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A Practical Guide to Correctional Law Issues

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Overview

After sentencing, an accused enters the correctional system, either as a provincial or federal inmate, depending on the length of the sentence. Sentences of 2 years less a day or less are served in a provincial jail, and sentences of 2 years or more are served in a federal penitentiary/prison.

Below is a guide to some of the common correctional law issues for both federal and provincial inmates.

Federal inmates

Authorities

- *Corrections and Conditional Release Act*, SC 1992, c 20 ("*CCRA*") governs the federal correctional system
- Correctional Service Canada ("CSC") is responsible for federal inmates
- The Parole Board of Canada ("PBC") makes parole decisions
- The Federal Court has supervisory jurisdiction over both CSC and the PBC

Security classification and penitentiary placement

Federal inmates (males) are initially sent to the Joyceville Assessment Unit at Joyceville Institution Medium in Kingston. The assessment phase normally lasts between about 60 and 120 days. During the first few weeks, a parole officer completes the Custody Rating Scale, which helps the parole officer determine the offender's institutional adjustment, escape risk, and public safety risk ratings. A parole officer will assign a score of low, medium, or high in each of these three domains. Based on these three ratings, the offender will be assessed as either minimum, medium, or maximum security and will begin serving their time in a corresponding prison.

Offenders convicted of some offences (e.g. murder) are automatically classified as maximum security on the Custody Rating Scale; however, the final decision about security classification is

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generally made by the institutional head. This decision generally confirms the results of the Custody Rating Scale and the parole officer's assessment.

Inmates are placed in a penitentiary based on their security classification. The institutions in Ontario include:

- Millhaven Institution (maximum)
- Bath Institution (medium)
- Collins Bay Institution (minimum/medium/maximum)
- Joyceville Institution (minimum/medium)
- Warkworth Institution (medium)
- Beaver Creek Institution (minimum/medium)
- Grand Valley (minimum/medium/maximum) – women only

Inmates can request a particular institution, but CSC ultimately decides where an inmate is placed. A person convicted in Ontario can also be placed in an institution outside of Ontario.

Challenging a penitentiary placement is normally done by way of an internal grievance, which can ultimately be reviewed in the Federal Court on judicial review. However, the grievance process normally takes so long that it becomes moot by the inmate being transferred to another institution or released. As well, the remedies the Federal Court grants are usually limited to sending the decision back to CSC to do over, which often results in the same decision—the Federal Court rarely directs CSC where to house inmates.

There may be a limited opportunity to challenge a penitentiary placement by way of habeas corpus in the Superior Court. This would be a timely approach. It has generally not been successful, but may be open to being revisited in light of the Supreme Court's recent decision in *Canada (Public Safety and Emergency Preparedness) v Chhina*, 2019 SCC 29, in which Borys Law successfully intervened in on behalf of the Canadian Prison Law Association. As with the Federal Court though, the remedy would likely be for CSC to do the decision over again.

Involuntary Transfers

After an initial penitentiary placement, inmates can be involuntarily transferred to an institution of the same security level or to a higher security level if the inmate's security classification is raised.

<u>The process for an involuntary transfer</u>

- A parole officer will complete an Assessment for Decision that will outline why a transfer is recommended

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- The offender will be provided with the Assessment for Decision, notice of the transfer recommendation, and any information to be used in making the decision
- The offender will be allowed to make a rebuttal
- A final decision will then be made by the warden about whether to transfer the inmate or not

This process typically occurs before the inmate is transferred, but, in the case of an emergency transfer, it may be done after the actual transfer.

Challenging involuntary transfers

Involuntary transfer decisions can be challenged by way of an internal grievance, which can ultimately be reviewed in the Federal Court on judicial review, but for reasons related to time and remedy outlined above, this is not particularly effective.

A better way to challenge an involuntary transfer is through a habeas corpus application. Habeas corpus applies squarely to involuntary transfers to higher security levels, but is problematic to use for lateral transfers to another institution of the same security level because of the difficulty in establishing the required deprivation of liberty. Involuntary transfer decisions can be challenged on the basis that they are unreasonable and/or procedurally unfair.

If a habeas corpus application is successful, CSC must release the person from whatever form of imprisonment (i.e. whatever security level or institution) the court has deemed is unlawful for them to be transferred to, but the Superior Court does not generally make an order about where specifically CSC should or must place the inmate. A successful habeas corpus application usually results in the inmate being sent back to the institution they came from (or another institution of the same security level they came from, if they were sent to a higher security level), but CSC does have the opportunity to redo the transfer decision, and this can sometimes result in the same outcome the second time around.

