Canadian Prisoners’ Right to a Fair and Impartial Disciplinary Proceedings

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General concepts

Functions of the Canadian correctional system

1 Disciplinary punishment should be examined in a context of co-existing with other forms of enforcing authorities that reconcile disciplinary law and penal law. Massat (2003) claims that there is an increasing trend toward “progressive penalization” in disciplinary law. This leads to the belief that administrative penal law tends to assimilate itself to modern law, or at a minimum, to expand its jurisdiction through the transfer or extension of the legal protection offered to the users of public services and the fundamental and conventional principles of penal law to the sphere of discipline. Both authorities embody a common punitive finality that serves to ensure order and maintain cohesion in the institutions and communities (Massat, 2003), hence the theory—increasingly supported by a doctrinal movement (Dellis, 1987)—of the assimilation of disciplinary and penal law. Consequently, it is appropriate to question whether this emergence of what we call “administrative penal law” should include a transfer of all of the basic legal protection encompassed in the foundation of penal law to prevent double jeopardy, where an inmate is subject to criminal prosecution and a disciplinary hearing for the same actions. Because reality fall short of this ideal, it is appropriate to question the possibility of applying the guiding principles of penal law to disciplinary proceedings in prison and to take into account the courts’ position in this matter.

2 At the outset is the notion that the current prison society can be considered as society in its own right, increasingly open and subject to the rule of law and external control. From the totalitarian society it was before the advent of the Canadian Charter of Rights and
 Freedoms, the Canadian prison system has evolved significantly, both in theory and in reality. Obviously, its daily operation is not perfect. All of the guiding principles that are proper to a criminal trial are applied to disciplinary proceedings with a certain level of timidity and genuine uneasiness. However, Correctional Service Canada recognizes the primacy of the rule of law in its mission statement document.

Before discussing the applicability of the guiding principles to penal law, it is necessary to clearly define the functions of the Canadian correctional system. The Sub-committee on the Corrections and Conditional Release Act of the Parliament of Canada’s Standing Committee on Justice and Human Rights summarizes the functions of Correctional Service Canada as follows:

The Correctional Service is responsible for receiving and assessing offenders serving terms of imprisonment in excess of two years, and managing their sentences. It operates maximum-, medium-, and minimum-security penitentiaries for men and women; community correctional centres where offenders on some form of supervised conditional release in the community reside; and community parole offices that supervise offenders conditionally released into the community. The Correctional Service also contracts with many private-sector agencies for the provision of halfway houses and community supervision of conditionally released offenders. It not only manages the sentences of offenders, but also prepares them for gradual release and releases them back into the community. The Correctional Service provides the Parole Board with information about offenders, upon which its conditional release decisions can be based. It also plays a key role in identifying which offenders the Parole Board should consider ordering detained in custody beyond their otherwise presumptive statutory release dates, potentially until the end of their sentences. Finally, the Correctional Service supervises offenders conditionally released into the community.

In the context of Canadian federalism, it is important to remember that offenders serving terms of imprisonment of less than two years come under provincial authority, whereas those sentenced to two years or more are committed to imprisonment in custodial facilities known as penitentiaries, and they come under federal government jurisdiction. The disciplinary regime in Canadian penitentiaries is regulated by an extensively prescriptive environment that is fragmented between various legal sources, namely, the Act, the Regulations and the Commissioner’s Directives (CDs). These legal and regulatory instruments define offences and set out sanctions for each incident of misconduct and the procedure to be followed to judge the accused. Michel Foucault (1975) writes that every disciplinary system is centered on a small penal mechanism that works in accordance with its own laws, specific offences, specific forms of sanction, and proceedings (Foucault, 1975, p. 180). The Canadian correctional service is no exception. Discipline is one of the focal points of every closed institution which, in Goffman terminology, is comparable to a totalitarian or total institution in which individuals live, cut off from the outside world for a relatively long period of time, and in which living arrangements are explicitly and meticulously regulated (Goffman, 1968).

Institutional disciplinary law and criminal law in general are similar with regard to classifying offences and to the functioning of proceedings. Analogies abound to the extent that it becomes redundant to question the application of guidelines for criminal trials to disciplinary proceedings in the penitentiaries. However, Professor Chiavario (2004) recommends avoiding the risk of identifying only one “disciplinary justice” in situations of veiled criminal justice, as this confusion is damaging to the individuals being tried, who will not be entitled to the guarantee of a “fair trial.”
In the Canadian criminal justice system, legal rights are set out in sections 7 to 14 of the
Canadian Charter of Rights and Freedoms (hereinafter, the “Charter”). These are the
principles of natural justice that aim to protect all individuals against arbitrary, vague or
overly extensive rules and to guarantee that the accused is entitled to a full and complete
defence. Professor Garant believes that the principles of natural justice are one of the best
results produced by the ancient wisdom of common law in our Canadian legal culture
(Garrant, 2004). Common law is not a synonym for natural law, as the expression
“common law” has been translated in French as “justice naturelle,” or natural justice and
is a part of positive law. It should be noted that the basis for legal rights is not primarily
the Charter, but the principles of common law sanctioned by the courts. According to
Professor Garrant, the principles of natural justice are a precedent-setting construction,
based on the notion that the public authority responsible for rendering a decision on a
subject’s rights must not only be impartial, but it must also give the subject an
opportunity to be heard or to present his or her point of view or defence. These
principles took on a constitutional dimension in Re B.C. Motor Vehicle Act ([1985] 2 S.C.R.
486) when the Supreme Court stated that the “principles of fundamental justice” as set
out in section 7, include a number of basic tenets, in addition to all of the express
guarantees prescribed by the Charter (themselves generated by common law):
Consequently, the principles of fundamental justice are to be found in the basic
tenets and principles, not only of our judicial process, but also of the other
components of our legal system.4

