Prisoners' Legal Services
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VIA EMAIL: Heidi.Scott@leg.bc.ca

Laurie Throness, MLA
Chilliwack-Hope
Parliamentary Secretary for Corrections
Room 276 Parliament Buildings
Victoria, BC V8V 1X4

Dear Mr. Throness:

Re: Roundtable Meeting on safety of inmates, staff and the community
January 16, 2014, Quality Inn Maple Ridge

Thank you for extending an invitation to Prisoners' Legal Services to attend the January 16, 2014 roundtable meeting on safety issues within BC Corrections. As the Executive Director and supervising lawyer of Prisoners' Legal Services, it will be my honour to attend.

Prisoners' Legal Services is a legal aid office serving prisoners in British Columbia since 1980. We assist prisoners with issues that affect their liberty rights under s. 7 of the *Charter*, as well as health care issues and human rights. Our legal advocates and lawyers have identified a number of areas in which the safety of prisoners, staff and the community could be improved.

BC Corrections' mission statement is to "reduce reoffending and protect communities". In my submission, this cannot be achieved unless prison administrators and correctional officers respect the rule of law and the human dignity of prisoners. If prisoners are not treated fairly while in pre-trial custody or while serving their sentences, we cannot reasonably expect them to have a respect for the rule of law when they are released to the community.

For this reason, I have taken a broad interpretation of safety issues for the purpose of this roundtable meeting. In the following pages, I will outline the concerns and recommendations of Prisoners' Legal Services in relation to:

1. the use of segregation, separate confinement and Enhanced Supervision Placement;

2. the disciplinary hearing process;

3. health care; and

4. programs and release planning.

Each of these issues relates to the safety of prisoners, institutional staff and the community.

1. Use of segregation, separate confinement and Enhanced Supervision Placement

(a) Legislation and policy

Segregation, separate confinement and Enhanced Supervision Placement ("ESP") involve solitary confinement in a cell, usually for 23 hours per day, to punish prisoners, to provide for their protection or the protection of others, or for the purpose of behaviour modification.

Section 27(1)(d) of the *Correction Act Regulation,* B.C. Reg. 58/2005, allows prisoners to be held in segregation for up to 30 consecutive days as punishment for breaching an institutional rule (or up to 45 consecutive days for more than one breach).

Sections 17 and 18 of the *Correction Act Regulation* allow the person in charge to order a prisoner to be held in separate confinement for safety reasons. A new order must be made every 15 days, but there are no legislative or policy limits on how long a prisoner may be held in separate confinement.

No legislation governs the use of ESP. ESP is set out in the BC Corrections Adult Custody Policy Manual and each institution has its own ESP procedures. ESP involves keeping prisoners under behavioural contracts in solitary confinement for extended periods of time. Prisoners are expected to graduate to lower levels of ESP when their behaviour improves, which involves increasing amounts of time out of the

cell. Provincial institutions generally keep prisoners at stage 1 of ESP for three weeks. Stage 1 involves isolating the prisoner in a cell for 23 hours per day.

Subsection 17(1)(a)(vi) of the *Correction Act Regulation* allows a prisoner to be separately confined if the person in charge reasonably believes that the prisoner "suffers from a mental illness". Adult Custody Policy 4.8.3 indicates that "[a]ny inmate may be internally classified to an enhanced supervision placement (ESP) when identified as high risk due to: Mental or physical disorders..." In our submission, these provisions are discriminatory under human rights law on the ground of physical or mental disability.

(b) Literature and Case Law Review

On August 5, 2011, the Special Rapporteur of the United Nations Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, issued a report on solitary confinement. Mr. Méndez reviews the work of experts internationally who conclude that negative health effects can surface after only a few days in solitary confinement. Negative health effects worsen the longer an individual is kept in isolation. He points to research that shows solitary confinement causes "psychotic disturbances" or "prison psychoses" with symptoms including anxiety, depression, anger, cognitive disturbances, perceptual distortions, paranoia and psychosis, and self-harm.

Mr. Méndez warns that some of the effects of solitary confinement are long-term, including continued sleep disturbances, depression, anxiety, phobias, emotional dependence, confusion, impaired memory and concentration. He notes "lasting personality changes often leave individuals formerly held in solitary confinement socially impoverished and withdrawn, subtly angry and fearful when forced into social interaction" that impairs a person's ability to readjust to prison life outside of segregation and makes successful community reintegration difficult. He asserts that "long periods of isolation do not aid the rehabilitation or re-socialization of detainees" which is contrary to the essential goals of rehabilitation and reintegration of offenders into society. He calls for the absolute prohibition of solitary confinement for more than 15 days.

Mr. Méndez also discusses research indicating that solitary confinement often severely exacerbates previously existing mental conditions, resulting in dramatic deterioration in isolation and can result in self-harm or suicide. He calls for the abolition of solitary confinement for people with mental disabilities.

