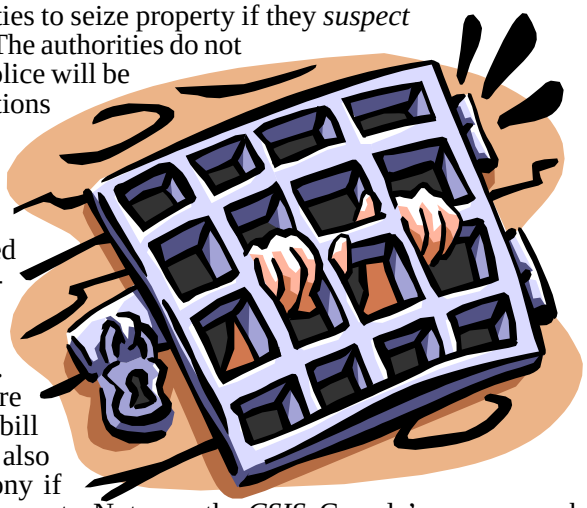
West Coast
PRISON JUSTICE
SOCIETY NEWSLETTER NOVEMBER - DECEMBER 2001

Paranoia and Legislation How Will They Affect Prisoners?

by Eddie Rouse

As promised in the last issue, here is more on bills introduced in the House of Commons theoretically to combat 'terrorism.' Since September 11 of this year, governments around the world have been introducing legislation following the US example. How will this impact on prisoners and former prisoners? Once this type of legislation is introduced and accepted by the public, then it is only a small step to apply it to the next level. Bill C-36 follows on the heels of Bill C-24, otherwise known as the 'organized crime bill' which was passed into law a short time ago. These bills take away many rights that are guaranteed by our own Constitution. Prisoners and those deemed to be criminals in our society have experienced the devastation of rights by authorities who use the excuse of *'public protection'* to introduce this type of legislation. What will occur is a complete stripping of every Canadian citizens rights through legislation. The public, whose paranoia is heightened by the government, its agents and the news media, will readily agree to these measures without considering the long term consequences.



The organized crime bill, for instance, allows the authorities to seize property if they *suspect* that property has been obtained with illegal funds or means. The authorities do not need solid proof in order to do this. Also take note that the police will be allowed to commit crimes in the course of these investigations and will be protected from prosecution. The anti-terrorist bill introduced takes many of the concepts of the anti-crime legislation and raises them to extraordinary heights. For example, the newly proposed bill on fighting terrorism removes a citizens right to be informed of why he or she is being arrested or detained as well as removing the right to counsel. The anti-terrorism bill (C-36) recently introduced by the Justice Minister gives extraordinary powers to the police allowing them to conduct wiretapping without any authorization from the courts. Bill C-36 eliminates that requirement for the police if they are investigating suspected terrorists. The Liberals slipped this bill through with little opposition from the other parties. This bill also allows arrest and detention without charge, forced testimony if there is a charge and suppression of information regarding suspects. Not even the *CSIS*, Canada's spy agency has those powers although some people think that the spy agency should never have had that obstacle in the first place.

These proposed Canadian wiretap powers follow the same pattern as the roving wiretap legislation introduced in the US after the September 11, 2001 plane crashes in New York City. In this legislation, police can and will tap any phone that a suspect has access to. However, Nat Hentoff reports in the *Village Voice (Sept 26 – Oct 2, 2001)* that roving wiretaps were introduced into legislation during the Clinton administration. Nobody bothered pointing out that this legislation was already law before introducing the new bill. The difference in the US amendment

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to this existing legislation was that it expanded the roving wiretap to the *national level* rather than a *state wide* one. The potential for abuse by the government is immense. Think of this as the beginning of a new McCarthy era. Rather than finding a communist under every bed, the authorities will find terrorists standing on every corner. People will have their freedom of speech and association curtailed by this legislation in the US. Under this legislation, people will also be arrested and detained without right or access to attorneys. Any proceedings against suspects will take place in secrecy, far from the eyes of public scrutiny.

Canadian authorities are under no geographical boundary constraints (provincial v federal laws) if this type of legislation is introduced because the Criminal Code applies across the country. The roving wiretap law means that if a person is suspected to be a terrorist or has that label applied to him/her, everyone s/he comes into contact with will be subject to having their communications intercepted. Who can be designated a terrorist? It depends on who does the interpretation. For instance, an argument could be made that any person or group protesting government policy or the established order could be so designated.

> Our government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become law unto himself; it invites anarchy…To declare that in the administration of criminal law, the end justifies the means…would bring terrible retribution. Against this pernicious doctrine this Court should resolutely set it face
>
> **Justice Louis Brandeis in**
> ***Olmstead v. United States, 1928***

Here in Canada, the Defence Minister, Art Eggleton will have Bill C-42 to rely on. This nasty piece of legislation allows the Defence Minister to designate military security zones. In other words, the right to protest by the public will now be suppressed by the military and people will be subject to arrest for anything the military deems to be unlawful. Could this be an invocation of the old '*War Measures Act'* all over again. (Pierre Treadeau invoked this act during the FLQ crisis in the 1970's.) Like the police, the military will hide behind the cover of 'national interest' or 'classified information' if they are confronted and the courts will have little or no power to correct this.

The Canadian Police Association is also opposed to the inclusion of a 'sunset clause' in the proposal. The CPA's glib argument against the clause will give no comfort to those innocent people who are caught in an investigation.This clause put a life limit on the legislation and force review of the law after five years in order to revise or to revoke the law. Their argument against the clause is that an active investigation could be taking place and would have to be put on hold while the review is taking place.

People's legitimate right to protest and their freedom of speech will be eroded under this legislation. Anyone involved in activist politics, ie: protesting government policies, could be deemed a potential terrorist. The consitutional right to association comes under attack and a person becomes criminalized because s/he knows someone, or may have provided a donation to some organization that is under suspicion. Police routinely videotape protests and add peoples image's to their database for future reference. This information is shared with US law enforcement agencies, thereby making a protester a potential target of a foreign power. Where this will all stop is anyone's guess.

