

**Time for Accountability:  
Effective Oversight of Women's Prisons**

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Women prisoners in Canada have long endured a system that has been designed and managed for the over 95% of the prison population that is men (Arbour 1996: 239). Various government reports and commissions of inquiry dating back to 1938 have highlighted the way women have been disadvantaged, treated unfairly, and essentially penalized for their under-representation among those convicted of crime (Arbour 1996: 240-241). Calls for change in recent reports have been prompted in large part by revelations of the shocking and tragic experiences of women prisoners that, in turn, revealed an equally shocking lack of effective oversight and accountability. Notably, the scathing report of Justice Louise Arbour<sup>1</sup> (1996) into the infamous “certain events at the Prison for Women in Kingston” (the strip-searching of women prisoners by a male Institutional Emergency Response Team in full riot gear, the subsequent illegal and involuntary transfer of women to a segregated unit inside Kingston Penitentiary for men, and further illegal detention in segregation for many months) had as its central focus the lack of independent accountability and oversight that facilitated such seemingly inconceivable events going on as long as they did, and (almost successfully) being covered up.

Justice Arbour found a culture of disrespect for the rule of law and “little hope that the Rule of Law will implant itself within the correctional culture without assistance and control from Parliament and the courts” (1996: 182). Among her long list of recommendations, Justice Arbour called for an end to the practice of long-term confinement in administrative segregation (to be facilitated by a recommendation that

segregation be subject to judicial supervision) and the expanded jurisdiction of judges to reduce sentences where prisoners have been subjected to “illegalities, gross mismanagement or unfairness in the administration of a sentence” (Arbour 1996: 183). She implored that “efforts must be made to bring home to all participants in the correctional enterprise the need to yield to the external power of Parliament and of the courts” (181).

None of Justice Arbour’s most substantive recommendations in this regard have been implemented. Ten years after the Arbour Commission, after the building of six new women’s prisons to replace the since-closed Prison for Women, the need for meaningful oversight and remedies for illegality and unfair treatment have never been greater. The recent report of the Canadian Human Rights Commission (2003) into the discrimination experienced by women prisoners underlined once again the need for effective oversight and accountability mechanisms. There is a very real concern amongst women prisoners and their advocates that these most recent recommendations will join those of Justice Arbour and others, gathering dust on a shelf, while token gestures – if any – toward accountability are made. For example, the recent one-off visits to Grand Valley Institution and Nova Institution by Her Majesty’s Chief Inspector of Prisons for England and Wales, at the invitation of CSC, are more an evasion rather than a meaningful response to the recommendations for independent oversight, including an independent Canadian inspectorate of women’s prisons.

This paper starts from the proposition that report after report has made the case that meaningful, independent accountability and oversight of women’s prisons is urgently

needed. The question is what forms, structures or mechanisms will most effectively realize the goal of meaningful, independent oversight and accountability. As will be discussed below, ultimately, it is our view that an effective and accessible avenue of judicial review of rights violations, other illegalities, and long-term segregation must be available to prisoners as part of a broader accountability and oversight framework. Other mechanisms such as an independent prison inspectorate and the Correctional Investigator (with a power to take complaints to a tribunal and/or direct issues to court) are necessary complements to – but not a substitute for – an effective and accessible judicial sanction and remedial scheme which must be made available.

Our analysis proceeds in three parts. First, we describe the context of women’s imprisonment in which the calls for meaningful accountability and oversight have arisen. Next, we outline the necessary criteria for any effective oversight body within this correctional context and measure against those criteria some of the key recommendations for oversight models and mechanisms made in recent years. Finally, we conclude with a brief discussion of why and how the context of federally sentenced women presents a unique opportunity – as well as challenge – for effective oversight and accountability.

A key question that begs to be asked is, can respect for human rights and accountability take root in women’s prisons? Perhaps the best way, if indeed it is at all possible, is to ensure that effective remedies are available when rights are violated. We will evaluate some of the key oversight options and outline why we consider judicial oversight to be more likely than administrative tribunals to provide a meaningful sanction and redress for rights violations in prison. Underlying our

conclusions is our view, shared by others who have studied imprisonment, especially the imprisonment of women (*e.g.*, Sudbury 2005, Carlen 2002, Hannah-Moffat 2000), is that prison reform is susceptible to what Pat Carlen has aptly called “carceral clawback” (2002: 220) and is, therefore, ultimately ineffective. We join these other scholars of women’s imprisonment in concluding that only by focusing on the dismantling of the prison structure and the decarceration of prisoners do we have any hope of accomplishing lasting change. We hope this piece spurs readers toward careful reflection along those lines while also offering some practical steps to promote accountability and compliance with the law in Canada’s existing prisons.

## **I. Brief History of Federally Sentenced Women and the Absence of Accountability**

### *The Legal Landscape*

Women who are sentenced to terms of imprisonment of two years or more serve their sentences in federal prisons by virtue of section 743.1 of the Criminal Code. In relatively rare situations, a woman who receives a sentence of less than two years may be transferred from a provincial jail to a federal prison pursuant to section 16 of the Corrections and Conditional Release Act (CCRA). The CCRA and the regulations under it form the federal law that governs the nature of imprisonment and the release of federally sentenced prisoners. Both the common law and subsection 4(e) of the *CCRA* provide that prisoners retain all the rights and privileges that are enjoyed by all members of society except for those which are necessarily removed by the consequences of the sentence of imprisonment (*e.g.*, Solosky v. The Queen 1980).

The CCRA and Regulations both include restrictions on the rights and privileges of prisoners and provide them entitlements and procedural protections.

A great number of procedures and practices implemented by the Correctional Service of Canada (CSC) are not spelled out in either the CCRA or the Regulations but are authorized by policy promulgated by the Commissioner of Corrections, pursuant to section 97 of the CCRA. Too often, the power of the Commissioner to make policy and the implementation of that policy is understood as the freedom to take any measures not specifically prohibited by the CCRA and Regulations.

However, the legality of policy and the manner in which policy is implemented are not assessed only as against the requirements of the CCRA and Regulations. As is the case with all governmental actions, decisions and actions taken by the CSC must comply with the Canadian Charter of Rights and Freedoms, which consists of rights held by all members of society, including prisoners. Decisions that result in discriminatory treatment based on specified grounds (such as, for example, race, sex, and disability) are also subject to the Canadian Human Rights Act.

The problem faced by prisoners as targets of governmental action is that the CSC interprets and applies the *CCRA* from a perspective which allows it to control and restrict prisoners to the greatest extent possible. It does not adopt an interpretation focused on the legislative and constitutional entitlements of prisoners, and how to restrict them only to the extent that is actually necessary. For the CSC, the entitlements of prisoners, whether legislative or constitutional, can be ignored or restricted when a security concern is implicated, no matter how important or

fundamental the right and how tangential or speculative the security concern. From this perspective, actions are not recognized as discriminatory or otherwise illegal where the purpose of the action is security.