These concerns are illustrated by the Canadian case of *Tekano v. Canada (Attorney General)*, 2010 FC 818. This federal prisoner was held in long-term solitary confinement which exacerbated his Post Traumatic Stress Disorder and Attention

Deficit Hyperactive Disorder to the point that he engaged in severe self-harm. The Federal Court refers to a medical expert who describes segregation as being "akin to mental torture" for a prisoner who suffers from Attention Deficit Hyperactive Disorder.

In Mr. Méndez' opinion, solitary confinement cannot be justified for the purpose of punishment as it "imposes severe mental pain and suffering beyond any reasonable retribution for criminal behaviour" constituting a violation of the Convention against Torture and the International Covenant on Civil and Political Rights.

Mr. Méndez recommends that "solitary confinement should be used only in very exceptional circumstances, as a last resort, for as short a time as possible" and reviews of solitary confinement should be conducted in good faith by an independent body. He recommends that prisoners in solitary confinement be monitored by independent medical personnel with specialized training in psychology.

In *Bacon v. Surrey Pretrial Services Centre*, 2010 BCSC 805, the Honourable Mr. Justice McEwan of the BC Supreme Court considered BC Corrections' use of solitary confinement on prisoner James Bacon. In that case, Professor of Psychology Craig Haney provides the opinion that the conditions in segregation at the Surrey Pretrial Services Centre ("SPSC") were similar to the most severe American solitary or "supermax" facilities. He describes the segregation unit at SPSC as "truly horrendous".

Professor Haney is critical of SPSC for failing to provide adequate medical and psychological monitoring of prisoners, and for failing to provide specialized training to staff on the psychological effects of long-term isolation. (*Bacon*, ¶ 170).

Mr. Justice McEwan found that BC Corrections' placement of Mr. Bacon in solitary confinement constituted cruel and unusual treatment under s. 12 of the *Charter* (Bacon, ¶ 353). He also found that BC Corrections violated Mr. Bacon's rights under s. 7 of the *Charter*. He found SPSC's 15-day reviews for separate confinement violated procedural fairness and natural justice as they were prepared without a hearing and without providing Mr. Bacon with an opportunity to respond, they were based on no information or information that was not assessed and no adequate reasons were given (*Bacon*, ¶ 109, 352 and 354).

Mr. Justice McEwan refers to the Honourable Louise Arbour, *Commission of Inquiry into Certain Events at the Prison for Women in Kingston*, 1996 (the "Arbour Report"). The Arbour Report warns that segregation often leads prisoners to become desperate for any means to assert some form of control over their lives, which results in crises including violence, suicide and self-injury. Madam Justice Arbour found that the indefiniteness of the isolation had the most demoralizing effect on prisoners.

Mr. Justice McEwan rejects the argument that solitary confinement and the associated deprivations are necessary in order to keep staff and other prisoners safe, or necessary in light of limited resources. He finds this to be a "manifestly false dichotomy" that ignores a range of alternative ameliorative options that are available. (*Bacon*, at ¶ 296.)

The Court in *Bacon* is critical of the mentality within BC Corrections that "all is denied that is not granted in the discretion of the prison administration". This mentality is demonstrated by the use of the word "privileges" to describe the basic rights listed under s. 2 of the *Correction Act Regulation*, such as "regular meals of the type ordinarily served to inmates" and "clothing, a mattress and bedding". He notes that this mentality is contrary to the concept that prisoners retain their rights other than those that are necessarily taken away. Mr. Justice McEwan finds this to be "a fundamental affront to the concept of human dignity". He states:

> On the level of "pens" and "inhalers" or the placement of television sets, it is not a question of catering to trivial complaints, but of recognizing the psychologically corrosive effect that having no autonomy over even the smallest things can have on a person. (*Bacon* at ¶ 315.)

The Court in *Bacon* found that BC Corrections ignored, misinterpreted or misapplied the *Correction Act,* SBC 2004, c 46, the *Correction Act Regulation* and the Adult Custody Policy Manual to the extent that it was impossible to adjudicate on the constitutionality of the legislation (*Bacon* at ¶ 355). The failure of BC Corrections to comply with its own legislation lends support to a call for the implementation of an independent review process for continuing solitary confinement under s. 18 of the *Correction Act Regulations*.

Segregation Is Our Prison Within The Prison is a report produced for the Correctional Service of Canada by Dr. Margo Rivera (May 4, 2010) (the "Rivera Report"). The Rivera Report makes a number of practical recommendations for reform of the federal prison segregation system with an emphasis on the segregation of prisoners with mental health concerns. Many of Dr. Rivera's recommendations would also improve the safety of prisoners, staff and the community if implemented by BC Corrections.

Dr. Rivera recommends that segregation be used only when credible evidence of danger cannot be managed in any other way. She recommends that mediation be used to address aggressive behaviour in place of segregation. Dr. Rivera emphasizes the importance of ensuring a high quality of staff who work in segregation units who are trained in conflict-diffusion skills and who use professional, respectful, encouraging and empowering communication with prisoners in segregation. She advocates for more opportunities for prisoners to leave the unit for social interactions, more access to programming and education in segregation, access to television in segregation to decrease isolation and increase stimulation, and implementation of Behavioural

Counsellors to create behaviour-changing programs similar to the way Dialectical Behavioural Therapy has been used in women's institutions.