From a prisoner's point of view, this legislation can have a greater impact on his/her life within the prison system and outside of it. People released on parole have a variety of restrictions placed on them including *'association'*. These regulations are already accepted and supported by the judiciary and the public. If a prisoner were to become politically active or aware, s/he could have additional restrictions or sanctions placed upon him/her even to the point of keeping him/her incarcerated because s/he may pose a *'danger'* to the public. Transfers to other prisons could be made easier and a prisoner would have no access to redress. However, thier status would have to change from one of *'criminal'* to *'political'* which would automatically bring new rules into play and international attention. This scenario may not ever happen, but the structure is there for implementation.

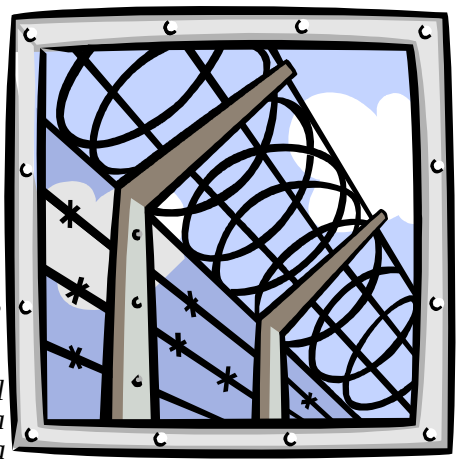
Prisoners should make themselves aware of the political movements on a local, national and international level. Governments on the local and national levels make decisions that affect the world they will be eventually released to. On an international level, the events outside of our country affect the whole population. The least able to defend themselves against the reactive policies and legislation emanating from those events are the disenfranchised among our society and the lowest on the disenfranchised scale are prisoners.

COMPUTERS 1, PRISONERS 0

by Sasha Pawliuk

In a court case that challenged the involuntary transfers to higher security of five Pacific Region prisoners, a Supreme Court of B.C. Justice didn't see any problem with the CJIL\Computerised Reclassification Scale, despite the misgivings of counsel for the prisoners. Terry Lee May, Gareth Wayne Robinson, Maurice Yvon Roy, Segun Uther Speer-Senner and David Edward Owen launched the application for relief in the nature of *habeas corpus* after they were all transferred from Ferndale to Mission or Matsqui following a policy change at CSC. According to CSC, all prisoners at Ferndale serving a life sentence who had not completed a violent offender program were subjected to a security classification review. The computerized program as well as the Offender Security Classification were among the "tools" utilized in the review.

Counsel for the prisoners argued that this case presented the same facts as Hay v. Canada (National Parole Board) (1985), 21 C.C.C. (3d) 408. In Hay the prisoner was transferred from a minimum to a maximum solely as a result of a policy change, and absent any wrongdoing on his part. Mr. Justice Bauman, the judge in this case (May et al. and Owen v. Warden of Ferndale Institution et al. 2001 BCSC 1335) framed the applicants' (the prisoners) argument in this way:



"[13] It is their general submission that it was only a change in general policy - a direction from headquarters to review the security classifications of offenders at Ferndale serving a life sentence utilizing the CJIL/ Computerized Reclassification scale and the Offender Security Classification - that prompted their transfers.

[14] In this sense it is urged by the applicants that each of the transfers was arbitrary, made in the absence of any "fresh" misconduct on their parts and without a consideration of the individual merits of each case."

While the judge agreed that the security reviews themselves were the result of a general order from headquarters, he found that this was not objectionable so long as each individual prisoner's case had a true review in accordance with sections 28 and 29 of the Corrections and Conditional Release Act and the relevant regulations. After noting that each case had gone through the grievance procedure with the help of counsel, the Judge stated:

"[30] In short, and without an extensive reproduction of the reasons for the decisions, it is apparent from my review of each petition that the responsible Corrections officers have considered (and reconsidered) each case on an individual basis and upon its own singular merits. The decisions in each case are reasoned and based upon specific concerns with each inmate. These cases are not the "quintessence of unfairness and arbitrariness" that was the case in Hay v. Canada (National Parole Board)…"

So, although each prisoner had been transferred from minimum to medium without being accused of doing anything wrong, the judge found that the transfers were fine because each case had been considered individually, in accordance with the relevant legislation.

Mr. Justice Bauman spent over half of the decision confirming that *habeas corpus* in the provincial Superior Court is indeed still available to review the validity of a transfer from lower to higher security. As the judge notes, this was settled by the Supreme Court of Canada over 15 years ago in R. v. Miller, [1985], 2 S.C.R. 613, 23 C.C.C. (3d) 97. I guess that every time CSC gets a new lawyer from the Department of Justice, they feel it's their duty to reinvent the wheel…

As mentioned above, the CJIL/Computerised Reclassification scale was one of the "tools" relied upon by CSC to increase the prisoners' security levels. As described to me, this sounds like some sort of computer game - a CSC staff member enters information into it, and out spurts a security classification like magic. There's no sharing of what information was entered, in what format, or how the computer arrived at the decision. Counsel for the prisoners also argued that the non-disclosure of the scoring matrix breached their rights to procedural

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Editors Note

The following is another in a series of articles introduced last year which were slated to run in consecutive issues of this newsletter. The articles were written as part of presentations and submissions to various legal committees and government agencies. Although these articles were written a couple of years ago, the information contained within them is still relevant to prisoners and others involved in the criminal justice system today. In some cases the information is very timely.

