The Honourable Dennis Timbrell

SUBMISSIONS TO: The House of Commons Committee on Justice and Legal Affairs

RE: Inquiry into Maximum Security Institutions of the Canadian Penitentiary Service

FROM: Canadian Civil Liberties Association

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INTRODUCTION

The Committee's inquiry originated with recent disturbances at various maximum security institutions, and the scope of the inquiry encompasses, in general terms, 'any matter relevant to the proper administration of such institutions'.

The thesis of this brief is that one matter not only relevant but significant to a major degree in the proper administration of maximum security institutions, and institutions generally, is the treatment of the inmates therein: the extent to which their rights are recognized, the extent to which their legitimate grievances are given effect; and the extent to which they are accorded fair procedures or due process for the vindication of their rights and settlement of their grievances. To the extent that prison inmates are treated as a non-privileged minority group, they will respond accordingly. The historical lesson is that all such groups, when conditions are right, enter upon revolution. This term is used not in the narrow sense concerned with armed warfare, but in a more general, theoretical sense of which violence is only one possibl. aspect; namely, that the minority group no longer accepts the characterization or status given it by the majority, and determines, through various means, to realign the social ordering. To meet this revolution merely with force is to ignore the lessons of history.

A response offering greater hopes of success is objectively and honestly to consider the present position of the complaining group, in this case, inmates, and their grievances, however badly articulated by the inmates themselves. Separate the legitimate complaints from the illegitimate and measure the extent to which the treatment given inmates accords with the expressed ideals of a contemporary democratic society.

On a philosophical level, is it not inconsistent for society to claim moral superiority for the rule of law while at the same time denying the application of basic legal rules and principles to that segment of society - prison inmates - whom it seeks to convert to this view?

On a practical level, bringing the rule of law to corrections offers some hope for the avoidance of further resort to extra-legal self-help means by inmates to secure redress for their grievances.

As a general proposition we state that a prison inmate begins with all the rights and privileges accorded any person in this society. Thereafter, by virtue of his status, obviously certain rights and privileges must be removed for a certain period of time. But this removal of rights and privileges and the extent thereof must be no more than necessary to fulfill the legitimate purpose of his imprisonment. It is not a question of giving inmates rights; it is a question of the State justifying any removal, and on a basis recognized as proper by our society.

Rather than seeking to cover the entire wide field of prison administration, this brief will focus on certain specific areas that seem to be of particular concern to inmates: visits, correspondence and other aspects of the right to communicate, and prison discipline and transfer decisions, both of which involve the rights of inmates to question basic decisions being made against them and the procedures followed in doing so.[1] In the interests of a more balanced approach, the brief concludes with a short discussion concerning certain grievances of the other inmates within the prison system - the guards.

The Canadian Civil Liberties Association is a national organization with a cross-country membership of more than 3000 individuals, some 50 associated groups which, themselves represent several thousand people, and eight affiliated chapters. Our membership roster includes a wide variety of callings and interests - lawyers, writers, housewives, trade unionists, minority groups, media performers, business executives, etc.

Our objectives are essentially two-fold:

1. to promote legal protections against the unreasonable invasion by public authority of the freedom and dignity of the individual
2. to promote fair procedures for the determination of people's legal rights and obligations.

It is not difficult to appreciate the relationship between these objectives and the subject matter of this inquiry. In our view, the wise application of civil liberties principles is likely to improve the proper administration of our penal institutions.

VISITS AND COMMUNICATIONS

The freedoms of speech, assembly and association guaranteed to Canadian citizens generally and enshrined in the Canadian Bill of Rights are totally denied prison inmates, far beyond any limits justifiable by the legitimate needs of the fact of incarceration. Communication by inmates with their family, friends,and other visitors via the mails or in person, their contact with the press or public generally and their access to published materials are all controlled and regimented by a host of regulations and directives. None of these provisions recognize any general rights on the part of inmates in this area; their spirit and their express wording in some instances is clearly to the contrary.

With respect to visiting and correspondence, the Penitentiary Service Regulations[2] provide:

> 2.17 The visiting and correspondence privileges that may, in accordance with directives be permitted to inmates shall be such as are, in all the circumstances, calculated to assist in the reformation and rehabilitation of the inmate.
>
> 2.18 Insofar as practicable the censorship of correspondence shall be avoided and the privacy of visits shall be maintained, but nothing herein shall be deemed to limit the authority of the Commissioner to direct or the Institutional head to order censorship of correspondence or supervision of visiting to the extent considered necessary or desirable for the reformation and rehabilitation of inmates or the security of the institution.