Dr. Rivera further recommends that rehabilitation, special-needs or complex needs units be established in every institution to decrease the number of vulnerable prisoners placed in segregation, and that intermediate care programs be established for prisoners with chronic psychiatric problems, personality disorders, brain injury, low cognitive functioning or who engage in self-harm. She also recommends improving access to Aboriginal services in segregation.

(c) Observations of Prisoners' Legal Services

Prisoners' Legal Services receives a high volume of calls from provincial prisoners who, in our view, have been denied their rights under s. 17 and 18 of the *Correction Act Regulation* to adequate reasons for their separate confinement, notice of the period of time they will be held in separate confinement and the reason for the length of time. Our clients are never provided an in-person hearing and are rarely provided notice of their right to make submissions regarding their separate confinement. In our experience, reasons for continuing separate confinement under s. 18 of the *Correction Act Regulation* most often do not constitute reasons under law, but are merely a restatement of the legislative criteria. The institutions do not provide enough information for a prisoner to be able to respond to allegations.

Whenever we have referred a client to counsel to bring a *habeas corpus* application in BC Supreme Court, the client is released from separate confinement, making the application moot. While this is a good result for the individual client at the particular moment, this allows for the institutions to continue to routinely violate the procedural fairness protections of the *Correction Act Regulation* and the *Charter* without any judicial oversight.

Prisoners' Legal Services receives many complaints from prisoners placed to ESP. In our view, ESP is separate confinement by another name and the legislative procedural fairness protections that apply to separate confinement must also apply to ESP placement. Our clients are rarely afforded these protections. The reasons provided to prisoners for placement in ESP take the form of a "case plan" and are minimal, non-descriptive and seem to be cut and pasted week-to-week. Although by policy case plan reviews are to be conducted on a weekly basis and prisoners are to be afforded an opportunity to make submissions, our clients report that they often are not aware of the right to make representations or given a deadline to make submissions. In general, the first time a prisoner has notice of the review is when the case plan indicating the decision to maintain ESP placement is slid under a prisoner's door. The prisoner might make a complaint to the person in charge under s. 37 of the *Correction*

Act Regulation, but this complaint is not considered or referred to in the following week's decision to maintain ESP placement.

Prisoners' Legal Services' clients often report that they are sentenced to a term of segregation after being found guilty of a disciplinary charge, and are then held under s. 18 of the *Correction Act Regulation* after the segregation term expires, based on the same behaviour that led to the charge. In cases where a prisoner is found not guilty, or the conviction is overturned on appeal by the Investigation and Standards Office, he or she is often put in separate confinement based on the allegation raised in the charge. These clients are often then moved to ESP, where they can only graduate to lesser deprivations of liberty if they are able to improve their behaviour. For prisoners who face difficulties with their behaviour as a result of long term isolation or because of pre-existing mental disabilities, it is often impossible for them to improve their behaviour long enough to get out of this spiral of isolation. These clients may be transferred for a "fresh start" at another institution but inevitably will be placed on s. 17 and 18 upon arrival at the new institution. We have clients who have spent months, and sometimes years, in almost continual isolation within BC Corrections facilities. One of our clients, who had no pre-existing diagnosed mental disorder, was held in isolation so long that he had difficulty speaking upon his release.

It is clear from the experts cited in the above referenced reports and case law that it is dangerous to the community to release prisoners from solitary confinement directly to the streets. Prisoners who suffer the long term effects of isolation, including fearfulness and anger, have not been served well by BC Corrections in the goal of rehabilitation and reintegration. The practice of holding prisoners in solitary confinement is contrary to BC Corrections' mission statement of reducing reoffending and protecting communities, which can only happen if prisoners are able to rehabilitate and reintegrate successfully into society upon release.

(d) Recommendations

Prisoners' Legal Services makes the following recommendations regarding the use of segregation, separate confinement and ESP in BC provincial prisons:

1) That prolonged separate confinement, segregation or ESP placement (more than 15 days) be prohibited.

2) That separate confinement, segregation or ESP placement be prohibited for prisoners who are at risk of suicide or self-injury, or who suffer from mental disabilities that may be exacerbated in isolation.

3) That the use of segregation as punishment for breaches of institutional rules be prohibited.

4) That an independent and impartial review body be established to review separate confinement decisions under s. 18 of the *Correction Act Regulation*, that reviews be conducted on the basis of an oral hearing, and that the prisoner be afforded the right to be represented in person by counsel and be provided adequate written reasons.

5) That prisoners in segregation, separate confinement and ESP be provided daily independent medical and psychological monitoring.

6) That BC Corrections abolish the use of ESP, or significantly modify the program to exclude the use of isolation and in its place, provide effective behaviour-changing programs.