It would be wrong to interpret the term “fundamental justice” as being synonymous with
“natural justice,” as, according to the Supreme Court whose position was expressed by
Lamer J., “to do so would strip the protected interests of much, if not most, of their
content and leave the "right" to life, liberty and security of the person in a sorely
emaciated state. Such a result would be inconsistent with the broad, affirmative language
in which those rights are expressed and equally inconsistent with the approach adopted
by this Court toward the interpretation of Charter rights in Law Society of Upper Canada v.
[…]”.5

Given that individuals who have been sentenced to a term of imprisonment preserve all
of the other rights of any citizen except those that result from the sentence and
incarceration—principles that have been reaffirmed in R. v. Solosky6— it is relevant to
question the actual application of the guiding principles of a criminal trial to disciplinary
proceedings. These principles have been reiterated in paragraph 4(e) of the Corrections and
Conditional Release Act (CCRA)7 which clearly stipulates “that offenders retain the rights
and privileges of all members of society, except those rights and privileges that are
necessarily removed or restricted as a consequence of the sentence.”

Like Professor Landreville, we maintain that additional violations of the fundamental
rights of inmates cannot be justified, because neither deterrence, intimidation,
retribution or even rehabilitation is a valid reason for depriving an inmate of his or her

In the following discussion, we will examine some of the principles of a criminal trial set
out in the Charter in light of their applicability to disciplinary proceedings in the context
of prisons in Canada. We will specifically analyze the legal rights provided at paragraph
10(h) of the Charter regarding the right to the assistance of or representation by counsel,
and paragraphs 11(b) and 11(h), which address the right to be tried within a reasonable
time and the principle of double jeopardy or \textit{nonbisinidem}, respectively. A critical examination of the legal rights will be carried out in light of Canadian case law and new developments in legal and criminological doctrine.

**Typology of disciplinary offences in prison**

In Canada, section 40 of the \textit{Corrections and Conditional Release Act} (CCRA) sets out a series of behaviours and attitudes that are considered disciplinary offences. These disciplinary offences may be grouped into three categories. The first category includes disciplinary offences in essence, or offences that can only be applicable in prison. For example, these include the offences set out in the following paragraphs of section 40 of the CCRA: 40(a) disobeys a justifiable order of a staff member; 40(b) is, without authorization, in an area prohibited to inmates; 40(i) is in possession of, or deals in, contraband; 40(m) creates or participates in (i) a disturbance, or (ii) any other activity that is likely to jeopardize the security of the penitentiary; 40(p) without reasonable excuse, refuses to work or leaves work; 40(j) without prior authorization, is in possession of, or deals in, an item that is not authorized by a Commissioner’s Directive or by a written order of the institutional head; and, 40(r) wilfully disobeys a written rule governing the conduct of inmates. These offences can be further divided into two sub-categories: (1) refusal to obey orders, and (2) lack of respect for authority. For example, the “disobeys a justifiable order” offence is necessary to maintain order in the prison. However, the absence of a clear definition of “justifiable order” makes interpreting this prohibited behaviour vague and variable, and subject to the circumstances and the witness to the misconduct. For some, the behaviour at issue may go unnoticed in a minimum-security institution, whereas the same behaviour could be deemed a serious offence in a maximum-security institution. In general, the Canadian courts are reluctant, and hesitate to intervene in cases of minor offences considered trivial or theoretical matters. In \textit{Ross v. Canada} [2002] 2 F.C. D-37, the applicant, found guilty of a “minor” offence and sentenced to a fine of $25 for building airplanes and jewellery out of paper-mâché without the appropriate “recreational permit,” applied to the court pursuant to section 18.1 of the \textit{Federal Courts Act} [R.S., 1985, c. F-7] for a judicial review of a decision rendered on July 28, 1999, further to a disciplinary hearing in a penitentiary. The court ruled that all of the disputes born of the prison environment should not be subject to recourse before the courts, because some of them are trivial and of little importance in law.

The second typology of disciplinary offences provided for at section 40 of the CCRA consists of offences that also exist in criminal law. The nature of these offences is mixed. They are offences against the person or property. The following behaviours are included in this typology: 40(c) wilfully or recklessly damages or destroys property that is not the inmate’s; 40(d) commits theft; 40(e) is in possession of stolen property; 40(h) fights with, assaults or threatens to assault another person; 40(o) offers, gives or accepts a bribe or reward; 40(q) engages in gambling; and, 40(n) does anything for the purpose of escaping or assisting another inmate to escape. Inmates subject to proceedings before a disciplinary body for breach of discipline that comes under this typology could be prosecuted even if they were not in prison, because these are offences that already exist in the \textit{Criminal Code}. It must be proven beyond a reasonable doubt that the three constituent elements of this offence exist, namely, \textit{actus reus} (material element), \textit{mens rea} (moral element) and the legal element.
Finally, the third typology includes polysemic offences that may be given various meanings and interpretations, depending on the circumstances and the witnessing officer. In other words, these incidents could occur in prison or in any other closed or professional environment. Police officers could lay the same charges against anyone. These acts and omissions are set out at the following paragraphs: 40(f) is disrespectful or abusive toward a staff member in a manner that could undermine a staff member’s authority; 40(g) is disrespectful or abusive toward any person in a manner that is likely to provoke a person to be violent; 40(l) fails or refuses to provide a urine sample when demanded pursuant to section 54 or 55; 40(k) takes an intoxicant into the inmate’s body; and 40(s) attempts to do, or assists another person to do, anything referred to in paragraphs (a) to (t). These offences are likely to be considered disciplinary offences in some cases, and criminal offences in others. Refusing to provide a urine or blood sample could be held against a person in society if it was a condition of probation. Once again, the vagueness of these offences opens the door to arbitrary action. For example, an intoxicant may receive multiple meanings. Because of this ambiguity, the point is easily lost among the numerous interpretations.

