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PRESENTATION OF THE CANADIAN PRISON LAW ASSOCIATION TO STRATEGIC POLICY / POLITIQUE STRATÉGIQUE, CORRECTIONAL SERVICE OF CANADA / SERVICE CORRECTIONNEL DU CANADA

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The Canadian Prison Law Association ("CPLA") is a national organization of prison law practitioners from across the country whose purpose is to advocate on behalf of incarcerated persons and promote the rule of law as it affects the prison community. Since our founding in 1985 it has been our privilege to submit comments and appear before Committees of Parliament and the Senate on matters affecting the legal environment of the penitentiary and parole system. We should mention that while our members are legal professionals all activities undertaken on behalf of the CPLA are performed on a volunteer basis.

The CPLA is concerned that the *Regulations Amending the Corrections and Conditional Release Regulations* providing greater authority to search and restrict visits (the "proposed amendments") do not take into account the full spectrum of the Correctional Service of Canada's ("CSC") drug strategy, which includes prevention, treatment and enforcement. The proposed amendments focus exclusively on enforcement, to the extent that prisoners' entitlement to visits are further diminished. The proposed amendments do nothing to improve harm reduction or treatment which are essential to assisting prisoners to overcome addiction.

The proposed amendments are contemplated by the 2007 Report of the Correctional Service of Canada Review Panel, *A Roadmap to Strengthening Public Safety*. This report was the subject of a thorough analysis and criticism in Michael Jackson, QC and Graham Stewart's *A Flawed Compass: A Human Rights Analysis of the Roadmap to Strengthen Public Safety* (2009). The CPLA adopts the analysis set out in the chapter entitled "Drugs in Prison" in *A Flawed Compass*.

A. The Proposed Amendments

The proposed amendments will:

- allow the warden to designate unspecified "secure areas" of the institution where staff may conduct routine non-intrusive searches, routine frisk

searches or routine strip searches of prisoners, and routine non-intrusive searches or routine frisk searches of visitors;

- lower the standard from "believes" on reasonable grounds to "suspects" on reasonable grounds that a closed visit is necessary for the security of the institution or safety of any person; and

- allow the warden or designated staff to refuse or suspend a visit on the lower standard of suspicion.

B. Scope of the Proposed Amendments

There is no denying the fact that drugs are a problem for the majority of prisoners, and that drug use contributes to crime and health care problems in Canadian society. It is estimated that 80% of federal prisoners in Canada have problems with drugs and/or alcohol, many of whom committed a crime under the influence of drugs or to support a drug habit, and many of whom suffer from additional mental health problems. Canadian prisoners are 7-10 times more likely to be HIV positive and 30 times more likely to have hepatitis C than other Canadians.[1]

Despite compelling evidence that a zero-tolerance approach to drugs in prison is not an achievable goal, and compelling evidence that drug treatment and harm reduction strategies are successful, CSC has responded to the drug crisis by focussing on strategies to control the flow of drugs from entering prisons. The Standing Committee on Public Safety and National Security was critical of this approach in its 2010 report *Mental Health and Drug and Alcohol Addiction in the Federal Correctional System*.

According to that report, in 2008, the Minister of Public Safety was provided $122 million over five years to spend on CSC's drug strategy which included interdiction measures, as well as substance abuse programs for prisoners. The Committee refers to evidence before it that all of this funding was directed toward drug control efforts, such as drug dogs, ion scanner and x-ray machines. The Committee notes that this was "to the detriment of substance abuse programs and harm reduction initiatives".

Evidence presented by Don Head, the Commissioner of CSC, to the Standing Committee in advance of its 2012 report *Drugs and Alcohol in Federal Penitentiaries: An Alarming Problem* demonstrated that the $122 million dollars spent on interdiction

[1] *Mental Health and Drug and Alcohol Addiction in the Federal Correctional System*. Report of the Standing Committee on Public Safety and National Security, House of Commons Canada, December 2010, 40th Parliament, 3rd Session.

tools since 2008 did not lead to any reduction in drug use in Canadian prisons, and that the spending was "largely ineffective" according to CSC's report on drug-testing.[2]

In its 2010 report *Mental Health and Drug and Alcohol Addiction in the Federal Correctional System*, the Committee encourages CSC to take an approach that balances interdiction efforts with rehabilitation and prevention efforts. In addition to drug interdiction monitoring activities, the Committee recommends that the federal government and CSC:

- Explore all program options that are most effective at reducing the spread of infectious diseases in prisons (for example, a needle exchange program was proposed by the Canadian HIV/AIDS Legal Network) (Recommendation 29);