7) That a uniform BC Corrections-wide procedure be developed for ESP to replace the individual standard operating procedures at each institution.

8) That legislation, policy and practice be amended to ensure that prisoners with physical or mental disabilities are not discriminated against in the use of segregation, separate confinement or ESP.

9) That prisoners in segregation, separate confinement or ESP be treated equivalently to other prisoners in all material respects, that they be provided "privileges" equivalent to those of the general population, including contact with other prisoners when possible without compromising safety, television access and the same amount of time out of their cells as other prisoners.

10) That segregation, separate confinement and ESP unit staff be trained in conflict diffusion skills and the psychological effects of solitary confinement. Performance reviews should include functioning regarding professional, respectful, encouraging and empowering communication with prisoners. Units should be staffed according to skills rather than (lack of) seniority and a mentoring program should be implemented where staff with demonstrated excellent attitudes and communication skills with prisoners mentor less experienced staff.

11) That prisoners in separate confinement, segregation or ESP be provided regular psychological therapeutic services and programs.

2. The Disciplinary Hearing Process

(a) Legislation and Policy

Section 25(1) of the *Correction Act Regulation* allows disciplinary hearings to be presided over either by a person appointed by the assistant deputy minister, or by a staff person appointed by the person in charge, who is not independent of the institution laying the charge. Prisoners' Legal Services has never seen a provincial disciplinary hearing presided over by someone appointed by the assistant deputy minister under s. 25(1)(b) of the *Correction Act Regulation*. In our experience, hearings are always decided by a member of the institution's staff.

The standard of proof to be applied at disciplinary hearings is not identified in legislation. The standard applied by BC Corrections is the civil standard of "balance of probabilities". A balance of probabilities standard of proof requires a finding of guilt if the decision maker believes that on balance, the accused was more likely than not to have committed the offence. This is a less onerous standard of proof than the criminal "beyond a reasonable doubt" standard that is applied in criminal proceedings.

The possible penalties available for a breach of an institutional rule include up to 30 days of segregation for one breach or up to 45 days for more than one breach, and loss of earned remission of up to 60 days. Both represent a deprivation of liberty under s. 7 of the *Charter*.

(b) Case law Review and Review of Other Jurisdictions

The BC disciplinary system is pre-*Charter* in both design and application. Section 7 of the *Charter* is violated when a prisoner is punished with a loss of liberty, such as segregation or loss of earned remission, and a breach of procedural fairness has occurred. Section 7 of the *Charter* reads:

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

It is well established in law that the requirements of independence and impartiality are integral components of the principles of fundamental justice for the purposes of s. 7 of the *Charter (Ruffo v. Conseil de la Magistrature*, [1995] 5 S.C.R. 267 at ¶ 38).

A standard of proof of "beyond a reasonable doubt" is required when the government prosecutes an individual and the liberty of the individual is at stake (*F.H. v. McDougal*, [2008] 3 S.C.R. 41 at ¶ 42). The "beyond a reasonable doubt" standard of proof is "inextricably linked to the presumption of innocence" (*R. v. Lifchus*, [1997] 3 S.C.R.

320 at ¶ 13). The presumption of innocence is integral to the protection of life, liberty and security of the person guaranteed by s. 7 of the *Charter* (*R. v. Oakes*, [1986] 1 S.C.R. 103, at ¶ 29).

The *Corrections and Conditional Release Act*, S.C. 1992, C. 20 and *Regulations*, SOR/92-620 govern federal prison disciplinary hearings. Section 24 of the *Corrections and Conditional Release Regulations* establishes the ministerial appointment of Independent Chairpersons. Subsection 27(2) requires serious disciplinary offences to be heard by Independent Chairpersons, except in "extraordinary circumstances".

The standard of proof applied to federal disciplinary hearings is the more onerous criminal standard of "beyond a reasonable doubt" (s. 43(3) of the *Corrections and Conditional Release Act*).

A constitutional challenge to the lack of independent adjudicators in the Alberta prison disciplinary hearings was brought successfully in *Currie* v. *Alberta (Edmonton Remand Centre)* 2006 ABQB 858 ("*Currie*"). The Alberta Court of Queen's Bench found that the disciplinary boards failed to meet the requirements of independence under s. 7 of the *Charter* (*Currie*, ¶ 168).

The Alberta Court of Queen's Bench identifies the following indices of a reasonable apprehension of bias in prison disciplinary hearings:

(i) Witnessing officers may be superior or equal in rank to the staff person presiding over the hearing. This would put the adjudicator in the position of having to decide between a superior or equally ranking staff person's version of events and the evidence of the accused prisoner.

(ii) It is possible for a charging officer to be superior to the adjudicator of the hearing.

(iii) An informed and objective person would be concerned that staff who lay or approve charges would pressure colleagues adjudicating the hearings to uphold the charges.

(iv) Because adjudicators are senior staff, they often come to hearings with previous knowledge of the incident and the alleged offender.

