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I. *Introduction*

A prison inmate is supposed to have the same basic rights as any other citizen, except to the extent that such rights are circumscribed by physical confinement. This may be surprising to many prison authorities, and most of the general public. The point was made forcefully by Mr. Justice White of the United States Supreme Court in *Wolff* v. *McDonnell*.[1]

> But though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain between the Constitution and the prisons of this country.

Until recently these comments could be easily dismissed as American constitutionalism which was inapplicable north of the 49th parallel. However, Canada now has a *Charter of Rights and Freedoms*[2] of her own. The provisions of the *Charter* apply to federal penal institutions and to the provincial penal institutions of any province which does not opt out of the relevant *Charter* provisions by using the over-ride clause.

All provisions in the *Charter* are subject to the limitation clause in section 1, which states that all rights and freedoms are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". This clause may be a very important restriction in regard to the *Charter*'s impact on prisons. In the past, Canadian society has seen fit to impose many "reasonable" limits, which have been accepted by the public whether they were free and democratic or otherwise. These limits must also be prescribed by law. This may mean that prison rules must be written and in relatively clear and accessible form, before they can be relied on as reasonable limits.

Because many denials of rights to prison inmates and parolees are in the form of statutory provisions and regulations, common law protections of fairness and natural justice frequently are excluded. Such provisions cannot be used to set aside the guarantees of the *Charter* which take precedence over all other forms of law.[3] This does not mean that the

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1. (1974), 418 U.S. 539.
2. *Constitutional Act, 1981,* Schedule B, of *Canada Act, 1982,* U.K. 1982, c. 11.
3. This point was underscored by Strayer J. in *Latham* v. *Solicitor General Canada* (1984), 5 Adm. L.R. 70 (F.C.T.D.).

constitutional guarantees are absolute but any departure from the *Charter* standard must be justified under section 1 as a reasonable limit prescribed by law. Limitations on the release of a confidential report contained in a Policy Manual of the National Parole Board were found not to be "prescribed by law" in the important case *Re Cadieux and the Director of Mountain Institution.*[4] In the view of the Federal Court, the National Parole Board has no blanket exemption from the requirements of fundamental justice and any section 1 limitations would have to carry more legal force than a Board policy manual. This is an important point for prison inmates who face a host of rules all claiming to have legal force in restricting their rights.

II. *Charter Rights and Prisons*

The democratic rights in sections 3-5 of the *Charter* provide a clear example of the significance of the reasonable limits clause in the prison context. Section 3 of the *Charter* declares boldly that everyone has the right to vote. Read at face value "everyone" would include prison inmates. However, most courts to date have regarded the denial of the right to vote to prison inmates as an example of reasonable limits under section 1 of the *Charter.* A denial of the right to vote to a person on probation has been held to not be a reasonable limit[5] but people actually behind bars have not fared so well.[6] Reasonable limits are likely to be read broadly in respect to prisons and their inmates.

It is interesting to note that prison inmates are not denied the right to vote in two provinces — Newfoundland and Quebec. In one recent case, *Badger et al.* v. *A.G. Manitoba*[7] a provincial prohibition on prison inmates voting in a provincial election was invalidated as a violation of section 3 of the *Charter.* The Manitoba Queen's Bench did not find the challenged provision to be a reasonable limit within the meaning of section 1 of the *Charter* as elaborated by the Supreme Court of Canada in *R.* v. *Oakes.*[8] Scollin J., speaking for the Manitoba Queen's Bench in *Badger,* stopped short of ordering that prisoners be allowed to vote in the imminent provincial election but left it to the newly elected government to implement his decision as a matter of administrative practice.