The Commissioner's Directives, authorized under the governing statute[3] go on to carefully control visitors to institutions. Directive 113 of January 19, 1967 indicates "tours...by members of the press...shall be carefully controlled and all requests [therefor] shall be referred to the ...Commissioner". An inmate, therefore, has no right to a visit from a member of the press, even if both parties wish the visit to be an ordinary visit counted as part of the inmate's regular quota of visits. By way of contrast, local Service Clubs "active in the citizen participation programs" on the other hand "shall be welcomed to visit". Directive 114 headed "Relations with the Press" and dated January 31, 1972 deals mainly with press releases and release of information concerning escapes, deaths,and unusual occurrences. But paragraph 9 repeats the above limitation on press visits to institutions and paragraph 10 prohibits interviews with inmates.

With respect to correspondence, Directive 212 dated November 23, 1974 states:

> "while censorship of correspondence will not normally be performed, all incoming and outgoing correspondence, except privileged correspondence as defined by C.D. 219, paragraph seven, shall be inspected to prevent transmission of contraband. All visits in maximum and medium security institutions shall be closely supervised and may, when in the opinion of the Director, Preventive Security or the Institutional Director, if security so requires, be monitored and/or recorded. Whenever such action is taken a report shall be forwarded to the Commissioner, Attention Director, Preventive Security, within 48 hours of the occurrence. Warning notices to this effect shall be displayed in all visiting areas.

Directive 219 of June 29, 1976 sets forth the rules governing inmate correspondence. Privileged correspondence is limited to government officials and ombudsmen, and all other correspondence can be opened to search for contraband. Even 'privileged' correspondence can be opened to search for contraband merely where any institutional staff member 'suspects' contraband in such correspondence, if the Commissioner's approval is obtained.[4] Participation in contests and book or record clubs is prohibited.

Access within the institution to published material is limited under section 2.21 of the Penitentiary Service Regulations, which provides:

> 2.21 No reading material, of any description, shall be permitted in an institution if it is calculated
>
> (a) to bring into ridicule or contempt any religion or faith,
>
> (b) to promote controversy between members of different religions or faiths, or
>
> (c) to affect adversely the good order or administration of the institution.

Directive 211 dated November 1, 1963, limits magazine subscriptions to those " of a character and nature in keeping with the broad principles of inmate training".

With respect to communication by inmates with each other and with the public generally via some sort of newsletter or the like, directive 227 of November 1, 1963 governs inmate Publications: the Assistant Deputy Warden is the Chairman of the Editorial Committee, and the Institutional Head is given complete control to prevent publication of any item not "in the best interest of the Penitentiary Service or the Institution".

As seen above, the interests in censorship are stated to be the "reformation" of inmates and the "security of the institution". To the extent that some measure of control of inmates' external contacts is necessary to prevent transmission of contraband, formulation of escape plots, and other illegal activity, some limits in these areas are undoubtedly a structural necessity. But the above provisions are unduly broad and hardly consistent with the philosophy herein expressed. Rather than beginning with the fact of a right in the inmate and proceeding to a justifiable limitation, these various provisions each grudgingly grant a privilege, wrapped in caution and bestowed half-heartedly, lest it be meaningful.

With respect to correspondence, the normal rights of citizens are reflected in the Post Office Act[5], which provides that "...nothing is liable to...seizure...while in the course of post, except as provided in the Act or Regulations".[6] Departure from this right requires, as a general proposition "a belief on reasonable grounds" that unlawful activity is afoot.[7] The question of contraband peculiar to penal institutions admittedly necessitates a limitation to this general right in the case of inmates, but it certainly does not warrant its total disallowance. One does not need to read a letter to ascertain whether it contains a hacksaw. Furthermore, even if institutional staff are instructed to restrict their activities appropriately when acting solely on the contraband rationale, the dragnet inspection of all mail (with the one limited exception) to search for contraband must inevitably give rise to the suspicion, if not the reality, of abuse, in that the mail is not only being inspected but also read, at the least. Therefore, with respect to the question of contraband, where this is the only legitimate basis for examination of a piece of correspondence, we suggest a reasonable solution would be an 'observation' mechanism whereby the inmate, or perhaps an inmate representative, could be present to see that the staff examine the correspondence for contraband only without reading it. This, we submit, insofar as the question of contraband is concerned, recognizes inmates' rights with a minor legitimate limitation.