(v) Institutional witnesses testified that it was important for staff morale that staff members are seen as supporting their fellow staff members.

(vi) There was evidence of actual bias against prisoners – where there is an issue of credibility between staff and prisoners, decision makers said they would

> support the evidence of staff over prisoners before hearing the evidence. (*Currie*, ¶ 175-182.)

All of these indices of a reasonable apprehension of bias also exist under the disciplinary hearing scheme in BC.

The Alberta Court of Queen's Bench considers whether appeal to an ombudsman, such as the Investigation and Standards Office of the Ministry of Justice in BC, would solve the problem of lack of independence at the hearing level, and determined that it would not. The Court finds that such a right of appeal shares the same limitations as a remedy through the courts by way of judicial review – by the time an appeal is heard, punishment has already been carried out (*Currie*, ¶ 185).

The Court further concludes that while training board members would improve procedural fairness, it "cannot remove the inevitable bias in favour of the evidence of correctional officers" (*Currie*, ¶ 197).

The Court concludes:

> There is such a clear conflict between the duty of staff members of a disciplinary board in Alberta's correctional centres to maintain discipline and staff morale and the right of the prisoner to have his charges dealt with before a tribunal with a sufficient degree of independence and impartiality, that both the perception of lack of independence and bias and the fact (as proved in evidence) that in a substantial number of cases (almost all cases where there is a conflict between the evidence of correctional officers and that of inmates) there is a reasonable apprehension of bias. (*Currie*, ¶ 196.)

The Court declares the impugned legislation unconstitutional and suspends its declaration of invalidity for one year to allow Alberta to implement a scheme in compliance with s. 7 of the *Charter*. Alberta did not appeal the decision and has since amended its legislation to be in compliance with the Court's judgment.

(c) Observations of Prisoners' Legal Services

Although the current BC Corrections disciplinary hearing system provides a right of appeal to the Investigation and Standards Office, in most cases, the prisoner will have served his or her time in segregation by the time the appeal is decided. A successful appeal is a hollow victory for someone who has already served the punishment of segregation.

The current scheme results in many prisoners being subjected to segregation only to be found not guilty after the fact. This experience of procedural unfairness could be avoided in most cases by implementing independent adjudication of disciplinary hearings.

Prisoners' Legal Services obtained 436 successful appeal decisions from the Investigation and Standards Office from 2002 to 2008 through the *Freedom of Information and Protection of Privacy Act*. According to the Ministry of Public Safety, these represent all of the successful prisoner appeal decisions in that time period. A review of these decisions reveals that the current disciplinary hearing process is rife with procedural unfairness and that a reasonable apprehension of bias is found in a significant number of cases.

Our research reveals that between 2005 and 2008, approximately 52% of appealed hearings were appealed successfully to the Investigation and Standards Office.

Of the 436 successful appeals reviewed:

- there were 104 findings of a breach of the right to an impartial adjudicator or a hearing free from a reasonable apprehension of bias;
- in 79 cases there was insufficient evidence for a finding of guilt on a balance of probabilities;
- in 54 cases, the decision was found to be unreasonable;
- in 46 cases, the accused was denied the right to make submissions before the hearing officer imposed a disposition; and
- in 46 cases, the accused was denied the right to call witnesses or evidence in his or her defence.

Other breaches of procedural fairness included (but are not limited to) the right to have only evidence presented before the tribunal considered in a finding of guilt (24), the right to written reasons (20), the right to consult with counsel prior to or during the hearing (19), the right to know the evidence prior to the hearing (27), the right to cross-examine witnesses and challenge evidence prior to a determination of guilt (15), the right to be present at the hearing except in exceptional circumstances (8), and the right to have evidence and submissions completed before a determination of guilt (8).

Implementing independent adjudication of disciplinary hearings to decide cases based on a "beyond a reasonable doubt" standard would likely significantly improve the fairness of BC provincial disciplinary hearings. It would remove the actual or perceived

bias of decision makers. It would also ensure that there is sufficient evidence to warrant a loss of liberty as significant as segregation before an accused is found guilty of an offence.

The vast majority of provincial prisoners will return to the community. It is in the interest of public safety that we treat prisoners fairly and in accordance with the law while they are incarcerated if we expect them to abide by the law upon their release to the community. When prisoners are treated fairly in their interaction with the state, they are more likely to internalize respect for the rule of law and become rehabilitated.

(d) Recommendations

Prisoners' Legal Services makes the following recommendations regarding the disciplinary hearing process:

1) That the *Correction Act* be amended to include the following provision:

Discipline

[1.] An inmate shall not be disciplined otherwise than in accordance with the regulations.

[2. (a)] The Minister shall appoint persons, including employees of the Government of British Columbia who are not employees of correctional institutions, as independent adjudicators to conduct disciplinary hearings in accordance with the regulations.

[(b)] An independent adjudicator may be appointed for a term of not more than 5 years and may be reappointed.

[(c)] A person appointed as an independent adjudicator continues to hold office after the expiry of the term of appointment until the person is reappointed, the person's successor is appointed or a period of 3 months has elapsed, whichever occurs first.