There are many other provisions of the *Charter* which are relevant to prisoners. The fundamental freedoms of religion, expression and assembly and "legal rights" are obvious examples. These important

4. (1984), 13 C.C.C. (3d) 330 (F.C.T.D.).
5. *Re Reynolds* (1982), 143 D.L.R. (3d) 365 (B.C.C.A.).
6. *Gould* v. *A.G. Can.* (1984), 13 D.L.R. (4th) 485 (F.C.A.).
7. Unreported decision Mar. 12, 1986 (Man. Q.B.).
8. [1986]1 S.C.R. 103.

claims by prison inmates to the fundamental freedoms will not be explored here in favour of concentrating on the provisions which have received the most attention to date. Some specific legal rights of special interest include:

> 7. Everyone has the right to life, liberty and the security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Revocation of parole or sentencing a prisoner to solitary confinement would be the kind of decisions which would appear to fall within the ambit of section 7.[9] A right to security of the person is also a matter of real concern in many Canadian prisons. Due process protection for prison inmates and parolees has been enhanced by section 7 of the *Charter.*[10] To what extent is not yet clear.

Proper hearings in parole revocation have been demanded in a series of early *Charter* cases.[11] Section 7 has also been read to entitle prison inmates[12] and parolees[13] to legal counsel in certain situations. A good review of the potential *Charter* rights available to remand inmates appears in *Re Maltby and A.G. Sask.*[14] After exploring a host of rights including freedom from unreasonable searches, the right to telephone calls, due process and fundamental freedoms of expression and religion, all limitations were declared reasonable except the denial of the right to vote. While inmates have made some gains in respect to fair process, the gains on substantive rights have been small to date.

Courts have been cautious in articulating the principles of fundamental justice in the context of prison disciplinary hearings. In *Howard* v. *Stony Mountain Institution*[15] the Federal Court of Appeal held that section 7 of the *Charter* did include a right to legal counsel when an inmates earned remission was at stake and lack of such counsel would deny him or her the opportunity to fully present a defence. The Court emphasized that the facts of each case were crucial and in *Savard* v. *Edmonton Institution Disciplinary Court*[16] the Federal Court Trial Division identified the

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9. W. MacKay, "Fairness After the Charter: A Rose By Any Other Name?" (1985), 10 Queen's L.J. 263. Indicates that parolees have done well under section 7 of the Charter while the experiences of inmates has been more mixed.
10. *Id.,* at 310-16.
11. *Re Cadeddu and the Queen* (1982), 4 C.C.C. (3d) 97 (Ont. H.C.); *Re Conroy* (1982), 4 C.R.R. 278 (Ont. H.C.) and *Cadieux* v. *Director of Mtn. Institution* (1984), 10 C.R.R. 248 (F.C.T.D.), are a few examples.
12. *Howard* v. *Stony Mtn. Institution* (1985), 19 D.L.R. (4th) 502 (F.C.A.). On leave to S.C.C.
13. *Re Latham* (1984), 10 C.R.R. 120 (F.C.T.D.).
14. (1982), 4 C.R.R. 348 (Sask. Q.B.).
15. *Supra,* note 12.
16. (1986), 3 F.T.R. 1 (F.C.T.D.).

following factors — seriousness of the charge, complexity of a hearing, capacity of the inmate, procedural problems, need for expeditious disciplinary process and striking the proper balance of fairness for both prison inmates and prison officials. After considering these factors the Court refused the right to counsel.

An inmate who did not request legal counsel for disciplinary hearings for what he thought were minor charges, did not succeed in using section 7 of the *Charter* to claim that the absence of a lawyer was a violation of fundamental justice. Even though the charges turned out to be serious and the result of a loss of earned remission, the Federal Court Trial Division concluded that there was no violation of section 7 because the inmate should have known about his right to request legal counsel and failed to do so.[17] While accepting that disciplinary hearings must be conducted in accordance with fair procedures,[18] courts have not required these hearings to adhere to normal evidentiary rules or provide reasons for the Board's conclusions.[19] There have been few advances in the procedural rights of inmates in disciplinary hearings as a result of the *Charter.*