In other cases, where on valid grounds, the issue goes beyond contraband and into censorship and the invasion of privacy involved in reading another's correspondence, this should be strictly controlled and limited. Rather than the present delegation

of discretionary authority exercisable on vague grounds, the grounds upon which this can be done should be delineated as clearly as possible. No reason is evident to us why these grounds, which express the limitation on the inmates' right to correspond, should be greater than that available to authorities in the case of an ordinary citizen as applied mutatis mutandis to a penitentiary. In other words, we suggest that censorship require the existence of 'reason to believe that the correspondence involves a criminal offence or an offence contrary to the prison rules'. Where such action is taken, the inmate and other party to the correspondence should be notified to that effect and the notice should contain a reasonable description of the extent to which the privacy was invaded; i.e. letter read, orally disclosed, copies, etc. As well, the grounds upon which such was done should be disclosed. The foregoing, we suggest, recognizes legitimate institutional interests while maximizing respect for the basic right.

With respect to personal visits and the oral communications involved therein, we suggest the institutional interests are the same as those in the case of written communications. Our comments about contraband lead us to the conclusion that visitors to institutions can legitimately be searched in furtherance of this interest. But the wholesale monitoring of conversations and, in fact, the elimination of the opportunity for private conversations manifested by the warning signs referred to in the relevant provisions appear to us to be unjustifiable. Private oral conversations should be permitted as the usual course, and the ground for intercepting a private conversation should be the same as for the invasion of mail. Similar notice provisions should apply where an interception has been carried out.

With respect to the question of access to the press, this should be broader than present both in and out. The restriction on subscriptions to regularly-published periodicals seems indefensible; literature available to the public should be available in prison. There is no class of material legally and regularly available to the public that seems to us should merit special treatment because the reader is in an institution. With respect to press interviews, these should be solely up to the inmate as in the case of any citizen. No justification exists for preventing an inmate from speaking to a member of the press in the course of a regular visit to which an inmate is entitled.

Finally, the control on inmate publications is almost as broad as possible. Again, we feel the criteria could be narrowed to express the legitimate interests of the institution, while at the same time demonstrating respect for the inmates' right to freedom of speech. The limit to be drawn seems justifiable only on the ground of prison security, but such hardly requires the very wide test in the legislation. Prison press may not be the most significant of all the printed media, but it is nevertheless press; there seems to be no valid basis why it should be subject to restrictive powers which are so much greater than those our society generally permits. In our view, authority to censor inmate publications should be given only where an item to be published presents a clear and present danger of the likelihood of the commission of a criminal offence or an offence contrary to the prison rules.

Special mention, we feel, should be made at this time of the particular area of solicitor-client correspondence. If the above suggestions are accepted, special provision for solicitor-client correspondence seems unnecessary. Such mail could, we feel, be treated in the same manner in which we suggest above that all mail should be treated. The same is true of oral or other communication between clients and their solicitors.

However, to the extent that penitentiary law and practice is not brought into line with the foregoing, we feel solicitor-client correspondence should be accorded "privileged" status as is presently accorded communications to ombudsmen and government officials.

The importance of solicitor-client correspondence should not be underestimated: the client is often some distance from his lawyer, who is most likely to be at the place of conviction, and mail is the only reasonable method of communication. For the same reason, an in-person visit or telephone conversation is a serious occasion in which precious time should not be lost wondering about the privacy of the communication. This factor is, of course, additional to all the factors which generally support the recognition in law of solicitor-client privilege, and we rely on those factors as well to support a rejection of any invasion of the privilege.

In any event, therefore, we recommend that solicitor-client communications both oral and written, be recognized as "privileged" within the meaning of the Penitentiary Directives.

PRISON DISCIPLINE

The "Warden's Court" administers the "criminal law" of the prison, which is contained in the Regulations and Directives:

Inmate Discipline

2.28 (1) The institutional head of each institution is responsible for the disciplinary control of inmates confined therein.

(2) No inmate shall be punished except pursuant to an order of the institutional head or an officer designated by the institutional head.

(3) Where an inmate is convicted of a disciplinary offence the punishment shall, except where the offence is flagrant or serious, consist of loss of privileges.

(4) The punishment that may be ordered for a flagrant or serious disciplinary offence shall consist of one or more of the following,

(a) forfeiture of statutory remission,

(b) dissociation for a period not to exceed thirty days (i) with a diet, during all or part of the period that is monotonous but adequate and healthful, or (ii) without a diet,

(c) loss of privileges.