Eddie Rouse, Editor

RE-FRAMING PAROLE
The Perspective of Prisoners' Counsel

By John W. Conroy QC

Introduction

On this panel we have been asked to address perceptions as to the viability of conditional release or parole. Whether it is still an effective way to support the safe re-integration of offenders into society, or should we abolish it and have what some call "real time" sentences, which some perceive to more closely equate with what Judges and the public want. In addition, we have been asked to address the question of so-called "reliable statistical tools" for predicting and managing the risk of criminal recidivism. Whether or not we could simply use those tools to support the safe re-integration of offenders into society without the need for professional discretion being exercised by parole decision-makers.

We have been asked to do this in the overall context reflected by the conference title - **Changing Punishment at the Turn of the Century**: Finding a Common Ground, and more specifically in the context of today's general theme -"**The ongoing struggle for justice"**.

Because this is the last day of the conference and we are the last panel, I am hopeful that by the time our turn arrives, all participants in the conference will have changed their understanding of punishment and will have become penal abolitionists. Hopefully we will have changed the role of the courts in sentencing from a retributive to a restorative one, and even more hopefully, there will be very little imprisonment left to re-frame, let alone the need for parole at all. Of course, all those persons processed under the old system and sentenced to imprisonment will still be there and we will still need one mechanism or another to get them out, or at least to greatly reduce their numbers at the earliest time. From my perspective, imprisonment in Canada, while undoubtedly better than most other countries remains, to quote the 1977 Sub-Committee on the Penitentiary System in Canada:

"…where it is not simply inhumane, is the most individually destructive, psychologically crippling and socially alienating experience that could conceivably exist within the borders of the country" (45 :168 para752).

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Under my ideal system, sentences of imprisonment would be abolished to the greatest extent possible and with few exceptions. Society would, of course, still be entitled to defend itself from those who break the law. People would still be arrested and detained but their detention would only continue for as long as necessary and the onus would be on the government to regularly show cause why the detention was still necessary instead of some lesser restrictive alternative. In addition there would be a continuing positive duty on government, to not only try and determine the facts and circumstances of the case and its underlying causes, but to work with the victims and others impacted by the offending, and the offender, to effect some form of reconciliation that involves, at a minimum, putting things right for the victim to the extent that that is humanly possible. The ultimate objective would be to transform the situation for the victim, the offender and society as a whole so that it is unlikely to happen again. Essentially, we would return to a system where imprisonment is only used pre-trial or on the same legal basis as bail or judicial interim release and solutions that are alternatives to imprisonment will have been found in most cases before the need for any trial arrives. Given the current climate, I suspect that it will be a long time before those in whom the urge to punish remains strong, will come around to this way of thinking.

Again, hopefully, with the abolition of punishment or the infliction of pain as the dominant method of trying to deter crime, offenders, seeing more constructive means of correction being available, will be more willing to accept responsibility and to be accountable for their actions, instead of pleading not guilty and hoping for a miracle simply to delay or avoid altogether ones so called "just desserts". The alternative options, upon the acceptance of responsibility, would be so attractive under my system that those denying guilt would cause the government to have sufficient doubts about their case that it compels them to re-examine it thoroughly to make sure they are not making a mistake. I understand that something similar to this operates informally in Japan, although in conjunction with continuing and significant sentences of imprisonment.

Restorative or Transformative Justice would take place in all circumstances where the facts are agreed or at least not significantly disputed so that the focus would be on trying "to put things right".

In those cases where there is a dispute as to the facts of the offence or any other related matter, I have been unable to come up with any better human solution than our adversarial system where witnesses are called, examined and cross-examined, and their veracity determined by an independent trier of fact, be it judge or jury. In my opinion it is impossible to fairly resolve factual disputes on paper or by reading one side on paper and accepting it without question and hearing only from the other in person by way of a form of inquisition.

Before moving on to look at "Reality", permit me to say a few things about my background and interests so that you will be able to easily identify where my biases lie.

Some backgrounder

My interest in imprisonment and parole came about as a result of my returning to Abbotsford, British Columbia, to practise law, followed by a five year stint running BC's first community law office - Abbotsford Community Legal Services. Before that, like most criminal defence counsel, when my client was sentenced to imprisonment, he went through a side door in the courtroom and that would usually be the last I heard of him -unless of course he re-offended and then only if he didn't blame me for his earlier conviction.

At the community law office, the demands on my time soon started coming from prisoners and their families because Abbotsford, like Kingston, is surrounded by prisons, both federal and provincial. Fairly early on in the job I remember being asked to represent a member of the Native Brotherhood at Matsqui Institution called Chico Martineau before what was then called "the disciplinary board". When I contacted the Warden to tell him that I had been asked to represent Mr. Martineau and to appear before the Board, I remember being told "we don't allow lawyers in here". Of course, this was the wrong thing to say to a young lawyer not long out of law school and particularly to one who had just acquired the luxury of being able to do research and prepare test case litigation without having to worry about billing and meeting the overhead. Not only was I incensed by the Warden's response and how it did not accord with what I had learned in law school, but I was appalled at how arbitrary and unjust the prison administration and particularly the "disciplinary board" was. In those days, the Assistant Warden security (the Chief of Police in the prison) sat as the chairperson on the Board and the only evidence against the prisoners invariably came from his subordinate officers, whom he obviously could not afford to disbelieve.

"...the prison, supposedly designed to enforce the law, became a complete negation of the very principle of legality."