The transfer of a prison inmate to a more secure institution is a vital matter for the inmate concerned and the process by which such a transfer is made has spawned numerous *Charter* challenges. Some of these claims are based on arbitrary detention under section 9 of the *Charter* or cruel and unusual punishment under section 12 but most are founded on a denial of "life, liberty and security of the person" under section 7. In *Collin* v. *Lussier*[20] the transfer of an inmate from a medium to a maximum security institution was held to be a denial of his security of the person and thus a process that should encompass the principles of fundamental justice. The Federal Court Trial Division held that security of the person includes access to medical care and since the relevant inmate had a heart condition that could not be properly treated in a maximum security institution, his rights under section 7 of the *Charter* were triggered. Inadequate notice, the absence of specific disciplinary offences and the lack of opportunity to make representations constituted a breach of the principles of fundamental justice. Where there is no misconduct to justify the transfer and the most is made without giving the

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17. *Mitchell* v. *Crozier* (1986), 1 F.T.R. 138 (F.C.T.D.).
18. *Bull* v. *Prison for Women Disciplinary Tribunal* (1987), 7 F.T.R. 278 (F.C.T.D.).
19. *Lariviere* v. *Millhaven Institution* (1987), 7 F.T.R. 289 (F.C.T.D.).
20. (1983), 6 C.R.R. 89 (F.C.T.D.). While the power of the trial judge to award damages in this kind of motion was reversed on appeal, there was no direct reversal on the substance of the lower court ruling.

inmate an opportunity to collect his personal things, contact friends and family or protest in any way, the courts have been sympathetic.[21]

The above cases, however, are the exceptions which prove the rule. in general, the rule is that courts regard the transfer of a prison inmate from one institution to another as the classic example of an administrative decision which the courts should leave to the bureaucrats on the front lines. It was clearly stated in *Bovair* v. *Regional Transfer Board*[22] that a prisoner has no right to be confined in a lower as opposed to higher security institution. In *Re Chester and the Queen*[23] the Federal Court held that there was no right to an in person hearing when an inmate is transferred to a super maximum security unit within a prison. There is a general duty of fairness but *Re Chester* concluded that these procedural rights were not enlarged by section 7 of the *Charter*.[24] *Pilon et al.* v. *Yeomans*[25] is even clearer in asserting that the *Charter* has not impeded the rights of prison officials to transfer inmates for security reasons. If the process does infringe the rights of the affected inmate the infringement is likely to be saved by section 1 of the *Charter*, so long as there is some misconduct to justify the transfer in the first instance. Once again the *Charter* has produced little change in the great majority of cases.

Parolees have fared better than prison inmates under section 7 of the *Charter*. The improvement in the rights of parolees began with the expansion of procedural rights at common law, as will be discussed later in this comment. There has also been an extension of their rights as a result of changes to statutory provisions and regulations affecting penitentiaries and parole. The *Charter* has been used to reinforce and in some cases extend these rights.[26] Rights of the applicant for parole to be present throughout the hearing[27] and the right to have all Parole Board members present for the hearings[28] are examples of where the *Charter* has at least clarified if not extended the current state of the law.

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21. *Hay* v. *National Parole Board* (1985), 18 C.R.R. 313 (F.C.T.D.). *Lasalle* v. *Disciplinary Tribunals of Le Clerc Institution* (1984), 5 Adm. L.R. 23 (F.C.T.D.) did establish the right of the inmate to be present throughout the hearing.
22. 2 F.T.R. 185 (F.C.T.D.).
23. (1984), 5 Adm. L.R. 111 (Ont. H.C.).
24. *Re Cadeddu, supra,* note 11, held that the procedural rights encompassed by section 7 of the *Charter* were more expansive than the common law rights of fairness and natural justice.
25. (1984), F.C.R. 932 (F.C.T.D.).
26. F. O'Connor, "The Impact of the *Canadian Charter of Rights and Freedoms* on Parole in Canada" (1985), 10 Queen's L.J. 336, provides a good summary of the early section 7 cases.
27. Re Martens (1983), 35 C.R. (3d) 149 (B.C.S.C.); *Re Lowe and the Queen* (1983), 5 C.C.C. (3d) 535 (B.C.S.C.) and *R.* v. *Nunery* (1984), 5 C.R.R. 69 (Ont. H.C.).
28. *Re Mason* (1983), 35 C.R. (3d) 393 (Ont. H.C.) and *O'Brien* v. *National Parole Board* (1984), 43 C.R. (3d) 10 (F.C.T.D.).

