were found to have sexually provocative (but not legally pornographic) materials on them. Indeed almost all of the serious incidents identified by CSC related to staff permitting their computers to be used by prisoners rather than anything involving prisoner’s computers. Even where serious breaches of security had occurred, there were no incidents of any serious harm that had occurred because of the breach.

In response to a strong and vigorous criticism from both prisoners and community groups to the ban on the purchase or upgrade of prisoner owned computers, CSC eventually agreed to form an advisory committee comprised of their own senior managers, CSC senior IT staff, community groups and prisoners from four institutions who participated by conference call.³⁰⁷ Of special note, particularly in light of the almost total absence of participation of prisoners in the Panel’s deliberations, the inclusion of federally sentenced men and women as equal members of this committee was unlike any other committee that National Headquarters had convened in the past. As noted in the advisory committee’s report “the federally sentenced men and women contributed their time by conducting research, writing papers, participating in conference calls and meetings, consulting on documents and sharing experiences. The direct participation of these men and women regarding the benefits and impacts of having access to a personal computer has been insightful, informative and tremendously meaningful.”³⁰⁸

In its report the committee particularly identified the importance of computers to education:

306 CSC Policy Bulletin #21, 1997-02-17

307 Both authors were members of this advisory committee.

308 Proposal to the Assistant Commissioner Correctional Operations and Programs On Improving Inmate Access to Computers, Prepared by the Advisory Committee on Inmate Access to Computers, December 2005 p. 2

Advances in information technology now allow individuals the ability to exercise their own independence in acquiring and managing information. Such information may be personally relevant, educationally valuable or vocationally practical. Incarcerated persons in Canada are the exceptions to this.

Core Value # 2 [of the Mission Statement] states "We recognize that the offender has the potential to live as a law-abiding citizen." To the greatest extent possible CSC should introduce inmates to computer technology to ensure the greatest opportunity for education, employment and employability and for successful living in today's world. Studies affirm that there is a positive correlation between law abiding behaviour and formal education. From a public safety perspective, recidivism can be influenced by providing better access to education for all inmates. The data on education achievement in the federal institutions suggest that about 75 percent of inmates have, at best, achieved grade 10 standing. A large majority of them, therefore, have not earned a high school diploma, i.e. what is now considered to be the basic qualification for any employment with prospects for advancement and economic security.

The question can be framed as follows: How can federal inmates be encouraged to pursue education roughly in the same proportion as students in the community? Corrections literature commonly refers to lack of motivation as a key reason for this continuing disproportion. How, then, can inmates be more motivated to improve their education credentials? The computer is a powerful motivator of learning to the extent that it is an enabling and empowering device. It fosters independent enquiry through access to the World Wide Web and its capacity to transfer vast amounts of information on-screen from various other media. There is the related fact of a steady increase in the number and variety of credit courses, both secondary and post-secondary, available on-line, many of them only on-line.

By a more liberal use of computer technology, then, individualized to inmates who can meet security criteria, CSC could update its education policy and practice without significant new expenditures on physical facilities and teaching staff. In that scenario, the computer becomes the means by which prison education could approximate community standards in a short period of time and without a lot of new public money. That is a goal worth pursuing.³⁰⁹

After two years of intensive work the committee reported with recommendations that would permit prisoners to own specially made computers with substantial security features that addressed all of the original CSC concerns including internet access prohibition. In its report the advisory committee wrote:

The recommendation above complements and supports the basic statutory principles of the Correctional Service of Canada i.e. its legal obligation to support incarcerated men and women in their efforts to re-integrate successfully after release. Computer technology is now central to every aspect of society - work applications, personal growth, recreational activity and social communications. This recommendation, then, aims to create a situation where there are ample opportunities for all inmates to become computer literate for purposes both educational and recreational. Some will want to become technically proficient about computers. Some will want to advance their education qualifications to meet the changing requirements of the job market. Nearly all inmates can take advantage of constructive ways of "doing time" with a computer. The Committee believes that the benefits outweigh the risks involved, especially as those risks appear to be manageable.

309 Improving Inmate Access to Computers Annex A

With appropriate security measures and specifications for computers, the committee believes that risk to CSC can be mitigated in order to allow inmates to purchase and have in-cell computers. CSC's IT Security Branch has raised the following IT Security issues as being the most important elements that must be addressed in order to reduce the risk to CSC. These issues are: hardware standardization, software standardization, ease of visual inspection, ease of technical inspection, adequacy of supervision, external communication, and media tampering.³¹⁰

The Committee addressed each of these concerns and proposed viable and cost effective solutions.³¹¹

In its conclusion the Committee suggested that:

The model presented in this proposal addresses interests common to CSC, stakeholders, staff and federally sentenced men and women with respect to access to computers. The Committee believes that this model will allow CSC to improve access to computers for all inmates in a manner that is safe, secure and fiscally responsible so that they can be assisted with educational pursuits, employment and employability pursuits and effective use of leisure time, all of which contribute to a robust re-entry into the community.

The Committee believes that the safeguards presented in the above proposal respond to previous views that threats existed to CSC's infrastructure and ability to deliver its mandate if inmates were allowed to have in cell computers. Under the proposed model computer inspections will be made much less difficult and complex and demand on IT resources will be largely reduced. We anticipate a significant reduction in the number of computer related security incidents under our proposed model.

310 Improving Inmate Access to Computers, p. 4

311 The Committee addressed each of these concerns and proposed viable and cost effective solutions. For example, to deal with hardware and software standardization the committee proposed:

Hardware Standardization: Under this proposed scenario, inmates will be allowed to purchase one particular computer configuration. Computers will be designed according to CSC specifications and will be produced by a limited number of pre-qualified outside suppliers. Under the previous policy, operating systems and models of computers varied greatly and this contributed to the difficulty of inspection and management. The proposed scenario will allow CSC to monitor, search and control inmate owned computers more easily.

Specifications for the design of the computers will be reviewed annually to ensure that changing technology issues are incorporated into the design and set-up of computers. A National Committee with varied representation (IT Security, Operational Security, Human Rights, Programs, stakeholders etc.) should be formed to provide assistance with these annual reviews.

Software Standardization: CSC will establish a limited list of authorized application software, which inmates will be able to purchase and have installed on their computers. CSC will also establish a limited list of qualified vendors from which inmates will be able to purchase educational, self-development and recreational software.

It is suggested that computers be outfitted with Microsoft Windows XP Professional operating system. In addition to standardizing all computers with a common OS for ease of inspection and management, the security features of Windows XP Professional will be leveraged to provide a degree of protection not available in earlier operating systems.

CSC will review the list of authorized software on an annual basis and add to it new options accordingly. Inmates shall pay the cost of all software. Improving Inmate Access to Computers, p. 5

The Committee recommends that the Assistant Commissioner Correctional Operations and Programs support the recommendations made in this proposal and present this report to the EXCOM so that a new decision may be made with respect to allowing inmates to have access to computers.³¹²

If the committee's recommendations were even considered by EXCOM, no report back to the committee members was ever made. We do not know if the committee's recommendations were ignored or rejected.

CSC went ahead with alternate plans to make available to prisoners, in common areas, a few older staff computers that were being replaced. Those plans have been implemented. Such access, however, is extremely limited in terms of access as they can be used only when the common areas are open and staff supervision is available, there is a low ratio of computers to prisoners, there is very restricted availability of software, lack of privacy, inability to store or keep data except on a few floppy disks and many other limitations. Again, none of the computers have internet access.

Any parent today knows that education beyond basics is not possible without the regular use of computers and the internet. The work, educational and recreational world outside of prisons have embraced the enormous potential that computers offer while our prisons appear virtually Neanderthal in comparison. Computers and internet access have the potential to make high-quality education available to all prisoners at minimal costs. Indeed, it is increasingly valid to state that good education is virtually impossible without them. Conversely, with computers and internet access the educational possibilities for prisoners are expanded enormously.

At the same time, computers have become such a crucial part of community life it seems likely that the position that CSC has taken will be increasingly difficult to justify as a reasonable limitation on the rights of prisons to communicate and participate in activities. Security issues, to the extent that they exist and can be demonstrated, can clearly be addressed.

9.3.5 Conclusion

We do not deny the need for work and trades related programming. However, in the interests of both public safety and fiscal accountability we feel obliged to raise the question of why the *Roadmap* gives such overwhelming attention to work and minimal attention to education when, dollar-for-dollar, and demonstrated effects on recidivism, good education programs appear to offer much greater cost-effectiveness and logistically are much easier to implement.

It is irresponsible for CSC to rely on the conclusions of the *Roadmap's* "transformative agenda" in the vacuum of knowledge and evidence that the *Roadmap* reflects and in light of the other important areas of inquiry that were never addressed. A commitment to huge and extremely long-term investments is unwise before first being able to answer the following questions:

- For whom and under what circumstances are work and/or education most likely to reduce recidivism? Do resources match needs in all locations?
- How should limited resources be allocated so as to take advantage of relative cost effectiveness?

312 Improving Inmate Access to Computers, p. 15

- What conditions are necessary to create environments within prisons that clearly support the engagement of individuals in their personal development— as opposed to merely forcing compliance?
- How can environments be created that maximize the options for constructive choices for prisoners?
- How can education be made excellent? Were the previous practices of CSC to use community colleges, boards of education and local universities to deliver education at the same standard as that given to community students superior to education delivered through contracts with private commercial firms? Is it feasible for private education contractors to meet the same standard as is possible when teachers are part of and report to a local public educational institution?
- Should there be the same support for post-secondary education as is available for Adult Basic Education? Does ending education at grade 12 really make sense?
- Can education occur, particularly at levels above basic literacy, without easy access to computers, email and the internet? Can CSC's policy to prohibit individual ownership of computers and access to the internet be justified given the substantial impact of education on recidivism?

It is distressing to see the *Roadmap* trample though such important aspects of corrections without the information necessary to ask or answer these and other key questions. The confidence with which the Panel promotes their plan for corrections seems inversely proportional to how little they were influenced by the available evidence.

10 Aboriginal Offenders

The Panel devotes considerable space to the issue of Aboriginal offenders and its recommendations broadly endorse and encourage expansion of CSC's existing initiatives, including Aboriginal specific programming, Aboriginal staffing and cross cultural training and recommend that greater priority be placed on Aboriginal employment and community reintegration. The full slate of recommendations is set out in the sidebar:

Whereas in other parts of our response we have criticized the Panel for misunderstanding the issues and the nature of the problems facing CSC and for recommending far-reaching, ill-conceived and unprincipled changes, our critique of their discussion of Aboriginal offenders is different. Our issue is not with the Panel's recommendations but rather that they have not been given the necessary profile and priority. This illustrates one of the problems when a roadmap is developed with a one-dimensional focus on public safety without sufficient attention to the justice goals of the criminal justice system. A "transformation" agenda that does not address, as the first priority, the "staggering injustice" that has been and continues to be inflicted on Aboriginal peoples is not one that a just society should endorse.

Recommendations

30. *The Panel recommends that employment be the first priority in supporting Aboriginal offenders in returning to the community.*
31. *The Panel recommends that, as the second-largest federal public service employer of Aboriginal people, CSC should:*
 - a) enhance recruitment, retention and development of Aboriginal staff, particularly in correctional officer, parole officer and management positions in CSC penitentiaries and in communities where Aboriginal representation is high;
 - b) ensure that Aboriginal staff can demonstrate their knowledge and awareness of the particular challenges facing Aboriginal people on reserve and in Aboriginal urban communities; and
 - c) promote awareness and understanding of Aboriginal life among non-Aboriginal employees, and provide them with the tools and training to work more effectively with Aboriginal people and communities.
32. *The Panel recommends that CSC make resources available to respond to the specific needs of Aboriginal offender populations, such as further investment in correctional programming tailored specifically to their needs.*
33. *The Panel recommends that CSC achieve a balance between correctional and healing interventions, and ensure that programming emphasis be placed on managing drug and alcohol problems, managing anger, and using conflict resolution.*
34. *The Panel also recommends that CSC ensure it can measure the results of these programs effectively, so that it can demonstrate to Aboriginal communities that Aboriginal offenders have addressed their problems and can rejoin their communities.*
35. *The Panel recommends that employment be CSC's first priority in supporting Aboriginal offenders' return to their communities. The Panel recognizes the importance of other program interventions to address the behavioural and skills deficits of Aboriginal offenders, but recommends that CSC achieve a better balance in providing these programs.*
36. *The Panel recommends that CSC review its approach to mental health assessments of Aboriginals at intake and ensure effective screening techniques are in place.*
37. *The Panel recommends that the number of Aboriginal Community Development Officers should be increased to work with Aboriginal communities and support local Aboriginal offender employment.*
38. *The Panel recommends that Pathways Units be expanded in CSC penitentiaries to meet the requirements of Aboriginal offenders where warranted, and that these "Pathways Units" have a job-readiness components.*

10.1 The Nature of the Problem - Aboriginal Overrepresentation

The problem of Aboriginal overrepresentation in Canadian prisons is well documented and has received the attention of a large number of commissions and inquiries and more recently that of the Supreme Court of Canada. Yet one looks in vain for any reference to this in the *Roadmap*. It does not even rate a footnote in the changing offender profile section. This is especially troubling since the problem is getting worse. In 1988 in a study prepared for the Canadian Bar Association, titled "Locking Up Natives in Canada" one of us provided this account:

Statistics about crime are often not well understood by the public and are subject to variable interpretation by the experts. In the case of the statistics regarding the impact of the criminal justice system on native people the figures are so stark and appalling that the magnitude of the problem can be neither misunderstood nor interpreted away. Native people come into contact with Canada's correctional system in numbers grossly disproportionate to their representation in the community. More than any other group in Canada they are subject to the damaging impacts of the criminal justice system's heaviest sanctions. Government figures -- which reflect different definitions of "native" and which probably underestimate the number of prisoners who consider themselves native -- show that almost 10% of the federal penitentiary population is native (including 13% of the federal women's prisoner population) compared to about 2% of the population nationally. . . . Even more disturbing, the disproportionality is growing. In 1965 some 22% of the prisoners in Stony Mountain Penitentiary were native; in 1984 this proportion was 33%. It is realistic to expect that absent radical change, the problem will intensify due to the higher birth rate in native communities...

Prison has become for young Native men the promise of a just society which high school and college represents for the rest of us. Placing this in a historical context, the prison has become for many young Native people the contemporary equivalent of what the Indian residential school represented for their parents.³¹³

In 1999 the Supreme Court of Canada cited this passage in the *Gladue* case as a "disturbing account of the enormity of the disproportion." The Court issued this call to action: "**These findings 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**".³¹⁴ In the decade between "Locking up Natives" and the *Gladue* case the overrepresentation had deepened. By 1997 "Aboriginal peoples constituted closer to 3 percent of the population of Canada and amounted to 12 percent of all federal inmates"³¹⁵. Later in its judgment the Court referred to the "**staggering injustice**" these figures represented.

Prison overrepresentation is part of a larger pattern. As the Supreme Court observed in *Gladue*:

313 Canadian Bar Association Committee on Imprisonment and Release, *Locking up Natives in Canada* by Michael Jackson [Ottawa: Canadian Bar Association, 1988]. Reprinted in [1989] 23 *U.B.C. Law Review* 215. See also Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba*, vol. 1, *The Justice System and Aboriginal People* (1991); Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* [Ottawa: Canada Communications Group, 1996].)

314 *R. v. Gladue*, [1999] 1 S.C.R. 688 at para. 64

315 Solicitor General of Canada, Consolidated Report, Towards a Just, Peaceful and Safe Society: The Corrections and Conditional Release Act -- Five Years Later (1998), at pp. 142-55 cited in *Gladue* at para 58

[T]he excessive imprisonment of aboriginal people is only the tip of the iceberg insofar as the estrangement of the aboriginal peoples from the Canadian criminal justice system is concerned. Aboriginal people are overrepresented in virtually all aspects of the system. As this Court recently noted in R. v. Williams, [1998] 1 S.C.R. 1128, at para. 58, there is widespread bias against aboriginal people within Canada, and “[t]here is evidence that this widespread racism has translated into systemic discrimination in the criminal justice system”.

Statements regarding the extent and severity of this problem are disturbingly common. In Bridging the Cultural Divide, supra, at p. 309, the Royal Commission on Aboriginal Peoples (“RCAP”) listed as its first “Major Findings and Conclusions” the following striking yet representative statement:

The Canadian criminal justice system has failed the Aboriginal peoples of Canada -- First Nations, Inuit and Métis people, on-reserve and off-reserve, urban and rural -- in all territorial and governmental jurisdictions. The principal reason for this crushing failure is the fundamentally different world views of Aboriginal and non-Aboriginal people with respect to such elemental issues as the substantive content of justice and the process of achieving justice.³¹⁶

Over representation of this magnitude suggests either that Aboriginal peoples are committing disproportionately more crimes or that they are the victims of systemic discrimination. Studies and Commission reports confirm that both phenomena operate in combination.³¹⁷

Although over-policing and other forms of systemic discrimination undoubtedly play their part in higher crime rates, the available evidence shows higher Aboriginal crime rates in many reserve communities and among urban Aboriginal populations: particularly disturbing are the rates of interpersonal violence in some reserve communities where women are the primary victims. The Panel cites a June 2006 report of the Canadian Centre for Justice Statistics that presented the grim picture of the realities for Aboriginal people and their communities. Specifically, young people aged 15 to 34 experience violent victimization 2½ times more frequently than those aged 35 or older; on-reserve crime rates were about three times higher than crime rates elsewhere in Canada, and violent crime rates were significantly higher; rates of spousal violence were 3½ times higher than for non-Aboriginals.