Greenberg and Stender, <u>The Prison as a Lawless Agency</u>, 1972

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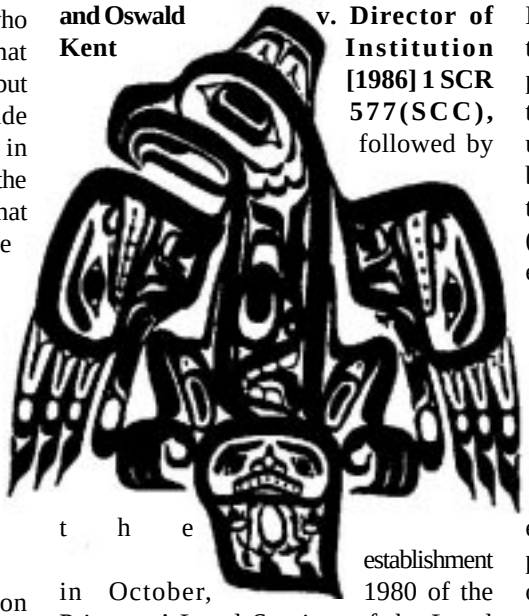
That was the beginning of my involvement with Matsqui Institution and the "Disciplinary Board" which culminated in the Martineau line of cases, which resulted in two trips to the Supreme Court of Canada. (**see Martineau and Butters v. Matsqui Institution Inmate Disciplinary Board (No 1),[1978] 1 SCR118** and **Martineau v. Matsqui Inmate Disciplinary Board (No 2),[1980] 1SCR 602.)**

The Wardens remarks have taken on several new meanings over the years. CSC staff like most of us, hate being held accountable or having to deal with lawyers or even intelligent prisoners who stand up for their rights. It's not that they prevent lawyers from coming in but they go to great lengths to dissuade prisoners from engaging Counsel in connection with their problems. Over the years clients have regularly told me that their caseworker tried to discourage them from hiring me by telling them, for example, how the Parole Board hates lawyers or how they will be wasting their money etc. The latest tool is the Millennium telephone system. We now have the privilege of having to pay collect call rates ($1.75 per call) for all prisoner calls even local calls.

Shortly after becoming involved on behalf of Mr. Martineau, I was asked to act as counsel for Dwight Lucas in the trial of Lucas, Bruce and Wilson, more popularly known as the "Steinhauser hostage taking incident" at the old BC Pen. **(see R v. Bruce, Wilson and Lucas (1977), 36 CCC (2d) 158 (BCSC).** In that case, I was exposed, not only to the "cruel and unusual punishment" inflicted upon the prisoners in the solitary confinement unit at the British Columbia Penitentiary, **(see McCann v. The Queen [1976] 1 FC 570 (TD)),** but I was also profoundly affected by the absence of peaceful legal remedies open to prisoners to resolve their real or imagined disputes. The Courts seemed to find all sorts of excuses to dismiss prisoners' claims and to defer to the so-called wisdom of correctional administrators using, from my perspective, the wholly inappropriate analogy of the armed services or the police. 'Hands off' was the policy of the day, a policy that still continues to some extent today. It was no wonder, to me, that riots, hostage takings and other violent incidents were occurring in our prisons. I was surprised that they were not occurring more often. These were some of the experiences that moved me to spend a considerable amount of my time as Director of the Community Law Office attempting to develop peaceful legal remedies through Martineau (No.1) and Martineau (No.2) and later **Cardinal and Oswald Kent v. Director of Institution [1986] 1 SCR 577(SCC),** followed by the establishment in October, 1980 of the Prisoners' Legal Services of the Legal Services Society of British Columbia.



My experiences with parole did not come until later. While I may have attended a few hearings and made written submissions, my litigation experiences with the Board commenced when the practice of *"gating"* started. This involved taking the prisoner that had become entitled to mandatory supervision out to the quarry at the back of Kent prison and letting him out of the vehicle on statutory release. The prisoner was then immediately re-arrested and suspended in the absence of any post-release conduct that might warrant such suspension. This practice was also held to be unlawful **(see R v. Moore; Oag v. The Queen (1983), 4 CCC (3d) 216 (SCC) and Truscott v. The Director of Mountain Prison (1983), 4 CCC (3d) 199 (BCCA)).** This led to a hue and cry about all the dangerous offenders who were about to be released on mandatory supervision and how the Board needed to have the power to keep people in until warrant expiry. Parliament was called back in the middle of the summer to pass the "detention" legislation.

I have since attended as an " assistant" (you can't call yourself "Counsel ") before the National Parole Board (NPB) on many occasions. As an experienced Barrister appearing more frequently in the regular criminal courts, I find the procedures and processes of the NPB to be both incredibly frustrating and unfair. Obtaining full disclosure beforehand is most frustrating. Nine times out of ten the Board will blindly (partly due to the lack of cross-examination) accept the written reports of CSC staff, who know they can write almost anything they want and get away with it. Who is going to believe the prisoner? The same can be said of psychological reports that are relied upon without any consideration as to weight or expertise. The prisoner is grilled in the presence of several silent, but obviously hate filled victims or relatives. In high profile cases, the Board is more likely than not to be intimidated by the likely media and victim response to a decision favourable to the prisoner, so they turn him down. I mean no disrespect to Board members here. The pressure that they are sometimes subjected to, including actual organized campaigns, is quite incredible. They do not have the job security that members of the Bench enjoy and their discretion is now so controlled by policy that they lack independence in more ways than one.

The Canadian Bar Association (CBA)

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responded to the proposed Detention legislation by the creation of a "Taskforce on Imprisonment and Release" chaired by David Cole, as he then was. The following year, the CBA created the Special Committee on Imprisonment and Release, which I had the privilege of chairing, and this evolved into the current Standing Committee of the Canadian Bar Association Criminal Justice Section - the Committee on Imprisonment and Release. David Cole continued as a member of that Committee for many years, along with Michael Jackson, and various others. Alison MacPhail was our ex-officio member from the Correctional Law Review of the Solicitor General Secretariat. Later Allan Manson joined the Committee and more recently Helene Dumont. Mary Campbell was also for a time our ex-officio member from the Solicitor General's Ministry.

I mention all of this for several reasons. Firstly so that you will see that this conference is, for me, a bit of reunion. Secondly, so that you will understand that my exposure and focus is from the prisoners' side. Consequently I undoubtedly see the worst blemishes of both the prison and parole system, although my clients and my 25 plus years of experiences tells me that they are common and not unusual or exceptional blemishes. Thirdly, so that you will see how biased lam and will appreciate how the writings of the Bar Committee became balanced - not by the influence of the Chair, but by the influence of its members on the Chair.

