

Selected Legal Aspects of Effective Correctional Program. ming: Access to Programming and Mandatory Programming

In making decisions based upon individual needs, correctional programming creates distinctions between individuals. In many cases, these distinctions may address, to varying degrees, existing differences among individual inmates. These differences may themselves create further differences in the impact of a particular program on, or its usefulness to, particular inmates.

As is always the case when individuals are so directly affected, many important legal issues are involved in assessment and program decisions. In particular, the exercise of decision-making powers by the Correctional Service of Canada triggers the duty to act fairly. As these decisions often have the potential to affect residual liberty and sometimes equality, there may well be corresponding implications under the Canadian Charter of Rights and Freedoms. Finally, there are additional, important implications for these fairness and equality concerns under current conditions of fiscal restraint and limited resources.

Correctional programming in general raises many legal issues. We have selected two of the most important issues to discuss briefly here. In some ways, these two issues illustrate the major concerns in this area. First, we will examine the basic question of access to programming and the legal concerns associated with that primary consideration. Then, the more specific issue of mandatory programming will be addressed. Access to Programming Many people insist that the issue of access is not a legal question but more one of simple logistics. Is the program the inmate needs offered at the institution in which he or she is incarcerated? If not, can the inmate transfer to another institution where the program is offered? Are enough people interested in the program to warrant its being offered? Conversely, are there so many people interested in the program that inmates cannot get into it and must be placed on a waiting list?

All these questions raise legitimate access issues. However, from a legal perspective, even if the individual inmate is placed in a particular program, there are often differences in the impact or usefulness of the program for individual inmates. These differences between real and apparent access to programming may result in a lack of equality of access. Apparent Access Recently, there has been much written about glass ceilings when discussing women in the public service.⁽¹⁾ A glass ceiling or wall has often been used as a metaphor for explaining the differences between real and apparent access in general terms. The metaphor is a useful one, as barriers are often invisible and, without close scrutiny, may appear non-existent.

In correctional programming, most often the issue is not one of access, meaning getting into an existing program. Although there are often long waiting lists for some programming (such as sex offender programs), offenders generally have a chance to participate in the recommended program at some point during their incarceration. Indeed, the Mission Document accords high priority to the provision of programming to meet individual needs.²

Often, however, mere access to a program or service, such as registration in a course for sex offenders, will not guarantee real access to the benefit the course is designed to bestow. A clear, relatively obvious example, is the following situation: In some cases, handicapped people seem to have the same

opportunities for services, benefits, and activities as non-handicapped people. If handicapped people cannot take full advantage of an opportunity, however, its value and effectiveness are diminished for them. Allowing a deaf person to attend a speech or other oral presentation may appear to be equal treatment, for instance, but without an interpreter or some captioning process, the presentation may be less effective for the deaf person than for the rest of the audience. Similarly, without readers or braille materials, treating blind students identically to sighted students by providing printed textbooks will obviously not produce an equally effective educational program.⁽³⁾ In correctional programming, there are many more subtle but parallel situations. These range from the clearer examples of individuals who lack the language skills necessary to understand the program, through those of illiterate persons who cannot read the written material used in the program, to those of individuals who cannot benefit because they lack, either totally or partially, the cultural context needed.

An example of this last situation might be a traditional Inuit man who is sent to the same sex offender program as a group of white males of Anglo-Saxon origin. Other examples may prove even more difficult to anticipate. Many programs have been designed for members of the majority by members of our mainstream culture, usually well-educated persons with an urban Canadian or American background. These programs have been designed for other members of that mainstream culture and often contain inherent, unconscious biases. Without an innate understanding and acceptance of the values of other parts of our society, the programming will be less useful to many individuals attending the course.

This aspect of program planning has recently been discussed extensively in connection with programs in other areas. For example, the American pre-university aptitude tests, or SATs, were completely redesigned recently after their results were called into question. It was shown that they had a disproportionate impact on women and on members of visible minority groups. The questions had been unconsciously designed so that the test was an accurate measure of knowledge available to most urban, white males, resulting in disproportionately high scores among this class. Real Access Real access, therefore, often involves much more than whether or not an individual is allowed into a course. However, how real access is ensured is not a clear matter. As one author has suggested: No one opposes equality. As a principle of democratized civilization, it is accepted without controversy. It always has been. But its definition and application produce controversy of a fundamental kind, and we find, on closer analysis, that although no one disagrees with the universal right to equality, few principles attract a wider range of visceral debate.⁽⁴⁾ The means to achieve equality are not easily agreed upon, particularly when the nature and existence of the problem itself are not universally acknowledged.