Like the figures on overrepresentation, the statistics on higher crime rates demand further answers to hard questions directed to the root causes. Why does crime and social disorder play more havoc in personal and community well-being than they do in the lives of non Aboriginal people and communities? This is a question that the Panel at least needed to consider because “misunderstanding the roots of the problem can lead only to solutions that provide, at best, temporary alleviation and, at worst, aggravation of the pain reflected in the faces of Aboriginal victims of crimes — in many cases women and children — and in the faces of the Aboriginal men and women who receive their ‘just’ deserts in the form of a prison sentence”.³¹⁸

There are several explanatory theses for this “crisis in the Canadian criminal justice system.” The Supreme Court in Gladue referred to the socio-economic causes of overrepresentation:

316 *Gladue*, paras 61-2

317 RCAP, p.33

318 RCAP, p.39

*The background factors which figure prominently in the causation of crime by aboriginal offenders are by now well known. Years of dislocation and economic development have translated, for many aboriginal peoples, into low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness, and community fragmentation. These and other factors contribute to a higher incidence of crime and incarceration.³¹⁹ A disturbing account of these factors is set out by Professor Tim Quigley, "Some Issues in Sentencing of Aboriginal Offenders", in *Continuing Poundmaker and Riel's Quest* (1994), at pp. 269-300. Quigley ably describes the process whereby these various factors produce an overincarceration of aboriginal offenders, noting (at pp. 275-76) that "[t]he unemployed, transients, the poorly educated are all better candidates for imprisonment. When the social, political and economic aspects of our society place Aboriginal people disproportionately within the ranks of the latter, our society literally sentences more of them to jail."³²⁰*

There is a further explanatory pathway in which overrepresentation is linked to the particular and distinctive historical and political processes that have made Aboriginal people poor beyond poverty. As described by RCAP

*The relationship of colonialism provides an overarching conceptual and historical link in understanding much of what has happened to Aboriginal peoples. Its relationship to issues of criminal justice was identified clearly by the Canadian Bar Association in its 1988 report, *Locking Up Natives in Canada*.*

What links these views of native criminality as caused by poverty or alcohol is the historical process which Native people have experienced in Canada, along with indigenous people in other parts of the world, the process of colonization. In the Canadian context that process, with the advance first of the agricultural and then the industrial frontier, has left Native people in most parts of the country dispossessed of all but the remnants of what was once their homelands; that process, superintended by missionaries and Indian agents armed with the power of the law, took such extreme forms as criminalizing central Indian institutions such as the Potlatch and Sundance, and systematically undermined the foundations of many Native communities. The Native people of Canada have, over the course of the last two centuries, been moved to the margins of their own territories and of our 'just' society.³²¹

Over the last decade the overrepresentation has only worsened. One struggles to find the appropriate words beyond "staggering injustice" the Supreme Court might now have to employ to describe the present state of affairs. The percentage of Aboriginal federal prisoners in 2004 rose to 18.5% with no correlative rise in the non-prison Aboriginal population. In October 2006 the Correctional Investigator, Howard Sapers, in addressing Parliamentarians on the tabling of his 2005-6 Annual Report, highlighted the continuing and accelerating overrepresentation of Aboriginal persons in Canada's federal institutions and the current dimensions of the problem facing federal corrections:

The overrepresentation of natives in Canada's prisons and penitentiaries is well-known: nationally, Aboriginal people are less than 2.7% of the Canadian population but comprise almost 18.5 % of the total federal prison population. For women, this overrepresentation is even more acute - they

319 Gladue, para. 67

320 Gladue, para. 65

321 RCAP, p. 47

represent 32 % of women in federal penitentiaries. Alarming, this huge overrepresentation has grown in recent years. While the federal inmate population in Canada actually went down 12.5% between 1996 and 2004, the number of First Nations people in federal institutions increased by 21.7%. This is a 34% difference between Aboriginal and non-Aboriginal inmates. Moreover, the number of federally incarcerated First Nations women increased a staggering 74.2% over this period.

While the Correctional Service is not responsible for the social conditions and policy decisions which help shape its offender population, it is responsible for operating in compliance with the law and ensuring all offenders are treated fairly. It is therefore with grave concern I am underscoring today that the Correctional Service of Canada falls short of this standard by allowing for systemic discrimination against Aboriginal inmates. For example:

- *Inmates of First Nations, Métis and Inuit heritage face routine over-classification resulting in their placement in minimum security institutions at only half the rate of non-Aboriginal offenders.*
- *The over-classification for Aboriginal women is even worse. For example, at the end of September, native women made up 45 percent of maximum security federally sentenced women, 44 percent of the medium security population and only 18 percent of minimum security women.*
- *This over-classification is a problem because it means inmates often serve their sentences far away from their family and the valuable support of other community members, friends and supports such as Elders.*
- *Aboriginal offenders are placed in segregation more often than non-Aboriginal offenders.*
- *Placement in a maximum security institution and segregation limits access to rehabilitative programming and services intended to prepare inmates for release and successful reintegration into society.*
- *Aboriginal inmates are released later in their sentences than other inmates.*
- *The proportion of Full Parole applications resulting in reviews by National Parole Board is lower for Aboriginal offenders.*

In short, as stated by the Canadian Human Rights Commission, the general picture is one of institutionalized discrimination. That is, Aboriginal people are routinely disadvantaged once they are placed into the custody of the Correctional Service.³²²

As a consequence, longer periods of incarceration and more statutory releases, as opposed to parole, for Aboriginal offenders contribute to less time in the community for programming and supportive

322 In his 2007-8 Annual Report the Correctional Investigator summarises the cumulative effect of systemic barriers to reintegration: "The combination of over-classification and lack of Aboriginal programming best illustrates how systemic barriers can hinder offender reintegration. Aboriginal offenders are over-classified because of a poorly conceived actuarial scale. As a result, Aboriginal offenders are disproportionately and inappropriately placed in higher security institutions, which have limited or no access to core programs designed to meet their unique needs. This scenario, for the most part, explains why the reintegration of Aboriginal offenders is lagging so significantly behind the reintegration of other offenders. Clearly, correctional outcomes cannot be explained by individual differences alone". Annual Report of the Correctional Investigator, 2007-8, online at <http://www.oci-bec.gc.ca/rpt/annrpt/annrpt20072008-eng.aspx>

intervention than for non-Aboriginal offenders; the proportion of Aboriginal offenders under community supervision is significantly smaller than the proportion of non-Aboriginal offenders serving their sentences on conditional release in the community; Aboriginal offenders continue to be over-represented as a proportion of offenders referred for detention and ultimately detained compared to the other offender groups; parole is more likely to be revoked for Aboriginal offenders than non-Aboriginal offenders. The rate of revocations for breach of parole conditions (i.e., no new criminal offence) is higher for Aboriginal offenders; Aboriginal offenders are re-admitted to federal custody more frequently than non-Aboriginal offenders, and too often this cycle of inequitable treatment begins again. To break this cycle, the Correctional Service must do a better job at preparing Aboriginal offenders while in custody, and provide better support while in the community; the outcome gaps are even more pronounced when looking at the situation of Aboriginal woman offenders.

The Correctional Service's own statistics regarding correctional outcomes for offenders confirm that, despite years of task force reports, internal reviews, national strategies, partnership agreements and action plans, there has been no measurable improvement in the overall situation of Aboriginal offenders during the last 20 years. To the contrary, the gap in outcomes between Aboriginal and other offenders continues to grow. Clearly, more commitment and resources are required to address this troubling trend. Today, I call on the Correctional Service of Canada to act swiftly to strengthen the implementation of its Strategic Plan for Aboriginal Offenders by fully adopting the following recommendations within the year:

- *Implement a security classification process that ends the over-classification of Aboriginal offenders;*
- *Significantly increase the number of Aboriginal offenders housed at minimum security institutions;*
- *Increase timely access to programs and services that will significantly reduce time spent in medium and maximum security institutions;*
- *Significantly increase the use of unescorted temporary absences and work releases programs to assist in supporting safe and timely community reintegration;*
- *Significantly increase the number of Aboriginal offenders appearing before the National Parole Board at their earliest eligibility dates;*
- *Build capacity for and increase use of agreements which provide for the direct involvement of Aboriginal communities in supporting timely conditional release; and*
- *Significantly increase the number of Aboriginal people working at all levels in the Service, and especially at institutions where a majority of offenders are of Aboriginal ancestry.*

Equitable treatment of Aboriginal inmates is required by law. It is also a human rights and public safety issue. Clearly, the need to do better is obvious and urgent. My message to the correctional service is walk your talk and make real progress a priority. My message to government is give the Service the resources required to get the job done.³²³

The Correctional Investigator, in his June 2007 presentation to the Panel, advised the Panel that the number of Aboriginal offenders is, as predicted, still increasing and now represents 19.6% of the

323 Speaking Notes for Mr. Howard Sapers, Correctional Investigator, 33rd Annual Report to Parliament October 16, 2006

federal incarcerated population and the gaps in correctional outcomes between Aboriginal and other offenders are still widening. He warned, "Should the current trends continue unchecked, experts project the Aboriginal population in Canada's correctional institutions could reach the 25% mark in less than 10 years". In his latest 2007-8 Annual Report he writes, "using the latest census data, we estimate **the overall incarceration rate of Aboriginal Canadians to be 983 per 100,000, or almost nine times higher than the rate for non-Aboriginal people**".³²⁴

10.2 The Appropriate Remedial Response

Given the characterization of the over representation of Aboriginal prisoners as a "crisis" and a "staggering injustice" and the extensive analysis of the issue by the Royal Commission on Aboriginal Peoples, the Supreme Court and the Correctional Investigator, it was reasonable to expect that the Panel, as part of a transformative roadmap, would have given this issue the highest profile and its recommendations the highest priority. Regrettably the Panel's summary of the nature of the problem demonstrates no appreciation of national urgency or the need for extraordinary efforts to redress the problems that are within the Service's mandate. In considering that redress it is important to recognize that the Correctional Service cannot, any more than the courts, resolve all the contemporary legacies of a colonial history. The Supreme Court specifically addressed the limitations on criminal justice agencies in *Gladue*.

*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. 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 play perhaps a stronger role in restoring a sense of balance to the offender, victim, and community, and in preventing future crime.*³²⁵

The Supreme Court went on to provide a framework of analysis for the sentencing judge:

How are sentencing judges to play their remedial role? The words of s. 718.2(e) [Criminal Code] instruct the sentencing judge to pay particular attention to the circumstances of aboriginal offenders, with the implication that those circumstances are significantly different from those of non-aboriginal offenders. The background considerations regarding the distinct situation of aboriginal peoples in Canada encompass a wide range of unique circumstances, including, most particularly:

- (A) The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and*
- (B) 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.*³²⁶

324 Annual Report of the Correctional Investigator 2007/08, online at <http://www.oci-bec.gc.ca/rpt/annrpt/annrpt20072008-eng.aspx>

325 *Gladue*, para. 65

326 *Gladue*, para. 66

The Supreme Court placed particular emphasis on restorative justice which is now recognized as part of the purposes of sentencing in the *Criminal Code*, because "most traditional aboriginal conceptions of sentencing place a primary emphasis upon the ideals of restorative justice"³²⁷.

Paralleling the role of the sentencing court, those who administer our prison system have an obligation in implementing their rehabilitative mandate to take into account the unique systemic and background factors that have brought Aboriginal peoples to prison and to recognize correctional responses that take into account traditional Aboriginal conceptions and processes of justice. In this regard it is not sufficiently well-known that a decade before the Supreme Court's judgment in *Gladue* the Correctional Service of Canada became the first criminal justice agency to take seriously the claims of Aboriginal offenders that Aboriginal pathways to healing, what was to become known as the "Red Road," were an integral part of their rehabilitation and reintegration. In 1983, members of the Native Brotherhood at Kent Institution went on a hunger strike, maintaining that they had the right to practise their spirituality, including participation in spiritual and healing ceremonies, and that this was both an existing Aboriginal right under section 35 of the *Constitution Act, 1982* and a right of freedom of religion protected by the *Canadian Charter of Rights and Freedoms*. Beyond these arguments, they maintained that practising culturally relevant ceremonies directed to healing was more appropriate in their journey towards rehabilitation and reintegration into the community than programs that lacked Aboriginal cultural or spiritual content.

In the years that followed, the Red Road and Aboriginal spirituality became increasingly powerful influences in the lives of many Aboriginal prisoners, who discovered, often for the first time, a sense of identity, self-worth and community. Because the path must be taught by those who have special knowledge and who are respected for their spiritual strength and wisdom, the practice of Aboriginal spirituality requires that prisoners communicate with Elders drawn from outside the prison. Some prisoners, by virtue of prior training or the training they undergo in prison, are able to lead certain ceremonies and provide spiritual counselling to other prisoners. There has developed, therefore, a continuum in which those who are more experienced in spiritual ways are able to help those less experienced. From this a sense of community emerges, based not on the common element of criminality or membership in a gang but rather on the search for spiritual truth. In place of the alienation that prison typically engenders, Aboriginal prisoners are able to experience a sense of belonging and sharing in a set of indigenous values. Aboriginal spirituality therefore provides prisoners with constructive links not only to each other but with Aboriginal people outside of prison and with their collective heritage. Charting a path along the Red Road is seen by many Aboriginal people, both inside and outside the prison, as an important element in dealing with problems of alcohol and drug dependency, violence, and other forms of anti-social behaviour.³²⁸

The *Corrections and Conditional Release Act* contains provisions which require the Correctional Service of Canada to "provide programs designed particularly to address the needs of Aboriginal offenders" (section 80). The *Act* also authorizes the Solicitor General to enter into agreements with

327 *Gladue*, para. 70

328 James Waldram, *The Way of the Pipe: Aboriginal Spirituality and Symbolic Healing in Canadian Prisons* (Peterborough: Broadview Press, 1997)

Aboriginal communities to provide correctional services to Aboriginal offenders (section 81); it mandates the establishment of a National Aboriginal Advisory Committee and permits the creation of regional and local advisory committees to advise CSC on the provision of correctional services to Aboriginal offenders (section 82). Section 83 provides that:

- (1) *For greater certainty, Aboriginal spirituality and Aboriginal spiritual leaders and elders have the same status as other religions and other religious leaders.*
- (2) *The service shall take all reasonable steps to make available to Aboriginal inmates the services of an Aboriginal spiritual leader or elder.*

Since the passage of the CCRA CSC, to its great credit has developed, in consultation with Aboriginal communities and organizations, an impressive array of culturally sensitive Aboriginal programs to address the issues of violence, sexual abuse and substance abuse that incorporate Aboriginal values and processes that are facilitated by Aboriginal elders and professionals. There are now in the correctional landscape a number of minimum-security institutions referred to as healing lodges or healing villages where Aboriginal-centred ceremonies and programs are given a prominent place in the life of the institution, and where the local Aboriginal communities have a distinct presence and role.³²⁹ There are also seven funded Pathways Healing Units at medium-security penitentiaries where prisoners who demonstrate a commitment to the healing journey can seek some respite from the politics and pressures of the mainline.

The Panel recognized the significance of these healing-based correctional programs:

*According to evaluation information, Aboriginal offenders are more likely to engage in and complete programs that are relevant to their life experiences and needs. Research has identified the need for healing-based programs designed for and preferably delivered by Aboriginal people. This premise has formed the basis for partnerships with Aboriginal organizations to develop and pilot seven national Aboriginal correctional programs. Their content reflects not only the requirements of CSC but also the teachings of the Elders. It is essential to engage Elders in delivering these correctional programs to ensure they integrate traditional teachings that are appropriate for the diverse needs of Aboriginal offenders. CSC should examine its program framework to ensure there is a reasonable balance between correctional and healing interventions. Although a continuing emphasis must be placed on programs addressing violent behaviour, particularly family violence, and on those that address the management of alcohol and drug abuse, CSC must also identify what resources are required to enhance employability and employment initiatives for Aboriginal offenders.*³³⁰

The Panel in reviewing CSC's strategic plan provides this summary and commentary:

*A Continuum of Care Model, adopted by CSC in 2003, provides the framework to integrate traditional Aboriginal approaches to healing within the CSC policy framework. The Strategic Plan for Aboriginal Corrections (2006-11) responds to the needs and aspirations of Aboriginal people within the CCRA. It is based on the following strategic priority: "to enhance capacities to provide effective interventions for First Nations, Métis and Inuit offenders." National Aboriginal organizations have expressed their support for the plan. **However, the Panel was told that the lack of resources has restricted its full***

329 The relationship between one such institution in British Columbia, Kwikwèxwelhp Healing Village, and the local Aboriginal reserve community of Chehalis is the centerpiece of a recent documentary film "The Meaning of Life" by internationally recognized filmmaker Hugh Brody

330 *Roadmap*, p. 86

implementation... *The Panel is of the view that the issues and challenges regarding the Inuit are well understood by CSC. **Progress on a “Northern Strategy” is not for lack of analysis, but rather action.***³³¹ ...