Access to information and disclosure of the case on the other side is crucial to a meaningful parole hearing. Much of the relevant information for a pre or post suspension of parole hearing is sensitive in nature, relating to such matters as the security of the institution or the identity of informants. Most *Charter* challenges have arisen at the post suspension stage, presumably because there is a clearer denial of liberty, needed to trigger section 7 of the *Charter*. *Latham* v. *Solicitor General Canada*[29] held that a parolees liberty is at stake when faced with a revocation of parole and that it would be a denial of fundamental justice to not give the parolee at least an outline of the allegations against him or her. In *Re Cadieux and Director of Mountain Institution*[30] the revocation of a temporary absence program triggered section 7 of the *Charter* and the Federal Court reiterated that the inmate is entitled to at least the gist of the charges against him or her. The Court did acknowledge that there would be reasonable limitations on disclosure of information to protect the identity of informants and the operations of the Board.[31] It appears that the *Charter* has advanced the rights of parolees to full disclosure at the post revocation hearings.[32] There is a significant silence on the rights of inmates seeking parole.

In 1986 amendments were made to the *Parole Act* concerning earned remission and mandatory supervision.[33] Prior to these amendments a prison inmate who had earned remission of his or her sentence would be automatically placed on mandatory supervision. The new amendments allow for a review prior to the granting of mandatory supervision of the National Parole Board can direct that the inmate serve the rest of the sentence if he or she is likely to commit a crime causing death or serious injury prior to the expiration of the sentence.

In *Ross* v. *Warden of Kent Institution* this "gating" procedure was originally invalidated as a violation of section 7 of the *Charter* but on appeal Hinkson J.A. held that the effect of the amendments were merely to qualify the guarantees of fundamental justice and not to deny them.[34] Some cases conclude that there is no section 7 violation[35] others that there is a violation saved by section 1 of the *Charter*.[36] In *Evans* v. *A.G. Canada* the Ontario Court of Appeal held that there is nothing

29. *Supra*, note 13.
30. *Supra*, note 4.
31. *Wilson* v. *National Parole Board* (1985), 18 C.C.C. (3d) 541 (F.C.T.D.), emphasized the need for full disclosure short of identifying the informer.
32. Richards v. *National Parole Board* (1985), 45 C.R. (3d) 382 (F.C.T.D.); aff'd. (1986), 50 C.R. (3d) 240 (F.C.A.) is a further example of the extension of rights to disclosure.
33. S.C. 1986, c. 42.
34. (1987), 12 B.C.L.R. (2d) 145 (C.A.).
35. *Maxie* v. *National Parole Board* (1985), 47 C.R. (3d) 22 (F.C.T.D.).
36. *Belliveau* v. *The Queen* (1984), 13 C.C.C. (3d) 138 (F.C.T.D.).

fundamentally unjust about changing the mandatory supervision law as this was not an additional penalty but a variation on how the penalty is to be served. Similarly requiring an inmate to live in a community based residential facility, as a term of mandatory supervision, is not a violation of section 7 of the *Charter.*[37] Substantive applications of section 7 have not born fruit in the prison context.

Another relevant provision under the heading of "legal rights" is the section on punishment.