Inmate Offences

2.29 Every inmate commits a disciplinary offence who

(a) disobeys or fails to obey a lawful order of a penitentiary officer,

(b) assaults or threatens to assault another person,

(c) refuses to work or fails to work to the best of his ability,

(d) leaves his work without permission of a penitentiary officer,

(e) damages government property or the property of another person,

(f) wilfully wastes food,

(g) is indecent, disrespectful or threatening in his actions, language or writing toward any other person,

(h) wilfully disobeys or fails to obey any regulation or rule governing the conduct of inmates,

(i) has contraband in his possession,

(j) deals in contraband with any other person,

(k) does any act that is calculated to prejudice the discipline or good order of the institution,

(l) does any act with intent to escape or to assist another inmate to escape,

(m) gives or offers a bribe or reward to any person for any purpose,

(n) contravenes any rule, regulation or directive made under the Act, or

(o) attempts to do anything mentioned in paragraphs (a) to (n)

Dissociation

2.30 (1) Where the institutional head is satisfied that

(a) for the maintenance of good order and discipline in the institution, or

(b) in the best interests of an inmate

it is necessary or desirable that the inmate should be kept from associating with other inmates he may order the inmate to be dissociated accordingly, but the case of every inmate dissociated shall be considered, not less than once each month, by the Classification Board for the purpose of recommending to the institutional head whether or not the inmate should return to association with other inmates.

(2) An inmate who has been dissociated is not considered under punishment unless he has been sentenced as such and he shall not be deprived of any of his privileges and amenities by reason thereof, except those privileges and amenities that,

(a) can only be enjoyed in association with other inmates, or

(b) cannot reasonably be granted having regard to the limitations of the dissociation area and the necessity for the effective operation thereof.

Offences Generally

2.31 (1) Every one who,

(a) delivers or attempts to deliver contraband to an inmate,

(b) receives or attempts to receive contraband from an inmate,

(c) trespasses upon penitentiary lands, or

(d) assists any person to do anything mentioned in paragraph (a), (b) or (c),

is guilty of an offence punishable on summary conviction and is liable to imprisonment for six months or to a fine of five hundred dollars or both.

(l) does any act with intent to escape or to assist another inmate to escape,

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is guilty of an offence punishable on summary conviction and is liable to imprisonment for six months or to a fine of five hundred dollars or both.

(2) Where the institutional head suspects, on reasonable grounds, that an officer, employee, inmate or visitor to the institution is in possession of contraband he may order that person to be searched but no such person, who is female, shall be searched except by a female person.

Directive 213, dated August 1, 1975 is headed "Guidelines for Inmate Discipline". In paragraph 6 'serious or flagrant' offences are listed, but the list is not exhaustive. Examples of such offences are: "does any act that is calculated to prejudice the discipline or good order of the institution"; "wilfully wastes food"; "is indecent or disrespectful ". Conviction of these offences must result in at least one of the following punishments: forfeiture of remission; dissociation or loss of privileges. The only minor offences listed, conviction of which merely results in loss of privileges such as television, radio, arts and crafts, are: leaving work without permission, failing to work to best of his ability or breaking any rule governing inmate conduct.

The Director of the institution is given an absolute discretion to determine whether any breach is a major or minor offence.

The trial is before the Director and two other staff members "as advisors only". Questioning and cross-examination of witnesses is done through the presiding officer. Nothing appears about an inmate's right to representation, if only by a more articulate friend or other inmate.

Other highlights of this lengthy directive include a prohibition of smoking in punitive dissociation.

Respect for law can hardly be instilled by a legal system bearing little resemblance to what we call "due process of law", and yet it is hard to think of a worse example of this than the prison 'penal' system as set out in these provisions.

The definition of penal offences is the first area in which we feel changes must be made. One of the basic rules of our penal system is the 'principle of legality' which has several facets but generally it expresses the concept that penal statutes must

not be vague so that citizens are left to guess at their meaning and act at their peril. Criminal justice must be objective, pursuant to a definite statutory norm which precludes ad hoc decisions.

Certain of the prison offences are obviously unobjectionable, namely those which involve conduct otherwise punishable under the Criminal Code, such as assault or wilfull damage to property. But others involve considerable ambiguity and enormous scope and they will simply not do as penal offences. These offences, namely ".... doing any act calculated to prejudice the...good order of the institution", "being indecent or disrespectful", "failing to work to the best of [one's] ability", should be eliminated. Furthermore, care should be taken in the drafting of offences in the future to prevent the recurrence of this type of provision.

A further problem with respect to the scope of offences arises from the fact that many penitentiary rules created at an individual institution can constitute the source of a disciplinary offence, for example, under s. 2.29 (h), which prohibits the disobedience of any "rule governing the conduct of inmates". There are often so many particular rules that an individual inmate is not aware of them all.

We recognize that local conditions at particular institutions may require special rules enforceable as disciplinary offences, but we can see no justification for such rules to go beyond the purpose and scope of the central core of offences applicable system-wide. We therefore recommend that such 'house rules' must not only be consistent with our recommendations herein,but also that they must be consistent with the scope and purpose of one or more system-wide offences. Local rules should be filed centrally and examined to ensure such conformity.