[(d)] The Minister may authorize and provide for the payment of the remuneration and expenses of independent adjudicators who are not employees of the Government of British Columbia.

[3.] The independent adjudicator conducting a disciplinary hearing shall not find the inmate guilty unless satisfied beyond a reasonable doubt, based on the evidence presented at the hearing, that the inmate breached the rule in question.

Incidental amendments to the *Correction Act*:

Definitions:
"independent adjudicator" means a person appointed pursuant to section # to conduct disciplinary hearings;

Delete s. 33 (2)(p):
[delete] (p) prescribing allowances for persons who preside over disciplinary hearings who are not employees under the *Public Service Act*;

2) That s. 25 of the *Correction Act Regulation* be amended as follows:

Disciplinary hearing

25 A disciplinary hearing must be presided over by a person appointed by the Minister under s. # of the *Correction Act*.

Review of decision

29 (5) If a new disciplinary hearing is directed to be convened under subsection (4) (c) (ii),

(a) the Minister must, as soon as practicable, appoint an independent adjudicator, who has had no previous involvement with the allegation against the inmate, to rehear the allegation, ...

3. Health Care

(a) Legislation, Policy and Case Law

Subsection 2(1)(h) of the *Correction Act Regulation* provides that the person in charge of the institution must ensure that prisoners are given access to health care.

The BC Corrections Branch Adult Custody Policy Manual and the Health Care Services Manual set out the health services that must be provided to provincial prisoners (see *Eshghabadi v. British Columbia (Minister of Public Safety and Solicitor General)*, 2011 BCSC 434 at ¶ 59).

Health services are contracted out by the Ministry of Justice to Sentry Correctional Health Services Inc. ("Sentry"), a private contractor.

(b) Literature Review

On December 20, 2013, Dr. Ruth Elwood Martin, of the Collaborating Centre for Prison Health and Education, provided the Deputy Minister of Health with her recommendation to transfer delivery of health care for provincial prisoners from the Ministry of Justice to the Ministry of Health, with the Regional Health Authorities assuming responsibility for delivery of correctional health care.

Dr. Martin notes that an estimated 50-70% of prisoners in BC have hepatitis C, 10% of women prisoners in BC have HIV and that prison staff estimate that 80% of prisoners have a substance abuse disorder. She refers to a study that indicates 26% of BC prisoners have a mental disorder unrelated to substance use.

Dr. Martin raises concerns regarding the delivery of health services by a private contractor as it does not allow for continuity of care for individuals who are regularly in and out of custody. For example, she notes that family physicians do not receive discharge summaries from the provincial correctional health system.

Dr. Martin refers to international recognition in leading medical journals that continuity of care from the community, to prison, and back to the community, is essential to improve the health care of prisoners. She notes that the World Health Organization recommends that prison health care be aligned with a country's public health and primary care services for the general population. Dr. Martin reports that Norway, the United Kingdom, France and New South Wales in Australia have all transferred health care provision for prisoners to their Ministries of Health. In Canada, Nova Scotia and Alberta administer prison health care through the Ministry of Health.

The benefits of the Ministry of Health administering provincial prison health care noted by Dr. Martin include reduced recidivism rates, more consistent treatment of TB, HIV, Hepatitis C and STDs, shared immunization records between BC Corrections and health authorities, and family physicians having access to records, thereby improving patient safety.

A recent study by the BC Centre for Excellence in HIV/AIDS has found that incarceration is a strong predictor of inadequate treatment for HIV/AIDS and that people with HIV are more likely to share needles in prison. The study found that when people are incarcerated, viral loads were higher due to inadequate HIV treatment. Because there is no needle exchange program in prison, people who use injection drugs are more likely to share needles while in prison. Sharing needles while viral loads are high is very dangerous. The study calls on prison administrators to implement harm reduction strategies such as needle exchange programs and to

improve access to HIV treatment in prison in order to reduce the rates of HIV transmission among prisoners and in the community.

On December 16, 2013, Madam Justice Ross of the BC Supreme Court issued her decision in *Inglis v. British Columbia (Minister of Public Safety)*, 2013 BCSC 2309 ("*Inglis*"), which was a challenge to the decision to cancel the mother-baby program at the Alouette Correctional Centre for Women. The facts regarding the health benefits of mothers and babies being together were not contentious. The respondents agreed with the applicants that:

- It is best practice for mother and baby to be together in the immediate post-partum period for the health and social benefit of mother and baby. This contact is critical for the development of mother-baby relations and for the promotion of parental capacity.

- International health experts agree that babies should be breastfed exclusively until six months of age and that they should continue to breastfeed on demand until the age of two. Breastfeeding benefits the baby's health and psychosocial development and lowers the risk of ovarian cancer, Type II diabetes and post-partum depression in mothers.