Parole and other forms of release

Escorted temporary absences ("ETAs")	Inmates can apply at any time. These are at the discretion of CSC, although the PBC must approve ETAs in some cases (e.g, people serving life sentences).
Unescorted temporary absences ("UTAs")	An inmate with a sentence of 3+ years is eligible for UTAs after serving 1/6 of their sentence. Inmates serving sentences of 2-3 years are eligible after serving 6 months. Offenders with life and indeterminate sentences are eligible 3 years before their full parole eligibility date. UTAs are not available for offenders classified as maximum

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security.

Work release — Offenders are eligible for work release at the same time they are eligible for UTAs. Offenders serving sentences of 2+ years are eligible to apply 6 months before their full parole eligibility date or 6 months into the sentence (whichever time frame is greater).

Day parole — Offenders are eligible for day parole 6 months before their full parole eligibility date or after serving 6 months, whichever is greater. Day parole means residing at a Community Residential Facility ("CRF"), also known as a halfway house.

Full parole — Offenders are eligible after serving 1/3 of their sentence or after 7 years—whichever is less, subject to the period of parole eligibility set by the judge at sentencing. Full parole means residing the offender's own residence.

Statutory release — At 2/3 of their sentence, an offender is generally released on statutory release to serve the last third of their sentence on parole, which is the equivalent of full parole, unless a residency condition is imposed on them to reside at a Community Correctional Centre ("CCC"). This is subject to the ability of CSC to refer cases to the PBC for detention for the last third of the sentence. An offender is entitled to a detention hearing before the PBC to fight this. Obviously, statutory release is not applicable to lifers or those serving indeterminate sentences.

There is no form of release at 1/6 of a sentence anymore. This is what was known as Accelerated Parole Review ("APR"), which allowed first-time non-violent offenders to be presumptively released on parole at 1/6 of their sentence. But, this was abolished by the Conservative government on March 28, 2011. However, if an offender's offence predates this date, or the offence straddles this date, and the offender meets the other criteria for APR, they are still eligible for the APR process.

Test for parole

The Board can grant parole if it believes:

a) The offender will not, by re-offending, present an undue risk to society before the expiration of his or her sentence; and
b) the release of the offender will contribute to the protection of society by facilitating the reintegration of the offender into society as a law-abiding citizen.

Public safety is the paramount concern. The Board has access to a wide variety of information, including court records, police reports, and information from the victim. The rules for admissibility of information or documents at a parole hearing is *very* low.

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During a parole hearing, the Board will ask the offender questions to determine if the offender's risk is manageable and what conditions would be necessary and appropriate to control their risk of re-offending.

Parole appeals

Offenders can appeal a decision of the PBC to the Appeal Division of the Board.
The grounds of appeal are listed in the *CCRA*. An offender can appeal a decision on the basis that the Board:

- failed to observe a principle of fundamental justice;
- made an error of law;
- breached or failed to apply one of its policies;
- based its decision on erroneous or incomplete information; or
- acted without jurisdiction, or beyond its jurisdiction, or failed to exercise its jurisdiction.

Inmates have 60 days from the date of the Board's decision to file an appeal. Parole conditions can be appealed as well, not just the decision to deny parole. If the Board imposes a parole condition not recommended by CSC (one that the offender did not know the Board was contemplating), then an expedited option to challenge the decision is available by writing to the Board for "reconsideration". This must be done within 30 days of the Board's decision.

Further appeals are done by way of judicial review in the Federal Court of the Appeal Division's decision.

Post-suspension hearings

If a parolee breaches a condition of their release, or if it is deemed necessary and reasonable to prevent a breach or protect society, then their parole can be suspended. This applies to inmates on day parole, full parole, or statutory release. Parole is automatically suspended if the offender receives an additional sentence while on parole (other than a conditional or intermittent sentence).

Within 30 days of parole being suspended, the case must be referred to the Board for a post-suspension hearing, or the suspension must be cancelled locally by the parole officer. The Board must hold a hearing within 90 days of the referral, or of the offender getting back into federal custody from whatever provincial jail they are at, whichever is the later. If the Board is satisfied that the offender will, by reoffending before the end of the sentence, present an undue risk to society, then it may revoke or terminate parole. If the Board is not satisfied with this, then it can cancel the suspension and reinstate parole. This can be accompanied by a reprimand, new conditions, or a delay in the cancellation taking effect.

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Inmates are entitled to be represented by counsel at these hearings, the same as at parole and detention hearings.

File corrections

If an offender's file with CSC contains errors, the offender may need to make a file correction request. The review of the request is normally supposed to be completed by the author of the report or the offender's parole officer within 30 days of the offender's request. It should be noted that file correction requests are for factually inaccurate information, not for opinions that the offender disagrees with.

Grievances and inmate complaints

Inmates who want to contest a decision or complain about the conduct of CSC employees typically need to go through the inmate complaint and grievance process first. An inmate may be barred from judicial review until the complaint has gone through the statutory complaint and grievance process.