Further, no inmate should be faced with the possibility of being disciplined, either directly or indirectly, on the basis of a provision not generally published throughout the inmate population, and we feel the inmate 'penal code' should so expressly state. As a positive aspect of this, we feel all offences and punishable rules should be available for perusal by inmates, perhaps by means of an up-to-date file kept in the prison library.

When one considers the procedural aspects of disciplinary trials, one also finds much that would not be tolerated in the ordinary criminal trial. True, there are some very basic protections afforded an inmate accused. Considering the relevant provisions, the Ontario Court of Appeal has held in the Beaver Creek case[8] that, in respect of a disciplinary offence, the institutional head

(a) has an obligation to inform an inmate of the offence alleged;

(b) must give the inmate a fair opportunity to present his case, and

(c) must reach a decision judicially on the evidence before him and not capriciously or in reliance on some irrelevant consideration.

But the Court refused to go further and held that the inmate, who was in that case sentenced to punitive dissociation, was not entitled to a hearing in accordance with the rules of natural justice.

We limit our remarks to major offences, and we point out that in the case of such offences the possibility of losing statutory remission resulting in additional imprisonment means that, from an inmate's point of view, these tribunals can have repercussions equivalent to an ordinary criminal court.

An obvious defect in these proceedings is the nature of the tribunal by which an inmate is tried. No man should be a judge in his own cause, but yet the head of the institution and other staff members come to sit in judgment in cases where the credibility of the inmate as against that of a staff member is often the issue. Even in those cases where it is not, the 'interests of the institution' may be the issue, having regard to the way offences are defined. Whatever rights or protections we give to inmates as far as disciplinary proceedings are concerned are rendered nugatory so long as this situation obtains, and therefore we call for an independent president of disciplinary boards as basic to both the appearance and the actual doing of justice in these proceedings.

We also suggest, unlike at present, recognition of a right to representation, either by counsel or agent, or recognition of an inmate's right to call, question and cross-examine witnesses. These rights will ensure factual accuracy of the proceedings and

add an appearance of justice lacking at the present time. The present provision for cross-examination only through the presiding tribunal should clearly be repealed, any trial lawyer knows the ineffectiveness of such a method of cross-examination.

Finally, we make a recommendation about the statutory method of granting these recommended rights. At the present time, the procedures at disciplinary trials find their origin mainly in directives, as opposed to regulations or statutory provisions. It is true these directives make some attempt at procedural fairness, e.g. requiring a specific form of notice to an inmate of the charge against him. But directives are merely a matter between institutional employees and their superiors,[9] and in judicial terms they confer no rights on inmates. Therefore, even those aspects of the present procedures which are acceptable cannot be considered effective so long as they find their source merely in directives. According to the Annual Report of the Correctional Investigator, 1974-1975, the required procedures are often not followed.[10] Therefore we recommend that the provisions we suggest and disciplinary procedures should in general be a matter, at least, of regulation, not merely directive, to afford protection for the inmate's legitimate rights.

The use of dissociation as a punishment raises, we recognize, difficult problems. Punitive dissociation involves severe, punitive deprivation. Since 1972 dissociation can even be without diet. At some institutions conditions in dissociation are so disgraceful as to amount to "cruel and unusual punishment" contrary to the Canadian Bill of Rights.[11] Serious objective assessment of the utility of punitive dissociation should be carried out and serious consideration given to its continued use by the Canadian Penitentiary Service. If, objectively viewed, its use cannot be established to be functional, and its continued existence stems from simple inertia, then it should be abolished. More immediately, to the extent that punitive dissociation is continued, it should be accompanied by the necessary conditions of human habitation. The punishment is dissociation, not loss of sleep, food, or exercise, and therefore these should be ensured. The provision for dissociation without diet should therefore be repealed. Section 2.28 (4) (b) (ii) was added only in 1972 and its justification is impossible to see.

Another change we recommend for immediate implementation is a time limit of ten consecutive days on the period of dissociation which an inmate can undergo. The present time limit of thirty days, with no limit on imposition, is too broad based on the available research:[11A] "until more is known about long-term solitary confinement, durations exceeding ten days would not be recommended."[11B] Having regard to the conditions in dissociation, such a limit accords more with common sense and basic decency than the present limit.

TRANSFER DECISIONS

The prison administrator has in general terms total and absolute authority to decide where a person shall serve his sentence.[12]

The Regulations simply provide:

Custody of Inmates

2.03 The inmate shall, in accordance with directives, be confined in the institution that seems most appropriate having regard to

(a) the degree and kind of custodial control considered necessary or desirable for the protection of society, and

(b) the program of correctional training considered most appropriate for the inmate.

Classification

2.04 The file of an inmate shall be carefully reviewed before any decision is made concerning the classification, reclassification or transfer of the inmate.