There are also many international instruments that Canada has adopted, ratified or to which it has otherwise agreed to be bound. Research conducted by a previous Chief Commissioner of the Canadian Human Rights Commission, Max Yalden, on behalf of the Correctional Service of Canada, chronicle the extent to which CSC, and therefore Canada, is in violation of its international obligations when it comes to the manner it administers institutional and community corrections (Yalden 1997).

#### *The Unique Circumstances of Women Prisoners*

Notwithstanding their relatively low risk to the community in comparison with men, federally sentenced women as a group are, and have historically been, subject to more disadvantaged treatment and more restrictive conditions of confinement than men. Justice Arbour aptly summarized the situation in the following terms:

The history of Canada's treatment of women prisoners has been described as an amalgam of: stereotypical views of women; neglect; outright barbarism and well-meaning paternalism...From the beginning, the welfare of women prisoners was secondary to that of the larger male population (Arbour 1996: 239).

The under-representation of women as prisoners, relative to men, has been a justification for the failure to focus on the particular requirements of women prisoners. Correctional policies and practices applied to women have generally been adapted from what was considered appropriate for men, such that women are the correctional afterthought, the last 2-3% considered in terms of national policy:

Correctional services in both institutional and community settings have been designed by men for men who comprise more than 90% of the correctional population. The development of services for women is usually an afterthought; programs which are available for them are often extensions or hand-me-downs” of programs established for males. Correctional Facilities are often mere appendages (either figuratively or literally) of facilities designed for males (Ross and Fabiano 1985: 121).

In 1980, an important effort to remedy discrimination experienced by women in the correctional system occurred with the filing of a complaint to the Canadian Human Rights Commission by an advocacy group, Women for Justice (Arbour 1996: 245, n. 145). The group cited the following examples of disadvantageous treatment of women prisoners as compared to men prisoners: educational programs, vocational programs, social and cultural programs, recreational programs, employment opportunities and pay, security classification, segregation facilities, medical and psychiatric services, geographic location, prison administration and policy development. Subsequently, the Women’s Legal Education and Action Fund (LEAF), a women’s rights advocacy group with a focus on equality rights litigation, drafted a Statement of Claim alleging

various violations of the rights of women prisoners. That Claim was never filed because negotiations between LEAF and the administration at Prison for Women partially addressed some of the issues in the claim, as an interim measure pending closure of Prison for Women, and pending a more comprehensive future examination of corrections for women.

In 1989, the Task Force on Federally Sentenced Women (TFFSW) was launched. The Task Force, which included a substantial representation of women prisoners and their advocates, concluded that a new direction was needed in women's corrections, which did not depend on the traditional coercive prison regime (TFFSW 1990). A new model was proposed and accepted by the government. It proposed the closure of the Prison for Women in Kingston and the construction of five regional women's and an Aboriginal healing lodge. One of the rationales for this was the belief that smaller prisons would foster more independence and responsibility and replace the crude authoritarian model.

However, despite the recommendations in the Task Force report, *Creating Choices* (TFFSW 1990), the conditions at Prison for Women, especially for Aboriginal women, remained bleak and culminated in several suicides by Aboriginal women. An inquest was called to inquire into the systemic problems facing Aboriginal women at Prison for Women.

Also at this time, conditions at Prison for Women became increasingly oppressive for maximum security women, who were confined to a single range within the prison for long periods of time. In 1994, an incident occurred at Prison for Women, which

sparked a Commission of Inquiry chaired by Justice Louise Arbour. The Commission inquired into the strip-searching of women prisoners by men, the illegal transfer of women to the Regional Treatment Centre in the Kingston Penitentiary, a maximum security men's prison, and several months of segregation at Prison for Women in illegal and dehumanizing conditions.

The resulting Commission of Inquiry into Certain Events at the Prison for Women in Kingston ("Arbour Report") (1996) found at all levels of the Correctional Service of Canada, generally, a pervasive culture of disrespect for the rule of law, and more particularly that the needs of federally sentenced women were not being met by current correctional policies and practices. Yet within a year of the release of the Arbour Report, women classified as maximum security prisoners were transferred to men's prisons, where they were confined without any meaningful work, with little or no programs and with severe restrictions on their liberty. The situation was described bleakly by the Correctional Investigator in his 1999-2000 Report:

The placement of maximum security women and women with serious mental health problems in male penitentiaries is inappropriate. ...[S]uch placement was discriminatory and ... regardless of the accommodations made, it was, in fact, a form of segregation. These women are not only removed from association with the general population of the institution they are housed in; they are as well, segregated from the broader general population of female offenders housed at the women's regional facilities. This segregation based on security classification and mental health status places these women, in

terms of their conditions of confinement, at a considerable disadvantage to that of male offenders (OCI 2000: 28-29).

With the exception of two locked forensic units (one a prison under the control of CSC, the other in a psychiatric hospital), women classified as maximum security prisoners are now imprisoned in segregated maximum security “pods” and units in the regional women’s prisons: namely, Nova Institution in Truro, Nova Scotia, Etablissement Joliette in Quebec, the Grand Valley Institution in Kitchener-Waterloo, Ontario and Edmonton Institution for Women in Edmonton, Alberta. A maximum security unit is also due to open this year in Fraser Valley Institution in Abbotsford, British Columbia. Conditions in these units continue to be problematic and cry out for independent review (CHRC 2003).

The situation of federally sentenced Aboriginal women is particularly dire and is getting worse, rather than better (Monture-Angus 2002). Aboriginal women are vastly over-represented among the maximum security population and are less likely than non-Aboriginal women to be designated minimum security or to be serving their sentences in the community. They also tend to be segregated more frequently and for longer periods than non-Aboriginal women (CHRC 2003). The CSC’s 1994 promise to create an Aboriginal program strategy for federally sentenced women has not been implemented (CHRC 2003). Patricia Monture-Angus has made the compelling argument that these realities and the government’s failure to remedy a situation that has been denounced in report after report must be considered a breach of the federal government’s fiduciary duty to Aboriginal peoples (2002: 43-46). She states,

For women prisoners consideration of the duty owed to them by the federal Crown alongside the failure to remedy obvious and known circumstances of discrimination provides a legal opportunity that has yet to be fully considered in litigation. For Aboriginal women, the strength of the fiduciary duty owed enhances this opportunity. After all, it is a constitutionally protected right that rests on the fiduciary duty of the Crown (2002: 46).

This undeveloped legal terrain concerning the government's fiduciary duties to criminalized Aboriginal women reinforces the need for effective oversight and accountability as a step toward remedying their situation.