Most programming is designed to address individual differences to some extent, particularly programs that attempt to ascertain and deal with individual attitudes or behaviour outside the norm. However, "[n]ot all discrimination flows from prejudice. It may flow from stereotyping ... or from indifference or neglect."⁽⁵⁾ In many cases, differential effects of standardized programming may happen simply because the person designing or applying the program has not experienced the reality of the individual to whom the program is now applied. Far from being deliberate, this effect may still cause much frustration on both sides.

In some cases, the effect is the result of a misplaced attempt to create equality by treating everyone alike. This formalistic approach to equality may actually produce greater inequalities. As the famous saying by

Anatole France goes, which is often quoted, "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."⁽⁶⁾ Yet the impact of this law, which purports to apply equally to everyone, is vastly different on the rich and the poor. As the Supreme Court of Canada has acknowledged, substantive equality will often require that persons be treated differently because they are different.⁽⁷⁾

While the question of how this real access may be accomplished is not clear in all cases, it is clear that the law will require the issue to be considered and addressed in the design and delivery of programs. Equality of Access This requirement for equality of access does not refer to a guarantee of equality of result, but rather to equality of opportunity. In listing the rights of every Canadian within the broader context of Canadian society, one of the most basic is surely the right to be a part of our society. This concept, however, has within it many unstated assumptions.

We mean, of course, that every individual in Canadian society should have the equal opportunity to make use of his or her own unique talents and merits in order to contribute to, and benefit from, the wider society to the best of his or her abilities. To most of us, this means, at a minimum, opportunities for education and to develop family and career. To many, however, it may appear that these things are available to all Canadians, simply by virtue of their being born in, or becoming residents of, Canada.

Unfortunately, we know that this is not so in Canada today and that many of the inmates with whom we deal fall into this group of people who never get such an opportunity, or who misuse an opportunity because of a lack of education, psychological problems, substance abuse, lack of positive role modelling and various other factors. Thus, although it may superficially appear that all Canadians have equal opportunities to succeed in Canadian society, the apparently open door may hide many disparities.

Since the law expects every adult individual to accept some responsibility for his or her own life and future, we have the concept of punishment for wrongdoing. Correctional programming, too, has to balance the identification and the address of individual needs with the right of that individual to refuse help.

The courts have made it quite clear that, just because an individual is within the jurisdiction of the Correctional Service of Canada, it does not mean that the Correctional Service of Canada assumes the authority to act in loco parentis (as that person's parent or guardian) to determine what is best for him or her. Rather, the mandate of the Correctional Service of Canada is to encourage and reward responsible behaviour while allowing inmates sufficient autonomy to make their own mistakes and to learn from them. As one author has stated, in the context of disabled persons and the well-meaning attempt to shield persons from harm, "normal on our earth is trouble and strife, trial and tribulation, and the handicapped person has a right to be exposed to it."⁽⁸⁾

A direct example of this is the issue of whether, and under what circumstances, programs can be made mandatory. Mandatory Programming To what extent does the Correctional Service of Canada or the National Parole Board have the discretion to require an offender to submit to a particular treatment or to participate in certain programs, either in an institution or as a condition of parole or mandatory supervision?

In two recent decisions, the courts have held that a person's right to life, liberty and security of the person under section 7 of the *Charter* may be infringed upon by mandatory programming or by forcing a person to submit to psychiatric treatment or procedures.⁽⁹⁾ In these cases, the courts were asked to decide on the legality of the Crown's imposition of treatment on mentally ill individuals. The reasoning in these cases could have an impact on this aspect of corrections, as well as on mandatory programming in general.

In *Read and Gallagher v. Fleming* (Ont. C.A., unreported, 28 June 1991), the central issue was whether the State was entitled to administer neuroleptic drugs in a non-emergency situation to involuntary incompetent psychiatric patients who had, while being mentally competent, expressed the wish not to be treated with such drugs. The issues discussed by the Court are not only important to psychiatric patients within federal institutions, but the principles enunciated also provide guidance with respect to other compulsory programs imposed on unwilling participants.

Read did not deal with offenders per se, although both *Read* and *Gallagher* were being held pursuant to Lieutenant-Governor's Warrants. The Ontario Court of Appeal held that involuntary, incompetent mental patients' right to security of the person was violated, contrary to section 7 of the *Charter*, by the forced administration of anti-psychotic drugs in situations where the patients had, while competent, expressed the wish not to be treated with such medication.