According to the Correctional Investigator, "transfer to a more secure institution is used as a disciplinary tool",[13] and it can have serious repercussions for an inmate. Normal transfer decisions made with the intervention of a Transfer Board do not raise as many problems as so-called emergency transfers made by administrators alone. An example from the law reports is the case of Re Greene and Faquy et al[14], which was an application for mandamus to review the decision of the warden of a penitentiary transferring the inmate from Joyceville Institution to Millhaven, a maximum security unit. The transfer was allegedly made because of unsubstantiated charges of misconduct against him, without a hearing or other investigation. The applicant wrote the respondent Faquy requesting a hearing, and the latter's office replied that 'he was going to Europe'. The application was dismissed because the inmate's material, made without the assistance of counsel, failed to establish grounds for relief under the Beaver Creek decision and also because section 18 of the Federal Court Act limited jurisdiction to that Court.

A transfer to greater security is likely to be interpreted by custodial staff as a 'black mark' against an inmate. In addition to resulting in a limitation of his freedom, such a transfer affects his chances for parole, affects eligibility to apply for the return of lost statutory remission, disrupts educational programs and group activities.It may even have an impact on visits, since in a medium institution an inmate usually has open, fairly frequent visits with family and friends. Temporary absences are usually more restricted in maximum institutions.

The possibility of a sudden transfer hangs over the heads of inmates in less secure institutions. Only recently, apparently, have administrators started to give inmates some reasons for a transfer,but often this is simply that the person has been "found not suitable for the type of security" in which he is at that time.

In making such decisions administrators apparently act on information from many sources including police information, information supplied by visitors to the institution, and information supplied by other inmates. In addition, reports by officers of their observation of inmates and reports that substances and articles are found in the institution may result in a decision to transfer an inmate. An obvious criticism of this whole area is that inmates have no knowledge of the actual facts alleged against them and therefore no opportunity to challenge them, and the question is whether the procedure involved in sudden transfers can be justified.

On the other hand,it is acknowledged that an administrator is faced with extremely difficult decisions in carrying out his responsibilities. If it is suspected that dangerous articles and substances are being brought into the institution by someone, if an escape attempt is suspected, if one inmate is believed to intend to injure or kill another inmate, then the administrator must take preventive steps for the safety of all. If he neglects to act on suspicion, he may endanger the lives and welfare of both inmates and staff which ultimately are his responsibility. The administrator also ignores such suspicion at his peril because he might either be disciplined or,in the case of harm to others because of his negligence, may have to face the possibility of a judgment for damages. Faced with such responsibilities it is only natural that caution becomes a predominant factor in his thinking.

But, as we have seen above, severe disciplinary sanctions may only be imposed where there is an allegation of a serious or flagrant offence. Notice to the inmate and an opportunity for him to be heard and call witnesses is considered necessary. The effect of a transfer may in some instances be far more severe and have more long-range effect than any sentence that may be imposed by a disciplinary board. A fortiori the same philosophy should theoretically prevail in the area of transfer decisions. Therefore, we recommend that before a prisoner sustains an adverse transfer or reclassification, he should be notified of the allegations against him and he should be given an opportunity to call witnesses and make representations.

Furthermore, the lesson to be learned from legal history is the value of articulated reasons. If a decision is defensible, reasons can be articulated, and it does not seem too much to require that with respect to a decision so important to an inmate, he at some point receive reasons in writing, beyond bald generalities. Such a requirement can only improve the level of decision-making on the part of administrators in addition to satisfying the inmates.

In the area of transfer decisions, female inmates suffer a particular disadvantage that must not be allowed to continue. There are far fewer institutions for female offenders than for male offenders in this country, obviously because of the fewer numbers of such offenders, but the economic justification that results in one institution serving several provinces instead of several more local institutions cannot justify the resulting inequality and harm.

Women offenders today usually serve their penitentiary sentences far removed from their families and friends. Visits become impractical. This inevitably affects their rehabilitative process, the granting of temporary absences,and even their parole opportunities. In short, to save dollars the system for female offenders goes a long way towards eliminating the potential for effective rehabilitation which it professes to have. There should be a general presumption or prima facie right with respect to serving one's sentence in the province where one was convicted. Of course, an inter-provincial transfer will be justified in certain circumstances, but one of these must not be - as it is at present - simply because the offender is female.