> 12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Since much of what goes on in prisons might be considered cruel and unusual by some standards, the potential reach of section 12 is quite broad. An early attempt to attack double bunking in prisons as a cruel and unusual practice was not successful.[38] The failure to grant an injunction in this case was based upon a restrictive United States Supreme Court ruling on similar facts but the court did leave open a different ruling on more extreme facts. Section 12 can be an important tool for an activist court, if such exists in Canada. The Supreme Court of Canada ruling in *R.* v. *Smith*[39] that the mandatory seven year sentence for importing of narcotics was cruel and unusual punishment, offers some hope of activism. This decision also offers some guidance on how courts should interpret section 12 of the *Charter.*

Other provisions of the *Charter* are less obvious. The "non-discrimination rights" set out in section 15 are significant. A disproportionate number of inmates in Canadian prisons are Native Indians or members of another minority group. Prisoners generally are treated differently from the rest of society and thus denied the "equal protection and equal benefit of the law" as guaranteed by section 15 of the *Charter.* There are also significant differences between the treatment of men and women in prisons and this could lead to challenges under both sections 15 and 28 of the *Charter.* The latter section guarantees equal treatment to male and female persons. Once again the critical question is whether the differential treatments can be defended as reasonable in a free and democratic society?

The potential breadth of section 15 can best be described by quoting the broad language of the section itself. Section 15(1) states:

> 15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without

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37. *Compeau* v. *National Parole Board,* unreported decision May 21, 1987 (Ont. C.A.).
38. *Collin* v. *Kaplan* (1982), 2 C.R.R. 352 (F.C.T.D.).
39. (1987), 75 N.R. 321 (S.C.C.).

> discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

There are few cases on this section to date as it only came into effect on April 17, 1985. Ultimately the equality guarantees may be the most significant ones in the Charter.

It would be rash indeed to suggest that the *Charter of Rights* would provide Canadian prison inmates with the plethora of protections encompassed in the First, Eighth and Fourteenth Amendments to the United States Constitution. It is not clear that Canadian courts will assume the activist role of protecting constitutional rights in the prisons, as demonstrated by the United States Supreme Court in *Anti-Fascist Committee* v. *McGrath.*[40] Some change can be fairly anticipated; how much change will depend as much on the general tolerance of Canadian society as the precise wording of the Charter provisions. Gains are more likely in respect to procedural rather than substantive rights.

III. *Pre-Charter Rights in Prisons*

Even before the *Charter of Rights,* prison inmates did have some basic rights. The *Penitentiary Service Regulations*[41] do insist on certain minimum standards. Inmates are entitled to be adequately fed and clothed, to be provided with adequate bedding, essential medical and dental care, and to be given exercise periods. Most provincial institutions have similar standards. These rights represent only the barest core of the *Standard Minimum Rules for the Treatment of Prisoners* adopted by the United Nations in 1957.[42] These rules are extensive and cover such matters as religion, communication, transfers, and discipline procedures. As in some other areas, Canadian practice has fallen short of the international goal.

To understand the present state of inmate rights in Canada, and the effect that the decisions of prison authorities have on them, the prison bureaucracy must be examined. Prisons in Canada are often lawless societies. This is true in spite of the fact that a tangle of Penitentiary Regulations, Commissioner's Directives, Divisional Instructions, and Standing Orders attempt to regulate all aspects of an inmate's life. The problems with this tangle of rules are twofold. These rules are largely designed to promote institutional order and to the limited extent that they

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40. (1951), 341 U.S. 123.
41. 1962, SOR/62-90 as amended.
42. Resolution 663C (XXIV) of 31 July, 1957, in which the Economic and Social Council approved the *Standard Minimum Rules.*

define prisoners' rights, they are often unenforceable.[43] Secondly, there is a shocking lack of due process in the application of these rules. This problem may be alleviated by the application of section 7 of the *Charter of Rights.*

Michael Jackson, who has conducted one of the few empirical studies of discipline in Canadian prisons, was not encouraged by what he saw. Section 2.29 of the *Penitentiary Service Regulations* as described by Professor Jackson, sets out a series of offences for which an inmate may be disciplined. The vagueness of these offences is demonstrated by the following examples:

> (c) refuses to work or fails to work to the best of his ability;
>
> (g) is indecent, disrespectful or threatening in this actions, language or writing towards any other person;
>
> (k) does any act that is calculated to prejudice the discipline or good order of the institution;
>
> (o) attempts to do anything mentioned in paragraphs (a) to (r)

It is obviously open to the prison authority to define in his or her discretion, when someone is not working to the best of his ability, what acts are disrespectful and what will prejudice discipline and order. This kind of code invites arbitrary rule rather than the rule of law. An inmate cannot calculate in advance what acts will be viewed as a disciplinary offence. This vagueness also permits the guard on the prison range to define the rules of the institution. It is dubious that these rules are prescribed by law within the meaning of section 1 of the *Charter of Rights.* Thus they may not be available as a section 1 defence. It is also possible that such vague rules may be challenged under section 7 of the *Charter* and held void for vagueness. This American concept has been explored in a few early *Charter* cases.[44]

To make matters worse, this code of offences is incomplete as it incorporates many other private institutional rules. This point is emphasized by two other provisions of section 2.29 of the *Penitentiary Service Regulations.*

> (h) wilfully disobeys or fails to obey any regulation or rule governing the conduct of inmates;
>
> (n) contravenes any rule, regulation or directive made under the Act.

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43. R. v. *Beaver Creek* (1969), 2 D.L.R. (3d) 545 (Ont. C.A.), held that no duty was owed to the inmate to follow these rules. Furthermore, *Martineau* v. *Matsqui Institution* (1977), 74 D.L.R. (3d) 1 (S.C.C.) held that a prison directive was not law for the purposes of judicial review.

44. *R.* v. *Robson* (1985), 45 C.R. (3d) 68 (B.C.C.A.); *Luscher* v. *Dept. of Revenue* (1985), 45 C.R. (3d) 81 (F.C.A.) and *R.* v. *Cohn* (1984), 13 D.L.R. (4th) 680 (Ont. C.A.).

The statutes, regulations and directives are supposed to be available in prison libraries, but often they are not. Furthermore, the Divisional Instructions and Standing Orders traditionally have not been made public to the inmates. Prisoners' handbooks such as the one at Springhill Institution in Nova Scotia clearly indicate that the list of offences is incomplete. This private criminal code reinforces the inmates' bitterness and sense of injustice. Such a situation is unhealthy for both the prisoners and Canadian society.

How the rules are enforced is also important. This is demonstrated by changes to the *Penitentiary Service Regulations* which allowed prison officials to take urine samples to determine whether inmates were using drugs. These regulations were rendered void as violating the principles of fundamental justice in section 7 in *Dion* v. *A.G. Canada.*[45] What offended the court was not only the invasion of privacy, but also the arbitrary administration of the drug test.

In light of the foregoing, it may not be surprising that discipline procedures in prisons often have been short on due process protections. However, the common law concepts of natural justice and more recently fairness have provided a Canadian version of procedural due process, even before the *Charter* guarantees of fundamental justice in section 7.

As early as 1969 the Ontario Court of Appeal in *R.* v. *Beaver Creek Correctional Camp*[46] held that natural justice had to be observed where the prisoner's civil rights as a person in contrast to those as an inmate, were impaired. This was a difficult line to draw and inmates who lost privileges or were sentenced to solitary confinement did not have procedural protections.

This rather narrow view of procedural protections was reinforced in *McCann* v. *The Queen*[47] were Heald J. supported the right of a prison administrator to put an inmate into solitary confinement with no prior hearing. This stand was justified on the basis that order must prevail in a community of dangerous and violent people.[48] Mr. Justice Heald did not think that procedural protections and decisive administrative action were consistent. As discussed earlier the *Charter* has softened this view but not reversed it.