A further example of the particular problems arising from a lack of effective oversight and accountability in women's prisons relates to the vulnerability of women prisoners to sexual harassment and assault by male correctional staff working on the front lines. Indeed, CAEFS has found that women are being subjected to sexual harassment by such men but are unable to properly address it due to the lack of an effective complaint mechanism. For instance, a number of women at the Fraser Valley Institution (FVI) in British Columbia and the Grand Valley Institution (GVI) in Ontario recently have reported aggressive behaviour on the part of male staff. Based on years of working with women prisoners, CAEFS has found that it is not common for women to report or use the grievance and complaint system in the women's prisons, even when the breaches of law or policy they have experienced at the hands of staff are profound.

For example, in the recent FVI case, the women who filed a grievance about staff behaviour at FVI were not permitted to personally retain a copy of the findings of the investigation, nor the response to their grievance. CSC indicated that it was sensitive information that would be placed in their files, to which the women are provided limited access when staff permit. Therefore, in addition to being advised that their allegations were determined to be unfounded, the women were not provided with an adequate record of the matter. To address that lack of information, and with the consent of the women, CAEFS applied pursuant to Canada's privacy and access to information provisions for copies of the investigation and grievances. Through that process, CAEFS discovered that some of the staff members who had provided information that supported the claims of the women prisoners were not interviewed, nor were their statements apparently considered in the investigation.

After CAEFS and the Correctional Investigator encouraged them to reconsider the inadequacy of their response, the CSC indicated that they judged the allegations to refer to a possible abuse of power and not necessarily to reflect "gender issues." In any event, the investigation was discontinued, which served to reinforce the pre-existing inclination of these and other women prisoners to not report because of fear that nothing would be done and that, worse still, they would experience retaliation for bringing the issue forward in the first place. The primary staff person about whom the women complained has returned to duty and the women fear that CSC's response has granted him a license to act with impunity. With respect to the second incident at GVI, mentioned above, CAEFS has been advised that an investigation into it is ongoing.

In fact, this issue of “cross-gender monitoring” in women’s prisons, specifically men working on the front lines, has been the subject of numerous recommendations by bodies external to the CSC for years (*e.g.*, Arbour 1996, Lajeunesse 2000). Yet the physical integrity and safety of women has not been addressed and the situation has not been remedied. In response to Justice Arbour’s recommendation in 1996 that explicit protocols be introduced for men working as front-line staff in prisons for women, CSC introduced the National Operational Protocol for Front-Line Staffing in women’s institutions and maximum security units. It requires that staff and prisoners be advised of the protocol and that they be provided with a copy of it (Lajeunesse 2000).

In its final report (Lajeunesse 2000), the Cross-Gender Monitor (which was a consultant group contracted by CSC to report on this issue) found that there was no screening or training for many guards and that the National Protocol was largely being violated. In one institution, 74% of staff could not name one provision of the protocol. CSC has admitted that, “[t]here appears to be little system-wide understanding of the need for and strict enforcement of particular policies and practices designed to protect women prisoners from privacy violations and sexual misconduct” (Lajeunesse 2000).

The report of the Cross-Gender Monitor stated that the power imbalance between guard and prisoner is too great to have an effective informal conflict resolution process (Lajeunesse 2000). Most recently, the CHRC observed that CSC staff were not respecting the safeguards that were put in place under the National Protocol (CHRC 2003: 42) and designed to reduce the vulnerability of women in prison. Such

safeguards would have precluded such things as male guards doing unit and bed checks and night rounds, not just strip searches and monitoring cell cameras. Instead, CAEFS and the Correctional Investigator continue to receive complaints that male guards, sometimes two at a time, continue to do such checks and the allegations of intimidation and harassment persist.

Justice Arbour recommended that the CSC's sexual harassment policy be extended to prisoners (Arbour 1996: 253). This recommendation was reiterated by the CHRC in 2003, with the additional recommendation that the policy should include independent human rights analyses (CHRC 2003: 42). However, the CSC maintains that its existing harassment policy and procedures are adequate and cover situations involving prisoners.

We have related just a small portion of the recent history of the treatment of federally sentenced women and the numerous recommendations made for change in order to highlight the need for meaningful oversight and accountability of corrections. The repeated calls for correctional accountability have gone unanswered. These calls for accountability were reinforced, but not commenced, by Justice Arbour in her 1996 report. Indeed, the Office of the Correctional Investigator, the Task Force on Federally Sentenced Women and many previous reports and commissions of inquiry, not to mention at least one investigation conducted by the CSC itself (Yalden 1997), have called for increased accountability within corrections and between the CSC and other external bodies, including the Minister responsible for Correctional Services, the Minister of Public Safety and Emergency Preparedness (formerly the Solicitor General of Canada), and the Parliamentary Standing Committee on Justice, Human

Rights, Public Safety and Emergency Preparedness, as well as cabinet and Parliament itself.

The mere assertion by the Correctional Service of Canada that it is accountable, with no evidence of that being a reality, despite the existence of sections 77 and 80 of the Corrections and Conditional Release Act,<sup>2</sup> leaves any external observer to doubt seriously the ability of the Correctional Service of Canada to hold itself and its members accountable. Justice Arbour clearly recognized that the Correctional Service of Canada was grasping at straws when its representatives took the position throughout the Commission of Inquiry that they needed to “balance” the rights of prisoners with those of staff, as a rationale for why they violated the human rights and Charter-protected rights of women prisoners in 1994 at the Prison for Women. Justice Arbour recognized that the Correctional Service of Canada did not respect, much less uphold, the rule of law (1996: 179-183).

When it comes to the human rights and Charter rights of prisoners, there can be no discussion of balancing, eliminating or lessening those rights under any pretext that to diminish the human and Charter-protected rights of prisoners, somehow increases the safety of staff. In fact, as the Arbour findings and recommendations highlight, the opposite is more likely to be the case: the more the human rights and Charter-protected rights of women prisoners are violated, the more likely it is that the conditions of confinement to which women prisoners are subjected will create situations that interfere with the safety of women prisoners, as well as with the staff within the women’s prisons. This is exactly the scenario that has begun to unfold in the segregated maximum security units (called “Secure Units” by CSC) in the

regional prisons for women, and which we saw formerly in the men's prisons and in the 1993-1994 incidents at the Prison for Women in Kingston. The circumstances range from limited staff interaction with the women classified as the highest need, limited access to programs, services and recreation in the maximum security units, slashings, and attempted suicides, assaults on other women prisoners and, recently, of staff, and attempted escapes from prison.