- The critical period for the formation of attachment of a baby to his or her primary caregiver is six months to two years. Attachment assists with the baby's psychological and social functioning and is necessary for normal neurobiological function. Attachment is related to the ability to form future intimate relationships, to be emotionally balanced, to be happy and to be able to rebound from disappointment. Interfering with attachment puts the baby at risk of lifelong developmental deficits, insecurity and feelings of neglect. Adults who had problems with attachment as babies often experience difficulties understanding their own emotions and the emotions of others, and have an impaired ability to maintain relationships.

- Mothers who are separated from their babies may experience depression, suicidal ideation, increased use of alcohol and drugs, and increased criminal activity.

  (*Inglis* at ¶328-335.)

Justice Ross finds that BC Corrections' cancellation of the mother-baby program violated the rights to security of the person and liberty under s. 7 and the right to equality under s. 15 of the *Charter*. She finds that the decision was not based on a reasonable apprehension of potential harm to babies, or on cost considerations. She finds that BC Corrections adopted a guarantee of safety as the standard, which was

impossible to meet and inappropriate in light of the constitutional issues at play in the decision.

The Court considers international human rights documents that stand for the proposition that a state's responsibilities should be "in keeping with its fundamental responsibilities for promoting the well-being and development of all members of society", which includes the concept of the best interest of the child. Justice Ross concludes that BC cannot be permitted to avoid its obligations to protect the best interest of the child under the *Child, Family and Community Service Act*, RSBC 1996, c. 46, by compartmentalizing duties under different ministries and legislation.

(c) Observations of Prisoners' Legal Services

Prisoners' Legal Services has received many calls from BC prisoners who report that they have been cut off their medication when brought into custody. This practice appears to be contrary to policy which requires that measures be taken to ensure a continuum of care for prisoners at intake.

Many of our clients report that when they arrive at a provincial prison, they are taken off community prescribed medication for conditions including depression, Attention Deficit Hyperactive Disorder, Bipolar Disorder and HIV/AIDS. Our clients report that they are taken off their medication before seeing a doctor, and they are not informed of the decision or reason for the decision to discontinue medication. When they do see the institutional doctor, they are less likely to be put back on medication that they felt was effective in the community.

Discontinuation of medication can have very serious consequences for our clients. In the case of HIV medication, interruptions in anti-retrovirals can result in spikes in viral loads that can cause serious medical complications and symptoms of AIDS. Prisoners who have been cut off mental health medications often report difficulties in controlling their behaviour resulting in repeated charges for disciplinary offences. These charges result in segregation which can exacerbate the mental illness.

Prisoners' Legal Services has also received reports from prisoners that the institutions have stopped providing prisoners with over the counter medication. Prisoners who cannot afford to purchase over the counter medication are forced to attempt to obtain medication, such as Tylenol, by other means. This often results in prisoners trading items or favours for medication from other prisoners, which can lead to safety concerns and disciplinary charges.

Prisoners complain that they do not receive timely responses to requests for health care appointments.

Prisoners' Legal Services often has difficulty receiving medical information from the health care departments of the institutions. Health care departments will deny our clients the right to legal assistance by refusing to provide medical documentation despite being provided with signed consent for the release of the information.

Our office receives numerous complaints regarding specific doctors under contract with Sentry. Prisoners' Legal Services will assist our clients to make complaints regarding the doctor to the College of Physicians and Surgeons and the BC Investigation and Standards Office. The BC Minister of Justice's contract with Sentry requires that Sentry "perform the Services to the reasonable satisfaction of the Assistant Deputy Minister". Despite numerous complaints, nothing has been done to improve the quality of medical services provided by Sentry.

When a prisoner has filed a complaint with the College of Physicians and Surgeons or the Investigation and Standards Office against a doctor, they are not always able to see another doctor while the complaint is active. This may mean that the prisoner is denied health services.

Contracting out medical services makes it impossible for BC Corrections to perform quality assurance and to ensure that health services in prison are equivalent to community standards. It also prevents BC Corrections from setting standards for health care professionals such as requiring certification with the College of Family Physicians of Canada which would require doctors to participate in annual continuing professional development. Certification with the College of Family Physicians would also allow doctors to become clinical instructors and increase collaboration with the University of British Columbia, which would have the effect of improving the quality of health services provided to BC prisoners.

(d) Recommendations

Prisoners' Legal Services makes the following recommendations regarding the provision of health services in BC provincial prisons:

1) That the Minister of Justice transfer the provision of health services to the Ministry of Health with the Regional Health Authorities delivering health care to provincial prisoners.

2) That doctors who provide health services within BC Corrections facilities be required to be certified with the College of Family Physicians of Canada.

3) That BC Corrections implement harm reduction strategies in all BC prisons including needle exchange programs.

4) That BC Corrections reinstate the mother-baby program at the Alouette Correctional Centre for Women and that the Ministry of Justice not appeal the *Inglis* decision.

5) That a nurse be scheduled to be on staff at each institution 24 hours per day, seven days per week.

6) That an alternative doctor be made available to see a patient who has made a complaint regarding the regular institutional doctor.