The list of offences set out in the CCRA is not exhaustive; an array of additional regulatory texts exist in which other unacceptable behaviours in prison are defined. This motley collection of legal and regulatory sources explains—yet does not justify—the fragmentation and dispersion of Canadian correctional law (sentencing law). Not only does this create a profusion of rules and perpetuate confusion, but it also inflates the number of disciplinary offences and perpetuates a lack of understanding of the law. Regardless of the typology at issue, disciplinary offences can be qualified as minor or serious, depending on the nature of the misdeed and any other extenuating or aggravating circumstances. Not all offences are subject to section 11 of the Charter. According to the Supreme Court of Canada, “A matter could fall within s. 11 either because by its very nature it is a criminal proceeding or because a conviction in respect of the offence may lead to a true penal consequence. In cases where the two tests conflict the "by nature" test must give way to the "true penal consequence" test.” The term “true penal consequence” includes imprisonment or a fine with a view to redressing the wrong done to society at large, rather than to a group or institution.

Thus, the similarities between disciplinary law in prison and criminal law is so apparent that the disciplinary categories are, for the most part, a repetition, if not a replication, of the criminal categories. Some disciplinary sanctions mirror adapted criminal sanctions: a disciplinary cell is akin to a sentence that deprives a person of freedom (Herzog-Evans, 2004, 196).

Consequently, it is important to know whether the inmates who have been victims of the violation or negation of legal rights under the Charter may apply to a court of competent jurisdiction pursuant to subsection 24(1) of the Charter for a remedy that is just and appropriate. What happens in the case of a violation or negation of legal rights with respect to the right to the assistance of counsel or protection from the risk of being tried before two separate tribunals on the same charge, like the risk of being tried in another jurisdiction on the same charge under the principle of *non bis in idem*? This raises a relevant issue as to whether disciplinary proceedings constitute a genuine trial court or merely a board of investigation, because if it is not a genuine court, this debate would be theoretical and of no use.
Court or Board of Investigation?

17 The interpretation of the concept of court has been subject to careful examination by the Canadian courts. For example, the Supreme Court of Canada dealt with this matter in *Schubley*. According to Sopinka, Gonthier, and McLachlin JJ., a prison disciplinary proceeding is not, by its very nature, criminal. Its purpose is to maintain order in the prison, not to mete out criminal punishment. Consequently, disciplinary court is not a genuine court within the meaning of the Charter. The lower courts have adopted the Supreme Court’s position. Denault J. summarized the nature and function of disciplinary hearings in *Hendrickson v. Independent Chairperson of the Disciplinary Court of Kent Institution* as follows: “The hearing is not to be conducted as an adversary proceeding but as an inquisitorial one and there is no duty on the person responsible for conducting the hearing to explore every conceivable defence, although there is a duty to conduct a full and fair inquiry or, in other words, examine both sides of the question.” In other words, a disciplinary court is merely a board of investigation. Consequently, paragraph 11(h) of the Charter cannot be invoked to circumvent criminal prosecution for actions for which a disciplinary sanction has already been imposed.

18 It is clear that the Canadian courts have a restrictive concept of the notion of a court. They exclude any extension of this concept from disciplinary courts.

19 The European Court of Human Rights (ECHR) does not share this view; it tends to expand on the concept of court (Céré, 1994). In *Belilos v. Switzerland*, April 29, 1998, for example, the ECHR stated that the term “tribunal” should not necessarily be understood to include the meaning of a traditional jurisdiction incorporated into a country’s regular legal structure. For the Court, it was sufficient that the tribunal play a judicial role by resolving, on the basis of the standards of law and at the conclusion of organized proceedings, any issue that comes under its jurisdiction to assimilate this structure to a tribunal.

20 European law expands on the concept of a tribunal and requires that a disciplinary court be independent and impartial. Pralus-Dupy writes that the European bodies have maintained, in two cases (*Lithgrow* and *Belgium*), that disciplinary courts should be considered courts within the meaning of section 6 of the Convention, because the expression “right to a tribunal” involves the right to legal recourse (Pralus-Dupuy, 1995, 738-739).

Applicability of criminal trial guiding principles to disciplinary proceedings in prison

The right not to be tried twice on the same charges in criminal and disciplinary proceedings?

21 The legal rights provided for in the Charter normally apply to a criminal trial. However, can these legal principles be applicable where a person who is imprisoned is prosecuted before the prison’s disciplinary bodies for a behaviour that may be qualified as a mixed offence? In short, is an inmate entitled to invoke the principles of double jeopardy or *non bis in idem* to circumvent criminal or disciplinary prosecution?
22 In R. v. Wigglesworth [1987] 2 S.C.R. 541, the Supreme Court of Canada ruled that an offence set out in section 251 [sic] of the Royal Canadian Mounted Police Act is not an offence within the meaning of paragraph 11(h) of the Charter. This interpretation means that the legal rights set out in section 11 of the Charter cannot be invoked.