The policy framework and management protocol that have been established for the Secure Units are clear indicia of the fact that human rights and Charter violations are not only anticipated, but prescribed by the CSC policies and protocols that have been developed for those segregated maximum security units. Sections 31-37 of the CCRA (*i.e.*, the provisions dealing with Administrative Segregation) are not acknowledged by CSC to be operative. However, they are invoked by the conditions of confinement in the Secure Units since women held there meet the definition of Administrative Segregation in that they are "kept from associating with the general inmate population" (CCRA s. 31). Moreover, women who choose not to participate in programs or employment are restricted to their cells during the day, except for meals. These conditions amount to inhumane punishment and solitary confinement and are far from the "least restrictive measures" (CCRA s. 4(d)) that CSC is obliged to employ. It is particularly problematic that the standing order setting out the CSC Management Protocol allows for routine strip searching which violates the Charter-protected rights of women prisoners to security of the person. This reality notwithstanding, the existing protections under the CCRA only permit strip searches on a routine basis if the units are recognized as segregation units. Otherwise, a strip

search is only permitted where there are reasonable and probable grounds to believe that one is required to obtain contraband or evidence.

It is telling that the Correctional Service of Canada frequently poses the notion of balancing rights and security as its justification for violating the human and Charter rights of prisoners on a routine basis. In a Charter case, if a violation of rights is found, the government bears the heavy burden of proving that the violation is “demonstrably justified in a free and democratic society.” A free and democratic society is one that jealously guards and protects all rights, including those of prisoners. The government’s burden of proof requires cogent evidence of why the particular rights-violating action is the least restrictive means for ensuring the governments objective of, for example, institutional security (*Sauvé v. Canada* 2002). It is worth recalling Justice Arbour’s comments on this matter:

One must resist the temptation to trivialize the infringement of prisoners’ rights as either an insignificant infringement of rights, or as an infringement of the rights of people who do not deserve any better. When a right has been granted by law, it is no less important that such a right be respected because the person entitled to it is a prisoner. Indeed, it is always more important that vigorous enforcement of rights be effected in the cases where the right is most meaningful (Arbour 1996: 182-183).

Two key options come to mind when one contemplates a body to which prisoners could resort for redress: an administrative tribunal and the courts. Justice Arbour (1996) concluded that judicial oversight was necessary to redress rights violations and

effectively sanction breaches of the law. More recently, the Canadian Human Rights Commission (2003) recommended that the Minister responsible and the CSC “in consultation with stakeholders, establish an independent external redress body for federally sentenced offenders.” The Office of the Correctional Investigator (2004) has advocated the establishment of an independent tribunal to resolve disputes over significant issues bearing on national-level problems and human rights while also continuing to advocate for implementation of Justice Arbour’s recommendations concerning judicial oversight (32).

As will be discussed below, it is our view that Justice Arbour’s recommendations concerning judicial review, including the jurisdiction to reduce a prisoner’s sentence to sanction and compensate for rights violations, best address the various requirements of an effective oversight body in the prison context. Judicial oversight is required of all correctional decisions that involve further restrictions of liberty beyond that which is occasioned by the prison sentence itself. Alternatively, if an administrative tribunal is implemented for allegations of correctional misconduct and abuse of authority, a judicial appeal must be available and accessible to those prisoners who desire such a redress mechanism. The next part will explain how we have come to that conclusion.

## **II. Criteria for Effective Accountability and Oversight in the Prison Context: Evaluating the Recommendations**

### *Accountability and Oversight Generally*

Before beginning to consider the proposed models of accountability and oversight made in the context of women's imprisonment in Canada in recent years, it is important to understand what is meant by those concepts. Accountability has been defined as:

‘to give account’ of actions or policies, or ‘to account for’ spending and so forth. Accountability can be said to require a person to explain and justify – against criteria of some kind – their decisions or actions. It also requires that the person go on to make amends for any fault or error and take steps to prevent its recurrence in the future. A condition of the exercise of power in a constitutional democracy is that the administration or executive is checked by being held accountable to an organ of government distinct from it (Corder, Jagwanth and Soltau 1999: 2).

It has also been noted that the concept of accountability can mean different things in different contexts (Vagg 1994: 132). In his work on accountability in European prisons, Vagg has described the way accountability connotes “scrutiny over the structure and exercise of control” (132). He says, “[i]n the discourses of prison reform [accountability] is often held out as a tool in the business of making prisons more just and more humanitarian. In the hands of governments it is used as a justification for increased cost-efficiency and control over staff. In all these uses, however, it is in practice solely associated with the concept of control” (1994: 132).

While the concept of oversight is often used interchangeably with accountability (and will be used interchangeably in this paper), it has been suggested that oversight is an

even broader concept than accountability. For example, in post-apartheid South Africa, recognition of the profoundly corrupt and racist exercise of executive power under apartheid caused that country to constitutionally entrench a requirement of accountability and oversight of all organs of the state. Corder et al. (1999) have said,

Oversight refers to the crucial role of legislatures [in s. 43(2) of the S.A. Constitution] in monitoring and reviewing the actions of the executive organs of government. The term refers to a large number of activities carried out by legislatures in relation to the executive. In other words, oversight traverses a far wider range of activity than does the concept of accountability (Corder et al. 1999: 2).

While some form of external accountability and oversight is required for any government department, the need is nowhere greater than in relation to prisons which, by their very nature and function, are closed institutions, far removed from the public eye (Dissel 2004: 7). Prisons have as their *raison d'être* the deprivation of peoples' liberty and a virtually limitless potential for abuse. In this environment, "the law serves as a crucial counter-weight to the natural drift" toward callousness and brutality (Campbell 1996: 327).

In the Canadian context, we have learned (painfully for many prisoners) that despite the existence of a strong Charter of Rights and Freedoms and a correctional system that is marketed around the world as a model to other countries, the Rule of Law has not effectively taken hold within our prisons. As Justice Arbour remarked pointedly, "[t]he Rule of Law is absent, although rules are everywhere" (1996: 181).

It might be suggested by some that internal accountability at all levels of corrections, including training of staff in human rights and other aspects of the law, as well as disciplinary action for breaches of the law and human rights, could provide sufficient protection against abuses within prisons. However, experience has shown otherwise. After much careful investigation and review, Justice Arbour concluded that internal accountability mechanisms were incapable of effectively requiring that prisons conform to the Rule of Law. She urged that the CSC “would be well advised to resist the impulse to further regulate itself by the issuance of even more administrative directions. Rather, the effort must be made to bring home to all participants in the correctional enterprise the need to yield to the external power of Parliament and the courts” (Arbour 1996: 181). External and truly independent oversight is necessary.

The question is, therefore, what are the necessary criteria for an effective accountability and oversight strategy in Canada’s women’s prisons? We suggest there are at least three key criteria against which to measure any proposed solutions to the accountability problem. It must be established that any proposed body(ies) and/or mechanism(s) (1) are truly independent, (2) are accessible to prisoners, and (3) have the power to order meaningful and enforceable remedies. We will consider each of these criteria in turn and will comment on the ability of the various reform proposals to meet those criteria.