The harshness of the procedural ruling is emphasized by the other aspect of *McCann* v. *The Queen.* It was held that the solitary

45. [1986] R.J.Q. 2196.
46. *Id.*
47. (1975), 29 C.C.C. (2d) 337 (F.C.T.D.).
48. William Outerbridge, Chairman of the National Parole Board, suggests that this image of prisons is an exaggerated ersion of reality perpetuated by a sensational media. "Public Perceptions and Penal Reality: Some Issues of Prison and Parole" (Boyd Memorial Lecture, School of Social Work, University of Toronto, October 17, 1974).

confinement arrangements at the British Columbia Penitentiary at that time, constituted "cruel and unusual punishment" within the meaning of section 2(b) of the *Canadian Bill of Rights*. Moreover, the wealth of expert testimony in this case demonstrated that the rights of prisoners as human beings and not just inmates were being drastically affected.

Mr. Zellick, in a concise article, indicates that Canada had fallen behind not only the United States but also commonwealth countries, in judicial review of prison discipline rulings, for procedural inadequacy.[49] *Wolff* v. *McDonnell*[50] in the United States Supreme Court provides a sharp contrast to the traditional Canadian judicial deference to prison authorities. The American court insisted upon full due process even in matters of prison discipline.

Canadian courts may have embarked upon a new course with the recognition of the concept of fairness in *Re Nicholson*.[51] This approach was taken to a matter of prison discipline in *Martineau* v. *Matsqui Institution*[52] Pigeon J. speaking for the majority of the Supreme Court of Canada, conceded that there was a duty of fairness even in matters of prison discipline. However, there were strong suggestions that the content of fairness would be minimal in the prison context. Dickson J. in a concurring judgment took a broader approach. Time will tell whether *Martineau* was a real or pyrrhic victory and whether it was prophetic of the *Charter* era.

IV. *Pre-Charter Rights of Parolees*

Another aspect of correctional decision-making which has a vital effect on inmates' rights is National Parole Board rulings. Once again the positions of courts in Canada and the United States were in contrast. The United States Supreme Court abandoned the distinction between parole as a privilege or as a right, and squarely applied the Fourteenth Amendment to a decision to revoke parole.[53] Canada, on the other hand, clung to the notion that parole is a privilege and the Supreme Court of Canada used this notion in *Howarth* v. *National Parole Board*[54] to deny judicial review of a parole revocation decision.

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49. "Prison Discipline and the Courts" (1979), New Law Journal 308. It is also interesting to note that in New Zealand and Australia magistrates or justices often heard discipline matters in the first instance. Administrators make these decisions in Canada.
50. *Supra*, note 1.
51. (1979), 88 D.L.R. (3d) 671 (S.C.C.).
52. (1979), 30 N.R. 119 (S.C.C.).
53. *Morrisey* v. *Brewer* (1972), 408 U.S. 471.
54. [1976] 1 S.C.R. 453.

The same approach was followed in *Mitchell* v. *The Queen*[55] which was another case of parole revocation. The late Chief Justice Laskin wrote a spirited dissent in the *Mitchell* case which included a biting attack on the National Parole Board itself. He states as follows:

> The plain fact is that the Board claims a tyrannical authority that I believe is without precedent among administrative agencies empowered to deal with a person's liberty. It claims an unfettered power to deal with an inmate, almost as if he were a mere puppet on a string.[56]

Prior to 1978 an inmate had a very limited hearing before the National Parole Board decided to grant or deny parole. There was no real disclosure or the information on file and the Law Reform Commission of Canada suggests that the inmate had very little input into the decision process.[57] However, regulations were enacted under the *Parole Act* in 1978 which guarantee to inmates serving two years or more, a hearing, disclosure of information and written reasons for the decision to grant or deny parole.[58] The *Charter* has accentuated the trend to due process in parole hearings, as discussed earlier.