23 To better understand the Court’s reasoning, let us briefly review the facts. The appellant Wigglesworth, a member of the Royal Canadian Mounted Police (RCMP) was charged with assault under the Criminal Code and with excessive use of force against an inmate, pursuant to section 251 [sic] of the Royal Canadian Mounted Police Act (R.S. (1985), c. R-10). He was found guilty in disciplinary court. When he appeared in criminal court, he invoked paragraph 11(h) of the Charter to have the charges dismissed under the legal principle of non bis in idem. He argued that he could not be prosecuted twice for the same offence.

24 In his view, the disciplinary sanction was sufficient in itself, given the action for which he was accused. In his case, the Court concluded that section 11 of the Charter applied only to criminal, quasi-criminal and regulatory offences.

25 In Shubley, the Supreme Court of Canada was asked to rule on the issue of double jeopardy by determining whether an inmate subject to a disciplinary sanction as the result of an incident that occurred in the correctional institution could be prosecuted thereafter in criminal court. In other words, does a trial for a criminal offence violate paragraph 11(h) of the Charter? In Shubley v. R [1990] 1 S.C.R. 481, the majority of the Supreme Court found that paragraph 11(h) of the Charter had not been violated, because the disciplinary proceedings in the institution were not criminal in nature, given that their purpose is to maintain order in the prison, not punish a criminal offence. In addition, the disciplinary measures did not lead to true penal consequences.

26 However, Wilson and Cory JJ., were dissenting, stating that in their view, solitary confinement should be considered a separate form of punishment and its imposition within prison did lead to true penal consequences, as the inmate would lose his earned remission or the possibility of accumulating remission credits. Inmates punished in this matter may spend more time in prison, because they would not be able to obtain parole given that their behaviour inside the penitentiary figures among the aspects considered by the National Parole Board (NPB) in its review of the application for parole. Other researchers share the views of the dissenting judges, as solitary confinement under strict conditions could have psychopathological effects, and these effects could give rise to a specific clinical syndrome (Grassian, 1988, 1453). According to one author, solitary confinement is one of the most destructive experiences for an individual—the most debilitating on a psychological level, and the most alienating on a social level—that exists in the country (Jackson, 1983, 243). These effects may manifest themselves as “cognitive problems” (e.g., lack of concentration, deteriorating memory, hallucinations) and “emotional problems” (feelings of hopelessness, depression, anger and self-destruction) (Benjamin and Lux, 1977).

27 The ECHR adopted a different reasoning when it also debated the issue of applicability of section 6 of the European Convention for the Protection of Human Rights (ECPHR) which addresses the principle of non bis in idem, a provision that is similar in all respects to paragraph 11(h) of the Charter. The Court was to set out the circumstances in which a disciplinary dispute could be considered a criminal matter, given that, in principle, disciplinary proceedings do not come under the realm of criminal law.
The ECHR took a position in *Engel*. This was a motion involving soldiers of the Dutch armed forces who had been found guilty of various breaches of military discipline. Sanctions imposed on them amounted to a number of days of arrest, light arrest, aggravated arrest and strict arrest, and committal to a disciplinary unit. The soldiers—the appellants in this case—argued that Article 6 of the ECPHR had been violated. This article consigns the basic principles of the rule of law and recognition of the right to a fair trial. In *Engel v. the Netherlands* rendered on June 8, 1976¹⁴, the ECHR defines the criteria for assimilating a disciplinary issue to a criminal matter, or rather, differentiating between disciplinary and criminal issues: (1) the categorization in the domestic law of the defending state, (2) the nature of the offence, and (3) the severity of the sanction imposed on the guilty party.

According to the ECHR, the States have the right to ensure public interest and to differentiate between criminal law and administrative disciplinary law. However, it is feared that the contracting States will classify an offence as disciplinary rather than criminal, at will, or prosecute an individual for a mixed offence in a disciplinary proceeding, rather than in a criminal trial. In so doing, the fundamental clauses set out in Articles 6 and 7 would be subordinate to the sovereign will of the States (Pralus-Dupuy, 1995, 734).

In Canada, not only does subsection 24(1) of the Charter guarantee to anyone subject to trial the right to legal recourse, but paragraph 11(d) specifies that any person has the right to a hearing by an independent and impartial tribunal. Paragraph 10(b) stipulates that everyone has the right to retain and instruct counsel without delay. If an inmate retains all of his rights, can it be said that he has the right to an independent and impartial tribunal, like any other citizen in civil society?

Inmate’s right to a fair and impartial court and to be tried within a reasonable time?

Following the example of Article 6 of the *European Convention for the Protection of Human Rights* (ECPHR), section 11 of the Charter is equally elaborate and lists the procedural requirements for a fair and equitable trial. Regarding the tribunal, the CCRA describes a person responsible for dealing with disciplinary matters, whereas the *Corrections and Conditional Release Regulations* refers to an independent chairperson. The expression “court” is not mentioned in the Act or the Regulations, but rather, in Commissioner’s Directive 580 on disciplinary measures; it makes reference to a disciplinary court. The term “court” should be understood to mean “right to a judge,” which means that everyone’s case should be heard by a court (Herzog-Evans, 2004, 242).

The principles of independence and impartiality were defined in *Valente v. R*.¹⁵. The judges’ security of tenure, general financial security and institutional independence were identified as criteria for designating an impartial and independent tribunal. According to LeDain J., “impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case.”¹⁶ The term “independence” refers to the status of the tribunal and its relation to the government. Professor Béliveau (1991) summarizes these two concepts, claiming that impartiality refers to the attitude of the judge, and independence refers to the judge’s status.
As Professor Jackson (2002) writes, unfortunately, the application of the same principles of impartiality and independence to the prison disciplinary courts points up the fact that the two forms of prison disciplinary courts—minor court and major court, two sides of the same reality—are neither impartial nor independent. Further to interviews with inmates who call the disciplinary court “kangaroo court,” or a parody of justice, he concluded that “there is no difference between the independent Chairperson and the warden’s court. The institution controls the judge.” (Jackson, 2002).