### *Independence*

The cornerstone of effective oversight mechanisms is independence from the body being overseen. As a preliminary matter, it is important to distinguish the concept of independence from impartiality. One can aim to be impartial without being independent. As discussed by Justice Le Dain in the leading case on judicial independence, Valente v. R. (1985), “impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case,” whereas independence “connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the Executive Branch, that rests on objective conditions or guarantees” (para. 15). For example, even internally-appointed investigators or decision-makers, such as those reviewing segregation decisions or considering grievances by prisoners, might strive for impartiality. However, independence requires that autonomy be fostered and protected in a structural way that provides investigators or decision-makers with the necessary freedom to fulfil their roles.

Independence has a number of elements which have been identified in the human rights context as *legal and operational* autonomy, *financial* autonomy, and *appointment and dismissal* autonomy (Ontario Human Rights Commission 2005).<sup>3</sup> These three elements are variants of the three essential ingredients of judicial independence, namely institutional independence, financial security, and security of tenure (Valente v. R. 1985). We would add a third element of independence that is particularly important in the prison context, namely what we call *associational* and *ideological* autonomy, which we describe below.

Legal and operational autonomy means that the oversight body has a clear statutory mandate and the authority to structure its processes to fulfil that mandate. If there is a reporting relationship involved, the body will not report to the ministry or department it is charged with regulating or overseeing. It is widely understood that the best way to ensure legal and operational autonomy – and the best information to the legislative branch as a check on executive power – is to provide for a reporting relationship directly to the parliament or legislature. For this reason, both the federal Auditor General and the federal Privacy Commissioner report to Parliament. Similarly, CAEFS has recommended that the Correctional Investigator report directly to Parliament, rather than through the Minister of Public Safety and Emergency Preparedness as is currently the case (CAEFS 1999).

Financial autonomy entails that an oversight body not be beholden for its budget to the ministry or department it oversees. Without financial autonomy, government funders may “employ financial punishments or financial inducements to inappropriately direct human rights activity” (OHRC 2005). Again, this is a variant of the financial autonomy that is a key element of judicial independence whereby the salary of judges must be adequate, fixed, and not subject to arbitrary change by any branch of government (Valente v. R. 1985). The requirement of financial autonomy is also interrelated with the third criteria, namely appointment and dismissal autonomy, which requires adequate resources to realize.

In the judicial context, security of tenure is a vital element of independence (Valente v. R. 1985). The fact that judges cannot be removed from office except for serious misconduct and with the consent of Parliament (Kelly 1996: 9)<sup>4</sup> allows them to

operate as a true check the other branches of government. Appointment and dismissal autonomy is essential to ensuring that those charged with oversight of a government department have the necessary qualifications and confidence to exercise truly informed yet independent judgment in fact-finding and decision-making (OHRC 2005).

In the context of oversight and other regulatory bodies, the autonomy to employ staff whose continued employment will not be dependent on the approval of the government they are charged with overseeing is crucial. For example, in the discussion paper, *Reviewing Ontario's Human Rights System* (2005), it is suggested that because the Ontario Human Rights Commission (OHRC) gets its funding from the Ministry of the Attorney General, does not report directly to the legislature, and is subject to government protocols and restrictions on hiring, the OHRC is not autonomous in any meaningful sense, despite the fact that the OHRC, according to the Discussion Paper, "has been granted considerable deference in its activities." The fact that the Ministry has not to date chosen to interfere or exert pressure on the OHRC is not a substitute for structural independence that would make such interference or influence impossible.

Finally, there is a tendency of regulatory or oversight agencies to be "colonized" by the bodies they scrutinize (Vagg 1994: 13). Over time, the staff of oversight agencies inevitably develop relationships with the staff of bodies they oversee. As a practical matter, it may be much easier to gather information in an oversight role if one has good relationships with those who work in the institution being overseen. In that process, oversight staff may come to empathize with, for example, the practical and

operational difficulties of complying with certain aspects of the law in a prison context. Despite the best intentions and processes for maintaining an independent and external perspective, there is a danger of “regulatory capture” whereby oversight bodies may find themselves coopted by the values and goals of the organization they are required to regulate, thus losing the necessarily critical eye of the external, independent observer (Dissel 2004: 10).

In the prison context, we see a particular need for all parties working toward effective accountability and oversight to strive for associational and ideological independence, since the potential to be overly sympathetic to concerns about institutional security is strong. Often it is very difficult for advocacy groups such as local Elizabeth Fry Societies (some of whom receive funding from CSC to provide services to prisoners) and even official oversight bodies such as the Correctional Investigator, to get information about incidents that occur within prisons due to institutional security concerns expressed by correctional staff and administration. Associational independence entails the ability to challenge correctional decisions and seek answers without fear of damaging a close working relationship, not to mention fear of losing one’s livelihood through a loss of correctional funding.

In our view, for non-governmental organizations and advocacy groups to be in a position to contribute to a multi-faceted approach to correctional accountability as recommended in reports such as that of Justice Arbour (1996: 196), they also must make every effort to preserve their ideological independence and to resist the potential for a form of “regulatory capture” and internalizing of a correctional mindset. In that vein, the vision statement created by CAEFS and two other advocacy groups<sup>5</sup> who

have formed a coalition called, “Human Rights in Action” to work proactively to reduce the number of Aboriginal women in federal prisons by 10% in two years, provides one example of an attempt to maintain associational and ideological independence:

This project is about strengthening women and creating self reliance to survive the CSC experience. We want to increase the abilities of individual women in prison and the organizations involved to work within the spirit of resistance to achieve realistic goals, to name and rectify injustices, and to create a legacy of permanent change.

The three groups have also agreed to four key principles of operation including that the initiative must be wholly independent of CSC and must be penal abolitionist in nature (*i.e.*, focussed on keeping women in, and returning women to, the community).<sup>6</sup>

In short, independence is a requirement of effective oversight of any government department or activity. In the prison context, those general arguments for independence are underlined and augmented by additional concerns that arise because of the nature of the government activity in question (deprivation of peoples’ liberty in a place and manner that resists public scrutiny). In this context, the guarantees of independence that judges enjoy mean that they are well-suited to play a key oversight role as part of a multi-faceted strategy.

*Accessible to Prisoners*

Prisoners are among the most disempowered and powerless people in our society. The vast majority are poor and inadequately educated. Among women prisoners, a history of physical and sexual abuse is the norm (Hannah-Moffat and Shaw 2000: 19). Prisoners are locked in an environment far from the public eye, where the prospect of (overt or subtle) retaliation for claiming their rights is very real. In this context, accessibility of any oversight body has a number of aspects.

First, it must have the trust and confidence of the prisoners (which is another reason its independence is so crucial). It must also work to facilitate disclosure by prisoners of the illegalities and mistreatment that goes on behind the walls, and have safeguards and resources in place to protect and support prisoners who come forward. The problem of facilitating disclosure by women prisoners is particularly acute, given the complex layers of discrimination, violence and abuse most women prisoners have been subjected to throughout their lives. As noted by the Women's Legal Education and Action fund in its submissions to the Canadian Human Rights Commission (2003: 1):

The complexity of disclosure in this context relates not only to the many factors that would inhibit women from coming forward with their stories but also to information that in isolation or when taken out of context may appear benign, but when examined through a substantive equality lens and in context is recognizable as part of a pattern of systemic discrimination. Those who are seeking the information need to be sensitive to these more subtle discrimination/equality issues in their investigation, as do those who analyze the information once it is gathered.