CSC is at a critical juncture in developing the infrastructure (both physical and interventions and services) necessary to move forward with its strategic plan. CSC must continue to be responsive to disparities between Aboriginal and non-Aboriginal Canadians in the context of initiatives to be undertaken by governments and Aboriginal organizations. Creating the conditions for success requires a more seamless approach with all stakeholders, while respecting the aspirations of Aboriginal people, the jurisdictional mandates of governments, and the needs of Aboriginal offenders and their communities.

There is an urgent need for broader implementation of Aboriginal-specific interventions, and significant investment is needed over the next five years. It should be noted that not all Aboriginal offenders will choose to follow a traditional healing path—some will choose to participate in mainstream correctional interventions. Others, particularly those associated with gangs, may resist any type of involvement, requiring concerted efforts to motivate them to change. CSC must ensure that the implementation of the Continuum of Care model takes these options into consideration, focuses on addressing the needs of Aboriginal offenders and their communities, and is fully integrated with CSC’s priorities.

As expressed to the Panel by Donna Duvall of the Canadian Human Rights Commission:

*“It is positive that the Service in its 2007–2008 RPP [Report on Plans and Priorities] recognized the unique background and needs of First Nations on reserve, First Nations off reserve, Métis and Inuit offenders. **However, this needs to be translated into concrete action**, one of which is ensuring that all Aboriginal offenders have access to cultural practices and ceremonies, such as the use of sweat lodges and smudging.”*

*There is increasingly less capacity to meet the needs of Aboriginal offenders because of the growing numbers of Aboriginal offenders. A critical issue for CSC is maintaining these initiatives through appropriate measures and adequate funding.*³³²

There is a clear theme that emerges from the passages that we have bolded. That theme is the substantial disconnect between strategic planning and its implementation. It is this disconnect that gives rise to the realities described by the Correctional Investigator in his Annual Report and submission to the Panel; the over representation of Aboriginal offenders, particularly Aboriginal women, in maximum security, which means prisoners often serve their sentences far away from their family and the valuable support of other community members, friends and supports such as Elders; the absence of Aboriginal programming in maximum-security institutions limiting their ability to be transferred to lower security institutions; the underrepresentation of Aboriginal offenders in minimum-security institutions that contributes to their being released later in their sentences than other prisoners; longer periods of incarceration and more statutory releases for Aboriginal offenders contribute to less time in the community for programming and supportive intervention than for non-Aboriginal offenders; the proportion of Aboriginal offenders under community super-

331 *Roadmap*, p. 52

332 *Roadmap*, p. 83-4

vision is significantly smaller than the proportion of non-Aboriginal offenders serving their sentences on conditional release; Aboriginal offenders continue to be over-represented as a proportion of offenders referred for detention and ultimately detained compared to the other offender groups; parole is more likely to be revoked for Aboriginal offenders than non-Aboriginal offenders and Aboriginal offenders are re-admitted to federal custody more frequently than non-Aboriginal offenders, repeating the cycle of inequitable treatment.

It is here that the Panel's failure to properly review the evidence of overrepresentation becomes so important. Had the Panel done so and had it acknowledged that this state of affairs had been described and condemned by the Supreme Court as a "staggering injustice", and had it recognized that the root causes of this injustice have deep cultural, social and economic roots arising from our colonial history, how could it in all good conscience have concluded that "The Panel recommends that employment be **the first priority** in supporting Aboriginal offenders in returning to the community". As we have discussed earlier in our response in the chapter on employment, there is no question that finding a job is a vital element for community reintegration and personal development. We have also pointed out the enormous difficulties facing a correctional service in implementing an effective employment strategy. It is particularly difficult for Aboriginal prisoners given that the communities to which many of them will be returning already suffer from some of the highest unemployment figures in the country. But this aside, the evidence is clear that the reasons why Aboriginal peoples are overrepresented in prison and underrepresented on conditional release cannot be explained by the simplistic notion that they are unemployed. That employment would be the Panel's first priority is explained not by a careful consideration of the evidence of injustice but by the Panel's faith that employment, coupled with restricting prisoners to basic rights and toughening up prison regimes, is the correctional wave of the future.

Nor could the Panel in good conscience have contented itself with simply recommending that "CSC make resources available to respond to the specific needs of Aboriginal offender populations, such as further investment in correctional programming tailored specifically to their needs." This is hardly the clarion call necessary to respond to a national crisis. In the absence of anything more, the recommendation has to compete with the many other recommendations that also call for further resources that may and indeed been given much higher priority. Consider the investment that has now been committed as a result of the *Roadmap* for the hiring of many more security intelligence officers and the deployment of more ionscan machines and drug dogs to tackle the problem of drugs in the institutions. Drugs in institutions are a serious problem but do not constitute a national crisis of staggering injustice.

Had the Panel taken seriously the importance of restorative justice principles to the reintegration of Aboriginal offenders, how could it give the green light to CSC to ramp up security measures and place further burdens and injustice on community visitors in ways quite antithetical to the healing journey? Further, had the Panel given the necessary restitutive attention to overrepresentation and that Aboriginal prisoners are released later in their sentences than other prisoners, how in good conscience could it recommend the elimination of statutory release without any concern that it would almost certainly mean that Aboriginal offenders will serve even more time. It is surely little comfort that more of their non-Aboriginal peers will share the fate of extended imprisonment.

It is not too harsh a judgment to conclude that the Panel's recommendations, in the context of the systemic causes of Aboriginal overrepresentation and in conjunction for the other criminal justice initiatives of the Government (including restricting the availability of conditional sentences and the expansion of mandatory minimum sentences) provide an unintended roadmap for incarcerating even more Aboriginal offenders for even longer periods of time.

As we have described, the Correctional Investigator has done his utmost, through his Annual Reports, to bring to the attention of both the correctional establishment and Parliament the continuing injustice facing Aboriginal prisoners. Had the Panel given this issue greater priority it might have invigorated the Government and CSC to pay as much attention and devote as many resource dollars to redressing this problem as it has poured into anti-drug initiatives. Instead of the necessary invigoration we can see from the latest 2007-8 Annual Report of the Correctional Investigator that there is a lamentable lack of action:

In past OCI annual reports, this Office recommended that the Correctional Service appoint a deputy commissioner specifically responsible for Aboriginal corrections to ensure that the Correctional Service incorporates Aboriginal concerns into all of its operational and policy decisions at the senior level. This recommendation has not been accepted. The Correctional Service instead expanded the role and responsibilities of the Senior Deputy Commissioner (SDC) by adding the Aboriginal portfolio to his duties. Three years later, there is little evidence that this change has had the desired result. On the contrary, the gap in outcomes between Aboriginal and other offenders continues to grow.

The Corrections and Conditional Release Act stipulates that the Correctional Service shall establish a National Aboriginal Advisory Committee to advise the Correctional Service on the provision of correctional services to Aboriginal offenders. The National Aboriginal Advisory Committee has not met since June 2004. In response to my last annual report, the Correctional Service indicated that "work to select new members for the National Aboriginal Advisory Committee is underway"¹. A year later, this Office has yet to be informed of the re-establishment of this legally required committee.³³³

We continue to be concerned that the Correctional Service does not have the necessary data collection systems in place to monitor and evaluate its progress in the area of Aboriginal corrections. We have for years recommended that the Correctional Service publicly issue detailed quarterly reports analyzing key correctional outcomes for Aboriginal offenders, including transfers, segregation, discipline, temporary absences and work releases, detention referrals, delayed parole reviews, and suspensions and revocations of conditional releases. The Correctional Service indicated in its Strategic Plan for Aboriginal Corrections that it would develop and implement an integrated monitoring system for assessing the impact of policy and operational changes on Aboriginal offenders by March 2007. This date has long passed, and there is no evidence of improved data collection or analysis. In fact, we have been advised that the Correctional Service will now produce only basic internal annual reports on Aboriginal offenders, as it claims trends are not significantly changing over time. Key correctional outcomes must be the subject of close and regular monitoring to evaluate progress on the implementation of the Strategic Plan for Aboriginal Corrections.

In response to my last annual report, the Correctional Service stated that it uses the Departmental Performance Report (DPR) to "...report on progress toward the goals of the National Action Plan on Aboriginal Offenders"¹⁶⁶¹. Unfortunately, the latest CSC DPR, for 2006/07, does not report on key correctional outcomes that are of concern to this Office... Therefore, parliamentarians and Canadians

333 The Committee was eventually re-established in September 2008.

have no way of evaluating the Correctional Service's progress, or lack thereof, in this priority area of concern. The lack of openness and the refusal to engage in full reporting on this critical file remain a serious concern to this Office.³³⁴

10.3 Conclusion

We want to be clear that we support many of the recommendations made by the Panel regarding Aboriginal programming, including the need for community-based maintenance programs that will allow Aboriginal offenders to sustain progress after release and beyond their sentences, increased partnerships with Aboriginal communities and organizations to increase community engagement in correctional planning, release decision making and community supervision, a re-examination of the interrelationships among the use of CCRA Section 81 (Healing Lodges) and Section 84 Agreements (supervision by an Aboriginal community) and the use of community correctional facilities, and mobilizing community capacity to develop a more holistic response to Aboriginal victimization. The problem is that these recommendations have not been elevated to the profile that the dimensions of the injustice demands. We feel it necessary to restate that a “transformation” agenda that does not address, as the first priority, the staggering injustice that has been and continues to be inflicted on Aboriginal peoples is not one that a just society should endorse.

334 Annual Report of the Correctional Investigator, 2007-8, <http://www.oci-bec.gc.ca/rpt/annrpt/annrpt20072008-eng.aspx>

11 Physical Infrastructure and Regional Complexes

The Panel appears to have been persuaded by the UCCO submissions that substantial redevelopment of the prison infrastructure is needed in order to impose the control and disciplinary regimes that the union wants to see implemented. They quote from the UCCO brief:

*Ideally, new construction would...give CSC the ability to physically separate the inmate populations according to their security classification and commitment to their correctional plan.*³³⁵

We have already addressed in another chapter the problems with the UCCO brief and the recommendations that the Panel has adopted that flow from the brief. Suffice it to say at this point that if the data and analysis from UCCO was seriously flawed, a plan to rebuild the entire federal prison infrastructure to accommodate their proposals needs to be seriously questioned.

Neither author of this response to the *Roadmap* pretends to be qualified to address matters of infrastructure “rust-out” or prison design except in terms of some general principles where the location and design of prisons have a bearing on human rights. We will, therefore, focus our response largely on the human rights considerations. That said, we recognize that no structure can last forever – or should. This is particularly true of prisons that have gone through important transformations from the days of the Cherry Hill and Auburn Penitentiaries. While change is inevitable, and buildings become obsolete, few structures have the lasting power of the prison. We need to realize that any prisons built today will be with us for a very long time and it is, therefore, essential that if we are to avoid costly and long-lasting mistakes our plans must be based on clear correctional objectives, respect for human rights principles and solid evidence as to how design supports those objectives and principles.

The human rights principles we speak of and their relationship to the architecture of prisons have been identified by John Paget in his recent review of human rights and prison architecture in Australia:

*Provisions common to human rights instruments, such as equality before the law, the right to life, protection from torture, cruel, inhuman or degrading treatment, privacy, the rights of minorities and humane treatment when derived of liberty will provide a set of principles against which aspects of prison architecture can be assessed and the quality of confinement potentially improved.*³³⁶

If the human rights that he identifies are to be relevant to corrections, then the design and location of prisons must give very careful consideration to them so as to avoid creating conditions where attempts to respect those rights are undermined by the environment. The constitutional standard reflected in the *CCRA* that CSC use and justify the *least restrictive measures* demands that the structures that give force to the restrictive nature of the prison be developed to ensure that very

335 “Rewards and Consequences: A Correctional Service for the 21 Century—A brief to the Independent Review Panel studying the future of Correctional Service Canada,” UCCO-SACC-CSN, June 2007, p. 27

336 Paget, J. **Error! Main Document Only.** Human Rights and Prison Architecture: The Alexander Maconochie Centre: from Conception to Construction, Doctoral Thesis, Charles Sturt University. March 2008 p.2

careful accounting of how “least restrictive measure” has been recognized. Nowhere in the Act does it say that administrative convenience, efficiencies or even costs trump rights.

Paget cautions the reader that:

*All the “best practice” architecture counts for very little if the right staff are not recruited, if they are not thoroughly trained, if they are not effectively supervised in the execution of human rights-based policies and procedures, if they are not well managed and developed and if they are not inspired by leaders of integrity.*³³⁷

The key point here is that good management and good design must complement each other in order to achieve the desired outcome. Neither can be considered in isolation of the other and if the *Roadmap* is to set in motion a process that is intended to make major changes in the “philosophy”³³⁸ of prison design -to be embodied in concrete and steel – the Panel should articulate the key elements of that philosophy and demonstrate how it accommodates the fundamental principles relating to human dignity and law of human rights. In fact, other than some tenuous claims to increased efficiencies, we are left to wonder what the plans they articulate tells us about their vision of corrections in the 21st century.

11.1 To Build New or Replace Existing Structures

Before considering new construction or the repair of old prisons, the bigger question that needs to be answered is: “what prison capacity is *needed* in Canada in the foreseeable future? Prisons are enormously expensive to build or repair and in both cases take a great deal of time to plan and implement. In the case of major repair, institutions can have their routine and access to programs seriously interfered with for very long periods of time - sometimes years as exemplified by the years of limited use and disruption that as occurred during the renovations to Collins Bay Penitentiary in Kingston Ontario. If new prisons are built with the intention to replace existing ones but the prison population grows, it is quite possible that by the time the new prison is built the old prison may need to continue in service. This occurred when Millhaven was built to replace the old Kingston Penitentiary in 1970. The demand for prison space has forced CSC to continue using the oldest federal prison in Canada even to this date. It is therefore prudent to consider likely population levels before building strategies should even be considered.

Prison population levels are driven by many factors including the growth in the Canadian population generally, especially growth in the young male population, and crime rates. However, the size of prison populations is also affected by public policy choices that influence how many people are sentenced to imprisonment and how long they stay there. The most important factors that increase prison population levels are those that bring to prison significant numbers of people who would not have been there before or lengthen the period in custody either through longer sentences or restrictions on gradual release. Over the last three decades in Canada the prison population levels as a proportion of the Canadian population generally has remained flat. In Canada, we imple-

337 Puget, p. 101

338 “The Panel has heard from CSC how the shortcomings mentioned earlier could be addressed by building regional complexes across the country and moving away from a construction philosophy that relies on stand-alone facilities”. *Roadmap*, p. 157

mented sentencing options and principles that clearly directed judges to use imprisonment as a last resort. We also maintained programs of gradual release such as parole, day parole, accelerated parole review and statutory release that took pressure off the prison populations. At the same time, in the US a plethora of legislative changes introduced legions of mandatory sentencing measures that dramatically increased prison length while simultaneously sharply reducing gradual release options. As a result, our prison population rate per 100,000 of the general population increased only from 89 in 1974 to 116 in 2007. In the US during the same period, the prison population increased from 149 to 756.³³⁹

Over the last 30 years crime rates have changed largely in tandem between the two countries. Property crime is about the same in both countries and violent crime, while higher in the US, has been on a downward trend in unison with the decline in violent crime in Canada.³⁴⁰

The comparison between Canada and the US shows that while crime and general growth in the population has an impact on imprisonment levels, public policy choices have, by far, the greatest influence. The fact that over the last two years our current federal government has adopted what is generally described as “harsh US style sentencing policies” that rely heavily on mandatory sentences for many offences should be of considerable concern for those planning future prison accommodations. The Panel, however, makes no attempt to factor these changes in sentencing policies into their proposals. Not only did they ignore the likely impact of the shift towards greater reliance on longer terms of imprisonment through the sentencing process, they did not even assess the impact on levels of imprisonment arising from their own recommendations relation to parole, statutory release and accelerated parole review. As we write in the chapter entitled *Earned Parole*, the Panel’s recommendations cannot help but generate sharp increases in our

RECOMMENDATIONS

101. *The Panel recommends that any review of changes to CSC’s physical infrastructure consider the impact of building new correctional facilities in different regional locales or correctional complexes, financing these new capital expenses in a new way, and decommissioning facilities that have long served their usefulness.*

102. *The Panel suggests that CSC look at other correctional jurisdictions to determine the operational and related cost-effective benefits of building new correctional facilities in different regional locales or correctional complexes.*

103. *The Panel recommends that CSC review standards used in the purchase of outside medical services in each of its regions.*

104. *The Panel recommends that the government take into consideration the importance of ensuring that both federal and national initiatives related to health care reflect the responsibilities and accountabilities of CSC. The Panel suggests that the Government examine how health care costs are funded for federal offenders and either consider providing a direct allocation out of Health Canada, or continue consideration of these core costs in the determination of CSC budgetary allocations.*

105. *The Panel recommends that the two-year bridge funding provided by Treasury Board to CSC for the period of 2007–09 be extended as part of CSC’s normal operating allocations.*

339 World Prison Brief, International Centre for Prison Studies, Kings College, London, online at <http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/?search=northam&x=North%20America>

340 See Zimring, F. *The Great American Crime Decline* (New York: Oxford University Press, 2007) for an in-depth comparison of Canadian and US crime trends.

federal prison population. The abolition of statutory release alone will remove the release mechanism that is used in two-thirds of all releases and the Panel's suggestion that their other reforms will result in a dramatic increase in the number of prisoners who will earn parole is unrealistic.