In European law, the concept of independence is examined in two cases cited by Herzog-Evans (2004), namely *Le Compte, Van Leuven and de Meyere v. Belgium*, June 23, 1981, and *Langborger v. Sweden*, June 22, 1989. The Court claims that this concept should be analyzed with reference to the executive as well as to the parties.

To determine the independence or impartiality of a court, Herzog-Evans (2004) suggests that it is necessary to take into account the method of designation and the duration of the mandate of its members, the existence of protection against outside influence, and whether or not there is an appearance of independence (Herzog-Evans, 2004, 242). She maintains that disciplinary courts in French prisons are not at all independent, because the members of the disciplinary panel (disciplinary court) are selected by the executive power embodied by the prison warden, who is the self-proclaimed chairperson.

In Canadian correctional law, the chairperson of the court for minor offences is the institution’s warden or that person’s delegate. Whether the chair of such a court can be impartial and independent in these circumstances is questionable. In fact, the warden of the institution is both the administrative and legal authority, which becomes both the instrument of prosecution and of judgment. This ambiguous situation is a real infringement on the impartiality and independence of the judge, because this person cannot be both the instrument of prosecution and of judgment. Ms. Herzog-Evans (2004) feels that the chairperson of a disciplinary court in its current form cannot be independent for the following reasons:

Firstly, because the warden performs concurrently the adversarial functions, particularly prosecution, investigation and judgment—a combination that European case law maintains is in violation of Article 6. Secondly, because the warden manages an institution and is responsible for the necessary order and safety. Consequently, the warden cannot keep strictly to the facts and the personality of the accused, and takes into account institutional balance. And thirdly, the chairperson of the board is the hierarchical superior of the author of the incident report, and often, of the victims of the facts disputed. Finally, where the chairperson of the board is also the institution’s warden, this person will have developed some of the rules that have been breached for which he may prosecute, namely those contained in the local regulations.

Finally, the right to an impartial and independent court is not sufficient; everyone also has the right to stand trial within a reasonable time.

Standing trial within a reasonable time is the right of every person accused of an offence, including persons who are incarcerated.

Slow progress in the criminal justice system is a universal problem. It takes months, if not years, to try a person accused of a crime for which the sentence can sometimes be less than the waiting time for trial.
41 The European Committee on Crime Problems produced a full report on delays in the criminal justice system, with an introduction by Steenhuis, who states that a timely trial and diligent proceedings appear to be important to the quality of criminal justice because “…lengthy trials and tardy execution of sentences […] may diminish the reliability of the criminal justice system and eventually invite potential offenders to perceive criminal justice interventions as negligible cost factor in deciding whether or not to commit a crime.” (Steenhuis, 1991, 7).

42 In Canada, a legal void exists with respect to reasonable time. The CCRA does not set out any specific criteria to assess the reasonableness of a timeframe; however, CD 580 stipulates the number of days within which specific actions are to be addressed. Three business days following receipt by the inmate of the notice of charges for disciplinary offences are required before commencement of a hearing before the disciplinary court. Unfortunately, the internal policy remains silent about the consequences of excessive delays. Normally, it should have clearly indicated that excessive delays should give rise to the dismissal of charges and the acquittal of the inmate at fault.

43 An in-depth review of the data on the speed of the disciplinary process shows that, except in cases where the person accused is found not guilty of serious offences, all of the cases are resolved in less than 30 days. In the case of serious offences that end in a not-guilty verdict, the average number of days per region varies between 23 and 41 days. For minor offences that end in a non-guilty verdict, the average number of days varies between 18 and 41. Minor offences for which the accused is found guilty require 14 to 23 days. The fact that approximately one additional week is needed to arrive at a not-guilty verdict could imply that the chairperson (either independent or from the institution) gives the matter due consideration in arriving at a decision, or that the complexity of the case is such that postponements are required, or the officer who laid the charge is absent, leading to hearing postponements, or the inmate requests postponements for various reasons, some of which are health-related. There are myriad reasons for the postponement of a hearing.

44 In all cases, waiting times are lengthy. The Committee Reviewing Inmate Discipline made this same observation. In its report, it states:

Another important aspect of the disciplinary process that requires correction is the time between the commission of the offence and the final decision from the disciplinary court. Generally, the sooner a sanction imposed after the offence is committed, the greater impact it is likely to have. In contrast, if the proceedings are drawn out or the hearing is constantly postponed because witnesses or counsel for the inmate are not available, the beneficial and remedial effect of the sanction is diminished. Moreover, it is not unusual for inmates to be transferred or released before the disciplinary court hears their case or renders a verdict. We were told that major court could sometimes take as long as six or even nine months to conclude a disciplinary proceeding.

45 In Russell and Semmens concerning two inmates from the Collins Bay Institution in Ontario, Mulldon [sic] J. of the Federal Court sided with the applicants by preventing a their hearing from being held. The main reason cited here was the manifestly unreasonable time frame. Inmates Russell and Semmens were tried before the disciplinary court for a series of offences pursuant to section 30 of the Penitentiary Service Regulations. They appeared before the disciplinary board on June 15 and July 27, 1983, respectively. They waited until September 7, 1983, to be told by the chairperson of the
disciplinary board that the hearings were postponed *sine die*, until the case involving another inmate, Conacher, had been resolved.