Even some of those within the CSC acknowledge the inappropriateness of the internal grievance and complaint process for women prisoners. The following quote was attributed to a CSC official in the Canadian Human Rights Commission Report: “Given that the women are completely disempowered, it is difficult to expect them to use the grievance system to resolve conflicts” (CHRC 2003).

The power imbalance between prisoners and prison staff is a key cause of the ineffectiveness and inefficiencies of the current complaint mechanisms. This power imbalance is amplified for women from traditionally marginalized groups such as racialized women, Aboriginal women, women with disabilities, and women who are lesbian.

The accessibility of an oversight regime, and the extent to which prisoners will utilize it, is also related to the confidence prisoners have that the process is transparent and fair. Internal grievance procedures have proven woefully inadequate to address breaches of the law inside Canadian prisons. The inadequacy of the grievance procedure, including its lack of procedure fairness guarantees, delays, and failure to address long-standing issues, always figures prominently in the annual reports of the Correctional Investigator (*e.g.*, OCI 2004, 2003, 2002). The grievance procedure was also much criticized by Justice Arbour in her Report (1996). Of greatest significance was her finding that CSC could not be expected to process complaints against themselves because of their inability to admit error and accept responsibility for what happens within the institutions (Arbour 1996: 194). One would be hard-pressed to find a single prisoner in the system with any confidence in the fairness of the grievance process in which decision-making power rests with the jailers. Their

experience is that time frames are often not adhered to, complaints and grievances are rarely upheld, and the perspective of staff usually determines the manner in which the grievance or complaint will be “resolved”.

Moreover, many complaints and grievances are given to the staff members against whom the complaint or grievance is made or who made the decision which is being complained about or grieved. Such a process not only appears to be, but is, patently unfair. In situations where women do pursue complaints and grievances, there are far too many instances where women report that they have received overt or subtle indications that they should not proceed with such grievances unless they wish to experience negative consequences as a result. Clearly, this reality violates existing CSC policy and contravenes the governing legislation. It is no doubt for these reasons that Justice Arbour, the Canadian Human Rights Commission, the Correctional Investigator, and most recently, the Human Rights Committee of the United Nations have called on the Canadian government to act to remedy the discriminatory treatment of women prisoners (Arbour 1996: 162, CHRC 2003: 64, OCI 2005: 19, UNHRC 2005).

The reality is that when discrepancies about the treatment of prisoners arise, it is the women prisoners’ word against that of staff. Furthermore, according to a report prepared for the Canadian Human Rights Commission by LEAF (2003), there is a presumption of staff innocence that skews the investigative process in favour of the respondent. This is coupled with an assumption that complainants are overly sensitive, overly excited and lack credibility. What is most disturbing is that the Cross-Gender Monitor found that the grievance process was being used to route

allegations of sexual misconduct against staff (Lajeunesse 2000). It is inappropriate to be using the grievance process, which is ineffective and time consuming, to process complaints that deserve immediate attention and resolution.

To make matters worse, federally sentenced women who are located in provincial facilities due to the Exchange of Services Agreements between the federal government and provincial governments do not even have access to the grievance process. This is because CSC does not require that the Corrections and Conditional Release Act (CCRA) apply to the conditions of confinement to which women are subjected pursuant to ESAs and/or Memoranda of Understanding with provincial correctional and health authorities. Most provincial corrections and mental health legislation do not contain adequate grievances provisions.

In the cases of women in the federal prisons, CAEFS has witnessed situations where women have been “encouraged” to either not file a complaint or, once filed, to withdraw same. Furthermore, too often, when women do utilize the complaint and grievance system, especially if they are classified as maximum security prisoners, they will be described as “difficult to manage” and as failing in their “institutional adjustment.” For the women, being labelled as such carries the explicit or implicit threat that they may not be reviewed and have their security classification reduced, even in circumstances where there is no other reason other than their “resistance to abuses of authority” for maintaining them at a maximum security level. Indeed, when the CHRC was reviewing this issue they were provided with an e-mail exchange between CSC staff which stated that a prisoner’s use of the complaint and grievance procedure was evidence of her denial of responsibility, and therefore, of her

“maximum security behaviour.” As these realities demonstrate, for as long as the Correctional Service of Canada remains essentially “self policing”, the complaint and grievance system will be ineffective.

Accessibility also means that rights of redress are not unavailable due to prohibitive cost. Prisoners have a legal right to access the superior courts for judicial review by way of *habeas corpus*<sup>7</sup> on Charter or administrative law grounds, or to challenge breaches of correctional law in the Federal Court. Prisoners also have a right to be represented by counsel in prison disciplinary hearings where their residual liberty interests guaranteed in s. 7 of the Charter are threatened (*Howard v. Stony Mountain Institution* 1984). However, those rights are more illusory than real when one considers that inadequate funding of legal aid across the country means that legal assistance is unavailable to the vast majority of prisoners (Department of Justice 2002). The Supreme Court has not yet addressed the question of whether prisoners have a free-standing, constitutional right to legal aid where deprivations of their liberty and other rights violations are concerned. While there is a strong case for such a right to be recognized,<sup>8</sup> it remains true that an effective oversight regime for prisoners requires meaningful access to the courts. For the vast majority of prisoners who are poor, access to the courts requires legal aid.

#### *Power to Order Meaningful and Enforceable Remedies*

The sheer number of recommendations, reports, and calls for accountability over the years make the case that an independent inspectorate or ombuds function alone, without the power to remedy past injustices and order future changes, will not

effectively address the accountability gap. Just one example of the frustration of making recommendations without the power to compel change can be found in a letter written by the former Correctional Investigator to the Commissioner of Corrections in December 2002. In that letter, the Correctional Investigator openly criticized the CSC for its completely inadequate response to the very serious concerns raised by the Correctional Investigator in the previous annual report:

The Service's rejection of virtually all of our recommendations, and the absence of any substantive proposal for addressing the issues, represents a totally unreasonable embracing of the status quo. It further represents a failure to accept the significance of the areas of concern detailed or an acknowledgement of their past commitments to address these matters. My concern is that without accountability on these matters, the Correctional Service will have license to continue to ignore both the substance of the issues raised and the specifics of the recommendations provided to address these matters (OCI 2003: 4).

Since that letter was written, the Office of the Correctional Investigator has produced its Discussion Paper, *Shifting the Orbit* (2004), canvassing options for improving correctional accountability and oversight. The paper focuses on the need for adequate enforcement and remedial mechanisms to address abuses and rights violations in Canadian prisons.