It is quite likely that with both the sentencing and releasing policies changing, the federal government would be hard pressed to build enough prison capacity to keep up with the growing population. Plans to replace the existing prisons for new ones will become increasingly difficult to achieve. For these reasons, the discussion of addressing "rust-out" through new construction seems a denial of correctional reality. In fact the current policies of the government when added to the new recommendations of the Panel ensures that the problems associated with repair of existing prisons will continue far in to the future – even with massive new construction. The Panel's invitation to consider design justified by the need for replacement while ignoring expansion pressures presents both a limited and misleading picture.

11.2 Regional Complexes

The full recommendations of the Panel are presented in the insert but, in summary, the new prisons envisaged by the Panel would be distinguishable from existing prisons primarily by a number of characteristics.

The Panel proposes that the size and capacity of the new complexes would be much larger than any existing federal penitentiaries.

*Instead of groups of inmates with the same classification level being housed in institutions with capacities ranging from a few hundred to 500-600 offenders, a regional complex could house between 1500 and 2000 offenders.*³⁴¹

By building physically separate housing units within the complex while using common central services such as kitchens, case management, administration, and possibly work programs and visiting facilities, distinct populations would be housed, at least at nighttimes, in separate units.

Contrast this proposal with criteria Paget identifies as crucial to design respectful of human rights.

Human rights is fundamentally concerned with the dignity of the individual, thus from the perspective of prison architecture the challenge is to express that idea in the built form.. What is sought is an understanding of first, how architecture can assist in creating a physical setting which demonstrably recognises and responds to the needs of various cohorts of prisoners and their social organisation and second, how the features of this same setting impact on prisoner behaviour and the nature of the custodial experience. The architectural features and building sciences which need to be examined include the overall environment of the prison, its orientation, colour, light, noise, space, texture, furniture and fittings and building materials.

The Panel identifies what they consider to be the problems of discrete facilities in hampering effective consolidation of resources, limiting the provision of a "continuum of care" and losing economies of scale:

341 *Roadmap*, p. 115

*[Isolation of prisons within regions]...makes it extremely difficult to capitalize on approaches to manage the diverse challenges presented by the offender population. If a penitentiary is having difficulties with a certain group or category of offenders, it is difficult to combine resources within a region when the facilities are separated by hundreds of kilometres. In a crisis situation or when there's a need to access professional services at a different institution, the geographical separation of the penitentiaries creates a unique set of problems."*³⁴²

*...In many cases, staff at the receiving penitentiary must re-start elements of the correctional planning process and valuable time is lost in managing the offender's sentence."*³⁴³

*...having a physical infrastructure strategy that maintains an approach of separation, economies of scale are lost by replicating identical management, administrative and operational structures"*³⁴⁴

We have no disagreement that all of these are currently problems for CSC. Our concern is the narrow focus that the Panel would bring to bear in addressing them and the Panel's failure to identify a whole range of other issues that are crucial in redesigning the physical organization of imprisonment.

The Panel gives us this profile of the proposed regional complexes:

[They] would comprise minimum-, medium- and maximum-security accommodation areas, appropriately separated within a common perimeter fence but sharing common services and/or space at different times. For example, common programming or vocational skills development space could be accessed separately by different segments of the population or food services could be provided from a common preparation unit.

The presumed advantages of the proposed complexes include the following:

- *A regional complex approach would provide an opportunity to more effectively and efficiently manage larger groups of inmates and use a larger pool of resources to address the needs of the inmates in a more targeted manner.*³⁴⁵
- *A complex would certainly allow for a better concentration of staff to deliver select, targeted programs to offenders.*³⁴⁶
- *It is reasonable to assume that waiting lists for programs could be reduced and that offenders would no longer have to wait, as they do in certain cases, to be transferred to another penitentiary before being able to access a program.*³⁴⁷
- *CSC could invest in relatively sophisticated equipment to screen not only people but also vehicles entering the compound. Also, drug detector dogs could be used much more effectively as well.*³⁴⁸
- *A regional complex would also be able to provide appropriate and separate accommodation for offenders at various security levels but provide a common management team to oversee the correctional plans and progress of offenders through their incarceration.*³⁴⁹

342 Roadmap, p.156

343 Roadmap, p.156

344 Roadmap, p.157

345 Roadmap, p.157

346 Roadmap, p.157

347 Roadmap, p.158

348 Roadmap, p.158

- ... avoid unnecessary costs associated with transferring inmates, the gaps that are created by having a new case management team assume responsibility for an offender every time he/she is transferred, and worrying about having to duplicate an array of programming responses in each and every penitentiary, despite its size.³⁵⁰
- ... the ability to reinforce an overall correctional management model that stresses offender accountability to follow their correctional plans. Offenders would usually be maintained and managed within the complex but their overall location within the complex would be dictated by their motivation and participation in their correctional plans. Services and resources would be aligned within the complex based on inmate participation and motivation.³⁵¹
- ... provide an opportunity to focus resources to deal with distinct segments of the population or the distinct needs of segments of the population. For example, inmates who require ongoing physical health care needs could be housed in regional health care units thus avoiding high costs associated with prolonged stays in community hospitals. As well offenders with mental health care needs would have better access to services that are located in one facility and not thinly spread out between several penitentiaries.³⁵²
- This design would also provide an opportunity to more consistently address problems associated with having segregation units in every maximum- and medium-security penitentiary across the country. A common segregation unit within a complex would provide a more consistent approach to managing the behavioural problems that a small segment of the inmate population regularly presents. Common approaches by properly trained staff could provide a safer and more effective alternative to the smaller segregation units, which are not staffed properly, to motivate inmates to modify their behaviour in a positive way.³⁵³
- Furthermore, since the offender would, as a norm, remain in the same regional complex during the sentence, the potential of maintaining important family ties increases.³⁵⁴
- Although CSC has not had an opportunity to thoroughly identify overall cost savings associated with moving to a complex design approach, both the Panel and CSC believe this new approach would result in cost savings.³⁵⁵

The advantages identified above are provided without any evidence that such advantages might actually be realized or any analysis of the assumptions upon which they are based. Neither is there any discussion of possible disadvantages. Several multiplexes already exist within the federal system, as well as the new womens' institutions but the Panel does not identify any studies by CSC that seek to measure whether these do deliver the benefits that are assumed by the Panel. Might some or all of the advantages the Panel identifies be contingent on the regional complex replacing existing prisons? Would the advantages apply to the same degree, or at all, if the complexes were in addition to existing prisons? Given that most of the costs of operating prisons are salary costs,

349 Roadmap, p.158

350 Roadmap, p.158

351 Roadmap, p.158

352 Roadmap, p.159

353 Roadmap, p.159

354 Roadmap, p.159

355 Roadmap, p.160

might we expect that the savings that might occur with more “efficient” prisons be strongly resisted by the unionized staff – ultimately defeating the potential for savings?

Among the factors ignored by the Panel are those that relate to the actual environment of the prison and the degree to which that environment is conducive to the personal development of those who live and work there. In thinking about the specifics of the prison and in particular the common facilities for all of the sub-prisons in the proposed complexes we would be wise to keep in mind Paget’s comments about “hard” and “soft” architecture.

Institutional life is mediated by institutional architecture. Hard architecture sends a clear and negative message about society’s attitude towards its prisoners and the prevailing law and order approach. The materials of hard architecture are robust, if not industrial, and are selected on the basis of cost, durability and ease of maintenance, rather than aesthetics. Hard architecture lacks permeability and encourages psychological withdrawal. It also invites assault for, as Sommer (1974: 12) observes ‘human ingenuity can always find a way to destroy things that are physically or spiritually oppressive’.

“Soft” architecture also provides a cue to behaviour. The prison experience should encourage the prisoner to respect the society and its values which are reflected in the conditions of imprisonment. Under a human rights framework, there is no real reason why these conditions should not include the elimination of many of the overt symbols of incarceration, such as razor wire, to reduce the sense of trauma caused by sudden removal from the outside environment and placement in another which is so far removed from the norm. The conditions of imprisonment should also provide, where feasible, for prisoner defensible space, which is defined by real and symbolic barriers that combine to bring an environment under a degree of control by its occupants. This, in turn, invites personalisation, that is, the ability to put an individual imprint on one’s immediate surroundings, as a counter to deindividuation.³⁵⁶

Recognizing that the elements of “hard” architecture may be necessary more often for high-security prisoners than those at other levels, we should question how the notions of the less restrictive “soft” architecture could exist for low security inmates who would have to share many of the same spaces as higher- risk prisoners in a regional complex model. This is already a problematic feature of the new womens’ institutions where double chain link fences restrictively define the status of “minimum security” prisoners.

Other questions abound, such as:

- With common areas used by different security levels, would not all those areas need to be built with the maximum security risk in mind – thereby subjecting lower security prisoners to more restrictive movement and supervision? Can that be consistent with the fundamental principle of least restrictive means?
- Would the ability to invest in new drug detection hardware and dogs not mean that even those in lower security would now be subject, along with their families, to far more intrusive and otherwise unjustified screening – along with all of the problems such searches imply as discussed in our section on Drugs?

356 Paget, p. 119

- Can treatment, school or correctional staff – even administrators easily move between prisoner groups of various security levels and adjust to these groups in an appropriate manner or will they tend to act as though all were higher security prisoners?
- Can distinct groups make use of common areas at different times (i.e., programs, recreation, work or visiting) without severely limiting access to these areas thereby also limiting their rights, programs, recreation, work or visiting activity?
- Can the units be kept sufficiently distinct without building solid barriers between them? Will those in protective custody or who are otherwise vulnerable such as the mentally ill be within sight and sound of other prisoners – particularly when in the outdoor recreational spaces?
- If solid barriers are used to separate populations, would those barriers serve to recreate some of the most oppressive environments and undermine entirely the notion of minimum security?
- Given that prisoners today are already subjected to persistent changes of case management staff (frequently every few months) why should we expect that regional complexes would see less staff changes?
- Might ease of transfer between security levels contribute to growth in the higher security levels?
- Might that same ease of transfer begin to compromise the procedural protections designed to ensure that transfers to higher security are made in accordance with the duty to act fairly and in accordance with fundamental principles of justice?³⁵⁷
- Would a common segregation area not mean that those in segregation for their own safety would be subjected to the highest security regime? And how might they be reintegrated back into general population? Currently, several prisons in Canada are viewed as being ones where people who have been segregated for their protection can be more easily integrated back into the general population. Without such options the segregated protective custody population continues to grow and prisoners housed in protective custody are virtually excluded from progression to lower security and eventual parole. What will be the impact if all protective custody prisoners remain within the same complex?
- Would the important advantage in the administration of smaller prisons of staff knowing the prisoners, and the converse, be lost in an environment with populations four to five times the size of today's largest federal prisons?
- With new prisons typically built in the more remote areas away from community services and professionals, might it become more difficult, rather than less difficult, to recruit sufficient specialists to meet the heavy demand of very large prison complexes?
- Would prisons in more remote areas make access for many families even more difficult than it is for many now where prisons are in municipalities? Even in Kingston there is an enormous difference in accessibility between Collins Bay, which lies within the city limits and is serviced by city buses and Millhaven, one of the proposed sites, which is well outside the city and requires an expensive cab fare to reach?

357 There is evidence to suggest this compromising occurred in the past where super maximum Special Handling Units were located within the walls of a maximum security institution.

All of these questions relate directly to the ways in which prison design has a dramatic bearing on how prisoners are treated and the protection of their human rights. Administrative convenience has always been a major counterpoint to human rights³⁵⁸ and a massively large institution justified almost entirely on the bases of administrative convenience and efficiencies could well shift the pressure even more against the human rights perspective. We believe we could easily make the case that each of the problems we have identified in the above questions is at least as valid as the “advantages” suggested by the Panel.

11.3 Cost

It is interesting to note that the only significant expenditure of the Panel to obtain objective third-party “evidence” occurred in relation to their proposal for regional complexes.

To validate the hypothesis as much as possible, the Panel contracted with Deloitte & Touche to independently estimate the costs of constructing and operating a new regional complex facility versus the status quo.

Overall, Deloitte & Touche concluded that although a significant level of rigour has been applied to developing several aspects of the cost estimates and that this has been conducted in a manner consistent with CSC’s methodologies and practices, it may be possible that the analysis is overly weighted towards “business as usual.” That is, although the capital, operating and lifecycle estimates are consistent with CSC methodologies, they may not represent the most advanced thinking, such as that available from other departments (for procurement timelines), jurisdictions or third-party advisors. The underlying assumptions for the analysis may be considered reasonable only to the extent that CSC baseline data and standards (such as resource indicators) are reasonable. In many respects, the complex may be considered a transformational business model, potentially requiring new operating approaches and standards.³⁵⁹

While we applaud the Panel for seeking something more tangible than their beliefs to ground their recommendations in this case, there are two important observations that need to be made about the Deloitte & Touche report:

1. the mandate was extremely limited – with a singular focus on cost while ignoring virtually all other correctional and human rights considerations, and
2. the report’s conclusions about costs are cautious and equivocal.

Based on the lack of clarity or conviction reflected in the Deloitte & Touche report itself, we cannot understand either the unbridled enthusiasm of the Panel for this proposal or the apparently uncritical endorsement of their recommendations by the Minister and CSC.

11.4 An Alternative Planning Approach

It is instructive to compare the process and analysis that characterises the Panel’s rush to judgment on correctional regional complexes as the organizational/design paradigm of the 21st century with

358 See Michael Jackson, *Justice Behind the Walls: Human Rights in Canadian Prisons* for details of how Canadian prisons regularly allow administrative convenience to displace human rights.

359 *Roadmap*, p. 160

that reflected in the commissioning and construction of the Australian Capital Commission's first multi level security prison, the Alexander Maconochie Centre (AMC).³⁶⁰ It was also the first prison in Australia to be conceptualised, designed and constructed under the framework of human rights legislation. As described by John Paget, the director of this project:

The decision by the ACT government to proceed with the construction of the AMC and bring into law the Human Rights Act 2004, posed a key question, which is that in responding to the rights of all prisoners and to the specific rights of those who are unwell, who are damaged, disabled or discriminated against, what would a prison designed, constructed and operated under a framework of human rights actually look like?³⁶¹ ...

The Preliminary Assessment for the site drew upon the Functional Brief for the AMC. Reflecting the fact that human rights legislation was imminent, the Assessment notes that 'A prison in the ACT would reflect a Human Rights-based approach to prison management with a focus on rehabilitation within the context provided by the "Healthy Prison" model'. The Functional Brief was the primary document which informed the design of the AMC. While it was crafted in the emerging human rights environment, like the Preliminary Assessment, it initially sought design inspiration through an interpretation of the "Healthy Prison" model adopted by Her Majesty's Inspectorate of Prisons which, in turn, had borrowed the concept from the World Health Organisation (WHO 1998). The elements of this model are that everyone is and feels safe, that is, staff, prisoners and those who work in or visit the prison; everyone is treated with respect as a fellow human being; everyone is encouraged to improve themselves and given the opportunity to do so through access to purposeful activity; and everyone is enabled to maintain contact with their family and is prepared for release. The passing of the ACT Human Rights Act in late 2004 reinforced and validated this design direction of the AMC.³⁶²

To ensure, then, that the architecture of the AMC would stand up to the inevitable criticism the Functional Brief was circulated throughout Australia to correctional practitioners, architects, public and capital works staff, academics, inspectorial staff, mental health professionals, Indigenous people, and senior professional women with experience in corrections, education, health and Indigenous issues. This process of "peer review" was also necessary to ensure the Functional Brief was sufficiently rigorous and comprehensive.³⁶³

The Alexander Maconochie Centre is a small (300 bed) single prison complex. The Panel is proposing a transformation of an entire prison system for thousands of prisoners. Any move to change the approach to prison construction must involve very broad and detailed consultations. The premises and assumptions must be seriously challenged and the feasibility tested in terms of the human rights implications. The Panel has not suggested any sort of public consultation process to test or refine their proposals. Neither have seen any indication that CSC intends to engage in a peer review process.

360 Prior to its construction ACT exported its small remand and sentenced prisoners to New South Wales, a practice referred to as modern day transportation.

361 Paget, p. 2

362 Paget, p. 255

363 Paget, p. 259

11.5 Conclusion

The Panel's assessment is blind to the likely impact of the government's current criminal justice policies, as well as to their own recommendations, on the size of future prison populations. In addition no attempt was made to consider the potential problems regional complexes might create. Their selective profiling of the regional complex model resembles a sales pitch more than a serious and thoughtful planning document. It seems ill-advised, and the antithesis of responsible correctional governance, to build an infrastructure of prisons – buildings that typically last for over a hundred years - on such a weak foundation. Any plan, especially one as massive and permanent as regional complexes, must be seriously challenged in the planning stages if we are to avoid having many future generations saddled with expensive, obsolete structures. Sadly, once again, there is no recognition of the relevance, importance, or even the existence, of human rights and their implications for their proposed design.

12 Rhetoric and Reality

One of the hard lessons the authors have learned from our collective 75 years of being involved in Canadian corrections is that there is often a huge gap between the rhetoric and reality of change. We have both repeatedly experienced events in Canadian penitentiaries, often in contradiction to the law, policy and stated values of the prison system that have been huge disappointments in our quest for the humane treatment of prisoners. Even when governments are not beating the populist drum of “doing real time for real crime” by ratcheting up the pains of punishment, the promise of a humane prison system always seems to be out of reach. There are many, among both prisoners and those in free society, who would argue that the promise itself is an illusion, indeed a delusion that is incapable of fulfillment. Imprisonment by its nature – the isolation, forced confinement, loss of privacy, lost opportunities, and danger - is dehumanizing and humiliating. Prison is in many ways the antithesis of a respectful environment and it is no mystery why respect for human rights is often ignored or seen as an unnecessary encumbrance.