46 The Court found that the applicants had been denied the right to stand trial within a reasonable time, in accordance with paragraph 11(d) of the Charter, by postponing the date of the hearings. The Court felt that a reasonable time for disciplinary hearings was inevitably short, because all of the parties to the proceedings, except the chairperson of the disciplinary board, work or are imprisoned in the institution. By postponing the hearings *sine die*, the chairperson unintentionally rendered it impossible to fulfil this right. However, it should be noted that the definition of a timeframe depends on a number of factors, the main one being safety.

47 The disciplinary process also raises the issue of the inmate’s right to the assistance of counsel. Normally, every accused person has the right to the services of counsel to ensure a full and complete defence. The situation appears to be different in the prison environment.

**Is the right to the assistance or representation of counsel automatic?**

48 The principle of the right to defence is part of the technical rules found in a criminal trial. It is part of the general principles of law with which all legal proceedings must comply. The right to a defence includes both the right to defend oneself and the right to the assistance of counsel. Where the first of these rights to defence—namely, the possibility of defending oneself—is recognized without complication by the institution’s administration, the right to the assistance of counsel, however, is not automatic in Canadian prisons. The issue of representation by counsel was raised in the case of Glen Howard, and inmate at Stony Mountain Institution in British Columbia, where he was sentenced to two years and four months. According to Court documents, Glen Howard was charged on December 31, 1982, with possessing contraband, using indecent or disrespectful language to another person, committing an act calculated to prejudice discipline or good order of the institution, disobeying a lawful order of a penitentiary officer, and threatening to assault another person.

49 The five charges were upheld and laid against him under section 39 of the *Penitentiary Service Regulations* [C.R.C., chap.1251]. All of these charges were categorized as “serious or flagrant” in accordance with Commissioner’s Directive 213. At his January 6, 1983, appearance in court, he pleaded guilty to charges of possession of contraband and disobeying a justifiable order. He entered pleas of not guilty on the other three charges: threatening to assault another person; using indecent or disrespectful language to another person; committing an act calculated to prejudice discipline or good order of the institution.

50 On February 2, 1983, the date scheduled for his hearing, the chairperson of the Institution’s disciplinary court adjourned the hearing because the inmate had, in the meantime, retained the services of a legal aid counsellor and, consequently, wanted to exercise his right to be represented by counsel at the disciplinary hearing.

51 The chairperson of the court adjourned the disciplinary hearing and, at the following hearing, dismissed the inmate’s request to be represented by counsel, stating that section 7 of the Charter had not created a new set of rights and that the absence of counsel did
not preclude a fair hearing. An application to obtain a prohibition order (ask the court to order an administrative authority not to render a decision in a case) was denied on appeal, as the trial judge concluded that, in common law, the appellant did not have the right to be represented by counsel in such proceedings and that section 7 of the Charter did not confer on the appellant any new right to such representation.

The matter was appealed before the Federal Court. Thurlow C.J. (Pratte J. concurring) explained the purpose of section 7 of the Charter as follows:

The enactment of section 7 of the Charter has not created any absolute right to counsel. The standard to satisfy the procedural requirement of section 7 is that of a procedure that is fundamentally just. In that context, any right a person has to the assistance of counsel arises from the requirement to afford the person an opportunity to adequately present his case. It is not necessary in order to afford an inmate such an opportunity and thus to fulfil the requirement of section 7 to recognize in all circumstances his right to be represented by counsel in a disciplinary court. [...] “The standard enunciated in section 7 is the right not to be deprived of the right to liberty ‘except in accordance with the principles of fundamental justice.’ Fundamental justice requires that an accused be given the opportunity adequately to state his case.”

The Court set out six elements to take into consideration in determining an inmate’s right to the assistance of counsel: (1) the seriousness of the charge; (2) whether any points of law are likely to arise; (3) the capacity of a particular prisoner to present his own case; (4) procedural difficulties; (5) the need for reasonable speed in adjudication; (6) the need for fairness as between prisoners and as between prisoners and prison officers.

According to the Court, section 7 of the Charter guarantees fundamentally fair proceedings, but does not automatically give an inmate the right to be represented by counsel at a disciplinary court hearing, except in well-defined circumstances.

The inmate brought his case before the Appeal Division of the Federal Court of Canada to determine whether section 7 of the Charter gives unquestionable right to be represented by counsel at disciplinary hearings. In its March 1, 1985, decision to allow the appeal, the Appeal Division of the Federal Court (specifically, the Chief Justice and Pratte J.) stated that the adoption of section 7 of the Charter did not create an absolute right to be represented by counsel in all disciplinary proceedings. However, where life, liberty or security come into play, the inmate must be given an opportunity to be represented by counsel at the hearing.

In Howard, the disciplinary court’s irrevocable elimination of remission was a final and irrevocable deprivation of the inmate’s right to parole. The Court maintained that a broader interpretation was given to section 7 of the Charter, and, to comply with this section, the procedures followed must be fundamentally fair and must absolutely vary according to circumstances and the nature of the case. The Court also felt that the vagueness of one of the charges laid against the inmate, “committing an act calculated to prejudice discipline or good order of the institution,” and the risk of losing 267 days of earned remission were major aspects that warranted the need for counsel. MacGuigan J. also added that where charges laid against an inmate risk having major consequences, the probability that representation of counsel is required is so great that it amounts to a presumption.

Also, in a recent case, Winters, the Supreme Court of Canada ruled on an inmate’s right to legal aid and to be informed of this right. The Federal Court ruled that it was the duty of the correctional authorities to inform the inmate of his right to consult counsel and give
him a reasonable opportunity to exercise this right once it decided to place him in administrative segregation. The Court set aside the correctional authorities' transfer decision.