Article 2 of the International Covenant on Civil and Political Rights (ICCPR), to which Canada is a signatory, requires that effective remedies be provided for persons

whose rights have been violated. This provision calls for every person to have their claims of human rights violations heard by a competent administrative, judicial or legislative authority. This is a right that is effectively denied to women in federal prisons due to the inadequate and flawed grievance and complaints process outlined above, a reality that was not lost on the United Nations Human Rights Committee in its recent Concluding Observations made in respect of Canada's fifth periodic report on implementation of the ICCPR (UNHRC 2005). The Committee's report included the following recommendation:

[Canada ]...should provide substantial information on the implementation of the recommendations of the Canadian Human Rights Commission as well as on concrete results achieved, in particular regarding the establishment of an independent external redress body for federally sentenced offenders and independent adjudication for decisions related to involuntary segregation, or alternative models (UNHRC 2005: Recommendation 18).

In the correctional context, at least two kinds of remedies are important when a violation of the law is found: a sanction to deter further breaches and abuses in the future, as well as compensation for the person whose rights have been violated. The model of judicial oversight proposed by Justice Arbour is consistent with both remedial aims, although further compensation will likely be required. Justice Arbour recommended legislative implementation of the following principle:

If legalities, gross mismanagement or unfairness in the administration of a sentence renders the sentence harsher than that imposed by the court, a

reduction of the period of imprisonment may be granted, such as to reflect the fact that the punishment administered was more punitive than the one intended (Arbour 1996: 183).

Such a remedial power is consistent with the judicial functions of *habeas corpus* review of illegal detention and Charter review of police and other government action to ensure that non-compliance with the law is effectively sanctioned and deterred. As Justice Arbour noted, the proposed remedy would be similar to the exclusionary rule in s. 24(2) of the Charter which empowers – and indeed, mandates – judges to exclude illegally-obtained evidence from a criminal trial, sometimes leading to the acquittal or stay of proceedings. The courts’ exercise of that power has been, in Justice Arbour’s view, “the single most effective means ever in Canadian law to ensure compliance by state agents with the fundamental rights in the area of search and seizure, arrest and detention, right to counsel and the giving of statements to persons in authority (1996: 183-184). It has changed police behaviour because there is a “real and understood social cost of allowing a potentially guilty accused to escape conviction.”

The proposed remedy is consistent with the judicial function and with remedial principles. In the sentencing context, judges are increasingly willing to order that time spent in pre-trial custody be credited as triple or even quadruple time. Such orders for “enhanced credit” over and above the “double time” usually ordered for remand time, are made to more appropriately reflect the harshness of overcrowded and inhumane conditions (R. v. Permesar 2003) and periods of arbitrary detention (R. v. Ichikawa 2004), as well as time spent in pre-trial protective custody (R. v. Coombs 2003) or effective segregation for women prisoners (R. v. Bennett 1993).

There would be no “windfall” to a prisoner through the exercise of a rule simply restoring the integrity of the original sentence (Arbour 1996: 184). However, the proposed remedy would provide a measure of *de facto* compensation (*i.e.*, restoration to their position but for the breach) to prisoners who have been subject to illegal conditions of confinement, although additional monetary or other compensation will also be necessary in appropriate cases. With respect to further compensation, at least in the case of Charter violations, section 24(1) of the Charter provides broad remedial jurisdiction to the courts, namely the power to order “such remedy as the court considers appropriate and just in the circumstances.” Clearly, judges are empowered to order damages for breach of Charter rights, and have done so in a variety of contexts (Roach 2002, see *e.g.*, *Auton v. British Columbia* 2001).

In a related development, the Supreme Court of Canada has recognized that it is appropriate in some cases for a court to retain jurisdiction over the implementation of *Charter* remedies, particularly where the government in question has delayed or otherwise demonstrated a failure to ensure prompt and full vindication of the rights in question (Doucet-Boudreau 2003). In that case, a majority of the court upheld the trial judge’s order that the Nova Scotia government reappear before the court at various points in the future to demonstrate how it was fulfilling its obligation to provide French language education in accordance with s. 23 of the *Charter*. Nova Scotia had failed to mobilize resources in the past to provide French language education in a timely manner and, as such, the ongoing jurisdiction of the court was appropriate and just to preserve the integrity of the original order (for the building of French language

schools). The court held that novel remedies, including ongoing judicial supervision, may be necessary to ensure that rights are vindicated.

Of course, for judicial oversight along the lines proposed by Justice Arbour to have any appreciable affect, access to justice must be ensured. Inadequate funding of legal aid across the country has exacerbated the challenges for federally sentenced women who attempt to access resources to address violations of their human, Charter and CCRA-protected rights and entitlements (Department of Justice 2002). Accordingly, it is our view that a federally-funded Prisoner Court Challenges Fund should be established and administered at arms-length from the government. The fund could be modeled on the existing Court Challenges Fund (currently available for language and equality rights challenges against the federal government) which funds individuals and groups who would normally not have the resources to vindicate their rights in court.<sup>9</sup> The Prisoner Court Challenges Fund would operate in conjunction with specialized legal clinics across the country that would be staffed by lawyers with experience in prisoners' rights and knowledge of the relevant law. Presumably, if each province had adequately-funded legal aid clinics, including prisoners' rights clinics, the Prisoner Court Challenges Fund would not be necessary. However, to ensure consistent access to resources to prisoners across the country (Department of Justice 2002), and recognizing the federal government's responsibility to administer federal prisons in a manner consistent with the Constitution and other laws, the Fund is necessary at this time.

It is primarily due to the stronger guarantees of independence and broader remedial powers of the courts that we see judicial oversight as better suited to promoting

accountability than administrative tribunals. The potential for “regulatory capture” of oversight bodies in the prison context is significant and the reluctance of correctional administration to yield to external recommendations is well-known (*e.g.*, Arbour 1996, OCI 2004). Furthermore, experience in the human rights context indicates that the tribunal process has not been as efficient or effective in redressing legal wrongdoing as advocates had hoped. Reports prepared for the Canadian Human Rights Act Review Panel cite problems including those related to compliance with remedial orders, screening of complaints, and carriage of complaints by the Commission rather than the complainants themselves (*e.g.*, Fairbairn and Priest 1999, Day and Brodsky 1999, Birenbaum and Porter 1999). Recommendations of the Review Panel’s report relating to these issues have not been implemented. Moreover, it is significant that although Justice Arbour had the option of recommending an administrative tribunal when she issued her report in 1996, she chose not to suggest such a process, instead citing judicial oversight as the model likely to be most effective.

It is worth noting that the opposition of the Correctional Service of Canada to judicial oversight is reminiscent of the opposition expressed to the introduction of independent chairpersons for disciplinary hearings, prior to their inception. Similarly, police services across the country expressed the same kind of concerns before the entrenchment of the Canadian Charter of Rights of Freedoms. For example, police officers argued that it would be unwieldy for them to be informing people who were detained or arrested of their rights to retain counsel at the like, while they were in the midst of an arrest. Twenty-three years later, it is clear that the issues and fears expressed by police officers and correctional authorities at the time were largely unfounded (*e.g.*, Stuesser 2002).