A WORD ABOUT THE "OTHER INMATES"

No inquiry into the penitentiary system can properly overlook the legitimate interests of the other inmates who live so much of their lives behind the walls -- the guards. In recent discussions with representatives of the jail guards union, the Canadian Civil Liberties Association was able to identify at least three issues where the guards appeared to have legitimate grievances - the size of the institutions, the lack of consultations, and the state of their training.[15]

According to the representatives with whom we spoke, overcrowding constitutes one of the greatest sources of friction within the penitentiaries of this country. In a brief dated July 28, 1975, the Solicitor General's Component of the Public Service Alliance of Canada called for the building of new institutions in all regions. This proposal was designed not to increase the number of incarcerated people in this country but rather to redistribute more sensibly those who already were incarcerated. The idea, according to the Union brief, was to ensure that "there will be not more than 250 inmates in any institution either maximum or medium...".

It is difficult to quarrel with the essential common sense of this proposal. We, therefore, respectfully urge its early implementation.

Time after time, according to the Union, the Penitentiary Service has imposed upon the guards, without any advance warning or consultation, the obligation to implement some new policy or program. It is obvious that the cooperation of the guards would enhance the prospects for the success of these new initiatives. It is just as obvious, in our view, that prior consultation would enhance the prospects for such cooperation. It may very well be that on many occasions the Government and the guards will disagree. But this cannot justify the failure to consult. Whether viewed as right or wrong on any given point, the guards have had invaluable experience. Their reactions and advice should not only be heard, they should eagerly be sought. The Government cannot, of course, bind itself to follow anyone's advice. But it commits a foolish blunder, not even to solicit such advice.

In discussions with us, the guards complained that their training is "almost nil". Although their induction period is supposed to consist of 9 weeks of training, they told us that in reality it is often reduced to 4 weeks. According to the Union, even the management supervisors at the staff college often lack adequate training. At the moment, living unit officers require a minimum of grade 12 education but security officers require only grade 10.

In view of the hazards and difficulties in performing the functions involved, we believe that the Government should heed the guards' call for improved training programs - a full 9 weeks induction plus at least 2 weeks of refresher courses per year. It is also hard to quarrel with their proposal that all security officers should require the equivalent of a grade 12 education. Perhaps even more important is the adoption by the Government of a program to encourage upgrading among the guards. If they show the ambition to acquire the kind of additional education which would improve their job performance, some measure of financial assistance would appear to be warranted at least in certain cases. Moreover, such academic achievement should somehow be reflected in the pay rates they subsequently receive. The prison population and, indeed, the entire country stands to benefit from the increased education and training of this vital constituency.

CONCLUSION

Throughout the legislation and directives governing prison life a strong philosophical thread of paternalism and absolute authority runs, stronger in the older sections and slightly weaker in the new. For example, in Directive No. 211, November 1, 1963, owning and using a radio is labelled a "privilege" and extended only to inmates of medium and minimum security institutions. This is contradicted by Annex A to Directive 209 of October 12, 1976 which allows the privilege to inmates at a maximum security institution, but the characterization as a "privilege", so that presumably it can be removed as punishment, is a good example of this philosophy. Directive 241 of September 24, 1974 magnanimously grants the privilege of wearing a wrist watch to all inmates.

Aside from relying on the persuasive powers of the Correctional Investigator and the benevolence of the prison authorities, inmates have been virtually devoid of non-violent instruments of redress. Initially, they did seek the assistance of the courts. But the courts, with few exceptions, have refused to review penal decisions or procedures because of the obvious intent of the legislation.

Perhaps if inmates had been more successful in litigation they would not have resorted to the 'self-help' remedy common to an 'underdeveloped' legal system. But the fact is that legislative changes are now necessary. Those recommended herein are neither earth-shattering nor inimical to the proper functioning of the Canadian Penitentiary Service. But they would represent a reasonable recognition of inmates' rights and perhaps constitute thereby a contribution towards the prevention of future disturbances at our institutions.

SUMMARY OF RECOMMENDATIONS

The underlying principle for the recommendations that follow is that prisoners should suffer no more restrictions on their normal liberties than is necessary to fulfill the legitimate purposes of their incarceration. In particular, the Canadian Civil Liberties Association would recommend the following changes in existing prison regulations.

1. (a) Prisoners should be entitled generally to privacy in their oral conversations and written communications. The censorship of their mail and the monitoring of their conversations should require a reason to believe that such communications involve criminal offences or contraventions of the prison rules.
   (b) In any event, solicitor-client communications, both oral and written, should be treated as "privileged" within the meaning of the Penitentiary Directives.

2. When such an interception does take place, the inmate and his correspondent should be notified - such notification should contain a reasonable description of why and how far the communication was invaded.

3. Where the inspection of correspondence is designed only to prevent the transmission of contraband, the prison staff should not be permitted to read the material and, as a safeguard, the inmate concerned or his representative should be permitted to witness the inspection.

4. Inmates should be able to read whatever literature and periodicals are accessible to the general public.

5. Inmates should have the right to grant interviews to the mass media.

6. Censorship of inmate publications should require a clear and present danger of a criminal offence or contravention of the prison rules.