58 The case was appealed to the Supreme Court of Canada. Lamer C.J. and L'Heureux-Dubé, Gonthier, McLachlin, Iacobucci, Major, Bastarache and Binnie J.J. concurred with Cory J. that the appellant had established a statutory right to "legal services" in connection with his prison disciplinary hearing. However, the Legal Services Society retained the discretion to determine the level of legal services to which the appellant was entitled. In making its decision, the Society must consider all of the relevant circumstances of the application, including the nature of the charge, the procedure for its determination, the severity of the punishment of the applicant if convicted, and other potential indirect consequences such as loss of remission, or prejudice to a potential transfer to a lesser institution. As the Society incorrectly found that the appellant was not entitled to legal services, and as the Court did not have sufficient particulars of the offence to determine the appropriate level of legal services required by the appellant, the matter was sent back for reconsideration. However, the Court ruled that, in the case of mandatory services, the level of service is to be determined by the exigencies of the situation confronting the applicant, including the cost effectiveness of varying levels of service.

59 In 1995, during a review of the disciplinary system applicable to inmates, the Correctional Service Canada audit team found that form CSC/SCC 222, “Inmate Offence Report and Notification of Charge,” did not contain any mention of representation by counsel. This situation has since been rectified.

60 There are differing views with regard to the presence of counsel at a disciplinary hearing. According to the report of Joint Committee, some employees are ill at ease in the presence of counsel owing to their vulnerability in a legal environment in which they do not have the support of a Crown attorney, as would be the case in an outside court, and where they are subject to an examination and cross-examination that often challenge their judgment, their knowledge, and the instructions they followed with regard to the incident that led to the offence report. The officers called on to testify often feel that they are sitting in the prisoner's dock, whereas they simply wish to report the facts that led to the charges. Their vulnerability also results from the fact that they are not extensively trained in the functioning of a disciplinary court, how to testify or how to respond in a cross-examination.

61 It should be noted, however, that despite the resistance to the presence of counsel at disciplinary hearings expressed by the correctional officers who do not wish to assume the burden of proof for their charges, they have become accustomed—against their will—to having counsel attend disciplinary hearings, to the extent that it has become the norm and familiar.

62 Resistance to compliance with the right to representation by counsel is not particularly problematic in Canada; it is more so in the United States and in Europe. The Supreme Court of the United States dealt with this issue in Wolff v. McDonnell. In this case, the Supreme Court of the United States held that:

The insertion of counsel into the disciplinary process would inevitably give the proceedings a more adversary cast and tend to reduce their utility as a means to further correctional goals. There would also be delay and very practical problems in providing counsel in sufficient numbers at the time and place where hearings are to be held. At this stage of the development of these procedures we are not prepared...
to hold that inmates have a right to either retained or appointed counsel in disciplinary proceedings. Where an illiterate inmate is involved, however, or where the complexity of the issue makes it unlikely that the inmate will be able to collect and present the evidence necessary for an adequate comprehension of the case, he should be free to seek the aid of a fellow inmate, or if that is forbidden, to have adequate substitute aid in the form of help from the staff or from a sufficiently competent inmate designated by the staff. We need not pursue the matter further here, however, for there is no claim that respondent, McDonnell, is within the class of inmates entitled to advice or help from others in the course of a prison disciplinary hearing.

In Europe, Fraser v. Mudge was long ago considered in England to be precedent-setting. It relied on the principle that inmates do not have any absolute right to be represented by counsel. It was believed that the presence of counsel prolonged procedural delays. In his reasons, Lord Denning, who was in favour of non-recognition of an inmate’s right to be represented or assisted by counsel, said:

If legal representation were allowed, it would mean considerable delay. So also with breaches of prison discipline. They must be heard and decided speedily. Those who hear the cases must, of course, act fairly. They must let the man know the charge and give him a proper opportunity of presenting his case. But that can be done and is done without the matter being held up for legal representation. I do not think we ought to alter the existing practice. We ought not to create a precedent such as to suggest that an individual is entitled to legal representation.

English law has, since that time, evolved and changed, allowing the presence of counsel at disciplinary hearings. As stated by the European Court of Human Rights in Campbell and Fell v. the United Kingdom, “...justice cannot stop at the prison gates.” In Engel and others v. the Netherlands, the European court defined the concept of criminal matter in order to determine when a disciplinary matter should be considered a criminal matter.

Pralus-Dupuy summarizes the position of the European Court as follows:

Contrary to the (disciplinary) Board, which considered that disciplinary proceedings did not enter into the realm of application of this text, the Court is not considered bound by the classification of Dutch law. After reiterating the fact that the Convention clearly allows the States, in fulfilling their role as guardian of public interest, to establish a distinction between criminal law and administrative disciplinary proceedings and to set its course, it separated itself from the classification given by domestic law, claiming that if the contracting States could, at will, categorize an offence as disciplinary rather than criminal, or try a person for a mixed offence in disciplinary proceedings rather than criminal ones, the fundamental clauses of Articles 6 and 7 would be subordinate to the their sovereign will (Pralus-Dupuy, 1995, 734).

The European Court defined three criteria for considering a disciplinary matter in domestic law a criminal charge within the meaning of the Convention, namely: (1) the classification given in the domestic law of the defending State, (2) the nature of the offence, and (3) the level of severity of the sanction to be imposed on the guilty party.

In France, Ms. Herzog-Evans found that the May 9, 2003, Circulaire specified that an inmate has the right to be assisted by counsel. Section 2 of the Circulaire stipulates that, in disciplinary matters, an inmate may request the assistance or representation of counsel or certified agent when appearing before a disciplinary board (Herzog-Evans, 2004, 347).