Conditional Release -Is it still viable or should we abolish it and have real time sentences?

In my opinion, so long as we have sentences of imprisonment, we will need some form conditional release mechanism. We will need some form of relief from incarceration, some way of gradually reintegrating the offender back into the community instead of releasing them directly to the street. I have not heard of any proposal that would completely abolish all forms of conditional release for all prisoners. While an argument might be made regarding the elimination of full parole for fixed sentences, I find it difficult to imagine indeterminate or life sentences without some hope of supervised release. I would expect such sentences would run afoul of s.12 (Cruel and Unusual punishment) **following R v. Lyons (1987), 37 CCC (3d) 1 (SCC)**.

I am not forgetting the recent Liberal private members Bill that gives Judges a discretion to impose a legal absurdity, namely the consecutive life sentence. Presumably this type of sentence is really designed to ensure that the prisoner doesn't live long enough to reach his or her parole eligibility date. It troubles me that so many of our lawmakers, including senior Cabinet members and the Premier of Ontario, not to mention numerous citizens, continue to believe that "life imprisonment" means "25 years."

There continues to be widespread disparity in sentencing in Canada. The prospects of that changing in the near future seems bleak. While I always thought that the proposals of the Sentencing Commission in this regard, coupling guidelines with maximum discretion, provided a reasonable opportunity to do something about this, the fear of a US style mathematical grid model with little or no discretion seemed too much for us to bear. While the provisions of C-41 still have scope to help bring sentences down, this is also unlikely to occur, given the current continuing level of public demand for greater not less punishment. We live in times where public perception fuelled by the media overrides both reality and rationality.

I do not accept the criticism from some judicial quarters that parole undermines the sentence or transfers the sentencing functions to the Board. It has been a matter of elementary law, that a "sentence according to law" meant in accordance with the *Criminal Code*, the *Prison and Reformatories Act*, the *Penitentiary Act*, and the *Parole Act*, the latter two having been replaced by the *Corrections and Conditional Release Act*. I am surprised to hear that some Judges either claimed not to understand this or more likely resented being unable to lock someone up for longer without imposing an unfit sentence. As long as we have had sentences of imprisonment, it has always made perfectly good sense to me that the first third of the sentence was considered the denunciatory period. This was to be followed by efforts to correct the offender's behaviour and to begin the process of reintegrating the offender as a law -abiding citizen. While eligibility dates were set by Parliament and provided the basic framework for the sentence, Judges now have the power to set eligibility dates

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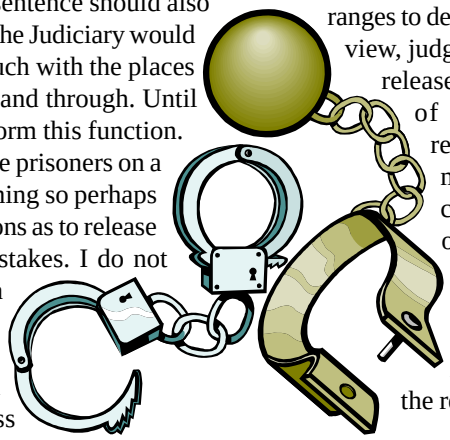
in certain circumstances. Unfortunately, this, it seems to me will only lead to greater disparity. I In my opinion it is wrong for Judges to give longer sentences simply because a person might get parole. This assumes the offender will be released at eligibility and if he isn't will result in a sentence that is more onerous than intended. On the other hand, if a prisoner reaches parole eligibility and is granted parole he continues to serve the sentence subject to supervision and suspension, even for an anticipatory breach, which can entail a return to custody.

It is similarly wrong for Parole Boards to focus on deterrence and other sentencing principles and to keep someone in just because the members sitting happen to think that the prisoner should do more time. It is not their function to sentence. In my experience the more senior and therefore trained the Member the less likely this will occur.

While I may be able to think of good arguments for abolishing the Parole Board, given its lack of independence from the Correctional Service of Canada (CSC) and its 90% or better congruence with CSC in its decision making, rendering it, perhaps, superfluous, this is a topic for another paper. Ideally I think that the Court that imposes the sentence should also assume the paroling function. This way the Judiciary would keep on top of and be much more in touch with the places and processes that they send people to and through. Until that happens the CSC may as well perform this function. They are responsible for dealing with the prisoners on a daily basis and to provide for programming so perhaps they should be responsible for all decisions as to release and take the heat directly for their mistakes. I do not expect CSC would do a better job than the Board. Prisoners would only have to go through the process once. Board members could all be made judges and learn something about a fairer process when credibility is in issue or alternatively they could all go and work for CSC as the releasing component. Little would probably change, money might be saved, and the fa9ade of independence would be removed.



A proposal to abolish full parole was made by the **Canadian Sentencing Commission** in its report in February, 1987, entitled **"Sentencing Reform: the Canadian Approach"**. More specifically, the Commission recommended the abolition of full parole except in those cases of sentences of life imprisonment as a minimum, bearing in mind that it also recommended the abolition of the sentence of life imprisonment as a maximum, substituting therefor an enhanced sentence regime. It also recommended the retention of a form of earned remission and a form of day release. The Commission gave three reasons for its recommendations as follows:

1. *Parole conflicts with the principle of proportionality, which the Commission assigned the highest priority in the sentencing rationale.*
2. *Because discretionary release introduces a great deal of uncertainty into the sentencing process.*
3. *Because parole release transfers sentencing decisions from the judge to the parole board. The Commission asserted that such tendencies may result in unwarranted disparities in time served so that the effects of the transfer was quite dramatic when one compared the data on percentages of sentences actually served in prison.*

The Commission lamented that current law and practice made it difficult for Judges to estimate how long offenders sentenced to prison would actually spend in custody, leading some judges to take parole and remission into account when sentencing. In the Commission's view, under its proposals this would no longer be necessary as the Judge would know that only the last ¼ would be served in the community as a result of earned remission and judges would have guideline ranges to determine fit sentences. In the Commission's view, judges need not and should not consider early release when determining the appropriate length of custody. However, the Commission recognised the continuing need for some method of reducing the time served in custody and so recommended the retention of a form of earned remission. The Commission also recognised the objective of releasing prisoners prior to the expiry of their sentences to allow for reintegration into the community hence recommended the retention of a form day release.