The inmate complaint and grievance process has three levels. Inmates generally need to start at the first level, unless they are grieving a decision made by the warden, in which case the grievance goes directly to the third level. This process can take several months, or even over a year:

- First, there is a written complaint to the supervisor of the staff member at issue
- Second, there is a grievance to the Institutional Head/District Director, which may be referred to the Inmate Grievance Committee (if it exists in the institution) or (at the request of the grievor) sent for review by the Outside Review Board
- Third, there is a final grievance at the national level which is submitted to the Commissioner

Complaints and grievances generally need to be submitted by the grievor within 30 working days of the action/decision at issue. This time frame can be extended in some cases.

There are time frames for CSC to respond to complaints and grievances. For complaints and initial grievances, a response is due with 15 days for high priority cases and 25 working days for routine cases. For final grievances, a decision is to be rendered in 60 working days for high priority cases and 80 days for routine cases. However, the decision-maker can give himself or herself more time to make a decision. This is done regularly, and the inmate whose decision is delayed will be sent a letter explaining the delay and the new anticipated date for the decision. There is no firm upper limit with respect to how much time CSC has to provide a response, and

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the systemic delays in the complaint and grievance system have been discussed in several cases. There is no ability to challenge the decision maker's decision to extend the timeframe for a response.

Segregation review hearings

Offenders placed in administrative segregation are entitled to hearings before the Institutional Segregation Review Board. An initial hearing is held within 5 working days of the offender's admission (or following any readmission), within 30 calendar days of admission, and at least once every 30 calendar days thereafter.

The Regional Segregation Review Board reviews the case of offenders who reach 38 days in administrative segregation, and at least every 30 days after. There is an overlap between the work of the Institutional and Regional Segregation Review Boards.

Offenders are entitled to make representations and be represented by counsel at segregation review hearings, but the short notice for hearings being convened makes it extremely difficult for counsel to actually arrange access to the institution for the hearing—you cannot just show up at a federal institution as you can at many provincial jails.

Disciplinary charges

The *CCRA* sets out a number of disciplinary offences for inmates, including, but not limited to:

- Disobeying a justifiable order of a staff member
- Theft
- Assault
- Possession of contraband
- Consuming an intoxicant
- Creating or participating in a disturbance or activity likely to jeopardize the security of the penitentiary
- Failure to provide a sample for urinalysis when requested to do so

When charged, offenders are provided with a copy of the offence report, and a hearing is scheduled. Hearings are conducted before the institutional head or a designate (for minor offences) or an external Institutional Chairperson ("ICP") (for serious offences).

The strict rules of evidence in criminal matters do not apply in disciplinary court, but the standard of proof is still proof beyond a reasonable doubt and there is a body of case law about the procedural fairness that must be afforded to inmates in a disciplinary hearing If an inmate is

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found guilty, then the inmate may receive a sanction ranging from a warning, to loss of privileges, to fines and restitution, or even segregation.

Inmates are entitled to be represented by counsel at disciplinary hearings. The Correctional Law Project at Queen's Law School provides assistance to inmates at disciplinary hearings at Millhaven, Bath, Collins Bay, Joyceville, and Warkworth.

Judicial review

The Federal Court has supervisory jurisdiction over both CSC and the PBC. Judicial review can be sought to challenge decisions about, among other things:

- Parole
- Segregation
- Disciplinary court decisions
- Security level
- Transfers
- Mistreatment by staff
- Access to/refusal of privileges
- Visitation issues
- Third level grievance denials

It can take several months to over 18 months to get a judicial review application heard in the Federal Court. In some circumstances, an expedited hearing may be available. Inmates generally must pursue any internal routes of appeal before they can get to the Federal Court.

Aboriginal offenders

Aboriginal offenders (or anyone self-identifying as Aboriginal) have access to specific cultural programming and interventions. Aboriginal Liaison Officers ("ALOs") meet with offenders interested in following a healing path and can refer offenders to an Aboriginal Elder. Programs specifically for Aboriginal offenders are available as well.

Institutions also accommodate certain cultural ceremonies, and may allow offenders access to certain cultural objects (smudging supplies, medicine bag, etc.).

Aboriginal offenders are entitled to a circle hearing, as opposed to a standard parole hearing, and also to the assistance of an Elder at their hearing.

Provincial inmates

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Authorities

- *Ministry of Correctional Services Act*, RSO 1990, c M.22 governs provincial inmates
- The Ministry of Community Safety and Correctional Services is responsible for provincial inmates
- The Ontario Parole Board ("OPB") makes parole decisions
- The Superior Court has supervisory jurisdiction over both the Ministry of Corrections and the OPB

Security classification and jail placement

Inmates can be placed in minimum, medium, or maximum security, but these security levels are all housed within the same institution—there are no separate institutions for the different levels, as there are in federal institutions.