It was one hundred years ago that Winston Churchill in a speech to the House of Commons reminded us that our status as a civilization is measured against the degree to which our rhetoric *and* our practices place values that reflect human dignity at the foundation of our social policy.³⁶⁴ We take great pride as a society in our attempts to respect the human dignity of its members by measures which include a progressive constitution with a Charter of Rights and Freedoms, a professional judiciary, Medicare, free universal education, and income security through welfare and old age benefits. While prison is one of the most difficult environments to respect human dignity that means we must be ever more vigilant to ensure that the values that we depend on for our quality of life are extended to those in prison. We both continue to profess and advocate that a humane prison is a substantially realizable and necessary goal. The fact that many important steps have been taken during our working lives speaks to the fact that our goal is shared by many dedicated administrators and staff within the Correctional Service of Canada. But while the achievements are important and a matter for celebration, we must never lose sight of the gaps between the rhetoric and reality. The goal of living in a humane society cannot be surrendered - particularly in our prisons.

12.1 Context

A consistent and reliable Canadian barometer of change in the direction of greater protection of human rights is to be found in the annual reports of the Correctional Investigator. Significantly the most recent annual report for 2007-8, publicly released in February of this year, marks the 35th anniversary of the establishment of the Office of Correctional Investigator and the present incumbent, Howard Sapers, has provided a valuable retrospective of the contributions of the Office.

³⁶⁴ The Churchill speech can be read at http://justicebehindthewalls.net/03_voices_01_01_00.html

The creation of any ombudsman office ... is a recognition that even those who have committed serious crimes must have access to an independent avenue of redress to voice their concerns and ensure that they are subject to fair and humane treatment while in the care and custody of government officials. Through respecting the human rights of prisoners, a society conveys a strong message that everyone—regardless of their circumstances, race, social status, gender or religion—is to be treated lawfully, with respect and dignity.

By their nature, penitentiary systems are largely closed to the public eye and operate behind closed doors. Historically, there can be no doubt that this operating reality has on occasion masked unfairness, inequity and even brutality from public view. Openness, transparency and accountability in corrections are thus fundamental objectives to ensure that the rule of law prevails behind prison walls. The Office of the Correctional Investigator has contributed significantly to those three objectives in the last 35 years....

In reviewing the 35-year history of the Office, the Correctional Investigator (hereafter CI) identified the common themes that emerged in the annual reports:

- *Harsh conditions and treatment of prisoners, as well as the denial of access to effective internal and external complaint mechanisms, can lead to violence. Introducing effective complaint mechanisms can alleviate tensions and reduce violence in prison.*
- *Correctional culture is strong and difficult to change. Outside intervention is often not embraced, but it is necessary to make significant progress.*
- *At times, the Office has made important recommendations that the Correctional Service has not implemented until the courts, royal commissions of inquiry or other oversight agencies, such as the Canadian Human Rights Commission, have required the CSC to do so.*
- *Some issues raised decades ago remain central concerns for the OCI.*
- *Independent oversight and external decision-making are essential in instances where prisoners' fundamental rights are at stake—for example, in disciplinary and segregation decisions.*
- *Segregation, formally known as dissociation—the harshest condition of confinement in a penitentiary—has often played a significant role in high-profile incidents.*
- *The Correctional Service has been inconsistent in applying lessons learned from serious incidents, including deaths in custody, and ensuring that corrective action is implemented across the country and over time.*³⁶⁵

In previous chapters of our response we have addressed several of these issues, particularly relating to segregation and independent oversight. Two other systemic issues that have been the subject of particular concern of the Correctional Investigator have been the treatment of women offenders and the mentally ill. It was the 1995 special report of the CI arising from the humiliating and illegal strip searching and segregation of women in the Prison for Women in 1994 that led to the Arbour commission and the CI's 2003-4 report included a special section that focused on the increasing needs of one of the most vulnerable groups of offenders, those suffering from mental illnesses. In preparing our response to the *Roadmap* we had initially thought that we would not be devoting much space to either of these issues. This was not because the issues were other than of great significance. Our reasoning was that in the case of the mentally ill offender the Panel had appropriately endorsed CSC's comprehensive mental health

365 Annual Report of the Correctional Investigator 2007-8 online at <http://www.oci-bec.gc.ca/rpt/annrpt/annrpt20042005-eng.aspx#IIIA>

strategy- one which had received broad support from the Correctional Investigator, mental health professionals and community organizations and was an example of principled correctional intervention based on good research. That serious issues of implementation remained to be resolved were identified in the most recent 2007-8 annual report of the Correctional investigator but beyond joining with the CI's recommendation that "that full implementation of the Correctional Service's Mental Health Strategy is urgently required" we felt that we would have little more to contribute.³⁶⁶ Indeed the Panel clearly recognized the gap between the strategy and its implementation making entirely appropriate recommendations in this respect.³⁶⁷

On the issues of women offenders we are very aware of the immense literature on the treatment of federally sentenced women in Canada. Few areas of corrections have been the subject of as much attention, change and criticism over the years. The issues are substantial, complex and in many ways unique. Our initial reason for restraint was that the Panel's mandate³⁶⁸, contrary to the mandate relating to most other topics, was very narrowly drawn and limited to only a commentary on the earlier report of the Glube Committee³⁶⁹:

The CSC Review Panel carefully considered the recommendations of the report, Moving Forward with Women's Corrections, submitted by the Expert Committee chaired by the former Chief Justice of Nova Scotia, Constance Glube, and CSC's response to these recommendations.

The mandate of the Glube Expert Committee was itself a limited one and unlike the Panel did not consider itself charged with designing a transformative agenda for Canadian corrections. The scope of the Glube mandate and the nature and context of the Committee's inquiry is clearly set out in its report:

[The Committee's] mandate is described within a Terms of Reference annexed to this report and essentially asks that the Committee assess the progress achieved in women's corrections through a review of CSC's Ten-Year Status Report on Women's Corrections.

The Committee wishes to make clear that the approach it took to this task does not constitute an evidentiary investigation, forensic audit, scientific evaluation or an inquiry of the sort that has, on many occasions, preceded this undertaking.

366 "The full implementation of the Correctional Service's Mental Health Strategy is urgently required. It will ensure that the Correctional Service complies with its legal obligation to provide every inmate with essential mental health care and reasonable access to non-essential mental health care that will contribute to the inmate's rehabilitation and successful reintegration into the community, according to professionally accepted standards. Improving outcomes in this area is critical". Annual Report of the Correctional Investigator 2007-8.

367 Most notable in this respect are the following recommendations:

47. The Panel recommends that the 'bridge funding' approved by Treasury Board for CSC's Mental Health Strategy be provided permanently to CSC so that they can implement and maintain its mental health initiatives and meet legislative obligations.

55. The Panel recommends that the Review consider the overriding management principle that treatment and operational requirements should take place in the context of a "penitentiary within a hospital setting rather than a hospital within a penitentiary setting" so that a strategy and business case supporting the development of these facilities over the next five years can be developed.

368 *Roadmap*, p. iii : "Review the recommendations made in the report *Moving Forward with Women's Corrections*;"

369 *Moving Forward with Women's Corrections: The Expert Committee Review of the Correctional Service of Canada's Ten-Year Status Report on Women's Corrections*, 2007

*The Committee has chosen, in a manner consistent with the time given to meet its mandate, to conduct a global assessment and constructively determine what progress CSC has achieved in relation to the critical studies of the past ten years.*³⁷⁰

The Glube Expert Committee concluded that CSC had made “remarkable progress” and made just six recommendations.³⁷¹ The Panel having reviewing those recommendation and CSC’s response endorsed them, with the exception of the recommendation that the wardens of the women offender institutions report directly to the Deputy Commissioner of Women, a recommendation originally made by the Arbour Commission, and subsequently concurred in by the Canadian Human Rights Commission and the Correctional Investigator.³⁷²

The Glube report in effect gave CSC an A grade in bringing about change in women’s corrections in Canada. Given that the expert committee was chaired by a former Chief Justice of Nova Scotia it would seem churlish to fault the CSC Review Panel for doing anything other than taking the Glube report findings at face value. At the same time, it would be unfair to criticize the Panel for staying within its mandate. This was why in formulating our initial response we similarly felt constrained to limit our discussion to the one recommendation from the Glube report that the Panel rejected.- that dealing with the direct accountability of wardens to the Deputy Commissioner for Women.

370 Moving Forward with Women’s Corrections: The Expert Committee Review of the Correctional Service of Canada’s Ten-Year Status Report on Women’s Corrections, 2007

371 The Glube Committee’s recommendations were:

1. *The Committee recommends that CSC revisit the women’s corrections governance structure in order to have the Wardens of the women offender institutions report directly to the Deputy Commissioner of Women.*
2. *The Committee recommends that CSC put a human resource strategy in place to support its women’s corrections workforce needs.*
3. *The Committee recommends that CSC make women’s community corrections a higher priority in order to increase opportunities for successful reintegration into the community.*
4. *The Committee recommends that CSC dedicate full-time Elders to the secure units at Edmonton and Fraser Valley.*
5. *The Committee recommends that CSC incorporate the need for an Aboriginal women’s healing lodge facility in its long-range accommodation plan on a priority basis for Eastern Canada.*
6. *The Committee recommends that if CSC decides to discontinue operations at Isabel McNeill House every effort be made to retain the existing resources so that they are proportionately distributed to the women’s regional facilities and used to support the orientation of newly arrived women*

372 The Panel’s recommendations were:

26. *The Panel, overall, endorses the recommendations contained in the report “Moving Forward with Women’s Corrections.”*
27. *The Panel recommends that a strong functional role for the Senior Deputy Commissioner, Women be maintained.*
28. *The Panel endorses the approach used for women with mental health issues and was impressed by the Structured Living Environment (SLE) and recommends that the model should be considered for adaptation to men’s corrections.*
29. *The Panel recognizes the importance of an independent review of the status of Women’s Corrections in Canada and recommends that the recommendations of the Glube Report should form the basis of a formal review in five years.*

As to the Glube report itself, it would also seem to be unreasonable to quarrel with its overall assessment that the changes in women's corrections since the Arbour commission have indeed been impressive. The report highlighted the following elements of that changed correctional landscape:

For example, a Human Rights Division has been established; the Prison for Women has been closed; the regional facilities are now fully operational; an Aboriginal Healing Lodge for women has been opened; a host of women related research has been completed; cultural and gender-specific programs have been implemented; women-only emergency response teams have been created; administrative segregation accountabilities have been strengthened; the Mother-Child Program has been introduced; community residential services have been expanded; a mental health strategy for women has been implemented; the Structured Living Environment Units have been added; and various intervention strategies have been developed to support women admitted to the Secure Units now in place at the regional facilities.

CSC has clearly applied the sometimes difficult and costly lessons learned from the earlier reviews, to move forward with women's corrections.

*This is most evident, in the Committee's view, in relation to Human Rights, certainly the most important theme and the one that represents the foundation for this report.*³⁷³

The Canadian Association of Elizabeth Fry Societies (CAEFS) whose indefatigable advocacy role on behalf of federally-sentenced women was publicly recognized by Justice Arbour, while acknowledging that there have been important changes in the physical architecture, women centered policy and research framework, programs and staff training, have maintained that "some of the most insidious and invidious issues" in women's corrections that were not identified in the Glube report, because of the expert committee's limited mandate and reporting time frame, give rise to serious reservations on the reality of change for women offenders and continue to compromise the goal of respect for human rights.³⁷⁴ These issues include the significant months of delay in terms of case management, access to programs and preparation/application for conditional release and the conditions in the maximum-security units within the new women's prisons.

In 2003, in response to the new regimes planned for the maximum security units that CSC was building to replace the temporary³⁷⁵ segregated maximum security units for women in men's prisons, CAEFS advised CSC of their grave concerns that the regimes in these units would aggravate, not ameliorate, threats to public safety and compromise respect for human rights:

"We believe that responses to problems and incidents in the women's prisons that are primarily security-based (such as the creation of Maximum Security Units) are not only destined for failure but are more likely to increase, than decrease, the incidence of violence and harm. We are gravely concerned that the very existence of these units will create a demand for yet greater lev-

373 Moving Forward with Women's Corrections

374 CAEFS Annual Report 2007-8

375 Following an escape from the new Edmonton Institution for Women all women classified as medium and maximum security prisoners were temporarily transferred into segregated maximum security units in prisons for men. These temporary measures were supposed to exist for 18-24 months, but it would be 8 years before separate maximum security units were constructed and operational in all the new women's institutions.

els of static security, which will in turn result in even further increases in the use of force and systemic oppression and repression - all of which will be to the further detriment of everyone who lives and works in the women's prisons. The spill over of these approaches will also further negatively impact on the broader community and will undoubtedly heighten public safety concerns.

CAEFS is of the view that there needs to be a clear recognition that a security-based response to women's behaviour too often results in an inhumane response and consequent exacerbation of what are characterized as "behavioural problems". Paradoxically, this entire approach tends to increase, rather than decrease, any real or perceived risk of harm to both prisoners and staff.

We believe that the design of the units, together with the explicit condoning of the use of force, deprivation, physical and emotional punishment, strip searches and solitary confinement, throughout the remainder of the document is inconsistent with creating a safe and humane "quality care environment".

We are concerned about the creation of new degrees or sub-classifications within the maximum security designation and oppose the use of instruments of restraint on women prisoners as they move about within the prisons. The use of restraints on women classified maximum security prisoners will heighten their own emotions and reactions and will likely exacerbate and/or created an unnecessary climate of fear amongst the women prisoners who form the general prison population towards the women segregated in the maximum security units.

Particularly in light of the proven success of the first peer support teams at the Prison for Women in Kingston, and the modelling of these by CSC in the regional prisons for women, we cannot understand the rationale for an absolute ban on such a support option. Peer support, whether recognized by prison administrators or not, is one of the most significant and successful crisis prevention and intervention approaches available to most federally sentenced women.³⁷⁶

The UK Prison Inspectorate described one aspect of the conditions in the new maximum security units in its 2005 report:

"Within the maximum security classification there were four levels of security applied to women when they were escorted off the unit. These levels were a measurement of progress, improved behaviour, reduced risk and proximity to reducing to medium security. Movement from level one through to level four was recommended by the interdisciplinary team. Level one women were moved off the unit in handcuffs and leg irons and escorted by two staff. However, whatever their level, all women on the unit were unlocked with all others on their pod without staff supervision. The contrast between this and the requirement for some to be moved in leg irons and handcuffs seemed marked and anomalous. We did not consider the level of risk posed by any of the women justified the use of leg irons which was degrading... Rule 33 of the United Nations Standard Minimum Rules for the Treatment of Prisoners says that: 'Chains or irons shall not be used except in a number of defined circumstances, including as precaution against escape during a transfer

376 <http://www.elizabethfry.ca/secunit/4.htm> (emphasis added)

*or to prevent self-injury. Despite this, the use of leg irons was a national practice, and we did not consider their use was appropriate.*³⁷⁷

Of particular concern to CAEFS and the subject of a communication with the UN Human Rights Committee was CSC's special management protocol for those women who are identified as the most disruptive to institutional order.³⁷⁸ There are currently five women on the Protocol, four are of Aboriginal ancestry and one is of African Nova Scotian ancestry. The only woman released from the protocol into the community at her warrant expiry date, has experienced many challenges, but has not gone on to commit the heinous crimes predicted by CSC.

The conditions of confinement under the protocol are more stringent than those of men in the Special Handling Units and many of the behavioural standards set in these protocols are virtually impossible to meet. It is like a purgatory of segregation where every time a prisoner takes a step forward and moves to a lesser level of restrictive segregation, they are so closely scrutinized that they end up moving back up a level because nothing but excellent behaviour would allow them to continue on the path of lesser restrictions. The first young Aboriginal woman subjected to the 'protocol' has described the features of this highly restrictive regime :

It was during my fourth year, when I was the first federal female to be placed on the "Management Protocol" for a fight that allegedly involved a weapon. The Management Protocol was developed for "high risk women that pose a significant threat to the security of the Institution". The Union of Canadian Correctional Officers had been urging CSC to construct a Special Handling Unit for Women. However, the Management Protocol was developed "as an alternative to a S.H.U for women". There are three steps that govern the Management Protocol"

1. *Segregation: the guideline states that although there are no fixed time-frames, it should take a minimum of 6 months for a woman to complete all three steps of the Protocol.*
2. *Partial reintegration: a woman still resides in the segregation unit but is given increased privileges and gradual interaction with others.*

377 Report on announced inspection in Canada by HM Chief Inspector of Prisons for England and Wales: Grand Valley Institution for Women, 2005 paras 6.23 and 6.42, online at http://www.csc-scc.gc.ca/text/prgrm/fsw/wos25_GrandValley/tableOfContents-eng.shtml . In March 2001, the Canadian Human Rights Commission (CHRC) agreed to undertake a broad review of the treatment of federally sentenced women, following concerns expressed by a number of organisations, particularly about the treatment of incarcerated Aboriginal women and those with cognitive and mental disabilities. The CHRC's report, published in December 2003, made 19 recommendations for change, including one (Recommendation 19) which called for an independent external redress body for federally sentenced offenders. The CSC did not accept Recommendation 19 as such; but, as part of its action plan to implement the CHRC's report, in 2005 it asked the Chief Inspector of Prisons for England and Wales to carry out a full inspection of two federal women's institutions, Nova (in the Atlantic region) and Grand Valley (in Ontario). Her Majesty's Inspectorate of Prisons (HMIP) is an independent statutory body, set up in 1981 to inspect and report on conditions in prisons and the treatment of prisoners.