7. (a) Disciplinary offences should be better defined and, subject to what follows, they should be made a matter at least of regulations rather than merely administrative directives.
   (b) To whatever extent required by purely local conditions, each institution may adopt special rules but no inmate should be punishable as a consequence thereof unless such rules
      (1) are consistent with system-wide rules,
      (2) have been filed centrally and examined to ensure such consistency,
      (3) have been published throughout the inmate community.

8. Disciplinary trials should contain certain minimum procedural safeguards, such as the following:
   (a) adjudication, independent of the prison administration and the Solicitor General's Department
   (b) the right to representation by counsel or even another inmate
   (c) the right to call, question, and directly cross-examine witnesses.

9. (a) The Government should conduct a serious assessment of the utility of punitive dissociation. Unless such assessment demonstrates its utility, this form of punishment should be abolished.

(b) To the extent that punitive dissociation is continued, however, it should be limited to ten consecutive days and accompanied by the necessary conditions of decent human habitation, i.e. the prisoner should avoid a loss of sleep, food, or exercise.

10. (a) Unless there is justification in particular circumstances to do otherwise, inmates should be entitled to serve their sentences within institutions which are located in the Province where they were convicted.

(b) Before a prisoner sustains an adverse transfer or reclassification, he should be notified of the allegations against him and he should be given an opportunity to call witnesses and make representations. The decision-maker should be required to provide written reasons.

11. The Government should build a sufficient number of prisons in order to ensure that no one institution shall contain more than 250 inmates.

12. Before introducing new administrative policies or programs for the prisons the Government should consult with the guards and their nion.

13. The training of prison guards should be intensified so that,at a minimum, there be 9 full weeks induction plus 2 weeks of refresher courses per year.

14. New security officers should require the equivalent of a grade twelve education.

15. Prison guards should ~~receive~~,in meritorious cases, financial assistance and ultimately higher pay scalesfor acquiring the kind of additional education which would improve their job performance.

FOOTNOTES

1. According to the Annual Report of the Correctional Investigator for 1973-1974, of 627 complaints received, 44 had reference to visits and correspondence, 93 involved discipline (of which 55 had reference to dissociation) and 117 involved transfer decisions (at p. 23). For 1974-1975, the corresponding figures (of 665 complainants) were 35, 70 (including 18 involving dissociation) and 189: Annual Report at p. 18.

2. P.C. 1962-302, as amended P.C., 1965-824; P.C. 1967-563; 1968-1873; 1972-1339; 1927-2327

3. Penitentiary Act, R.S.C. 1970, c. P-6, s. 29(3)

4. Directive 219, s. 8c.

5. R.S.C. 1970, ch. P-14

6. Section 43

7. For example, section 7

8. Regina v. Institutional Head of Beaver Creek Correctional Camp Ex parte MacCaud, [1969] 1 O.R. 373

9. Ibid., at 380-1

10. Annual Report, 1974-1975, at p. 31. In Re McLeod and Maksymowich (1973), 12.C.C.C. (2d) 353 (N.W.T.), Morrow J. granted an application for certiorari to quash proceedings of a disciplinary hearing held by the superintendent of the Yellowknife Correctional Institute, but as one reads the headnote description of the disciplinary hearing there held, one can only hope the case was a most unusual one. The headnote reads:

> "If a disciplinary hearing before the head of a correctional institution is not carried out judicially in accordance with the principles of fundamental justice certiorari will lie to quash the proceedings. Where an inmate charged with a breach of institutional regulations does not really have the case against him presented to the superintendent, but rather the "hearing" consists of those present attempting to convince him that by admissions they already have he has in effect, admitted his guilt, and he is found guilty when he persists in denying his guilt, the proceedings should be quashed."

This case also held that on a disciplinary hearing for breach of institutional regulations, an inmate does not have a right to counsel.

11. McCann et al. v. The Queen (1975), 29 C.C.C. (2D) 337 (F.C.T.D.)

11A. Gendreau, Placing Inmates in Solitary Confinement: An Assessment of Its' Effects on Inmates' Self-Concepts and Stress Levels (unpublished)

11B. Ibid. at p. 15

12. Penitentiary Act, cit. f.n. 3, s. 13

13. Annual Report, 1974-1975, at p.36

14. (1972), 7 C.C.C. (2d) 388 (.O.H.C)

15. This is not to suggest that these 3 issues represent the only legitimate grievances of the jail guards. They are simply the ones we were able to identify within the time constraints created by the need to prepare for this hearing. For our part, we plan to continue this dialogue and, at appropriate points, raise any further legitimate issues that are drawn to our attention.