In *R. v. Rogers* [(1990), 61 C.C.C. (3d) 481], the offender was convicted of possession of concealed weapons. A report prepared by a psychiatrist identified the offender as schizophrenic with a history of failing to take his medication, the result being that he would manifest thought-disorder and hallucinations. The Court held that a probation order compelling the offender to take psychiatric treatment or medication places an unreasonable restraint on liberty and security of the person. It went on to state that only in exceptional circumstances could such an order be justified as being a reasonable limitation in a free and democratic society pursuant to section 1 of the *Charter*.

Although unlikely, there is always a risk that the person could be subjected to an unusual or dangerous medication or treatment. The Court recognized that protection of the public was the objective behind the probation order compelling the compulsory submission to treatment or medication, but it concluded that there were other less drastic means to accomplish this goal. To provide the necessary protection for the public, the Court considered that it would be more defensible, where the offender refused to consent to a prescribed treatment or medication, to order incarceration rather than probation. Even though *Rogers* was consenting to take the medication at the time the probation order was made, it was contrary to the *Charter* to make this consensual treatment compulsory.

The Court, therefore, varied the conditional probation so as to require the offender to take reasonable steps to maintain himself such that his chronic medical problem would not likely cause him to conduct himself in a manner dangerous to himself or anyone else, and so that it was not likely that he would commit further offences. The probation order could require him to attend, as directed, for the purpose of receiving such medical counselling and treatment as may be recommended; but he could not be required to submit to any treatment or medication to which he did not consent.

The two cases of *Read* and *Rogers* illustrate the way in which section 7 is being interpreted to protect the integrity of a person's body and his or her right to self-determination in respect of medical procedures or treatment. Even in the case where the protection of society is being advanced as justification for the imposition of treatment, it appears that the courts will be reluctant to approve such a measure. Alternative means of controlling an offender, up to and including incarceration, would have to be considered to avoid the imposition of involuntary treatment or procedures. Of course, some creative wording, such as the judge imposed in the *Rogers* case,⁽¹⁰⁾ could also help to avoid *Charter* problems where specific treatment is required before the offender can be granted conditional release.

While these cases do not imply that all mandatory programming may be contrary to the *Charter*, they do indicate that forcing a person to participate in programming may infringe a person's right to liberty or to security of the person. Any proposal that could intrude upon an offender's personal security and integrity would, therefore, have to be carefully examined to ensure that it is in conformity with the *Charter*.
Conclusion Careful steps must be taken to ensure that all correctional programming is truly accessible to those inmates identified as being in need of such programs, both in nominal access to the course and in substantive access to the opportunity for which the program is designed.

On the other hand, if such treatment or programs are refused by the inmate, it is unlikely that they can be imposed. Rather, the consequences of the refusal must be explained to the inmate and, unless persuaded to change his or her mind, he or she will have the right to live the consequences.

(1) Beneath the veneer: Report of the Task Force on Barriers to Women in the Public Service. (*Ottawa: The Task Force, 1990*).

(2) See generally *Core Value 1 and 2 and Strategic Objectives 1.1, 1.2, 1.7, 2.1, 2.2, 2.3, 2.4, 2.5 and 2.6*.

(3) *United States Committee on Civil Rights, "Accommodating the Spectrum of Individual Abilities," Clearinghouse Publication 81, September 1983, 41*.

(4) *Rosalie Silberman Abella, "The Social and Legal Paradigms of Equality," Windsor Review of Law and Social Issues, 1, 5 (1987): 5*.

(5) *Ibid.*, 11.

(6) *Anatole France, as cited in John Bartlett, Familiar Quotations, (Toronto: Little, Brown and Co., 1980) 655*.

(7) *Andrews v. Law Society of B.C., [1989] 1 S.C.R. 143*.

(8) *Dr. Gunnar Dybwad, professor of human development at Brandeis University in Massachusetts, as cited in Tammy D. Barrett, "Employing Disabled Persons: Bona Fide Occupational Requirement or Qualification, Reasonable Accommodation and the Tolerance of Safety Risk," Windsor Yearbook of Access to Justice, 9 (1989): 154, 179*.

(9) *Section 7 of the Charter states: Everyone has the right to life, liberty and security of the person and a right not to be deprived thereof except in accordance with the principles of fundamental justice*.

(10) *The probation order read as follows:*

You will take reasonable steps to maintain yourself in such condition that; (a) your chronic schizophrenia would not cause you to conduct yourself in a manner dangerous to yourself or anyone else; and (b) it is not likely you will commit further offences... You will thereafter attend as directed from

time to time at the interministerial project for the purpose of receiving such medical counselling and treatment as may be recommended except that you shall not be required to submit to any treatment or medication to which you do not consent.