378 Significantly CAEFS first received a copy of the proposed protocol printed on the letterhead of the Union of Canadian Correctional Officers (UCCO). Since then, such other UCCO suggestions as secure interview rooms and the use of full body restraints and handcuffing the women to the back whenever they are out of their cells have been adopted as part of the protocol.

3. *Movement to a regular cell: a woman is moved onto a range and retains all privileges of a regular Maximum Security inmate. Movement off the Max Unit is not permitted. This is the only step of the Management Protocol that has a fixed time-frame. Three months of stable behaviour along with a recommendation from a woman's Case Management team is required. The recommendation is then sent to the Warden who decides whether or not to discharge a woman from the Protocol. Although the Management Protocol states that "all policies, procedures, and legal entitlements of the Administrative Segregation Commissioner's Directive will be adhered to", this is not the case. The Management Protocol and the Administrative segregation directive overlap and contradict both policies, procedures, and entitlements. For example, the Admin. Seg. Directive states that inmates retain the same privileges and entitlements as those in the general population, with the exception of security requirements. The Management Protocol states that all items/ privileges will be considered based on risk assessments. CSC officials have used this guideline in the Protocol to control items such as toilet paper, basic hygiene items (soap, toothpaste, etc) and rights such as confidential legal calls and the right to contact family. Some Institutions take the "observation" aspect of the Protocol literally by posting female guards to observe women take a shower and during recreation.*

Given that CSC claims the Federal institutions for women do not have the proper infrastructure to house/manage women on the Protocol, plans have been made to expand upon the "security requirements". In one Institution, a Plexiglas interview room was built to accommodate "safe interactions" between state and Management Protocol women. Management officials have advised the Protocol women there are plans to build more of the Plexiglas/ secure interview rooms for each of the Protocol women. These newly developed interview rooms conjure up macabre images of the new female "Hannibal" that CSC is essentially propagating. One need only look at the durations the women have spent on the Management Protocol to deduce it is not a successful OR humane model of confinement. I find it reprehensible that the group of women who designed the Management Protocol with the "special needs of women offenders taken into consideration" cannot even meet with us. Perhaps they don't want to confront the ghosts of women their brilliant Protocol has reduced the women to.³⁷⁹

This prisoner's reference to the "ghosts of women" has now taken on an added ghastly significance that should stir the conscience of Canadians. Although not a protocol case, the grave concerns expressed by CAEFS that the Service has not found an appropriate way to manage the custody of women with the most severe behavioural problems and mental health challenges has been brought into the sharpest and indeed shocking relief as a result of the release of a special report of the Correctional Investigator on the death of 19-year-old Ashley Smith at Grand Valley Institution in 2007. This CI's report, like his previous report in 1995 and the Arbour report regarding the incidents at the Prison for Women, raises profound questions as to the strength of CSC's commitment to a culture of respect for the human rights of offenders and demonstrates why this particular incident cannot be so easily dismissed as an isolated breakdown in an otherwise robust system. Many important changes in corrections, particularly in respect to human rights, were motivated by tragic and horrible failures. For that reason, coupled with the Panel's failure to understand or recognize this vital lesson of history, we deem it nec-

379 *Journal of R.A.* 2008 (written contemporaneously in crayon and from memory)

essary to review the circumstances leading to the death of Ashley Smith. In our opinion the agonizing death of this nineteen year old in federal custody illustrates powerfully the fatal flaw of the Panel's vision for corrections, by pointing to larger issues that can only be redressed by a roadmap that places human rights protection at the centre, not the periphery, of institutional transformation.

12.2 Ashley Smith and the Implications for Human Rights

12.2.1 What Happened

The circumstances of Ashley Smith's death are described in these few damning words:

On October 19, 2007, at the age of 19, Ms. Smith was pronounced dead in a Kitchener, Ontario hospital. She had been an inmate at Grand Valley Institution for Women (GVI) where she had been kept in a segregation cell, at times with no clothing other than a smock, no shoes, no mattress, and no blanket. During the last weeks of her life she often slept on the floor of her segregation cell, from which the tiles had been removed. In the hours just prior to her death she spoke to a Primary Worker of her strong desire to end her life. She then wrapped a ligature tightly around her neck cutting off her air flow. Correctional staff failed to respond immediately to this medical emergency, and this failure cost Ms. Smith her life.³⁸⁰

There can be no dispute that Ashley Smith was a difficult, disturbed and challenging prisoner. After a stormy experience with the New Brunswick social agencies and youth authorities she was sentenced to closed custody at age 16 after which she incurred 50 additional criminal charges, many of which were related to her response to incidents in which correctional or health professionals were attempting to prevent or stop her self-harming behaviours. As a result she spent extensive periods of time isolated in the "Therapeutic Quiet Unit" (i.e., segregation) at that facility. In January 2006, still on segregation status at the youth facility, Ms. Smith turned 18 years of age. Unfortunately, Ms. Smith's challenging behaviours continued and she found herself once again in criminal court in October 2006 for offences committed against custodial staff. The presiding judge gave Ms. Smith an adult custodial sentence for the new offences. Because the merged adult sentence was more than two years, Ms. Smith was transferred to Nova Institution for Women - a federal penitentiary - on October 31, 2006.³⁸¹ Her year in federal custody proved to be as turbulent as her previous incarceration:

While in federal custody over 11.5 months, Ms. Smith was involved in approximately 150 security incidents, many of which revolved around her self-harming behaviours. These incidents consisted of self-strangulation using ligatures and some incidents of head-banging and superficial cutting of her arms. Whenever attempts to negotiate the removal of a ligature failed, staff would (on most occasions) enter Ms. Smith's cell and use force, as required, to remove it. This often involved the use of physical handling, inflammatory spray, or restraints. Ms. Smith was generally non-compliant with staff during these interventions.

380 A Preventable Death, Report of the Correctional Investigator, June 2008, released to the Public March 3, 2009, online at <http://www.oci-bec.gc.ca/rpt/oth-aut/oth-aut20080620-eng.aspx>

381 This summary is taken from "A Preventable Death".

In the space of less than one year, Ms. Smith was moved 17 times amongst and between three federal penitentiaries, two treatment facilities, two external hospitals, and one provincial correctional facility.

Nine of the above 17 moves of Ms. Smith were institutional transfers that occurred across four of the five CSC regions. The majority of these institutional transfers occurred in order to address administrative issues such as cell availability, incompatible inmates and staff fatigue, and had little or nothing to do with Ms. Smith's needs. Each transfer eroded Ms. Smith's trust, escalated her acting out behaviours and made it increasingly more difficult for the Correctional Service to manage her.

12.2.2 Mental Health Issues

Like the incidents at the Prison for Women in 1994, those in 2007 at Grand Valley were not just individual lapses.

In order to fully appreciate the circumstances of Ms. Smith's death, it is important to isolate the larger systemic issues that existed within the federal correctional system during Ms. Smith's period of incarceration. These systemic issues contributed to the environment that permitted the individual failures to manifest themselves - with fatal consequences. Sadly, these systemic concerns are well known to the Correctional Service and have been the subject of previous comment from this Office.³⁸²

The Correctional Investigator identified serial and cumulative problems with Ms. Smith's treatment, starting with the failure to respond to her mental health needs, reflecting a stunning and ultimately fatal gulf between the rhetoric and reality of CSC's new mental health strategy:

- *Ms. Smith had significant mental health issues. This fact was well known to the Correctional Service prior to Ms. Smith's arrival at the Nova Institution for Women. In addition, the Correctional Service knew that: Ms. Smith had been in a segregated status since 2003 at the Miramichi Youth Detention Centre, with no significant periods in open population;*
- *confinement had had a detrimental effect on Ms. Smith's overall well-being;*
- *Despite this information, the Correctional Service placed Ms. Smith on administrative segregation status - under a highly restrictive, and at times, inhumane regime - and maintained her on this status during her entire period of incarceration.*
- *In addition, despite having Ms. Smith in its custody for over 11 months, and despite having access to previous mental health records, the Correctional Service never made any advancements in its treatment of Ms. Smith. **A concrete, comprehensive treatment plan was never put into place for this young woman, despite almost daily contact with institutional psychologists.** The attempts that were made to obtain a full psychological assessment were thwarted in part by the Correctional Service's decisions to constantly transfer Ms. Smith from one institution to another. As a result, she was never in one place long enough to complete an assessment and to develop a treatment plan. Each transfer further eroded any possibility of establishing a therapeutic relationship with Ms. Smith and negatively impacted on her willingness to co-operate with treatment staff.*

³⁸² A Preventable Death, para. 86

- *Without a full and proper diagnosis, the Correctional Service was working in the dark. In addition, most of the front-line staff, correctional managers and senior managers lacked the specialized mental health training required to adequately assess or address Ms. Smith's behaviours.*
- *What mental health care Ms. Smith did receive differed from one institution to another; there was no consistency. In fact, some of the interventions that were put into place for Ms. Smith actually served to exacerbate her behaviours and worsen her condition rather than to assist her. With time, Ms. Smith's self-injurious behaviours (primarily tying a ligature around her neck) became more frequent and increased in severity. This, in turn, triggered even more security-focused responses from the Correctional Service.*
- *In the weeks prior to her death, Ms. Smith spent all of her time in a security gown, in a poorly lit segregation cell, interacting with staff only through a tiny food slot and with absolutely nothing to occupy her time. A few days prior to her death, an institutional psychologist recognized that Ms. Smith's mental health had further deteriorated. At that point she was allowed out of her segregation cell for brief periods of time in an attempt to establish meaningful interaction with staff.*
- ***Since Ms. Smith's death, the independent psychologist contracted by the Correctional Service to review Ms. Smith's treatment during incarceration has interpreted Ms. Smith's self-injurious behaviour in part as a means of drawing staff into her cell in order to alleviate the boredom, loneliness and desperation she had been experiencing as a result of her prolonged isolation. This behaviour was Ms. Smith's way of adapting to the extremely difficult and increasingly desperate reality of her life in segregation. On eight occasions, Ms. Smith was certified under provincial mental health legislation and was admitted to psychiatric facilities; however, she was usually released after a very short period of time without having been fully assessed or meaningfully treated. This left the Correctional Service with a dilemma because its own Mental Health Strategy for Women, and its Intensive Intervention Strategy for Women were not appropriately designed or resourced to provide assistance to women who required specialized mental health care and intervention.***
- *Things went from bad to worse at GVI. Senior managers who had limited mental health expertise drafted, and then redrafted management plans for Ms. Smith. These plans largely excluded the input of those who should have been best suited to provide Ms. Smith with professional assistance, namely, the mental health care staff and physical health care staff. As a result, the plans were largely security-focused, lacked mental health components, and were often devoid of explicit directions for addressing Ms. Smith's on-going self-harming behaviours. In addition, these plans were not properly communicated to front-line staff - the very people who were responsible for monitoring Ms. Smith and for ensuring her safety and well-being.*
- *With misinformed and poorly communicated decisions as a backdrop, **Ms. Smith died - wearing nothing but a suicide smock, lying on the floor of her segregation cell, with a ligature tied tightly around her neck - under the direct observation of several correctional staff.***³⁸³

383 A Preventable Death, paras 22-32(emphasis added)

12.2.3 Transfer Issues

A second failure of law and policy was the manner in which Ms. Smith was shuttled from one institution to another, a total of 17 times in less than a year. Section 87 of the CCRA requires that all decisions (including transfer decisions) taken by the Correctional Service take into consideration the health status of an inmate. More specifically, Commissioner's Directive 843 - Prevention, Management and Response to Suicide and Self-Injuries clearly prohibits the transfer of inmates considered imminently suicidal or self-injurious to an institution other than a treatment facility unless the psychologist managing the case deems the transfer a necessity to reduce or eliminate an inmate's potential for suicide or self-injury.³⁸⁴ The CI concluded that Ms. Smith's transfers were made with no proper consideration of these requirements and

Given that Ms. Smith's mental health needs went unaddressed, that she was actively involved in self-injurious behaviour, and that she was almost constantly on suicide watch, it is my conclusion that the sheer number of transfers to which she was subjected were not only inappropriate, but beyond comprehension.³⁸⁵

12.2.4 Segregation Issues

Ashley Smith's continuous administrative segregation status was a third feature of her imprisonment that the Correctional Investigator found to be in violation of relevant law and policy as well as compounding her inhumane confinement:

I find that the regime put into place to manage her behaviours was overly restrictive. She had very little positive human contact. She was provided with very few opportunities for meaningful and purposeful activity. She spent long hours in a cell with no stimulation available - not even a book or piece of paper to write on.

*What is most disturbing about the Correctional Service's use of this overly-restrictive form of segregation is the fact that the Correctional Service was aware - from the outset - that Ms. Smith had spent extensive periods of time in isolation while incarcerated in the province of New Brunswick, and that **confinement had been noted as detrimental to her overall well-being**^[3]. **Despite this knowledge, the Correctional Service's response to Ms. Smith's significant needs was to do more of the same.***

There is no evidence to suggest that subsequent to her transfer out of the Prairie Regional Psychiatric Centre in April 2007, the Correctional Service ever seriously considered an alternative to keeping Ms. Smith on perpetual administrative segregation status, despite the fact that segregation had done nothing to address her behaviours.

There is a legal requirement for the Correctional Service to review all cases of inmates who are placed on administrative segregation status at the 5-days, 30-days, and 60-days marks. The purpose of these reviews is to closely examine the impact of segregation on the inmate, to determine whether continued placement on this status is appropriate, and to carefully explore and document possible alternatives to continued segregation.

384 Commissioner's Directive 843 - Prevention, Management and Response to Suicide and Self-Injuries; A Preventable Death, paras 56-60

385 A Preventable Death, para. 61(emphasis added)

42. ***The legal requirement to review a segregation placement at the 60-days mark extends the segregation review process beyond the institution and requires regional authorities to ensure compliance with law and policy. In the case of Ms. Smith, 60-days regional reviews were not conducted even though she remained on segregation status for almost one year. The failure to review Ms. Smith's segregation status at the 60-days mark was in contravention of section 22 of the CCRR and paragraphs 29-32 of the Commissioner's Directive 709 - Administrative Segregation.***

43. *The required regional reviews were never conducted because each institution erroneously "lifted" Ms. Smith's segregation status whenever she was physically moved out of a CSC facility (e.g., to attend criminal court, to be temporarily admitted to a psychiatric facility, or to transfer to another correctional facility). This occurred even though the Correctional Service had every intention of placing Ms. Smith back on segregation status as soon as she stepped foot back into a federal institution. **This totally unreasonable practice had the effect of stopping and starting "the segregation clock", thereby negating any review external to the institution on the continuation of the placement in segregation. This in turn assisted in reinforcing the notion that segregation was an acceptable method of managing Ms. Smith's challenging behaviours.***³⁸⁶

12.2.5 Use of Force

It was the extraordinary manner in which force was deployed against Ms. Smith that drew the Cl's strongest condemnation:

Ms. Smith's self-injurious behaviour either took the form of superficially cutting herself, head-banging or, most frequently, fashioning a ligature out of material and then tying it around her neck. As stated above, although these behaviours were maladaptive and dangerous, they could be understood in part as a means of drawing staff into her cell in order to alleviate the boredom, loneliness and desperation she had been experiencing as a result of her constant isolation.

Initially, staff responded immediately to the presence of tools for self-harm. For example, staff often attempted to negotiate with Ms. Smith to hand over pieces of glass, screws or actual ligatures. When this failed, staff would enter Ms. Smith's cell and use physical force to remove these items. In fact, there were well over 150 incidents which resulted in staff using force against Ms. Smith for these reasons. There were days when multiple staff interventions took place and when the Institutional Emergency Response Team was deployed in order to prevent Ms. Smith from harming herself

Over time, Ms. Smith's behaviours began to exhaust front-line staff. For example, during an institutional visit in June 2007, my staff was advised that Ms. Smith would often "play with ligatures" (e.g., tie it in a bow-like fashion) and then taunt staff with it. There were also times when she would wrap a ligature around her neck, hide herself from view (e.g., under her security gown or mattress), or lie face down on the floor and "pretend" to be unconscious, and then she would assault staff once they had entered her cell to cut off the ligature. Some staff had begun to perceive this as a dangerous game that Ms. Smith was playing and they indicated that they were growing more and more uncertain as to when to intervene in these situations.

Having become aware of this situation, my staff contacted the CSC's Women Offender Sector at National Headquarters to organize a conference call with that sector and NHQ ...During the call,

386 A Preventable Death, paras. 38-43(emphasis added)

the necessity of responding immediately to Ms. Smith's ligature use was discussed. My staff were advised by CSC that an intervention plan had been created for Ms. Smith and that front-line staff had been engaged and informed of how to best intervene - from a therapeutic perspective - with Ms. Smith.