The Commission recognised that if implemented this recommendation would increase federal prison populations by an estimated 20% if no changes were made to the length of sentences imposed by the courts. Over two years, unless sentence lengths were modified, this abolition of full parole would result in a substantial increase in the federal prison population. The recommendation was therefore predicated upon a modification of sentence lengths. The Commission recognised that the abolition of all forms of early release would result in at least a doubling of the prison population in a short period of time and that it would be unrealistic to expect that judges would drastically alter their sentencing practices over night. The publicity that would be attracted and the reaction by the public were also recognised.

Consequently, the Commission recommended a continued

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form of remission based release up to 1/4 of the sentence with provision for withholding of this type of release. It also recommended a form of day release after serving 2/3 of the sentence that would not be available to those from whom remission release had been withheld. Escorted temporary absences would be called "special leave" and would still be administered by the Correctional Service of Canada and not the parole board. This is a very general review of the Commission's proposals and in fairness to the Commission they should be looked at in the context of the overall recommendations made and how these proposals would be integrated with others.

The CBA Committee on Imprisonment and Release responded to the Sentencing Commission's report in a paper entitled **"Parole and Early Release",** which was also our submission to the Parliamentary Committee, then known after its Chair as the Daubney Committee. In that paper, we took the position that the abolition of full parole could not be justified by the Commission's arguments, nor was it a required step in a process of reform predicated on restraint, proportionality and equity. While noting many problems with the existing parole regime in terms of unchecked discretion, disparity, unfairness and other functional defects, we still could not support its abolition.

We pointed to the late Chief Justice Laskin's well known quotation in the mid 1970's **from Mitchell v. The Queen,[1976] 2 SCR 570 (SCC)** describing the power of the board in terms of a "tyrannical authority" manipulating its subjects "like puppets on a string", and our own criticisms of the existing parole regime. We noted how the abolition of parole would at least remove one source of grievance, instability and unfairness from the prison environment. Nevertheless our thinking at that time was influenced by two factors. Firstly, the post-1980 era that substantially increased opportunities for judicial scrutiny and external exposure as a result of the acceptance of the "duty to act fairly" and the advent of the *Charter*, believing that many of the process complaints that permeated the system during the previous decade had been addressed. Secondly, we remained concerned about the rigors of the penitentiary environment. In our opinion, in the absence of fundamental changes in the nature of imprisonment in Canada, there was an overriding need to restrict its grasp and limit its human impact. As we said back then, "mechanisms of early release may not be ideal, but they are essential".

While noting that criticism of the existing system of release was apt and necessary , we pointed to issues of disclosure, the right to counsel and the application of the doctrine of res judicata as needing to be addressed in order to avoid unfairness. In addition we noted as well such structural issues as the articulation of criteria, the publication of decisions and the basis for appointments to the board needing to be examined. However, at the end of the day, notwithstanding our recognition of these defects, we still did not feel that this state of affairs logically supported a cry for abolition.

Unfortunately, while judicial scrutiny continues to exist and remedies are available, my faith in the Courts as a means of improving the fairness of Parole hearings has been severely weakened if not destroyed completely. Following the Supreme Court of Canada's decision in **Mooring v. Canada (National Parole Board), [1996] 1 S.C.R.75**, the federal Court of Appeal in **Mclnnes v. Canada (Attorney General), [1996] F .C.J.1117 (FCA)** made it clear that while s.7 of the *Charter* applies to the Board it does not have the effect of giving the prisoner a right to counsel nor a right to hear or call witnesses or to cross examine them at hearings. As far as the Court of Appeal is concerned, (leave to appeal to the Supreme Court of Canada was refused), compliance with the common law rules and the practices and procedures set out in the *Corrections and Conditional Release Act (CCRA)* constitutes full compliance with the principles of fundamental Justice and therefore s.7 of the *Charter*. This was said in the context of a review of a "Dangerous offender" at one of those reviews that according to Lyons (supra) prevented the entire sentence from becoming "Cruel and Unusual." It was also a case in which conflicting reports had been put before the Board yet the Court found that cross-examination was not necessary to ensure fairness.

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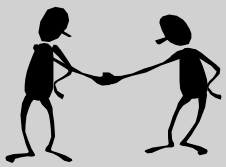
Thanks for the Support

The WCPJS gratefully acknowledges the financial contribution from the



Public Legal Education Program of the Legal Services Society

which enables the publication of this newsletter.

Reframing Parole Cont'd from .../p8

The implications of this decision will hopefully become apparent when we come to consider the question of "statistical tools" in the second part of this paper. This "Struggle for Justice" appears to have been lost. It is now acceptable to have substandard justice and fairness when liberty is in issue. It is now part of the consequence of the sentence or punishment -notwithstanding Martineau (supra), **Solosky v. The Queen (1979), CCC (2d) 495 (SCC)**, and the express words of s. 4(e) of the CCRA.

As I said at the outset, when facts are in dispute and credibility is in issue, there is simply no substitute for a full hearing with witnesses and cross-examination before an independent tribunal or adjudicator. One would have thought that this would be recognised as even more important in circumstances where one of the parties is under the direct control of the other and that other is the CSC. In this regard the words of Madame Justice Arbour in the Report of the Commission of Inquiry into certain events at the Prison for Women in Kingston, the recent Arbour Report, at pp. 180 – 181 are worth recalling:

"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."