- Expand the use of 12 Step programs in prisons to deal with addiction (Recommendation 30);

- Encourage the creation of drug treatment units in prisons (Recommendation 31); and

- Allocate additional resources for drug treatment, harm reduction and prevention (Recommendation 32);

The CPLA is disappointed that the scope of the proposed amendments is limited to drug interdiction strategies while drug treatment and harm reduction strategies that are demonstrated to be effective in reducing drug use and the harms caused by drug use, remain untapped.[3]

The CPLA supports the implementation of evidence-based strategies that would reduce the harms caused by drug use in prison, such as needle exchange programs, supervised use programs, safe tattoo programs and expansion of methadone programs. The CPLA further supports initiatives that would provide support for prisoners to overcome their addictions through programs, treatment and therapy. Such programs would provide prisoners with coping skills that they can carry with them upon release to the community.

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[2] Dissenting Opinion of the New Democratic Party of Canada, April 10, 2012, in response to the Report of the Standing Committee on Public Safety and National Security, House of Commons Canada report *Drugs and Alcohol in Federal Penitentiaries: An Alarming Problem,* April 2012.

[3] See, for example, *Clean Switch: The Case for Prison Needle and Syringe Programs in Canada*, Canadian HIV/AIDS Legal Network, 2009.

C. Legal Entitlement to Visits

The CPLA is concerned that the proposed amendments will have the effect of imposing further restrictions on the legal entitlement of prisoners to visits.

For prisoners who are fortunate enough to have friends and family members able and willing to visit with them, legislation that allows for further restrictions on visits would have a devastating effect on their wellbeing, and ultimately, their ability to rehabilitate and reintegrate successfully into society. Visitors may be deterred from visiting their loved ones by the increased incident of being wrongly accused of bringing drugs into prison. Further limits would make it even more difficult for prisoners to establish or maintain community support that is necessary for a successful return to society.

The purpose of CSC under s. 3 of the *Corrections and Condition Release Act* (the "CCRA") is to "contribute to the maintenance of a just, peaceful and safe society by

> (a) Carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and
>
> (b) Assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community."

Visits are a legal entitlement under s. 71(1) of the CCRA:

> 71. (1) In order to promote relationships between inmates and the community, an inmate is entitled to have reasonable contact, including visits and correspondence, with family, friends and other persons from outside the penitentiary, subject to such reasonable limits as are prescribed for protecting the security of the penitentiary or the safety of persons.

The CCRA enshrines the *Charter* value of freedom to associate by establishing the entitlement of prisoners to have visitors.

A Flawed Compass cites Florida State University research conducted in 2008 as "the most comprehensive study to date on the relationship between visiting and recidivism". According to this study, visitation reduces recidivism: "any visitation and more frequent visitation were both associated with a lower likelihood of recidivism."

A 2009 CSC study on visiting and post-release outcomes for Canadian federal prisoners "conclusively demonstrated that a positive association exists between receiving visits (including private family visits) and lower likelihoods of readmission". Prisoners who received visits from a spouse were less likely to reoffend than their counterparts who were not visited by spouses. The study suggests that encouraging visits in custody can result in "significant cost savings" of approximately $65,000 per year for each prisoner who is supervised in the community rather than in prison.[4]

The proposed amendments will further restrict prisoners' legal entitlement to visits by lowering the standard from belief to suspicion that a visitor may be bringing drugs into the prison. Any further restrictions on prisoners' entitlement to have visits is contrary to the purpose of CSC to assist prisoners in their rehabilitation efforts and the spirit of s. 71(1) of the CCRA which enshrines the *Charter* value of the right to association.

The authors of *A Flawed Compass* point out that the current CCRA and regulations were drafted to ensure that the *Charter* rights of prisoners and visitors are protected and that any limits to these rights are the least restrictive, or necessary and proportionate. The authors suggest that any changes to the current regulations would "raise serious questions of constitutionality".

D. Effect of Further Restrictions on Visits

The CPLA has serious concerns that CSC is now routinely failing to meet the legal test, even under the current legislation of reasonable grounds to believe that a visit would result in drugs entering the institution. *A Flawed Compass* provides a detailed analysis of the fallibility of non-intrusive search tools such as ionscan equipment and drug detection dogs. The authors provide compelling examples of how visits review boards often use a single indication by ionscan or drug dog as the only evidence to restrict or refuse visits, despite policy guidelines that a single indication is not enough evidence to restrict a visit. This is contrary to the test for a reasonable ground belief, which is stated in the Canada Gazette's *Regulatory Impact Analysis Statement* as requiring "an objective basis for the belief in the alleged facts based on compelling and credible information that can be objectively established".