The right to the assistance of counsel also raises the question of the right to a full and complete defence, which is only possible, in some circumstances, with the assistance of...
counsel. An inmate being tried by a disciplinary body must have the right to defend himself fully and completely. This implies, among other things, that he is entitled to a hearing, to call witnesses and to cross-examine the persons laying charges against him and the witnesses for the prosecution. In short, he theoretically has the right to natural justice, like any other accused person. In reality, however, things work differently.

In *Cardinal and Oswald v. Director of Kent Institution*\(^3\), the Supreme Court of Canada ruled that the obligation to respect procedural fairness applies, in principle, to the disciplinary proceedings in a penitentiary. Consequently, the denial of a right to a fair hearing must always render a decision invalid. According to the Court, the right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have.

Based on the preceding, it can be affirmed that the specific circumstances in a penitentiary may, at times, dictate swift decision-making to prevent a serious security breach, and that may lead to limitations and restrictions on an inmate’s exercising of his fundamental rights under section 1 of the Charter.

In the Canadian context, these reasonable limitations and restrictions may be placed on some rights guaranteed by the Charter, on condition that the two central criteria set out in *R. v. Oakes*\(^3\) have been met. First, the objective to be served by the measures limiting a Charter right must be sufficiently important and be connected to urgent and real concerns in a free and democratic society to warrant overriding a constitutionally protected right or freedom. Second, the means must be shown to be reasonable and demonstrably justified. Once this objective has been recognized as sufficiently important, “…there must be a proportionality not only between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, but also between the deleterious and the salutary effects of the measures\(^3\).” This criterion varies according to circumstances.

**Conclusion**

Despite the notable progress made in criminal law over time, grey areas in which systemic problems occur still exist. The fragmentation of correctional law and the proliferation of regulations contribute scarcely to the familiarity of and accessibility to this law. Inmates, including illiterate inmates, are supposed to know everything, given that they cannot cite their lack of knowledge as an excuse to exempt them of their responsibility.

A review of the application of some guiding principles of criminal trials to disciplinary proceedings in Canadian penitentiaries points up the shortcomings and weaknesses in Canadian correctional law. It is obvious that the lower Canadian courts continue to base their decisions on Supreme Court cases. These decisions are already outdated and are no longer adapted to the evolution of the law and the mindset in Canadian society. In fact, *Wigglesworth* and *Shubley* were settled prior to the coming into effect of the CCRA and at a time where prisons were closed to outside control. Despite its shortcomings, the CCRA contains provisions that establish the rights of inmates and confirms in its principles that inmates retain all of their rights, as do all other citizens. This was not the case in earlier
legislation. Nonetheless, hopefully, Canada will adopt an Act, as did France\textsuperscript{34}, \textsuperscript{34} in which justice is adapted to the evolution of crime and penal philosophy.

It is equally important for prison authorities have the right to choose between the penal approach and the disciplinary approach to prosecute a mixed disciplinary offence, such that the French adage “le criminel tient le civil (disciplinaire) en état” (which means “Having chosen one course, he is not allowed to have recourse to another”) is also conceivable in the prison environment. In so doing, the combining of sanctions and uneasiness in cases where inmates tried in criminal court are acquitted in the absence of evidence or culpability could be prevented. The independence of disciplinary law should not be understood to mean a disregard for the fundamental rights of inmates, as this would be contrary to the mission of the correctional service, which aims to simultaneously fulfil its objectives in matters of safety and justice, and teach inmates to become law-abiding citizens. This means that inmates should have the right to invoke all of the legal rights prescribed in the Charter for their defence, with the exception of the limitations and restrictions set out in Section 1 of the Charter. Otherwise, there is a risk that the correctional plan will not be achieved.

That said, the true impact of the role played by the courts in respecting the rule of law and inmates’ rights should be examined. Do the Canadian courts contribute to the evolution of law or to its stagnation? Mandel (1986) believes that the Canadian courts support the status quo rather than act as agents of change. He does not have faith in the changes brought about by the introduction of the rule of law to the functioning of the disciplinary system. In his view, the legalization of prison discipline is merely an indirect way to prevent any real progress (Mandel, M., 1986, 86). Mandel shares Tammy Landau’s (1984) view whereby the new system of regulations, which complies with the due process approach, has contributed to upholding the discretionary powers of prison authorities. Legal action in cases of violation of procedural fairness have certainly led to improvements, even though it has not given rise to any substantial changes in the regulatory or legislative texts at issue. In other words, the complainant may be successful, but the law whose interpretation was in dispute does not change accordingly. This is the status quo.

Other researchers, such as Rhine (1990) feel that due process has not had an impact on the level or burden of proof in disciplinary proceedings, given the existence of unfavourable biases in prison toward the inmates accused. The belief that inmates would be best served by lying and that they are manipulative further undermines their credibility before disciplinary courts. Because they may influence or pressure witnesses, it is difficult to believe in their innocence. However, violations of these fundamental rights no longer go unnoticed.

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**Additional reading**

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25. Ibid. at 644.
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ABSTRACTS

Critical review of the Disciplinary Correctional Law in Canada shows its fragmentation between a variety of sources. The latter defines and punishes the disciplinary offences according to a particular procedure. The disciplinary court is headed by either the warden for minor offences or an external professional called independent president for all serious offences. According to the Canadian legal precedents, an inmate prosecuted before these two instances has restricted constitutional rights set out in the Canadian Charter of Freedom and Human Rights.

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