The Commissioner then quotes at length from a paper by Lucie Lemonde , including in particular this part :

"Notwithstanding the proliferation of rules, analysts of penal systems are almost unanimous in concluding that they are lawless States. Thus Greenberg and Stender, in their 1972 article "The Prison as a Lawless Agency", assert that "the prison, supposedly designed to enforce the law, became a complete negation of the very principle of legality". In 1974, Professor Michael Jackson, after scrutinizing the disciplinary process in some penitentiaries, concluded that the Canadian Correctional Service was " a lawless state".

The Commissioner continued:

"This dual characteristic of the role of legal norms in a penal institution was amply demonstrated throughout this inquiry.

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May, Owen et al Cont'd from .../p3

fairness. They said that without that basic information, the prisoners were unable to challenge the usefulness of the computer program as a part of the decision making process.

The judge made short work of that argument, accepting the CSC's contention that the scoring matrix "is not available". The judge reasoned that if the matrix was not available, then the CSC could not fail to disclose it because they did not have it…call me cynical, but I find it hard to believe that CSC would put so much faith in a program if someone in the organization was not sure how it marked the data going into it….

In any event, the applications for *habeas corpus* were dismissed, and an appeal of this decision has been filed in the B.C. Court of Appeal. We will keep you posted of developments as they occur.

W.C.P.J.S Newsletter Subscription Rates

Individuals- $25.00 per year
Organizations - $35.00 per year
Students and Seniors - $15.00 per year
Prisoners/Parolees - Free

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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."

It is my impression that the CSC will vigorously resist the opening up of the system to agents of the law such as lawyers and other independent adjudicators and therefore the most likely sources of the introduction of the Rule of Law into the prison culture will be effectively excluded from any meaningful participation. The results of **the Task Force on Independent Adjudication in relation to Segregation** tells the story. So does every other previous investigation into the operations of the Correctional service.

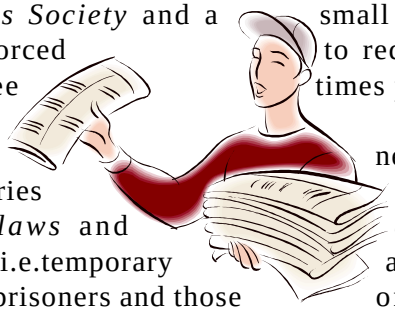
Notwithstanding these problems from Prisoners' Counsels perspective, I still cannot, due to the rigors of life in prison, bring myself to support the abolition of some form or forms conditional release.

Next issue: <u>The Role of the Media</u>

What influence does the media have in the decison making process.

CHANGE IN PUBLICATON FREQUENCY

We at the West Coast Prison Justice Society regret to inform our readers that we will now be publishing this newsletter only three times per year instead of a quarterly basis as we have been. The publication of this newsletter has always relied mainly on the generous support of the *Public Legal Education Program of the Legal Services Society* and a small number of paid subscribers. Due to a reduction in our grant, we are forced to reduce the frequency of this publicaton from a quarterly basis to three times per year starting in 2002.



The mandate and scope of our newsletter has been to keep prisoners in the local prisons and penitentiaries (i.e. BC) informed of changes in *legislation, administrative laws* and *court challenges* that would affect their incarceration or state of release (i.e.temporary absences, day/full parole). The newsletter is distributed free to prisoners and those on parole. This newslettes has also enjoyed exposure internationally due to people forwarding copies to friends in other countries. The response from individuals to various newsletteres has been positive and comments have indicated how pertinent the articles contained in them are as it pertains to the specific conditions of the prisons the writers re incarcerated in.

We would like to extend our thanks for your continued support.

THANKS FOR YOUR SUPPORT

NewPage Foundation would like to thank everyone who contributed to the Claire Culhane Memorial Bench Fund. Many prisoners who have been and are currently in the prison system are aware that Claire and other supporters have been instrumental in effecting positive changes in the Federal prison system over the years. It was through thier efforts and personal sacrifices that these changes were made.

Claire was the catalyst for many people and spurred them on to action. She spent many years fighting for people whose predicament was ignored by society. She was an activist in the 1930's, in the 1960's she protested the Canada's involvement in the Vietnam war during which she chained herself on Parliament Hill and later taking up the cause of prisoners and prison rights. Claire had mentioned in several letters to a Canadian priosner in the US that she often went for walks and sat at Trout Lake because it was so peaceful. Although he never met Claire in person, she helped him through his time in the US prison zoo. When he was released, he visited the park and then suggested donating a bench in memory of Claire. Through the generous donations of many individuals, we have raised enough funds to purchase the bench which will be installed at John Hendry Park (Trout Lake) near where Claire lived for many years. Any monies above the required funds will be put into a memorial fund which will be used to further the cause and principles that Claire believed in. We hope to have the dedication on April 28, 2002, the anniversary of Claire's passing. If you wish to contribute to the Culhane Memorial Fund Bench Project, please mail a check or money order made out to:

NewPage Foundation
149 – 2496 East Hastings Street
Vancouver, BC V5K 1Z1

Please indicate on the memo line that this is for the Bench Project and whether or not you require a tax receipt. Thank you.

Eddie Rouse

PRISONERS' LEGAL SERVICES

We can help you with your prison and parole issues. We can also assist with disciplinary charges.

Federal prisoners in BC may call us toll-free at 1-888-839-8889 on Millennium, or on the administrative phones. The correctional authorities tell us that we are a "common access number", which means that you do not have to enter us on your authorized call list. If you don't have a PIN, ask to use the administrative (or non-Millennium) phones.

BC Provincial Prisoners call us collect at (604) 853-8712, except for those at North Fraser who use our toll-free number above.

We answer the phones daily from 9:00 am to 3:00 pm Monday to Friday.