We see the introduction of judicial oversight, and access to the courts by prisoners, as operating alongside and in addition to effective first-instance and proactive processes. For example, while we would like to see more active coverage of systemic issues and we recognize that the depth and quality of their investigations often depends on the orientation and tenacity of individual investigators, we support the continued work of the Correctional Investigator. We also advocate the introduction of an independent inspector general to monitor the ongoing conditions of confinement experienced by women prisoners and to promote compliance with the law. Such a position must be provided with the mandate and requisite resources, including the financial means, to conduct annual audits of institutional adherence to governing legislation and policy within each of the regional prisons for women (in addition to conducting unannounced inspections) with the audits submitted to Parliament.

Finally, a few words must be said about Recommendation 17 in the CHRC Report (2003) advocating the use of mediation of prisoner complaints of human rights violations. In a context where the power is unequivocally and irrevocably unbalanced, the use of mediation is never appropriate. From time to time, women prisoners will request assistance in mediating disputes amongst themselves (*i.e.*, between prisoner peers). However, given the reality that correctional staff will always have power and control over the lives and experiences of women prisoners, mediation should not be accepted as a viable means of addressing allegations of rights violations or other issues that arise between prisoners and staff. Critical research into the use of mediation in family matters, particularly in instances involving violence against women, has demonstrated the devastating impact of using approaches that presume

equal positions for all parties in circumstances where one party has significantly greater authority, resources and power over the other (*e.g.*, Goundry et al. 1998). Similar concerns were also expressed by the Cross-Gender Monitor in relation to the use of mediation or other informal conflict resolution systems in women's prisons (Lajeunesse 2000: 37). In short, the use of mediation or other informal mechanisms to attempt to resolve complaints against correctional staff or administration is inappropriate for all prisoners, and is particularly problematic in the context of women's imprisonment.

### **Conclusion: Seizing the Opportunity**

Justice Arbour took pains to stress in her report that the relatively small number of federally sentenced women, combined with the generally low risk women pose to the community, must be seen as an opportunity to pilot innovative programs and initiatives (1996: 229), rather than as an excuse to ignore their situation. As discussed above, the cornerstone of any oversight strategy must be accessible and effective judicial review for illegalities and rights violations, including the remedial sanction proposed by Justice Arbour. In making her recommendation for judicial oversight to remedy interference with the integrity of the sentence, Justice Arbour addressed the concern that such a remedy would be an undue burden on an already stretched court system. She noted that any additional burden "would only be so in relation to the Correctional Service's non-compliance with the law" (Arbour 1996: 184), pointing out that there are ways to control frivolous litigation, should such a problem arise.

Ultimately, our society has chosen to utilize imprisonment and to do so at an increasing rate for women, and particularly Aboriginal women. Experience has taught us that oversight and accountability is extremely difficult due to the nature of imprisonment itself which is the very antithesis of fundamental values such as liberty and human dignity. But if our society is going to continue (misguidedly, in our view) to use imprisonment as it does, it cannot shrink from the imperative to comply with human rights, the Charter, and ultimately the Rule of Law itself. However, the difficulty of making prisons humane and effectively overseen – of requiring that the Rule of Law take root inside prison walls – should give us pause and encourage us to take seriously the need for alternatives to, and even abolition of, prisons.

As a start, corrections and criminal justice officials could and should take immediate action to reduce the number of women who are incarcerated in this country, for as Justice Arbour suggested, to do so would “free the resources necessary to ensure that those who are imprisoned are treated in accordance with the law” (1996: 184-185). The urgency of the situation has most recently found voice in the Concluding Observations of the United Nations Human Rights Committee reviewing Canada’s compliance with the International Covenant on Civil and Political Rights. The Committee called upon Canada to implement the recommendations of the Canadian Human Rights Commission (2003) and, in particular, to establish external redress and adjudication processes for prisoners (UNHRC 2005). Article 26 of the UNHRC report requires that Canada report back within one year on how it plans to implement those recommendations. If there was any doubt, the case for meaningful oversight and accountability has been made. It is time for action.

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## **Cases**

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Solosky v. The Queen, [1980] 1 S.C.R. 821.

Spindler v. Millhaven Institution (2003), 15 C.R. (6<sup>th</sup>) 183 (Ont. C.A.).

Valente v. R., [1985] 2 S.C.R. 673, 24 D.L.R. (4<sup>th</sup>) 161, 23 C.C.C. (3d) 289.

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<sup>1</sup> Justice Lousie Arbour was a justice of the Ontario Court of Appeal at the time of her work as Commissioner of Inquiry. She was subsequently appointed to the Supreme Court of Canada and, most recently, to her current position as the United Nations High Commissioner for Human Rights.

<sup>2</sup> Section 77 of the CCRA provides that the CSC “shall (a) provide programs designed particularly to address the needs of female offenders; and (b) consult regularly about programs for female offenders with (i) appropriate women's groups, and (ii) other appropriate persons and groups with expertise on, and experience in working with, female offenders.” Section 80 provides that the CSC “shall provide programs designed particularly to address the needs of aboriginal offenders.” CAEFS has long taken the position that these sections create an obligation that the CSC be accountable to equality-seeking women’s groups and Aboriginal women’s groups in a meaningful way.

<sup>3</sup> See also the Paris Principles, established by the United Nations as standards for human rights and ombuds offices in member states, which include these and other criteria.

<sup>4</sup> Section 99(1) of the Constitution Act, 1867 provides that “...the Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor General on Address of the Senate and House of Commons.”

<sup>5</sup> The two other groups are Strength in Sisterhood, an organization of current and former women prisoners, and the Native Women’s Association of Canada, the leading political organization and lobby group for Aboriginal women in Canada.

<sup>6</sup> The other two guiding principles of the Human Rights in Action project are commitments to a substantive equality approach and inclusiveness.

<sup>7</sup> However, this right is currently threatened by a series of lower court decisions curtailing the availability of *habeas corpus* review in the prison context. See, for example, Spindler v. Millhaven Institution (2003) and May v. Ferndale Institution (2003). May has been appealed to the Supreme Court of Canada and the court’s decision is on reserve.

<sup>8</sup> The Canadian Bar Association has announced plans to launch a legal action for recognition of a Constitutional right to legal aid:

[http://www.cba.org/CBA/News/2005\\_Releases/2005-02-19\\_lacounsel.aspx](http://www.cba.org/CBA/News/2005_Releases/2005-02-19_lacounsel.aspx)

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<sup>9</sup> For information about the Court Challenges Program, see <http://www.ccppcj.ca/e/ccp.shtml>.