Despite these discussions evidence indicates that by mid-August 2007, some staff at Nova Institution for Women shifted from removing ligatures from Ms. Smith as soon as one was visible, to permitting her to retain ligatures in her possession for extended periods of time. It is not clear at this time why this shift in approach occurred, however, it appears that it was related to factors such as staff fatigue, the over-reliance on largely security-focused intervention approaches, and a misinterpretation of the Situation Management Model (SMM).

It is clear that given Ms. Smith's history of self-harm, staff should have been intervening to remove any tool of self-harm - in as humane a fashion as possible - as soon as they became aware of its presence. In my opinion, the "wait and see" approach undertaken at Nova Institution for Women was a misapplication of the SMM. Preventing harm and preserving life should have been the overriding principles governing staff interventions.

*When Ms. Smith was transferred to GVI in August 2007, the above "wait and see" approach continued. More specifically, evidence shows that senior managers at GVI were directing staff to strictly adhere to the SMM by "assessing and reassessing" Ms. Smith whenever she had tied a ligature around her neck. **Video evidence indicates that there were times at GVI when Ms. Smith would turn blue, have trouble breathing, and break blood vessels from her ligature use, before staff would physically intervene. When these incidents were reviewed at the institutional level, there was no commentary in the Use of Force documentation from Health Care, Psychology or the Institutional Security Officer about these untimely staff interventions. In fact, documentation indicates that the opposite was true: senior managers at GVI had disciplined front-line staff for intervening too early when Ms. Smith had tied a ligature around her neck, even though she appeared to be in medical distress.***

There were also times when front-line staff had made the decision that Ms. Smith required immediate assistance, however correctional managers ordered the staff to not intervene. In one incident, a correctional manager physically prevented a staff member from entering Ms. Smith's cell to provide assistance.

*It is my view that these incidents and the action taken by senior managers represent **a gross misinterpretation of both the Situation Management Model and the Correctional Service's duty to provide safe and humane custody.** This set the stage for considerable uncertainty on the part of front line staff and this had tragic results.³⁸⁷*

12.3 Effects of Segregation

We have read and reread these paragraphs and struggled to understand the rationale for CSC's strategy of non-intervention. More than any case in our collective memory it illustrates the failure to integrate the dual roles of the Service for control and assistance within a legal culture that gives ultimate priority to respect for inherent human dignity. In words of its own creation the Mission Statement of CSC "clearly directs [CSC] to actively encourage and assist offenders in

³⁸⁷ A Preventable Death, paras. 62-73 (emphasis added)

reintegrating as law-abiding citizens while maintaining control. Our aim is to assist and encourage to the extent that it is possible and to control to the extent that it is necessary."³⁸⁸ Faced with a young woman, whose behaviour was enormously difficult to 'control' the Service seemingly lost sight of its responsibility to assist. If Ashley Smith was a danger to anyone, it was to herself.

The need for someone in a position to assist and step between Ashley and herself was lost. The very act of waiting and watching her self-destruct brings into focus the inhuman aspects of control. But in order to assist someone you must first recognize their shared humanity. It is the natural and necessary counter-weight to prevent control measures escalating to abuse of authority. In Ashley Smith's case, was extreme isolation intended to improve her behaviour? Did management believe that it would frighten her if no one came into her cell and make her stop self-strangling of her own accord? Was it intended to teach her a lesson? Was it purely a measure to protect staff? Whatever the rationale, it was clearly not helping her. Whose job then was it to help her? Why could no one be assigned to spend the day with her in her cell, or the yard, or in close proximity rather than on the other side of a food slot? Is it to be believed that there was really no psychiatrist, psychologist, empathic staff member, peer counsellor or community advocate who could reach out and touch her?

We have come to the conclusion that it was the correctional managers' view, filtered through the lens of power and control, that Ms. Smith's noncompliant and self-destructive behaviour was a matter of choice; to change and control that behaviour and render her compliant and manageable the staff should do nothing to reinforce or reward her ill-conceived attempts to gain attention. This had already been taken to what we would have thought to be the extreme of letting her choke herself to the point of turning blue and have trouble breathing but on October 17, 2007 she was allowed, with the staff standing by, to strangle herself to death. In effect the correctional service, with the full coercive power of the state behind it, played 'chicken' with Ashley Smith's life and she lost.

Since the CI's report was written more disturbing evidence has emerged in a 142-page transcript of the cross-examination of Grand Valley's security intelligence officer at the preliminary hearing for four GVI employees charged with criminal negligence in Ms. Smith's death. The new details bolster allegations that Ms. Smith's 2007 death occurred amid efforts by correctional managers to contain the amount of paperwork generated by her near-daily attempts at self-harm. The officer said the warden in the spring of 2007 told her to tailor some reports so they wouldn't be considered as involving force. "I was directed to classify it as a different classification."³⁸⁹

If the staff of CSC interpreted Ashley Smith's suicidal behaviour as an attempt to resist their authority and control, the independent psychologist contracted by the Correctional Service to review Ms. Smith's treatment during incarceration had a different view. That psychological review saw Ms. Smith's self-injurious behaviour in part as a means of drawing staff into her cell in or-

388 Introduction to the Mission Statement, reproduced in *Our Story: Organizational Renewal in Federal Corrections*, Ottawa: Correctional Service of Canada, 1991, p.237

389 Globe and Mail March 11, 2009

der to alleviate the boredom, loneliness and desperation she had been experiencing as a result of her prolonged isolation.

CSC did not have to wait until after Ashley Smith's death to realize the dynamics involved in her behaviour. The damaging psychological effects of prolonged segregation under the conditions prevailing in Canadian segregation units had been identified and repeatedly condemned in the Canadian literature over the least 35 years. In 1975 in the *McCann* case the conditions in the segregation unit the B.C. penitentiary were found to constitute cruel and unusual punishment and treatment by the Federal Court of Canada.³⁹⁰ Michael Jackson has described the nature of the relationship between prisoners and staff in segregation units in the 1970s in a way that seems to fairly capture what was happening in the segregation unit in which Ashley Smith was confined over 30 years later;

*There is a perverse symbiotic relationship between guards and prisoners in [segregation]. The guards, by perceiving the prisoners as the most dangerous and violent of [wo]men, can justify to themselves the intensity of the surveillance and the rigours of detention. Prisoners, by responding to that perception of dangerousness with acts of defiance, have at least one avenue of asserting their individuality and their autonomy, of making manifest their refusal to submit. The treadwheels of the 19th-century penitentiaries are no longer with us, but in [segregation] we have created a psychological treadmill put into motion and maintained by ever-increasing hostility and recrimination.*³⁹¹

One of the expert witnesses in the *McCann* case, Dr. Stephen Fox, testified that the purpose behind the rigor of the regime in segregation was to induce compliance with institutional rules and correctional authority. "It is designed, I believe, not so much for security purposes but to show that on instant demand you will comply, that you will not move a muscle that is not demanded, that is not requested, in the belief, of course, that compliance will move into the street."³⁹²

Dr. Fox testified that the effect of this was to reduce the prisoner to a state where he had no self-respect, no identity, and no dignity. However,

*"...to relinquish, to admit to the psychological suicide of non-identity, is essentially to violate all conceivable meaning in the evolution of mankind ...To come to have no meaning, to come to be nothing, is essentially the greatest human suffering, that is to say, it ultimately leads to insanity and suicide."*³⁹³

The *Globe and Mail* captured the horrifying effectiveness of escalating the intensity of segregation, "Only by killing herself could Ms. Smith draw attention to her humanity."³⁹⁴

The psychological effects of long-term segregation were also the subject of evidence before the *Arbour* commission from CSC's own psychologists who were working at the time in the *Prison for Women*. As described by Justice *Arbour*:

390 *McCann v. The Queen* [1976] 1 F.C. 570

391 *Prisoners of Isolation*, p.53-4 online at <http://justicebehindthewalls.net/book.asp?cid=772&pid=845t>

392 *Prisoners of Isolation*, p.72, <http://justicebehindthewalls.net/book.asp?cid=775&pid=856>

393 *Prisoners of Isolation*, p.72

394 *Globe and Mail* March 10, 2009

In October of 1994, the prison's psychologists advised the prison staff of the psychological ill effects being suffered by the women. Their report read:

If the current situation continues it will ultimately lead to some kind of crisis, including violence, suicide and self-injury. They will become desperate enough to use any means to assert some form of control of their lives. The constant demands to segregation staff [are] related to needs for external stimulation and some sense of control of their lives.³⁹⁵

In her report Justice Arbour made these findings on the management of the segregation unit and the segregation process at the Prison for Women:

The prolonged segregation of the inmates and the conditions and management of their segregation was again, not in accordance with law and policy, and was, in my opinion, a profound failure of the custodial mandate of the Correctional Service. The segregation was administrative in name only. In fact it was punitive, and it was a form of punishment that courts would be loathe to impose, so destructive are its consequences . . .

There was no effort on the part of the prison to deal creatively with their reintegration. There were no programs available to them, and they were left idle and alone in circumstances that could only contribute to their further physical, mental and emotional deterioration... The bitterness, resentment and anger that this kind of treatment would generate in anyone who still allows herself to feel anything, would greatly outweigh the short-term benefits that their removal from the general population could possibly produce . . .

If prolonged segregation in these deplorable conditions is so common throughout the Correctional Service that it failed to attract anyone's attention, then I would think that the Service is delinquent in the way it discharges its legal mandate.³⁹⁶

Now, 13 years since the Arbour Report, 10 years since the Task Force on Segregation, a 19 year old girl dies in a bare segregation cell. For those who would argue that the inhumane and deplorable conditions endured by segregated prisoners in the B.C. Penitentiary in the 1970's and in the Prison for Women in the 1990's can safely be consigned to the lessons of history, the Correctional Investigator's findings stand as an indictment of the failure of the Correctional Service of Canada to take those lessons seriously.

12.3.1 The Panel's Consideration of Segregation

We have in Chapter 5 criticized the Panel's partial and inadequate scrutiny of administrative segregation. We faulted the Panel on several grounds; failing to acknowledge the documented historical record of abuse, and encouraging CSC to toughen up the conditions to discourage prisoners from seeking admission to voluntary segregation. Of particular note however, was the Panel's failure to challenge CSC's unwillingness to introduce independent adjudication of segregation decisions, in the face of the repeated recommendations from Justice Arbour, a Parliamentary Subcommittee, the Canadian Human Rights Commission, the Office of the Correctional Investigator, the Canadian Bar Association and many others. In his report on the death of Ashley Smith the Correctional Investigator bears witness to the consequences of that recalcitrance:

³⁹⁵ Arbour Report, p.139 online at <http://justicebehindthewalls.net/book.asp?cid=142>

³⁹⁶ Arbour Report, p. 141-43

I believe strongly that a thorough external review of Ms. Smith's segregation status could very likely have generated viable alternatives to her continued and deleterious placement on such a highly restrictive form of confinement. There is reason to believe that Ms. Smith would be alive today if she had not remained on segregation status and if she had received appropriate care. An independent adjudicator - as recommended by Justice Arbour - would have been able to undertake a detailed review of Ms. Smith's case and could have caused the Correctional Service to rigorously examine alternatives to simply placing Ms. Smith in increasingly restrictive conditions of confinement. At that point, if it had been determined that no immediate and/or appropriate alternatives to segregation were available for Ms. Smith, the independent adjudicator could have caused the Correctional Service to expeditiously develop or seek out more suitable, safe and humane options for this young woman.³⁹⁷

12.4 Grievances

As with the need for independent adjudication for those placed in segregation, the importance of a fair, timely and responsive grievance system has been a theme of royal commissions, Parliamentary committees and government task forces. The CCRA now requires that CSC establish "a procedure for fairly and expeditiously resolving offenders' grievances".³⁹⁸ The difficulty CSC has had in living up to the law's promise has been a recurrent theme of the Annual Reports of the Correctional Investigator. The 1994-95 annual report detailed the continuing "excessive delay, defensiveness and non-commitment" of the Service, especially at the National Headquarters level, and concluded with this observation:

The Service's responses over the course of this reporting year are consistent with their past performances. The responses have avoided the substance of the issues at question including a failure to address the specific observations and recommendations contained in last year's Annual Report. The responses are defensive, display little if any appreciation for the history or significance of the issues at question and provide at best a further string of endless promises of future action, with no indication as to expected results or how the results of these proposed actions will be measured or analyzed.³⁹⁹

The effectiveness of the grievance system came under particular scrutiny in the course of the Arbour Commission's inquiry into events at the Prison for Women in 1994 and was the subject of some of Justice Arbour's harshest criticisms:

Some of these grievances were never answered at all. Those that were answered were almost always answered late, in some cases several months after the answers were due. In a number of instances, the grievances were responded to by an inappropriate person: either someone not at the appropriate level to respond, or someone who could not be expected to have access to the

397 A Preventable Death, para. 93

398 CCRA s.90

399 Annual Report of the Correctional Investigator, 1994-95, p.57

*relevant facts. There is no system to effectively prioritize those grievances where the only effective response would be one received on an urgent basis.*⁴⁰⁰

Fast forward 13 years and it is a litmus test of the reality of change, the Glube report notwithstanding, to read the Correctional Investigator's unveiling of the blatant failure of the grievance system in Ashley Smith's case.

In response to Ms. Smith's overly restrictive conditions of confinement at Nova Institution for Women, Ms. Smith submitted formal complaints through the CSC's Offender Complaints and Grievance System. Ms. Smith submitted seven complaints in August 2007.

Ms. Smith alleged the following in her complaints:

- *CSC used excessive force against her during an incident;*
- *CSC inappropriately refused to accept a complaint from her that was written by another inmate on her behalf even though she was not permitted paper or writing instruments;*
- *for a four-day period, she was not permitted to leave her cell to engage in physical exercise;*
- *she did not receive a copy of the decisions from the first and fifth working day reviews of her segregation status;*
- *she was not being permitted sufficient toilet paper for hygiene purposes;*
- *she was not being permitted soap in her cell, was only provided with finger foods, and was given only a small piece of deodorant on her finger at a time; and*
- *while menstruating, she was not permitted underwear or sufficient sanitary products to meet her hygiene needs.*

Response times for complaints

*According to Commissioner's Directive 081 - Offender Complaints and Grievances, when a complaint or grievance is received from an offender the Correctional Service must identify the time frame for response. That is, the response must be designated as either **routine priority** (requiring a response within 25 working days) or **high priority** (requiring a response within 15 working days). Correctional Service policy defines **high priority** as:*

400 Arbour Report p. 150-1. With respect to the effectiveness of the CSC's Offender Complaints and Grievance System, the Canadian Human Rights Commission concluded in 2003 that 'Federally sentenced women currently lack an effective means to grieve inadequate correctional services or treatment thus increasing their sense of disempowerment and lack of control over their lives. Although section 90 of the CCRA sets out the Correctional Service's duty to provide a grievance system that fairly and expeditiously resolves offenders' grievances, our review indicates that women inmates perceive the system as ineffective....The majority of the women who were interviewed described the redress system *in negative terms such as "slow and not very effective," "takes forever" and "useless."* With respect to the timeliness of the CSC's Offender Complaints and Grievance System, the CHRC found that: "More than 4 of 10 priority complaints (i.e., those considered to have a significant impact on an offender's rights and freedoms) were not processed within established time frames". A Preventable Death, paras. 95-6

...complaints and grievances concerning matters that have a direct effect on life, liberty or security of the person or that relate to a grievor's access to the complaint and grievance process.

*Based on the above definition and our review of the grievance documentation, it is my opinion that many, if not all of Ms. Smith's complaints at Nova Institution should have been designated as requiring a **high priority** response. I note, however, that all seven complaints were designated as **routine priority**.*

Inappropriate responses to Ms. Smith's complaints

Commissioner's Directive 081 - Offender Complaints and Grievances states that the Complaints and Grievance process should:

...ensure that decisions affecting offenders comply with the rule of law, respect for human rights, and are ethically sound.

*All seven of the complaints submitted by Ms. Smith at Nova Institution were denied by the Correctional Service. It is my opinion that the responses were largely inappropriate and not in compliance with CSC policy. For example, Ms. Smith had complained that she was being provided with an inadequate amount (four squares at a time) of toilet paper and an insufficient number of sanitary products during her menstrual cycle. The Correctional Service rejected these two complaints on the basis that she had been "misusing" the toilet paper and sanitary products. She was advised that she would be provided with more of these items when she reduced her self-injurious behaviour. **These responses were inappropriate as they did not permit Ms. Smith to meet her basic hygiene needs.***

Lack of vigilance

*Given that Ms. Smith had never submitted complaints to the Correctional Service prior to August 2007, and given the subject matter, **I question why these complaints did not trigger within the Correctional Service a review of Ms. Smith's conditions of confinement to ensure that they were in keeping with law, policy and Ms. Smith's basic human rights.** Given the severe restrictions placed upon Ms. Smith, the Correctional Service had a heightened duty to remain vigilant of her care and treatment, inclusive of any allegations of human rights violations. This does not appear to have occurred at Nova Institution. There is no evidence that these issues were brought to the attention of the Warden. Furthermore, this lack of vigilance appears to have continued after Ms. Smith's subsequent transfer to GVI.*

Upon transfer to GVI at the end of August 2007, Ms. Smith found herself in all too familiar restrictive conditions of confinement. In September 2007, Ms. Smith made a final attempt to improve these conditions by placing one more complaint in a sealed envelope into the designated receptacle on her unit at GVI. Incredibly, this complaint was only opened by the Correctional Service two months after Ms. Smith died. Despite a policy requirement that should a grievor die following the submission of a complaint, a response will be prepared and made available to any person conducting a lawful investigation, there is no evidence that this grievance has been either reviewed or answered.

