

## The Duty to Act Fairly in Penitentiaries

The Origins of the "Duty to Act Fairly" and its Application to Penitentiaries The "duty to act fairly" comes from the Rule of Law, which originated in Britain. The Rule of Law implies that everyone, from the most ordinary citizen to the head of state, is subject to the law. This is contrary to the rule of men, which prevails in totalitarian regimes. It goes without saying that in a society governed by the Rule of Law, as is Canada, the public service must respect the fundamental rights of citizens and the principles of natural justice, including the duty to act fairly. If an individual is required to respect the duty to act fairly and does not do so, an administrative decision made by that individual in the line of duty could be appealed by an affected citizen and overturned by a court. As well, the duty to act fairly is closely related to the necessary legal protection of the rights and freedoms of the person in a liberal democracy like Canada.

The Correctional Service of Canada and its employees are not exempt from the Rule of Law and the rules of natural justice, including the duty to act fairly implied by it. Even though imprisonment results in the loss of freedom, which is the most precious of fundamental rights, inmates nevertheless maintain other rights. In fact, the Supreme Court of Canada has, in the *Martineau* case, formally recognized that "the rule of law must run within penitentiary walls."<sup>(1)</sup> Prison life is thus subject to the Rule of Law, and inmates have certain specific rights, which are safeguarded by the duty to act fairly. The Components of the Duty to Act Fairly The duty to act fairly relates to two basic rights: <sup>(1)</sup> the right to be heard and <sup>(2)</sup> the right to have an impartial hearing. More specifically, the right to be heard is defined as the right of citizens to be informed of the allegations made against them and to respond to those allegations. The right to an impartial hearing means that a decision must not be rendered against a person for discriminatory or arbitrary reasons.

Obviously, all of those who make administrative decisions regarding the rights or liberties of penitentiary inmates have a duty to act fairly. In the penitentiary system, the duty to act fairly is most specifically applicable to three areas: <sup>(1)</sup> administrative segregation, <sup>(2)</sup> involuntary transfers of inmates and <sup>(3)</sup> discipline of inmates. The Duty to Act Fairly and Administrative Segregation Section 40 of the *Penitentiary Service Regulations*<sup>(2)</sup> and Commissioner's Directive number 590 set out provisions for the placement of inmates in segregation. These deal with the reasons for placement in segregation, the conditions of the confinement and the review of the case. The provisions are designed to eliminate any arbitrariness in the decision-making process and are based on the general duty of penitentiary directors to avoid irrelevant or discriminatory considerations when making decisions that affect an inmate's freedom. In addition, Directive number 590 provides clear examples of the application of the right to be heard within the penitentiary context: <sup>(1)</sup> the obligation to inform an inmate, in writing, of the reasons for the placement in segregation within 24 hours following this placement; <sup>(2)</sup> the obligation to notify the inmate in advance of each review of the placement into segregation, to permit the inmate to present his or her case at a hearing in person to the Segregation Review Board; and <sup>(3)</sup> the obligation to advise the inmate, in writing, of decisions concerning his or her status. The Duty to Act Fairly and the Transfer of Inmates The focus here is on involuntary transfers. Commissioner's Directives numbers 540 (Transfers of Inmates), 006 (Classification of Institutions) and 095 (Information Sharing) provide the legal context and ensure respect for the rule of impartiality, particularly in the clear statement on the reasons for inmate

transfers, including the behavioural norms that must be employed in assessing the inmate. The duty to act fairly is met through a number of provisions in Directive number 540, which include the obligations to:

- notify the inmate in writing of a proposed involuntary transfer;
- inform the inmate of the reasons justifying such a transfer;
- provide the inmate with as much detail as possible in order to be able to know the case against him or her, except in cases involving sensitive information;
- inform the inmate, in writing, that he or she has the right to respond to the proposed transfer within 48 hours following the notification; and
- consider the inmate's response and advise the inmate of the reasons for the decision within 10 working days following the time of this decision.

In addition, the inmate has the right to contest a transfer decision, using the inmate grievance procedure. The Duty to Act Fairly and the Discipline of Inmates Obviously, procedural fairness in the discipline of inmates is of greatest concern to disciplinary courts. These courts, which render decisions in actions against inmates charged with serious or intermediary offences, can impose punishment, such as the placement of the inmate in administrative segregation or forfeiture of statutory or earned remission. The Supreme Court of Canada has clearly stated, in *Martineau*,<sup>(3)</sup> that although they are essentially discharging an administrative task, these courts are nonetheless subject to the duty to act fairly.

The relevant provisions are found in sections 38 and 39 of the *Penitentiary Service Regulations* and Commissioner's Directive number 580. In keeping with the duty to act fairly, this Directive safeguards the rights of inmates, in particular in the following ways, through the obligations to:

- advise the inmate orally, at the time of misconduct, that a charge will be laid against him or her, unless there are special reasons for not doing so;
- provide the inmate with a copy of the misconduct report and a summary of any additional evidence;
- give the inmate at least 24 hours notice prior to the disciplinary hearing, unless he or she waives the notice or has his or her waiver recorded at the hearing; and
- have the charges against the inmate heard as soon as possible, within a reasonable time, after the charge has been laid.

The inmate is also guaranteed the right to:

- appear personally throughout the hearing unless he or she waives this right, his or her presence would jeopardize the security or the good order of the institution, or he or she disturbs the conduct of the hearing;
- receive a hearing in the official language of his or her choice;
- provide explanations, make representations and give evidence (including through his or her own testimony), be informed of his or her right to give evidence, and question witnesses through the Chairperson of the hearing;
- be protected against the use of incriminating evidence given at a disciplinary hearing as evidence

- against him or her in a subsequent disciplinary hearing of another charge; and
- be immune from a guilty verdict for an offence unless guilt is established "beyond a reasonable doubt."