7) That policies regarding ensuring continuum of care for prisoners entering and leaving provincial custody are adhered to.

8) That clear policy be implemented to ensure that medical treatment is not terminated except by a physician who has met with the patient.

9) That policy be implemented to require that responses to health care requests are delivered without delay to patients, and that a patient's medical information is shared with him or her, or his legal counsel, upon request.

10) That over the counter medication that is deemed medically appropriate is provided to prisoners from the health care department, free of charge.

4. Programs and Release Planning

(a) Legislation and Policy

Subsection 38(1) of the *Correction Act Regulation* requires the provision of programs for prisoners. Subsection 38(2)(b) requires programs to be designed, "as far as practicable" to assist prisoners to "reduce the risk they present to the community".

The BC Corrections Branch Adult Custody Policy Manual does not contain policy regarding the provision of treatment programs.

The Ministry of Justice website contains some information about the provision of treatment programs, indicating that high and medium risk prisoners are provided cognitive behaviour programs that are proven to be effective in reducing criminal behaviour. The website refers to a national research project by Dr. James Bonta of Public Safety Canada. BC probation officers participated in this project, called the Strategic Training Initiative in Community Supervision. The study found a 38% reduction in recidivism for offenders supervised by the probation officers trained by the project.

Although it seems that the purpose of ESP is to address behavioural issues, in our experience, prisoners in ESP are often denied the ability to participate in programs. The Adult Custody Policy indicates that "[p]rograms are only delivered to inmates in an enhanced supervision placement (ESP) when included in individualized case plans".

(b) Literature and Case Law Review

Dr. Bonta and Dr. Andrews, of Carleton University, authored a report in 2006-07 entitled "Risk-Need-Responsivity Model for Offender Assessment and Rehabilitation" that looked at recidivism rates in offenders who had participated in treatment programs. The report cites studies that found that prisoners who had participated in programs that addressed their criminogenic needs had an average of 19% lower recidivism rates. Treatment that used cognitive behavioural methods of intervention resulted in a 23% reduction in recidivism. When treatment programs used a combination of these principles, the effectiveness was even more significant.

Kelly v. B.C. (Ministry of Public Safety and Solicitor General) (No. 3), 2011 BCHRT 183 is a decision of the BC Human Rights Tribunal regarding a Fraser Regional Correctional Centre prisoner's right to Aboriginal spirituality while in segregation. The Human Rights Tribunal found that BC Corrections failed to accommodate Mr. Kelly's religion. The Human Rights Tribunal found that while Mr. Kelly was provided access to a Christian Chaplain, he was inappropriately denied access to Aboriginal spiritual advisors.

(c) Observations of Prisoners' Legal Services

Prisoners' Legal Services receives numerous complaints by prisoners who report they are not provided programs because they are being held in segregation, separate confinement or ESP. These prisoners are considered to be the highest risk to reoffend.

Unlike the Canadian federal model, the BC provincial corrections model does not include a period of community supervision in the sentence. Prisoners are able to earn remission and are released to the community without supervision upon their Probable Discharge Date.

Prisoners' Legal Services has a number of clients who spend the majority of their sentences in isolation where they are not able to participate in treatment programs. These individuals are released to the community untreated, and without community supervision. Many return to our office as clients in the future because, not surprisingly, they reoffend.

In our view, community safety could be greatly improved by avoiding the use of isolation in segregation, separate confinement and ESP where programs are not available to prisoners. Alternatively, treatment programs could be offered to prisoners held in solitary confinement in order to allow them the opportunity to address their risk of reoffending upon release to the community.

Prisoners' Legal Services continues to receive reports by our clients that they are denied Aboriginal spirituality while in segregation.

Our office has also received complaints from clients that they are not provided adequate assistance with release planning for parole opportunities and Probable Discharge Dates. This is particularly true for prisoners who are placed in segregation or separate confinement before their release dates.

Prisoners who are close to their release dates who receive disciplinary charges often report that the hearing officer has taken earned remission and imposed segregation prior to their release. Being in segregation makes it impossible to make arrangements in the community for their release. A delay in the prisoner's release may compromise release plans that have been arranged for housing, social assistance or employment. These concerns are rarely taken into consideration by hearing officers imposing penalties for disciplinary offences.

Adequate release planning is essential to a prisoner's successful reintegration into society. The safety of the community can be greatly enhanced by ensuring that prisoners will have housing, financial assistance and community support upon their release.

(d) Recommendation

1) That programs designed to address criminogenic needs and programs based on cognitive behavioural methods be available to prisoners held in segregation, solitary confinement and ESP.

2) That BC Corrections implement policies to ensure that all prisoners, including those in segregation, solitary confinement and ESP are able to practice Aboriginal spirituality.

3) That BC Corrections provide prisoners with enhanced support for the purpose of release planning and that release planning be considered when disciplinary sanctions are imposed.

Thank you very much for your consideration of these submissions.

Yours truly,

PRISONERS' LEGAL SERVICES

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