I provide these details of Ms. Smith's experiences with the CSC's Offender Complaints and Grievance System as concrete examples of the inability of that system to appropriately and reasonably resolve inmate complaints in a timely manner. The presence of a more timely, effective, fair and responsive internal complaints and grievance system within the Correctional Service could have

*significantly improved Ms. Smith's overly restrictive and dehumanizing conditions of confinement.*⁴⁰¹

12.4.1 The Panel's Consideration of Grievances

In the light of the Correctional Investigators recitation of CSC's record, it is telling that the only issue the Panel was asked to consider regarding the grievance system was that of "frivolous and vexatious grievances by offenders". This is the Panel's commentary:

CSC is faced with a small number of offenders who file grievances continuously and in large numbers. These grievances must be managed more expeditiously, while protecting the offender's right to raise issues of concern for review and action.

The Panel reviewed legislative alternatives but concluded that they do not offer a fair and expeditious approach to managing these types of grievances. The Panel has concluded that these types of grievances should be reviewed and resolved at the first level of the grievance process [the warden] and applying CSC policies at that level.

The Panel is to be commended for not adopting some of the draconian responses to multiple grievors to be found in the American federal prison but one is left wondering whether, but for the tragedy of her death, would Ashley Smith's last unanswered complaint had been designated "frivolous and vexatious" and following the recommendation of the Panel left to be resolved by the Warden of the institution in whose custody she died.

12.5 Direct Accountability to the Deputy Commissioner for Women

There is another question which presses for an answer from the findings of the Correctional Investigator. We earlier mentioned that the one recommendation of the Glube report that the Panel rejected, at CSC's urging, was the establishment of a separate stream of women's corrections with the warden's of the women's institutions reporting directly to the Deputy Commissioner for Women. CSC has steadfastly resisted this change. The Correctional Investigator's report traced the history of this recommendation and CSC's resistance:

Following the events at the Prison for Women in 1994, Justice Arbour recommended that:

The position of Deputy Commissioner for Women be created within the Correctional Service of Canada, at a rank equivalent to that of Regional Deputy Commissioner.

*The federally sentenced women facilities be grouped under a reporting structure independent of the Regions, with the Wardens reporting directly to the Deputy Commissioner for Women.*⁴⁰²

The Correctional Service appointed a Deputy Commissioner for Women (DCW); however, it did not afford the position line authority over the women's facilities. Instead, the DCW was mandated to provide advice, guidance and support to the women's facilities (i.e., functional authority), while the wardens of those facilities continued to report to their respective RDCs for opera-

401 A Preventable Death, paras. 44-55 (emphasis added)

402 Arbour Report, recommendations 4(a) and (c)

tional matters. This was not the "separate stream" for women's corrections that was envisioned by Justice Arbour.

The Expert Committee chaired by Justice Glube in 2006, closely reviewed federal women's corrections in Canada, including the governance model that the CSC chose to put into place for women's facilities. Justice Glube found that there were problems with the governance model and she subsequently recommended that:

...the Correctional Service revisit the women's corrections governance structure in order to have the Wardens of the women offender institutions report directly to the Deputy Commissioner for Women.

The Correctional Service rejected Justice Glube's recommendation as they had rejected Justice Arbour's a decade earlier.⁴⁰³

As he did with the failure of CSC to implement independent adjudication of segregation, the Correctional Investigator considered the impact of CSC's resistance to the establishment of a separate stream of corrections for women on the calamitous events leading to Ashley Smith's death

As evidenced by the case of Ms. Smith, the current organizational structure resulted in nobody taking control for the overall management of what was clearly a very challenging set of behaviours. This is particularly concerning given the excessive number of times that Ms. Smith was transferred and given Ms. Smith's continuous placement in segregation.

The current operational structure for women's corrections has been in place for a decade. As referenced by Justice Glube, and as exemplified by the death of Ms. Smith, it is reasonable to state that the current governance structure for women's corrections is flawed and lacks the required accountability.⁴⁰⁴

While we agree that the recommendation of Arbour, Glube and the Correctional Investigator are sound, we need to be clear that weaknesses in the governance structure cannot account for the treatment of Ashley Smith. Regardless of the specifics of the governance structure surely one of the primary roles of the Deputy Commissioner must be to oversee and ensure that women are treated fairly and humanely. That mandate requires her exercising responsibility for policies governing the operation of women's institutions. But the mandate also requires a much greater commitment to and recognition by CSC that the safeguarding of human rights is the heartbeat of its organization. There is nothing in the Panel's *Roadmap* that would encourage such commitment and, as we have demonstrated, much that would further undermine it.

12.5.1 The Panel's Response to Direct Accountability for Women

In spite of the continuous call by virtually every major review of the circumstances of federally-sentenced women as well as those of key community organizations and others for direct accountability of institutions for federally-sentenced women to a deputy commissioner, and the steadfast resistance to those recommendations by CSC, the Panel simply sides with CSC.

403 A Preventable Death, paras. 101-104

404 A Preventable Death, paras. 105-8

The Panel believes the functional role of DCW is currently satisfactory. The Panel agrees with CSC's response to the Expert Committee's recommendation that a "strong functional and strong leadership role by the [DCW], rather than a line authority model, is the most effective governance structure at this time. Balancing corporate attention and visibility with efficient use of resources is an important element in managing the overall model for women's corrections." CSC also promised to "enhance and strengthen the relationship of the DCW and her staff with all levels of the organization in order to ensure a clear and sharpened women-centered focus in support of the women's correctional model." The Panel supports this direction.⁴⁰⁵

This is the only matter that the Panel does not simply defer to the Glube Committee recommendations and it does so without giving any explanation for their deviation from all previous recommendations. Indeed the Panel's comments on this matter are worded in such vague terminology that one is left to wonder how they were able to dismiss those recommendations so easily and without apparently considering the important reasons that gave rise to them. One cannot help but suspect that the recommendation conveniently gave CSC the recommendation they had been seeking since Arbour.

12.6 Deaths in Custody

A Preventable Death was not the first report the Correctional Investigator had published on the subject of a prisoner's death in a Canadian penitentiary that resulted from CSC's failure to take the required or recommended measures to prevent such occurrences. In 2006, he commissioned *The Deaths in Custody Study* which was delivered to CSC in February 2007. This study examined 82 reported suicides, homicides, and accidental deaths of inmates while in the custody of the Correctional Service of Canada during a five year period (2001 to 2005). The Study found the Correctional Service had failed to incorporate lessons learned and to implement corrective action over time and across Regions, with similar errors and observations being made incident after incident. As the Correctional Investigator concluded in his report on Ashley Smith's death, one of the key findings of that Study was that:

It is likely that some of the deaths in custody could have been averted through improved risk assessments, more vigorous preventative measures, and more competent and timely responses by institutional staff.

In the concluding section of *A Preventable Death* the Correctional Investigator lists the numerous ways in which at the institutional, regional and national level there was a failure of accountability:

The investigations into the death of Ms. Smith that were conducted by this Office and by the Correctional Service both found that, during her eleven-month period in federal custody, widespread breakdowns in many major components of federal corrections occurred, including:

- *inter-Regional transfers;*
- *administrative segregation;*
- *conditions of confinement;*

405 Roadmap, p. 79

- health care;
- use of force interventions;
- the delivery of mental health services; and
- the grievance process.⁴⁰⁶

It is the responsibility of the Correctional Service, as a publicly accountable organization mandated to provide safe and humane care to offenders, to learn from each of these deaths and to implement corrective measures to ensure that preventable deaths do not occur. Yet, in its *Roadmap to Strengthening Public Safety* the Panel, under the umbrella of “offender accountability”, recommends “transformative” changes without hardly a reference to the Correctional Service of Canada's mandate as set out in the CCRA to provide for safe and humane conditions.

How then should we view the tragedy of the death of a nineteen year old in a segregation cell in the most modern of Canadian prisons within a framework of women centred corrections? Nils Christie, one of the world's most respected criminologist and humanist has suggested this approach:

*Punishment can then be seen to reflect our understanding and our values, and is therefore regulated by standards people apply every day for what it is possible and what it is not possible to do to others . . . More than a tool for social engineering, the level and kind of punishment is a mirror of the standards that reign in a society. So the question for each and every one of us is: would it be in accordance with my general set of values to live in a state which represented me in this particular way?*⁴⁰⁷

What happened to Ashley Smith in 2007 offers such a mirror. In a lead editorial following the release of the Correctional Investigator's report the Globe and Mail captured the images in that mirror:

Ashley Smith was not a killer or a hardened criminal; she was a mentally ill 19-year-old with personality disorders. Yet when she took her life in federal prison, she had been confined for 1 ½ months to a solitary cell measuring 6 ft. by 9 ft., without a mattress, a book, or pen and paper. Seven staff looked on as she suffocated after tying a ligature around her neck. They did not go to her aid because, for bureaucratic reasons, they had been instructed to wait until she stopped breathing.

Her suicide in 2007 is a black mark on Canada's mental-health and corrections systems. Canada is simply not equipped to handle extreme behavioural disorders in children and teenagers. The Dickensian response to Ms. Smith, as described in an inquiry report last week by Correctional Investigator Howard Sapers, is indicative of wide failings that even now are probably being felt by an unknown number of inmates and mental patients.

406 A Preventable Death, paras. 117-8

407 Nils Christie, *Crime Control as Industry: Towards Gulags, Western Style*, 2d enlarged ed., [London: Routledge, 1994] at 185-86

This was not some backwoods jail in which Ms. Smith was kept. This was Canada's federal prison system, governed by laws and policies that reflect Canadians' expectations of humaneness for all prisoners. Yet those laws and policies were routinely violated, even subverted⁴⁰⁸

In his elegant and evocative book *A Just Measure of Pain*, Michael Ignatieff has provided us with clear images of the nature of solitary confinement in the penitentiary in the nineteenth century.

The night was the hardest time of all. Sleep was likely to be fitful and restless. A convict worked out the night watching the stars or the clouds scudding across the moon through the cell window, and listening to the catacomb silence. Sometimes there were screams. Men came apart in the loneliness and the silence ...The wardens came for the ones who cried out and took them down to the infirmary.⁴⁰⁹

In *Prisoners of Isolation* Michael Jackson, in describing the conditions of solitary confinement in the 20th century, suggested that these images continue to have a terrible relevance in the contemporary Canadian penitentiary. The entrenchment of human rights in the Charter and their recognition in the CCRA was intended to ensure that the cries in the night might begin to recede from our collective memory.

12.7 Conclusion

Ashley Smith may not have cried out aloud for her jailers to hear as she lay dying in a segregation cell. But can anyone doubt that not only that day but for a long time before she had been crying out? Can anyone imagine that faced with the experience of their own child crying out in such a disturbed and disturbing manner that they would not intervene until she was close to death? Would anyone accept as justification for such neglect the intention to hold her accountable and thereby change her behaviour? Respect for human dignity and our common humanity bespeaks and begs for humane intervention. Human dignity and dignity's child suffered a fatal blow when Ashley Smith was allowed to die.

The Panel is not responsible for Ashley Smith's death. But the Panel has adopted the same policies adopted by the highly stressed staff at Grand Valley who subjugated the rights of Ashley Smith to the perceived needs of security and control. In our view the Panel was too easily captured by those who promote deprivation as a means to achieve compliance in a system where compliance often trumps all other considerations such as the desperate circumstance or mental health of the individual. The importance of vigilant and principled leadership in maintaining conditions that respect the rights of individuals confined by the power of the state was missed entirely. Indeed, the Panel demonstrated a failure of leadership to address the most vexatious and pernicious problem of corrections through the ages: providing safe and humane conditions through respect for human rights in a prison environment.

All of this speaks to the dangers of creating major "transformative" policy virtually overnight by a largely unqualified group under a heavy cloud of political expediency. Surely these factors

408 Globe and Mail March 10, 2009

409 Michael Ignatieff, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution 1750-1850*, p.9

alone warrant that the report be set aside as a failed experiment in public policy. That it was accepted in its entirety without any apparent internal critical review or public consultation as the future for CSC is alarming. Surely in this case the emperor has no clothes.

The Panel's *Roadmap* seeks to move the Correctional Service of Canada away from an unequivocal commitment to respect and protect the human rights of prisoners as the centerpiece of its operations. It is a flawed moral and legal compass. It points in the wrong direction; a direction that, tragically and inevitably, will bring yet more chapters in an already overburdened history of abuse and mismanagement of correctional authority through gross disregard of human dignity.

13 Conclusion

So what should readers conclude from our response? We have challenged the *Roadmap's* framework for transforming the future of the Canadian correctional system on many grounds. The principal themes that have informed our critique of the proposed transformation are that it falls short of two of the fundamental criteria for a correctional system for the 21st century. The first of those criteria is that in law, policy and practice the system must demonstrate its overriding commitment to the protection of human rights. The fact that nowhere in their analysis does the Panel, even for a paragraph, reflect on the concept of human rights when discussing the future of the most coercive arm of the state is unpardonable and we would argue that for this reason alone the *Roadmap to Strengthening Public Safety* is discredited. We do not have to labour over the hard lessons learnt from Abu Ghraib and Guantánamo Bay to understand the essential relationship between human rights and imprisonment. In Canada our own legacy of abuse, most recently exposed in the report of Justice Louise Arbour and the Correctional Investigators report on the death of Ashley Smith and in the continuing and increasing over-representation of Aboriginal prisoners, should make it clear that complacency has no place in our commitment to human rights.

The second criterion for a “correctional system” is that it must “correct.” If a correctional system is to correct, then we must judge its operation in that light and assess any proposals for changes on the basis of likely outcomes. While the *Roadmap* makes very substantial recommendation for change, in major areas it provides a dearth of evidence for the likely effect, let alone benefit of them. They claim that the abolition of statutory release will result in more prisoners actively following their correctional plans and, therefore, being released by the National Parole Board on the road to reintegration - without any evidence. They propose massive investment in work readiness as the key to post release success – without evidence. They dismiss most education beyond basic job training – without evidence. And so it goes time and time again thus raising the larger question of whether key elements of the transformation agenda have any foundation stronger than the beliefs of the Panel and senior CSC management.

For years CSC has, through its own research branch and in conjunction with the research branch of the Ministry of Public Safety and the academic community conducted some of the most advanced research and analysis of what can be done within the correctional environment that serves to reduce recidivism. CSC often prides itself in its international reputation in this respect and yet all this was entirely ignored by the Panel who instead substituted their personal beliefs. How was this possible and, more importantly, *why* was this possible?

In our opening chapter we trace back statements of the Prime Minister that clearly dismisses, even derides, evidence as the basis of public policy in criminal justice. We identified long-held positions of founding political parties to the current governing party that now appear in the report as major recommendations – political positions that were never analyzed objectively or justified with evidence.

When we hold the *Roadmap* up to the record of the impressive reports of previous royal commissions, commissions of inquiry and parliamentary committees that have marked the progression of Canadian corrections over the course of almost two centuries, it lacks the essential features of a landmark pointing the way to a better future, a safer future, a more just and humane future. What it represents is a warning sign of the dangers of forming public policy in one of the most difficult and challenging areas of our democracy where the most fundamental rights are at stake, in the crucible of narrow political ideology. That the Panel did not have the necessary strengths and independence to carry out its broad mandate and that it was given an impossibly short timeframe have only contributed to what must be regarded as an abject failure in reshaping Canadian corrections.

It is one of the great ironies, but also very telling, that a document so flawed has so quickly become the blueprint for operational change and opening of the public purse. Many of the recommendations of the *Roadmap* do not require changes to the legislative framework and are in the process of being implemented. We have been told that “the train has left the station” and that critical commentary will not bring it back. Our response is that if the train is heading for a crash the responsible step is to try and stop it in its tracks before it does irreversible harm.

There are other parts of the *Roadmap* that recommend legislative amendment to the legislative framework of corrections. In June 2009, in the final days of the session the Honourable Peter Van Loan, Minister of Public Safety, introduced in Parliament a package of legislative amendments to the *CCRA* identified as Bill C-43. The direct link between the *Roadmap* and the proposed amendments is made clear in the Minister’s statements “It sets the foundation to strengthen the federal correctional system as we are proposing with the tabling of this bill”.⁴¹⁰

We carefully considered adding as a final chapter to this response our commentary on Bill C-43. We have decided however that it is better to distribute this commentary as a separate albeit companion document. The *Roadmap* is being held up by CSC as the foundation for correctional transformation displacing and eclipsing every other vision of corrections. The implications for the policies, practices and values contained in the *Roadmap* go far beyond that which requires legislative change and so we did not want readers to assume that Bill-43 is the complete response of the Government to the report. Indeed Bill C-43 it is likely to be only the first of several Bills, including one to abolish statutory release. As a matter of historical record we have an obligation to make it as clear as we can that this is a vision that offers a false promise of public safety, obscuring its great detrimental impact on the protection of human rights and effective corrections. We also have an obligation to make it clear to those who will be deliberating upon the merits of Bill C. 43 that its amendments are not the “modernization” of the correctional system as the government would have but a deeply regressive move.

410 Backgrounder Bill C-43, June 16, 2009