It should be noted that the inmate does not have the right to be present, after being found guilty, during the consultation between the Independent Chairperson and the two officers who advise the Chairperson with respect to the punishment that should be imposed upon the inmate. However, the inmate has the right to be informed, after the deliberations, of the discussions that took place during these deliberations and has the right to make submissions as to punishment before the punishment is imposed (**see Commissioner's Directive number 580, section 33**).

Likewise, precedents seem to lean toward allowing the inmate a limited right to representation by counsel at the time of the disciplinary hearing. For example, in the *Howard* decision,<sup>(4)</sup> a leading case in this field, the Federal Court of Appeal has ruled that the granting of this right should be ascertained, essentially but not exclusively, on the basis of three factors:

- the gravity of the offence with which the inmate is charged;
- the capacity of the inmate to present his or her own defence; and
- the complexity of the case.

The Future Application of the Duty to Act Fairly to Prison Law The development of the duty to act fairly is far from losing momentum. On the contrary, the notion seems to have been confirmed, even enriched, by the proclamation of section 7 of the *Canadian Charter of Rights and Freedoms*, which stipulates, in particular, that "everyone has the right to . . . liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." In practice, this **could** mean that additional duties will be imposed on penitentiary authorities in the name of the duty to act fairly. However, it could also mean that disciplinary courts will be harnessed with even more duties related to procedural requirements that are usually proper to genuine criminal trials. No one yet knows the extent of the impact that section 7 of the Charter will have on the day-to-day administration of our penitentiaries. However, this provision certainly raises a great number of questions as to how extensive inmate rights will eventually be. And, it will just as certainly "be essential that the requirements of prison discipline be borne in mind, just as . . . the requirements of the effective administration of criminal justice . . .," as Mr. Justice Pigeon suggested in the *Martineau* case<sup>(5)</sup>

*The following summaries and extracts have been made from opinions, reports and other documents for the information and convenience of the reader. The extracts are not complete and should not be relied upon without legal advice or reference to the actual opinion or document. The reader is advised to consult with Legal Services at National Headquarters concerning the specific interpretation or applicability of any opinion or decision cited. If you have any questions with respect to these or other relevant matters, please contact Theodore Tax, Senior Counsel Department of Justice, Legal Services, Correctional Service of Canada, National Headquarters, 4A-340 Laurier Ave. West, Ottawa, Ontario, K1A 0P9.* Recent Decisions In two recent cases, *Durack v. Warden of Saskatchewan Penitentiary and Unrau v. Warden of Saskatoon Correctional Centre*, the Saskatchewan Court of Queen's Bench ruled

that *habeas corpus* should not be granted for federal prisoners transferred from a Saskatchewan correctional facility to Saskatchewan Penitentiary. The inmates had originally been housed in provincial facilities under the terms of Exchange of Services Agreement with Saskatchewan but changes in circumstances caused Saskatchewan authorities to send the inmates back to federal jurisdiction. The court ruled that it was not satisfied that the transfer resulted in a loss of residual liberty, as is the case with a transfer to segregation or high maximum security. In other words, no change in the conditions of confinement warranted the issuance of *habeas corpus*.

In *Jackson v. A G of Canada*, the Federal Court (Trial Division) struck down section 41.1 of the *Penitentiary Service Regulations*, which authorized penitentiary officers to order inmates to submit to urinalysis. The court held that it was contrary to section 7 of the Charter and infringed on the right of the individual to be free from unreasonable search and seizure as guaranteed by section 8 of the Charter. The court indicated that while it did not in principle object to urinalysis in a penitentiary setting, the regulation as presently drafted did not contain sufficient standards and criteria to allow it to conform to the requirements of the Charter. The case will not be appealed.

In *Ford v. Commissioner of Corrections and National Parole Board*, inmate Ford was referred in July 1989 by Correctional Service of Canada to the National Parole Board for a detention hearing. The referral was withdrawn upon receipt of information that Criterion B was not met since the victim did not suffer serious harm. Subsequently, a Commissioner's referral was made based on "new information" consisting of a psychiatric report received in October 1989 (i.e., after the six-month cutoff date for a service referral).

Ford brought an application to quash the referral. In dismissing the application, the Federal Court (Trial Division) held that there was "new information" which could be relied upon by the Commissioner to support the referral. The *Parole Act* does not require that the information be created or originate in the six months prior to the presumptive release date. It is the content of the information that must be new, in the sense that it must be unknown to both the Commissioner and the Service prior to the end of the six-month period. The psychiatric report was not simply a reinforcement of the decision already reached by the case management team. It provided a professional opinion about the psychiatric condition of the inmate and was therefore new information, which was not available prior to its receipt in October 1989, notwithstanding the fact that it could have been requested earlier.

This decision is being appealed to the Federal Court of Appeal.

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(1) *Martineau v. Matsqui Institution Disciplinary Board*, (1980) 1 S.C.R. 602, p.622.

(2) C.R.C., c. 1251, *as amended*.

(3) *Martineau v. Matsqui Institution Disciplinary Board*, *supra*, note 1.

(4) *Howard v. Stony Mountain Institution*, [1984], 2 F.C. 642, p.663.

(5) *Martineau v. Matsqui Institution Disciplinary Board*, *supra*, note 1, p.637.