A Flawed Compass refers to a 2006 audit by CSC's Internal Audit Branch of 13 institutions' compliance with law and policy in relation to restrictions on visits. The audit revealed that in many instances CSC was not in compliance with policy and

[4] D Derkzen, R Gobeil & J Gileno, *Visitation and Post-Release Outcome Among Federally-Sentenced Offenders*. Correctional Service of Canada (June 2009).

procedures and that visits were being denied on the basis of false positive ionscan testing alone.

The Canada Gazette's *Regulatory Impact Analysis Statement* describes a reasonable ground suspicion as a "lower standard" than belief that "calls for a constellation of objectively discernible facts which give rise to the suspicion of the criminal activity or a risk to public safety".

The CPLA is concerned that CSC staff, who are now routinely restricting visits based on a single indication by unreliable non-intrusive search tools, will apply an even lower standard for restricting visits than under the current law and policy if the proposed amendments are passed into law. If visits were restricted on a routine basis in the past, they will be restricted more often under the proposed amendments.

By lowering the test to suspects on reasonable grounds, CSC risks making routine decisions to restrict or deny visits based on little or no evidence that courts will likely find to be arbitrary. The danger of taking dramatic decisions based on suspicion alone is illustrated by numerous court actions successfully brought by prisoners (see for example, *Steele v. Canada (Attorney General),* 2012 FC 380 and *Paul v. Canada (Attorney General),* 2012 FC 64, where the Federal Court finds that the reason for an involuntary transfer cannot be mere suspicion).

It is essential that the steps CSC takes to suppress the introduction of drugs into institutions be based on correct information. Restricting the visits of prisoners who are not involved in the drug trade will do immeasurable harm to both the wrongly accused prisoners and their families. The goal of CSC's interdiction strategy must be to incapacitate and deter the people who are actually responsible for bringing drugs into prisons. Suspicion as a standard will have little or no impact on the amount of drugs that are brought into prison, and is counterproductive in that it will work against CSC's own purposes of assisting prisoners to build community and family support and to successfully rehabilitate.

E. Increase in Searches of Prisoners

The proposed changes allow the warden to designate "secure areas" in the penitentiary where prisoners can be subjected to routine non-intrusive searches, routine frisk searches and routine strip searches. The Canada Gazette *Regulatory Impact Analysis Statement* provides gymnasiums as an example of additional secure areas.

There are no parametres in the proposed regulations on the addition of secure areas. The CPLA is concerned that prisoners may be subjected to an unreasonable increase

in frisk and strip searches. For some prisoners, such as prisoners who have a history of being sexually abused or transgender prisoners, frisk and strip searches can be an overwhelmingly traumatic experience. These prisoners may already avoid certain activities or release opportunities in order to avoid the humiliation of a strip search. Adding secure areas where prisoners will be subjected to additional searches, such as gymnasiums, may prevent vulnerable prisoners from participating in additional activities that may be of great benefit to their wellbeing and rehabilitation efforts.

The CPLA is also concerned that the focus on increasing drug interdiction measures on prisoners and their visitors is misguided. While in practice, prisoners and their visitors are routinely searched for drugs, CSC staff are not subjected to the same degree of routine scrutiny, despite several occurrences of CSC staff smuggling drugs into prisons.[5]

F. Conclusion

The CPLA calls on government to reject the proposed amendments that would increase routine searches of prisoners and their visitors and restrict visits on the basis that the evidence does not demonstrate that these measures will result in the reduction or elimination of drugs in prisons.

The CPLA further calls on government to implement evidence-based programs to assist prisoners in overcoming addictions and evidence-based programs to alleviate the harm caused by drug use in prison, such as needle exchange programs, supervised use programs, safe tattoo programs and expansion of methadone programs.

All of which is respectfully submitted.

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[5] See Toronto Star, "Drugs, alcohol, weapons smuggled into Canada's prisons rising" by Kenyon Wallace (February 4, 2012): "last September, Don Head, commissioner of the Correctional Service of Canada, told a parliamentary committee that it had dismissed 12 staff members that year for smuggling contraband into prisons." http://www.thestar.com/news/canada/2012/02/04/drugs_alcohol_weapons_smuggled_into_canadas_prisons_rising.html. See also The Province, "Former B.C. prison guard who smuggled drugs into Kent Institution gets jail time" by Jennifer Saltman, (May 3, 2014). http://www.theprovince.com/news/Former+prison+guard+smuggled+drugs+into+Kent+Institution+gets+jail+time/9801775/story.html.