V. *Other Limitations on Inmates' Rights*

There are many other decisions of prison authorities which affect the fundamental freedoms of inmates. According to Gerard McNeil,[59] most prisons monitor conversations between inmates and their visitors. This is not really surprising as there is very little right to privacy in Canada, inside or outside the prison walls. Mail opening is another common practice and in light of the Supreme Court of Canada decision in *Solosky* v. *The Queen*[60] even an inmate's letter to his lawyer can be opened to see if it is legitimately subject to solicitor-client privilege. Dickson J. may be overly optimistic in instructing prison authorities that they should open, but not read, mail.

Prison authorities, of course, must have power to regulate the inmate's contacts with the outside world. In *Bruce* v. *Reynett*[61] the Director of the British Columbia Penitentiary refused an inmate permission to marry.

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55. [1976] 2 S.C.R. 570.
56. *Id.*, at 577.
57. P. Carriere and S. Silverstone, *The Parole Process, A Study of the National Parole Board* (Ottawa, Law Reform Commission of Canada, 1976).
58. SOR/78-428. These protections may partly explain the lack of *Charter* challenges in pre-suspension hearings.
59. G. McNeil and S. Vance, *Cruel and Unusual* (Toronto: Deneau and Greenberg, 1978).
60. (1978), 24 N.R. 360 (S.C.C.).
61. [1979] 4 W.W.R. 408.

While this decision was on appeal, an attempt was made to transfer Mr. Bruce to an Ontario institution. Mr. Bruce attempted to enjoin this decision to transfer, but the court dismissed his claim on the basis that this was an administrative decision which the courts should not disturb.[62] Are such limitations on rights demanded by law and order in the prisons?

Many other examples could be provided to demonstrate how prisons impinge upon the most basic rights of the inmate. However, the point should be clear. What can be done to assure that the decisions made by prison officials, many of which are necessary, are made fairly? By way of conclusion, a few recommendations for change will be suggested in outline form.

VI. *Recommendations for Change*

1. The relevant provisions of the *Charter of Rights* should be applied to prisons to protect the rights of inmates and to ensure that decisions are made in accordance with fair procedures.
2. Courts whould take a more active role in supervising the decisions of prison authorities and provide real remedies when rights are infringed.
3. A clear statement of prison offences subject to discipline should be developed. This list should be relatively complete and available to all inmates.
4. The boards and individuals who make disciplinary decisions should be trained in procedures for fair decision-making. These procedures should strike a proper balance between the administrative needs of the institution and the rights of the inmates.
5. Both the status and staff of the Penitentiary Ombudsman should be increased. This will enable him or her to do more regular inspections and provide a forum for the airing of grievances.
6. Internal grievance procedures in the various correctional institutions should be examined and where necessary improved. Arbitration Boards should be made available to resolve disputes that cannot be settled internally.
7. Prisoners' Rights Groups should be actively encouraged so that inmates can have some link with the community and to provide a channel of communication to the general public, in addition to the official one.
8. Prison libraries should be improved so that inmates can become aware of their rights and responsibilities within the institution. Included in this

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62. *Re Bruce and Yeomans* (1979), 49 C.C.C. (2d) 346 (F.C.T.D.).

library should be the United Nations *Standard Minimum Rules for the Treatment of Prisoners,* and the *Charter of Rights and Freedoms.*
9. Prison employees and prison inmates should be educated about the Charter of Rights and its potential implications in the prison context.
10. The starting assumption should be that prison inmates have basic human rights and that they should only be limited when it is reasonable and demonstrably jusifiable under the *Charter.*

Prisons were not intended to be, nor should they be pleasant places. If society were honest, it would admit that it sends people to jail to punish them. However, the confinement itself is the punishment and additional penalties should not be inflicted at the whim of the institutional keepers. Prisons should be fair and they must be humane. Otherwise, they will continue to produce rather than prevent criminals. The *Charter* may assist in breaking this vicious circle. We would all be the beneficiaries of such a change.