Inmates serve their pre-sentence custody in remand/detention centres, but once sentenced, they are generally transferred to a correctional centre, typically either Central East Correctional Centre in Lindsay or Central North Correctional Centre in Penetanguishene.

It is very difficult to challenge jail placement or subsequent transfers to another jail through any internal or court method.

Parole and other forms of release

Temporary absence	Offenders are eligible at any point in their sentence.
Parole	Offenders are eligible after serving 1/3 of their sentence. However, if the sentence is less than 6 months, the Board has the discretion not to hold a parole hearing. For sentences of 6 months or more, the offender is automatically considered for parole. Unlike federal parole, there is no distinction between day and full parole. Provincial parole is essentially the same as full parole, in the sense that the inmate lives at their own residence.
Earned remission	Offenders are credited with ½ day of credit for each day of their sentence they serve, as long as they are of good behaviour. If they are not, they can lose some or all of this earned remission. Earning ½ day for each day of the sentence served means inmates will be eligible to be discharged at 2/3 of their sentence. When this happens, the inmate is not on parole for the last third of their sentence—the sentence is truncated and is simply over. However, if an inmate is released on parole prior at any point in their sentence prior to this, they will be on parole for

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the full length of their sentence.

Test for parole

The OPB does not have its own test for parole. Instead, it adopts the parole test set out in the *CCRA*.

The Board can grant parole if it believes that:

a) The offender will not, by re-offending, present an undue risk to society before the expiration of his or her sentence, and
b) the release of the offender will contribute to the protection of society by facilitating the reintegration of the offender into society as a law-abiding citizen.

Public safety is, again, the paramount concern. The Board has access to a wide variety of information, including court records, police reports, and information from the victim. The rules for admissibility of information or documents at a parole hearing is *very* low.

During a parole hearing, the Board will ask the offender questions to determine if the offender's risk is manageable and what conditions would be necessary and appropriate to control the risk of re-offending.

Aboriginal offenders

Aboriginal offenders have access to an Indigenous spiritual leader, Elder, or Healer. They are also given opportunities to participate in certain cultural ceremonies and have access to cultural items, including sacred medicines.

Aboriginal offenders are entitled to a circle hearing, as opposed to a standard parole hearing, and also to the assistance of an Elder at their hearing.

Parole appeals

Inmates can request that the Chair of the OPB conduct a review of the decision to deny them parole. There are no set grounds of appeal for decisions of the Ontario Parole Board, and instead the Chair has broad authority to order a new hearing if the hearing was unfair in any way, or if there is new information for the OPB to consider at a new hearing.

A request for a new hearing can be made at any time.

Post-suspension hearings

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Parolees can have their parole suspended if they breach a condition of their parole or if it is necessary and reasonable to suspend parole to prevent a breach of a condition or protect any person from danger or property from damage.

After suspension, a review is held, and the OPB can lift the suspension or revoke the inmate's parole.

Inmates are entitled to representation by counsel at these hearings, as with parole hearings.

Complaints

Inmates can make complaints against other inmates or employees in writing to the Superintendent.

Segregation reviews

The Superintendent must review the case of an inmate put in segregation within 24 hours of admission. The Superintendent must review that inmate's case at least once every 5 days to determine if segregation is warranted. After 30 days in segregation, the Superintendent must report to the Minister the reasons for the continued segregation.

Inmate misconduct

Inmates may be disciplined if they commit a disciplinary offence, including, but not limited to:

- Disobeying a staff member
- Theft
- Assault
- Possession of contraband
- Creates or incites a disturbance likely to jeopardize the security of the institution
- Wilfully breaching a term or condition of a temporary absence

The Superintendent decides if the inmate committed the offence. Before a decision is made, the Superintendent must notify the inmate and give the inmate an interview. The inmate is allowed to present arguments to dispute the allegation and question the person(s) making the allegation and any witnesses. If the inmate is found responsible, the Superintendent can impose a sanction ranging from a reprimand, to change of security status, to close confinement.

Conclusion

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This paper is intended to provide criminal lawyers with a basic overview of some of the main issues in correctional law. It should be remembered that, as with criminal law, the law is nuanced and any advice is dependent on the particular facts of a case.

This is particularly true of the two main questions that we get at Borys Law from clients and from other criminal lawyers wanting to advise their own clients: (1) if a sentence is going to be close to two years, is it better to go provincial or federal, and (2) what is the likelihood of getting parole and when. We are always happy provide this type of advice and consultation to other lawyers.

We also serve individual clients in the areas of parole, detention, and post-suspension hearings, habeas corpus applications challenging involuntary transfers and segregation, inmate grievances, judicial review, and institutional charges, and we have a network of lawyers we can refer civil cases for inmates to as well.