We are a small office of only eight staff, including one lawyer, serving prisoners across BC. We cannot take every case that comes our way , but can usually at least give some advice.

If you wish to appeal your conviction or sentence in a criminal matter, please call the Appeals Department at the head office of the Legal Services Society in Vancouver by calling (604) 601-6000 collect, and ask to speak to a person in the **Appeals Department**.

ODDS 'N ENDS

EDDIE ROUSE

Now that the BC provincial government has changed, look for changes that are detrimental to the social safety network. Past experience tells me that the agenda will be to decimate the programs that are in place which address the problems people have encountered in thier lives. This government will sell off all the assets of the province to outside interests in the guise of privatization. This will also include the provincial prisons which will be operated by the lowest bidder in this process. Prisoners will then be a new commodity as they will become a new source of labour for more private interests. More in the next issue.

JOHN HOWARD SOCIETY OF THE FRASER VALLEY

The JHS worker is available with information and assistance on the following:

- *Services for Families*
- *Accommodation for Visitors*
- *Halfway house information*
- *Parole preparation*
- *Street survival Tips*
- *Community based programs and services*
- *Social Insurance Applications*
- *BC Medical Applications*
- *Welfare rates and information*
- *Substance Abuse programs and services*
- *Counselling*

And other concerns

Visitation is provided in the following institutions

Matsqui, RHC, Ferndale, Mission, Mountain, Kent PC, Kent GP and Elbow Lake.

Please refer to the institutional brochures posted in each institution for dates and times of the JHS workers schedule.Federal prisoners in BC can call us at 1-877-640-1122

NOTICE TO ALL PRISON VISITORS

Are you aware that the ***JOHN HOWARD SOCIETY FAMILY HOUSE*** exists to serve you? We recognize that visiting a loved one who is incarcerated often means financial strain for families. If you are visiting from out of town and are finding accommodation costs difficult, you are invited to contact

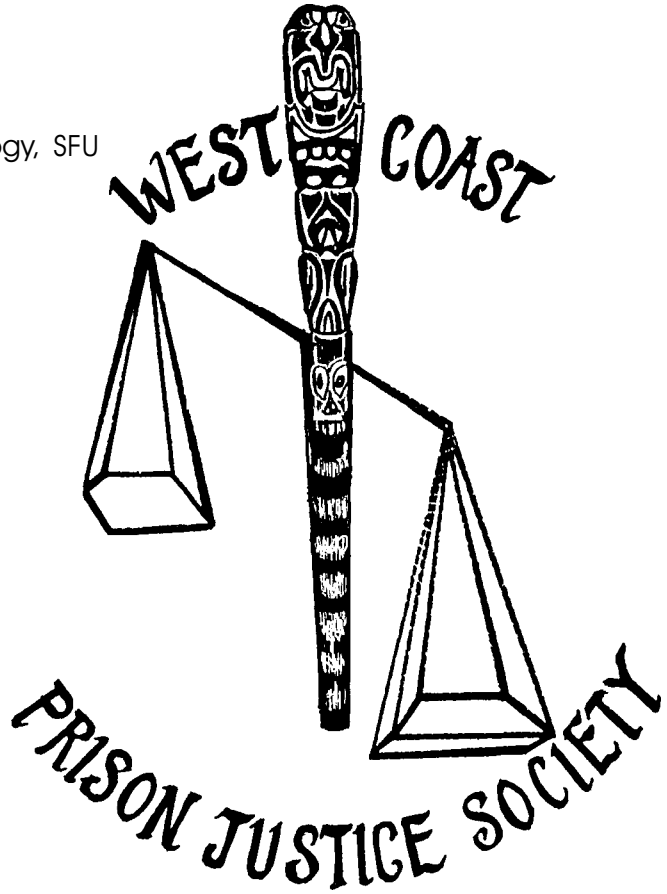
JHSFV Family House
Abbotsford, BC
Telephone: (604) 852-1226

The West Coast Prison Justice Society was started in 1993 and incorporated in February 1994. The objectives of this organization are to further the application of justice in B.C. penitentiaries, prisons, jails and reformatories. Through our newsletter, we wish to provide prisoners with an open forum for ongoing dialogue. We will try to provide legal interpretations of recent legislation and current prison case law and to bring to the forefront the major issues which concern prisoners in B.C. We will also keep you updated with respect to current Legal Aid policies. We share the commitment to work together towards these goals.

Your responses and your suggestions are key to the success of this ongoing process. In order to be able to address the problems that you believe are most relevant to conditions inside the walls and when on parole, we rely on your questions and comments. We also wish to hear how any legal precedent and/or legislation is affecting you.

PURPOSES OF THE WEST COAST PRISON JUSTICE SOCIETY

a) To promote the provision of legal services to people who are incarcerated in the Lower Mainland and Fraser Valley of British Columbia, and who are financially unable to obtain legal services privately.
b) To encourage the provision of legal services to prisoners whose problems arise because of their unique status as prisoners.
c) To promote the rule of law within prisons and penitentiaries.
d) To encourage prisoners to make use of the legal remedies at their disposal.
e) To promote the fair and equal treatment of prisoners, by assisting prisoners who face discrimination based on such matters as sex, aboriginal origin, race, colour, religion, national ethnic origin, age or mental or physical disability.
f) To encourage the application of the Canadian Charter of Rights and Freedoms inside prisons and penitentiaries.
g) To promote openness and accountability in the prisons and penitentiaries of British Columbia.
h) To promote the principle that incarcerated people must be treated with fairness and dignity.
i) To promote the abolition of prisons through the reform of the criminal justice system.



We would be pleased to hear from you. Please write, or have someone write for you, to:
West Coast Prison Justice Society
c/o Conroy and Company,
Barristers & Solicitors
2459 Pauline Street, Abbotsford, B.C. V2S 3S1